SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 29, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7476 In re Kareem W.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), for appellant.

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

Order, Family Court, Bronx County (Allen Alpert, J.), entered on or about September 28, 2011, which remanded appellant to the custody of the Administration for Children's Services pending further proceedings on the court's sua sponte motion to vacate and modify an earlier disposition of probation, unanimously reversed, on the law, without costs, and the order vacated.

The Family Court lacked authority to issue an order remanding appellant. For the reasons stated in *Matter of Rayshawn P.* (Appeal No. 7477-7A [decided simultaneously

herewith]), we conclude that the court was not authorized to initiate what was effectively a violation of probation proceeding by invoking Family Court Act § 355.1(1). In any event, there is no statutory authority for detaining a juvenile during the pendency of proceedings under that section. Authority to order detention of a juvenile may not be implied in the absence of an express statutory provision (*see Matter of Jazmin A.*, 15 NY3d 439, 444 [2010]).

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

ENTERED: NOVEMBER 29, 2012

CLERK

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

8393 Efraim Shurka, Index 304584/08
Plaintiff,

-against-

Jane Shurka,
Defendant-Respondent.
- - - - - -
Esther Zernitsky,
Proposed Third-Party Plaintiff-Appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Garr and White, P.C., New York (Ira E. Garr of counsel), for respondent.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered March 6, 2012, which granted defendant's motion to join appellant as a party to this matrimonial action and to require appellant to turn over defendant's proportionate share of payments on certain promissory notes, to pay to defendant plaintiff's support and other obligations pursuant to a September 10, 2008 pendente lite order, to provide certain discovery to defendant, and to surrender her passports, unanimously modified, on the law, to the extent of denying that part of the motion seeking to require appellant to surrender her passports and vacating that part of the order directing appellant to pay

plaintiff's obligations under the pendente lite order, and remanding the matter for an evidentiary hearing consistent herewith, and otherwise affirmed, without costs.

Appellant was not entitled to an automatic stay of the proceedings pursuant to CPLR 321(c), because counsel withdrew pursuant to a voluntary discharge (*Sarlo-Pinzur v Pinzur*, 59 AD3d 607, 608 [2d Dept 2009]). Nor do we see any basis in the record for remanding this matter to another Justice.

The court properly granted defendant leave to amend her pleadings to assert claims against appellant and to join appellant as a party to the action (*see* CPLR 3025[b]). Defendant presented evidence that plaintiff has fled the country, that appellant is the chief financial officer of the umbrella organization, Signature Investment Group (SIG), which holds all of plaintiff's assets, and that appellant has administered and controlled the payment of the promissory notes on which defendant is a payee, thus creating a fiduciary relationship between defendant and appellant (*see* CPLR 1001; 1003; *Solomon v Solomon*, 136 AD2d 697, 698 [2d Dept 1988]).

The court also properly ordered appellant to produce documents related to SIG and the other companies involved, and to pay to defendant her proportionate past and future payments on

the promissory notes, which it appears appellant has withheld at plaintiff's direction. The notes direct a substantial portion of the annual payments to defendant; moreover, they are unconditional promises to pay. We note that plaintiff has failed to comply with a previous order directing him to turn over these proceeds to defendant.

The court should have held a hearing on defendant's request to have appellant arrange for the payment of support and other expenses due under the September 10, 2008 pendente lite order. Defendant submitted evidence showing that throughout the parties' marriage, appellant, who was a signatory on the parties' joint personal bank account, deposited funds into, and paid bills from, that account. Defendant also points to evidence showing that appellant controls the finances of the family businesses that hold plaintiff's assets. In response, appellant submitted an affidavit stating that she does not pay, either personally or as CFO of the businesses, any of plaintiff's personal expenses.

In light of this factual dispute, a hearing is necessary on these issues. It is true that appellant has no obligation to use her own personal funds to make support payments to defendant. However, an issue of fact exists as to whether appellant is acting as plaintiff's agent, or is otherwise in control of

plaintiff's finances, including his share of funds or loan payments due from the family businesses. Having been properly joined in this action, to the extent appellant controls plaintiff's finances, or possesses assets that can be imputed to plaintiff, she can be directed, in that capacity, to satisfy plaintiff's pendente lite obligations.

There is no basis for ordering appellant to surrender her passports. While plaintiff has fled the country, there is no evidence that appellant presents a similar flight risk.

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

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

ENTERED: NOVEMBER 29, 2012

CLERK

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

8414 Sophie Malleret, Index 106300/09
Plaintiff-Appellant,

-against-

Federal Express Corporation, et al.,
Defendants-Respondents,

HLR Service Corporation,
Defendant.

[And A Third-Party Action]

Gary B. Pillersdorf & Associates, P.C., New York (Andrew H. Pillsersdorf of counsel), for appellant.

Kaplan, Massamilo & Andrews, LLC, New York (Daniela Jampel of counsel), for respondents.

Order, Supreme Court, New York County (George J. Silver, J.), entered June 14, 2011, which, insofar as appealed from, granted the cross motion of defendants Federal Express Corporation and Jeremy Carter for summary judgment dismissing so much of the complaint as asserted damages resulting from injuries sustained in the March 29, 2008 accident, unanimously reversed, on the law, without costs, and the cross motion denied.

On February 8, 2008, plaintiff pedestrian sustained injuries, including head trauma, as a result of being struck by defendants' truck. Subsequently, on March 29, 2008, plaintiff

was again injured when, while visiting an art gallery, she became dizzy and fell from a seven-foot-high loft to the concrete floor below. The record shows that after being struck by defendants' vehicle, but prior to the March 2008 incident, plaintiff had suffered episodes of dizziness and disorientation.

The record presents a triable issue of fact as to whether plaintiff's conduct of ascending the loft despite having episodes of dizziness constituted a superseding cause of the ultimate injuries she sustained from the March 29, 2008 accident. It cannot be said, as a matter of law, that plaintiff's conduct was so reckless that it necessarily constituted the sole legal cause of her ultimate injuries, breaking the chain of causation from the first accident (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492 [2006]; *cf. Tkeshelashvili v State of New York*, 18 NY3d 199, 206 [2011]).

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

ENTERED: NOVEMBER 29, 2012

CLERK

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

8620 In re Carmen G.,
Petitioner-Respondent,

-against-

Rogelio D.,
Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Randall S. Carmel, Syosset, for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the child.

Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about July 7, 2011, which granted petitioner mother's petition to relocate from Manhattan to Virginia with the parties' minor child, unanimously affirmed, without costs.

The court's determination has a sound and substantial basis in the record, and there is no reason to disturb the court's findings (*see Matter of Koegler v Woodard*, 96 AD3d 454, 455 [1st Dept 2012]). Indeed, the court considered all of the relevant factors and properly concluded that the proposed relocation would serve the subject child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741 [1996]). Although the child has a loving relationship with both parties, petitioner has been the

child's primary caregiver and has been responsible for his day-to-day routine. Further, petitioner showed that a move to Virginia would improve the child's quality of life. In addition, both petitioner and her current husband are committed to fostering a relationship between the child and respondent father (*see Sonbuchner v Sonbuchner*, 96 AD3d 566, 567 [1st Dept 2012]). Although petitioner's relocation inevitably will have an impact upon respondent's ability to spend time with the child, the liberal visitation schedule, including extended visits during the summer and school vacations, will allow for the continuation of a meaningful relationship between respondent and the child (*see Matter of Jennings v Yillah-Chow*, 84 AD3d 1376, 1377 [2d Dept 2011]; *see also Matter of Aruty v Mormando*, 70 AD3d 683 [2d Dept 2010]).

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8661 In re Mia B., and Another,

Children Under The Age
of Eighteen Years, etc.,

Brandy R.,
Respondent-Appellant,

Administration for Children’s Services,
Petitioner-Respondent.

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

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

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about April 25, 2012, which, after a fact-finding determination that respondent mother had neglected one of her children by inflicting excessive corporal punishment and derivatively neglected the other child, placed the children with petitioner Administration for Children’s Services, and, inter alia, continued suspension of her visitation with the children, unanimously affirmed, without costs.

The findings of neglect were supported by a preponderance of

the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Tammie Z.*, 66 NY2d 1, 3 [1985]). The record shows that respondent neglected the older child by inflicting excessive corporal punishment upon her (*see* Family Ct Act § 1012[f][i][B]; *see also e.g. Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]), as evidenced by the hospital records and oral report transmittals documenting the 22-month old infant's extensive bruising on the legs, buttocks, elbow, and lumbar area, all of which were in various stages of healing. Respondent's sister testified that after observing the bruises, she confronted respondent, who stated, "[T]hese are my kids and I raise them the way I want. If they act up[,] I'm going to hit them." Under this scenario, the court properly inferred that respondent had implicitly admitted to causing the injuries, and her failure to testify and otherwise explain the statement permitted the court to draw the strongest possible negative inference against her (*see Matter of Eugene L. [Julianna H.]*, 83 AD3d 490 [1st Dept 2011]; *Matter of Kazmir K.*, 63 AD3d 522, 523 [1st Dept 2009]). The Family Court was in the best position to observe and assess witness demeanor, and its credibility determinations are entitled to deference (*see Matter of Jared S. (Monet S.)*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]) and are supported by

the record herein. Moreover, a derivative finding as to the younger child was appropriate, as respondent's infliction of excessive corporal punishment on a 22-month old "demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in [her] care" (*see Matter of Joshua R.*, 47 AD3d 465, 466 [1st Dept], *lv denied* 11 NY3d 703 [2008]).

The court was well within its discretion to disbelieve respondent's subsequent explanation to the agency's caseworker that she had not been present in the home for three days leading up to the older child's most recent injuries, and that her mother was the children's primary caretaker and, thus, the likely culprit. The caseworker further testified that respondent admitted that she knew of the grandmother's history of child mistreatment and claimed that the grandmother had not taken her medication for bipolar disorder for the previous month. Thus, assuming the veracity of respondent's claims, she had to have known or should have known about the neglect, since the various stages of healing of the child's injuries indicated neglect over a prolonged period of time, yet she failed to act as a reasonably

prudent parent to protect the children (*see e.g. Matter of Rayshawn R.*, 309 AD2d 681, 682 [1st Dept 2003]; *Matter of Eric J.*, 223 AD2d 412, 413 [1st Dept 1996]).

In addition, respondent's argument that the court should not have granted her application to proceed pro se at the fact-finding and dispositional hearings is without merit, since the record shows that the court conducted a searching inquiry to assure that she knowingly, intelligently, and voluntarily waived her right to counsel (*see Matter of Jetter v Jetter*, 43 AD3d 821, 822 [2nd Dept 2007]). There is nothing in the record indicating that she was not competent to make such a decision (*see Matter of Emma L.,* 35 AD3d 250, 252 [1st Dept 2006], *lv dismissed, denied* 8 NY3d 904 [2007]).

We further find that the court's suspension of respondent's supervised visitation was appropriate, given her refusal to undergo a mental health evaluation and other services, as well as her erratic behavior, including an attempt to take the children

from the foster mother at her last scheduled visit (*see e.g. Matter of Cheyenne S.*, 11 AD3d 362 [1st Dept 2004]).

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

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8664 The People of the State of New York, Ind. 5362/10
Respondent,

-against-

Darren Antrum,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about April 26, 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 29, 2012

CLERK

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

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8665 The People of the State of New York ex rel. Jonathan M. Kirshbaum, on behalf of Daniel Omolukun,
Petitioner-Appellant,

-against-

Dora B. Schriro, etc.,
Respondent-Respondent.

Index 401036/12

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

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

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered May 15, 2012, denying the writ of habeas corpus and dismissing the petition, unanimously affirmed, without costs.

The habeas court properly found that the bail court (Bruce Allen, J.) did not abuse its discretion in denying bail pending retrial (*see People ex rel. Rosenthal v Wolfson*, 48 NY2d 230, 232 [1979]). The bail court presided over a trial at which defendant was convicted of serious charges. That court subsequently granted defendant's CPL 440.10 motion to vacate the judgment based on newly discovered evidence, but it declined to fix bail pending a new trial. The fact that the court did not state its

reasons for that determination does not warrant the conclusion that the determination was an abuse of discretion. The court implicitly based its ruling on the arguments of the parties, which addressed the factors enumerated in CPL 510.30(2)(a), as well as its familiarity with the strength of the prosecution's case viewed in light of the newly discovered evidence. Based on these factors, we find no abuse of discretion.

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8666 115 Spring Street Company, Index 107569/09
Plaintiff-Appellant,

-against-

JPMorgan Chase Bank, N.A.,
Defendant-Respondent,

Chin & Ho, P.C.,
Defendant.

Balestriere Fariello, PLLC, New York (John G. Balestriere of counsel), for appellant.

Levi Lubarsky & Feigenbaum LLP, New York (Andrea Likwornik Weiss of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about March 6, 2012, which, insofar as appealed from, granted defendant JPMorgan Chase Bank's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff argues that UCC 3-405(1)(c), the "fictitious payee" or "padded payroll" rule (*see Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 271 [1989]), is inapplicable to this case because Chase's negligence was not in the payment of checks written on certain disputed accounts but in allowing the accounts to be opened in the first place. However, UCC 3-405(1)(c) "is

not limited to forged endorsements; it plainly covers situations . . . where an employee starts the wheels of normal business procedure in motion to produce a check for a non-authorized transaction" (*Prudential-Bache*, 73 NY2d at 271 [quotation marks omitted]). Plaintiff's disloyal management agent employed normal business procedure to produce checks for transactions that were not authorized, and it is the production of those checks – not the mere opening of the disputed accounts – that resulted in plaintiff's losses. Plaintiff, as the record demonstrates, "was in a position to prevent the massive losses in issue here, by supervising its [management agent] . . . and examining records relating to a fraud that had been in progress" since the agent opened the first disputed account in the fall of 2007 (*see Prudential-Bache*, 73 NY2d at 271). Thus, the losses should fall to plaintiff, not Chase.

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 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8668 In re Gabriel J., and Another,

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

Dainee A.,
Respondent-Appellant,

O'Neil H.,
Respondent,

Administration for Children's Services,
Petitioner.

- - - - -

In re Shawn J.,
Petitioner-Respondent,

-against-

Dainee A.,
Respondent-Appellant.

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

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

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Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about January 3, 2012, which, to the extent appealed from as limited by the briefs, granted the father's petition to modify a prior order of custody and the parents' 2008 agreement, and awarded the father sole legal and physical custody of the subject children, with supervised

visitation to appellant mother, unanimously affirmed, without costs.

The court's determination that a "change of circumstances" had occurred warranting modification of the prior custody order, and that it would be in the children's best interests to award sole legal and physical custody to the father, has a sound and substantial basis in the record (*Matter of Wilson v McGlinchy*, 2 NY3d 375, 380-381 [2004]; *see Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641-642 [1st Dept 2012]). Indeed, since the entry of the prior custody order, there has been a finding of neglect against the mother based on her failure to protect the children from the excessive corporal punishment inflicted on them by her former boyfriend. Despite this finding, the mother continued to assert that the children had lied about the abuse. Although the mother had completed a parenting skills program and participated in therapy, the record shows that she failed to improve her relationship with the children and did not have empathy for them. By contrast, the records shows that the children were comfortable with the father, were happy living with him, and were making progress under his care.

The court properly determined that supervision of the mother's visits is in the children's best interests (*see Matter*

of Arelis Carmen S. v Daniel H., 78 AD3d 504 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]), particularly given the evidence of her consistent pattern of destructive behavior toward the children, which continued even during supervised visits (*see Matter of Carl T.*, 95 AD3d at 642).

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, P.J., Friedman, DeGrasse, Román, Gische, JJ.

8670 Nicola Stampone, et al., Index 115992/07
Plaintiffs-Respondents,

–against–

Consolidated Edison, Inc., et al.,
Defendants-Appellants.

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Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellants.

The Yankowitz Law Firm, P.C., Great Neck (Andrew S. Koenig of counsel), for respondents.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about January 30, 2012, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly denied defendants' motion to dismiss. There are questions of fact as to whether a special employment relationship exists between plaintiff and defendants, including who controlled and directed the manner, details, and

ultimate result of plaintiff's work (*see* ; *Vincente v Silverstein Props., Inc.*, 83 AD3d 586 [1st Dept 2011], *lv denied* 17 NY3d 710; *Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 550 [1st Dept 2008]).

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8671-
8672 Index 603756/07

Amaranth LLC,
Plaintiff-Appellant,

Amaranth Advisors L.L.C.,
Plaintiff,

-against-

J.P. Morgan Chase & Co.,
Defendant-Respondent,

J.P. Morgan Chase Bank, N.A., et al.,
Defendants.

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Kleinberg, Kaplan, Wolff and Cohen, P.C., New York (Marc R. Rosen of counsel), and Bartlit Beck Herman Palenchar and Scott LLP, Chicago, IL (John D Byars, III of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Eric S. Goldstein of counsel), for respondent.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 9, 2011, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 5, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

As plaintiff Amaranth LLC (the Fund) conceded at oral argument, and as it concedes in its opening brief, it no longer relies on the defamatory statement alleged in its complaint.

Rather, it relies on a statement set forth in an interrogatory response — which was later superseded — stating, in essence, that defendant J.P. Morgan Chase & Co. (JPMC) had concerns about the impact of any potential bridge loan to the Fund on preference risk in the event of the Fund's bankruptcy. This statement is not "sufficiently analogous" to the statement alleged in the complaint (*Rossignol v Silvernail*, 185 AD2d 497, 499 [3d Dept 1992], *lv denied* 80 NY2d 760 [1992]; *see* CPLR 3016[a]). Moreover, it is not defamatory, as it simply expresses an opinion based on information available to all potential parties to the potential Fund transaction (*see Silverman v Clark*, 35 AD3d 1, 14 [1st Dept 2006]; *cf. Guerrero v Carva*, 10 AD3d 105, 112 [1st Dept 2004]). Furthermore, the statement is substantially true, as there is uncontroverted evidence that JPMC did consider, if only briefly, making a bridge loan to the Fund and concluded that it

was “less than creditworthy” and a “potential[] preference risk” (*see Silverman*, 35 AD3d at 14).

In light of our decision, we need not consider the Fund’s remaining contentions.

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8674 The People of the State of New York, Ind. 30174/10
Respondent,

-against-

Heriberto Cruz,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about February 7, 2012, which adjudicated defendant a level two sex offender and sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant's application for a downward departure (*see generally People v Pettigrew*, 14 NY3d 406, 409 [2010]; *People v Mingo*, 12 NY3d 563, 568 n 2 [2009]). The underlying criminal conduct against a child was very serious, and defendant's point score was well in excess of the threshold for level two. We have considered the mitigating factors and other information cited by

defendant, and we find that they do not warrant a conclusion that defendant presents a low risk of reoffense.

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., DeGrasse, Román, Gische, JJ.

8675 Linda Spector, et al., Index 104607/07
Plaintiffs, 590275/08
590616/08

-against-

Cushman & Wakefield, Inc., et al.,
Defendants,

Citibank,
Defendant-Respondent,

One Source Facility Services, Inc.,
Defendant-Appellant.

- - - - -

Citibank, N.A.,
Third-Party Plaintiff-Respondent,

-against-

One Source Facility Services, Inc.,
Third-Party Defendant-Appellant.

- - - - -

[And a Second Third-Party Action]

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Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for appellant.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 20, 2011, which, to the extent appealed from as limited by the briefs, vacated that portion of a prior order, same court and Justice, entered January 27, 2010, dismissing defendant third-party plaintiff Citibank's cross claims for

contractual indemnification and failure to procure insurance against OneSource Facility Services, Inc. (OneSource), and granted Citibank partial summary judgment on its failure to procure insurance claim against OneSource, unanimously affirmed, without costs.

The motion court properly granted summary judgment to Citibank on its cause of action for failure to procure insurance. Under the Citibank-OneSource agreement, OneSource was required to purchase an insurance policy with a limit of $1 million each occurrence; however, OneSource obtained a policy with an each occurrence limit of $1.5 million, an aggregate limit of $1.5 million, and a $500,000 self-insured retention. Although OneSource correctly maintains that the agreement did not prohibit self-insured retentions, it required OneSource to provide a certificate of insurance notifying Citibank of such a provision and no such notice was given. Thus, the insurance procurement provision was breached because Citibank reasonably expected (*see Federated Retail Holdings, Inc.*, 77 AD3d 573, 574 [1st Dept 2010]) that OneSource would either provide effective coverage or notice of the amount of the self-insured retention.

Because the insurance procurement clause is entirely independent of the indemnification provisions in the contract

(*Kinney v Lisk Co.*, 76 NY2d 215, 219 [1990]), a final determination of liability for the failure to procure insurance "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [1999]). Where as here, a promisee such as Citibank is self-insured, the proper measure of damages remains indemnity and defense costs (*see Occhino v Citigroup Inc.*, 2005 WL 2076588, *11, 2005 US Dist LEXIS 28899, *31 [ED NY 2005]; *cf. Incahustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]).

Further, OneSource agreed to maintain the sidewalks, walkways, and parking lots "free of snow and ice at all times to prevent hazard to public and personnel." As such, evidence that the plaintiff injured herself on an icy condition on the sidewalk abutting Citibank was sufficient to establish that the injury arose out of the Citibank-OneSource agreement (*see Occhino*, 2005 WL 2076588 at *10, 2005 US Dist LEXIS 28899 at *31; *Moll v Wegmans Food Mkts.*, 300 AD2d 1041, 1042-43, [4th Dept 2002]). In

terms of an insurance-based claim, this is precisely the type of risk or claim for which Citibank was seeking insurance and the fact that OneSource breached its agreement to procure the insurance triggered the "arising out of" clause.

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, JJ.

8676-
8677 Index 104454/08

Daniel Landers,
Plaintiff-Respondent,

-against-

1345 Leashold LLC, et al.,
Defendants,

Plaza Construction Corp.,
Defendant-Appellant.

_____

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

Salenger, Sack, Kimmel & Bavaro, LLP, New York (Christopher J. Pogan of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 18, 2011, which denied the motion of defendant Plaza Construction Corporation (Plaza) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered April 17, 2012, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Dismissal of the complaint is warranted in this action where plaintiff was allegedly injured when, while working on the

renovation of office space in a building, the door of a freight elevator fell on his head; Plaza was the construction manager for the renovation. The record shows that plaintiff failed to oppose Plaza's showing of entitlement to judgment as a matter of law on the common-law negligence and Labor Law § 200 claims as well as the Labor Law § 241(6) claim to the extent that it was predicated on violations of 12 NYCRR 23-1.5 and 12 NYCRR 23-1.7(a) and (f).

The only portion of Plaza's motion that plaintiff did oppose concerned his claim for liability pursuant to § 241(6), predicated on a violation of 12 NYCRR 23-1.8(c)(1), which concerns the provision of safety hats where there is a danger of being struck by falling objects. However, plaintiff failed to raise a triable issue as to the application of that Industrial Code section. Indeed, plaintiff testified that his work site was free of falling object hazards. His attorney's assertion in

opposition to Plaza's motion that a hard hat should have been provided was insufficient to defeat Plaza's motion (*see e.g. Telfeyan v City of New York*, 40 AD3d 372 [1st Dept 2007]).

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

ENTERED: NOVEMBER 29, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8678 Park Terrace Gardens, Inc., Index 121647/02
Plaintiff-Respondent,

-against-

Nicholas Penkovsky, et al.,
Defendants-Appellants,

John Doe, et al.,
Defendants.

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Nicholas A. Penkovsky, Riverdale, appellant pro se.

Law Office of Nicholas A. Penkovsky, P.C., Riverdale (Nicholas A. Penkovsky of counsel), for Robin Schwartz, appellant.

Litwin & Tierman, P.A., New York (Robert D. Tierman of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 9, 2012, which granted plaintiff's cross motion for summary judgment on its cause of action for ejectment and struck defendants-appellants' (defendants) answer and counterclaims, unanimously modified, on the law, to reinstate the answer and counterclaims, and otherwise affirmed, without costs.

Ejectment was properly based on defendants' repeated failures to comply with orders directing payment of use and occupancy, which was a condition of their continued occupancy of

their cooperative apartment (*see Rose Assoc. v Johnson*, 247 AD2d 222 [1st Dept 1998]). However, plaintiff did not move to strike the answer and counterclaims, and there was no authority for doing so.

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

ENTERED: NOVEMBER 29, 2012

CLERK

Tom, J.P., Friedman, Acosta, Freedman, JJ.

7477-
7477A In re Rayshawn P.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), for appellant.

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

Order, Family Court, Bronx County (Allen Alpert, J.), entered on or about June 30, 2011, and order, same court and Judge, entered on or about September 27, 2011, reversed, on the law, without costs, and the orders vacated.

Opinion by Friedman, J. All concur.

Order filed.

Corrected order - December 3, 2012

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Rolando T. Acosta
Helen E. Freedman, JJ.

7477-
7477A

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In re Rayshawn P.,

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

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Rayshawn P. appeals from the order of Family Court, Bronx County (Allen Alpert, J.), entered on or about June 30, 2011, which remanded appellant to detention in the custody of the Administration for Children's Services of the City of New York, and order, same court and Judge, entered on or about September 27, 2011, which modified an order of disposition dated April 7, 2011, to the extent of imposing upon appellant enhanced supervision probation, with the term of such probation set to expire on September 26, 2013.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal and Kristin M. Helmers of counsel), for presentment agency.

FRIEDMAN, J.

This appeal presents for resolution two questions left open by the Court of Appeals' decision in *Matter of Jazmin A.* (15 NY3d 439, 443 n * [2010]): "whether a properly made motion under Family Court Act § 355.1 to stay, modify or terminate an order of probation based on change of circumstances would provide an alternative means of initiating proceedings to revoke probation, and whether detention would be authorized pending resolution of such a motion" (internal quotation marks and brackets omitted). We answer both questions in the negative.

By a final order of disposition entered April 7, 2011, (the 2010 case), Family Court, Bronx County, adjudicated appellant Rayshawn P. a juvenile delinquent, placed him on probation for 18 months, and ordered him to perform 50 hours of community service. The adjudication was based on appellant's admission that, on October 27, 2010, he had committed an act that, if committed by an adult, would constitute grand larceny in the fourth degree.[1] Thereafter, on June 29, 2011, appellant was arrested for resisting arrest after he was apprehended for allegedly punching someone in the face.

On June 30, 2011, upon the application of the detention

[1]At all relevant times, appellant was under the age of 16.

center holding appellant based on his arrest the previous day, Family Court conducted a pre-petition hearing pursuant to Family Court Act § 307.4.[2] The police witness, Officer Jarmarie Flowers, testified that she placed appellant under arrest after he was brought to the precinct station. Officer Flowers stated that she arrested appellant based on information provided to her by her lieutenant, who told Flowers that he had seen appellant "engaging in an assault," and that as he tried to arrest him, appellant had "started to kick, punch, and throw in the direction of the officers." Officer Flowers acknowledged that she had no personal knowledge of the events on which the arrest was based.

At the conclusion of the hearing, the court determined that it had jurisdiction over the matter arising from the June 29 arrest. However, the court did not grant the pre-petition detention application before it, which, under Family Court Act § 307.4(7), would have entitled appellant to the filing of a petition and a probable-cause hearing within four days. Instead, the court, at its own instance, and over the objection of

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[2]Family Court Act § 307.4(1) provides:

> "If a child in custody is brought before a judge of the family court before a petition is filed upon a written application pursuant to subdivision four of section 307.3, the judge shall hold a hearing for the purpose of making a preliminary determination of whether the court appears to have jurisdiction over the child."

appellant's counsel, reactivated appellant's 2010 case (for which, as noted, he was already on probation) and stated that it was "remanding the respondent[,] open remand[,] pending modification of that disposition." The court then dismissed the pre-petition application, without prejudice to the filing of a petition, and adjourned the matter to July 18, 2011.

The case file contains two written orders of the Family Court bearing the date of June 30, 2011, both under the docket number of the 2010 case, which, as noted, had already been finally adjudicated. One is an order to show cause, which, "[u]pon the Court's own motion pursuant to Family Court Act § 355.1(1)," directed appellant to show cause, at a hearing to be held on July 18, 2011,

> "(1) why the Court should not make a determination that there has been a substantial change of circumstances since the entry of the order of disposition, in that respondent's arrest for the commission of one or more acts of juvenile delinquency on 6/30/11, constitutes a violation of the order which placed him under probation supervision in this case; (2) why the Court should not enter an order in accordance with Family Court Act § 355.1(1)(b) vacating, modifying or terminating the order of disposition based upon such substantial change of circumstances; and (3) why the Court should not enter such interim orders as may be necessary to protect the best interests of the respondent and the safety of the community."[3]

[3]From subsequent colloquy in the record, it appears that the July 18 return date was inserted after the order to show cause was initially signed.

The other Family Court order dated June 30, 2011, that is found in the case file is denominated an "Order Directing Detention" (the remand order). Although, as of June 30, 2011, no new delinquency petition (Family Court Act § 311.1) or petition alleging a violation of probation (Family Court Act § 360.2) had been filed based on the incident of June 29, the remand order recites that a petition under section 311.1, "including a charge of Violation of Probation," had been filed. The remand order goes on to state that Family Court had determined that the "[d]etention of the [r]espondent is necessary" under the criteria of Family Court Act § 320.5, which addresses an initial appearance after the filing of a petition. Based on findings that "[r]espondent did not comply with terms of probation and was arrested" and that he was "likely to commit further acts of delinquency," the order remanded him to the Administration for Children's Services "for open detention, to be detained pending further proceedings herein on July 18, 2011."

On July 1, 2011, the presentment agency filed a new petition, under a new docket number (the 2011 case), based on appellant's arrest of June 29. On the same day, the presentment agency and counsel for appellant (furnished by the Legal Aid Society) appeared before Family Court; appellant himself was not produced in court that day. The petition in the 2011 case

alleged that appellant committed acts that, if committed by an adult, would constitute the crimes of second-degree obstruction of governmental administration, resisting arrest and attempted third-degree assault. In the attached supporting deposition, a police lieutenant stated that, on June 29, he attempted to arrest appellant after observing him run after another person and punch him in the face. When the lieutenant attempted to arrest appellant, the latter began kicking his legs and flailing his arms, and sought to avoid being handcuffed.

Because appellant was not present in court at the July 1 hearing, the presentment agency asked to adjourn the matter to July 5, 2011, for arraignment on the petition in the 2011 case. The presentment agency noted that it was the agency's "understanding" that, on June 30, 2011, the court had "remanded the respondent on [the court's] own motion based on Family Court Act [§] 355.1 and that the Court filed an Order to Show Cause which was served on the Legal Aid Society this morning." Family Court confirmed that it had invoked § 355.1 the day before and added that "the parties have been provided with the Order to Show Cause," which "left out the adjourned date, which is July 18th." The court then stated that "the pre-petition hearing [on the 2011 case] was heard yesterday and the Court made findings and reopened the disposition [of the 2010 case] based on the

testimony of the pre-petition hearing."

Appellant's counsel objected that, under Family Court Act § 307.4, the purpose of the June 30, 2011, pre-petition hearing was only to determine whether the court had jurisdiction, and did not provide a basis for remanding appellant to detention or revoking his probation. Counsel also maintained that no order to show cause had been served on the Legal Aid Society.[4] Counsel argued that the court had unlawfully remanded Rayshawn to detention because no petition alleging a violation of probation (VOP) (*see* Family Court Act § 360.2[1]) had been filed, and that, under *Matter of Jazmin A.* (15 NY3d 439 [2010]), the court did not have authority to remand a juvenile to detention during the period of probation in the absence of a pending VOP petition. Counsel further asserted that the court could not use § 355.1 to revoke probation, and that, in any event, the court had not complied with that section's procedural requirements. The judge

[4]On appeal, it is undisputed that the June 30 order to show cause was never served either upon appellant's counsel personally or upon the offices of the Legal Aid Society before Family Court issued the remand order. Appellant's appellate counsel represents, without contradiction, that appellant's counsel in the Family Court discovered the order to show cause on July 1, 2011, in the Family Court's file for this case, which she had reviewed to obtain a copy of the remand order for the purpose of moving for a stay in this Court. The presentment agency apparently takes the position that counsel's discovery of the order to show cause in the court file constituted service.

responded, "I did not revoke probation. I remanded your client pending a determination as to whether or not probation was to be revoked, that is, pursuant to the statute [§ 355.1]." The court added that the order to show cause was "to get the parties into court to be heard," and that the parties had an opportunity to be heard at the pre-petition hearing.

Appellant's counsel replied that a pre-petition hearing could not serve as the basis for adjudicating a VOP and that the June 30 pre-petition hearing was based on hearsay without any eyewitnesses (*see* Family Court Act § 360.2[2] ["Non-hearsay allegations of the factual part of the (VOP) petition or of any supporting depositions must establish, if true, every violation charged"]). The court noted that the Department of Probation could have filed a VOP petition, which would have provided a basis on which to remand appellant to detention. When counsel again objected that, in fact, no VOP petition had been filed, the court stated that it nonetheless had "found a violation because there was a change in circumstances." Counsel reiterated that no VOP petition had been filed and that the remand order was therefore improper under *Jazmin A*.

On July 5, 2011, appellant was arraigned on the petition in the 2011 case, and the agency asked that he be remanded under that docket. The Family Court judge who had presided over the

prior proceedings (Alpert, J.) was on vacation, and the judge presiding in his absence (Gribetz, J.) declined to remand on the 2011 case because Judge Alpert had not done so. Appellant remained in detention, however, based on the June 30 remand order issued in the 2010 case, until the next day, July 6, when a justice of this Court granted his motion for an interim stay of that order.[5] On July 8, Judge Gribetz again denied the presentment agency's application to remand appellant on the 2011 petition. Because the court did "not want[] to interfere with Judge Alpert," it instead ordered that appellant be placed under "house arrest."

On July 18, 2011, after Judge Alpert's return, the presentment agency asked the court to remand appellant on the 2011 case. The court granted the application, due to negative reports from the program that appellant had been ordered to attend. Both the 2010 case and the 2011 case were adjourned one day for fact-finding.

On July 19, 2011, appellant entered an admission to having engaged in acts on June 29, 2011, that, if committed by an adult, would constitute the crime of obstructing governmental

[5]By order entered October 4, 2011, this Court granted appellant leave to appeal from the remand order but denied the motion for a stay as moot.

administration in the second degree. The presentment agency asked the court to waive its motion under § 355.1, in the expectation that the Department of Probation would file a VOP petition. The court withdrew its motion "without prejudice," declaring that any issues thereunder were "moot."

On September 27, 2011, Family Court conducted a hearing to dispose of the 2011 case and to determine the § 355.1(1) motion to modify the April 2011 disposition of the 2010 case, both on the basis of appellant's admission at the hearing of July 19.[6] With respect to the § 355.1(1) motion, the hearing resulted in an order, dated September 27, 2011 (the modification order), providing in pertinent part as follows:

> "PURSUANT TO FCA 355.1, IT IS ORDERED that the disposition dated April 7, 2011 is modified and Respondent Rayshawn [P.] is ordered to a term of 24 Months Enhanced Supervision Probation, with 50 Hours Community Service . . . Term of probation is to expire on September 26, 2013."[7]

Discussion

Appellant now appeals from the remand order of June 30, 2011, and from the modification order of September 27, 2011. In

[6]The court addressed the § 355.1(1) motion at the September 27 hearing notwithstanding its announcement at the July 19 hearing that the § 355.1(1) motion was being withdrawn.

[7]The disposition of the 2011 case is not at issue on this appeal.

essence, appellant argues (1) that a motion to modify a final disposition under Family Court Act § 355.1(1) is not available to the court as an alternative to the procedures prescribed by §§ 360.1, 360.2 and 360.3 for prosecuting a VOP, and (2) that §§ 355.1 and 355.2 (the latter of which sets forth the procedures for a motion under § 355.1) do not, in any event, authorize the court to detain a juvenile pending the determination of a motion under § 355.1. The presentment agency agrees that each of these orders should be reversed and vacated but argues that, because procedural errors require reversal in any event, we need not reach the question of the propriety of using a § 355.1(1) motion to address a VOP. We will discuss first the modification order and then the remand order.

The September 27, 2001 Modification Order

When appellant's arrest of June 29, 2011, was brought to Family Court's attention at the pre-petition hearing held on June 30, the court responded by initiating a motion, pursuant to Family Court Act § 355.1(1), to modify the dispositional order of April 7, 2011, which had imposed 18 months of probation on appellant in the 2010 case. Ultimately, the court resolved its § 355.1(1) motion by issuing the modification order of September 27, 2011, which modified the April 7 dispositional order in the 2010 case by imposing 24 months of enhanced supervision

probation, to commence upon the date of the modification order. The modification order has the effect of extending appellant's term of probation by nearly a year (moving the end-date from October 2012 to September 2013) and enhancing the level of supervision to which he is subject. In addressing the June 29 arrest by way of a motion under § 355.1(1), which authorizes the modification of a dispositional order "[u]pon a showing of a substantial change of circumstances," Family Court assumed that an act constituting a VOP may be considered "a substantial change of circumstances" under § 355.1(1) and therefore may be dealt with under § 355.1(1) as an alternative to the procedures prescribed for prosecuting a VOP by Family Court Act §§ 360.1, 360.2 and 360.3.[8] Appellant contends that this assumption was erroneous, and we agree.

At the outset, the presentment agency argues that we need

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[8]Subdivision 1 of Family Court Act § 355.1 (captioned "New hearing; staying, modifying or terminating an order") provides:

> "Upon a showing of a substantial change of circumstances, the court may on its own motion or on motion of the respondent or his parent or person responsible for his care:
>
> "(a) grant a new fact-finding or dispositional hearing; or
>
> "(b) stay execution of, set aside, modify, terminate or vacate any order issued in the course of a proceeding under this article."

not consider whether Family Court may use a § 355.1(1) motion to address an apparent VOP, because, in this particular case, the presentment agency concedes that the modification order must be vacated for procedural infirmity even if the court had authority to move to modify the dispositional order under § 355.1(1). In this regard, the presentment agency points out, among other things, that Family Court issued the modification order after it had expressly withdrawn its § 355.1(1) motion on the record at the July 19 hearing, after appellant admitted to second-degree obstruction of governmental administration. Thus, when the court entered the modification order on September 27, no motion to modify the preexisting dispositional order was pending. Besides its having been entered on a motion that had already been withdrawn, the modification order appears to be tainted by still other procedural and substantive errors.[9]

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[9]The modification order's additional procedural infirmities appear to include: (1) Family Court's failure to cause the order to show cause to be served on appellant or his counsel in accordance with the CPLR, as required by § 355.2(2); (2) the court's failure to afford appellant an opportunity for "oral argument and . . . a hearing to resolve any material question of fact" (§ 355.2[3]), it being conceded by the presentment agency that this hearing requirement was not satisfied by the "cursory pre-petition detention application" on the 2011 case (*cf. Matter of Benjamin L.*, 283 AD2d 646, 647 [2d Dept 2001], *lv denied* 97 NY2d 603 [2001] [reversing modified dispositional order where VOP petition was converted to petition to modify prior disposition pursuant to § 355.1 "without proper notice and opportunity to be heard"]); and (3) the court's failure to comply with the

While it appears that we could, as urged by the presentment agency, vacate the modification order based on Family Court's failures to comply with the requirements of §§ 355.1 and 355.2, without addressing whether the court-initiated § 355.1(1) motion was proper to begin with, we decline to do so. The parties are in agreement that it is not unusual for Family Court to use § 355.1(1) motions, rather than the procedures prescribed by § 360.1 *et seq.*, to address VOPs (*see Matter of Shatique B.*, 70 AD3d 1036 [2d Dept 2010]; *Matter of Lorenzo A.*, 59 AD3d 441 [2d Dept 2009]).[10] Given that the question of the propriety of this practice is squarely presented by this appeal — and, in this regard, the procedural and substantive requirements of §§ 355.1 and 355.2 become relevant only if the § 355.1(1) motion was authorized in the first place — we choose to address the more

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directive of § 355.2(4) to "set forth on the record its findings of fact, conclusions of law and the reasons for its determination" of the § 355.1 motion (which requires "a showing of a substantial change of circumstances"). Moreover, as the presentment agency also concedes, the modification order, by imposing a term of probation extending beyond the term imposed by the original dispositional order, violates the directive of § 355.1(3) that, if a new dispositional order is issued pursuant to that statute, "the date such order expires shall not be later than the expiration date of the original order."

[10]Although it appears that, in each of *Shatique B.* and *Lorenzo A.*, Family Court addressed conduct violating probation by way of a motion under § 355.1, this manner of proceeding was not challenged by the probationer on either of those appeals.

fundamental question.

Turning to the question of Family Court's authority to proceed under § 355.1(1) to address an apparent VOP, we observe that, as appellant correctly points out, the Legislature has enacted a detailed statutory scheme setting forth procedures specifically intended to address VOPs. As previously noted, this statutory scheme is set out at §§ 360.1, 360.2 and 360.3 of the Family Court Act. Nowhere in these provisions is the court authorized to initiate, sua sponte, proceedings to modify a dispositional order. Rather, § 360.2(1) authorizes the probation service — not the court — to "file a petition of violation" if the service "has reasonable cause to believe that the respondent has violated a condition" of the probation order.[11] Further, §§ 360.2 and 360.3 set forth specific procedural requirements that must be observed in adjudicating an alleged VOP. In particular, under § 360.2(2), a VOP proceeding must be commenced by the filing of a verified petition (1) that "stipulate[s] the condition or conditions of the order violated and a reasonable description of the time, place and manner in which the violation

[11]Where the Legislature intended to authorize the court to act at its own instance with respect to a possible VOP, it expressly so provided (*see* § 360.1[3] ["If at any time during the period of probation the court has reasonable cause to believe that the respondent has violated a condition of the probation order, it may issue a search order"]).

occurred" and (2) that is supported by "*[n]on-hearsay allegations* . . . establish[ing], if true, every violation charged" (emphasis added). In addition, unless the respondent enters an admission to the charge in accordance with Family Court Act § 321.2, he or she is entitled to a prompt hearing on the alleged VOP (§ 360.3[1], [2]), at which only "competent" evidence may be admitted (§ 360.3[3]). By contrast, on a motion under § 355.1, the respondent is entitled to a hearing only "to resolve any material question of fact" (§ 355.2[3]), which effectively shifts to the respondent the burden of establishing that a material question of fact exists.[12]

By proceeding against appellant by way of a motion to modify the dispositional order based on "a substantial change of circumstances" under § 355.1(1), Family Court effectively circumvented certain procedural requirements of the Legislature's statutory scheme for prosecutions of VOPs at §§ 360.1 *et seq.* In particular, unlike a VOP petition under § 360.2(2), a § 355.1(1) motion may be — and the motion in this case in fact was — based on hearsay (*see* § 355.2[1]). In addition, while a VOP petition "must stipulate the condition or conditions of the order violated

[12]With regard to the last point, appellant in this case did enter an admission to the charge, which, we acknowledge, would have obviated the need for a hearing had the matter been prosecuted pursuant to a VOP petition.

and a reasonable description of the time, place and manner in which the violation occurred" (§ 360.2[2]), the order to show cause by which the court purported to initiate its § 355.1(1) motion: (1) failed to specify which condition of the dispositional order appellant was alleged to have violated; (2) gave no description of the place and manner in which the VOP occurred (other than noting that appellant had been arrested "for allegedly committing an act, which if committed by an adult, would constitute a crime"); and (3) inaccurately (and repeatedly) described the time of appellant's arrest as "6/30/11" (in fact, the date of the arrest was June 29, 2011). Finally, by itself initiating the § 355.1(1) motion, Family Court circumvented the Legislature's delegation to the probation service of the responsibility to determine whether to prosecute an act as a VOP (*see* § 360.2[1]).

Family Court's decision to proceed against appellant under § 355.1(1) for what was essentially an alleged VOP, thereby avoiding the requirements of the statutory scheme for prosecutions of VOPs, was contrary to basic principles of statutory construction. "[W]here the Legislature enacts a specific provision directed at a particular class, and a more general provision in the same statute which might appear to encompass that class, the specific provision will be applied"

(*New York State Crime Victims Bd. v T.J.M. Prods.*, 265 AD2d 38, 46 [1st Dept 2000] [internal quotation marks omitted]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 238). Section 355.1(1) is a general provision recognizing Family Court's power to vacate or modify its own orders, analogous to CPLR 5015 and CPL article 440 (*see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Court Act § 355.1). Sections 360.1 *et seq.*, by contrast, specifically address the modification or revocation of probation based on an alleged violation thereof. We agree with appellant that, because the Legislature has created a detailed scheme specifically dealing with VOPs, those provisions, not § 355.1(1), must be applied. It would be illogical for the Legislature to have enacted requirements specifically applicable to the prosecutions of a VOP only to permit a court to circumvent those requirements by addressing an alleged conduct constituting a VOP by moving under § 355.1(1), the more general provision permitting the court to revoke or modify its orders based on "a showing of a substantial change of circumstances." Thus, we reject the presentment agency's position that a motion under § 355.1(1) and a VOP petition pursuant to § 360.2 should be viewed as "overlapping mechanisms" for addressing conduct constituting a violation of probation.

In sum, Family Court was not authorized to initiate a motion under § 355.1(1) to modify a prior dispositional order based on alleged conduct by appellant that, if proven, would constitute a VOP. The modification order, because it was rendered pursuant to such an unauthorized motion, must be vacated as invalid.

The June 30, 2011 Remand Order

The remand order of June 30, 2011, pursuant to which appellant was placed in detention pending determination of Family Court's § 355.1(1) motion, is now moot, since appellant's detention pursuant to that order has ended. Both parties agree, however, that we may rule upon the validity of the remand order because it comes within the exception to the mootness doctrine for orders presenting novel and substantial issues that are likely to recur but to evade appellate review (*see Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 505-506 [1998]).

In reviewing the modification order, we have already determined that Family Court was without authority to address appellant's alleged VOP by initiating a § 355.1(1) motion to modify the preexisting dispositional order. Because the remand order was issued as an adjunct to the § 355.1(1) motion, and the § 355.1(1) motion was itself unauthorized, the remand order would be invalid even if § 355.1 or § 355.2 (which sets forth the procedures to be followed on a § 355.1 motion) provided authority

for an order detaining a juvenile pending the determination of a § 355.1 motion. But, as the presentment agency concedes, even if Family Court did have the authority to initiate the § 355.1(1) motion (as the presentment agency maintains the court did), the remand order would still be unauthorized because nothing in § 355.1 or § 355.2 authorized the court to remand appellant to custody pending determination of a motion under § 355.1.

In *Matter of Jazmin A.* (15 NY3d 439 [2010]), the Court of Appeals held that a juvenile may be remanded to detention only at "specific junctures in a delinquency proceeding" spelled out in the Family Court Act (*id.* at 444).[13] Thus, in *Jazmin A.*, Family Court was held to lack authority to order the detention of the respondent probationer when she appeared in court for a monitoring hearing, before any VOP petition had been filed. As the Court of Appeals explained: "Because the Legislature did not . . . empower Family Court to order detention of a juvenile probationer before the filing of a VOP petition, we are unwilling to imply such authority in the absence of a statutory peg" (*id.*). The Court of Appeals further noted that Family Court's

[13] *Jazmin A.* notes that the points at which the Family Court Act authorizes detention are the pre-petition hearing (§ 307.4[4][c]), the initial post-petition appearance or an adjournment thereof (§§ 320.1, 320.4[2]), the probable cause hearing (§ 325.3[3]), and "after a VOP petition is filed" (§ 360.3[2][b]) (15 NY3d at 444).

"continuing jurisdiction [over a juvenile probationer] does not vest [the court] with the power to take actions not authorized by article 3 [of the Family Court Act]" (*id.*).

Although the question of "whether detention would be authorized pending resolution of [a § 355.1] motion" (*Matter of Jazmin A.*, 62 AD3d 526, 527 [1st Dept 2009], *affd* 15 NY3d 439 [2010]) was not presented in *Jazmin A.*, the implication of the decision for that question is clear. Given that neither § 355.1 nor § 355.2 offers any "statutory peg" on which to hang authority for remanding appellant to detention, the remand order in this case was invalid, even if Family Court's § 355.1 motion were itself authorized (which, as we have held, it was not).[14] Accordingly, the remand order must be vacated.[15]

Accordingly, the order of Family Court, Bronx County (Allen Alpert, J.), entered on or about June 30, 2011, which remanded appellant to detention in the custody of the Administration for Children's Services of the City of New York, and the order, same

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[14]The presentment agency notes an additional, and independently fatal, procedural infirmity in the remand order — that it was issued before the order to show cause initiating the § 355.1(1) motion was served on appellant.

[15]We note that our vacating the modification order and the remand order on this appeal does not affect the final disposition of the 2011 case (based on the same admission, rendered at the same time, and imposing the same sanction as the modification order), which appellant does not challenge on this appeal.

court and Judge, entered on or about September 27, 2011, which modified an order of disposition dated April 7, 2011, to the extent of imposing upon appellant a term of 24 months of enhanced supervision probation, with the term of such probation set to expire on September 26, 2013, should be reversed, on the law, without costs, and the orders vacated.

All concur.

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

ENTERED: **NOVEMBER** 29, 2012

CLERK