SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 15, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8497 The People of the State of New York, Respondent, Ind. 1721/06

-against-

Frankie Ramos,
Defendant-Appellant.

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

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

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about May 27, 2011, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court and Justice, rendered March 19, 2007, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously reversed, on the law, and the matter remanded for a hearing on defendant's motion.

Defendant's moving papers were sufficient to warrant a hearing on his claim of ineffective assistance of counsel under *Padilla v Kentucky* (599 US __, 130 S Ct 1473 [2010]), which is

applicable to this case (*see People v Baret*, 99 AD3d 408, [1st Dept 2012]). Defendant adequately alleged that his counsel at the plea proceeding failed to inform him that a plea to criminal sale of a controlled substance in the third degree would subject him to automatic deportation without the possibility of discretionary relief from removal.

We reject the People's argument that defendant's allegations were excessively vague. It is clear that defendant was not alleging that his plea counsel provided either misadvice or no advice at all on immigration consequences, but that counsel provided materially incomplete or inadequate advice, given the clarity of the applicable immigration statutes (*see Padilla*, 130 S Ct at 1483).

Similarly, defendant's allegations that he would not have pleaded guilty but for his attorney's deficient advice regarding the immigration consequences of the plea were sufficient to raise a question of fact as to whether defendant was prejudiced. Defendant claimed serious health problems, including that he required dialysis three times a week, and alleged that the medical care necessary to keep him alive was unavailable in his native Honduras. He alleged that had he known that discretionary relief from deportation was unavailable for a person convicted of third-degree sale of a controlled substance, he would not have

accepted that plea, even though the promised sentence was only one year. Instead, he would have asked his attorney to negotiate a plea with less severe immigration consequences, and, if unsuccessful, would have gone to trial.

Furthermore, the possibility of prejudice was not foreclosed by the fact that deportation proceedings had been initiated against defendant based on two other convictions and not the instant one. The two other offenses were misdemeanors, subject to discretionary relief from removal, and the government was not precluded from proceeding based on the instant felony conviction.

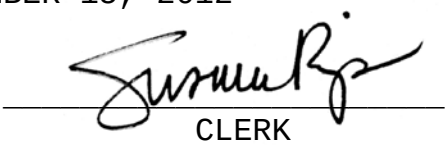
Finally, we conclude that defendant sufficiently explained his inability to obtain an affirmation from the attorney who represented him at the plea. Motion counsel set forth in detail her conversations with plea counsel. To the extent plea counsel recalled the case, his recollections tended to support defendant's position. However, plea counsel did not respond to requests for an affirmation. The prosecutor also spoke with plea counsel, but did not learn anything that would warrant summary denial of the motion. Moreover, defendant's allegations were corroborated by plea minutes that support an inference that while defendant was aware his plea could have immigration consequences, both defendant and counsel were under a misapprehension that discretionary relief from deportation was available. Under all

these circumstances, motion counsel's failure to make a formal written request for an affirmation did not warrant denial of a hearing.

We have considered and rejected the People's remaining arguments.

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

ENTERED: NOVEMBER 15, 2012



CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8498 William Pena, Index 7803/07
Plaintiff-Respondent,

-against-

Donald Slater, et al.,
Defendants-Appellants,

Action Auto Leasing Corporation, et al.,
Defendants.

_____

Rosenbaum & Taylor, P.C., White Plains (Dara L. Rosenbaum of counsel), for appellants.

Codelia & Socorro, P.C., Bronx (Peter R. Shipman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 18, 2011, which, to the extent appealed from, upon granting leave to renew and/or reargue defendants-appellants' motion for summary judgment, denied the motion as to defendants Slater and Arthurs Limo, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendants Slater and Arthurs Limo (defendants).

Defendants made a prima facie showing of their entitlement to judgment as a matter of law. Defendants submitted evidence showing that defendant Slater was faced with an emergency situation not of his own making, when plaintiff's vehicle

suddenly crossed over yellow double lines into his lane of traffic, leaving Slater with no opportunity to avoid a collision (*see Caban v Vega*, 226 AD2d 109, 111 [1st Dept 1996]; *Kenney v County of Nassau*, 93 AD3d 694, 696 [2d Dept 2012]). The police officer's testimony and report, to the extent they were based on her personal observations at the scene of the accident while carrying out police duties, were admissible in support of the motion (*see Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 396 [1st Dept 2003], *lv dismissed in part, denied in part* 100 NY2d 636 [2003]; CPLR 4518[a]). Plaintiff's equivocal testimony that his vehicle had stopped at the double yellow lines and that he did not know whether his vehicle had ever crossed the yellow lines was insufficient to raise a triable issue of fact as to how the accident occurred or whether the emergency doctrine applied to relieve defendants of liability.

The court correctly declined to consider the handwritten statement, purportedly signed by an eyewitness, that plaintiff submitted in opposition to the motion. The statement was not in admissible form and plaintiff did not provide "'any excuse for his failure to provide the [statement] in proper form'" (*Barile v Carroll*, 280 AD2d 988, 989 [4th Dept 2001], quoting *Grasso v Angerami*, 79 NY2d 813, 814 [1991]). Nor did plaintiff provide any information about how the statement was obtained, or why it

was not submitted in opposition to the original motion for summary judgment. Speculation by counsel that defendant Slater's vehicle may have crossed over and hit plaintiff's vehicle before bouncing back into his lane of traffic, or that Slater could have avoided the accident if he had been driving slower or taken some other action, is insufficient to raise a triable issue of fact (*see Caban*, 226 AD2d at 111).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8499-
8499A In re Sandra N.,
Petitioner/Intervenor-Appellant,

Administration for Children's
Services, et al.,
Respondents-Respondents.

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

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

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about July 22, 2011, which dismissed petitioner's application for custody of the subject children, and order, same court and Judge, entered on or about September 14, 2011, denying petitioner's motion to vacate the order of dismissal, unanimously affirmed, without costs.

Application by petitioner's assigned counsel to be relieved

as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed the record and agree with counsel that there are no nonfrivolous issues that could be raised on this appeal.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8500 John Mescall, et al., Index 109157/04
Plaintiffs-Appellants,

–against–

Structure-Tone, Inc.,
Defendant-Respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellants.

Camacho Mauro Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered February 28, 2011, which, following a jury verdict, denied plaintiff's CPLR 4404 motion to set aside the verdict as inconsistent and inadequate, unanimously affirmed, without costs.

Plaintiff, an ironworker, was injured when a crane that was lifting a steel “screen” or “curtain” failed, causing the screen to fall some 20 feet in the air before striking plaintiff. This Court previously affirmed a finding that plaintiff was entitled to partial summary judgment on his claims pursuant to Labor Law § 240(1) (49 AD3d 339 [1st Dept 2008]).

Following a trial on damages, the jury returned a unanimous verdict awarding plaintiff: $124,000 in past medical expenses (upon prior stipulation of the parties), $90,000 in lost earnings, $25,000 for past pain and suffering, $200,000 for

future medical expenses, and no damages for future pain and suffering, future lost earnings, or future loss of pension benefits. The jury was polled and released without objection.

Plaintiff failed to preserve his claim that the verdict was inconsistent in that the jury made an award for future medical expenses, but not future pain and suffering *(see Knox v Piccorelli*, 83 AD3d 581, 581 [1st Dept 2011]; *Arrieta v Shams Waterproofing, Inc.,* 76 AD3d 495, 496 [1st Dept 2010]).

As for whether the verdict is insufficient and against the weight of evidence, sufficient evidence was adduced from which the jury could have concluded that most of plaintiff's alleged serious injuries pre-existed his accident and that the others, involving a fractured rib, clavicle and vertebra, had resolved (*see Crooms v Sauer Bros. Inc.*, 48 AD3d 380, 382 [1st Dept 2008]; *Batchu v 5817 Food Corp.*, 56 AD3d 402 [2d Dept 2008], *lv denied* 12 NY3d 704 [2009]). Plaintiff had brought four prior, work-related lawsuits, claiming many of the same injuries claimed in this case. For example, one of plaintiff's own doctors testified, under defendant's subpoena, that he advised plaintiff, six months prior to the subject accident, that surgery might be warranted to his cervical spine. Under the facts of this case, it cannot be said that the jury's verdict deviated materially from reasonable compensation.

There was also sufficient evidence from which the jury could have concluded that plaintiff's failure to return to work was not as a result of this accident, but by choice. There exists no basis to disturb the jury's credibility determinations (*see Knox*, 83 AD3d at 581).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8501 Jeannette Bharat, Index 111235/09
Plaintiff-Respondent,

-against-

RPI Industries, Inc., et al.,
Defendants-Appellants,

M. Tucker, Co., Inc.,
Defendant-Respondent,

Credit Suisse Securities (USA), LLC.,
Defendant.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for appellants.

Law Offices of Alvin M. Bernstone, LLP, New York (Peter B. Croly of counsel), for Jeannette Bharat, respondent.

Law Office of Stewart H. Friedman, Garden City (Thomas C. Awad of counsel), for M. Tucker, Co., Inc., respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered March 6, 2012, which denied the motion of defendants RPI Industries Inc. and Regal-Pinnacle MFG (collectively RPI) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

RPI failed to establish entitlement to judgment as a matter of law in this action where plaintiff was injured when a stone shelf manufactured and installed by RPI fell on her right arm, fracturing her wrist. Although plaintiff was not a party to

RPI's contract with defendant M. Tucker & Co., she sufficiently alleged that RPI "launche[d] a force or instrument of harm" by either negligently installing the shelf or by failing to inspect and shore up the shelf's support following the collapse of a similarly installed shelf (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal quotation marks omitted]; *cf. Gordon v Pitney Bowes Mgt. Servs., Inc.*, 94 AD3d 813 [2d Dept 2012]). Accordingly, to demonstrate its entitlement to summary judgment, RPI was required, but failed, to tender evidence showing there was no issue of fact concerning its negligence. Moreover, even if we were to find that RPI met its prima facie burden, there are triable issues as to whether RPI was negligent in using only epoxy to support a 50-pound shelf.

Because there are issues of fact concerning RPI's

negligence, the cross claims for contribution and indemnification cannot be dismissed (*see Gorham v Reliable Fence & Supply Co., Inc.*, 92 AD3d 834, 837 [2d Dept 2012]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8503 The People of the State of New York, Respondent, Ind. 5804/06

-against-

Lionel Johnson, Defendant-Appellant.

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

Lionel Johnson, appellant pro se.

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

Judgment, Supreme Court, New York County (Carol Berkman, J. at speedy trial motion; Marcy L. Kahn, J. at plea and sentencing), rendered May 28, 2009, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

Based on our analysis of the *Taranovich* factors, we conclude that the court properly denied defendant's constitutional speedy trial motion (*see People v Taranovich*, 37 NY2d 442, 446 [1975]). The original charge, second-degree murder, was extremely serious. Although there was a 31-month delay between defendant's arrest and trial, and he was incarcerated during that period, defendant only claims that 18 months were attributable to the People. The reasons for that period of delay were matters such as scheduling

conflicts, the prosecutor's illness and the unavailability of witnesses. While some of the reasons for the delay were less than compelling, there is no evidence of bad faith. Finally, defendant has not substantiated his claim of prejudice. In particular, defendant fled after the homicide and was at large for a two-year period that is not at issue on this appeal. Defendant has not established that the alleged prejudice resulted from the People's delay, as opposed to resulting from the delay in locating defendant.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]). In any event, regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

We have considered defendant's remaining contentions, including those raised in his pro se brief, and find them to be unavailing.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8507 Ronald K. Armstrong, Index 22031/05
Plaintiff-Appellant,

-against-

Sensormatic/ADT,
Defendant-Respondent.

David Zevin, Roslyn, for appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., New York (Jennifer Rygiel-Boyd of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 23, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's deposition testimony and averments contained in an affidavit submitted in opposition to defendant's motion are too ambiguous to raise an issue of fact as to whether he had engaged in a protected activity by complaining of preferential treatment towards women, or was terminated in retaliation for that allegedly protected conduct (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Intl. Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F Supp 2d 345, 357 [SD NY 2007]). Although plaintiff testified that a subordinate had received preferential treatment based on her gender and race, he

did not testify that he had communicated the allegedly discriminatory conduct to defendant's human resources department. Further, none of the averments relating to the alleged preferential treatment of a female temporary worker are set forth in his deposition testimony. Accordingly, his affidavit "raises only a feigned issue of fact," insufficient to withstand summary judgment (*Schwartz v JP Morgan Chase Bank, N.A.*, 84 AD3d 575, 577 [1st Dept 2011]). The alleged statement by plaintiff's manager that plaintiff "had let the cat out of the bag" about the manager's "discriminatory hiring and favoritism" fails to raise an issue of fact, as plaintiff has not pointed to any cognizable instances of discriminatory conduct or complaints about such conduct.

Plaintiff also fails to rebut defendant's evidence that it had terminated him for legitimate, nondiscriminatory reasons — namely, his vulgar and inappropriate messages to coworkers (*see Forrest*, 3 NY3d at 313; *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553-554 [1st Dept 2010]). Plaintiff's reliance on an alleged statistical case of racial discrimination in defendant's sales forces is insufficient to raise an issue of fact as to whether defendants' reasons were pretextual. Indeed, the statistical pool on which plaintiff relies is too small to support an

inference of discrimination (*see Pollis v New Sch. for Soc. Research*, 132 F3d 115, 121-122 [2d Cir 1997]).

Plaintiff's failure to promote claim was properly dismissed as time-barred. The continuing violations doctrine does not apply to toll the running of the statute of limitations on this claim, as plaintiff has failed to submit sufficient evidence of a pattern or practice of discrimination (*see Van Zant v KLM Royal Dutch Airlines*, 80 F3d 708, 713 [2d Cir 1996]; *Sculerati v New York Univ.*, 2003 NY Slip Op 50928[U], *7-8 [Sup Ct, NY County 2003]).

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 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8508 Andrew B. Ostroy, etc., Index 114674/08
Plaintiff-Appellant,

-against-

Six Square LLC, et al.,
Defendants-Respondents.
- - - - -
[And A Third-Party Action]

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Herbst Law PLLC, Larchmont (Robert L. Herbst of counsel), for appellant.

Martin Clearwater & Bell, LLP, New York (Stewart G. Milch of counsel), for Six Square LLC, Edward Steinman, Joseph Alpert and Charles Alpert, respondents.

White Fleischner & Fino, LLP, New York (Jason Steinberg of counsel), for Bradford General Contractors Co. Inc. and Jus Hernandez, respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered on or about July 1, 2011, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants Bradford General Contractors Co. Inc. and Hernandez cannot be held vicariously liable pursuant to the doctrine of respondeat superior for third-party defendant Pillco's criminal conduct, because the record demonstrates as a matter of law that the undocumented immigrant's murder of plaintiff's decedent was not "within the permissible ambit of

[his] employment" (*see Riviello v Waldron*, 47 NY2d 297, 303 [1979]). Rather than furthering his employer's interests, Pillco's crime was motivated by his admitted personal fear that the decedent would contact the police or immigration authorities (*see RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 164 [2004]).

The claim of negligence per se based on defendant Bradford's alleged violation of the Immigration Reform and Control Act (8 USC § 1324a[a][1]) in hiring Pillco must be dismissed because there is no evidence that the decedent was among the class of people for whose particular benefit the statute had been enacted (*see Fagan v AmerisourceBergen Corp.*, 356 F Supp 2d 198, 214 [ED NY 2004]).

The claim of negligent hiring, retention, training, and supervision fails because there is no evidence that Bradford was on notice that Pillco had a propensity for violence (*see Naegele v Archdiocese of N.Y.*, 39 AD3d 270 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007]; *White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243 [1st Dept 2006]). To the contrary, the record shows that Hernandez, Bradford's owner, regarded Pillco as a normal and happy young man who never displayed signs of anger or a bad mood.

Plaintiff's argument that defendants Six Square LLC, Edward Steinman, Joseph Alpert, and Charles Alpert can be held liable

for the Bradford defendants' negligence pursuant to an exception to the general rule against liability for independent contractors is misplaced, since the decedent's death was not the result of any negligent repairs performed by Bradford but the result of Pillco's criminal conduct.

The negligent security claim against the Six Square defendants fails because there is no evidence that they knew or had reason to know of conduct on the part of workers in the building that would likely endanger a tenant (*see Jacqueline S. v City of New York*, 81 NY2d 288 [1993]; *Maria S. v Willow Enters.*, 234 AD2d 177 [1st Dept 1996]).

Plaintiff is not entitled to a reduced burden of proof under the *Noseworthy* doctrine (*Noseworthy v City of New York*, 298 NY 76 [1948]), because there is no evidence that the decedent's death was the result of negligence (*see id.*; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 928 [1st Dept 2010]).

The claim for punitive damages must be dismissed because

there is no evidence that defendants "authorized, participated in, consented to or ratified" Pillco's criminal conduct (*Loughry v Lincoln First Bank*, 67 NY2d 369, 378 [1986]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8509-
8510

In re Omea S., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

- - - - -

William S.,
Respondent-Appellant,

Family Support Systems Unlimited
Inc., et al.,
Petitioners-Respondents.

_____

Elisa Barnes, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

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Orders, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about November 21, 2011, which, to the extent appealed from as limited by the briefs, upon a fact-finding determination that respondent-appellant had permanently neglected his children, terminated his parental rights to his son and committed custody and guardianship of that child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The record demonstrates, by clear and convincing evidence, that the agency made diligent efforts to reunite respondent with

his children (*see* Social Services Law § 384-b[7][a], [f]). The agency's records show that the agency met with respondent on a regular basis, discussed his need to complete his service plan and visit the children regularly, and provided him with transportation money. Moreover, respondent acknowledged that the agency had referred him to parenting classes, a drug treatment program, a stress management class and vocational training (*see Matter of Destiny S. [Hilda S.]*, 79 AD3d 666, 666 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]; *Matter of Terry P.*, 18 AD3d 348 [1st Dept 2005]). Despite the agency's diligent efforts, respondent failed to plan for the future of the children and remedy the problems that led to their placement (*see* Social Services Law § 384-b[7][c]).

A preponderance of the evidence supports the determination that it is in respondent's son's best interests to terminate respondent's parental rights and free the child for adoption. The child has been living in a two-parent, non-kinship pre-adoptive foster home since he entered foster care, and his foster parents wish to adopt him. The agency caseworker testified that the foster parents ensure the child receives all of the services he requires for his special needs. In addition, respondent testified that he believes the child is in "an excellent home" and that he wants him to stay in the foster home, "if anything

fail[s].” Given the foregoing and respondent’s failure to demonstrate that he has taken sufficient steps to ameliorate the conditions that led to the child’s placement, a suspended judgment is not warranted (*see Matter of Jada Dorithah Solay McC. [Crystal Delores McC.]*, 95 AD3d 615, 616 [1st Dept 2012]; *Matter of Kianna Maria L.*, 26 AD3d 166, 166-167 [1st Dept 2006]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8511 The People of the State of New York, Respondent, Ind. 4607/07 583/08

-against-

Darwin Castro, Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered January 30, 2009, convicting defendant, upon his pleas of guilty, of attempted robbery in the second degree and promoting prison contraband in the first degree, and sentencing him to an aggregate term of two years, unanimously affirmed.

Defendant did not preserve his challenge to the voluntariness of his guilty plea, and we decline to review it in the interest of justice. As an alternative holding, we find that

in the first of the two plea proceedings in this case the court sufficiently warned defendant that he could expect to be deported as the result of his conviction.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8512 Yvonne Benjamin, Index 117150/07
Plaintiff-Respondent,

-against-

Avis Car Rental Group, LLC,
Defendant-Appellant.

Cascone & Kluepfel, LLC, Garden City (Ajay C. Bhavnani of counsel), for appellant.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered August 30, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff was allegedly injured when she tripped and fell over a parking bumper located in defendant's rental car facility. There is no indication that the bumper was defective or created a hazardous condition in any way.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8514 Jorje L. Santana, et al., Index 310591/08
Plaintiffs-Appellants,

-against-

James H. McQueen, et al.,
Defendants-Respondents.

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Scarcella Law Offices, White Plains (M. Sean Duffy of counsel), for appellants.

Saretsky Katz Dranoff & Glass, L.L.P., New York (Patrick J. Dellay of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 16, 2011, dismissing the complaint pursuant to an order, same court and Justice, entered March 23, 2011, which, insofar as appealed from as limited by plaintiffs' brief, granted defendants' motion for summary judgment on the ground that the injured plaintiff did not suffer a serious injury to his right shoulder within the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the judgment vacated, the motion denied and the complaint reinstated.

Plaintiff raised an issue of fact as to whether the subject accident caused the tear of his right shoulder's infraspinatus tendon by submitting the affirmed reports of a radiologist and an

orthopedic surgeon stating as much (Insurance Law § 5102[d]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). Plaintiff's radiologist opined that plaintiff's infraspinatus tear was "directly related to an acute injury that occurred" on the date of the accident, and based that opinion on, among other things, his review of an MRI of plaintiff's right shoulder, taken before the accident, which revealed no such injury, while two MRIs taken subsequent to the accident did. Plaintiff's orthopedic surgeon concurred, and specifically attributed the subject accident as the cause of the injury, ruling out plaintiff's prior injury to the supraspinatus tendon of his right shoulder.

We reject defendants' argument that plaintiffs' experts failed to rebut defendants' radiologist's finding of degeneration because plaintiffs' experts distinguished plaintiff's pre-accident injury from his post-accident injury, opining, based on objective medical evidence, that the latter was caused by the

subject accident (*see Fuentes v Sanchez*, 91 AD3d 418 [1st Dept 2012]; *compare Torres v Gamma Taxi Corp.*, 97 AD3d 440 [1st Dept 2012]; *McArthur v Act Limo, Inc.*, 93 AD3d 567, 568 [1st Dept 2012]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8515 Jose G. Lizama, Index 301601/09
Plaintiff-Respondent,

-against-

1801 University Associates, LLC, et al.,
Defendants-Appellants.

_____

The Law Offices of Edward M. Eustace, White Plains (Heath A. Bender of counsel), for appellants.

Jacob Oresky & Associates, PLLC, Bronx (Rhonda P. Katz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 23, 2011, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff submitted evidence showing that while standing on the fourth rung of a five-rung A-frame ladder, and using both hands to move a sander back and forth on the walls, he was injured when the ladder suddenly shifted, a "crack" was heard and the ladder collapsed, causing him to fall to the floor. Plaintiff testified that he had examined the ladder prior to using it and found it to be functional. However, immediately following the accident, he noted that a stabilizing bracket on the side of the ladder was broken. The ladder was the lone piece of safety equipment available to plaintiff for use in sanding the

upper part of the walls, plaintiff's foreman was not at work on the day of the accident and no definitive instructions were given to plaintiff on how to perform the sanding work. Under these circumstances, plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his claim under Labor Law § 240(1) (*see Carchipulla v 6661 Broadway Partners,* LLC, 95 AD3d 573 [1st Dept 2012]; *Picano v Rockefeller Ctr. N., Inc.*, 68 AD3d 425 [1st Dept 2009]).

In opposition, defendants failed to raise a triable issue of fact. Contrary to defendants' contention that plaintiff was the sole proximate cause of his accident, the record shows that the ladder was inadequate for the nature of the work performed and the gravity-related risks involved (*see Lipari v AT Spring, LLC*, 92 AD3d 502 [1st Dept 2012]). Moreover, defendants did not show that another safety device was available, but went unused, that plaintiff failed to heed instructions on how to perform his assigned sanding task, or that the cause of plaintiff's injury

was unrelated to the ladder's shifting and ultimate collapse (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Lipari*, 92 AD3d at 504; *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8517 Martha Banegas, Index 307002/08
Plaintiff-Respondent,

-against-

Unique Gas Corp.,
Defendant-Appellant.

_____

Camacho Mauro Mulholland, LLP, New York (Joseph O. Tuffy of counsel), for appellant.

The Law Offices of Stuart M. Rissoff, P.C., Garden City (William R. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 6, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff was allegedly injured when she slipped on ice on the driveway of defendant's gas station. Plaintiff testified that she slipped on the driveway where cars entered and exited the station. When presented with photographs at her deposition and asked to mark the location of her fall, plaintiff marked a spot in the street that was not part of defendant's premises. However, on the correction sheet to her deposition testimony, which predated defendant's motion, plaintiff clarified that she had marked the

area where she landed after slipping on the driveway. Moreover, defendant's employee and the police officer who responded to the scene testified that while they saw plaintiff sitting in the roadway after the accident, they did not see her fall. Accordingly, defendant failed to conclusively demonstrate that plaintiff's fall was not on its premises.

Defendant's argument that its snow removal efforts were adequate was not raised in its motion papers, and is therefore unpreserved (*see e.g. Crawford v Windmere Corp.*, 262 AD2d 268, 269 [2d Dept 1999]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8518N AllianceBernstein L.P., Index 651033/12
Plaintiff-Respondent,

-against-

William Atha,
Defendant-Appellant.

_____

Luboja & Thau, LLP, New York (Jonathan C. Thau of counsel), for appellant.

Gibbons P.C., New York (Paul A. Saso of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 11, 2012, which, inter alia, directed defendant to deliver his iPhone to plaintiff's counsel, unanimously reversed, on the law, the order vacated, and the matter remanded for further proceedings consistent herewith, without costs.

Plaintiff, an investment firm, brought this suit against defendant, a financial analyst, shortly after he left plaintiff's employ for another firm. Plaintiff alleges that defendant breached his employment contract by, among other things, misappropriating plaintiff's confidential information, including client contact data, and using the information to solicit plaintiff's clients on behalf of his new employer.

Within days of commencing this action, plaintiff sought and obtained a temporary restraining order prohibiting defendant from

retaining or using plaintiff's confidential information. Thereafter, during his deposition by plaintiff, defendant stated that, while working for plaintiff, he had serviced its clients by calling them on his personal iPhone and that the device contained contact information for a few clients. On plaintiff's subsequent request, defendant turned his iPhone over to his counsel to comply with the TRO's requirement that he not retain plaintiff's confidential information.

Around this time, plaintiff served document requests on defendant which included a demand for his iPhone's call logs from the date he left plaintiff's employ. When defendant resisted producing the information on his iPhone on the ground that, among other things, production would infringe on his privacy rights, plaintiff wrote a letter to the court stating that a discovery dispute had arisen and requesting that the court hold a pre-motion discovery conference pursuant to its rules. Without giving defendant a chance to respond to plaintiff's letter and without holding a conference, the court issued an order directing defendant to deliver his iPhone to plaintiff's counsel within five days of the order's entry "to enable [plaintiff] to obtain the contact information it requested at [defendant's] deposition."

The court's order is not appealable as of right because it

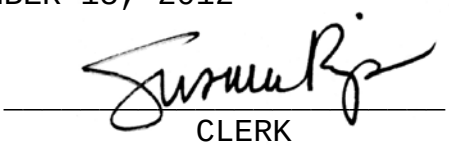
did not decide a motion made on notice (*see* CPLR 5701[a]). However, in the interest of judicial economy, we deem the notice of appeal to be a motion for leave to appeal, and grant such leave (*see Milton v 305/72 Owners Corp.*, 19 AD3d 133 [1st Dept 2005], *lv dismissed and denied* 7 NY3d 778 [2006]; CPLR 5701[c]).

The court should have afforded defendant an opportunity to respond to plaintiff's letter application before ruling. Moreover, its order that defendant turn over his iPhone is beyond the scope of plaintiff's request that the court "compel defendant's timely production of the requested information *from* his iPhone" (emphasis supplied) and is too broad for the needs of this case. The TRO adequately addressed plaintiff's concern that defendant may have retained confidential information about plaintiff's clients. However, ordering production of defendant's iPhone, which has built-in applications and Internet access, is tantamount to ordering the production of his computer. The iPhone would disclose irrelevant information that might include privileged communications or confidential information. Accordingly, the iPhone and a record of the device's contents shall be delivered to the court for an in camera review to determine what if any information contained on the iPhone is responsive to plaintiff's discovery request. In camera review

will ensure that only relevant, non-privileged information will be disclosed (*see Neuman v Frank*, 82 AD3d 1642, 1643-1644 [4th Dept 2011]; *Detraglia v Grant*, 68 AD3d 1307, 1308 [3d Dept 2009]).

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

ENTERED: NOVEMBER 15, 2012



CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8574 In re Shatavia Jeffeysha J., etc.,

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

Jeffrey J.,
Respondent-Appellant,

Little Flower Children and
Family Services of New York,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

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

Jessica I. Cuadrado, New York, attorney for the child.

Order of disposition, Family Court, New York County (Monica Drinane, J.), entered on or about April 6, 2011, which, to the extent appealed from as limited by the briefs, upon fact-finding determinations that respondent father's consent was not required for the subject child's adoption and that, in any event, he had abandoned the child, terminated his parental rights 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 the child's adoption is not required, as he did not maintain "substantial and continuous or

repeated contact" with the child (Domestic Relations Law § 111[1][d]). Although respondent testified that he had lived with the child and openly held himself out to be her father for two or three years preceding her placement in *foster care*, there is no evidence that he had lived with her for at least six months during the year immediately preceding her placement for *adoption*. Accordingly, respondent cannot be "deemed to have maintained substantial and continuous contact with the child" (*id.*).

In any event, even if respondent's consent is required for the adoption, clear and convincing evidence supports the Family Court's alternative determination that respondent had abandoned the child (*see* Social Services Law § 384-b[4][b], [5][a]; *Matter of Harold Ali D.–E. [Rubin Louis E.]*, 94 AD3d 449, 449-450 [1st Dept 2012]). The Family Court's credibility determinations have a sound and substantial basis in the record and should not be disturbed (*see Matter of Amin Enrique M.*, 52 AD3d 316, 317 [1st Dept 2008], *lv dismissed* 12 NY3d 792 [2009]).

A preponderance of the evidence supports the Family Court's determination that the child's best interests would be served by freeing her for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that respondent is capable of caring for the child, and the record shows that the

child is doing well with her foster mother, who wishes to adopt her (*see Matter of Chandel B.*, 58 AD3d 547, 548 [1st Dept 2009]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8575 Angela Vazquez, Index 21354/06
Plaintiff,

-against-

Diamondrock Hospitality Company, et al.,
Defendants-Respondents,

866 3rd Next Generation LLC,
Defendant,

Centennial Elevator Industries, Inc., et al.,
Defendants-Appellants.

_____

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for Centennial Elevator Industries, Inc., and Centennial Elevator Maintenance & Repair Corp., appellants.

Sabatini & Associates, New York (Ava R. Maynard of counsel), for Schindler Elevator Corporation, appellant.

Garbarini & Scher, P.C., New York (Michael D. Drews of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 11, 2011, to the extent appealed from as limited by the briefs, dismissing the complaint and all cross claims as against defendants Diamondrock Hospitality Company (Diamondrock) and Courtyard Management Corporation (Courtyard), and bringing up for review an order, same court and Justice, entered on or about April 18, 2011, which granted defendants' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously

modified, on the law, the motion of Diamondrock for summary judgment to the extent it sought dismissal of the cross claims as against it denied, the cross claim against Diamondrock converted to a third-party claim, and otherwise affirmed, without costs.

The motion for summary judgment should have been denied insofar as it sought dismissal of the cross claims as against Diamondrock. It is undisputed that Diamondrock owns the subject premises and, as such, has a common-law duty to keep the premises in a reasonably safe condition, which duty extends to elevators on its premises (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]). It is also undisputed that the premises is a hotel, which is a multiple dwelling under Multiple Dwelling Law § 4(9). Thus, Diamondrock has a nondelegable duty to maintain and repair elevators on its premises under Multiple Dwelling Law § 78 (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 687-688 [1990]; *Rogers v Dorchester Assoc.*, 32 NY2d 553, 563 [1973]).

Diamondrock failed to meet its burden of establishing that it had "completely parted with possession and control" of the premises such that it, as an out-of-possession owner, should be exempt from liability (*Worth Distribs. v Latham*, 59 NY2d 231, 238 [1983]). Diamondrock's reliance on its management agreement with Courtyard is unavailing because that agreement is not a lease and

reserves several rights in Diamondrock's favor. This includes "the right to enforce compliance with respect to the maintenance, repair, restoration or operation" of the premises, "any other right necessary to maintain and/or operate the Hotel or Common Elements." Viewing the evidence in a light most favorable to the nonmovants, the management agreement does not "irrefutably establish" that Diamondrock "had no right or responsibility regarding the operations of the building itself" (*Bonifacio v 910-930 S. Blvd. LLC*, 295 AD2d 86, 89 [1st Dept 2002]).

The cross claims as against Courtyard were correctly dismissed as on this record there is no question as to whether Courtyard is protected by the Workers' Compensation Law exclusivity bar. The record demonstrates that Marriott, plaintiff's employer, is Courtyard's alter ego. It has failed to show that discovery regarding Marriott and Courtyard's relationship is necessary or that material defining that relationship is in their exclusive possession (*see* CPLR 3212[f]; *see also Cruceta v Funnel Equities*, 286 AD2d 747 [2d Dept 2001]).

We decline to reinstate the complaint since plaintiff has not appealed, and full relief can be afforded to appellants without reinstating the complaint (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8576 In Re East 51st Street Crane Collapse Litigation. Index 769000/08 104427/08

- - - - -

John Della Porta, et al.,
Plaintiffs,

-against-

East 51st Street Development Company, LLC,
Defendant-Respondent,

Reliance Construction Group, et al.,
Defendants-Appellants,

Joy Contractors, Inc., et al.,
Defendants.

- - - - -

[And A Third-Party Action]

Gallo Vitucci & Klar LLP, New York (Kimberly A. Ricciardi of counsel), for Reliance Construction Ltd., doing business as RCG Group, sued herein as Reliance Construction Group and RCG Group, Inc., appellant.

O'Melveny & Myers LLP, New York (Thomas G. Carruthers of counsel), for respondent.

Order, Supreme Court, New York County (Carol Edmead, J.), entered June 13, 2011, which, to the extent appealed from, denied defendant RCG's motion to renew with respect to a prior order determining that the indemnification clause of its 2008 construction management agreement with defendant/third-party plaintiff East 51st Street Development Company, LLC was triggered, thereby obligating RCG to indemnify East 51st Street for any

losses arising out of the work of RCG or its contractors, unanimously affirmed, without costs.

The motion court properly found that RCG failed to demonstrate a reasonable justification for the failure to present the "new evidence" in opposition to the initial motion (CPLR 2221[e]; *see American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006]). Further, the motion court correctly concluded that the evidence would not have changed the prior determination, since the parties' 2008 construction management agreement contained a broad merger clause, and thus, extrinsic evidence, such as the oral agreements alleged by RCG, should not be considered to alter, vary or contradict the written agreement (*Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]; *see also Torres v D'Alesso*, 80 AD3d 46, 51 [1st Dept 2010]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8578 In re Trinity J.,

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

Lisa F.,
Respondent-Appellant.

The New York Foundling Hospital,
Petitioner-Respondent,

Andrew J. Baer, New York, for appellant.

Law Offices of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (Jane Wu of counsel), attorneys for the child.

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 3, 2011, which, to the extent appealed from as limited by the briefs, 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 Social Services for the purpose of adoption, unanimously reversed, on the facts, without costs, the termination of the mother's parental rights and disposition as to the child vacated, and the matter remanded to the Family Court for issuance of a suspended judgment with terms and conditions consistent with this decision.

A preponderance of the evidence shows that a suspended judgment, rather than termination of the mother's parental rights, is in the child's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). At the time of the dispositional hearing, the mother had fulfilled all aspects of her required service plan, including the completion of a drug treatment program and parenting skills course, a mental health evaluation, and consistent attendance at after-care programs. Although the then-three-year-old child had bonded with her foster mother, she had been placed in the foster home only a year and one-half before the hearing. Further, the mother had not missed any of the biweekly visits that had been occurring since five months before the hearing, despite a four-hour round-trip commute spanning three states. It was undisputed that the quality of those visits had improved, that the child reciprocated the mother's efforts to engage and interact with her, and that the child called the mother "mommy."

By the end of the dispositional hearing, the mother was approaching one year of sobriety, her longest period of sobriety since she became addicted to drugs while in her teens. Moreover, she testified that she had an extensive support network in her new out-of-state home, which had helped her find consistent work, provided her with long-term transitional housing, and was

assisting her in obtaining permanent housing, even though these goals were not a part of her service plan. We note that there was no expert testimony or other evidence that the child would be negatively affected by reunification with the mother. We also note that the agency caseworker had never informed the mother of the child's recently diagnosed special needs. In any event, the mother testified that her support network would help her find an appropriate school for the child. Accordingly, it cannot be said that the mother did not have a realistic, feasible plan for the child.

Given the child's very young age, the mother's recommencement of regular visitation, the relatively short time during which the child was placed with the foster mother, the sustained efforts on the part of a dedicated and reformed mother, and the Legislature's express desire to return children to their natural parents whenever possible (*see* Social Services Law § 384-b[1][a][ii]), the mother should have been granted a "second chance" in the form of a suspended judgment (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *see Matter of Society for Seamen's Children v Jennifer J.*, 208 AD2d 849 [2d Dept 1994]). We thus

remand for issuance of a suspended judgment conditioned upon the mother's maintenance of her sobriety, her continuation of medical treatment, and her obtainment of permanent housing and a school to serve the child's special needs.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8580-
8581 Deephaven Distressed Opportunities Trading, Ltd., et al.,
Plaintiffs-Respondents,

-against-

3V Capital Master Fund Ltd., et al.,
Defendants-Appellants.

- - - - -

3V Capital Master Fund Ltd.,
Third-Party Plaintiff-Appellant,

-against-

Imperial Capital LLC, et al.,
Third-Party Defendants.

Index 600610/08
590803/08

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Andrew Kazin of counsel), for appellants.

Dickstein Shapiro LLP, New York (Jeffrey A. Mitchell of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered November 2, 2011, as amended by order entered on or about December 21, 2011, which granted plaintiffs' motion for summary judgment on their breach of contract claim as against 3V Capital Master Fund Ltd., SV Special Situations Master Fund, Ltd., SV Special Situations Fund LP, and SV Special Situations Fund, Inc., and order, same court and Justice, entered January 20, 2012, which denied the motion by all defendants for summary judgment dismissing the complaint, unanimously affirmed, with

costs.

As the motion court found, the threshold issue in this case is whether the parties intended to be bound by the Trade Confirmations (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 427 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]). The parties were sophisticated hedge funds that traded a claim through third-party defendant Imperial Capital LLC. They executed three Trade Confirmations that contained all the material terms of the trade and provided that closing was subject only to the negotiation, execution and delivery of a reasonably acceptable assignment agreement. Defendants argue that the provision subjecting the closing to the negotiation of an assignment agreement shows that the parties had no intent to be bound by the Trade Confirmations. However, before the assignment agreement was executed, defendants attempted to sell the underlying claim to the third-party defendant Post funds. Nowhere in their voluminous papers do defendants explain the basis for their selling a claim that, if they were not bound by the underlying Trade Confirmations, was not theirs to sell.

Defendants cite cases in which this Court held that agreements contemplating the execution of further agreements were non-binding. However, in none of those cases did the defendants so blatantly take ownership of the subject matter underlying the

initial agreement before the execution of the contemplated agreements. Here, as the motion court found, by referring to the claim as one of their assets, assigning it to the Post funds and expecting to be paid a profit, defendants admitted that the Trade Confirmations were binding.

We reject defendants' companion argument that the Trade Confirmations, which state that they cover claims allowed by the bankruptcy court, are not final because they lack a term governing the parties' rights upon disallowance. Defendants cite no authority for their contention that this omission renders the Trade Confirmations incomplete or non-binding. Their offer of parol evidence as to the importance of a disallowance representation was an improper attempt to create an ambiguity where none exists (*see Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [2007], *affd* 10 NY3d 25 [2008]).

Given the feeder nature of 3V Capital Master Fund Ltd. and the SV Special Situations Master Fund, Ltd. and 3V Capital Master Fund Ltd.'s admission in a government filing that SV Special Situations Master Fund, Ltd. was its successor, the court correctly found as a matter of law that the SV funds were successors in interest to 3V Capital Master Fund Ltd.

Issues of fact preclude summary judgment dismissing plaintiffs' remaining claims. Scott Stagg's self-serving

affidavit, without more, is insufficient to demonstrate defendants' entitlement to judgment as a matter of law (*see Slates v New York City Hous. Auth.*, 79 AD3d 435, 436 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]).

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

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8585 The People of the State of New York, Respondent, Ind. 7232/00

-against-

Raphael Cintron, Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Alexandra Keeling 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 (Richard D. Carruthers, J.), rendered July 23, 2010, resentencing defendant, as a second felony offender, to seven concurrent terms of 12 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 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8586 Commissioners of the State Insurance Fund,
Plaintiff-Appellant,

-against-

Mark Ramer & Michael R. Saperstein, etc., et al.,
Defendants-Respondents.

Index 401313/09

Michael Miliano, New York (Isaac N. Guy Okafor of counsel), for appellant.

Werbel, Werbel & Verchick, LLP, Brooklyn (Shelly Werbel of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 28, 2011, which denied, as premature, plaintiff insurer's motion for summary judgment on its claim for $161,776.75 in unpaid workers' compensation premiums plus interest, and to dismiss defendants' affirmative defenses, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff moved for summary judgment on the basis of, inter alia, audit worksheets that revealed that defendants owed an additional $161,776.75 in premiums for coverage supplied by plaintiff. In opposition, defendants disputed two aspects of plaintiff's audit. First, defendants argued that plaintiff had improperly billed them for coverage of two employees of their

subcontractor Z&K, as Z&K had covered the employees under its own policy with plaintiff. Second, defendants asserted that plaintiff had misclassified one of their employees and thus charged a higher premium than warranted by her work. Defendants' arguments are unavailing.

Under the plain terms of Z&K's workers' compensation policy, the two Z&K employees at issue were expressly excluded from coverage. Accordingly, plaintiff had properly billed defendants for coverage of those employees.

Defendants' failure to exhaust administrative remedies rendered their misclassification argument inappropriate for judicial review (*see Commissioners of State Ins. Fund v Yesmont & Assoc.*, 226 AD2d 147, 147 [1st Dept 1996]). Defendants argue that it would have been futile to seek review because the administrative agency only reviews challenges to classifications that are made within 12 months of the end of a policy term, and the audit at issue occurred more than 12 months after the end of two of the three applicable policy terms. Under the facts of this case, we are compelled to reject defendants' argument. The audit of the third policy period was completed in time for defendants to seek administrative review, and the agency's review of that period would have been determinative of all the issues in that period.

Even if the misclassification issue is reviewable, plaintiff's motion is not premature and should have been granted. Defendants never stated what classification code should have been assigned to the subject employee. If the employee was, indeed, improperly classified, that information would be in the exclusive possession of defendants, not plaintiff. Indeed, it was defendants who hired, supervised, and paid the employee, and thus they would know the exact nature of her work. Further, plaintiff assigned the employee a code for "painting/decorating," based on worksheets and other documentation provided by defendants during the audit; defendants, while protesting the classification, admitted that the employee had been paid for "painting" work, which confirms plaintiff's classification.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8587 Rajnarine Rampersaud, Index 308477/09
Plaintiff-Respondent,

-against-

Ann T. Eljamali,
Defendant-Appellant.

_____

Martin, Fallon & Mullé, Huntington (Stephen P. Burke of counsel), for appellant.

Law Offices of Richard M. Altman, Bronx (Alice Charles of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 6, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d). The Clerk is directed to enter judgment dismissing the complaint.

The reports of defendant's expert orthopedist and radiologist established prima facie that plaintiff's injuries were not permanent or significant because they had resolved and plaintiff had full range of motion in his cervical and lumbar spine (*see Porter v Bajana*, 82 AD3d 488 [1st Dept 2011]). Moreover, the radiologist affirmed that plaintiff suffered from a preexisting degenerative condition, unrelated to trauma (*id.*).

In opposition, plaintiff failed to raise a triable issue of fact. The MRI reports, chiropractor report, and medical records were in inadmissible form and therefore lacked probative value (*see Quinones v Ksieniewicz*, 80 AD3d 506, 506 [1st Dept 2011]). The medical expert's report, to the extent admissible, failed to raise a triable issue of fact as to causation, since the expert did not explain why plaintiff's prior injuries and degenerative condition were ruled out as the cause of his current alleged limitations (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Jimenez v Polanco*, 88 AD3d 604 [1st Dept 2011]). Absent evidence that plaintiff's injuries were caused by the subject accident, his 90/180-day claim fails (*see Jimenez*, 88 AD3d at 604).

Given the lack of serious injury, the issue of liability is academic (*see Hernandez v Adelango Trucking*, 89 AD3d 407, 408 [1st Dept 2011]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8588 The People of the State of New York, Respondent, Ind. 4868/09

-against-

Luis Natal, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 21, 2011, convicting defendant, after a bench trial, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 18 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 15 years, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supported the trier of fact's determination that although intoxicated, defendant had the intent to cause serious physical injury when he stabbed the victim in the chest (*see* Penal Law § 15.25). Defendant's oral and videotaped postarrest statements, as well as the observations

of the responding police officers, contradicted defendant's claim that he was so intoxicated that he was unable to form the requisite criminal intent (*see generally People v Sirico*, 17 NY3d 744, 746 [2011]).

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8589 In re Fatima V.,
Petitioner-Appellant,

-against-

Ramon V.,
Respondent-Respondent.

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

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about September 20, 2011, which, after a fact-finding hearing, dismissed the petition for an order of protection, unanimously affirmed, without costs.

The determination that respondent's actions did not rise to the level of the family offenses of harassment in the second degree, menacing in the third degree and disorderly conduct is supported by a fair preponderance of the evidence (*see* Family Court Act § 832). Petitioner did not offer sufficient evidence

in support of her petition, and there exists no basis to disturb the credibility determinations of the court (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8590 Trepp, LLC, Index 650004/11
Plaintiff-Appellant,

-against-

McCord Development, Inc.,
Defendant-Respondent.

_____

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Richard M. Howard of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Anil Singh, J.), entered January 18, 2012, pursuant to a so-ordered stipulation granting summary judgment in favor of plaintiff in the total amount of $101,908.06, and bringing up for review an order, same court and Justice, entered April 6, 2011, which denied defendant's motion to dismiss the portion of the complaint seeking $78,000 owed for the second year of the contract, following automatic renewal, unanimously affirmed, with costs.

The contract under which plaintiff agreed to give defendant access to its information and analytics concerning commercial and collateral mortgage-backed securities for a fee via plaintiff's website does not constitute a contract for "service . . . to personal property" (*see* General Obligations Law § 5-903; *Wornow v Register.Com, Inc.*, 8 AD3d 59 [1st Dept 2004]). The contract did

not involve the provision or lease of personal property (*see* General Obligations Law § 5-901; *compare Ovitz v Bloomberg L.P.*, 77 AD3d 515 [1st Dept 2010], *affd* 18 NY3d 753 [2012]).

Defendant's contention that the contract permits it to terminate its subscription after the initial three months upon giving 15 days written notice is unpreserved. In any event, such interpretation amounts to a strained reading of the plain language of the contract.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8591-
8592 Index 110157/09

Caribbean Direct, Inc., etc.,
Plaintiff-Appellant,

-against-

Dubset, LLC, et al.,
Defendants-Respondents.

_____

Frank M. Graziadei, P.C., New York, (Frank M. Graziadei of counsel), for appellant.

Gabriel Salem, Brooklyn, for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 17, 2011, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the quantum meruit claim, unanimously reversed, on the law, without costs, and the motion denied.

"[T]o establish a claim in quantum meruit, a claimant must establish (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Moses v Savedoff*, 96 AD3d 466, 471 [1st Dept 2012] [internal quotation marks omitted]).

Defendants do not dispute the first two elements. With respect to the third element, they contend that plaintiff (a) did

not expect compensation for any services other than the development of Dubset LLC's website and (b) should be estopped from arguing that it expected compensation for any such services. However, defendants failed to raise these arguments until their reply papers below, when plaintiff had no chance to respond. (*see e.g. Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]). Were we to reach the merits, we would note that "[t]he question of whether a party had a reasonable expectation of compensation for services rendered is a matter for the trier of fact to determine based on the evidence before it" (*Moors v Hall*, 143 AD2d 336, 338 [2d Dept 1988]; *see also Brennan Beer Gorman/Architects, LLP v Cappelli Enters., Inc.*, 85 AD3d 482, 483 [1st Dept 2011]).

Regarding the fourth element of quantum meruit, defendant Stein testified at his deposition that Brian Miller, who is affiliated with plaintiff, (a) sent him an e-mail with the number of hours that plaintiff had spent developing Dubset's website and (b) estimated that plaintiff had spent $30,000 - $40,000 developing the site. Stein further testified that, from the above data, he could deduce that plaintiff spent $100 - $200 per hour to develop the website. That is some evidence of the value of plaintiff's

services (*see Rolleston-Daines v Estate of Hopiak*, 263 AD2d 883, 885 [3d Dept 1999] [plaintiff's "own cost estimates" were "the most probative evidence of the reasonable value of the services rendered"]; *see also Brennan*, 85 AD3d at 484).

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8594 Jimmie Stephens, Index 401262/08
Plaintiff-Respondent,

-against-

Elrac, Inc., et al.,
Defendants-Respondents,

James Roth, et al.,
Defendants-Appellants.

- - - - -

[And Another Action]

Francine Scotto, Staten Island, for appellants.

Hach & Rose, LLP, New York (Michael A. Rose of counsel), for Jimmie Stephens, respondent.

Carman, Callahan & Ingham, LLP, Farmingdale (Michael M. Burkart of counsel), for Elrac, Inc. and Jeffrey Campbell, respondents.

Brand Glick & Brand, P.C., Garden City (Andrew Federman of counsel), for Glotel, Inc., respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered June 21, 2011, which, insofar as appealed from, denied the Roth defendants' cross-motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

This action for personal injuries arises from a motor vehicle accident that occurred when defendant, James Roth, the driver of one of the vehicles involved in the accident, collided with a vehicle driven by defendant Jeffrey Campbell, in which

plaintiff was a passenger. Campbell was in the process of making an illegal U-turn when Roth, who was traveling on the same road and had the right of way, collided with his car.

Although making an illegal U-turn is a violation of the Vehicle and Traffic Law (*see* Vehicle and Traffic Law § 1128[a]; § 1143), triable issues of fact exist as to whether defendant Roth was negligent in failing to avoid the accident and speeding. Roth testified that he did not see Campbell's car until just before impact yet he also testified that he had a clear, unobstructed view of the road. As such, there is a question of fact regarding whether Roth was negligent in failing to observe what should have been observed. In addition, plaintiff testified that Roth admitted that he could not stop before the accident and an individual who witnessed the accident testified that Roth was speeding, at a rate of 40 miles per hour, after having sped up to make a traffic light.

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

ENTERED: NOVEMBER 15, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8595N Rosenhaus Real Estate, LLC, Index 601012/09
Plaintiff-Appellant,

-against-

S.A.C. Capital Management, Inc., et al.,
Defendants-Respondents,

Macklowe Properties, LLC, et al.,
Defendants.

_____

David M. Samel, New York, for appellant.

Jones Day, New York (Todd R. Geremia of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about January 5, 2012, which granted the SAC defendants' motion for a protective order, unanimously affirmed, with costs.

Plaintiff failed to show that the several SAC officers and employees it had already deposed lacked information about the transactions at issue and that Steven A. Cohen, SAC's chief executive, uniquely possesses relevant information that renders his deposition necessary (*see Barnwell v Emigrant Sav. Bank*, 81 AD3d 518 [1st Dept 2011]; *Wo Yee Hing Realty Corp. v Stern*, 74 AD3d 469 [1st Dept 2010]). Cohen's lack of involvement in the

underlying transaction is undisputed, and plaintiff's assertion that he possesses relevant information is entirely speculative.

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

ENTERED: NOVEMBER 15, 2012

CLERK