SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 8, 2012, a.m.

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8404 The People of the State of New York, Respondent, Ind. 6084N/08

-against-

Derrick Moultrie, Defendant-Appellant.

Office of Appellate Defender, New York (Richard M. Greenberg of counsel), and Debevoise & Plimpton LLP, New York (Kate K. Smith of counsel), for appellant.

Derrick Moultrie, appellant pro se.

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

Judgment, Supreme Court, New York County (Robert M. Stolz, J. at dismissal motion; Thomas Farber, J. at jury trial and sentencing), rendered May 25, 2010, convicting defendant of criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 2½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Defendant asserts that the evidence failed to prove he possessed 500 milligrams of cocaine, the threshold for fifth-degree possession (Penal Law § 220.06[5]).

The police recovered nine similar bags of cocaine from defendant, and there is nothing to suggest the possibility that the bags differed significantly in purity. A chemist testified that he combined the contents of the bags and gave a representative sample of the combined drugs to another chemist. The second chemist testified that she measured the purity of the cocaine in the sample and mathematically computed the total weight of the cocaine contained in the nine bags. She concluded that the total weight of cocaine was nearly three times the statutory threshold. The second chemist also described the standard procedure in obtaining a representative sample.

This testimony provided ample grounds for the jury to conclude that a proper sampling method had been employed and that it established defendant's guilt (*see People v Hill*, 85 NY2d 256, 261 [1995]; *People v Argro*, 37 NY2d 929 [1975]). The absence of testimony from the first chemist as to whether he followed the standard procedure for combining the drugs does not undermine that conclusion. Even accepting the unlikely possibility that one or more of the bags contained cocaine of a dramatically

higher purity than the others, defendant has presented no plausible theory of how the first chemist might have combined the drugs but still obtained a sample that was not only unrepresentative, but so skewed that it led to a grossly inaccurate calculation.

Similarly, the court properly declined to charge seventh-degree possession as a lesser included offense of fifth-degree possession. No reasonable view of the evidence, viewed in the light most favorable to defendant, supported that charge (*see e.g. People v Butler*, 248 AD2d 274 [1st Dept 1998], *lv denied* 91 NY2d 1005 [1998]). There was no basis, other than speculation, for the jury to find that the quantity of cocaine was less than 500 milligrams.

The alleged defects in the grand jury presentation did not rise to the level of impairing the integrity of the proceeding

and did not warrant the exceptional remedy of dismissal (*see People v Huston*, 88 NY2d 400, 410 [1996]; *People v Darby*, 75 NY2d 449, 455 [1990]).

We have considered and rejected defendant's pro se claims.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8405 Patricia O'Donoghue, Index 117382/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Rivergate LP, et al.,
Defendants.

_____

Smiley & Smiley, LLP, Garden City (John V. Decolator of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 12, 2011, which, in an action for personal injuries allegedly sustained when plaintiff tripped and fell over a raised brick in a tree well, granted the motion of defendant City of New York for summary judgment dismissing the complaint, unanimously affirmed, without costs.

It is well established that in order to hold the City liable for injuries resulting from defects in tree wells in City-owned sidewalks, a plaintiff must demonstrate that the City has received prior written notice of the defect (*see* Administrative Code of the City of New York § 7-201[c][2]; *Tucker v City of New York*, 84 AD3d 640 [lst Dept 2011], *lv denied* 17 NY3d 713 [2011]).

Here, in opposition to the City's showing of entitlement to judgment as a matter of law, plaintiff submitted, inter alia, a Big Apple Map to prove that the City had notice of the allegedly defective condition. However, the map only provided notice that every tree well on the block lacked a fence or barrier, which was not sufficient to bring the particular condition to the City's attention (*see D'Onofrio v City of New York*, 11 NY3d 581 [2008]).

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8406-
8406A In re Laquanda Lasheaia
Myesha D., etc., and Another.

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

Josephine F., etc.,
Respondent-Appellant.

Little Flower Children's Services,
Petitioner-Respondent,

Michael S. Bromberg, Sag Harbor, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

Orders of disposition, Family Court, Bronx County (Douglas Hoffman, J.), entered on or about June 17, 2010, which, upon findings that respondent mother violated the terms of a suspended judgment entered upon prior findings of permanent neglect, terminated her parental rights 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.

Respondent does not dispute the court's finding that she violated the terms of the suspended judgment. However, she challenges the determination to terminate her parental rights as

a result of that violation, arguing that the court erred in making this determination without permitting the children to testify *in camera*. Respondent's argument has been waived since her counsel failed to subpoena the children after obtaining the court's permission to do so and, in any event, lacks merit. There was extensive testimony at the dispositional hearing regarding the children's desires and counsel for the children informed the court that it would be stressful for the children, both of whom have special needs for which they receive therapy, to come to court. Additionally, we note that there is no requirement that the children testify (*see Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]). Thus, there is no basis to disturb the court's finding, supported by a preponderance of the evidence, that it was in the children's best interest to terminate respondent's parental rights so that they can be freed for adoption.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8408 Golden City Commercial Bank, Index 104319/93
Plaintiff,

-against-

207 Second Avenue Realty Corp., et al.,
Defendants.

- - - - -

Michael G. Zapson, etc.,
Nonparty Appellant,

-against-

Janet Chang, etc.,
Nonparty Respondent.

Kantor, Davidoff, Wolfe, Mandelker, Twomey & Gallanty, P.C., New York (Lawrence A. Mandelker of counsel), for appellant.

Vernon & Ginsburg, LLP, New York (Mel B. Ginsburg of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 10, 2011, which, insofar as appealed from, granted the motion of nonparty Janet Chang for release of funds held by nonparty Michael G. Zapson as receiver, and, upon reargument and renewal, denied Zapson's motion to settle his supplemental account for the period from August 7, 2007 through May 27, 2010 and to bring it current, unanimously modified, on the law, to give Zapson leave to pay nonparty Lawrence Mandelker $111,569.65 before releasing the remainder of the funds to Chang's attorney, and otherwise affirmed, without costs.

Zapson was not entitled to commissions after August 6, 2007. An August 1, 2007 order states, "[T]he Receivership of Michael Zapson shall terminate upon delivery of the deeds in this action at the date of closing." The closing took place on August 6 or 7, 2007. The August 2007 order also states, "[W]ithin sixty . . . days of closing, the Receiver shall account and shall seek an award of compensation for himself . . . and his attorneys." Accordingly, at some point before September 23, 2008, Zapson moved for approval of his *final* account. In an order entered September 25, 2008, which we modified on other grounds (*see Chang v Zapson*, 67 AD3d 435 [1st Dept 2009]), the IAS court approved Zapson's *final* accounting.

It is true that the September 2008 order states that, after making the payments authorized by that order, Zapson shall "retain the balance then remaining in his receivership account until [the appeal in *Chang v Zapson*] has been disposed of and until the further order of the Court." However, this merely made Zapson effectively an escrow agent; it did not continue his receivership. Indeed, since the premises at issue had been purchased by a nonparty in August 2007, there was no need for Zapson to manage the building any further.

Mandelker is entitled to additional attorneys' fees pursuant to law of the case. On August 19, 2004, the IAS court stated,

"if there is a final determination in this case that there is no wrongdoing to how Mr. Zapson handled his affairs as a receiver, the fees to Mr. Mandelker will come out of whatever money is owed to Ms. Chang." There was no final determination until March 16, 2010, when the IAS court held the hearing that this Court had ordered in *Chang* (67 AD3d at 435-436). Hence, Zapson is given leave to pay Mandelker's fees for the period from August 7, 2007 through March 16, 2010, except to the extent Mandelker seeks fees for submitting the final accounting (*see Matter of Jakubowicz v A.C. Green Elec. Contrs., Inc.*, 25 AD3d 146, 151-152 [1st Dept 2005], *lv denied* 6 NY3d 706 [2006]). $29,365 of the fees and $654.40 of the disbursements sought by Mandelker post-date March 16, 2010. In addition, $1,585 in fees deals with the accounting, even though it predates March 16, 2010. Therefore, Zapson is given leave to pay Mandelker $111,569.65 (the $143,174.05 sought by Mandelker minus the $31,604.40 disallowed above).

The order appealed from directs Zapson to turn the funds

over to Chang's attorney, who "shall retain [them] in escrow pending receipt of general releases from each of the shareholders of 207 Second Avenue Realty Corp." Thus, the distribution of the surplus is no concern of Zapson's.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8410 Abyssinian Development Corporation, et al., Plaintiffs-Respondents, Index 115576/08

-against-

David Bistricer, et al., Defendants-Appellants.

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for appellants.

Windels Marx Lane & Mittendorf, LLP, New York (Mel P. Barkan of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 16, 2011, which granted plaintiffs' motion for summary judgment dismissing the counterclaim for fraud, unanimously reversed, on the law, without costs, and the motion denied.

The motion court confused defendants' counterclaim for legal and consulting fees as consequential damages for plaintiffs' alleged fraud with plaintiffs' claim for similar fees pursuant to the parties' letter of intent, and erred in finding that defendants had not proved damages, inasmuch as they were not obligated to do so in opposition to plaintiffs' showing. Even if plaintiffs' motion was predicated on defendants' failure to show

loss causation (*see e.g. Laub v Faessel*, 297 AD2d 28, 30-31 [1st Dept 2002]), because they had engaged their attorneys and consultants prior to entering into negotiations with plaintiffs, plaintiffs failed to show that defendants did not incur fees for professional services during their negotiations and while waiting for plaintiffs to execute their copy of the letter of intent.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8411 The People of the State of New York, Respondent, Ind. 5911/10

-against-

Juan Martinez, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

Judgment, Supreme Court, New York County (Larry R. Stephen, J.), rendered January 26, 2011, as amended February 16, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and attempted robbery in the third degree, and sentencing him, as a second felony offender, to consecutive terms of 2 to 4 years on each count, unanimously modified, on the law, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

As the People concede, the record, consisting of the accusatory instrument and the plea allocution, does not disclose sufficient facts from which it could be concluded that

defendant's possession of a knife was complete before the attempted robbery in which defendant used it. Accordingly, the concurrent sentences were required (*see* Penal Law § 70.25[2]).

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8412 In re Ceawanya W., and Others,

Children Under Eighteen
Years of Age, etc.,

Preston B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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

Andrew J. Baer, New York, attorney for the child Dontaya W.

Steven N. Feinman, White Plains, attorney for the child Kenneth S.

Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about April 13, 2011, which, insofar as appealed from as limited by the briefs, determined, after a fact-finding hearing, that respondent-appellant had neglected and sexually abused the subject children and had repeatedly sexually abused the subject child Ceawanya W., unanimously reversed, on the law and the facts, without costs, the findings of abuse and neglect vacated, and the petition dismissed as against respondent.

The court erred in finding that respondent was legally responsible for the care of the children (*see* Family Ct Act § 1012 [a]). The record shows that the children were at all times in the care of their adoptive parents, including when the abuse and neglect took place. Further, there was no evidence that respondent, the grandson of the adoptive parents, acted as the functional equivalent of the children's parent at the relevant time (*see Matter of Shaun B.*, 55 AD3d 301, 301 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009]).

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8413 Melissa Katz, et al., Index 101737/10
Plaintiffs-Respondents,

–against–

Blank Rome Tenzer Greenblatt, et al.,
Defendants,

804 Lexington LLC, et al.,
Defendants-Appellants.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for 804 Lexington Avenue LLC, sued herein as 804 Lexington LLC, appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for Evnick Restaurant, Inc., doing business as Burger Heaven, appellant.

Drabkin & Margulies, New York (Ralph J. Drabkin of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered November 16, 2011, which denied the motions of defendants 804 Lexington LLC and Evnick Restaurant, Inc. d/b/a Burger Heaven (Burger Heaven) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff Melissa Katz was allegedly injured when she fell down the winding staircase that led from Burger Heaven's dining room to the basement; defendant 804 Lexington LLC was the owner of the

premises. Defendants have a duty to maintain the property in a reasonably safe condition (*see generally Kellman v 45 Tiemann Assoc., Inc.*, 87 NY2d 871 [1995]), and here, the configuration of the winding staircase and partial absence of a handrail at its turn, raise triable issues as to whether defendants were on constructive notice of a dangerous condition (*see Timmins v Benjamin*, 77 AD3d 1254 [3d Dept 2010]; *see also Swerdlow v WSK Props. Corp.*, 5 AD3d 587 [2d Dept 2004]).

We note however that contrary to the motion court's finding that there was a triable issue as to whether the subject stairs were in violation of Administrative Code of City of NY § 27-375(e)(4) and (f), the record shows otherwise. The winding stairs that led from the dining room to the basement are not "interior stairs" within the meaning of the Administrative Code since they "did not serve as a required 'exit,' i.e., as a required 'means of egress from the interior of a building to an open exterior space'" (*Maksuti v Best Italian Pizza*, 27 AD3d 300,

300 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006], quoting Administrative Code § 27-232; *see Cusumano v City of New York*, 15 NY3d 319, 324 [2010]; *Kittay v Moskowitz,* 95 AD3d 451 [1st Dept 2012]).

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8415 In re Bryant Parks, Index 402363/10
Petitioner-Respondent,

-against-

New York City Housing Authority
Respondent-Appellant.

Sonya M. Kaloyanides, New York (Andrew M. Lupin of counsel), for appellant.

Bryant Parks, respondent pro se.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 3, 2011, granting the petition to the extent of, inter alia, annulling respondent's determination to terminate petitioner's Section 8 rent subsidy, unanimously reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

Pursuant to paragraph 22(f) of the first partial consent judgment in *Williams v New York City Hous. Auth.* (US Dist Ct, SD NY, 81 Civ 1801, Ward, J., 1984), the four-month statute of limitations of CPLR 217 began to run on the date of receipt of respondent's letter notifying petitioner that his Section 8 subsidy would be terminated in 45 days if he did not request a

hearing (*see Matter of Lopez v New York City Hous. Auth.*, 93 AD3d 448 [1st Dept 2012]; *Matter of Fernandez v NYCHA Law Dept.*, 284 AD2d 202 [1st Dept 2001]). Here, the record shows that the letter was mailed on November 16, 2009 and received no later than December 5, 2009, and this proceeding was not commenced until August 16, 2010. Accordingly, the petition should have been denied and the proceeding dismissed as time-barred.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8416-
8416A

In re Lizette Patricia M.,
and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Gwendolyn M.,
Respondent-Appellant.

McMahon Services for Children,
etc.,
Petitioners-Respondent,

Tennille M. Tatum-Evans, New York, for appellant.

Joseph T. Gatti, New York, for respondent.

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

Appeals from orders of disposition, Family Court, New York County (Jody Adams, J.), entered on or about August 31, 2011, which upon a fact-finding determination that appellant mother had permanently neglected the children, terminated her parental rights and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services, unanimously dismissed, without costs.

No appeal lies from the fact-finding and dispositional orders since they were made on default at the hearing (*see Matter of Miguel R v Wilda C,* 74 AD3d 631 [1st Dept 2010]). Appellant appeared and testified on the first day of the fact-finding

hearing, but when she failed to appear on the second day of the proceeding to complete her testimony, her testimony was properly stricken by the court. She was not present at the dispositional hearing, which immediately followed. Moreover, her motion to vacate her default was dismissed upon her failure to appear in court on the return date of the motion.

Were we to review the fact-finding and dispositional orders, we would find that clear and convincing evidence provided by the agency's progress notes established that the agency made diligent efforts to strengthen and encourage the parental relationship by referring appellant for services, including mental health counseling, and that the possible consequences of her failure to comply were explained to her. The agency also demonstrated that despite its diligent efforts, appellant permanently neglected the children by failing to continue to attend therapy, and her relationship with the children deteriorated to the point that they no longer wanted to visit with her.

The finding that termination of appellant's parental rights was in the children's best interests was also supported by the record. Appellant failed to take steps to address her mental health issues or to acknowledge the problems that led to placement. A caseworker testified that the children were well-

cared for in their foster home, where they wanted to remain, and that the foster mother wanted to adopt them.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8417-
8417A

Luis Ramos,
Plaintiff-Respondent,

-against-

Michael Stern,
Defendant-Appellant,

Macro Enterprises, LTD., et al.,
Defendants,

Champ Construction Corp., et al.,
Defendants-Respondents.

Index 23981/06

Zisholtz & Zisholtz, LLP, Mineola (Robert Vadnais of counsel), for appellant.

Leonard C. Spector, Brooklyn, for Luis Ramos, respondent.

Goodman & Jacobs, LLP, New York (Sue C. Jacobs of counsel), for Champ Construction Corp., and New York Sand & Stone Inc., respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 6, 2011, which denied defendant Michael Stern's motion for summary judgment dismissing the complaint as against him, and order, same court and Justice, entered November 10, 2011, which, to the extent appealable, denied his motion to renew, unanimously affirmed, without costs.

Defendant Stern's motion for summary judgment was properly denied, as he never moved to vacate a self-executing, conditional order, entered upon the parties' stipulation, which called for

the striking of his answer in the event he failed to comply with specified discovery demands within 60 days (*see generally Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 (2010); *AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [1st Dept 2009]). We find no ambiguity in the self-executing language, which was similar to that utilized in *AWL Indus.* (65 AD3d at 905). Once Stern's answer was automatically stricken as a result of his default, he, upon failing to vacate such default, was deemed to "'admit[] all traversable allegations in the complaint, including the basic allegation of liability,' but not damages" (*Cillo v Resjefal Corp.*, 13 AD3d 292, 294 [1st Dept 2004], quoting in part *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

The denial of renewal should be affirmed, as Stern's excuse of a family medical emergency in Israel was available to him at the time of his original motion, and he offered no viable reason why he failed to provide such information at the time of his original motion (*see e.g. Henry v Peguero*, 72 AD3d 600 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]). Morever, the motion court properly exercised its discretion in rejecting the belated medical excuse as unsubstantiated (*see generally Kolbasiuk v Printers Bindary*, 93 AD2d 739 [1st Dept 1983]; *Aguilar v Djonvic*, 282 AD2d 366 [1st Dept 2001]). Even assuming, arguendo, the

validity of the excuse, once the grounds for the excuse disappeared (i.e., his return from Israel) Stern still had sufficient time (nearly a month) to comply with the conditional order.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8421-
8421A Larry Pouncy, Index 403478/10
Plaintiff-Appellant,

-against-

Jason L. Solotaroff, et al.,
Defendants-Respondents.

Larry Pouncy, appellant pro se.

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

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 12, 2011, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Order, same court and Justice, also entered May 12, 2011, which dismissed as moot plaintiff's motion for a default judgment, unanimously affirmed, without costs.

Upon defendants' motion, the IAS court tolled the time to answer or move in response to the complaint, and defendants submitted their motion to dismiss by the date ordered. As a result, defendants did not default in responding to the complaint, even though they responded after the original deadline (*see DiPietro v Seth Rotter, P.C.*, 267 AD2d 1, 2 [1st Dept 1999]).

The IAS court properly dismissed plaintiff's claim for legal

malpractice, as the complaint failed to state a claim for that cause of action. Rather, plaintiff's complaint amounts "to no more than retrospective complaints about the outcome of defendant[s'] strategic choices and tactics," with no demonstration that those choices and tactics were unreasonable (*Rodriguez v Fredericks*, 213 AD2d 176, 178 [1st Dept 1995], *lv denied* 85 NY2d 812 [1995]). In any event, plaintiff's claims are barred by the doctrine of collateral estoppel (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Wray v Mallilo & Grossman*, 54 AD3d 328, 329 [2d Dept 2008]).

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: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8422 The People of the State of New York, Ind. 2992/07
Respondent,

-against-

Daniel Otero,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about May 5, 2010, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level three. Initially, we note that defendant's point score was 105, which is nearly enough for a level three adjudication. The court properly determined that the risk assessment instrument did not adequately take into account aggravating factors including the seriousness of the underlying

sex crime (*see e.g. People v Schlau*, 60 AD3d 529 [1st Dept], *lv denied* 12 NY3d 712 [2009]). These aggravating factors outweighed any possible mitigating factors cited by defendant.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8424 Kim Charlton Benson, Index 350022/09
Plaintiff-Respondent,

-against-

E. Stephen Benson,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Saralee Evans, J.), entered on or about July 1, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 18, 2012,

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8425N In re Government Employees Insurance Company, etc.,
Petitioner-Appellant,

-against-

Genis Torres, et al.,
Respondents,

Praetorian Insurance Company, et al.,
Proposed Additional Respondents-Respondents.

Index 260392/10

O'Conner, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for appellant.

Ryan & Conlon, LLP, New York (Jacob A. Goins of counsel), for proposed additional respondents-respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 20, 2012, which denied petitioner GEICO's petition to permanently stay the uninsured motorist arbitration commenced by respondents, its insured, unanimously affirmed, without costs.

GEICO's argument regarding the right of respondents, the injured parties, to provide separate notice of the claim under Insurance Law § 3420(a)(3) was improperly raised for the first time in its reply brief in further support of its petition. Accordingly, the IAS court was under no obligation to consider this fact-based argument (*see e.g. Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995]). In any event, the argument is unavailing, as there is no evidence in the

record that respondents were diligent in ascertaining the identity of proposed additional respondent Mhbahfarma's insurer or in notifying the insurer of the claim (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [1st Dept 2008]; *Ringel v Blue Ridge Ins. Co.*, 293 AD2d 460, 461-462 [2d Dept 2002]). Indeed, although the police accident report prepared the night of the accident contained proposed additional respondent Praetorian's policy number, respondents waited eight months to inform Praetorian of the accident (*see Ringel*, 293 AD2d at 461-462).

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

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8426 In re Robert Fleming, Ind. 564/09
[M-3629] Petitioner,

-against-

City of New York, et al.,
Respondents.

Robert Fleming, petitioner pro se.

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella of counsel), for District Attorney, Bronx.

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: NOVEMBER 8, 2012, a.m.

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7793 In re The State of New York, Index 30061/07
Petitioner-Respondent, 4067211/07

-against-

Floyd Y.,
Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Deborah P. Mantell of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondent.

Order, Supreme Court, New York County (Patricia Nunez, J.), entered on or about July 7, 2010, unanimously affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. Catterson
Leland G. DeGrasse
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

7793
Ind. 30061/07
4067211/07

_____x

In re The State of New York,
Petitioner-Respondent,

-against-

Floyd Y.,
Respondent-Appellant.

_____x

Respondent appeals from an order of the Supreme Court, New York County (Patricia Nunez, J.), entered on or about July 7, 2010, which, upon a jury finding of mental abnormality, and upon a finding made after a dispositional hearing that he is a dangerous sex offender requiring confinement, committed him to a secure treatment facility.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Deborah P. Mantell of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco and Nancy A. Spiegal of counsel), for respondent.

RICHTER, J.

In 2007, the New York State Legislature passed the Sex Offender Management and Treatment Act (SOMTA), which, among other things, includes article 10 of the Mental Hygiene Law of New York State. Article 10 was created with the stated goals of: the protection of society from recidivist sex offenders, supervision of the offenders, and management of their behavior (Mental Hygiene Law § 10.01). The legislature determined that "some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses," and that such offenders "may require long-term specialized treatment modalities to address their risk to reoffend" (§ 10.01[b]).

In 2001, respondent-appellant was convicted after trial of four counts of first-degree sexual abuse and four counts of endangering the welfare of a child for sexually abusing his prepubescent stepson and stepdaughter. Between 1996 and 1998 respondent twice touched his stepson while he was sleeping, and he touched his stepdaughter twice as well. He was sentenced to a prison term of 4 to 8 years. At the expiration of respondent's criminal sentence, he was confined to the Kirby Forensic Psychiatric Center pending potential civil commitment proceedings. In 2007, the Attorney General filed a civil management petition against respondent under article 10 of the

Mental Hygiene Law, alleging that he suffered from a mental abnormality warranting civil management. The petition was supported by Dr. Michael Kunz's evaluation, which concluded that respondent had met the criteria for pedophilia, which is considered a mental abnormality under article 10. After the hearing, the court determined that there was probable cause to believe that respondent was a sex offender requiring civil management and ordered his confinement pending trial.

Expert testimony is a necessary component of an article 10 trial. The statute specifically allows the State to choose a psychiatric examiner who will have access to the respondent for the purposes of an exam, as well as to the respondent's "relevant medical, clinical, criminal or other records and reports" (Mental Hygiene Law § 10.08[b]). Further, the State shall be entitled to request "any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management" (§ 10.08[c]).

The same evidentiary rules regarding hearsay that apply to the testimony of a lay witness also apply to the testimony of an expert witness. In *People v Sugden* (35 NY2d 453 [1974]), the

Court of Appeals recognized two limited exceptions to the hearsay rule and held that an expert may rely on out-of-court material if "it is of a kind accepted in the profession as reliable in forming a professional opinion" or if it "comes from a witness subject to full cross-examination on the trial" (*id.* at 460-461; *see also Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726 [1984]). The Court of Appeals further stated in *Hambsch*, that "[i]n order to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material" (63 NY3d at 726).

At respondent's article 10 trial, the state called Dr. Catherine Mortiere as an expert to provide her opinion as to whether respondent suffered from a mental abnormality predisposing him to engage in repeat sex offenses. Prior to Mortiere's trial testimony, at respondent's request, the court conducted a voir dire examination to determine if the professional reliability exception to the hearsay rule applied to certain material reviewed by Mortiere, which the State intended to discuss during its direct examination of the doctor. Mortiere explained that she considered numerous records, including respondent's records from Kirby and the facility to which he was later transferred, his correctional records, his presentence report, various police records, and the reports of Dr. Kunz and

Dr. Singer, respondent's expert witness. Mortiere also testified that she relied on witness and victim statements from prior sexual attacks allegedly committed by respondent, which were contained in affidavits or incorporated into police reports. Mortiere further testified, without contradiction, that such documents are heavily relied upon in her profession and necessary in making a decision as to whether respondent suffers from a mental abnormality.

On appeal, respondent contends that the trial court erred by permitting Mortiere to testify, without limitation, as to hearsay statements that formed the basis of her opinion. It is noteworthy that during the in limine proceedings, respondent did not elicit any testimony from Mortiere to suggest that reliance on respondent's history and information from prior victims is not a recognized method within the profession for assessing mental abnormalities. Further, respondent offered no testimony from his own expert to suggest that this was not a recognized method within the profession. Because Mortiere's testimony that these materials are used by the profession was not refuted, the trial court properly determined that the doctor could inform the jury that she used them as a basis for her expert opinion.

Article 10 dictates that the State's psychiatric examiner will have access to the respondent's relevant records and is

entitled to request any and all records relevant to a determination of whether the respondent is a sex offender requiring civil management (Mental Hygiene Law § 10.08[b]). The statute, in effect, requires an expert to review the very material Mortiere considered in order to evaluate and reach a prognosis. To require a doctor to reach a prognosis without being able to explain to the jury how that determination was reached would significantly hinder the jury's ability to assess the expert's testimony and opinion, as well as the respondent's ability to challenge the expert's reasoning.

Once in front of the jury, Mortiere was qualified as an expert without objection. Mortiere is a licensed forensic psychologist and has been employed at Kirby Forensic Psychiatric Center since 2002, where she treats and assesses patients, including respondent, who participated in the sex offender program at Kirby in 2007. In order to diagnose respondent when he arrived at Kirby, Mortiere relied on documents from the Department of Corrections, progress notes and her own treatment teams' observations and evaluations. She diagnosed respondent with pedophilia, antisocial personality disorder and polysubstance dependence.

The information Mortiere relied upon was not limited to victims' affidavits, but rather came from police reports, plea

documents and conviction certificates, all of which established the reliability of the out-of-court material and are "specifically deemed reliable" by the statute (*Matter of State of New York v Mark S.*, 87 AD3d 73, 78 [3d Dept 2011], *lv denied* 17 NY3d 714 [2011], citing *Matter of State of New York v Pierce*, 79 AD3d 1779 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]). Mortiere considered and testified about seven acts that were sexual in nature, in addition to the underlying offense, in which respondent either pleaded guilty to a sexual crime or was alleged to have committed a sexual crime against a female, and in some cases, against young girls. Three acts that Mortiere relied on and testified to resulted in guilty pleas. Specifically, in 1984 respondent was charged with third-degree assault after he sexually assaulted a woman in a parked car, and he pleaded guilty to the charge. In 1992 respondent was charged with third-degree sexual abuse after he raped his 23-year-old female neighbor. He pleaded guilty to second-degree sexual abuse. In 1995 respondent was charged with third-degree sexual abuse for touching two 15-year-old girls while they were staying in his home. He pleaded guilty to second-degree harassment.

Mortiere also testified regarding four acts that did not result in a charge or a conviction. Respondent asserts that the State failed to present evidence establishing the reliability of

these uncharged or unproven accusations that factored into Mortiere's expert opinion and were a part of her testimony. However, "there is no provision in Mental Hygiene Law article 10 that limits the proof to acts that resulted in criminal convictions" (*Mark S.*, 87 AD3d at 78) [internal quotation marks omitted]). Yet, as noted by the Court of Appeals in *People v Goldstein* (6 NY3d 119 [2005], *cert denied* 547 US 1159 [2006]), an argument can be made for "some limit on the right of the proponent of an expert's opinion to put before the factfinder all the information, not otherwise admissible, on which the opinion is based. Otherwise, a party might effectively nullify the hearsay rule by making that party's expert a conduit for hearsay" (*id*. at 126 [internal quotations omitted]).

Here, two uncharged accusations before the jury were supported by an admission from respondent himself, and therefore were reliable. The first uncharged act occurred in 1997 when respondent called his then-wife's 15-year-old half-sister and asked her two questions, both of which were sexual in nature. Although charges were never brought against respondent, according to Dr. Singer's report, respondent told him that he did admit to his then-wife that he had called the teenager and had asked her one of the two sexual questions. The second act occurred in 1998 when respondent's then-girlfriend saw him laying on top of her

15-year-old daughter and attempting to play a "tickle game" with her. Charges were brought against respondent, but were eventually dropped. However, as a condition for dropping the charges, respondent signed a parole document in which he agreed to stay away from the teenage girl. Thus, the court properly allowed the doctor to testify as to both incidents.

Two accusations, however, stemming from alleged acts in 1996 and 1999, should have been excluded because neither was supported by evidence establishing the reliability of the out-of-court material (*Hambsch,* 63 NY2d at 726), and the acts therefore were of questionable probative value (*Matter of State of New York v Wilkes*, 77 AD3d 1451 [4th Dept 2010]; *Matter of State of New York v Fox*, 79 AD3d 1782 [4th Dept 2010]). The 1996 act proceeded to trial, and respondent was acquitted. The 1999 act was deemed to lack sufficient evidence or corroboration, and no charges were brought.

Although Mortiere should not have be able to testify about the 1996 and 1999 accusations, due to reliability issues and a need to put some limit on the hearsay information put before the factfinder, the trial court's allowance of this brief testimony was harmless error. First, the jury was informed that neither of these accusations resulted in either charges or a conviction. Additionally, "the hearsay in issue represented only a small

fraction of the evidence considered by the expert and [did] not constitute the sole or principal basis for the expert's opinion" (*Mark S.*, 87 AD3d at 78 [internal quotation marks omitted]; *see also Fox*, 79 AD3d at 1783). Indeed, Mortiere's testimony and opinion focused on the nature of the underlying offense for which respondent was in custody, and respondent's abject failure to fully participate in sex offender treatment at Kirby and the facility he was transferred to after his confinement at Kirby. Mortiere relied upon her own observations of, and interactions with, respondent as well as progress notes from other staff members, which were included in respondent's medical records. When Mortiere did discuss respondent's past sexual criminal acts, she gave a brief description of the facts, but then focused on respondent's explanation of the events, his denial of his behavior and what that meant in terms of his mental condition and inability to control his behavior.

Moreover, Dr. Singer, respondent's expert, testified that he too looked at victim statements and relied on the same information that Mortiere considered. Singer noted that Mortiere's method was one of three methods used in their field, but that it just happened to not be the method he subscribed to. Singer never testified that prior acts, charged or uncharged, could not be used when evaluating mental abnormalities.

Finally, the trial court gave limiting instructions advising the jury that they were to "consider any testimony as to the accusations that ended in dismissal and acquittal only for the purpose of evaluating the expert's findings and understanding the basis of their conclusions," and that any testimony regarding out-of-court material relied upon by the experts was admitted only for the "limited purpose of informing [the jury] as to the basis of the expert's opinions" and was not to be considered as establishing the truth of those statements. Notably, respondent did not object to these instructions, or request further limiting instructions. Thus, the jury was well aware that this testimony was admitted only for a limited purpose.

Respondent also argues that the admission of testimony regarding communications between him and Mortiere, who treated him at Kirby Forensic Psychiatric Center, violated the psychologist-patient privilege set forth under CPLR 4507. However, Mental Hygiene Law § 10.08(c) requires the disclosure of "any and all records and reports" pertaining to, not only respondent's sex offenses, but also his medical and clinical program, institutional adjustment, and treatment. Thus, the statute requires the disclosure of communications that would ordinarily be privileged under CPLR 4507. No reason exists to treat the doctor here differently simply because, at some point,

she also provided treatment.

Accordingly, the order of the Supreme Court, New York County (Patricia Nunez, J.), entered on or about July 7, 2010, which, upon a jury finding of mental abnormality, and upon a finding made after a dispositional hearing that respondent is a dangerous sex offender requiring confinement, committed him to a secure treatment facility, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 8, 2012, a.m.

CLERK

PM ORDERS

ENTERED ON

NOVEMBER 08, 2012

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 8, 2012, p.m.

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7398 The Sound Beyond Electrical Corp., Plaintiff-Appellant, -against- The City of New York, et al., Defendants-Respondents. Index 117803/09

Robinson Brog PC, New York (Jennifer S. Smith of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Graham Morrison of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 7, 2011, which granted defendants' motion to dismiss pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

We have previously stated – in a case involving the same contract provision as in the instant case – "The construction contract entered into between plaintiff and the City unambiguously precluded plaintiff from commencing a plenary

action for damages upon a determination by the City that plaintiff had defaulted under the contract. Plaintiff's remedy was to commence a CPLR article 78 proceeding challenging the determination of default, which it failed to do" (*Cal-Tran Assoc., Inc. v City of New York*, 43 AD3d 727, 727 [2007]). We perceive no reason to depart from *Cal-Tran* (*see Maxtron Bldrs. v Lo Galbo*, 68 NY2d 373, 381 [1986]).

It is true that *Cal-Tran* did not consider restitution, quantum meruit, unjust enrichment, or fraudulent misrepresentation. Nevertheless, those unpleaded claims are barred by Article 49.2, which precludes plaintiff from commencing a plenary action for *any* damages *relating to* the contract. In addition, the quasi-contract claims for restitution, quantum meruit, and unjust enrichment are barred by the existence of a valid contract between plaintiff and the City, covering the

subject matter of their dispute (*see e.g. DePinto v Ashley Scott, Inc.*, 222 AD2d 288, 289 [1995]; *Grace Indus., Inc. v New York City Dept. of Transp.*, 22 AD3d 262, 263 [2005], *lv denied* 6 NY3d 703 [2006]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

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.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (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), entered on or about January 6, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 27, 2012,

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8396 DC Media Capital LLC, doing business as Newtek Media Capital, Plaintiff-Respondent, Index 600378/07E

-against-

Avi Sivan, et al., Defendants-Appellants.

Law Offices of Joel B. Rudin, New York (Terri S. Rosenblatt of counsel), for appellants.

Law Offices of Robert M. Brill, LLC, New York (Anita Jaskot of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered February 18, 2011, which denied defendants' motion for leave to renew their motion to vacate an order and ensuing judgment entered on default, unanimously affirmed, with costs.

The "new facts" submitted on renewal, in the form of affidavits of merit, could have been submitted on the prior motion to vacate the default judgment, and defendants failed to offer a reasonable justification for the failure to do so (*see* CPLR 2221[e][3]; *Matter of Beiny,* 132 AD2d 190, 210 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]). The claim that defendants' former counsel mistakenly made the prior motion pursuant to CPLR 2221, which did not require the submission of an

affidavit of merit, was undermined by counsel's identification of the motion as one to "vacate" a prior order and judgment.

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: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8428 Bartolomeo Monda, Index 104884/03
Plaintiff-Respondent, 591452/03

-against-

City of New York, et al.,
Defendants.

- - - - -

City of New York,
Third-Party Plaintiff,

-against-

Northstar Contracting Corp., etc.,
Third-Party Defendant-Appellant.

- - - - -

Elite Contractors Trust of NY, et al.,
Nonparty Appellants.

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Kenneth J. Gorman, New York, for appellants.

Joel M. Gluck, Brooklyn, for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 21, 2011, which granted plaintiff's motion to compel Elite Contractors Trust of NY (the workers' compensation carrier for third-party defendant Northstar Contracting Corporation) to consent to the settlement of his claims in this action and to extinguish its workers compensation lien based upon its proportionate share of his attorneys' fees, unanimously affirmed, without costs.

While plaintiff's total disability was found to have been brought about 25% by a 1998 accident and 75% by the 2002 accident at issue in this action, there is no greater presumption than in any other total disability case that his disability will change in any material way in the future (*see Burns v Varriale*, 9 NY3d 207, 215 [2007]). Thus, the value of the future benefit to Elite from the settlement of plaintiff's claim – i.e., that Elite is relieved of its future obligation to make benefit payments to him – is no less "quantifi[able] by actuarial or other reliable means" than the value of the future benefit resulting from the settlement of any other permanent total disability claim (*see id.*). Therefore, in assessing Elite's proportionate share of plaintiff's attorneys' fees, the court properly considered the

value of the future benefit payments that Elite will not have to pay to plaintiff (*see Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 139 [1983]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8430-
8431 In re Keena H.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Lisa H. Blitman, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about January 27, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that appellant committed acts that, if committed by an adult, would constitute robbery in the second degree, assault in the third degree, and criminal possession of stolen property in the fifth degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs. Appeal from fact-finding determination, same court and Judge, entered on or about October 30, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court was not obligated to draw an adverse inference with respect to a surveillance videotape purportedly made at the

store at which the incident occurred. There is no indication that the tape was ever in the presentment agency's possession, and the agency had "no constitutional or statutory duty to acquire, or prevent the destruction of, evidence generated and possessed by private parties" (*People v Banks*, 2 AD3d 226, 226 [1st Dept 2003], *lv denied* 2 NY3d 737 [2004]). In any event, there was no evidence suggesting that the relevant portion of the incident even had been videotaped, and the testimony suggested otherwise (*see People v Wright*, 58 AD3d 543 [1st Dept 2009], *lv denied* 12 NY2d 823 [2009]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8432 K & K Enterprises Inc., Index 100805/08
Plaintiff-Respondent,

-against-

Stemcor USA Inc.,
Defendant-Appellant.

_____

Tarter Krinsky & Drogin LLP, New York (Linda S. Roth of counsel), for appellant.

Agus & Partners, P.C., New York (Stephen A. Agus of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered July 6, 2011, after a nonjury trial, awarding plaintiff the principal sum of $115,447.33, and bringing up for review an order, same court and Justice, entered April 27, 2011, unanimously modified, on the law, to reduce the principal sum to $77,036.48, and to direct that within 30 days of satisfaction of the judgment plaintiff either return the goods that it rejected but retained or pay defendant $51,534.02, and otherwise affirmed, without costs.

The trial court properly admitted into evidence certain third-party business records pursuant to the party admission exception to the hearsay rule. The documents were bills of lading generated by defendant's agent, a stevedore, in the course

of its duties for defendant, and were therefore receivable against defendant (*Spett v President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 206 [1967]). The documents were also admissible as third-party business records. While no representative of the stevedore testified as to the foundation for their introduction into evidence, the bills of lading were created in the agent's performance of its contractual duties and therefore were sufficiently reliable to be admissible without such testimony (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 11 [1st Dept 2011]).

Having found that the trucking bills of lading were the only evidence of the amount of goods plaintiff received, the court should have adjusted the credits issued by defendant to plaintiff for damaged goods. Those credits were based on the amount of goods reflected in the marine bills of lading, and should have been reduced, as indicated, to an amount based on the smaller amount of goods reflected in the trucking bills of lading.

The court properly permitted plaintiff to exercise, until a judgment was entered in its favor and satisfied, a security interest in certain rejected goods that it retained, since the

amount owed, the quantities shipped and received, and any credits to be issued were all inextricably intertwined in a single dispute.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8433 Gate Five, LLC, Index 651094/11
Plaintiff-Respondent,

-against-

Beyoncé Knowles-Carter, et al.,
Defendants-Appellants.

_____

Reed Smith LLP, New York (Jordan W. Siev of counsel), for appellants.

Johnson Gallagher Magliery LLC, New York (Peter J. Gallagher of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 1, 2012, which denied defendants' motion for summary judgment dismissing the complaint and on their counterclaim for indemnification and reimbursement of attorneys' fees, unanimously affirmed, without costs.

The motion court correctly denied defendants' motion. Issues of fact remain as to whether defendants intended to forgo their right to terminate the licensing agreement, under a financing contingency clause, for plaintiff's failure to obtain "committed financing or additional capital" by a certain date (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96 [2006]). The record shows that defendants never objected to and worked actively toward a closing

on the loan which would not occur by that date. In addition, whether the non-finalized financing agreements obtained by plaintiff prior to the financing contingency deadline and prior to defendants' termination of the agreements constituted "committed financing," which term is not defined in the agreement, remains an issue for the trier of fact. The record also raises issues as to whether defendants' own actions or bad faith caused or prevented plaintiff from securing financing by the deadline (*see generally Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]) and whether plaintiff is entitled to an injunction to prevent defendants from utilizing their services in a competing video game project during the prescribed period (*see American Broad. Cos. v Wolf*, 52 NY2d 394, 402 [1981]).

Defendants did not establish that the agreement's indemnification provision satisfied the exacting standard of language "exclusively or unequivocally referable to claims

between the parties themselves" as opposed to third-party claims only (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8434 Yesid Sanchez, Index 304016/10
Plaintiff-Appellant,

-against-

Lonero Transit, Inc., et al.,
Defendants-Respondents.

_____

Block O'Toole & Murphy, LLP, New York (Frederick C. Aranki of counsel), for appellant.

Silverman, Sclar, Shin & Byrne, New York (Wayne S. Stanton of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 24, 2011, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law in this action where his vehicle was struck by a school bus driven by defendant Herrera. Herrera testified that she did not see the stop sign and apply the brakes until two or three feet of the bus had passed the sign and entered the intersection, where the collision occurred. Accordingly, plaintiff demonstrated that a substantial cause of the accident was Herrera's negligence in failing to stop at the stop sign and yield the right of way (*see* Vehicle and Traffic Law § 1172[a]).

Even assuming comparative negligence is relevant, defendants failed to raise a triable issue of fact concerning plaintiff's comparative negligence based on Herrera's testimony that plaintiff's vehicle was traveling fast. There was a lack of evidence that plaintiff was speeding and plaintiff had no duty to anticipate that Herrera would not stop at the stop sign (*see Perez v Brux Cab Corp.*, 251 AD2d 157, 159-160 [1st Dept 1998]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8435-
8435A-
8435B-
8435C-
8435D In re Kasey D., and Others,

Dependent Children Under
Fourteen Years of Age, etc.,

Richard D.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent,

Commissioner of Social Services
of the City of New York,
Petitioner.

_____

Steven N. Feinman, White Plains, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

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Orders, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 4, 2011, which terminated appellant's parental rights to the subject children upon a finding of mental retardation, and transferred custody and guardianship of the children to petitioner and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court-appointed psychiatrist provided clear and convincing evidence that the children were in danger of being neglected due to appellant's mental retardation (Social Services Law § 384-b[6][b], [c]; *Matter of Erica D. [Maria D.]*, 80 AD3d 423, 424 [1st Dept 2011], *lv denied* 16 NY3d 708 [2011]; *Matter of Jasmine Pauline M.*, 62 AD3d 483, 484 [1st Dept 2009]). Given the testimony that appellant would be unable to care for the children now or in the foreseeable future, and that additional parental training would not enhance his parenting and other skills, a dispositional hearing was not necessary to find that the termination of his parental rights was in the best interests of the children (*see Matter of Joyce T.*, 65 NY2d 39, 49 [1985]; *Matter of Laura F.*, 18 AD3d 362, 362-363 [1st Dept 2005]; *Matter of Antonio V.*, 268 AD2d 341 [1st Dept 2000], *lv denied* 95 NY2d 751 [2000]).

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

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8436 The People of the State of New York, Ind. 2215N/10
Respondent,

-against-

Luis Tapia,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ellen M. Coin, J.), rendered March 29, 2011, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

Defendant's waiver of his right to appeal was knowing, intelligent and voluntary (*see People v Hidalgo*, 91 NY2d 733 [1998]). As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), we reject defendant's claims on the

merits. The record supports the court's imposition of an enhanced sentence based on defendant's failure to complete drug treatment (*see People v Fiammegta*, 14 NY3d 90 [2010]), and we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8438 In re the State of New York, Index 398/07
Petitioner-Respondent,

–against–

Nelson D.,
Respondent-Appellant.

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

Eric T. Schneiderman, Attorney General, New York (Laura R. Johnson of counsel), for respondent.

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Amended order, Supreme Court, Bronx County (Michael A. Gross, J.), entered October 24, 2011, which directed that respondent, as a sex offender requiring strict and intensive supervision and treatment (SIST), reside at the Valley Ridge Center for Intensive Treatment, unanimously affirmed, without costs.

The court's determination that respondent should receive residential treatment at the Valley Ridge Center for Intensive Treatment was permissible under Mental Hygiene Law (MHL) § 10.11, which prescribes conditions of supervision, including

specification of residence and type of residence, that may be imposed as part of SIST.

Because the SIST regimen imposed was authorized under MHL Article 10, petitioner's substantive due process rights were not offended (*see Kansas v Hendricks*, 521 US 346 [1996]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8439 The People of the State of New York, Respondent, Ind. 2570/05

-against-

Efrain Ortiz, Defendant-Appellant.

Stanley Neustadter, Cardozo Appeals Clinic, New York (Douglas M. Schneider of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered August 2, 2007, convicting defendant, after a jury trial, of kidnapping in the first degree, rape in the first and second degrees (four counts each), criminal sexual act in the first and second degrees (two counts each), assault in the third degree (two counts), and menacing in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 30 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of inconsistencies in testimony.

The court properly exercised its discretion in precluding

defendant from cross-examining the victim about her prior sexual activity with defendant (*see generally People v Scott*, 16 NY3d 589, 594 [2011]), and the court's ruling had no adverse impact on defendant's ability to present his defense of consent. Although the Rape Shield Law does not bar evidence of an alleged victim's prior sexual conduct with the accused (*see* CPL 60.42[1]), the proposed line of questioning lacked any probative value in this case. Furthermore, the jury was well aware that defendant was the victim's ex-boyfriend, and that during the relationship she had been in love with him. In any event, any error in precluding this line of cross-examination was harmless. Defendant's claim that this ruling violated his constitutional right of confrontation is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Kello*, 96 NY2d 740, 743 [2001]), as well as being improperly raised for the first time in a reply brief (*see e.g. People v Napolitano*, 282 AD2d 49, 53 [2001], *lv denied* 96 NY2d 866 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant failed to preserve his present challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks were generally responsive to the defense

summation (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]), and that although some of these remarks should have been avoided, they did not deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's claim that the verdict was legally repugnant is unpreserved and we decline to review it in the interests of justice. As an alternative holding, we find that the verdict was not repugnant. "If there is a possible theory under which a split verdict could be legally permissible," as charged to the jury, the verdict "cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case" (*People v Muhammad*, 17 NY3d 532, 540 [2011]). Defendant was charged with groups of sex crimes relating to six incidents that occurred during the kidnapping, over the course of three days. The jury convicted defendant of the charges relating to four of the six incidents. The court instructed the jury to consider the counts separately, and it was free to reach different verdicts regarding different incidents (*see People v Rayam*, 94 NY2d 557 [2000]). In any event, the jury could have rationally concluded that the evidence was deficient with respect to two of the incidents.

Defendant's ineffective assistance of counsel claims are

unreviewable on direct appeal because they involve matters outside the record concerning counsel's trial preparation and strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). In particular, the unexpanded record is silent as to counsel's reason for not making a repugnant verdict motion. We note that counsel could have deemed such a motion futile, or even counterproductive given that a timely objection could have resulted in resubmission to the jury and the risk of defendant's conviction on more, rather than fewer, counts (*see People v Salemmo*, 38 NY2d 357 [1976]).

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]). Defendant has not shown that his counsel's lack of objection to the prosecutor's summation or to the mixed verdict fell below an objective standard of reasonableness, or that it deprived defendant of a fair trial, affected the outcome of the case, or

caused defendant any prejudice. In addition, there is no evidence that counsel was inadequately prepared for trial, or that the court should have granted him more time for preparation.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8440 In re American Transit Insurance Company, Petitioner-Respondent, Index 113263/10

-against-

Mohammad S. Hossain, Respondent,

State Farm Automobile Ins. Co., Proposed Additional Respondent-Appellant,

Stokely Braithwaite, Proposed Additional Respondent.

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Bruno, Gerbino & Soriano, LLP, Melville (Mitchell L. Kaufman of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for American Transit Insurance Company, respondent.

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Order, Supreme Court, New York County (Marilyn T. Sugarman, Special Referee), entered on or about August 17, 2011, which found that proposed additional respondent State Farm is obligated to insure proposed additional respondent Stokely Braithwaite in connection with the claims made against Braithwaite by respondent, Mohammad S. Hossain, unanimously modified, on the law, to grant the petition to stay the uninsured motorist arbitration, and otherwise affirmed, without costs.

The default judgment in State Farm's favor issued in Nassau

County Supreme Court did not have collateral estoppel effect precluding the determination by the Special Referee (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]; *Stumpf AG v Dynegy Inc.*, 32 AD3d 232, 233 [1st Dept 2006]).

The evidence at the framed-issue hearing was insufficient to establish lack of cooperation (*see Matter of Empire Mut. Is. Co. [Stroud-Boston Old Colony Ins. Co.]*, 36 NY2d 719, 721 [1975]; *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168-170 [1967]). Although State Farm sent letters and investigators to three different addresses for Braithwaite, the record does not establish that Braithwaite received the letters or had actual notice of State Farm's attempts to contact him. Further, State Farm never attempted to contact Braithwaite at various other addresses in its file or at a possible work location (*see Matter of Liberty Mut. Ins. Co. v Roland-Staine*, 21 AD3d 771, 773 [1st Dept 2005]; *Matter of New York Cent. Mut. Fire Ins. Co. [Salomon]*, 11 AD3d 315, 316-317 [1st Dept 2004]).

We modify only to include a provision granting the petition to stay arbitration.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8441 TJM Construction Corp., et al., Index 108211/08
Plaintiffs-Respondents,

-against-

AWCI Insurance Company, Ltd., etc.,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered on or about November 15, 2011,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 5, 2012,

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8442 In re Social Services Employees Union Local 371, on behalf of its member, Matthew Opuoru, Petitioner-Appellant,

-against-

City of New York Administration for Children's Services, Respondent-Respondent.

Index 107762/10

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

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 3, 2011, which denied the CPLR 7510 petition to confirm the second award of the arbitrator, reinstating grievant Matthew Opuoru to his former position with respondent City of New York Administration for Children's Services, and granted respondent's cross petition to vacate the award insofar as it orders the reinstatement of grievant, unanimously modified, on the law, the matter remanded to a different arbitrator for reconsideration of the appropriate penalty, and otherwise affirmed, without costs.

Grievant, a Child Protection Specialist Supervisor II with

the New York City Administration for Children's Services (ACS), pleaded guilty to grand larceny in the fourth degree, for filing false income tax returns using confidential ACS client information to fraudulently claim entitlement to state and local tax credits. This matter was then assigned to arbitrator Rose F. Jacobs, who imposed a penalty of suspension, after which grievant was to be restored to his former position. On appeal of the lower court's confirmance, this Court found that the award was irrational and defied common sense because "[r]einstated to the position of ACS supervisor, grievant again would have access to the ACS database from which he extracted the information he used to perpetrate his crime" (56 AD3d 322, 322 [1st Dept 2008], *lv dismissed* 12 NY3d 867 [2009]). Despite the clear directive from this Court not to do so, the arbitrator, on reconsideration after remand, restored grievant to his former position.

We find, once again and for the same reasons, that the arbitrator's award is irrational and defies common sense (*see City School Dist. of City of N.Y. v Campbell*, 20 AD3d 313, 314 [2005]; *cf. City School Dist. of City of N.Y. v Lorber*, 50 AD3d 301 [2008]). In view of the foregoing, we need not reach the issue of whether the award violates public policy.

Supreme Court vacated the award reinstating the grievant and

directed the entry of judgment accordingly. We modify only to remand the matter to a different arbitrator for reconsideration of the appropriate penalty.

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

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8443 Chaim Katzap, Index 650251/07
Plaintiff-Appellant-Respondent,

-against-

Knickerbocker Village, Inc., et al.,
Defendants-Respondents-Appellants.

Hinckley & Heisenberg LLP, New York (Christoph Heisenberg of counsel), for appellant-respondent.

Moses & Singer LLP, New York (Henry J. Bergman of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Debra A. James, J.), entered September 27, 2011, which, to the extent appealed from as limited by the briefs, granted summary judgment to defendants, dismissed the amended complaint, and dismissed the counterclaims, unanimously modified, on the law, to the extent of reinstating the amended complaint and the counterclaims for breach of fiduciary duty and fraudulent inducement, and otherwise affirmed, without costs.

In this action for breach of a brokerage agreement relating to the sale of Knickerbocker Village, a housing complex consisting of 12 apartment buildings, an issue of fact exists as to whether defendants sellers were adequately apprised of plaintiff's dual representation of both them and a potential

buyer. Contrary to defendants' assertion that they were unaware of plaintiff's dual representation, the evidence establishes that defendants consented to dual representation, the party from whom plaintiff received a buyer's commission, Taconic Investment Partners (Taconic), was explicitly referenced in the agreement as a potential purchaser, and plaintiff was extensively involved in the negotiations between defendants and Taconic.

The court erred in holding that defendants established, as a matter of law, that defendant Irene Pletka's signature on the brokerage agreement, as owner of defendant corporate seller Cherry Green Management Corp., was insufficient to bind the corporate seller. There is an issue of fact regarding Ms. Pletka's ability to bind the corporation since there is evidence that she signed other contracts as president of the corporation, defendants did not proffer any corporate documents requiring the signatures of any additional shareholders to bind the corporation, and there was a course of conduct between the parties which indicates that plaintiff had a binding brokerage agreement in place.

It is undisputed that nonparty Taconic Investment Partners, the party plaintiff introduced to defendants as a potential purchaser, participated, at least indirectly, in the final

consummated transaction. Thus, there is an issue of fact regarding whether plaintiff was a procuring cause of the transaction, irrespective of whether that transaction was structured so that a separate entity, and not Taconic, was the actual purchaser (see *Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778 [1st Dept 2006]; *Coldwell Banker Residential Real Estate v Berner*, 202 AD2d 949, 952 [3d Dept 1994]). Defendants' argument that plaintiff was not involved in the final transaction and that he dissuaded Taconic from increasing its final rejected offer does not eliminate the question of whether plaintiff was a procuring cause of the consummated transaction (*Gregory v Universal Certificate Group*, 32 AD3d at 778).

Defendants failed to establish, as a matter of law, that the course of dealings with plaintiff did not extend the agreement beyond its June 27, 2007 expiration date (*Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886 [1st Dept 2010]). Although the agreement required that its renewal must be in writing, defendants concede that plaintiff was directly involved in the negotiations until June 5, 2007, that he authorized defendants to negotiate directly with Taconic on June 8, 2007, and that they entertained direct offers from Taconic until at least July 21, 2007. They further concede that although

Taconic's final "direct" offer was rejected on July 23, 2007, the purchase agreement was entered into on that same date by KVI Holdings LLC, which is owned, in part, by Taconic. Thus, viewing the evidence in the light most favorable to plaintiff, a "course of dealings" extension of defendants' duty to pay him a commission has been established.

Even assuming that the brokerage agreement expired prior to the sale of the buildings, this did not extinguish plaintiff's right to recover a commission under the theory of quantum meruit (*see Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 262-67 [1st Dept 1995]).

The court improperly dismissed defendants' counterclaims for breach of fiduciary duty and fraudulent inducement which are independent causes of action. If defendants can establish damages, they are entitled to redress, not merely to dismissal of the complaint. However, the counterclaim for tortious

interference with contract was properly dismissed as there is no allegation that any contract between defendants and a third party was actually breached (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424–425 [1996]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8444 Kyle Burke, etc., et al., Index 6232/06
Plaintiffs-Appellants,

-against-

Paul Beyer, D.O., et al.,
Defendants-Respondents,

James E. Croll, M.D., et al.,
Defendants.

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Silberstein, Awad & Miklos, P.C., Garden City (Dana E. Heitz of counsel), for appellants.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for Paul Beyer, D.O., respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered April 20, 2011, which, to the extent appealed from, granted the motions of defendants St. Barnabas Hospital and Paul Beyer, D.O. for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law. Defendants submitted evidence showing that their treatment of decedent did not depart from accepted standards of medical practice and that any alleged departure did not

proximately cause decedent's death within hours of her admission to the hospital (*see generally Frye v Montefiore Med Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]). The evidence demonstrates that decedent's complaints upon presentment at the emergency room, combined with her past medical history and the medications she was taking, significantly belied the severity of her condition, which was ultimately found to include acute renal failure, diabetic ketoacidosis, pancreatitis and hyperkalemia.

In opposition, plaintiffs failed to raise a triable issue of fact. The opinion of plaintiffs' expert did not address the plausibility of other possible explanations for decedent's symptoms upon presentment to the emergency room or consider the entirety of decedent's medical condition and history, including

the effects of the medications that she was taking (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]).

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: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8445 James Polsky, Index 107108/11
Plaintiff-Respondent,

-against-

145 Hudson Street Associates, L.P., et al.,
Defendants-Appellants,

Rogers Marvel Architects PLLC, et al.,
Defendants.

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LePatner & Associates, New York (Henry H. Korn of counsel), for appellants.

Mandel Bhandari LLP, New York (Rishi Bhandari of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered March 1, 2012, which, to the extent appealed from, granted in part plaintiff's request for a preliminary conference, and denied in part defendant's motion to stay disclosure pending determination of the motions to dismiss plaintiff's complaint, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in lifting the stay of discovery imposed by operation of CPLR 3214(b) on the ground of the advanced age of defendants-

appellants' principal (*see Erbach Fin. Corp. v Royal Bank of Canada*, 199 AD2d 87, 87-88 [1st Dept 1993]; *Matter of Menahem*, 2005 NY Misc LEXIS 3830, *2 [Sur Ct, Kings County, Dec. 14, 2005]). Contrary to defendants' contention, it is not clear that the motions to dismiss will be granted.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8446 Hermitage Insurance Company, Index 114384/10
Plaintiff-Respondent,

-against-

Joe Kevin LaFleur, et al.,
Defendants-Appellants,

Malcom Dookie,
Defendant.

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Pearlman, Apat, Futterman, Sirotkin & Seinfeld, LLP, Kew Gardens (Gilbert J. Serrano of counsel), for appellants.

Max W. Gershweir, New York, for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 14, 2011, declaring that plaintiff is not obligated to defend or indemnify defendants LaFleur and Naraine (defendants) in the underlying personal injury action, unanimously affirmed, without costs.

Defendants do not deny that the building they described as a two-family dwelling in their application for commercial general liability insurance contains three apartments. In response to plaintiff's claim of a material misrepresentation entitling it to disclaim coverage, defendants point to the certificate of occupancy issued in 1967, which permits use and occupancy by two

families, and the New York City tax assessment roll for the last five years, which indicates that the building is a "two family converted from one family." Defendants argue that "most people" would understand the question "# Families" on the insurance application to be asking whether the premises is "a legal two family, which it is."

Contrary to defendants' argument, the only reasonable interpretation of the question "# Families" is that it seeks the number of separate dwelling units in the building (*see* Multiple Dwelling Law § 4[6], [7]). The import of the 1967 certificate of occupancy and the tax assessment roll submitted by defendants is that the third apartment was constructed without a proper certificate of occupancy and was never reported to the Department of Buildings. However, while the third apartment may have been constructed illegally, the building is nevertheless a three-family dwelling.

Contrary to defendants' contention, plaintiff demonstrated that defendants' misrepresentation was material by submitting

competent evidence that it would not have written the policy had it known that the premises contained a third apartment (*see Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213 AD2d 246, 247 [1st Dept 1995]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8447 The People of the State of New York, Respondent, Ind. 4669/06

-against-

Safedin Reckovic, Defendant-Appellant.

Murray Richman, Bronx, for appellant.

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered March 20, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that, in the course of the robbery, defendant used or threatened the immediate use of a dangerous instrument (*see* Penal Law § 160.15[3]). The knife used by defendant qualified as a dangerous instrument (*see* Penal Law § 10.00[13]) because it was readily capable of causing death or serious physical injury under the circumstances of its

use or threatened use, and it was not required to qualify as a deadly weapon (*see* Penal Law § 10.00[12]).

To the extent defendant is claiming that money recovered from him at the time of his arrest was inadmissible, that claim is without merit. The issues raised by defendant concerning the authentication of the money and whether it matched the funds taken from the victim were matters affecting the weight to be accorded this evidence and not its admissibility (*see People v Julian*, 41 NY2d 340, 343-344 [1977]).

The court properly denied defendant's request for a missing witness charge. In addition to being untimely, defendant's application failed to satisfy the requirements for such a charge (*see People v Savinon*, 100 NY2d 192 [2003]). In any event, any error in declining to give the charge was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

There is no merit to defendant's arguments that the People failed to disclose exculpatory or impeachment material, or failed to correct inaccurate testimony by their witness. When the witness testified he visited a doctor on the day after the crime, the prosecutor turned over medical records to the contrary and stipulated to the facts contained therein. Defendant had a

meaningful opportunity to cross-examine the witness on this matter, and was not prejudiced in any way (*see People v Osborne*, 91 NY2d 827 [1997]). The People's actions were sufficient to correct the inaccuracy, which, in any event, did not concern a material issue.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Tom, J.P., Sweeny, Acosta, DeGrasse, Richter, JJ.

8448N Kristen Haunss, Index 102323/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Faber & Troy, Woodbury (Candice A. Pluchino of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 20, 2011, which denied plaintiff's motion to renew, unanimously reversed, on the law, without costs, the motion granted and, upon renewal, the motion for leave to amend the notice of claim granted, insofar as it sought to allege that defendant caused and/or created the subject condition.

Supreme Court should have granted plaintiff's motion to renew. There is no dispute that the motion was based upon "new facts" that were unavailable to plaintiff when she moved for leave to amend the notice of claim. It was only after that motion had been denied that defendant furnished plaintiff with the various complaint reports showing that repairs had been completed at the intersection shortly before plaintiff's

accident. Thus, plaintiff had a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e][3]).

As to the merits of the motion for leave to amend the notice of claim, the amendment seeking to allege that defendant caused and/or created the condition is not a substantive amendment under General Municipal Law § 50-e(6) (*see Van Buren v New York City Tr. Auth.*, 95 AD3d 604 [1st Dept 2012]). The notice of claim sounds in negligence and alleges that plaintiff suffered personal injuries, and alleging that defendant was negligent by causing or creating the subject condition is not, as defendant contends, the addition of a new theory of liability (*see Cooke v City of New York*, 95 AD3d 537 [1st Dept 2012]; *Browne v City of New York*, 67 AD3d 620 [2d Dept 2009]; *Goodwin v New York City Hous. Auth.*, 42 AD3d 63 [1st Dept 2007]; *Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291-292 [1st Dept 2006]). The proposed amendments to

the notice of claim do not change the location or type of defect alleged in the original notice of claim.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8449 The People of the State of New York, Respondent, Ind. 5224/07 86/05

-against-

Maleek Jones, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered April 12, 2005, as amended July 10, 2005, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 25 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the

jury's credibility determinations. The evidence supports the conclusion that defendant was the source of a package of cocaine that the police found in the vicinity of defendant's struggle with an officer.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8450 Hugo Perilla, etc., et al., Index 16943/97
Plaintiffs-Respondents,

-against-

Paquita Carchi,
Defendant-Appellant.

Daniel Padernacht, Bronx, for appellant.

Thomas Torto, New York, for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 26, 2012, which, in this personal injury action, denied defendant's motion to vacate a prior default judgment on the ground of lack of jurisdiction, unanimously affirmed, without costs.

Defendant's affidavit submitted some 8 years after the default by defendant failed to rebut the presumption of proper service created by the affidavit of service submitted by plaintiffs (*see Wells Fargo Bank, NA v Edwards*, 95 AD3d 692 [1st Dept 2012]; *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). The portion of defendant's affidavit that purported to dispute that personal service had been made upon a person of suitable age and discretion at defendant's actual place of business was conclusory and not specific enough to warrant a

traverse hearing (*see Sanchez*, 57 AD3d at 454). Furthermore, defendant's affidavit failed to address, let alone dispute, that the pleadings had been mailed to her residence (*cf. NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8451-
8451A-
8451B In re Glenda C.,
Petitioner-Respondent,

-against-

Wayne C., etc.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Law Offices of Howard B. Felcher, PLLC, New York (Alexander M. Warshow of counsel), for respondent.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 14, 2011, which confirmed the Support Magistrate's finding that respondent-appellant had willfully failed to comply with his support obligations, adopted the Magistrate's recommendation of 6 months' incarceration, but suspended imposition of this sentence pending further order of the court and placed respondent on probation, and admonished him to pay $10,000 by the next court date and keep current on the 2011-2012 support obligation or lose his probationary status, unanimously affirmed, without costs. Appeal from amended order, Family Court, New York County (Karen D. Kolomechuk, Support Magistrate), entered on or about July 14, 2011, which ordered

respondent to pay $27,499.56 for his daughter's 2010-2011 tuition and $10,000 to petitioner to reimburse her for payments of $18,196.49 towards the child's 2009-2010 tuition, and amended order, same court and Magistrate, entered on or about the same date, directing entry of judgment in petitioner's favor in the amount of $27,499.56, unanimously dismissed, without costs.

No appeal lies from the amended orders of the Support Magistrate, as respondent failed to submit objections to the orders to a Family Court Judge (Family Ct Act § 439[e]; *Matter of Prill v Mandell*, 237 AD2d 445, 446 [2nd Dept 1997]; *Matter of Werner v Werner*, 130 AD2d 754 [2nd Dept 1987]).

Respondent received meaningful representation throughout the proceedings, and he did not suffer actual prejudice as a result of the claimed deficiencies (*see Matter of Kemp v Kemp*, 19 AD3d 748, 751 [3d Dept 2005], *lv denied* 5 NY3d 707 [2005]). Indeed,

the Support Magistrate's findings would not have been overturned, even if counsel had filed objections to the Magistrate's March 2011 orders.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8452 Dennis Alarcon, Index 301502/09
Plaintiff-Respondent, 84111/09

–against–

UCAN White Plains Housing
Development Fund Corp., et al.,
Defendants/Third-Party
Plaintiffs-Respondents-Appellants,

–against–

Masonry Services, Inc.,
Third-Party Defendant-Appellant-Respondent.

_____

Coburn & Coffman, PLLC, New York (Jonathan W. Greenbaum of counsel), for appellant-respondent.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for respondents-appellants.

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 29, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for leave to amend his bill of particulars to allege a violation of Labor Law § 240(2) and additional violations of the New York Industrial Code, and upon amendment, granted plaintiff's motion for summary judgment on the issue of his Labor Law §§ 240(1), 240(2) and 241(6) claims, and granted defendants/third-party

plaintiffs White Plains Housing Development Fund Corp. and White Plains Courtyard LLP summary judgment on their claims for contractual indemnity as against third-party defendant Masonry Services, Inc (MSI), unanimously affirmed, without costs.

Plaintiff was employed by third-party defendant MSI as a laborer/helper at a construction project at 2040-2060 White Plains Road, Bronx, New York. The property, owned by defendants, was being developed into a new seven-story affordable housing building. MSI was hired as a masonry subcontractor, one of over 15 subcontractors hired by defendants' general contractor. MSI had installed a scaffold structure in one of the empty elevator shafts, to which it attached a series of steps to create a staircase. The staircase, which did not have any guardrails, was the only means of traveling from floor to floor in the building.

On the day of the accident, plaintiff quarreled with his MSI supervisor, who told plaintiff that he did not want to see him on that site anymore. Plaintiff stopped his work, and proceeded to the fourth floor to gather his street clothes and leave. Halfway between the third and fourth floor, a piece of fabric from plaintiff's pants became stuck on a piece of the scaffold pipe. This caused plaintiff to lose his balance and fall three and one-half stories downward, landing on his feet, and losing

consciousness.

Plaintiff's belated allegations that defendants violated Labor Law § 240(2), 12 NYCRR § 23-5.1(j), and 12 NYCRR § 23-5.3(e) "entail[] no new factual allegations, raise[] no new theories of liability, and has caused no prejudice" (*Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [1st Dept 2000]; *see also Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 906, [1st Dept 2011]). Plaintiff's theory of the case, supported by the allegations in his bill of particulars and his deposition testimony, was always that he fell due to the scaffolding stairs' lack of guardrails. Thus, defendants cannot reasonably claim prejudice or surprise. Morever, in the context of this case, the fact that plaintiff was in the process of exiting the job site did not remove him from the protections of Labor Law § 240 (*see e.g. Morales v Spring Scaffolding, Inc.*, 24 AD3d 42 [1st Dept 2005])

Plaintiff's motion, served on the 120th day after he filed his note of issue, was timely (*see* CPLR 2211; *see also Greenfield v Philles Records*, 160 AD2d 458, 459 [1st Dept 1990]).

Pursuant to the contract between defendants and MSI, MSI agreed to, inter alia, indemnify defendants for all losses "arising out of, or in any manner relating to," MSI's work. The

provision went on to state that "[i]n jurisdictions in which the indemnification provided for in this Article is broader than that allowed by applicable law, this Article should be interpreted as providing the broadest indemnification permitted and should be limited only to the extent necessary to comply with that law." Thus, contrary to MSI's argument, the clause does not violate General Obligations Law § 5-322.1 (*see Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]; *Dutton v Pankow Bldrs.*, 296 AD2d 321 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]).

In any event, there is no evidence that defendants were actively negligent. Plaintiff testified that he was only supervised by MSI, it was uncontested that MSI constructed the scaffold, there was no evidence that defendants were on site, and plaintiff's common law and Labor Law § 200 claims against defendants were dismissed (*see Smith v Broadway 110 Devs., LLC*, 80 AD3d 490 [1st Dept 2011]). MSI's argument that the motion was premature is unavailing. The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion (*see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]; *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [1st Dept 2009]).

Notably, MSI did not offer any affidavits from its employees or principals contradicting any of the evidence submitted, despite the fact that they would have knowledge of the operative facts.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8453 Felix Hernandez, Index 105308/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

The New York City Police Department,
et al.,
Defendants.

_____

Neal Forman, Brooklyn, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Angela R. Cruz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about June 14, 2011, which, insofar as appealed from as limited by the briefs, granted the motion of defendant City of New York to vacate an order of the same court (Karen S. Smith, J.), entered on or about August 12, 2010, inter alia, directing the City to produce retired Police Officer Angel Pagan for further deposition, and denied plaintiff's cross motion for partial summary judgment on the issue of liability on his claims for false arrest and under 42 USC § 1983, and to strike the City's answer and to preclude the City from using the deposition testimony of Pagan, unanimously modified, on the law,

to the extent of granting, upon a search of the record, summary judgment dismissing the claims as against the City for false arrest, false imprisonment, malicious prosecution, and under 42 USC § 1983, and otherwise affirmed, without costs.

A plaintiff alleging a claim for false arrest or false imprisonment must show that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to it, and that the confinement was not otherwise privileged (*see Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *Marrero v City of New York*, 33 AD3d 556 [1st Dept 2006]). "The elements of an action for malicious prosecution are (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice" (*Colon v City of New York*, 60 NY2d 78, 82 [1983]). The existence of probable cause to arrest is a complete defense to such claims (*see Marrero* at 557; *Brown v City of New York*, 289 AD2d 95 [1st Dept 2001]).

The motion court properly denied plaintiff's cross motion for summary judgment. Our search of the record (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]), requires dismissal of the claims against the City for false arrest, false imprisonment, malicious prosecution and under 42

USC 1983. Although plaintiff was arrested in his home without a warrant, the grand jury's vote to indict plaintiff prior to the arrest and the subsequent indictment raised a presumption of probable cause, even though the indictment was subsequently dismissed (*see Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011], *lv dismissed* 19 NY3d 952 [2012]; *Arzeno v Mack*, 39 AD3d 341 [1st Dept 2007]).

The record contains further evidence of probable cause: During an extensive investigation, plaintiff was identified as one of more than 20 participants in a heroin trafficking operation based on, among other things, surveillance and wiretapping of a man using an apparent alias, who repeatedly conversed and met with other suspects in connection with selling heroin; a driver's license recovered from this man stating plaintiff's name and address; and plaintiff's presence at that address and physical resemblance to the suspect. Although plaintiff maintained that his Fourth Amendment rights were violated by the warrantless arrest in his home absent of exigent circumstances, such an alleged constitutional violation does not negate the existence of probable cause (*see People v Jones*, 2 NY3d 235, 243 [2004]).

Dismissal of the malicious prosecution claim is further

warranted since there is no triable issue as to whether the prosecution was motivated by actual malice (*see Nardelli v Stamberg*, 44 NY2d 500 [1978]; *Arzeno*, 39 AD3d at 342).

The court properly denied plaintiff's motion to strike the answer, since plaintiff failed to attach an affirmation of good faith (*see Molyneaux v City of New York*, 64 AD3d 406 [1st Dept 2009]; 22 NYCRR 202.7[a]). In any event, plaintiff failed to make a clear showing that defense counsel's conduct during a deposition, or failure to produce the deponent for further deposition, constituted willful, contumacious, or bad-faith conduct (*see Delgado v City of New York*, 47 AD3d 550 [1st Dept 2008]). The court also properly declined to preclude the existing deposition testimony transcript, notwithstanding plaintiff's representation that he contemplated further questioning (*see Farmer v Nostrand Ave. Meat & Poultry*, 37 AD3d 653 [2d Dept 2007]; *cf. Vera v Beth Israel Med. Ctr.*, 175 AD2d 716 [1st Dept 1991]). Moreover, the court providently exercised

its discretion by declining to order the City to produce the deponent for a further deposition (*see* CPLR 3116[d]).

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: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8454- Index 650604/09
8455-
8456

The Genesis Group, LLC, et al.,
Plaintiffs,

-against-

North American Energy Credit
and Clearing Corp., et al.,
Defendants,

Nasdaq OMX Group, Inc.,
Defendants-Respondents.

- - - - -

Flatiron Capital, etc.,
Nonparty Appellant.

_____

Helfand & Helfand, New York (Aaron Weissberg of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Louis L. Nock of counsel), for respondents.

_____

Amended order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 12, 2011, which granted the motion of defendant Nasdaq OMX Group, Inc. (OMX) to vacate a November 10, 2010 order, the ensuing November 30, 2010 judgment, an order dated May 26, 2011 and an unfiled judgment dated May 27, 2011, all of which directed turnover to nonparty Flatiron Capital of certain escrowed funds, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 29, 2011,

unanimously dismissed, without costs, as superseded by the appeal from the amended order. Order, same court and Justice, entered April 11, 2012, which, insofar as appealed from and to the extent appealable, denied Flatiron's motion to renew, unanimously affirmed, with costs.

OMX, although not a party to the escrow agreement, had standing as an "interested" entity under CPLR 5015 to challenge Flatiron's attempt to obtain payment from the escrow fund for more than was allotted it under the agreement's schedule of indebtedness. It was undisputed that OMX was a close affiliate of non-party Nasdaq OMX Commodities Clearing Company.

Because the additional amount that Flatiron sought to recover from the escrow fund arose from a default on an installment payment after the effective date of the escrow agreement and the consequent acceleration of the entire contractual amount due, it was not improper to exclude the unmatured debt from the escrow (*see* 8 Del Code Ann § 281[a][4]). There is no support for Flatiron's contention that the intent of the escrow agreement was to provide for payment of all of the debt to all of NECC's creditors.

Renewal was properly denied because, even if the evidence Flatiron submitted was considered new, it would not change the

prior determination (*see* CPLR 2221[e][2]).

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

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Freedman, JJ.

8457-
8458 The People of the State of New York, Ind. 1471/11
Respondent,

-against-

Kenneth Moreno,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Franklin Mata,
Defendant-Appellant.

_____

Law Offices of Tacopina Seigel & Turano, P.C., New York (Joseph Tacopina of counsel), for Kenneth Moreno, appellant.

Mandery & Mandery, Mineola (Edward J. Mandery of counsel), for Franklin Mata, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 10, 2011, convicting defendant Kenneth Moreno, after a jury trial, of three counts of official misconduct, and sentencing him to concurrent terms of 1 year, and judgment, same court and Justice, rendered August 8, 2011, convicting defendant Franklin Mata, after a jury trial, of three counts of official misconduct, and sentencing him to concurrent

terms of 60 days, with 3 years' probation, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5) as to both defendants.

We find that the verdict was based on legally sufficient evidence. We further find that it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

To establish the crime of official misconduct, the People had to prove that each defendant committed an act "relating to his office" that constituted an "unauthorized exercise of his official functions," that he knew the act was unauthorized, and that he acted with the intent to obtain a benefit (Penal Law § 195.00[1]). An action taken by a public servant that is "completely unrelated to his [or her] position" is not "within the scope of [his or her] real or apparent authority" (*People v Rossi*, 69 AD2d 778, 779 [1st Dept 1979], *affd* 50 NY2d 813 [1980]).

Defendants were police officers who initially responded to a taxi driver's 911 call reporting an intoxicated passenger who was unable to get out of the cab. Defendants assisted the passenger in getting out of the cab and escorted her to her apartment. The

passenger-complainant, who was vomiting, asked them to return and asked them to take her keys. Although not assigned to do so, and while giving their command false information as to their whereabouts, defendants returned three additional times that night to the complainant's apartment. While the events that occurred in the apartment are in dispute and were the subject of charges of which defendants were acquitted, the evidence establishes that each defendant's intent was, at least, to socialize with the complainant with a view toward sexual intercourse, or to assist his partner in doing so.

Defendants' returns to the complainant's apartment occurred while they were in uniform and on duty. Their initial contact with the complainant arose from their patrol duties, in response to a 911 call, whereby defendants acquired the complainant's personal information, became aware of her vulnerable condition, and obtained her keys, permitting them to enter the building and her apartment. In addition, during one of the entries, defendants falsely assured the complainant's neighbor that they were investigating a report of a prowler.

Therefore, the evidence supported the conclusion that defendants' acts "relat[ed] to" their official position. Furthermore, the three entries at issue were unauthorized

exercises of defendants' "official functions." While they had no duty to follow up on the complainant once they finalized the assignment, their actions nonetheless pertained to their official functions as police officers (*see People v Watson*, 32 AD3d 1199, 1202 [4th Dept 2006] [stopping car and kissing driver], *lv denied* 7 NY3d 929 [2006]). What rendered defendants' repeated entries into the apartment unlawful was not that they were beyond the scope of their police functions, but that their reentry had not been authorized by a legitimate assignment (*compare People v Rossi*, 69 AD2d at 779).

Entering a building or an apartment therein for the purpose of conducting an investigation or assisting an occupant is an official police function. Accordingly, making such an entry on the pretext of doing one of those things, when the police officer's actual intent is to obtain a personal benefit, would constitute official misconduct.

The instances of alleged prosecutorial misconduct cited by defendants did not deprive them of a fair trial. We conclude that in her summation the prosecutor misstated the law regarding the "benefit" element of official misconduct by suggesting that mere neglect of duty would qualify as a benefit (*see People v Feerick*, 93 NY2d 433, 446 [1999]). However, we find that

reversal is not warranted. It was clear to the jury throughout the trial, including the summations, that the alleged benefit was not neglect of duty, but the prospect of sexual relations with the complainant. Furthermore, the court instructed the jury that the attorneys' summations were merely argument, advised the jury that the court, not the attorneys, would instruct the jury on the law, and delivered a correct charge on official misconduct. The jury is presumed to have followed the court's instructions.

We have considered and rejected defendants' remaining claims of prosecutorial misconduct.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8459-
8460 Index 109620/07

Robert E. Kodsi,
Plaintiff-Respondent-Appellant,

-against-

Steven T. Gee, et al.,
Defendants-Appellants-Respondents.

Kaufman & Kahn, LLP, New York (Robert L. Kahn of counsel), for appellants-respondents.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 3, 2011, which, to the extent appealed from as limited by the briefs, denied so much of defendants' motion for summary judgment as sought to dismiss the first, second, third and sixth causes of action, granted the motion as to the claim for damages based on emotional suffering, and denied plaintiff's cross motion for summary judgment as to liability, unanimously modified, on the law, to grant defendants' motion as to the first and second causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered June 20, 2011, which denied plaintiff's cross motion to amend the complaint to add a cause of action under Judiciary Law § 487, and, upon

defendants' motion for reargument of their summary judgment motion, adhered to the original determination, unanimously affirmed as to plaintiff's motion, and the appeal therefrom otherwise dismissed, without costs, as academic in light of the foregoing.

The first cause of action, which alleges legal malpractice based on negligent delay, must be dismissed because plaintiff failed to raise an issue of fact in opposition to defendants' prima facie showing that his alleged loss and injury were not proximately caused by any of their acts or omissions (*see G & M Realty, L.P. v Masyr*, 96 AD3d 689 [1st Dept 2012]; *Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]). The record shows that defendants assisted plaintiff and his then wife in effectuating an uncontested divorce and that any harmful delays in the prosecution of the divorce were caused by the couple's indecision and inconsistence and plaintiff's conduct. After the marital stipulation they executed was rejected by the court clerk, the wife volunteered to re-execute it but plaintiff instructed her not to do so. Several months later, she changed her mind about the stipulation, after learning that plaintiff allegedly was seeing another woman and was "manipulating" his income downward and secreting assets. Thus,

the record demonstrates that it was not defendants' alleged negligence but plaintiff's own actions that caused his wife to abandon the original amicable agreement, whose terms plaintiff contends were more favorable to him than the terms of the settlement agreement on which the divorce judgment was entered.

The second cause of action alleges malpractice based on conflict of interest. The record contains no evidence that any conflict of interest proximately caused plaintiff to suffer any of the harm he alleges (*see Schafrann v N.V. Famka, Inc.*, 14 AD3d 363 [1st Dept 2005]; *Estate of Steinberg v Harmon*, 259 AD2d 318 [1st Dept 1999]).

The third cause of action alleges legal malpractice based on defendants' negligent failure to advise plaintiff of the ramifications of jointly purchasing a townhouse with his wife in the absence of a settlement agreement. Although, as the motion court found, this may prove to be a feigned issue in light of plaintiff's conceded expertise in real estate and the evidence that he was consulting with other counsel as to divorce at the time, nevertheless an issue of fact exists whether defendants' alleged negligence proximately caused plaintiff harm.

The sixth cause of action merely alleges plaintiff's entitlement to damages arising from professional negligence.

As to plaintiff's request for damages for emotional suffering, "nonpecuniary damages ... are not available in an action for attorney malpractice" (*Dombroski v Bulson*, 19 NY3d 347 [2012]).

The court correctly denied plaintiff's motion for leave to amend the complaint to include a cause of action under Judiciary Law § 487, since there is nothing in the record that shows that defendants engaged in "a chronic, extreme pattern of legal delinquency" (*see Estate of Steinberg v Harmon*, 259 AD2d 318 [1st Dept 1999] [internal quotation marks omitted]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8461-
8462 James Bobko,
Plaintiff-Respondent,

-against-

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

Index 105908/10

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for appellants.

Raskin & Kremins, LLP, New York (David M. Hoffman of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 22, 2011, which granted plaintiff's motion to amend his notice of claim and deemed it timely served nunc pro tunc, and denied defendants' cross motion to dismiss the complaint, unanimously reversed, on the law, without costs, plaintiff's motion denied, and defendants' cross motion granted. The Clerk is directed to enter judgment dismissing the complaint. Appeal from order, same court and Justice, entered May 31, 2011, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiff's notice of claim, filed on June 11, 2009, contained an accident date of March 18, 2009. He then moved to

change the date of the accident from March 18, 2009 to March 9, 2009. Plaintiff essentially sought an order deeming the notice of claim timely served nunc pro tunc. Given the accident date of March 9, 2008, plaintiff's service of the notice of claim, however, was untimely by three days (*see* General Municipal Law § 50-e [1] [a]). This late service, without leave of court, was a nullity (*see Croce v City of New York*, 69 AD3d 488 [1st Dept 2010]; *McGarty v City of New York*, 44 AD3d 447, 448 [1st Dept 2007]). Further, the court lacked the authority to deem the notice timely served nunc pro tunc, as the one-year and 90-day statute of limitations period had expired (*see Pierson v City of New York*, 56 NY2d 950, 954-956 [1982]; General Municipal Law §§ 50-e[5], 50-i[1][c]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8465 Ivy Daniels, Index 303124/09
Plaintiff-Appellant,

-against-

S.R.M. Management Corp., et al.,
Defendants-Respondents,

Luis Jose Perez,
Defendant.

Jacoby & Meyers, L.L.P., Newburgh (Kara L. Campbell of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 2, 2011, which granted defendants S.R.M. Management Corp. and Victor Cruz-Gonzalez's motion for summary judgment dismissing the complaint alleging serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of injury of a permanent nature, and otherwise affirmed, without costs.

The 34-year-old plaintiff alleges that she suffered serious injuries to her right knee, right shoulder, and cervical and lumbar spine as the result of a motor vehicle accident that occurred when she was a passenger in a livery cab in February

2009. Although defendants presented conflicting evidence as to whether plaintiff suffered a tear of the rotator cuff of her right shoulder or of the medial meniscus of her right knee, they established prima facie the absence of serious injury through the expert medical reports of a radiologist and orthopedist who opined that MRI films of each body part showed only preexisting, degenerative conditions and no evidence of traumatic injury and the orthopedist's findings that plaintiff had full range of motion, except for one minor limitation, in all affected parts as of February 2010 (*see Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

In opposition, plaintiff raised a triable issue of fact by submitting the August 2010 report of her treating orthopedist and surgeon, who, based on his review of the MRI reports and observations during arthroscopic surgery of the knee and shoulder, found that plaintiff had suffered injuries to her knee, shoulder, and spine that were causally related to the accident and that she continued to have quantified limitations in range of motion of each body part (*see Thompkins v Ortiz*, 95 AD3d 418 [1st Dept 2012]). The physician's opinion as to causation, based on the history provided, his examination of plaintiff, surgical findings, and review of the MRI reports, and the absence of any

pre-accident history of symptoms in the affected body parts, was sufficient to raise an issue of fact (*see James v Perez*, 95 AD3d 788, 789 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). Although the physician's report incorrectly states that he last treated plaintiff on November 17, 2010, a date subsequent to the date of the report, it is clear that the report reflects range of motion findings made at a recent examination. Defendants' speculation that plaintiff actually was last seen on November 9, 2009, does not eliminate any doubt as to the existence of triable issues of fact (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendants met their burden as to the 90/180-day claim by relying on plaintiff's deposition testimony that she was confined to home for less than two months, and plaintiff did not raise an issue of fact in opposition (*see Winters v Cruz*, 90 AD3d 412 [1st Dept 2011]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8466 In re Anthony M., and Others,

Children Under the Age
of Eighteen Years, etc.,

Allison M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Alex R. Yacoub of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 5, 2011, which, to the extent appealed from, after a hearing, found that respondent mother had willfully and without just cause violated a prior order of disposition, revoked a prior order of supervision, and placed the subject child in the custody of the Commissioner of Social Services, unanimously affirmed, without costs.

Respondent failed to preserve her hearsay objections, and we decline to review them (*see Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012]). Nor did

respondent preserve her argument regarding the applicable standard of proof for finding a violation of an order of supervision. In any event, a preponderance of the evidence supports the court's finding that respondent had violated the terms of a prior order of disposition by allowing her son to see his father (Family Ct Act §§ 1046 [b] [I]; 1072 [a]; *see Matter of Breeyanna S.*, 45 AD3d 498 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]; *Matter of Aimee J.*, 34 AD3d 1350, 1350-1351 [4th Dept 2006]).

Family Court did not violate respondent's right to due process by denying her application for an adjournment of the proceedings to allow further testimony. Family Court providently exercised its discretion in denying the application, as respondent's counsel offered no proof as to how the proposed testimony would be relevant to the subject child's best interests (*see Matter of Venditto v Davis*, 39 AD3d 555 [2d Dept 2007]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8468 Lidia Vazquez, Index 109855/08
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey,
Defendant-Respondent,

The New York City Transit Authority,
Defendant,

Laro Maintenance Corp.,
Defendant-Appellant.

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McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for appellant.

Ferro, Kuba, Mangano, Sklyar, New York (Kenneth E. Mangano of counsel), for Lidia Vasquez, respondent.

Cheryl Alterman, New York, for Port Authority of New York and New Jersey, respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 9, 2011, which, to the extent appealed from as limited by the briefs, denied defendant Laro Maintenance Corporation's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and Laro's motion granted. The Clerk is directed to enter judgment accordingly.

In this trip-and-fall case, defendant Laro Maintenance

contracted with the Port Authority to undertake responsibility for cleaning and inspecting stairs in the Port Authority Bus Terminal for defects. Plaintiff has alleged that Laro failed to fulfill its duty of care to her by not identifying the defective stair nosing she fell on.

The motion court erred in not dismissing plaintiff's action against Laro Maintenance. The evidence fails to show that an issue of fact exists regarding the enumerated exceptions of *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]).

First, plaintiff concedes that Laro Maintenance did not completely displace the Port Authority, which retained its own inspection rights and the obligation to make repairs. Second, plaintiff could not have detrimentally relied on Laro's performance of the contract, as she was unaware of the contract (*Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393 [1st Dept 2008]). Finally, Laro, by its mere failure to inspect, did not

launch a force or instrument of harm (*see Church v Callanan Indus.*, 99 NY2d 104, 111-112 [2002]; *All Am. Moving & Storage, Inc. v Andrews*, 96 AD3d 674 [1st Dept 2012]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8469-
8469A Alison Sass,
Plaintiff-Appellant,

-against-

TMT Restoration Consultants Ltd.,
et al.,
Defendants-Respondents,

Nat Varisco, et al.,
Defendants.

Index 111851/07

Marvin J. Weinroth, Great Neck, for appellant.

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for TMT Restoration Consultants Ltd., respondent.

Dennis H. McCoobery, New York, for Tina Marie Tapinekis & Associates LLC., respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 10, 2011, which granted defendant TMT Restoration Consultant's (TMT) motion for summary judgment, unanimously affirmed, with costs. Order, same court and Justice, entered December 16, 2011, which granted defendant Tina Marie Tapinekis & Associates' (TMTA) motion for summary judgment to the extent of dismissing the causes of action for negligence and fraud, unanimously affirmed, with costs.

The motion court properly relied on plaintiff's unsigned

deposition transcript since the transcript was certified by the reporter and plaintiff does not challenge its accuracy (*Bennett v Berger*, 283 AD2d 374, 375 [1st Dept 2001).

Plaintiff failed to state a prima facie case for piercing the corporate veil. Plaintiff entered into a written contract with TMTA to perform construction work on her apartments which referenced TMT as the architect for the work to be performed. Plaintiff maintains that TMT and TMTA are alter egos such that one exercises complete domination over the other sufficient to warrant piercing the corporate veil. Although she has shown that there is overlapping ownership, a common officer, and common office space and facilities, she has failed to meet her burden of showing complete domination and control and that such domination was used to commit a fraud or wrong causing her injury (*Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st 2009]. Given that TMT was neither a signatory nor a party to the contract, there is no basis for holding TMT liable for any alleged breach of the contract.

The negligence claim against TMTA was properly dismissed as it is merely an allegation that TMTA negligently performed its contractual duties. Such an allegation does not give rise to a claim for negligence, absent some duty independent of the

contract *(see Sommer v Federal Signal Corp.*, 79 NY2d 540, 551-552 [1992]). With regard to the fraud claim, there is no evidence that TMTA made the misrepresentation that it had a license from the Department of Consumer Affairs and, in any event, the only harm alleged, defective workmanship, relates to plaintiff's claim for breach of contract *(see Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607 [1st Dept 1985, *lv dismissed* 65 NY2d 637 [1985]).

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, JJ.

8470 Ingrid Santana, Index 26029/02
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for municipal.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 12, 2011, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff argues that the City has a nondelegable duty to transport homeless families from intake facilities to temporary overnight shelters. She relies on Administrative Code of City of NY § 21-313, which requires the Department of Homeless Services (DHS) to maintain a facility to handle applications for shelter from families with children, to provide temporary overnight shelter placement for those families that, at 10 P.M., are still in the process of applying, and to "arrange transportation for the families" to and from the temporary shelters.

We perceive no legislative intent on the face of

Administrative Code § 21-313 to impose a nondelegable duty to transport on the City. The language "shall arrange transportation for the families" establishes that the DHS is not required to transport the families itself, and, in contrast with legislation that has been found to impose a nondelegable duty, the provision contains no language making the City liable for injury resulting from breach of the duty. For example, Multiple Dwelling Law § 78(1), which requires that every multiple dwelling be kept in good repair, provides that "[t]he owner shall be responsible for compliance with the provisions of this section" (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687-688 [1990] ["a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another"]). Administrative Code § 7-210, which requires the owner of real property abutting a sidewalk to maintain the sidewalk in reasonably safe condition, provides that the owner "shall be liable for any injury to property or personal injury . . . caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" (*see Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008]).

Plaintiff argues that the imposition of a nondelegable duty is also required by the "affirmative governmental obligation" to

provide emergency shelter to homeless families (*see Barnes v Koch*, 136 Misc 2d 96, 100 [Sup Ct, NY County 1987]). However, courts have declined to impose vicarious liability on government entities that delegate transportation duties in the fulfilment of analogous obligations, such as the obligation to provide education (*see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370 [1995] [declining to impose upon public school districts a nondelegable duty to transport children to and from school]) and the obligation to care for patients (*see Hilsen v City of New York*, 254 AD2d 10 [1st Dept 1998], *lv denied* 92 NY2d 817 [1998] [declining to hold municipal emergency ambulance service vicariously liable for injury allegedly resulting from negligence of private hospital's paramedics]; *see also Brown v Transcare N.Y., Inc.*, 27 AD3d 350, 351 [1st Dept 2006]). Thus, we do not find that the public policy of obligating the City to provide

emergency shelter to homeless families, however salutary, requires the imposition of a nondelegable duty on the City to transport the families to and from the temporary shelters.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8472 The People of the State of New York, Ind. 3378/10
Respondent,

-against-

Yasmine Brown-Dietrich,
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 (Philip Morrow of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about February 24, 2011,

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.

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK

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

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8473N In re Jeanelin Mercado, etc., Index 260602/11
Petitioner-Respondent,

-against-

City of New York,
Respondent,

New York City Housing Authority,
Respondent-Appellant.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellant.

Law Offices of Joel L. Getreu, P.C., New York (Willard G. LaFauci of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 10, 2012, which granted petitioner's motion for leave to file a late notice of claim to the extent of permitting her to file it against respondent New York City Housing Authority (respondent), unanimously affirmed, without costs.

The court providently exercised its discretion in granting petitioner leave to file a late notice of claim. The accident giving rise to the claim occurred on December 28, 2010 when the decedent, petitioner's father, allegedly slipped and fell on a walkway due to the accumulation of snow and ice. Respondent was served with the notice of claim on May 6, 2011, less than 6 weeks

after expiration of the 90-day filing requirement (*see Matter of Caridi v New York Convention Ctr. Operating Corp.*, 47 AD3d 526 [1st Dept 2008]*; Weiss v City of New York*, 237 AD2d 212, 213 [1st Dept 1997]).

Although petitioner did not elaborate on her reason for failing to timely serve the notice, this failure is not, by itself, fatal to the motion (*see Weiss*, 237 AD2d at 213). Petitioner established that the late notice was sufficient to serve as actual knowledge of the claim and it was served within a reasonable time after the 90 days expired (*id.*). Additionally, respondent has not established any prejudice. Its bare claim that the delay has made it difficult to locate witnesses is insufficient *(see Lisandro v New York City Health and Hospitals Corp.*, 50 AD3d 304 [1st Dept 2008], *lv denied* 10 NY3d 715 [2008]). Further, the alleged defective condition is highly transitory and respondent would have been in the same position regarding any investigation even if the notice of claim had been timely served (*see Matter of Caridi*, 47 AD3d 526).

We reject respondent's argument that petitioner's claim is patently meritless. Petitioner is not required to establish conclusively the merits of the claim at this stage in the litigation (*Weiss*, 237 AD2d at 213).

We have considered respondent's remaining contention and find it unavailing.

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

ENTERED: NOVEMBER 8, 2012, p.m.

CLERK