SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 13, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8474 The People of the State of New York, Respondent, Ind. 1738N/09

-against-

Sandra Diaz,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 20, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree and four counts of unlawfully dealing with a child in the first degree, and sentencing her to concurrent terms of three years of probation, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for

disturbing the jury's credibility determinations. Although defendant's position was that the drugs and paraphernalia found in her apartment were solely attributable to the codefendant, the evidence supports the conclusion that defendant exercised dominion and control, at least jointly with the codefendant, over the contraband (*see e.g. People v Mayo*, 13 NY3d 767 [2009]; *People v Torres*, 68 NY2d 677, 679 [1986]).

The evidence also established the elements of first-degree unlawfully dealing with a child (*see* Penal Law § 260.20[1]), including the element of "activity involving controlled substances." Defendant knew or should have known that a large amount of heroin and drug paraphernalia were in her apartment, where four children under the age of 18 lived.

The court properly permitted the People to introduce evidence on their rebuttal case that defendant knew that the term bundle referred to 10 glassines of heroin. This impeached defendant's testimony that she was unfamiliar with that term. The evidence was not collateral because it was relevant to an issue other than credibility and it was offered to disprove evidence set forth by defendant (*see People v Beavers*, 127 AD2d 138, 141 [1st Dept 1987], *lv denied* 70 NY2d 642 [1987]). The charges submitted to the jury included possession with intent to

sell, and defendant's familiarity with the term bundle was relevant to intent, particularly since an expert witness testified that someone buying heroin for personal use would not purchase bundles of heroin.

The court also properly permitted the People to introduce evidence of ink stamps, a strainer, a spoon, and rubber bands, even though this paraphernalia was not the basis for the charges in the indictment. The paraphernalia in question was highly probative of defendant's and the jointly tried codefendant's intent to sell, and the People "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]).

We perceive no basis for reducing the sentence.

Defendant's remaining contentions, including her untimely constitutional claim, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Evidence that defendant and the codefendant's daughter saw the codefendant with drugs on an unspecified date or dates was not hearsay. Although it should

have been excluded because its prejudicial effect outweighed any probative value, the error was harmless. Defendant's other unpreserved claims are unavailing.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8475 Fernando J. Maldonado, Index 5392/04
Plaintiff-Appellant,

-against-

Monica P. Maldonado,
Defendant-Respondent.

Michele Hauser, New York, for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ellen Gesmer, J.), entered on or about April 2, 2010, insofar as appealed from as limited by the briefs, awarding defendant 35% of the appreciation in value of plaintiff's Manhattan apartment, imputing tip income to plaintiff for the purpose of calculating child support, and directing plaintiff to pay defendant $15,000 in counsel fees, unanimously affirmed, without costs.

Defendant was properly awarded a portion of the appreciation of plaintiff's cooperative apartment. This issue involves a matter of credibility that the court resolved in defendant's favor (*see Evans v Evans*, 48 AD3d 322, 323 [1st Dept 2008]). Moreover, the record supports the court's findings that defendant played a role in the upkeep and maintenance of the apartment,

contributed financially to the payments of the mortgage and maintenance, and contributed indirectly by acting as homemaker and mother (*see Lee v Lee*, 48 AD3d 377, 379 [1st Dept 2008]; *Hale v Hale*, 16 AD3d 231, 233 [1st Dept 2005]).

The court also providently exercised its discretion in imputing tip income to plaintiff (*see Ansour v Ansour*, 61 AD3d 536 [1st Dept 2009]; *cf. Brenner v Brenner*, 52 AD3d 322 [1st Dept 2008]). The court was not required to rely upon plaintiff's account of his finances, particularly since the evidence established that plaintiff was earning more than he reported on his tax returns (*see Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006]). Plaintiff had not reported any tip income except in 2007 and the evidence showed that his cash expenditures greatly exceeded the sum of his cash withdrawals.

The award of counsel fees to defendant was based upon a proper consideration of "the financial circumstances of both parties together with all the other circumstances of the case" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; Domestic Relations Law § 237). Plaintiff prolonged the trial by providing

false and misleading information to his financial expert, with the result being that the expert's testimony had no value.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8476 Rockwell Global Capital, LLC, Index 653017/11
Plaintiff-Appellant,

-against-

Soreide Law Group, PLLC, et al.,
Defendants-Respondents,

Salvatore Clark,
Defendant.

Gusrae Kaplan Nusbaum PLLC, New York (Brian D. Graifman of counsel), for appellant.

Law Offices of John E. Lawlor, Mineola (John E. Lawlor and Ian Y. Park of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 29, 2012, which denied plaintiff's motion to dismiss the counterclaims alleged by defendants Soreide Law Group, PLLC, Lars K. Soreide, and Frederick J. Seely's for tortious interference with contract (first), tortious interference with business relations (second), tortious interference with business expectancy (third) and malicious prosecution (fourth), unanimously modified, on the law, to grant the motion to the extent of dismissing the second, third, and fourth counterclaims, and otherwise affirmed, without costs.

The court properly declined to dismiss the counterclaim for

tortious interference with contract. The record shows that plaintiff knew that defendants had entered into various contracts with plaintiff's former customers for the purpose of commencing arbitration proceedings to recover lost investments. Defendants alleged that without justification, plaintiff commenced the instant action in order to render defendants' representation of their clients impossible (*see generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

However, we find that dismissal of the counterclaims for tortious interference with business relations and with business expectancy is warranted. Defendants have properly alleged that plaintiff used wrongful means by commencing this action to interfere with defendants' business relations with their clients, who were former customers of plaintiff (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]). However, defendants have not alleged that plaintiff's conduct was directed at the clients with whom defendants have or sought to have a relationship (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]).

The counterclaim for malicious prosecution must also be dismissed, since defendants failed to allege the termination of a prior proceeding in their favor, a required element of the claim

(*see generally Broughton v State*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]; *see Sasso v Corniola*, 154 AD2d 362, 363 [2d Dept 1989]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8477-
8478 In re Keisha Gabriel S., Index 76176/07
Petitioner-Respondent,

-against-

Alphonso S.,
Respondent-Appellant.

- - - - -

In re Keisha Gabriel S.,
Plaintiff-Respondent,

-against-

Alphonso S.,
Defendant-Appellant.

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Lisa H. Blitman, New York, for appellant.

White & Case LLP, New York (Michael DeSimone of counsel), for respondent.

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Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about November 12, 2009, which granted petitioner Keisha Gabriel S. a five-year order of protection against respondent Alphonso S. and order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered on or about November 17, 2010, which denied respondent Alphonse S.'s application seeking modification of his access/visitation schedule with the parties' two children, unanimously affirmed, without costs.

Respondent ’s participation in the hearing via telephone did not deprive him of his due process rights (*see Matter of Paul Antoine Devantae R. [Paul R.]*, 78 AD3d 610, 611 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]), and there is no reason to disturb the hearing court’s credibility determination (*see Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). The court’s decision was appropriate given that respondent is incarcerated and did not request to be produced for the hearing. With regard to respondent’s Supreme Court application to modify the visitation stipulation to include in-person visitation with the parties children at the correctional facility where he is incarcerated, the court properly found that respondent failed to present any evidence that there has been a change in circumstances to warrant such a modification, or that in-person visitation is in the best interests of the children (*see Matter of Santiago v Halbal*, 88 AD3d 616, 617 [1st Dept 2011]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8479 PBS Realty Advisors, LLC., etc., Index 100533/09
Plaintiff-Appellant,

-against-

Jones Lang LaSalle Americas Inc., et al.,
Defendants-Respondents.

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Law Office of Lionel A. Barasch, New York (Lionel A. Barasch of counsel), for appellant.

Schwartz, Lichtenberg LLP, New York (Barry E. Lichtenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered May 18, 2011, which denied plaintiff's motion for summary judgment on its causes of action for recovery of a broker's fee and unjust enrichment and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The motion court correctly determined that plaintiff could not recover a real estate broker's commission, since it had no contract of employment, express or implied, with defendants (*see Greene v Hellman*, 51 NY2d 197, 206 [1980]). Although the parties negotiated a sublease of the subject premises for plaintiff's client, as well as a separate commission agreement between plaintiff and defendants, those agreements were never executed.

In any event, plaintiff was not the "procuring cause" of the landlord's recapture of the premises or the ensuing lease of the premises between the landlord and a third party (*see Helmsley-Spear, Inc. v 150 Broadway N.Y. Assoc.*, 251 AD2d 185 [1st Dept 1998]). The court also properly found that plaintiff was not entitled to unjust enrichment as a remedy for its failed negotiations (*see Chatterjee Fund Mgt. v Dimensional Media Assoc.*, 260 AD2d 159 [1st Dept 1999]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8483 The People of the State of New York, Ind. 6107/08
Respondent,

-against-

Wilson Ruiz,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Kibbie F. Payne, J. at suppression motion; Renee A. White, J. at plea; Michael R. Sonberg, J. at sentencing), rendered July 14, 2009, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. When the police approached the parked car in which defendant was sitting next to the driver, this did not constitute a seizure, even if the police car blocked the parked car (*see People v Thomas*, 19 AD3d 32, 35-37 [1st Dept 2005], *lv denied* 5 NY3d 795 [2005]).

The police had an objective, credible reason for approaching

the car (*see id*. at 37), which was parked at a fire hydrant, and the police did not observe anything to indicate that any passengers were being discharged. "[A]ny reasonable person would understand that, for obvious reasons of public safety, stopping one's car beside a hydrant invites the attention of law enforcement" (*id*. at 39).

Furthermore, the police also observed a pattern of suspicious actions that at least suggested the possibility of a drug transaction (*see generally People v Jones*, 90 NY2d 835 [1997]). These indicia, when viewed collectively, provided, at a minimum, an independent basis for a Level I approach to request information. The officer's lawful approach led to an observation of drugs in plain view, which provided probable cause to arrest defendant.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, J.P., Saxe, Catterson, Acosta, Gische, JJ.

8484 Travelers Casualty and Surety Company, formerly known as The Aetna Casulty Insurity Company, et al., Plaintiffs-Appellants,

-against-

Alfa Laval Inc., formerly known as The DeLaval Seperator Company, Defendant-Respondent,

American Surety Company, et al., Defendants,

OneBeacon America Insurance Company, Defendant-Appellant.

Index 650667/09

Graham Curtin, P.A., New York (Stephen V. Gimigliano of counsel), for Travelers Casualty and Surety Company and The Standard Fire Insurance Company, appellants.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen P. Murray of counsel), for Onebeacon America Insurance Company, appellant.

Anderson Kill & Olick, P.C., New York (William G. Passannante and Cort T. Malone of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered November 22, 2011, which, to the extent appealed from as limited by the briefs, granted defendant Alfa Laval Inc.'s motion for partial summary judgment declaring that plaintiff Travelers Casulty and Surety Company and defendant OneBeacon American

Insurance Company are obligated to provide it with a complete defense against those claims that fell within the applicable scope of their policies, and denied Travelers' and OneBeacon's cross motions for summary judgment declaring that they have a duty to defend the underlying asbestos claims only on a pro rata "time on the risk" basis, unanimously modified, on the law, to vacate the declaration as to OneBeacon, as premature, and otherwise affirmed, with costs, to be paid by Travelers to Alfa Laval.

In this declaratory judgment action, Alfa Laval seeks insurance coverage under policies issued by several companies, including Travelers, for underlying asbestos bodily injury claims brought against Alfa Laval and its predecessor in name, DeLaval, as well as Alfa Laval's historical competitor, a company named Sharples, Inc. (the underlying claims), which assets Alfa Laval acquired in 1988.

The duty to defend is broader than the duty to indemnify, requiring each insurer to defend if there is an asserted occurrence covered by its policy; the insured should not be denied initial recourse to a carrier merely because another carrier may also be responsible (*see Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 655 [1993]). Although the pro

rata sharing of defense costs may be ordered when more than one policy is triggered by a claim, the court, in the interest of judicial economy, did not err in declining to order such sharing at this time, with the understanding that Travelers, Alfa Laval's longest standing insurer, may later obtain contribution from other insurers on applicable policies (*id.* at 655-656).

However, OneBeacon is correct that the court's ruling was inconsistent to the extent that both Travelers and OneBeacon cannot viably provide Alfa Laval's complete defense if both their policies are implicated by the same underlying action. In that case, Travelers, as the long standing insurer, should provide a complete defense, and OneBeacon may eventually be required to contribute to both defense costs and indemnification on a pro rata basis (*id.* at 655).

On this record, it cannot be determined whether any of the underlying actions implicate only OneBeacon's policy and not Traveler's.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8485 Edward Wilson, Jr., Index 113351/09
Petitioner-Respondent,

-against-

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

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

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered January 28, 2011, which, in this CPLR article 78 proceeding, granted the petition to vacate and annul respondents' determination, dated May 21, 2009, terminating petitioner as a probationary corrections officer, and reinstated him to said position without back pay, unanimously reversed, on the law, without costs, respondents' termination of petitioner's employment reinstated, the petition denied and the proceeding dismissed.

A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an

improper or impermissible reason (*see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]). The burden falls on the petitioner to demonstrate by competent proof that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason *(see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]).

The record demonstrates that petitioner was terminated during his probationary period for absenteeism, violation of respondents' rules by failing to report to his post on one occasion, and by being arrested for obstruction of governmental administration while off-duty. Petitioner failed to sustain his burden of showing bad faith or an improper motive. In any event, because petitioner filed a complaint with the State Division of Human Rights, subsequent judicial action on the same complaint is barred (*see Marine Midland Bank, N.A. v New York State Div. of Human Rights*, 75 NY2d 240, 245 [1989]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8486 The People of the State of New York, Ind. 1132/10
Respondent,

-against-

Edgar Imbert,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 (Robert Stolz, J.), rendered on or about December 22, 2010,

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 13, 2012

CLERK

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

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8487 In re Christina G., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

- - - - -

Vladimir G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

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

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Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about July 25, 2011, which, after a hearing, found that respondent-appellant had sexually abused his oldest daughter, derivatively abused the other three subject children, and neglected all four subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's determination that respondent had sexually abused his oldest daughter (*see* Family Ct Act §§ 1012 [e] [iii]; 1046 [b] [I]). The daughter's sworn testimony at the fact-finding hearing is

competent evidence of abuse (*Matter of Danielle M.*, 151 AD2d 240, 243 [1st Dept 1989]), and the absence of physical injury or other corroboration does not require a different result (*see Matter of Jonathan F.*, 294 AD2d 121 [1st Dept 2002]; *Danielle M.*, 151 AD2d at 243). There is no basis to disturb Family Court's credibility determinations (*Matter of Shirley C.-M.*, 59 AD3d 360, 361 [1st Dept 2009]). Once petitioner established its prima facie case, the burden shifted to respondent to explain his conduct and rebut the evidence of his culpability, which he failed to do (*see Matter of Elizabeth S. [Dona M.]*, 70 AD3d 453, 453-454 [1st Dept 2010]). Although the court did not state that it was drawing a negative inference from respondent's failure to testify, it was entitled to do so (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

Family Court's determination that respondent had derivatively abused the other children is also supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [a] [I]). Indeed, respondent's daughter testified that one of her brothers had witnessed the sexual abuse and that the other children were present in the apartment when the abuse took place (*see Matter of Marino S.*, 100 NY2d 361, 374 [2003]; *Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 520-521 [1st Dept 2012]).

A preponderance of the evidence also supports Family Court's finding that respondent had neglected the children by abusing cocaine (*see* Family Ct Act § 1012 [f] [I] [B]). An agency caseworker testified that respondent admitted that he had last used cocaine a month before the hearing and was "high" when he returned home, and that he was not in a treatment program. In addition, respondent's daughter testified that on one occasion, respondent had used cocaine while she was in the car. This proof was sufficient to trigger the application of the presumption of neglect under Family Court Act § 1046 (a) (iii), which obviates the need to establish the children's impairment or risk of impairment (*see Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414, 415 [1st Dept 2012]; *Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453 [1st Dept 2011]). Respondent failed to rebut this prima facie evidence of neglect (*id.*).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8488 46th Street Development, LLC, Index 601222/10
Plaintiff-Appellant,

-against-

Marsh USA, Inc.,
Defendant-Respondent.

_____

Greenberg, Trager & Herbst, LLP, New York (Stuart Rosen of counsel), for appellant.

Seyfarth Shaw LLP, New York (Jonathan P. Wolfert of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about August 25, 2011, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, deemed an appeal from the judgment, same court and Justice, entered October 18, 2011, dismissing the complaint (CPLR 5501 [c]), and, so considered, the judgment unanimously affirmed, with costs.

Plaintiff failed to state a cause of action based on defendant's failure to procure insurance coverage for a delay in obtaining temporary certificates of occupancy (TCO coverage) for the subject condominiums. Absent a specific request for the insurance, defendant, as broker, had no duty to obtain coverage (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152,

157-158 [2006]). Here, there is no evidence that plaintiff specifically requested that defendant obtain TCO coverage. Nor was there a special relationship between the parties (*see Murphy v Kuhn*, 90 NY2d 266, 272 [1997]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8489 New York Life Insurance and Annuity Corporation, Plaintiff-Respondent, Index 106297/09

—against—

Wei Ping Lin, Defendant-Respondent,

Zhonghui Chen, Defendant-Appellant.

Kevin Kerveng Tung, P.C., Flushing (Kenji Fukuda of counsel), for appellant.

Lawler Mahon & Rooney, LLP, New York (Christopher S. Rooney of counsel), for New York Life Insurance and Annuity Corporation, respondent.

John Yong, New York (Anthony Y. Cheh of counsel), for Wei Ping Lin, respondent.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered October 28, 2011, which, inter alia, granted plaintiff's motion for summary judgment declaring which defendant was the proper beneficiary of an insurance policy issued by plaintiff, granted defendant Lin's cross motion for summary judgment declaring that Lin is the proper beneficiary of the life insurance policy, and denied defendant Chen's cross motion for summary judgment declaring that the subject change in beneficiary form is void, unanimously

affirmed, without costs.

Plaintiff and Lin made a prima facie showing that Chen was competent and unaffected by undue influence when he executed a change of beneficiary form for the life insurance policy. In opposition, Chen failed to raise triable issues of fact as to his mental capacity or the existence of a fiduciary or confidential relationship between him and plaintiff (*see Kramer v Danalis*, 66 AD3d 539, 539-540 [1st Dept 2009]). Plaintiff's medical evidence was unsworn and therefore insufficient to raise an issue of fact (*see Henkin v Fast Times Taxi*, 307 AD2d 814, 814-815 [1st Dept 2003]). Given Chen's failure to submit competent medical evidence in support of his assertion of incapacity, the court was under no obligation to hold a hearing (*see Roach v Benjamin*, 78 AD3d 468, 469 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8490 Eustace Merrick, et al., Index 306985/09
Plaintiffs-Appellants,

-against-

Jose Lopez-Garcia, et al.,
Defendants-Respondents.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Patrick M. Murphy of counsel), for respondents.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 5, 2012, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made out a prima facie showing that plaintiff did not suffer serious injury of a permanent nature. In opposition, plaintiff raised an issue of fact as to significant limitations in his cervical, thoracic and lumbar spine by submitting MRI reports, an EMG/NCV report, and Dr. Barry Sloan's affirmed report of recent findings of limitations (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). However, he failed to address the gap in treatment between April 2008, when he was last

treated, and December 2011, when Dr. Sloan evaluated him for purposes of opposing defendants' motion. This "gap" is essentially a cessation of treatment (*see Pommells v Perez*, 4 NY3d 566, 574 [2008]). Plaintiff claimed that he stopped treatment because he could not afford it after his no-fault benefits ended, but he also testified that he had private health insurance. He never explained why he was unable to continue with treatment through his insurance, and testified only that the particular physical therapist he had been treating with did not accept his plan (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 94 AD3d 484 [1st Dept 2012]). Dr. Sloan was not plaintiff's treating physician, and his evaluation of plaintiff took place more than three and a half years after plaintiff was last treated. Because plaintiff did not adequately explain the gap in treatment, Dr. Sloan's opinion as to permanency, significance, and causation is speculative and seemingly tailored to meet the statutory definition of serious injury (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]).

Defendants established prima facie that plaintiff did not sustain a 90/180-day-category claim, by submitting plaintiff's bill of particulars alleging that he was not confined to bed or home at all and his deposition testimony that he was confined to

home for only two months (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]). Although he submitted a note from his employer stating that he did not work for four months after the accident, plaintiff testified that the company was operating in Florida during the requisite period and went bankrupt five months after his accident. His treating physician's report, dated about three months after the accident, noting that plaintiff would be able to go to Florida for work upon further improvement is not determinative of a 90/180-day injury, especially given that plaintiff testified only that he was unable to perform house chores or lift "things" after the accident, which is insufficient to show that he was unable to perform "substantially all" of his "usual and customary daily activities" during the requisite period (*see Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez P.J., Saxe, Catterson, Acosta, Gische, JJ.

8492 The People of the State of New York, Respondent, Ind. 2443/08

-against-

Gilbert Cameron, Defendant-Appellant.

Gilbert O. Cameron, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered November 4, 2010, as amended December 2, 2010, convicting defendant, after a nonjury trial, of burglary in the second degree, tampering with a witness in the fourth degree, criminal contempt in the second degree and eight counts of aggravated harassment in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of nine years, unanimously affirmed.

To the extent defendant is arguing that the verdict was based on legally insufficient evidence, and was against the weight of the evidence, we reject those claims (*see People v*

Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. There was ample evidence to support the victim's testimony.

Defendant's remaining claims are without merit.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Gische, JJ.

8493 Bolivar Amill, Index 107467/07
Plaintiff-Appellant,

-against-

Lawrence Ruben Company, Inc., et al.,
Defendants-Respondents-Appellants,

Blair Perrone Steakhouse Corp., et al.,
Defendants-Respondents.

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The Law Office of Dino J. Domina, Garden City (Lisa M. Comeau of counsel), for appellant.

Law Office of James J. Toomey, New York (Warren T. Harris of counsel), for Lawrence Ruben Company, Inc., Duit Realty Corp., and Tower Plaza Associates, L.P., respondents.

Gerard A. Falco, Harrison, for Blair Perrone Steakhouse Corp., respondent.

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for Four Little Ones LLC, respondent.

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Orders, Supreme Court, New York County (Eileen A. Rakower J.), entered on January 11, 2011, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint, denied plaintiff's cross motion to amend his supplemental bill of particulars, denied defendants Lawrence Ruben Company, Inc., Duit Realty Corp., and Tower Plaza Associates, L.P.'s (collectively, the landlord defendants) motion for summary judgment on their cross claims for indemnification,

and granted Four Little Ones LLC's (Four Little) cross motion to dismiss the landlord defendants' cross claims, unanimously modified, on the law, to the extent of denying Four Little's motion for dismissal of the complaint as against it, reinstating plaintiff's claims against Four Little, denying Four Little's cross motion to dismiss the landlord defendants' cross claims with regard to the second cross claim, for contractual indemnification, granting the portion of the landlord defendants' cross motion seeking to convert their second cross claim against Four Little to a third-party action, and upon conversion, granting the landlord defendants' summary judgment on the third-party claim and remanding the matter for an assessment of damages, and otherwise affirmed, without costs.

Plaintiff seeks recovery for injuries allegedly sustained by him, while working at a restaurant, known as the Blair Perrone Steakhouse (Blair Perrone). Plaintiff fell from an unsecured extension ladder while exiting a mechanical room located above the kitchen. The room was being used by the restaurant for storage.

The premises was owned by Tower Plaza Associates (Tower), managed by Lawrence Ruben Company (Lawrence Ruben), and leased to

Four Little. Pursuant to a management agreement, Four Little gave Blair Perrone "responsibility for all matters relating to the operation . . . of the Restaurant", including hiring, firing and directing all restaurant employees, who were to be deemed Blair Perrone's employees, and required Blair Perrone's owners to directly supervise the restaurant. The management agreement further provided that Four Little had no right to direct the restaurant's employees and was not to be deemed their employer.

The record establishes that Blair Perrone exclusively controlled and directed plaintiff's work and was his special employer, limiting plaintiff's recovery against Blair Perrone to Workers' Compensation benefits (*see* Workers' Compensation Law §§ 11, 29[6]; *Fung v Japan Airline Co., Ltd.*, 9 NY3d 351, 359 [2007]; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-558 [1991]). While plaintiff's paychecks were issued by CJ Service, Inc., a payroll company funded by Four Little, Blair Perrone's owners formed the company simply as a payroll company. In furtherance of the management agreement, Blair Perrone, through its owners, managed and operated the restaurant and supervised and controlled plaintiff's work. Additionally, Blair Perrone was listed as a named insured on the subject Workers' Compensation

policy (*see e.g. Akins v D.K. Interiors, Ltd.*, 65 AD3d 946 [1st Dept 2009]).

In contrast, Four Little failed to establish, as a matter of law, that it was CJ Service's alter ego. While Four Little funded CJ Service's payroll and was covered by the same Workers' Compensation policy, "there is no evidence that their finances were integrated, that they commingled assets, or that the principals failed to treat the entities as separate and distinct" (*Soodin v Fragakis*, 91 AD3d 535, 536 [1st Dept 2012][citation omitted]). Moreover, Four Little neither controlled nor directed CJ Service's employees (*see Gonzalez v 310 W. 38th L.L.C.*, 14 AD3d 464 [1st Dept 2005]).

The court properly granted Tower and Lawrence Ruben summary judgment dismissal of the complaint. While Tower had a contractual right to reenter the premises and make repairs, it had no duty to do so. Thus, Tower could only be held responsible for the condition of the premises "based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996][citations omitted]).

Tower and Lawrence Ruben met their initial burden on the motion by the submission of, inter alia, their expert's opinion that the accident was caused by a non-structural condition and that the Building Code violations alleged were inapplicable and had not been violated. In opposition, plaintiff failed to raise a triable issue of fact as to the existence of a significant structural defect and a violation of a specific statutory safety provision. Unlike in *Bouima v Dacomi, Inc.*, 36 AD3d 739 (2d Dept 2007), plaintiff's access to the mechanical room was not limited to an unsecured ladder. Plaintiff admitted that he could have used the stationary, steel ladder for such purpose.

Finally, Tower and Lawrence Ruben established entitlement to a recovery for expenses incurred in connection with the defense of this action. While paragraph 8 of the lease limited such recovery to expenses not reimbursed by insurance, paragraph 69, of the rider, which was "[i]n addition to" the earlier provision, did not contain such a limitation, providing for indemnity "against and from all liabilities . . . costs and expenses . . . incurred by . . . reason of any accident . . . in or about the demised premises . . . except to the extent caused by the negligence or willful misconduct of Landlord." This latter

provision is broader than the provision contained in the pre-printed portion of the lease, and thus, to the extent that the two provisions are inconsistent, the terms of the lease provided that the rider's language would prevail.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, JJ.

8496N Nelson Perez, Index 260301/11
Petitioner-Appellant,

-against-

Battery Park City Authority,
Respondent-Respondent.

Sacco & Fillas, LLP, Astoria (Larry I. Badash of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Janine A. Mastellone of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 16, 2011, which, to the extent appealed from as limited by the briefs, denied the petition for leave to file a late notice of claim, unanimously affirmed, without costs.

Petitioner's alleged inability to identify the proper party to sue is not a reasonable excuse for failing to serve a timely notice of claim (*see Arias v New York City Hous. Auth.*, 40 AD3d 298, 299 [1st Dept 2008]). Petitioner does not even attempt to argue that respondent acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose

or a reasonable time thereafter (*see* General Municipal Law § 50-e [5]). Nor has he demonstrated a lack of prejudice from the delay (*see Matter of Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8519 The People of the State of New York, Ind. 176/10
Respondent,

-against-

Dominique Mack,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Dechert LLP, New York (Jason O. Billy of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered July 8, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The court properly denied defendant's request that the People provide minutes of an expert witness's testimony in

unrelated trials in which the expert testified on the same issue as in defendant's trial. The People must disclose any recorded statement in its possession or control "made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony" (CPL 240.45[1][a]; *see People v Rosario*, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]). However, the "relates to the subject matter" requirement is generally interpreted to refer to the charges against the particular defendant (*see e.g. People v Harrell*, 251 AD2d 240 [1998], *lv denied* 92 NY2d 923 [1998]). There is no authority for the proposition that this requirement applies to an expert's testimony on the same issue in factually unrelated cases. The rule proposed by defendant would be burdensome and unworkable. We note that in this case, the officer had previously testified approximately 30 times concerning his expertise in street-level narcotics dealing.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that none of the nondiscriminatory reasons provided by the prosecutor for the challenge in question were pretextual. This finding, based primarily on the court's assessment of the prosecutor's credibility, is entitled to great

deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). The court correctly determined that when the prosecutor cited a prospective juror's residence in a housing project as a basis for challenging her, this was not a pretext. The prosecutor articulated his concern that the panelist may have had contact with a key police witness as the result of her residence in the project (*see People v Sanchez*, 302 AD2d 282, 282-283 [1st Dept 2003], *lv denied* 100 NY2d 542 [2003]). We also note that the prosecutor provided two additional reasons that were undisputedly nonpretextual. In any event, the record establishes that discrimination did not contribute to the peremptory challenge in any manner.

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8520 Martin Arzu, Index 20944/11
Plaintiff-Appellant,

-against-

Spandrel Property Services, Inc., et al.,
Defendants-Respondents.

Gregory Antollino, New York, for appellant.

Jackson Lewis LLP, New York (Daniel D. Schudroff of counsel), for respondents.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered January 6, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly dismissed the complaint on the grounds that plaintiff's discrimination claims under the New York City Human Rights Law were subject to mandatory arbitration under the relevant collective bargaining agreement (*see McClellan v Majestic Tenants Corp.*, 68 AD3d 574 [1st Dept 2009]; *Sum v Tishman Speyer Props., Inc.*, 37 AD3d 284 [1st Dept 2007]; *Garcia v Bellmarc Prop. Mgt.*, 295 AD2d 233, 234 [1st Dept 2002]). Moreover, under the controlling supplemental collective bargaining agreement, where, as here, plaintiff's union declined

to arbitrate his discrimination claims, the protocol required plaintiff to initiate mediation of those claims, which plaintiff failed to do (*see Duraku v Tishman Speyer Props., Inc.*, 714 F Supp 2d 470 [SD NY 2010]).

There is no basis for this Court to adopt the reasoning of the dissenting Justices in *14 Penn Plaza, LLC v Pyett* (556 US 247 [2009]). Nor does plaintiff point to any legislative text or history that supports his theory that the New York City Council intended to specifically protect him from waiving his right to submit his New York City Human Rights Law claims to a judicial forum (*see Pyett*, 556 US at 258).

Nor is a different result dictated by the fact that claims under the New York City Human Rights Law require a more liberal construction than claims under similar federal and state laws. A liberal construction of claims under the New York City Human Rights Law does not mean that such claims cannot be subject to arbitration where a plaintiff has agreed to arbitrate such a statutory claim (*Garcia v Bellmarc Prop. Mgt.*, 295 AD2d at 234). There is also no basis to reexamine or overrule our holding in *McClellan* (68 AD3d 574).

Finally, there is no merit to plaintiff's contention that defendants waived their right to mediation of the claims. The

supplemental collective bargaining agreement clearly states that either the Union or the individual employee is to initiate the mediation protocol in the event the Union decides not to pursue a discrimination claim. Thus, defendants could not have waived a right they never possessed.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8521 In re Sarah W.,
Petitioner-Respondent,

-against-

David W.,
Respondent-Appellant.

Neal D. Futerfas, White Plains, for appellant.

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about September 15, 2011, which, after a fact-finding hearing in a proceeding brought pursuant to article 8 of the Family Court Act, granted the petition for an order of protection for a period of two years, unanimously affirmed, without costs.

A fair preponderance of the evidence established that respondent committed the acts alleged in the petition which constituted two counts of harassment in the second degree and one count of disorderly conduct (*see* Family Court Act § 832). The evidence showed that respondent committed harassment in the second degree when, with the "intent to harass, annoy or alarm" petitioner (his 85-year-old disabled mother), he picked her up and threw her out of the kitchen and up against a sewing machine in the hallway, and later threw two pitchers of cold water on her

(*see* Penal Law § 240.26[1]). Moreover, petitioner's testimony that respondent had been both physically and verbally abusive to her over the years, including threatening to kill her, established a course of conduct to sustain the additional count of harassment in the second degree (*see* Penal Law § 240.26[3]). These actions also established the commission of disorderly conduct (*see* Penal Law § 240.20[3]; *Matter of Miriam M. v Warren M.*, 51 AD3d 581 [1st Dept 2008]).

Respondent's claim that there was insufficient proof of his intent is unavailing, since his intent was fairly inferred from his actions (*see People v Bueno*, 18 NY3d 160, 169 [2011]). There exists no basis to disturb the Referee's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8523 Janet Morrissey, Index 107086/09
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 2, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant demonstrated its entitlement to summary judgment by submitting plaintiff's testimony establishing that she was unable to identify the cause of her injury and could only speculate as to the cause (*see Smith v City of New York*, 91 AD3d 456, 456-457 [1st Dept 2012]). To the extent her affidavit in opposition to defendant's motion varies from her testimony at the 50-h hearing and deposition, it must be regarded as tailored to avoid the consequences of that earlier testimony, and is therefore insufficient to raise an issue of fact (*see Washington*

v New York City Bd. of Educ., 93 AD3d 739, 740 [2012]).

As plaintiff's expert opinion is based on plaintiff's speculative testimony, it too is speculative and therefore insufficient to raise an issue of fact. Nor does the inconsistency regarding the heights of the risers on the stationary escalator raise the inference that defendant was negligent (*see Adamo v National R.R. Passenger Corp.*, 71 AD3d 557, 558 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

The doctrine of res ipsa loquitur is inapplicable to the facts of this case, since trips and falls are not the kinds of events that ordinarily occur absent someone's negligence (*see Smith*, 91 AD3d at 457).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8525-
8526 In re Fatoumata D., and Another,

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

Sokona D., et al.,
Respondents-Appellants,

The Children's Aid Society,
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Sokona D., appellant.

Richard L. Herzfeld, New York, for Bakari D., appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Rhonda J. Cohen, J.), entered on or about May 25, 2011, which, to the extent appealed from as limited by the briefs, following fact-finding determinations that respondents-appellants had neglected the subject children, terminated respondent father's parental rights to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for

the purpose of adoption, unanimously affirmed with respect to the fact-finding determinations, and the appeal otherwise dismissed, without costs.

The agency proved, by clear and convincing evidence, that it exercised diligent efforts to reunite respondents with their children (Social Services Law § 384-b[7][a], [f]). Respondents' failed to preserve their argument that the agency failed to adequately address their language limitations (*Matter of Star Leslie W.*, 63 NY2d 136, 145 [1984]). In any event, the argument is unavailing. Respondent mother testified in English and communicated with her children in English, without raising any objection to the provision of services in English, as opposed to her native Soninke (*cf. Matter of Richard W.*, 265 AD2d 685, 687 [3d Dept 1999]). Further, respondent father testified that he understood English, and that he received clarification from the service providers when needed. Moreover, the court ordered an interpreter for the father after his counsel noted that he was not testifying in Soninke.

The agency also proved, by clear and convincing evidence, that respondents failed to plan for the children's future (*see* Social Services Law § 384-b[7][a], [c]). Indeed, the record shows that respondents were unable to comprehend the nature and

significance of the children's severe psychiatric and developmental disorders (*Matter of Jaiheem M.S.*, 62 AD3d 569, 569-570 [1st Dept 2009]). In addition, the father failed to attend all of his referred programming, was consistently late for visitation, and missed dozens of medical and educational appointments for the children (*see Matter of Jada Dorithah Solay McC. [Crystal Delores McC.]*, 95 AD3d 615, 615-616 [1st Dept 2012]).

The father cannot appeal from the dispositional part of the order, as it was entered upon his default (*see* CPLR 5511; *Matter of Aliyah Julia N. [Cecelia Lee N.]*, 81 AD3d 519, 519-520 [1st Dept 2011]). Were we to review that part of the order, we would conclude that termination of the father's parental rights, rather than a suspended judgment, is in the best interests of the children (*Star Leslie W.*, 63 NY2d at 147-148; *Aliyah Julian N.*, 81 AD3d at 520). The children have lived with their foster family for seven years, and the foster parents who have been

trained to address their special needs wish to adopt them. By contrast, at the time of the dispositional hearing, the father had missed several visits with the children.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, JJ.

8527 The People of the State of New York, Ind. 1529/08
Respondent,

-against-

Devon Miller,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered June 29, 2010, convicting defendant, after a jury trial, of murder in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of life without parole, unanimously affirmed.

The court properly denied defendant's motion to suppress statements made to law enforcement personnel. The record supports the hearing court's finding that when defendant made his pre-*Miranda* statements, a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *see also Stansbury v California*, 511 US 318 [1994]).

Defendant voluntarily went to the precinct at the request of a detective after the detective told him that he "needed" to make a formal statement. When viewed in context, this was clearly a request that defendant appear for an interview as a possible witness to a crime (*see People v Dillhunt*, 41 AD3d 216, 217 [2007], *lv denied* 10 NY3d 764 [2008]). Defendant came to the precinct unaccompanied by police, he was never restrained in any way, and neither the questioning nor the atmosphere was coercive.

Regardless of whether the detectives believed that defendant was a suspect in the crime, none of them did anything to suggest to him that his freedom of movement had been restricted. Although a detective mentioned to defendant that another suspect had provided some information connecting him with the crime, the detective did not convey that a decision had been made to arrest defendant, but rather "that the police were still in the process of gathering information about the alleged incident prior to taking any action" (*id*.).

Defendant's later statements preceded by the administration of *Miranda* warnings, including his videotaped statement to the assistant district attorney, were also voluntarily made. Furthermore, the videotaped statement was attenuated from the

pre-*Miranda* statements.

The court providently exercised its discretion in briefly informing the jury that a separately tried codefendant in this case, who did not testify at defendant's trial, had been convicted of murder and was serving prison time. This was permissible as a means of clarifying a reference in defense counsel's opening statement to the possibility that the codefendant might be testifying for the prosecution (*see generally People v Reid*, 19 NY3d 382, 389 [2012]). This information was not unduly prejudicial, and any prejudice was minimized by the court's instructions. Given these instructions, there is no reasonable possibility that the jury was influenced by the fact that another jury had convicted another defendant.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8528 67 Liberty LLC, Index 650574/11
Plaintiff-Respondent,

-against-

67 Liberty Street Associates, LLC, et al.,
Defendants-Appellants,

Nu-Way Crane Service Inc., et al.,
Defendants.

Tarter Krinsky & Drogin LLP, New York (David J. Pfeffer of counsel), for appellants.

Zeichner, Ellman & Krause LLP, New York (Steven S. Rand of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 13, 2011, which, in this action to foreclose on a mechanic's lien, denied defendants-appellants' motion to dismiss the complaint, unanimously affirmed, without costs.

Appellants, as property owner, argue that an assigned mechanic's lien is unenforceable unless plaintiff assignee was also assigned the agreement under which the debts arose. Appellants argue that for plaintiff to be able to enforce its lien in a foreclosure proceeding, it also needed the assignor to assign over its rights and obligations under the construction agreement. We disagree inasmuch as the Lien Law specifically

enables laborers to assign enforceable debts that have been validly filed as liens under the Lien Law (*see* Lien Law § 2[1], § 14; *Russell & Erwin Mfg. Co. v City of New York*, 118 App Div 88 [1st Dept 1907]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8529 Courtney Dupree, Index 653412/11
Plaintiff-Appellant,

Rodney Watts,
Plaintiff-Respondent-Appellant,

-against-

Scottsdale Insurance Company,
Defendant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for Courtney Dupree, appellant.

DePetris & Bachrach, LLP, New York (Marion Bachrach of cousel), for Rodney Watts, respondent-appellant.

Boundas, Skarzynski, Walsh & Black, LLC, New York (Alexis J. Rogoski and Aron M. Zimmerman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about June 29, 2012, which, to the extent appealed from, granted plaintiffs' motions for a preliminary injunction directing defendant insurance company to pay plaintiffs' defense costs but declined to direct defendant to pay costs accrued by plaintiff Courtney Dupree prior to January 4, 2012, and costs accrued by plaintiff Rodney Watts prior to June 7, 2012, unanimously affirmed, without costs.

In this action brought to compel defendant insurance carrier to pay defense costs, incurred in civil and criminal litigation

arising out of plaintiffs' actions as corporate officers, under a director's and officer's policy issued by defendant, the motion court properly considered irreparable harm and the equities (*Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012]) and did not improvidently exercise its discretion (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]), in limiting the defense costs which defendant is required to pay.

The additional defense costs that plaintiffs seek to recover constitute monetary harm which can be compensated by damages and does not constitute irreparable injury for which injunctive relief will be granted (*Matter of J.O.M. Corp. v Department of Health*, 173 AD2d 153 [1st Dept 1991]). The motion court properly determined that directing the payment of past defense costs may deplete the $5,000,000 limit on the policy thereby depriving plaintiff Watts of coverage under the policy and disturbing,

rather than maintaining, the status quo (*see Morris v Port Auth. of N.Y. & N.J.*, 290 AD2d 22, 26 [1st Dept 2002]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P.. Andrias, Renwick, DeGrasse, Richter, JJ.

8531 The People of the State of New York, Ind. 4473/10
Respondent,

-against-

Anthony Huger,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Renee White, J.), rendered on or about February 9, 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 13, 2012

CLERK

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

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8534- Index 601306/09
8535-
8536-
8537-
8538-
8539-
8540 Howard Kagan,
Plaintiff-Appellant,

-against-

HMC-New York, Inc., et al.,
Defendants,

Harbinger Capital Partners GP, LLC, et al.,
Defendants-Respondents.

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Lowenstein Sandler PC, New York (Lawrence M. Rolnick and Michael J. Hampson of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Walter Rieman of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 1, 2011, which denied plaintiff's motion for summary judgment awarding him prejudgment interest, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment awarding plaintiff the sum of $3,277,422, representing the interest that accrued until October 4, 2010. Appeal from order, same court and Justice, entered June 16, 2011, which denied plaintiff's motion to amend the complaint

to add an additional claim for breach of contract based on the delay in payment of his compensation, unanimously dismissed, without costs, as moot. Order, same court and Justice, entered December 5, 2011, as amended by orders entered December 15, 2011 and December 21, 2011, which denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 30, 2012, which so-ordered stipulated corrections to the transcript of oral argument of the motions for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable paper. Order, same court and Justice, entered May 15, 2012, which denied plaintiff's motion to renew, unanimously affirmed, with costs.

As defendants essentially concede, plaintiff is entitled to prejudgment interest on the withheld compensation they admittedly owed and in fact paid on October 4, 2010; in stipulating to settle for a portion of the principal amount, plaintiff reserved his rights (*see Matter of Hoffman*, 275 AD2d 372 [1st Dept 2000]).

The court correctly interpreted the agreements governing the valuation and payment of plaintiff's compensation. There is no conflict in the time for payment provisions for the "Excess

Withheld Amount," since "payment date" is clearly a term of art that did not mean the date required for actual payment; there is no conflict with the requirement that payment be made "promptly." Although plaintiff was not an investor in the Onshore Fund or a party to its limited partnership agreement, the 90-day redemption notice provision applied to his interest in the fund. Thus, the earliest end-of-quarter date that payment of his interest could be made after his August 27, 2008 termination without cause was December 31, 2008.

Contrary to plaintiff's contention, the governing agreements do not obligate defendants to convert the illiquid securities held on his behalf to cash.

The court correctly found that the new evidence plaintiff submitted in support of renewal would not have altered the prior determinations.

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, Richter, JJ.

8541 In re Sam Wu, Index 105446/10
Petitioner-Appellant,

-against-

New York City Water Board, et al.,
Respondents-Respondents.

Robert M. Kerrigan, Bronxville, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Daniel A. Pollak of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered October 14, 2011, which denied the article 78 petition seeking to annul the determination of respondent Water Board that there was no overbilling for petitioner's water usage during the period September 2003 through October 2007, and dismissed the proceeding, unanimously affirmed, without costs.

In light of the evidence of inspections conducted by respondent Department of Environmental Protection, which revealed that the water usage for the grocery store portion of petitioner’s premises was properly monitored, the challenged determination cannot be characterized as irrational and, accordingly, may not be judicially disturbed (*see Matter of MHG Family Ltd. Partnership v New York City Water Bd.*, 46 AD3d 472

[1st Dept 2007]). An administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record" (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008][internal citations omitted]). Thus, while petitioner did submit some evidence indicating that cross plumbing lines might have caused the grocery store meter to include water usage for the residential portion of the building, such evidence is insufficient to warrant reversal of respondents' determination.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8542-
8543 Index 303081/09

Carmen Felix,
Plaintiff-Respondent,

-against-

Lawrence Hospital Center, et al.,
Defendants,

Edwin Pan, M.D.,
Defendant-Appellant.

_____

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for appellant.

Pegalis & Erickson, LLC, Lake Success (Rhonda L. Meyer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura Douglas, J.), entered March 24, 2011, which, insofar as appealed, denied defendant Edwin Pan's motion to compel plaintiff to provide authorizations for medical records pertaining to subsequent obstetrical treatment and granted plaintiff's cross-motion for a protective order regarding the same records, unanimously affirmed, without costs. Order, same court and Justice, entered February 24, 2012, which, to the extent appealable, denied defendant's motion for leave to renew, unanimously affirmed, without costs.

In this action for medical malpractice, plaintiff alleges

that defendants' departure from accepted standards of medical practice in connection with the treatment of her pregnancy, resulted in the stillborn birth of her child. While plaintiff alleges physical injuries in connection with her hospitalization, the only subsequent injuries alleged relate to her emotional and psychological condition. Plaintiff has waived the physician-patient privilege only as to those conditions affirmatively placed in controversy. She has not placed her subsequent obstetrical treatment in controversy since her claims relate only to subsequent emotional and psychological injuries (*see Tirado v Koritz*, 77 AD3d 1368, 1369 [4th Dept 2010]) and defendants have failed to establish a particularized need (*see Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493 [1st Dept 2008]).

On renewal, defendant failed to assert additional material facts which existed at the time of the original motion but were not known to him that would change the prior determination (*see* CPLR 2221[e]). The only new evidence consisted of the testimony

of plaintiff's boyfriend, whose testimony was duplicative of plaintiff's earlier testimony.

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8544 Eric Charleston, Index 105513/04
Plaintiff-Appellant,

-against-

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

_____

Morton Povman, P.C., Forest Hills (Bruce Povman of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered January 13, 2012, awarding plaintiff the principal sum of $44,000 based upon a jury verdict finding plaintiff 60% liable and defendant Sutton Place Restaurant & Bar, Inc. 40% liable, unanimously affirmed, without costs.

The verdict finding plaintiff 60% liable in this action for personal injuries sustained during an altercation with employees at defendant bar and with police officers was based upon a fair interpretation of the evidence (*see e.g. McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). Two police officers testified that plaintiff was intoxicated at the time of the incident, and that he and another individual tried to push past defendant bar's security personnel and re-enter the bar. Although the jury found defendant bar partially liable, it does

not follow that the jury rejected the officers' testimony in its entirety, as the jury was free to accept some parts of their testimony and not others (*see Santos-Lopez v Metropolitan Tr. Auth.*, 85 AD3d 512, 513 [1st Dept 2011]). Nor was the jury obligated to accept plaintiff's version of the events, particularly where portions of his testimony were somewhat contradictory.

Plaintiff's argument that the jury should not have been provided with a charge on comparative negligence in the first instance, is unavailing. Comparative negligence is usually a jury question and should only be decided as a matter of law where there is "no valid line of reasoning and permissible inferences" which could lead a rational jury to conclude that the plaintiff was negligent (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 516-517 [1980]; *Johnson v New York City Tr. Auth.*, 88 AD3d 321, 324 [1st Dept 2011]). Here, the evidence, including that of plaintiff's intoxication at the time of the incident, supported the court's decision to provide the comparative negligence charge (*see*

Kelleher v F.M.E. Auto Leasing Corp., 192 AD2d 581, 584 [2d Dept 1993]; *see also Hazel v Nika*, 40 AD3d 430, 431 [1st Dept 2007]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8545 The People of the State of New York, Ind. 4465/09
Respondent,

-against-

Jorge Rivera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 9, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 2½ years, unanimously affirmed.

The court properly denied defendant's suppression motion.

As we concluded on a codefendant's appeal raising the same issue (*People v Colon* 96 AD3d 540 [1st Dept 2012]), there is no basis for disturbing the court's credibility determinations.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8546N The Alfred Condominium, Index 105602/09
Plaintiff-Appellant,

-against-

Cheng Hsien Wu, et al.,
Defendants-Respondents.

_____

Brill & Meisel, New York (Michael J. Willner of counsel), for appellant.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 28, 2011, which, in this action for, inter alia, breach of condominium bylaws, granted plaintiff's motion for counsel fees to the extent of awarding fees in the amount of $50,086 (inclusive of disbursements), unanimously affirmed, without costs.

There is no basis in the record to disturb the court's determination of counsel fees (*542 E. 14th St. LLC v Lee*, 66 AD3d 18, 24 [1st Dept 2009]). After a hearing, the trial court determined that counsel fees in the amount of $50,086 were reasonable based on, among other things, the lack of any complex or extraordinary questions of law involved in the matter. Further, the trial court considered the relevant factors in

determining reasonable attorney fees and its findings are supported by the record (*1050 Tenants Corp. v Lapidus*, 52 AD3d 248 [1st Dept 2008]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, JJ.

8547 In re Jeffrey Wilson, Ind. 2615/08
[M-4359] Petitioner,

-against-

Hon. Martin Marcus, etc., et al.,
Respondents.

_____

Jeffrey Wilson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew H. Meier of counsel), for Hon. Martin Marcus, respondent.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for Newton Mendys, respondent.

_____

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 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8548- Ind. 1600/02
8549-
8550 The People of the State of New York,
Respondent,

-against-

Quantrell Jones,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Laura A. Ward, J.), rendered February 17, 2012, resentencing defendant, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 12 years, unanimously affirmed.

The court provided a sufficient reduction of sentence pursuant to CPL 440.46. In light of defendant's extensive

criminal and disciplinary history, we perceive no basis for a further reduction.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8552 On the Level Enterprises, Inc., Index 602781/08
Plaintiff,

-against—

49 East Houston LLC,
Defendant-Appellant,

Charles McGrath Construction Inc.,
Defendant-Respondent,

Midfirst Bank, et al.,
Defendants.

[And A Third-Party Action]

_____

Ferber Chan Essner & Coller, LLP, New York (Robert M. Kaplan of counsel), for appellant.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 22, 2012, which, insofar as appealed from, denied defendant 49 East Houston LLC's (LLC's) motion for summary judgment dismissing the cross claim of defendant Charles McGrath Construction Inc. (McGrath) alleging a cause of action for quantum meruit, and granted McGrath's motion for summary judgment dismissing LLC's cause of action alleging wilful exaggeration of a mechanic's lien, unanimously modified, on the law, to deny McGrath's motion, and otherwise affirmed, without costs.

LLC is the owner of property upon which it planned to erect

a new residential condominium. LLC contracted with McGrath for it to act as general contractor on the project. Due to market changes, the project was abandoned soon after foundation work commenced. Shortly thereafter, McGrath filed a mechanic's lien against the property.

A claim under Lien Law § 39-a is subject to summary disposition where the evidence concerning whether or not the lienor wilfully exaggerated the lien is conclusive (*see Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557 [1st Dept 2011]). Such a burden necessarily involves proof as to the credibility of the lienor *(see Rosenbaum v Atlas & Design Contrs., Inc*., 66 AD3d 576 [1st Dept 2009]). Accordingly, the issue of wilful or fraudulent exaggeration is one that is ordinarily determined at the trial of the foreclosure action, and not on summary disposition (*see e.g. Aaron v Great Bay Contr*., 290 AD2d 326 [1st Dept 2002]).

LLC's failure to prove conclusively that McGrath willfully exaggerated its lien did not require dismissal of its cross claim pursuant to Lien Law § 39-a, since McGrath likewise failed to establish that it did not wilfully exaggerate the lien. The record is devoid of affidavits from either of McGrath's two principals, absent which, the motion court could not summarily

conclude they bore no ill will when they calculated the lien and that any errors were the result of ignorance or honest mistake. Moreover, as the motion court observed, McGrath was unable to support many of the charges appearing on the mechanic lien's breakdown list. Given the foregoing, a determination as to whether McGrath's exaggeration of the lien was due to its principals' wilfulness, versus their ignorance, should be left to a trier of fact.

LLC's argument that McGrath, in moving for summary judgment on its claim for breach of contract, is now barred from electing to pursue its claim in quantum meruit, raised for the first time on appeal, is unpreserved (*see e.g. Stryker v Stelmak*, 69 AD3d 454 [1st Dept 2010]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8554 In re Ernie Luis T.,

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

Enid F.,
Respondent-Appellant,

Family Support Systems Unlimited, Inc., et al.
Petitioner-Respondent.

_____

Carol Kahn, New York, for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose, LLP, New York (William H. Weisman of counsel), attorneys for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 19, 2011, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency, and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Petitioner met its burden of establishing, by clear and convincing evidence that the child was permanently neglected (*see*

Social Services Law § 384-b[7][a]). Petitioner made diligent efforts to strengthen and encourage the parent-child relationship by, among other things, scheduling visitation with the child, referring respondent for mental health services, and assisting respondent in obtaining suitable housing (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 698-699 [1st Dept 2012]). Despite these efforts, respondent failed to appear at many of the scheduled visits, behaved inappropriately when she did attend the visits and failed to bond with the child. In addition, respondent failed to seek and regularly attend recommended mental health services and failed to cooperate with petitioner's attempts to refer her to a shelter or other suitable housing (*id.* at 699).

We reject respondent's contention that petitioner's activities were deficient because she is mentally retarded. There is no evidence of mental retardation beyond the conclusory statements of respondent's counsel and, as noted above, petitioner referred respondent for mental health services which respondent failed to consistently attend.

Respondent may not appeal from the dispositional aspect of the order which was entered on default (*see Matter of Serenity Celene M. [Roy Enrique M.]*, 93 AD3d 448 [1st Dept 2012]). In any

event, a preponderance of the evidence shows that termination of respondent's parental rights is in the best interest of the child who has resided in the pre-adoptive foster home, where he is thriving, for almost all of his life, and where his special behavioral and emotional needs have been met by his foster parents (*see In re Guardianship of Star Leslie W.*, 63 NY2d 136, 147 [1984]; *Matter of Raquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8555 Galit Schloss, Index 104865/09
Plaintiff-Appellant,

-against-

Karen Steinberg,
Defendant-Respondent.

_____

Seligman & Seligman, Kingston (Delice Seligman of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 21, 2011, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment in her favor, unanimously affirmed, without costs.

Even if defendant's acts or omissions rose to the level of negligence, plaintiff's legal malpractice claims remain speculative. Indeed, nothing in the record shows that but for defendant's negligence, plaintiff would have been awarded a larger distribution of the marital estate or received a better settlement in the matrimonial action (*see Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008]; *Russo v Feder, Kaszovitz, Isaacson,*

Weber, Skala & Bass, 301 AD2d 63, 67 [1st Dept 2002]). Plaintiff's speculative arguments are insufficient to raise triable issues of fact (*see Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

We reject plaintiff's claim that she was not given a fair opportunity to voice objections or concerns during the allocution in the matrimonial action. During the allocution, plaintiff acknowledged on the record that she understood and agreed with the settlement terms, and understood that it was a final and binding agreement. Accordingly, plaintiff should not be heard to disavow the allocution (*see e.g. Harvey v Greenberg*, 82 AD3d 683 [1st Dept 2011]).

Defendant made a prima facie showing that she did not make any false representations to the court or otherwise violate Judiciary Law § 487. In opposition, plaintiff failed to raise a triable issue of fact (*see Colton, Hartnick, Yamin & Sheresky v Feinberg*, 227 AD2d 233, 233 [1st Dept 1996]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8557 In re Ana B.,
Petitioner-Respondent,

-against-

Hector N.,
Respondent-Appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 3, 2012, which adopted the fact-finding determination of the Support Magistrate, dated February 3, 2012, that respondent father had willfully violated a child support order, and committed him to the New York City Department of Correction (DOC) for a term of four months or until he pays $2,370 to the Child Support Collection Unit, unanimously affirmed, without costs.

Respondent's testimony acknowledging the child support arrears constituted prima facie evidence of a willful violation of the support order, which he failed to rebut with competent, credible evidence of his inability to make the required payments (*see* Family Ct Act § 454[3][a]; *Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]). There is no basis to disturb the Support

Magistrate's findings, which are supported by the record and based largely on his assessments of credibility (*see Matter of Maria T. v Kwame A.*, 35 AD3d 239, 240 [1st Dept 2006]). The record does not show that there was any bias on the part of the Support Magistrate.

We reject respondent's contention that child support arrears should have been fixed at $500 pursuant to Family Court Act § 413 (1)(g). Respondent failed to provide any documentation establishing his income from September 2009 to the date of the filing of the enforcement petition (*cf. Matter of Commissioner of Social Servs. v Campos*, 291 AD2d 203, 204-205 [1st Dept 2002]). He also failed to make an application to reduce or annul his child support arrears (*see* Family Court Act § 451 [1]; *Matter of Commissioner of Dept. of Social Servs. of the City of N.Y. v Charles B.*, 91 AD3d 455, 456 [1st Dept 2012]).

The Family Court providently exercised its discretion in committing respondent to the DOC for a term of four months (*see Matter of Gorsky v Kessler*, 79 AD3d 746, 747 [2d Dept 2010]). Indeed, the court had the authority to commit respondent "to jail for a term not to exceed six months" upon its finding that he had willfully failed to obey a lawful child support order (Family Ct Act § 454[3][a]). Given the proof that respondent owed $14,600

in child support arrears, it was not unreasonable to require him to pay $2,370 to purge his contempt (*see Gorsky*, 79 AD3d at 747).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8558-
8559-
8560 Index 651075/11

Citigroup Financial
Products Inc., et al.,
Plaintiffs-Appellants,

-against-

Countrywide Financial Corporation,
Defendant-Respondent,

Bank of America, National Association,
Defendant.

_____

Patterson Belknap Webb & Tyler LLP, New York (David W. Dykhouse of counsel), for appellants.

Arnold & Porter LLP, New York (Kent A. Yalowitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 22, 2011, dismissing the complaint as against defendant Countrywide Financial Corporation and awarding it costs, unanimously modified, on the law, to vacate the dismissal and replace it with the declaration that plaintiffs do not own Participation C free and clear of any right, title or interest of Countrywide therein, and otherwise affirmed, without costs. Order, same court and Justice, entered May 25, 2012, which, inter alia, directed Bank of America to distribute all escrowed funds to Countrywide and to pay Countrywide all funds

otherwise payable until the conditions of the subject commercial loan participation agreement have been satisfied, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 9, 2011, which granted Countrywide's motion to dismiss the complaint as against it, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Pursuant to sections 3 and 39 of the parties' Participation Agreement, which are unambiguous, the Participation C Holder was entitled to the repayment of principal and interest only on the "Participation C Principal Balance," i.e., "amounts funded by the Participation C Holder," and only after the Funding Backstop Party – Countrywide – was repaid the "Additional Advances" it made upon the Participation C Holder's failure to do so. As assignee of Participation C Holder nonparty GSRE II, Ltd. (Guggenheim), plaintiff Citigroup was entitled to recover only the principal that Guggenheim funded; its interest in Participation C did not extend to the loan advanced by Countrywide; "[a]n assignee stands in the shoes of its assignor, subject to all the equities and burdens attached to the property acquired" (*Condren, Walker & Co., Inc. v Portnoy*, 48 AD3d 331, 331-332 [1st Dept 2008]).

Contrary to Citigroup's contention, the Reimbursement Agreement and the Pledge and Security Agreement entered into by Guggenheim and Countrywide are irrelevant to sections 3 and 39 of the Participation Agreement, since those agreements merely granted a security interest in the Participation C Holder's interests; they did not affect Countrywide's interest in the direct, preferential repayment of all backstop funding by operation of sections 3 and 39 of the Participation Agreement.

Nor does the UCC contain any provision that allows Citigroup to alter Countrywide's superior rights under the Participation Agreement, since an assignment in satisfaction of an obligation transfers no more than the collateral (*see In re Brooke Corp.*, 2012 WL 3066706, *5, 2012 Bankr LEXIS 3595, *14-15 [D Kan 2012]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8561 The People of the State of New York, Ind. 4211/08
Respondent,

-against-

Daniel Santana,
Defendant-Appellant.

_____

Fahringer & Dubno, New York (Herald Price Fahringer of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered June 29, 2011, as amended July 22, 2011, convicting defendant, after a jury trial, of murder in the second degree (two counts) and kidnapping in the first degree, and sentencing him to concurrent terms of 25 years to life, 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]). There is no basis for disturbing the jury's credibility determinations. The testimony of the cooperating accomplice was amply corroborated by the testimony of the surviving victims, as well as other evidence.

In addition to kidnapping and felony murder, defendant was

properly convicted of depraved indifference murder (*see People v Battles*, 16 NY3d 54 [2010]). Although defendant did not personally commit the acts of "wanton cruelty, brutality or callousness" (*People v Suarez*, 6 NY3d 202, 213 [2005]) that caused the victim's death, the evidence established defendant's accessorial liability pursuant to Penal Law § 20.00.

The challenged portions of the prosecutor's summation did not deprive defendant of a fair trial (*see generally People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor did not make prejudicial appeals for sympathy, and any improprieties in this regard were sufficiently addressed by the court's curative actions. The portions of the summation that defendant challenges as misstating the facts constituted fair comment on the evidence. Defendant's remaining contentions regarding the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

The court properly exercised its discretion in granting the People a protective order concerning some aspects of discovery. The order was based on valid concerns about the safety of

witnesses (*see* CPL 240.50; *People v Ancrum*, 281 AD2d 295 [1st Dept 2001], *lv denied* 96 NY2d 859 [2001]; *cf*. *People v Sweeper*, 122 Misc 2d 386 [Sup. Ct. NY County 1984]). In any event, under the protective order, defendant received the documents that were required to be disclosed under CPL 240.45 even before the deadline set forth in that statute. Furthermore, nothing in the order prohibited defense counsel from showing any documents to his client. Defendant has not substantiated his conclusory claims that his trial attorney needed more time to review the documents, or that defendant needed to have his own copies. Defendant did not preserve his procedural or constitutional claims regarding the factual basis for the protective order, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

Defendant's arguments concerning his eve-of-trial request for an opportunity to retain new counsel are without merit (*see People v Arroyave*, 49 NY2d 264, 270-271 [1980]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8563 In re Ralph C. Brown, Index 110136/10
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

Ungaro & Cifuni, New York (Nicholas Cifuni of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 20, 2011, denying the petition to annul respondents' denial of accidental disability retirement (ADR) benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner was injured while changing from street clothes to his uniform. His firearm discharged when a radio antenna in his locker lodged in the trigger, releasing the safety mechanism. The bullet injured petitioner's right hand, rendering him unable to perform the full duties of a police officer. An investigation by respondents resulted in a finding of "Accidental Discharge, Violation" resulting from petitioner's "disregard for proper firearms safety."

The denial of ADR based on a tie vote of the Board of Trustees can be set aside on judicial review only if the court concludes that the retiree is entitled to greater benefits as a matter of law on a record that the disability was the natural and proximate result of a service-related accident *(see Matter of McCambridge v McGuire*, 62 NY2d 563, 568 [1984]). An accident is a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982] [internal quotation marks omitted]). Injuries sustained while performing routine duties, but not resulting from unexpected events, are not accidents (*see Matter of Starnella v Bratton*, 92 NY2d 836, 839 [1998]; *McCambridge* at 568).

Petitioner failed to establish as a matter of law that his injuries resulted from an accident or out of the ordinary event. Petitioner was aware that special safety precautions were

required when handling a firearm, and respondents' conclusion that his negligence caused the gun to discharge was rationally based (*see e.g. Matter of Dalton v Kelly*, 16 AD3d 200 [1st Dept 2005], *lv denied* 10 NY3d 705 [2008]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8564 Taramarie Profita, et al., Index 307465/08
Plaintiffs-Respondents,

-against-

Juan Diaz, et al.,
Defendants-Respondents,

Benjamin O. Jones, et al.,
Defendants-Appellants.

_____

Law Offices of Cohen & Kuhn, New York (Ira Goldman of counsel), for appellants.

McMahon & McCarthy, Bronx (John E. Boneta of counsel), for Taramarie and Christopher Profita, respondents.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for Juan Diaz and Compas Car Service, Inc., respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about July 20, 2011, which, to the extent appealed from, upon reargument, vacated the prior order of the court granting defendants-appellants' motion for summary judgment dismissing the complaint and cross claim as against them, unanimously modified, on the law, to reinstate the prior order granting defendants-appellants' motion, and, upon a search of the record, grant defendants-respondents' cross motion for summary judgment dismissing the complaint and cross claim as

against them, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of all defendants, dismissing the complaint in its entirety and all cross claims.

The court properly considered plaintiffs' motion to reargue, even though it was untimely under CPLR 2221(d)(3). "[R]egardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see also Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]).

However, on the merits, the court should have adhered to its prior order. Defendants made a prima facie showing of their entitlement to judgment as a matter of law with evidence that plaintiffs' vehicle rear-ended defendants-appellants' vehicle, which was stopped or coming to a stop. "It is well settled that a rear-end collision with a stopped vehicle creates a presumption that the operator of the moving vehicle was negligent" (*Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]).

In opposition, plaintiffs failed to offer a nonnegligent explanation for the collision (*Agramonte*, 288 AD2d at 76). Plaintiff driver's testimony that defendants-appellants' vehicle stopped suddenly and then struck defendants-respondents' vehicle

is insufficient to raise a triable issue of fact (*see Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). Indeed, plaintiff driver failed to explain why he did not maintain a safe distance between his vehicle and defendants-appellants' vehicle (*see Soto-Maroquin v Mellet*, 63 AD3d 449, 449-450 [1st Dept 2009]). Plaintiff driver's testimony that it had been raining on and off on the day of the accident is also insufficient, by itself, to raise an issue of fact (*Mitchell v Gonzalez*, 269 AD2d 250, 251 [1st Dept 2000]). Nor was a triable issue of fact raised by the eyewitnesses' sworn statements that defendants-respondents' vehicle rear-ended a vehicle before plaintiffs' vehicle rear-ended defendants-appellants' vehicle (*see Soto-Maroquin*, 63 AD3d at 450). Although defendants-respondents did not file a notice of appeal from the denial of their cross motion for summary judgment, upon a search of the record, we grant their cross motion (*see Lopez v Simpson*, 39 AD3d 420, 421 [1st Dept 2007]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8565- Index 301223/00
8566 Zahid J. Ullah,
Plaintiff-Respondent,

-against-

Farrin B. Ullah,
Defendant-Appellant.

- - - - -

Farrin B. Ullah, Index 402742/08
Plaintiff-Appellant,

-against-

Zahid J. Ullah,
Defendant-Respondent.

_____

Farrin B. Ullah, appellant pro se.

Zahid J. Ullah, respondent pro se.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered February 24, 2011, which, in this matrimonial action, denied appellant wife's motion to hold the husband in contempt and to find him in default on his various support obligations, and ordered the portion of the wife's motion regarding support obligations for the period subsequent to January 1, 2007 held in abeyance until the conclusion of the plenary action, unanimously reversed, on the law, without costs, and the matter remanded for findings as to the payments made by

the husband between December 1, 2002 and January 1, 2007, and for a contempt hearing to enforce any payments that remain outstanding. Order, same court and Justice, entered June 5, 2012, which dismissed appellant's complaint in a plenary action seeking to declare the parties' June 16, 2004 agreement to be enforceable as a marital agreement or as a standard contract, unanimously affirmed, without costs.

In determining the contempt and enforcement motions, Supreme Court erred in relying on a special referee's report which calculated the husband's total payments to the wife between May 12, 2004 and 2010. This was error because the contempt/enforcement motions were based on the time period between December 1, 2002 and January 1, 2007. Accordingly, findings must be made as to the total payments made between those dates, and we remand for that purpose and for a new contempt hearing.

Supreme Court properly dismissed the complaint in the plenary action. As held in this Court's prior order (40 AD3d 201 [1st Dept 2007]), the 2004 agreement was invalid because it was never judicially authorized, and thus could not modify the divorce decree. Further, the parties' 2002 stipulation, which was incorporated into their May 12, 2004 judgment of divorce,

provided that it could not be modified except by an agreement in writing duly subscribed with the same formality as the stipulation. The 2004 agreement did not meet that standard because it was only signed by the husband and was neither signed or acknowledged by the wife. The wife's belated attempt to sign the agreement four years after its execution was clearly insufficient to cure the defect.

In addition, because the 2004 agreement does not provide any certainty or limit on the husband's obligation to pay the costs of the apartments, it lacked reasonable certainty in its material terms, and thus could not be a legally enforceable contract (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]).

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

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8567 The People of the State of New York, Ind. 9508/99
Respondent,

-against-

John Neloms,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered June 29, 2011, resentencing defendant, as a second felony offender, to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8568 Jay Goodfellow, Index 102660/10
Plaintiff-Appellant-Respondent, 590582/10

-against-

Citibank, N.A.,
Defendant-Respondent-Appellant,

Babs O. Ayodeji, et al.,
Defendants.

[And A Third-Party Action]

Gregory E. Green, P.C., Callicoon (Gregory E. Green of counsel), for appellant-respondent.

Zeichner Ellman & Krause, LLP, New York (Ronald M. Neumann of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 27, 2011, which denied plaintiff's motion for summary judgment, granted defendant Citibank's motion for summary judgment dismissing the complaint as against it, and dismissed the third-party action as moot, unanimously reversed, on the law, with costs, plaintiff's motion granted, Citibank's motion for summary judgment dismissing the complaint denied, and its motion for summary judgment on its third-party complaint granted. The Clerk is directed to enter judgment accordingly.

The only account statement clearly indicating that the two

subject checks were withdrawn from an account held by the deceased depositor in trust for plaintiff was issued only after plaintiff gave two blank checks to his aunt, who was not an authorized signatory on the account. Thus, contrary to Citibank's contention, in giving the checks to his aunt, plaintiff cannot be said to have been negligent so as to preclude his action based on the bank's lack of ordinary care in failing to properly label the account and to examine the signature card upon presentation of the checks. *Midtown Copying & Duplicating Servs. v Bank of N.Y.* (268 AD2d 252 [1st Dept 2000]), upon which the motion court relied, is distinguishable as involving ratification by knowing and intentional misconduct; here, plaintiff acted intentionally, but not with knowledge of the import of his act.

We reject Citibank's alternative argument that plaintiff's claim is barred by the limitations period set forth in the customer agreement, which did not contractually bind him.

In view of our disposition regarding its liability, Citibank

is entitled to summary judgment on its third-party complaint seeking restitution of the wrongful retention of the proceeds by the unauthorized drawer of the checks (*see Manufacturers Trust Co. v Diamond*, 17 Misc 2d 909 [App Term, 1st Dept 1959]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8569 Vilma Sorrentini, Index 301784/09
Plaintiff-Appellant,

-against-

Netta Realty Group, et al.,
Defendants-Respondents.

Everett J. Petersson, P.C., Brooklyn (Michael A. Serpico of counsel), for appellant.

Smith Mazure Director Wilkens Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for Netta Realty Corp., respondent.

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for DA & JA Deli & Grocery Corp., respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 17, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendant DA & JA Deli & Grocery Corp.'s (Deli) motion, and otherwise affirmed, without costs.

Photographs and testimony from the parties raised factual issues whether plaintiff could have seen the cash register lying on the floor in time to avoid it as she entered the deli (*see generally Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]).

It was not unreasonable for plaintiff to claim she was

looking straight into the store at the moment she opened the door to enter the deli. One photograph showed the cash register lying upside down just inside the entrance, as described by the deli owner at deposition. The photograph of the purported "warning" sign (at the deli's entrance door), which Deli submitted in its reply papers, appears almost blank, with no apparent lettering at all. The nearly "blank" white paper sign, although placed at shoulder height above the right door handle, is seemingly small and inconspicuous when compared to the multiple other colorful advertising signs posted on the glass doors. Moreover, the purported word "Closed" written on the white sign does nothing to alert patrons regarding specific dangers inside, and it could conceivably be ignored, as the evidence indicated that the store light was on inside and the entrance doors were left unlocked. Based on all the evidence offered on the motions, it was not "clear" whether the contested hazard was open and obvious (*see generally Tagle v Jakob*, 97 NY2d 165 [2001]).

Even assuming, arguendo, the cash register could be deemed an "open and obvious" hazard as a matter of law, such finding, while negating a duty to warn, would not obviate a landowner's duty to maintain a premises in a reasonably safe condition (*see Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d

599 [1st Dept 2010]; *Westbrook*, 5 AD3d 69). Deli, as lessee, arguably could have made the premises safer by keeping the store closed and locked, as the police had instructed.

Defendant out-of-possession building owner's motion for summary judgment was properly granted, as there was no evidence offered to show that the building owner, upon leasing control of the premises to Deli, retained any obligation to maintain the premises, and particularly an obligation to rectify transient conditions of the type that allegedly caused plaintiff's fall (*see generally Stryker v D'Agostino Supermarkets Inc.*, 88 AD3d 584 [1st Dept 2011]; *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439 [1st Dept 2010]).

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8571 In re Jaden Christopher W.-McC.,

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

Michael L. McC., etc.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 13, 2011, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that the consent of respondent father was not required for the adoption of the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent's consent to his child's adoption is not required, since he failed to pay child support (*see* Domestic Relations Law § 111[1][d]). He also failed to communicate with

the child on a regular basis (*id.*; *Matter of Harold Ali D.-E. [Rubin Louis E.]*, 94 AD3d 449, 449 [1st Dept 2012]). Respondent's incarceration did not absolve him of the obligation to provide support and maintain regular communication (*id.*).

A preponderance of the evidence shows that it is in the child's best interests to be freed for adoption by his foster parent, who wishes to adopt him and has provided a loving and stable home since the child's placement in April 2009 (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Chandel B.*, 58 AD3d 547, 548 [1st Dept 2009]). Respondent is currently incarcerated, and he is not eligible for parole until August 2027. Moreover, the evidence shows that the child barely knows his paternal grandmother, who last visited the child approximately six months before the dispositional hearing. There is no evidence that any other paternal relative contacted the agency or the child.

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

ENTERED: NOVEMBER 13, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8572N Dr. Tulsa Knox, Index 106696/09
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

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Noah A. Kinigstein, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 7, 2011, which denied petitioner's motion for an award of attorney's fees pursuant to CPLR article 86, unanimously affirmed, without costs.

The motion was properly denied since respondent is neither the State nor a state agency within the meaning of the statute (*see* CPLR 8602[g]; *Hernandez v Hammons*, 98 NY2d 735 [2002]). The fact that respondent performs a governmental function, namely the administration of public education, does not make it an agent of

the State (*see Matter of Apollon v Giuliani*, 246 AD2d 130, 134-135 [1st Dept 1998], *lv dismissed* 92 NY2d 1046 [1999]).

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

ENTERED: NOVEMBER 13, 2012

CLERK