SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 27, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

8495 In re Sheureka L.,
Petitioner-Respondent,

-against-

Sidney S.,
Respondent-Appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Order, Family Court, New York County (Lori S. Sattler, J.) entered on or about September 8, 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, unanimously affirmed, without costs.

Petitioner established by a fair preponderance of the evidence that respondent committed acts warranting an order of protection in her favor (see Family Ct Act §§ 832, 834). Family Court found that respondent "smacked [petitioner] across her chest," as alleged in the petition. It also found that an

additional incident occurred, supporting a finding of harassment in the second degree (Penal Law § 240.26; *People v Wood*, 59 NY2d 811 [1983]). Family Court also expressly found that petitioner's testimony was credible and respondent's testimony was not credible. No basis exists to disturb Family Court's findings of credibility (*Matter of Norma B. v Sven H.*, 74 AD3d 464 [1st Dept 2010]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

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

7549 John Cahn, Index 106110/04
Plaintiff-Respondent, 590947/05
590446/07
-against- 490446/07
590189/09

Ward Trucking, Inc., et al.,
Defendants-Respondents,

J.T. Falk & Company, Inc.,
Defendant-Respondent-Appellant,

460 Park Avenue South Associates, LLC,
Defendant.

- - - - -

J.T. Falk & Company, LLC,
Third-Party Plaintiff-Respondent-
Appellant,

-against-

Chemtreat, Inc.,
Third-Party Defendant-Appellant-
Respondent.

- - - - -

J.T. Falk & Company, LLC,
Second Third-Party Plaintiff-
Respondent-Appellant,

-against-

Atlantic Coastal Trucking, Inc., et al.,
Second Third-Party Defendants-
Respondents.

[And Other Actions]

_____

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

Ahmuty, Demers & McManus, Albertson, (Glenn A. Kaminska of

counsel), respondent-appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for John Cahn, respondent.

Downing & Peck, P.C., New York (Brian E. Gunther of counsel), for Ward Trucking, Inc., respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Debra A. Adler of counsel), for R.C. Dolner, LLC, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazanzky of counsel), for Taconic Management Company, LLC and 450 Park Avenue South Associates LLC., respondents.

Quirk and Bakalor, P.C., New York (Debra E. Seidman of counsel), for Atlantic Coastal Trucking, Inc. and Triangle Trucking, respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 16, 2011, which, to the extent appealed from, denied third-party defendant Chemtreat's motion for summary judgment dismissing the third-party complaint and all cross claims against it, and denied defendant/third-party plaintiff/second third-party plaintiff J.T. Falk's motion for summary judgment dismissing the complaint against it and for summary judgment on its claims for contractual and common-law indemnification against Chemtreat, and for common-law indemnification against Ward Trucking, Atlantic, Triangle and Bermudez, unanimously modified, on the law, to grant Chemtreat's motion, and otherwise affirmed, without costs. The Clerk is

directed to enter judgment dismissing the third-party complaint and all cross claims against Chemtreat.

This is an action to recover damages for personal injuries sustained by plaintiff when he was struck by a barrel (or drum) of cleaning chemicals that fell off of a hand truck in the lobby of a building owned by defendant 450 Park, where plaintiff worked. Third-party defendant Chemtreat, the vendor of the chemicals, which allegedly failed to pack the barrels properly for delivery, was entitled to summary judgment. The claims for common-law indemnification against Chemtreat should have been dismissed, as the record shows that Chemtreat was not actively at fault in bringing about plaintiff's injury (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). Indeed, it is undisputed that the barrels were unpacked by the independent trucking contractors who delivered them, and that the barrel that hit plaintiff fell after the trucking contractors rocked the hand truck during delivery. Chemtreat also owed no duty of care to plaintiff, who was a third party to the vending contract between Chemtreat and Falk (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]).

The claims for contractual indemnification against Chemtreat also should have been dismissed. The indemnity provision in

Chemtreat's contract with Falk was limited on its face to losses arising from the use of Chemtreat's patented devices, processes, materials and equipment. Because the chemicals were not in use at the time of the accident, a properly strict reading of the indemnity clause bars a finding that Chemtreat owes Falk contractual indemnity (*Baginski v Queen Grand Realty, LLC*, 68 AD3d 905 [2009]). Nor did Chemtreat owe Ward Trucking, which subcontracted the delivery of the barrels to Atlantic/Triangle, contractual indemnity; the contract between Chemtreat and Ward Trucking contains an indemnification clause only in favor of Chemtreat. There is no basis in the record for finding that Chemtreat is subject to the indemnification provisions in the building manager Taconic's construction contract with Dolner, the general contractor.

The court properly denied Falk's motion for summary judgment dismissing the complaint against it. Although Falk did not actually supervise the unloading and delivery of the barrels, issues of fact remain as to whether it had the authority to actually supervise that activity, given the very specific duty in its contract with Dolner to oversee deliveries of materials used

in the work (*cf. Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [2003], *lv denied* 100 NY2d 508 [2003]). Because fact issues exist as to Falk's liability to plaintiff, Falk was properly denied summary judgment on its claims for common-law indemnity.

> The Decision and Order of this Court entered herein on May 30, 2012 is hereby recalled and vacated (*see* M—2632 decided simultaneously herewith).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Friedman, J.P., Moskowitz, Freedman, Richter, Abdus-Salaam, JJ.

8327-
8328 The People of the State of New York,
Respondent,

-against-

Eric Shields,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Kenneth Law,
Defendant-Appellant.

Ind. 3578/09

Michael G. Santangelo, White Plains, for Eric Shields, appellant.

Yalkut & Israel, Bronx (Arlen S. Yalkut of counsel), for Kenneth Law, appellant.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 21, 2010, as amended September 23, 2010, convicting defendant Kenneth Law, after a jury trial, of enterprise corruption, scheme to defraud in the first degree, conspiracy in the fifth degree, grand larceny in the first degree and five counts of grand larceny in the second degree, and sentencing him to an aggregate term of 5 to 15 years, unanimously

modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences on the enterprise corruption conviction and all larceny convictions to terms of 3 to 9 years, resulting in a new aggregate term of 3 to 9 years, and otherwise affirmed. Judgment, same court, Justice and dates, convicting defendant Eric Shields, after a jury trial, of enterprise corruption, scheme to defraud in the first degree, conspiracy in the fifth degree, grand larceny in the first degree and three counts of grand larceny in the second degree, and sentencing him to an aggregate term of 5½ to 16½ years, unanimously affirmed.

The verdicts as to both defendants were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The jury could have reasonably found that the accomplice testimony was both credible and adequately corroborated, and that the evidence established defendants' participation in the fraudulent transactions with knowledge of their fraudulent nature.

In this lengthy, multidefendant trial, the court properly exercised its discretion when it imposed reasonable limits on cross-examination. Defendants were not deprived of their rights to present a defense and to confront witnesses (*see Delaware v*

Van Arsdall, 475 US 673, 678 [1986]). The court permitted defendants to delve into all appropriate subject matters, and only precluded questioning that was cumulative, excessively lengthy, speculative, improper in form, or of questionable relevance. Defendants were permitted to conduct effective cross-examinations, and were not prejudiced by the court's limitations, which did not interfere with their ability "to expose to the jury facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of witnesses" (*Davis v Alaska*, 415 US 308, 318 [1974]).

The court properly exercised its discretion in admitting into evidence the summary charts prepared by the People's investigator. The charts assisted the jury in evaluating the voluminous evidence, and the alleged defects in the charts did not affect their admissibility. The court carefully instructed the jury that the charts were not independent evidence, but were valid only insofar as the jury concluded that they were accurately based on the evidence in the record (*see e.g. United States v Casamento*, 887 F2d 1141, 1151 [2d Cir 1989], *cert denied* 493 US 1081 [1990]). Given the limited role of these charts, the court's restrictions on defendants' cross-examination of the

investigator who prepared the charts were appropriate and nonprejudicial.

There is no support for the claim that the People introduced evidence that they knew or should have known was false.

The court properly denied defendant Law's motion to sever his case from that of his codefendants (*see* CPL 200.40[1][d][iii]). Evidence relating to the acts of the codefendants was admissible against defendant and necessary to prove the charged offenses, and defendant did not establish good cause for a severance (*see People v Council*, 52 AD3d 222 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008]).

We find defendant Law's sentence excessive to the extent indicated. We perceive no basis for reducing defendant Shields's sentence.

Defendants' remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 27, 2012

CLERK

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

8504-
8505-
8506

Aron Grinshpun, et al.,
Plaintiffs-Respondents,

Index 115376/10

-against-

Gennady Borokhovich, etc.,
Defendant-Appellant,

Vitaly Zaretsky,
Defendant.

Novak, Juhase & Stern, LLP, Cedarhurst (G. Alexander Novak of counsel), for appellant.

Michael Konopka, New York, for respondents.

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 9, 2011, awarding plaintiffs the principal sum of $2,162,104, and bringing up for review orders, same court and Justice, entered October 3, 2011, and December 23, 2011, which granted plaintiffs' motion for a default judgment and which, to the extent appealed, denied defendant Borokhovich's motion for renewal, unanimously affirmed, without costs. Appeals from the aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Judgment was properly awarded without an inquest since the amount sought was a "sum certain" (*see Transit Graphics v Arco Distrib.*, 202 AD2d 241 [1st Dept 1994]). Further, although not

raised by the parties, the argument that an inquest was required was not raised until defendant moved for renewal.

The challenge to service of process was properly denied without a traverse hearing. The affidavit of the process server constitutes prima facie evidence of proper service and the mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper (*see Matter of De Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]*; NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). Defendant's wife, who was alleged to have accepted receipt of the summons and complaint, failed to submit an affidavit denying receipt of service or a medical affidavit substantiating her claim that she was incapable of providing an affidavit on the initial motion.

The proposed answer verified by an attorney without personal knowledge of the facts was insufficient to set forth a meritorious defense warranting vacatur of the default (*see Young v Edwards*, 26 AD3d 249, 250 [1st Dept 2006]). Defendant's own brief conclusory statement submitted for the first time on renewal was also insufficient.

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

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

ENTERED: NOVEMBER 27, 2012

CLERK

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

8524 JMC Northeast Corporation, Index 6511696/10
Plaintiff-Respondent,

-against-

Oscar Porcelli, et al.,
Defendants-Appellants,

Ross Brothers, Inc.,
Defendant.

Norman A. Olch, New York, for appellants.

Biancone & Wilinsky, LLP, New York (Thomas B. Wilinsky of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about April 8, 2011, which, to the extent appealed from as limited by the briefs, denied the motion by defendants Oscar Porcelli and 2318, LLC to dismiss the fraud and aiding and abetting fraud causes of action as against them pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of Porcelli and 2318, LLC dismissing the complaint as against them.

Plaintiff's claims are based on allegations that defendants misrepresented the net profits as well as the expenses and revenues of a business that was the subject of the parties' Asset

Purchase and Sale Agreement. The motion should have been granted because the agreement provided that plaintiff was not relying on any representations outside of the agreement "as to the past, present or prospective income or profits of" the business. The specificity of the disclaimer destroys the allegation that plaintiff entered into the agreement in reliance on defendants' contrary representations (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]). The "exclusive knowledge" exception to the *Danann* rule articulated by this Court in *Steinhardt Group v Citicorp* (272 AD2d 255 [1st Dept 2000]) does not apply under the facts of this case, where plaintiff chose to enter into the transaction despite its own knowledge of the purported inaccuracy of information provided by defendants. Accordingly, the record demonstrates that plaintiff could not have justifiably relied on the list of expenses or general ledger provided by defendants

(*see Churchill Fin. Cayman, Ltd. v BNP Paribas*, 95 AD3d 614 [1st Dept 2012]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, P.J., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8618 The People of the State of New York, Respondent, Ind. 3853/09

-against-

Ernesto Encarnacion, Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered August 17, 2010, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of five years' probation with community service, unanimously affirmed.

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

The court properly exercised its discretion in granting the prosecutor's challenge for cause to a prospective juror. "It is almost always wise...to err on the side of disqualification"

because “the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror” (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]). The panelist indicated that she was biased against the police and could not be impartial in this case (*see People v Arnold*, 96 NY2d 358, 362 [2001]). She gave sharply conflicting responses that, when viewed as a whole, could not be viewed as containing an unequivocal assurance of impartiality.

Defendant did not preserve his challenge to the People’s use of a prior consistent statement to rebut a claim of recent fabrication, and we decline to review it in the interest of justice. Although the record indicates that defendant objected to this evidence, there is no indication that he objected on the grounds he raises on appeal.

The prior consistent statement consisted of the victim’s grand jury testimony in a proceeding that targeted another alleged participant in this assault, and that predated a motive to falsify that had been asserted by the defense (*see generally People v McClean*, 69 NY2d 426 [1987]). In that grand jury presentation, the victim did not refer to his second assailant by name, but only as “the big one.” At defendant’s trial, the prosecutor elicited a clarification from the victim that “the big

one" referred to defendant.

On appeal, defendant's principal argument is that, under the circumstances of the case, the grand jury testimony could not rebut a claim of recent fabrication unless it specifically implicated defendant, and that the testimony failed to do so until it was embellished by the prosecutor's allegedly improper question. However, defendant did not object to the clarifying question or do anything else to alert the court to this particular claim.

As an alternative holding, we find no basis for reversal. The prosecutor's clarifying question was permissible, and the import of the victim's grand jury testimony presented a factual issue for the jury to resolve.

When the deliberating jury requested a readback of the grand jury testimony at issue, defendant requested, for the first time, an instruction that the grand jury testimony was to be used by the trial jury only for rehabilitation of the witness. We find

that any error regarding the absence of such a limiting instruction was harmless (*see generally People v Crimmins*, 36 NY2d 230, 239-241 [1975]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8622 Ernest Lewis, et al., Index 101833/07
Plaintiffs-Respondents,

-against-

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

Steve S. Efron, New York (Renee L. Cyr of counsel), for appellants.

Alexander J. Wulwick, New York, for respondents.

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 9, 2011, after a jury trial, awarding plaintiffs the principal amounts of $2,500,000 for past pain and suffering, $4,000,000 over ten years for future pain and suffering and $283,202.90 for past hospital, rehabilitation and medical expenses, unanimously affirmed, without costs.

The trial court providently exercised its discretion in charging the jury as to the common carrier's duty when a passenger is disabled (PJI 2:162), which asked the jury to consider plaintiff's infancy, to the extent that the driver knew or should have known of it. The charge took into account the existing circumstances and did not create a higher duty of care (*see Bethel v New York City Tr. Auth.*, 92 NY2d 348, 351 [1998]).

Plaintiff could be considered a “passenger,” as he was trying to catch the bus at the time of the accident and testified that he had indicated his desire to board the bus by tapping on it.

The jury’s finding that defendants were solely at fault was supported by sufficient evidence and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Based upon the evidence presented at trial, including testimony that plaintiff had tapped on the stopped bus as he approached it from the rear, and that his mother stood in front of the bus’s open doors while gesturing him to come forward, it was reasonable for the jury to conclude that the driver, who admitted that he saw a “shadow” approaching, had acted negligently in pulling out of the bus stop and that plaintiff was not at fault.

The evidence shows that plaintiff suffered a serious injury to his right leg, including a fractured fibula, which required open reduction and internal fixation, and a degloving injury, which required skin and muscle grafting and several debridements. These injuries required extensive hospitalization and rehabilitation and resulted in scarring, worsening arthritic changes, permanent loss of range of motion and sensation, and a

need for a future ankle fusion. Defendants offered no expert testimony as to damages. Accordingly, we find the damages award not to be excessive.

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8623 In re Sergio Hernandez, Index 106213/11
Petitioner-Respondent,

-against-

The Office of the Mayor of
the City of New York,
Respondent-Appellant.

_____

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

Schlam Stone & Dolan LLP, New York (Raffi Melkonian of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered December 6, 2011, granting the petition brought pursuant to CPLR article 78 seeking to annul a determination of respondent Office of the Mayor of the City of New York, dated January 26, 2011, which denied petitioner's requests under the Freedom of Information Law (FOIL) for certain email messages sent from or received by any government email accounts assigned to the Office of the Mayor to or from Cathleen Black, at the time she was a nominee for the position of New York City School Chancellor, or any email address ending with the domain name of the company that employed her, to the extent of directing respondent to produce redacted copies of

such emails, and directing the parties to appear for a conference on the issue of attorney's fees and costs, unanimously affirmed, without costs.

The motion court properly directed respondent to disclose the redacted emails, which are not exempt from disclosure as inter- or intra-agency materials (Public Officers Law § 89[2][g]). Black was not an agent of the City since she had not yet been retained as Chancellor (*cf. Matter of Sea Crest Constr. Corp. v Stubing*, 82 AD2d 546 [2d Dept 1981]). Further, Black was not acting simply as an outside consultant on behalf of the City, but was a private citizen with interests that may have diverged from those of the City (*see Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 163 [1st Dept 2008]; *see also Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652 [2012]; *cf. Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131 [1985]).

Costs and attorney's fees should be decided by the motion court in the first instance.

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8624 The People of the State of New York, Ind. 2362/10
Respondent,

-against-

Craig Witter,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about February 15, 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 27, 2012

CLERK

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

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8625 In re Ebony Thorton, Index 402864/11
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent,

Youth Action Homes I,
Respondent.

_____

Ebony Thornton, appellant pro se.

Kelly D. MacNeal, New York (Marisa D. Shemi of counsel), for New York City Housing Authority, respondent.

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Judgment, Supreme Court, New York County (Arthur Engoron, J.), entered November 28, 2011, denying the petition seeking to annul the determination of respondent New York City Housing Authority to terminate petitioner's Section 8 rent subsidy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner received the Notice of Final Determination in April 2011 advising her that her Section 8 rent subsidy had been terminated. However, she did not commence this proceeding until October 2011, which was more than two months after the statute of limitations had expired (*see Matter of Delgado v New York City Hous. Auth.*, 88 AD3d 521 [1st Dept 2011]; CPLR 217[1]). This

Court cannot extend the statute of limitations (*see* CPLR 201), nor does it have discretion to address the merits of petitioner's other arguments (*see Matter of M & D Contrs. v New York City Dept. of Health*, 233 AD2d 230, 231 [1st Dept 1996]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8626 Maria Gonzales, et al. Index 101037/06
Petitioners-Respondents, 570261/07

-against-

Ihay Zinner, et al.,
Respondents,

Department of Housing Preservation
and Development,
Respondent-Respondent,

Esquire Group Estates, LLC,
Respondent-Intervenor-Appellant.

- - - - -

Elisa Vazquez, et al.,
Petitioner,

-against-

Ihay Zinner, et al.,
Respndents,

Vintage Ventures, LLC,
Respondent-Intervenor-Appellant.

_____

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for Department of Housing Preservation and Development, respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about December 1, 2010, which affirmed an order of the Civil Court, New York County (David B. Cohen,

J.), entered on or about September 30, 2009, granting respondent Department of Housing Preservation and Development's (HPD) motion to clarify a provision of an order and judgment (one paper), same court (Pam B. Jackman Brown, J.), entered on or about December 21, 2007, that HPD had the authority to issue loans to the Article 7A Administrator for repair of the subject buildings and to place liens against these properties in connection with the loans without prior court approval, unanimously affirmed, without costs.

Intervenors' interpretation of the court's appointment order, made pursuant to RPAPL 778(1), does not comport with our reading of the order. "[T]he starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Here, the plain language of the court's order expressly empowers and authorizes the 7A Administrator to, among other things, obtain loans from HPD, and permits HPD to place liens on the subject buildings in connection with those loans, without prior court approval. By contrast, the order requires the 7A Administrator to obtain court approval prior to obtaining loans from any bank, lending institution or grant which would result in a lien on the premises.

Moreover, intervenors' challenge to the 7A Administrator's use of funds for repairs is unpersuasive inasmuch as they failed to dispute such charges within the 30-day period prescribed by statute despite having had the opportunity to do so from the date they purchased the subject buildings (*see* Administrative Code of City of NY § 27-2129; *Wilson Realty, LLC v New York City Dept. of Hous. Preserv. & Dev.*, 25 Misc 3d 1221[A], 2009 NY Slip Op 52226[U] [Sup Ct, NY County 2009]).

Intervenors' claim that the court's order violated the due process clause is unpreserved, since it was not raised before the Civil Court (*see DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 553 [1st Dept 2011]), and we decline to review it in the interest of justice. Were we to consider the claim, we would find it unavailing, since intervenors purchased the buildings subject to the 7A Administration, were permitted to intervene in the proceedings, and were afforded "an opportunity . . . to contest the overall legitimacy of the need for the proposed repairs and

renovations and the reasonableness of the amounts to be borrowed" (*Chase Group Alliance LLC v City of N.Y. Dept of Fin.*, 620 F3d 146, 151 [2d Cir 2010]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8627 Charles Raffa, Jr., Index 305790/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

U.R.S. Corporation, et al.,
Defendants.

Broderick & Broderick, Bayside (Patrick F. Broderick of counsel), for appellant.

Greenblatt Lesser, LLP, New York (Gershon D. Greenblatt of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 16, 2011, which granted defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, the motion denied as to plaintiff's claims of negligence and violation of Labor Law § 200, and otherwise affirmed, without costs.

Supreme Court should have denied that portion of the motion which sought dismissal of plaintiff's negligence and Labor Law § 200 claims against the City. Because the Labor Law § 200 and common-law negligence claims are based on a dangerous condition on the site, not on the methods or materials used in the work,

the only issue is whether defendant City had notice of the condition, not whether it exercised supervisory control over the manner of performance of plaintiff's work (*Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010]).

Plaintiff testified that he slipped while going from his car to a trailer and that, during the two days immediately before his accident, he had lodged multiple complaints to the foreman and superintendents about snow and/or ice covering that area. Two of his co-workers also testified that the area had been covered in a slippery sheet of ice four to six inches thick for about three days prior to plaintiff's accident. The day before plaintiff's accident, another worker slipped on ice, albeit at a different location within the work site, and the Department of Environmental Preservation's project manager, the "lead on-site" figure, testified that, if there was an accident, he would be notified via email. Viewing all of the evidence in a light most favorable to plaintiff, and drawing all reasonable inferences in his favor, as is required at this procedural posture (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), a question of fact exists as to whether the City had actual or constructive notice of the icy condition that caused plaintiff's injury (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838

[1986]; *Callan v Structure Tone, Inc.*, 52 AD3d 334 [1st Dept 2008]; *Lewis v Lower E. Side Tenement Museum*, 40 AD3d 438, 439 [1st Dept 2007]).

Plaintiff's Labor Law § 241(6) claim was properly dismissed because the Industrial Code provisions set forth in the supplemental bill of particulars are not applicable. Here, the open, unpaved area where plaintiff was walking when he fell was not "a floor, passageway, walkway, scaffold, platform or other elevated working surface," within the purview of 12 NYCRR 23-1.7 (d) (*see Cook v Orchard Park Estates, Inc.*, 73 AD3d 1263 [3d Dept 2010]; *Porazzo v City of New York*, 39 AD3d 731 [2d Dept 2007]; *Roberts v Worth Constr., Inc.*, 21 AD3d 1074 [2d Dept 2005]; *Lawyer v Hoffman*, 275 AD2d 541 [3d Dept 2000]). Nor was the area a floor, platform or similar area where people "work or pass,"

and no "tripping hazard" is alleged, under 12 NYCRR 23-1.7 (e)(2) (*see Cook*, 73 AD3d 1263; *Scofield v Trustees Of Union Coll.*, 288 AD2d 807 [3d Dept 2001]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8628-
8628A
8628B In re Isiah Steven A., and Others

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

Anne Elizabeth Pierre L.,
Respondent-Appellant,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

C/O Ballon Stoll Bader & Nadler, P.C., New York (Frederic P. Schneider of counsel), attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about December 14, 2009, which, to the extent appealed from as limited by the briefs, revoked a suspended judgment entered on a finding of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent had violated the terms of the

suspended judgment is supported by a preponderance of the evidence (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Aliyah Careema D. [Sophia Seku D.]*, 88 AD3d 529 [1st Dept 2011]). Respondent admittedly failed to attend all visits with the children and all doctor's appointments, failed to obtain adequate housing and a steady income, and failed to understand each child's medical needs (*see Matter of Gianna W. [Jessica S.]*, 96 AD3d 545, 545 [1st Dept 2012]). Any lapses by the agency did not relieve respondent of her responsibility to comply with the terms of the suspended judgment (*Matter of Lourdes O.*, 52 AD3d 203, 203 [1st Dept 2008]).

A preponderance of the evidence supports the determination that termination of respondent's parental rights is in the children's best interests (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have been in the same foster homes for at least three years, and they have foster parents who have provided for their special needs and wish to adopt them (*Aliyah*, 88 AD3d at 529-530). A further suspended judgment is not

warranted, given that respondent has made only minimal progress in obtaining the ability to care for the children.

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8629 The People of the State of New York, Respondent, Ind. 4855/02 6149/02

-against-

Derrick Jordan, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about January 5, 2012, which denied defendant's CPL 440.46 applications for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of defendant's resentencing applications (*see e.g. People v Anonymous*, 85 AD3d 414, 415 [1st Dept 2011], *lv denied* 18 NY3d 922 [2012]). Although defendant claims to have been a mere street level seller, there are significant and reliable indicia of higher level trafficking, including the fact that two of defendant's convictions involved sales of half an ounce or more of cocaine. In addition, defendant's record includes repeated violations of parole, seven tier II prison disciplinary violations, and a

pattern of serious misconduct against women while at liberty. The mitigating factors cited by defendant failed to outweigh the aggravating factors in his background.

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8630 Jodi Miller, Index 108972/09
Plaintiff, 591010/09

-against-

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

Consolidated Edison Company
of New York, Inc.,
Defendant-Appellant,

Safeway Construction Enterprises, Inc.,
Defendant-Respondent.

- - - - -

Consolidated Edison Company
of New York, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Safeway Construction Enterprises, Inc.,
Third-Party Defendant-Respondent,

Nico Asphalt, Inc.,
Third-Party Defendant.

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Office of Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for appellant.

Rafter and Associates PLLC, New York (Patrick B. McKeown of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 7, 2011, which, to the extent appealed from, granted third-party defendant Safeway Construction Enterprises,

Inc.’s motion for summary judgment dismissing the complaint and the third-party complaint as against it, unanimously affirmed, without costs.

Pursuant to a contract with Con Ed, Safeway performed excavation, conduit installation, and backfilling at an intersection where, a few days later, plaintiff allegedly was injured when the front wheel of her scooter fell into a trench in the roadway. The contract called for Safeway to leave the trench an inch and a half below grade; the Con Ed construction representative who oversaw Safeway’s work testified that Safeway restored the trench to a depth of an inch and a half below grade. In opposition to this prima facie showing that Safeway did precisely what it was obligated to do under the contract, Con Ed failed to raise an issue of fact whether Safeway performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff, for whose injuries it could be held liable (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 493 [1st Dept 2010]). We reject Con Ed’s contention that Safeway owed plaintiff a duty pursuant to general negligence principles (*see Espinal*, 98 NY2d at 140).

Contrary to Con Ed’s contention, no issue of fact exists

whether Safeway breached its contractual duty to "protect and maintain" the 1½-inch-deep trench for five days after completing its work by failing to place cones or barricades in the vicinity. Pursuant to article 7.6 of Con Ed's "Trenching Manual," Safeway was "responsible for maintaining excavations and plates for a period of 5 working days from the date excavations are available for use by others." However, as defined in article 21 of Con Ed's "Standard Terms and Conditions of Construction Contracts," "maintenance" means keeping the work site "neat, orderly and workmanlike" so as not to interfere with the progress of work performed there; the definition does not refer to the safety of the general public.

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8631 Candace Carmel Barasch, Index 600053/09
Petitioner-Respondent,

-against-

Williams Real Estate Co., Inc.,
Respondent-Appellant,

Williams Corporate Realty
Services, Ltd., et al.,
Respondents.

Foley & Lardner LLP, New York (Jeremy L. Wallison of counsel), for appellant.

Wachtel Masyr & Missry LLP, New York (John H. Reichman of counsel), for Candace Carmel Barasch, respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered on or about November 7, 2011, which, to the extent appealed from as limited by the briefs, granted petitioner an appraisal of the fair value of her shares in respondent Williams Real Estate Co., Inc. (Williams) and denied Williams' cross motion for summary judgment dismissing the petition as against it, unanimously affirmed, with costs.

Williams sent a formal notice to its shareholders, stating that a meeting would be held to consider "[t]he authorization . . . of *the proposed disposition of substantially all of [its] assets*" (emphasis added). In reliance thereon, petitioner chose

to exercise her appraisal rights under Business Corporation Law § 910(a) instead of, for example, seeking to enjoin the transaction. Hence, Williams is estopped from denying that it disposed of substantially all of its assets (*see Matter of McKay v Teleprompter Corp.*, 19 AD2d 815 [1st Dept 1963], *appeal dismissed* 13 NY2d 1058 [1963]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8632 The People of the State of New York, Ind. 2732/02
Respondent,

-against-

Crispin Guity,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered July 18, 2011, resentencing defendant to an aggregate term of 12 years, with five 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 Velez*, 19 NY3d 642, 647-649 [2012]; *People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8633 VBH Luxury, Incorporated, Index 111342/07
Plaintiff-Appellant, 590589/09

-against-

940 Madison Associates, LLC,
Defendant-Respondent.

[And a Third-Party Action]

_____

Phillips Nizer LLP, New York (Bruce J. Turkle of counsel), for appellant.

Baker & Hostetler, LLP, New York (Dennis O. Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 16, 2011, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment as to liability, dismissing the affirmative defense of waiver, and declaring it the prevailing party under the lease, and granted defendant's cross motion for summary judgment dismissing the claims for consequential damages and lost profits and the cause of action for breach of the implied covenant of good faith and fair dealing, unanimously affirmed, without costs.

The lease exculpates the landlord from liability for lost rental value, and the lost profits claim for the new venture was speculative (*see Digital Broadcast Corp. v Ladenburg, Thalmann &*

Co., Inc., 63 AD3d 647, 647-648 [1st Dept 2009], *lv dismissed* 14 NY3d 737 [2010]). Plaintiff failed to provide a basis for calculating lost profits with reasonable certainty based on known reliable factors (*see Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]). There is no showing that plaintiff ever made a profit. The breach of the implied covenant of good faith cause of action is duplicative of the breach of contract cause of action (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

Issues of fact exist as to defendant's alleged refusal to sign a signage permit and failure to remove a Landmarks Commission violation. Defendant's liability for damage from leaky pipes is disclaimed in the lease; the disclaimer is not inconsistent with defendant's maintenance obligation, and does not render that obligation meaningless.

The motion court correctly denied, sub silentio, plaintiff's motion as to attorney's fees as the prevailing party under the lease. Plaintiff was not victorious and did not obtain relief (*see 542 E. 14th St. LLC v Lee*, 66 AD3d 18, 24-25 [1st Dept 2009]).

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 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8634 Dana Hammond, et al., Index 107660/09
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

_____

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 1, 2011, which granted defendant The City of New York's motion to reargue its motion to dismiss the complaint, and upon reargument, granted the motion, unanimously affirmed, without costs.

The complaint was properly dismissed because the City demonstrated that it had no prior written notice of the alleged defect and no exception to the notice-requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). There is no evidence that the City created the alleged defect or hazard through an affirmative act of negligence (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Plaintiff's contention is supported by nothing more than mere speculation that the alleged

height differential between the dirt in the tree well and the surrounding sidewalk was immediately present at the time construction of the tree well was completed, and plaintiff's notice of claim failed to give notice of the theory that the City was affirmatively negligent in failing to install tree gratings or cobblestones (*see Ghin v City of New York*, 76 AD3d 409, 410 [1st Dept 2010].

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8635N Atlantic Mutual Insurance Company, Index 651282/10
Plaintiff-Appellant,

-against-

M.H. Kane Construction Corp., et al.,
Defendants-Respondents.

Gottesman, Wolgel, Malamy, Flynn & Weinberg, P.C., New York (Richard B. Demas of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 24, 2011, which granted defendants' motion to change venue from New York County to Suffolk County pursuant to CPLR 510(3), unanimously reversed, on the law, without costs, and the motion denied.

Defendants' initial moving papers provided the names, addresses and occupations of four prospective nonparty witnesses in Suffolk County, but failed to make the requisite showing that those witnesses were actually contacted and were willing to testify, or to set forth the substance and materiality of their testimony (*see Berk v Linnehan*, 85 AD3d 475 [1st Dept 2011]). Nor did defendants provide any reason why traveling to New York County would constitute a hardship for those witnesses (*see*

Hernandez v Rodriguez, 5 AD3d 269, 270 [1st Dept 2004]; *Gluck v Pond House Farm*, 271 AD2d 334, 334-35 [1st Dept 2000]).

Defendants' attempt to cure these deficiencies in their reply papers was improper (*see Root v Brotmann*, 41 AD3d 247 [1st Dept 2007]). In any event, defendants failed to demonstrate that the proposed testimony of the nonparty witnesses, concerning defendants' claim that the County of Suffolk wrongfully declared defendant M.H. Kane Construction Corp. in default under a construction contract, would be material in the instant case in which plaintiff, a surety on performance bonds issued in connection with the construction project, seeks to recover pursuant to an indemnity agreement executed by defendants (*see BIB Constr. Co. v Fireman's Ins. Co. of Newark, N.J.*, 214 AD2d 521 [1st Dept 1995]).

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

ENTERED: NOVEMBER 27, 2012

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman ,JJ.

8680 In re Kolonji Mahon, Ind. 4569/10
[M-4676] Petitioner,

-against-

Hon. Michael A. Gross, et al ,
Respondent.

_____

Kalonji Mahon, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Michael Gross, Hon. Efrain Alvarado, Hon. Nicholas Iacovetta and Eric T. Schneiderman, respondents.

Robert T. Johnson, District Attorney, Bronx (Lindsay Ramistella of counsel), for District Attorney, 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 27, 2012

CLERK

Andrias, J.P., Saxe, Catterson, Renwick, Román, JJ.

7503 & M-1492 The People of the State of New York, Respondent,

-against-

Christopher B., Defendant-Appellant.

Ind. 1263/09

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

Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner and Richard Nahas of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about October 4, 2011, dismissed, without costs, as taken from a nonappealable order.

M-1492 - Motion to amend the caption granted.

Opinion by Andrias, J.P., All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
James M. Catterson
Dianne T. Renwick
Nelson S. Román, JJ.

7503
M-1492
Indictment 1263/09

_____x

The People of the State of New York,
Respondent,

-against-

Christopher B.,
Defendant-Appellant.
_____x

Defendant appeals from the order of the Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about October 4, 2011, which denied his motion to quash a court-ordered subpoena duces tecum served on behalf of the New York County District Attorney's Office seeking his psychiatric records in connection with a pending CPL 730.50 retention hearing.

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

Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner and Richard Nahas of counsel), for respondent.

ANDRIAS, J.

Defendant seeks to appeal from an order that denied his motion to quash a court-ordered subpoena duces tecum served on behalf of the New York County District Attorney's Office on the Director of Medical Records of Kirby Forensic Psychiatric Center (Kirby) requesting defendant’s post-commitment psychiatric records in connection with a pending CPL 730.50(2) retention hearing. As explained below, the denial of the motion to quash the subpoena is a nonappealable order. However, were the order appealable, we would find that Supreme Court correctly determined that the District Attorney had standing to participate in the retention proceeding and was entitled to the subpoenaed psychiatric records in the interests of justice pursuant to Mental Hygiene Law § 33.13(c).

On February 19, 2009, defendant was arrested and charged with setting fire to a bookcase in the lobby of an occupied apartment building and to four cars. At the time of his arrest, defendant possessed several weapons, including a loaded .22 caliber firearm, and a bottle of gasoline. A search of his home recovered a sawed-off shotgun with ammunition, as well as more than 200 rounds of .22 caliber ammunition and another bottle of gasoline.

On February 20, 2009, defendant was arraigned at Bellevue

Hospital and remanded for a competency examination pursuant to CPL 730.30. On March 11, 2009, defendant was indicted on arson and weapons possession charges. On March 26, 2009, he was arraigned on the indictment and the People moved to confirm the results of the CPL 730 examination, which found that defendant lacked the capacity to understand the proceedings and assist in his defense. Defendant was committed to the custody of the Commissioner of Mental Health and confined to Kirby (*see* CPL 730.50[1]).

On March 24, 2010, Kirby notified the court and the District Attorney that defendant had been restored to fitness. The report in support of competency restoration noted possible malingering. After defendant was transferred to Riker's Island to await trial, his attorney once again requested a CPL 730.30 examination, and the examiners found that defendant was not fit to stand trial. By order dated July 1, 2010, defendant was committed to the custody of the Commissioner and returned to Kirby as an incapacitated person.

In June 2011, two members of Kirby's forensic committee concluded that defendant was fit to stand trial; one of them implied that defendant had feigned delusional thinking during his previous admission, i.e., had been malingering. The third member found that defendant was still incapacitated. Defendant's

treating psychiatrist also found that defendant was fit, and recommended that he be returned to court. Nevertheless, Kirby's clinical director disapproved the recommended action, and on June 27, 2011, Kirby filed an application for an order of retention pursuant to CPL 730.50(2). Notice of the application was served on Mental Hygiene Legal Services (MHLS) and the District Attorney.

Defendant requested a CPL 730.50(2) hearing on the retention application. At a July 21, 2011 hearing date, the People, expressing concern over defendant's history of violence and the possibility that he was malingering, presented a subpoena duces tecum, which the court signed, directing Kirby to produce defendant's psychiatric records "from April 1, 2009 to the present." On August 16, 2011, defendant, represented by MHLS, moved to quash the subpoena. Supreme Court denied the motion.

"It is well established that '[n]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute'" (*People v Pagan*, 19 NY3d 368, 370 [2012], quoting *People v Dunn*, 4 NY3d 495, 497 [2005]). The order appealed from, which denied defendant's motion to quash a court-ordered subpoena, is not a disposition listed in CPL 450.10 or 450.15 (*see People v Hurley*, 47 AD3d 488, 488 [1st Dept 2008] ["Nothing in CPL article 450 authorizes an appeal from an order

denying a motion for a subpoena duces tecum"]).

Nor was Supreme Court "acting solely in the exercise of its civil jurisdiction" (CPL 10.10 [7]; *see also People v Santos*, 64 NY2d 702 [1984] [orders determining motions to quash subpoenas are appealable civil orders only when issued in the investigation stage of a criminal case]). CPL article 730 "provides a procedure for assessing the mental capacity of criminal defendants to stand trial and for the commitment of those found incapacitated, until such time as they regain competency to understand the criminal proceedings against them and to assist in their defense" (*People v Lewis*, 95 NY2d 539, 543 [2000], *cert denied* 534 US 833 [2001]). In this case, Kirby sought an order of retention pursuant to CPL 730.50(2), which is issued by a superior court exercising criminal jurisdiction (*see id.* at 547). Defendant then requested a retention hearing, and the so-ordered subpoena duces tecum addressed to Kirby's director of medical records was issued in connection therewith to aid the People in their examination of Kirby's witnesses (see CPL 610.10[2], [3]).

Defendant's invocation of the subpoena provision of CPLR 2304 and his characterization of this appeal as civil do not alter the conclusion that the motion court was not acting solely in the exercise of its civil jurisdiction when it denied his motion to quash the subpoena. CPL 1.20(18)(b) defines a criminal

proceeding as any proceeding that, among other things, “occurs in a criminal court and is related to a prospective, pending or completed criminal action . . . .” It cannot be argued that the proceedings herein “in no way affect the criminal proceeding ... and are entirely collateral to and discrete from the criminal proceeding” (*see Matter of Director of Assigned Counsel Plan of City of N.Y.* [Bodek], 87 NY2d 191, 196 [1995] [Bellacosa, J., concurring]). “Defendant remains under criminal indictment, and the order clearly arose out of the criminal proceeding against him” (*People v Anonymous*, 284 AD2d 207 [1st Dept 2001] [citation omitted]). To describe this appeal as "civil" because the court alternatively based its determination on Mental Hygiene Law § 33.13(c) would be to “resort to interpretative contrivances to broaden the scope” of CPL article 450 (*see People v Hernandez*, 98 NY2d 8, 10 [2002]).

We note that trial courts that have addressed the issue of whether the District Attorney has standing to participate in a retention proceeding have rendered conflicting decisions (*compare e.g. People v Lesly T.*, 33 Misc 3d 881 [Sup Ct, Kings County 2011] *with People v Popa*, Ind. No. 1938/07 [Sup Ct, NY County 2009]). Were we to reach this substantive issue, we would reject defendant’s argument that, under *People v Lebron* (88 NY2d 891, 894-895 [1996]), the District Attorney does not have standing to

participate (*see People v Elizabeth P.*, 34 Misc 3d 647, 658 [Sup Ct NY County 2011]). The issue in *Lebron* was whether the People, in the context of a speedy trial motion, are chargeable with the time that elapses between an order of commitment and a judicial finding that the defendant is no longer incapacitated. Finding that the District Attorney had no duty of inquiry until the defendant was declared competent, the Court of Appeals held that the People had no obligation to independently monitor the defendant's commitment status in order to exclude the period of commitment for CPL 30.30(4)(a) trial readiness purposes, even though the defendant's absence during that time was attributable in part to his being in the custody of the Department of Correctional Services in an unrelated case, rather than the Department of Mental Hygiene. The Court of Appeals did not address the question of whether or not the District Attorney had the right to participate in a CPL 730.50(2) retention hearing if it desired to do so.

Although a defendant’s incapacity suspends the criminal proceeding, it does not end the felony prosecution. While the District Attorney does not have any duty of inquiry until the defendant is declared competent, CPL 730.50(2) does not mandate that the District Attorney be precluded from contesting a defendant’s continued unfitness at a retention hearing when the

District Attorney deems such participation necessary to protect the public and the public's interest in the future of the criminal prosecution against a defendant who may be malingering for the purpose of avoiding prosecution.

"A finding of competency to stand trial is within the sound discretion of the trial court and involves a legal and not a medical determination" (*People v Phillips*, 16 NY3d 510, 517 [2011] [internal quotation marks omitted]). Each retention order has an impact on the indictment because the delay in prosecution will affect the viability of the People's case. Witnesses' memories may dim, or the witnesses may become inaccessible. Evidence may be lost. Moreover, if the delay continues long enough, it will eventually result in the automatic dismissal of the charges against defendant by operation of law (see CPL 730.50[3], [4]). In cases such as this, where the hospital and the Commissioner agree to retention notwithstanding medical opinions to the contrary and indications in the medical records that the defendant may be malingering, the input of the District Attorney is needed to present competing evidence on the issue of a defendant's fitness so that the court may informatively weigh the defendant's welfare against the safety of the public.

Significantly, there is no other party who will perform that function in this case. Quite often, the Attorney General's

Office represents the broad public interest. However, here the Attorney General's Office represents the interest of the Commissioner and the hospital, and Kirby is of the view that defendant is not fit to proceed, a position which, according to the District Attorney, is at odds with the public interest in seeing that defendant is timely prosecuted. MHLS represents the defendant's interests. Consequently, under the circumstances before us, there is no one to protect the public interest absent the participation of the District Attorney.

"Interpreting the notice provisions of CPL 730.50(2) as limiting the district attorney to the role of observer in retention . . . proceedings is too narrow and does not comport with the legislative directive that no incompetent defendant's custodial status be changed, except on notice to the district attorney (CPL 730.60[6][a][1])" (*Lesly T.*, 33 Misc 3d at 883) . The provisions of Article 730 relating to notice to the District Attorney should be seen as a "floor," or a level of entitlement, with regard to prosecutorial participation, not a "ceiling" that limits a court's reasonable execution of its duty to effectively conduct the hearing.

Indeed, CPL 730.50(2) provides that an application for retention "must be made within sixty days prior to the expiration of [the] period [prescribed in the temporary order of commitment]

on forms that have been jointly adopted by the judicial conference and the commissioner." The official forms for retention hearings formulated under CPL 730.50(2) provide for notice to the county's district attorney (22 NYCRR subtitle D, ch 6, form 16-h). 22 NYCRR 111.5(a) provides that notice of the retention application shall be served "on the defendant, on the defendant's attorney if known to the director, *on the district attorney of the county where the criminal proceeding is pending*, and on the Mental Health Information Service" (emphasis added). 22 NYCRR 111.5(b) provides that if defendant requests a hearing, "[t]he clerk of the court shall notify the defendant, the defendant's attorney if any, *the district attorney*, the director of the institution where defendant is confined, and the Mental Health Information Service of the time and place of the hearing" (emphasis added). In conformity with these rules and accepted practice, the District Attorney was served with Kirby's application for the order of retention, which included a Certificate of the District Attorney stating that 25 years was the maximum term of imprisonment defendant faced if he was convicted on the highest felony charged in the indictment.

Defendant is correct that a person does not, as Supreme Court found, "place[] his mental competency at issue," and thus waive confidentiality, by being an "incapacitated person" under

CPL article 730. “[I]ncompetency to stand trial, lack of criminal responsibility because of mental disease or defect, and mental illness for purposes of civil commitment are independent concepts” (*see Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430, 441 [1979]). The purpose of a retention hearing is to determine whether the defendant remains unfit to stand trial, and the inquiry focuses narrowly on the defendant's present mental capacity to understand the proceedings against him or her and to assist in his or her own defense. By requesting a retention hearing, defendant merely invoked a statutory due process right to defend against the State’s allegation that he was unfit to proceed to trial (*see Matter of Barbara W.*, 142 Misc 2d 542 [Sup Ct, Albany County 1988]). However, Supreme Court correctly determined that the People were entitled to defendant’s psychiatric records pursuant to Mental Hygiene Law § 33.13(c)(1).

Mental Hygiene Law § 33.13(c) states that information about mental health patients, and clinical records and information tending to identify patients, are not public records, and that such information and records may be released only under the limited exceptions and restrictions set forth therein. Pursuant to Mental Hygiene Law § 33.13(c)(1), a court may order the release of the documents "upon a finding by the court that the interests of justice significantly outweigh the need for

confidentiality."

The welfare of the allegedly mentally incapacitated defendant needs to be weighed against the safety of the public (*see People v Schaffer*, 86 NY2d 460, 468-469 [1995]). The District Attorney demonstrated that the requested psychiatric records, limited to the period after defendant was first committed to Kirby, are needed to enable it to present relevant evidence on the issue of defendant's fitness, including, among other things, whether defendant has been feigning mental illness. This is essential to preserving the integrity of the fact-finding process and our adversarial system, as it will allow the court to make proper legal determinations affecting the future of the criminal action, after considering all the evidence. While Kirby sought an order of retention, there was a split among members of the hospital forensic committee as to defendant's fitness to proceed, and defendant's treating psychiatrist believed he should be returned to court. The privacy concerns expressed by MHLS "are adequately protected by compliance with the controlling state and federal privacy laws, which do not prohibit disclosure where the applicable conditions of those laws are satisfied" (*People v Madrid*, 88 AD3d 674, 675 [2d Dept 2011]; *see also* Mental Hygiene Law § 33.13[f] ["Any disclosure made pursuant to this section shall be limited to that information necessary in

light of the reason for disclosure. Information so disclosed shall be kept confidential by the party receiving such information and the limitations on disclosure in this section shall apply to such party"]).

Accordingly, the appeal from the order of the Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about October 4, 2011, which denied defendant's motion to quash a court-ordered subpoena duces tecum served on behalf of the New York County District Attorney's Office seeking defendant's psychiatric records in connection with a pending CPL 730.50 retention hearing, should be dismissed, without costs, as taken from a nonappealable order.

M-1492 - *People of the State of New York v Christopher B.*

Motion to amend the caption granted.

All concur.

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

ENTERED: NOVEMBER 27, 2012

CLERK