SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 9, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Sweeny, Renwick, DeGrasse, JJ.

7002 Mark Komlosi, Index 115207/09
Petitioner-Plaintiff-Respondent,

-against-

Andrew M. Cuomo, as Attorney General
of the State of New York, et al.,

Respondents-Defendants-Appellants.

Eric T. Schneiderman, Attorney General, New York (Robert C. Weisz of counsel), for appellants.

Nixon Peabody LLP, Rochester (David H. Tennant of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Jane Solomon, J.), entered May 25, 2010, which, in this hybrid CPLR article 78/declaratory judgment proceeding, granted petitioner's article 78 petition, annulled and declared invalid the determination of the Attorney General denying nonparty state employee Melanie Fudenberg's request for indemnification, and declared that petitioner, as receiver for Fudenberg, was entitled to payment from the State in the amount of $2,372,988 pursuant to Public Officers Law § 17(3), reversed, on the law, without costs,

the petition denied, respondents' determination reinstated, and it is declared that Melanie Fudenberg has no right to be indemnified by the State of New York for petitioner-plaintiff's judgment against her.

Petitioner Mark Komlosi, as receiver for nonparty Melanie Fudenberg, commenced this proceeding to compel the State respondents to indemnify Fudenberg for a judgment that was rendered against her in a federal action that Komlosi, in his individual capacity, had brought pursuant to 42 USC § 1983 alleging, inter alia, malicious prosecution (*see Komlosi v Fudenberg*, 2000 WL 351414, 2000 US Dist LEXIS 4239 [SD NY 2000]). That action arose after Fudenberg falsely accused Komlosi of having sexually abused a mentally disabled resident of a facility at which both worked in 1985.

The State's determination declining to indemnify Fudenberg is supported by a rational basis (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The jury's finding that Fudenberg "knew with absolute certainty" that the allegations of sexual misconduct between Komlosi and the mentally disabled resident were false rationally supports the State's conclusions that Fudenberg was acting beyond the scope of

her employment, and that she was engaged in intentional wrongdoing (*see* Public Officers Law § 17 [3] [a]; *Dykes v McRoberts Protective Agency*, 256 AD2d 2 [1998]).

Komlosi's argument that the Attorney General is estopped from arguing that Fudenberg's acts fell beyond the scope of her employment is unavailing. The Attorney General's prior position was proffered during its defense of Fudenberg, and the State's duty to defend is broader than the duty to indemnify (*see Matter of Lo Russo v New York State Off. of Ct. Admin.*, 229 AD2d 995 [1996]; *see also Matter of Barkan v Roslyn Union Free School Dist.*, 67 AD3d 61, 67 [2009]).

Komlosi's argument, as Fudenberg's receiver, adopted by the dissent, that the jury's finding in the federal action *(see Komlosi v New York State Off. Of Mental retardation Dev. Disabilities,* 1990 WL 29352, 1990 US Dist Lexis 2659[SD NY 1990]) was based on an erroneously worded and expansive interrogatory, was not preserved by any party at the trial. At trial, counsel for both sides negotiated the words to be used in the verdict sheet, and neither objected when the court submitted the final interrogatory to the jury. Further, the interrogatory comported with the theory of the case of intentional conduct that Komlosi proffered at trial.

Moreover, irrespective of the jury's finding in the federal action, the State's determination, made pursuant to Public Officers Law § 17[3][a], that Fudenberg engaged in intentional wrongdoing has ample support in the record. The irrefutable fact remains that the sexual abuse charges that resulted in Komlosi's arrest and indictment were dropped in the middle of the trial when the alleged victim, Rosenberg, revealed to the prosecutor that Fudenberg had forced him to lie about them. The dissent, however, argues that Rosenberg's recantation is not credible because "he did not respond at all to the question of how she forced him" to lie. But the dissent cannot seriously argue that such recantation was not credible when it forced the prosecution to drop the sexual abuse charges against Komlosi. Under the circumstances, it cannot be said that the Attorney General lacked a factual basis to discredit Fudenberg's allegations, as noted by the dissent, that she "sincerely [but] misguidedly believed that by leading [the alleged victims] to press what she perceived as their legitimate grievances of sexual abuse[s], she was protecting them."

We have reviewed the remaining contentions and find them unavailing.

All concur except Saxe, J.P.,who dissents in a memorandum as follows.

SAXE, J.P. (dissenting)

The question we must answer on this appeal is whether the State should be required to indemnify former state employee Melanie Fudenberg for a $2,372,988 judgment that plaintiff Mark Komlosi obtained against her for actions she took in the course of her employment as a state Mental Hygiene Therapy Aide. I would require the State to do so. The rationale provided by the State to justify its refusal is insufficient and an improper basis for that refusal. When the complete record is considered, it is apparent that Fudenberg's conduct indeed fell within the parameters of Public Officers Law § 17(a)(3), and therefore the State should pay Komlosi's judgment.

Komlosi was working as a psychologist for the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) for several years when, in 1982, he was assigned to the Williamsburg Rehabilitation and Training Center (WRTC), a residential facility for developmentally disabled adults. This proceeding arises out of an ultimately-dismissed criminal prosecution brought against him in 1985 based on allegations that he had sexually abused one of the residents at WRTC.

David Rosenberg, the complainant in the dismissed criminal prosecution, is a developmentally disabled adult resident at

WRTC, with an IQ of approximately 72 and a complex clinical diagnosis that included a tendency to fabricate stories and a preoccupation with sex that regularly prompted him to leave the facility without permission and attend pornographic films at 42nd Street movie theaters.

Melanie Fudenberg was employed at WRTC at the time in the job title of Mental Hygiene Therapy Aide. It was she and two other staff members who brought the criminal charge of sexual abuse that David Rosenberg made against Komlosi to the attention of supervisory personnel, although this was not the first such complaint that Fudenberg brought to supervisory attention. To understand the dynamic that led to the criminal complaint, it is necessary to discuss the previous incidents in which Fudenberg brought to the attention of senior administrative staff purported abuse by Komlosi, and to note that Komlosi was cleared after investigation in each instance.

On August 14, 1984, Fudenberg accompanied a resident named Marion Greengrass to the WRTC Chief of Services, Arthur Fogel, and Greengrass told Fogel that Komlosi had sex with her. After Komlosi was placed on administrative leave, the charge was investigated, and was ultimately determined to have been fabricated. Investigator George Young reported that Greengrass

denied having had sex with Komlosi, but stated that Fudenberg told her to say she had.

During August 1984, Fudenberg also brought WRTC resident Michael Sakowitz to Fogel's office, where Sakowitz said that Komlosi had sexually abused him, using masturbatory hand gestures to demonstrate. However, when Fudenberg left Fogel's office, Sakowitz denied having been sexually abused, and said Fudenberg told him to get Komlosi in trouble. No administrative leave or other discipline resulted from this report.

But Fudenberg was not chastened or deterred by these determinations; on the contrary, she continued to press them. In November 7, 1984, she approached Ivan Canuteson, OMRDD Associate Commissioner of Program Operations, while he was visiting the facility, to express her concerns and make complaints about what she perceived to be poor care and treatment of a number of residents, including her concern that inadequate investigations had been made into the previous claims of sexual misconduct by Komlosi.

Canuteson then set a further inquiry in motion. An intradepartmental memo from Kenneth Brodsky, Deputy Director, indicates that he interviewed Fudenberg at length, and listed her complaints. In addition to her renewed complaints about what she

believed to be Komlosi's sexual misconduct, her allegations included charges against the facility's medical staff about their treatment and handling of some residents, and an accusation that a resident who fell out a window and died was actually intentionally murdered, along with speculation about staff members who could be behind the purported homicide. With regard to her assertions against Komlosi, Fudenberg elaborated that he had allowed a resident named Anthony Ford to beat him up because Komlosi enjoys being beaten, and that she saw him allowing another resident, Lee Pierce, to touch his penis. She accused Komlosi of locking his office door when seeing clients in order to privately obtain sexual favors from them, and expressed her belief that Komlosi paid the clients for those sexual favors with trips for coffee and rolls from a nearby bakery. She pointed out that Greengrass had claimed that she "had fun with" Komlosi.

Client Rights Specialist Lovetts Joyner then conducted the follow-up investigation on January 8, 1985. Once again, the allegations of sexual abuse against Komlosi were found to be unsubstantiated. Joyner reported that it is a common practice among the agency's psychologists to close their doors during client counseling sessions. He interviewed all the residents and found no foundation for any of the accusations. As to

Greengrass, she told him Komlosi used to take her to the store for coffee and rolls as a treat, and had always been very nice to her, and that she had dreams about having sex with him, but, she denied having actually had sex with him, and stated that Fudenberg had given her a cigarette and instructed her to say Komlosi had sex with her as a game.

Specialist Joyner concluded by recommending that this time, a formal letter of exoneration be placed in Komlosi's personnel file and that OMRDD Employee Relations be advised of Fudenberg's wrongful attempt to damage Komlosi's reputation and livelihood.

Instead, Fudenberg soon took part in spearheading a new accusation against Komlosi, beginning on March 11, 1985, when WRTC resident David Rosenberg stated, while in the presence of Fudenberg and two other therapy aides, that Komlosi had sexual contact with him. Fudenberg completed an incident report, indicating that David Rosenberg stated, in the presence of herself and two other staff members, William Guzman and Walter DeLeon, that "Mr. Molosi [*sic*] told me to touch his peanuts [*sic*], and he touched mine." DeLeon submitted a memorandum the next day indicating "I Walter De Leon heard David Rosenberg state that his genital area was touched by Mr. Komoloski [*sic*]. Rosenberg also stated that Mr. Komoloski [*sic*] touched his face

and said nice little Jewish boy." William Guzman submitted his own statement on March 12, 1985:

> "On the evening of 3/11/85 while sitting at the front desk on the 3rd floor, resident David Rosenberg stated to Ms. Fudenberg, Mr. DeLeon and myself that Mr. Komloski [*sic*] had touched his penis on several occasions. Mr. Rosenberg also said that Mr. Komloski [*sic*] had allowed David to touch and play with Mr. Komloski's [*sic*] penis. When questioned about the extent of Mr. Komloski's [*sic*] actions (e.g.: intercourse) Mr. Rosenberg said no."

Another psychologist at WRTC, Don Wiur, then interviewed David Rosenberg on March 12, 1985. His notes from this interview indicate that Rosenberg called Komlosi a "very nasty man" and said Komlosi "took me to his office and told me to suck his penis and I sucked his penis and [he] suck[ed] my penis back." Rosenberg told Wiur that Komlosi did not force him physically, but by his words alone. Although Wiur thought Rosenberg seemed sincere, one or two inconsistencies made during the interview made him uncertain of whether Rosenberg was telling the truth.

Investigator George Young then interviewed Rosenberg on March 13, 1985. At that interview, Rosenberg began by saying that Fudenberg came to him and asked him whether Mark Komlosi had sucked his penis, and that she forced him to say yes. However, when Young then asked, "Has Mark ever sucked your penis?" Rosenberg responded, "Yes, way back."

On March 13, 1985, Komlosi was once again placed on administrative leave pending investigation. This time, however, before the agency's investigation was completed, on March 22, 1985 the New York City Police Department asked the agency to stop its investigation, and proceeded with its own investigation. On March 25, 1985, Komlosi was informed that he was being suspended without pay due to charges that he sexually abused Rosenberg, and he was arrested on May 2, 1985 on those charges. On May 8, 1985, Komlosi was indicted on two counts of sodomy. He was incarcerated for 15 days, during which he was strip-searched and physically and sexually threatened by other inmates. He was also sent hate mail by readers of news articles that reported the charges. In one such news article, Fudenberg is quoted as describing how five residents spoke to her of having had sexual encounters with Komlosi and how "[w]hen nothing got done, I went to the cops." In a newsletter put out around the same time by Fudenberg's union, Fudenberg also repeated her assertions that the agency had failed to properly investigate the allegations of sexual abuse against Komlosi.

During the criminal trial in May 1986, although Rosenberg initially testified that Komlosi had sexually abused him, he thereafter told Fogel, and then the prosecution, that Fudenberg

had “forced” him to claim the sexual abuse. The indictment was then dismissed. In September 1986, OMRDD reinstated Komlosi, with back pay, but Fudenberg and Rosenberg were still at the facility, and Komlosi found that he was unable to resume his duties, fearing a repeat of the past horrific experiences. He therefore resigned for health reasons; he had been diagnosed as suffering from post-traumatic syndrome disorder, was prescribed anti-depressants and anti-anxiety medication. When he sought reinstatement a year later, OMRDD said it did not have a position to offer him.

In March 1988, Komlosi commenced the underlying federal action against Fudenberg and numerous other state and city employees and agencies, alleging violations of his civil rights under 42 USC § 1983. Although the Office of the Attorney General said it could not itself represent Fudenberg, it certified to the Comptroller that Fudenberg was entitled to be represented by private counsel paid for by the State under Public Officers Law § 17.

The claims against all defendants other than Fudenberg were dismissed on various grounds before trial (*see Komlosi v New York State Off. of Mental Retardation & Dev. Disabilities*, 1994 WL 465993, 1994 US Dist LEXIS 11864 [SD NY 1994], *mod* 64 F3d 810 [2d

Cir 1995]; *Komlosi v New York State Off. of Mental Retardation & Dev. Disabilities*, 1990 WL 29352, 1990 US Dist LEXIS 2659 [SD NY 1990]). The case proceeded to trial in May 1999 against Fudenberg as the sole remaining defendant.

The jury was instructed that for Komlosi to establish his claim against Fudenberg under 42 UCS § 1983, he had to prove three elements by a preponderance of the evidence. First, that Fudenberg's complained-of conduct was committed while she was acting under color of state law, meaning that her conduct was made possible only because she was clothed in the authority of the state and her actions made possible by virtue of state law. The act must be of such nature and committed under such circumstances that it would not have occurred except for the fact that the defendant purported or pretended to be lawfully exercising her official power while in reality abusing it.

The second element of the section 1983 claim is that the conduct deprived Komlosi of federal rights, privileges or immunities; the three rights he claimed were violated were (1) to continued employment, (2) to be free to pursue the career of his choice without stigma, and (3) to be free from malicious prosecution. In order to establish a violation of the right to be free of malicious prosecution, the court explained, Komlosi

was required to prove the following:

1 - the commencement of a criminal proceeding by Fudenberg against Komlosi,

2 - the termination of the criminal proceeding in his favor,

3 - the absence of probable cause,

4 - actual malice, and

5 - a post-arraignment deprivation of personal liberty.

The jury was told that first element could be satisfied using several possible factual bases, including where "Ms. Fudenberg persuaded Mr. Rosenberg to make the complaint and that without Ms. Fudenberg's persuasion, Mr. Rosenberg would not have made the complaint *or* that Ms. Fudenberg, acting in bad faith, gave Mr. Rosenberg false information as a result of which Mr. Rosenberg made the complaint" (emphasis added). That is, for this element, it was *not* necessary to find that Fudenberg got Rosenberg to provide false information; simply persuading him to press the complaint was sufficient.

As to the third prong, the absence of probable cause, the court instructed the jury that "[t]he question on the issue of probable cause is not whether Mr. Komlosi was in fact guilty or innocent, or whether Ms. Fudenberg was in fact mistaken or correct, but rather, whether, on the facts known to or reasonably

believed by Ms. Fudenberg, a reasonably prudent person would have believed Mr. Komlosi to be guilty."

The element of actual malice, needed to establish a violation of Komlosi's right to be free of malicious prosecution, was defined as "for a purpose other than bringing an offender to justice *or* out of personal ill will [or] if it is brought in reckless disregard of the rights of the person accused." So, this element could be satisfied without any finding that Fudenberg was acting out of personal animosity, if Fudenberg was found to have acted in reckless disregard for Komlosi's rights when she pressed Rosenberg to make his accusations.

The jury was then instructed about Fudenberg's affirmative defense of qualified immunity. The trial court charged the jury that Komlosi would be unable to succeed with his claim against Fudenberg if she proved that she was protected by qualified immunity, that is, "if, at the time she allegedly violated Mr. Komlosi's rights, she did not know with absolute certainty that the allegations of sexual misconduct between Mr. Komlosi and Mr. Rosenberg were false." In its explanation the court concluded that "if you find that Ms. Fudenberg was certain that these charges were false, either because she wrongfully caused Mr. Rosenberg to lie *or for some other reason*, then she is not

entitled to qualified immunity" (emphasis added).

The jury was given a written verdict sheet with a number of interrogatories. The first three questions concerned the elements of Komlosi's section 1983 claim, properly framed so as to ask whether Komlosi had successfully proved by a preponderance of the evidence that (1) Fudenberg had acted under color of state law, (2) her actions violated his constitutional rights, and (3) those actions were the proximate cause of Komlosi's injuries; the jury answered these questions in the affirmative.

The fourth question, and the jury's answer to it, is the crux of the present dispute, and it requires careful consideration. It concerns whether Fudenberg was protected by a qualified immunity. However, unlike the first three questions, the fourth interrogatory was not framed so as to ask whether Fudenberg had proved her affirmative defense of qualified immunity by a preponderance of the evidence. Rather, although the court had instructed the jury that it was Fudenberg's burden to prove "that she did not know with certainty that the charges against Mr. Komlosi were false," the interrogatory did more than ask the jury whether Fudenberg had or had not proved the defense. It actually asked the jury to make an affirmative finding *either way* regarding her knowledge of the falsity of the charge, by

checking off one of the two offered options. Specifically, the question reads:

> "4. Based on all the evidence do you find that:
>
> (a) _X_ Ms. Fudenberg knew with absolute certainty that the allegations of sexual misconduct between Mr. Komlosi and Mr. Rosenberg were false.
>
> (b) ___ Ms. Fudenberg did not know with absolute certainty that the allegations of sexual misconduct between Mr. Komlosi and Mr. Rosenberg were false."

As indicated above, the jury checked off the box indicating that Fudenberg "knew with absolute certainty that the allegations of sexual misconduct between Mr. Komlosi and Mr. Rosenberg were false" -- the box it had to check if it was to find in Komlosi's favor.

The jury returned a verdict in favor of Komlosi, which was ultimately upheld on the theory that Fudenberg, acting under color of law but unprotected by a qualified immunity, had violated his right to be free of malicious and baseless prosecution; the jury's $16 million award was reduced to $1,872,988 in compensatory damages plus $500,000 in punitive damages (*see Komlosi v Fudenberg*, 2000 WL 351414, 2000 US Dist LEXIS 4237 [SD NY 2000]).

Based on the jury's indication on the verdict sheet that

Fudenberg "knew with absolute certainty that the allegations of sexual misconduct between Mr. Komlosi and Mr. Rosenberg were false," the Office of the Attorney General has taken the position that since Fudenberg knew with certainty that Rosenberg's accusation against Komlosi was false, she was engaged in intentional wrongdoing and was acting outside the scope of her employment, and accordingly, is not entitled to indemnification under Public Officers Law § 17(3).

Komlosi challenges that determination in this hybrid declaratory judgment action and CPLR article 78 proceeding, brought in the capacity of Fudenberg's judgment creditor and the court-appointed receiver of Fudenberg's right to indemnification. The motion court set aside the Attorney General's decision denying indemnification as arbitrary and capricious, in view of the office's position throughout the federal action that Fudenberg had been performing her responsibilities in the course of her state employment. The Attorney General now appeals, contending that its determination declining to indemnify Fudenberg is supported by a rational basis based on the jury's finding.

I would affirm. Public Officers Law § 17(3)(a) requires the State to indemnify its employees in the amount of any judgment

obtained against such employees in any state or federal court, “provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee.” Therefore, to be entitled to receive indemnification, plaintiff must prove (1) that Fudenberg’s actions occurred while she was acting within the scope of her public employment or duties, and (2) that Fudenberg’s conduct did *not* constitute “intentional wrongdoing.”

The first requirement is easily established here. An act is considered to be within the scope of an employee's employment if it “can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act” and “was done while the servant was doing his master’s work, no matter how irregularly, or with what disregard of instructions” (*Riviello v Waldron*, 47 NY2d 297, 303, 302 [1979]). Here, Fudenberg’s actions in bringing Rosenberg and his statement to the attention of senior personnel were done in the scope and context of her employment as a state-employed therapy aide. Staff at facilities like WRTC are affirmatively required to report actual or

suspected abuse of residents (*see* Public Health Law § 2803-d; 14 NYCRR § 624.2). They are not entitled to independently weigh the credibility or veracity of an accusation, and, indeed, the failure to report such a claim may even subject the employee to liability (*see e.g.* Social Services Law § 420). It is incontrovertible that David Rosenberg made such a claim in front of Fudenberg and two other staff members; the three employees had no choice but to bring Rosenberg's words to the attention of senior supervisory personnel.

To support its conclusion that Fudenberg engaged in intentional wrongdoing so as to preclude indemnification for her acts under Public Officers Law § 17(3)(a), the State relied on the verdict sheet box checked off by the jury in the federal civil rights action in order to reject her qualified immunity defense. However, there are a number of reasons why we should not permit the State to use that purported finding to conclude that Fudenberg engaged in intentional wrongdoing.

Based on the law and the court's instructions to the jury in Komlosi's civil rights action against Fudenberg, the only finding the jury was required to make if it decided to reject Fudenberg's qualified immunity defense was that Fudenberg had failed to satisfy her burden of proving that she did not know with

certainty that the charges against Mr. Komlosi were false. Rejecting her qualified immunity defense did not require an affirmative finding that Fudenberg knew with certainty that Rosenberg's charges were false. Yet, the jury was given *no choice* but to check off that box in order to reject the qualified immunity defense and find in favor of Komlosi. In these circumstances, it is unjust to Komlosi to allow the State to rely on the flawed interrogatory and its unnecessary, but required "finding," to justify its refusal to indemnify.

Moreover, the credible evidence at trial in the federal civil rights action did not support a finding that Fudenberg had acted with the knowledge that the accusation was false, persecuting Komlosi out of some sort of personal animus against him unrelated to a belief that he posed a threat to the WRTC residents. Rather than maliciously manipulating residents into making completely false accusations against Komlosi, she was pressing them to come forward with accusations of things that she believed had occurred, based on her perception and interpretation of what she saw and heard. Review of the record makes it apparent that Fudenberg had a tendency to interpret innocuous statements and actions toward WRTC residents, especially by Komlosi, as proof of sexual conduct toward them. So, for

example, when she saw Komlosi holding a resident's hand, closing his office door when speaking with a resident, innocently touching a resident or allowing a resident to touch him without fussing or protesting, she saw those actions as indicative of sexual conduct. She sincerely, if misguidedly, believed that by leading these residents to press what she perceived as their legitimate grievances of sexual abuse, she was protecting them. The belief she harbored -- that she was heroically helping to protect the powerless residents from sexual predation -- is reflected in her testimony and in statements reported in news articles, in which she reportedly said that she was motivated by the desire to protect the patients.

Even when, upon investigation and inquiry, these residents then disclaimed any actual abuse, Fudenberg still did not waver in her views and her interpretation of what she had seen and heard. She continued to see Komlosi's innocuous actions as indicative of abuse, to press the residents to make those accusations to bring him to justice, as she saw it, and to believe that when he was cleared of the charges, the determination was due to professional bias or a poor investigation. From her perspective, she was not creating and orchestrating false charges by WRTC residents; instead, she was

helping residents make the accusations that they hesitated to make without a tough advocate helping them.

The tenaciousness with which Fudenberg persevered in her misperceptions, regardless of Komlosi's being cleared after formal investigation, is underscored by remarks made by administrative and supervisory staff about her. In his deposition testimony, OMRDD investigator George Young indicated that when he reported that he was going to recommend that charges against Komlosi be dropped, John Sabatos, then Director of the Brooklyn Developmental Center, responded that "Melanie [Fudenberg] was not going to let me drop this." George Young also stated that when he reported his conclusions to Sheldon Kramer, the director of Employee Relations at OMRDD, Kramer said he "approached [Fudenberg] with caution."

The only direct evidence tending to support a conclusion that Fudenberg "knew" David Rosenberg's accusation to be false can be found in Rosenberg's recantation of his earlier testimony at Komlosi's criminal trial. However, his reported statement was certainly far from clear and open, and beyond establishing that his initial accusations against Komlosi were untrue, it should not be relied on to establish that Fudenberg knew his accusation to be false and nevertheless forced him to make it. While

Rosenberg was reported to have said in his recantation that Fudenberg "forced" him to lie, he did not respond at all to the question of *how* she forced him, and he nowhere explained whether Fudenberg provided him with the lie he was to tell, or simply pressed him to repeat something he had already told her. Particularly when we recall that Rosenberg had previously used the word "forced" to falsely assert that Komlosi had "forced" him to participate in acts of oral sex with words alone and without touching him, there is no reason to take his assertion that Fudenberg forced him to lie to mean that she used force to get him to tell what she knew to be a lie about Komlosi. In all his earlier statements, Rosenberg said that Fudenberg had persuaded, or forced, him to come forward with his claim, not that she forced him to say something she and he knew to be untruthful. Therefore, Rosenberg's statement that Fudenberg forced him to lie, viewed in light of his previous inappropriate use of the word "forced" and his general inability to explain clearly what occurred, must be treated as merely establishing that Fudenberg pressed him to come forward with the claim that he now admits was untrue.

It would be improper to rely on earlier investigators' reports relaying hearsay statements reportedly made by other

residents to the effect that Fudenberg had solicited accusations by them against Komlosi. Those second-hand statements, purportedly made by individuals whose reliability cannot be assumed in any event, cannot be used to justify a finding that Fudenberg knew there was no basis for the accusations she prompted against Komlosi. But, even assuming that we could rely on those hearsay reports to establish Fudenberg's actions and motivations, those second-hand accusations are better understood to establish only that in the cases of those residents, too, Fudenberg interpreted innocuous observations as reflective of abusive conduct by Komlosi, and took the steps she perceived to be necessary in order to coax or prompt those residents to make the accusation that she believed they were too frightened to report on their own.

Determining what goes on in someone's mind is unquestionably a virtually impossible task, yet, of necessity, we ask juries to make those determinations, using prescribed standards of proof and making inferences. If the jury in the civil rights action had necessarily made the determination that Fudenberg knew Rosenberg's accusation to be false, that determination could legitimately provide sufficient support for the denial of the requested indemnification. But, in order to reach its verdict,

the jury did *not* have to find that Fudenberg knew the falsity of Rosenberg's assertions of sexual abuse by Komlosi. The only finding it had to make regarding Fudenberg's mental state, could have been limited to finding that Fudenberg's actions were brought in reckless disregard of Komlosi's rights. To the extent the jury's marking on the verdict sheet indicates a finding regarding Fudenberg's mental state, the State should not be permitted to rely on it because it was not necessary, it was not supported, and, most importantly, the jury was compelled to check that box in order to find for Komlosi.

The perplexing nature of Fudenberg's conduct may create the natural suspicion that she *must* have harbored tremendous personal animosity toward Komlosi, and that the way she kept pressing claims on behalf of WRTC residents after investigators and administrators had determined them to be baseless seems explicable only by the suggestion of personal animosity. Indeed, the legal theory of Komlosi's federal claim against her indicates that personal animosity, or a vendetta, was the only explanation he was able to proffer for Fudenberg's conduct toward him. However, the record before us includes one piece of information not provided to the jury, which Komlosi suggests helps, in retrospect, to explain why Fudenberg was so persistent in her

certainty that her observations demonstrated that Komlosi was sexually abusing residents, and why she was so unable to consider that she might be incorrect. Specifically, for the first time in a deposition in 2002, Fudenberg admitted that she then was unemployed and receiving Social Security disability benefits since approximately June 2000, based on medical disabilities that she admitted included a bipolar condition (as well as back injuries, including sciatica and scoliosis, a thyroid condition, high cholesterol, and an irregular heart beat).

The mere mention of her diagnosis with a bipolar condition does not in itself permit this Court to come to our own medical conclusions that the disorder caused her misperceptions and self-aggrandizement. It does, however, raise some question as to whether Fudenberg's perceptions regarding Komlosi's conduct with the WRTC residents might have been related to a psychological disorder. Had Komlosi known of this diagnosis during the civil rights trial, he could have provided evidence of a motivation that did not involve a personal vendetta on Fudenberg's part.

In the civil rights action, Komlosi successfully navigated the shoals of proving that Fudenberg was acting under color of state law while *not* being entitled to a qualified immunity. Having done so, he is now faced with an unintended -- and unfair

-- consequence of the positions he was forced to take. In order to obtain a jury verdict that Fudenberg was not protected by a qualified immunity, he had been compelled to take the position that she had knowingly pressed a false claim, and that finding is now being used to treat her actions as if they were taken outside of her capacity as a Mental Hygiene Therapy Aide. The State and its agencies, which defended Fudenberg every step of the way as having acted in the performance of her job responsibilities, now treat her actions as they would intentional conduct by a state employee that is unrelated to the perpetrator's employment. Not only do I fail to see the justification for this conclusion, but the decision seems to me to be cynical and disingenuous, an expedient position to take so that the state need not indemnify Fudenberg for the damage it put her in a position to create as an employee of WRTC.

When the evidence in the record is fully considered, the jury's indication of her purportedly "certain" knowledge of the falsity of David Rosenberg's accusation must be rejected as grounds to conclude that she engaged in intentional wrongdoing, and nothing else in the record justifies the conclusion. On the contrary, the evidence establishes that Fudenberg, however misguided, irrational, or psychologically compromised, continued

to believe herself to be acting for the protection of the residents from what she perceived to be a sexual predator. Based on those facts, the Attorney General's conclusion lacks a sufficient foundation, and Komlosi is entitled to the benefit of Fudenberg's right to indemnification.

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

ENTERED: OCTOBER 9, 2012

CLERK

Sweeny, J.P., Catterson, Acosta, Freedman, Román, JJ.

7989 Adam Ullrich, Index 300805/07
Plaintiff-Respondent,

-against-

Bronx House Community Center, et al.,
Defendants-Appellants.

_____

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for appellants.

Wingate, Russotti & Shapiro, LLP, New York (William P. Hepner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered January 12, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint is warranted in this action where plaintiff was injured during a basketball game at defendants' facility, when another player punched him in the jaw. Plaintiff and his father both testified that the assault was unprovoked and unanticipated, and that there was no warning of an impending assault. Thus, by plaintiff's own account, the assault occurred in such a short span of time that even the most intense

supervision could not have prevented it (*see e.g. Espino v New York City Bd. of Educ.*, 80 AD3d 496 [2011], *lv denied* 17 NY3d 709 [2011]).

Plaintiff's father testified that he observed a dispute on the basketball court involving the assailant and other club members several months earlier. However, plaintiff failed to show that the notice was sufficiently specific for defendants to have reasonably anticipated the assault upon plaintiff (*see Kamara v City of New York*, 93 AD3d 449, 450 [2012]). Defendants' failure to terminate the assailant's club membership after the earlier incident was not the proximate cause of the assault, which was an intentional and unforeseeable act of a third party (*see Sugarman v Equinox Holdings, Inc.*, 73 AD3d 654, 655 [2010]).

The Decision and Order of this Court entered herein on June 19, 2012, is hereby recalled and vacated (*see* M-3073 decided simultaneously herewith).

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Richter, JJ.

8050 The People of the State of New York, Ind. 5822/10
Respondent,

-against-

Todd Johnson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Kramer Levin Naftalis & Frankel LLP, New York (Shannon H. Hedvat of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J. at hearing; Charles H. Solomon, J. at plea and sentencing), rendered June 21, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

Defendant's arrest for disorderly conduct complied with CPL 140.10(1)(a), which provides that a police officer may arrest a person for an offense when "he or she has probable cause to believe that such person has committed an offense in his or her presence." The arresting officer heard another officer make a statement indicating that defendant and three other men had been

told “to get off the corner” where they were congregating in front of a local store. The officer himself made a statement indicating that the men should leave the corner. None of the men, including defendant, left and the officer arrested all four of the men for disorderly conduct.

Penal Law § 240.20(6) provides that “[a] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: ... He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.” Given the information the officer had about the gang problems that had occurred at that location in the past and the gang background of several of the men, he had a reasonable basis to believe their presence could cause public inconvenience, annoyance or alarm. Defendant’s failure to obey the police officer’s direction provided probable cause to arrest him (*see generally People v McDermott*, 279 AD2d 361 [2001], *lv denied* 96 NY2d 803 [2001]; *Matter of James T.*, 189 AD2d 580 [1993]).

Because the arresting officer had probable cause to arrest defendant, the hearing court properly declined to suppress the narcotics evidence recovered at the precinct incident to the lawful arrest. In light of our conclusion that the arresting

officer had probable cause based on his own observations, we need not address the People's argument that he could rely on the fellow officer rule in making this violation arrest.

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8212 In re Ernest Quinones, et al., Index 401037/11
Petitioners-Appellants,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Ernest Quinones, appellant pro se.

Patrina Quinones, appellant pro se.

Kelly D. MacNeal, New York (Melissa R. Renwick of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered September 27, 2011, denying the petition to annul the determination of respondent New York City Housing Authority, dated February 22, 2011, which denied petitioners' application to vacate their second default and dismissed the proceeding, unanimously affirmed, without costs.

The hearing officer's determination that petitioners failed to establish a reasonable excuse for their default (*see Matter of Cherry v New York City Hous. Auth.*, 67 AD3d 438, 439 [1st Dept 2009]; *Matter of Daniels v Popolizio*, 171 AD2d 596, 597 [1st Dept 1991]) has a rational basis in the record and is not arbitrary and capricious (*see Matter of Pell v Board of Educ.*, 34 NY2d 222,

231 [1974]). Petitioners' excuses for failing to appear at the hearing were not supported by any documentation (*see Cherry*, 67 AD3d at 438). Furthermore, plaintiffs did not explain why they did not either attempt to adjourn the hearing or arrange for a representative to appear on their behalf (*see Matter of Corchado v Popolizio,* 171 AD2d 598 [1st Dept 1991]); *Matter of Trinidad v New York City Hous. Auth.*, 2011 NY Slip Op 30599U, at 6 [Sup Ct, NY County 2011]).

In light of petitioners' failure to establish a reasonable excuse for their default, we need not consider whether they established a meritorious defense to the charges of chronic rent delinquency, breach of rules and regulations, and non-desirability by permitting excessive loud music. We note, however, that petitioners' arguments and documentation submitted in support of their Article 78 petition are not reviewable as

they were not part of the administrative record (*see Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept 1982], *affd* 58 NY2d 952 [1983]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8213 In re Jared M., and Another,

Children Under 18 Years of Age etc.,

Ernesto C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Steven M. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

Order of fact-finding and disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about December 21, 2011, which, insofar as appealed from, determined that respondent had neglected the subject children for whom he was legally responsible, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The record shows that police responded to complaints of marijuana use in the apartment building where respondent lived with his girlfriend and her two young children. A detective, upon smelling a strong odor of marijuana emanating from respondent's apartment, knocked on the door, and when respondent answered, the detective saw

marijuana in plain view. Following respondent's arrest, a search of the apartment recovered large amounts of marijuana located throughout the home, including over 130 individual packages of the substance.

Under the circumstances, the court properly found that respondent's conduct posed an imminent danger to the children's physical, mental and emotional well-being (*see* Family Ct Act § 1012[f][i]; *Matter of Eugene L. [Julianna H.]*, 83 AD3d 490 [1st Dept 2011]; *Matter of Michael R.*, 309 AD2d 590 [1st Dept 2003]). There is no basis to disturb the court's evaluation of the evidence, including its credibility determinations (*see Matter of Ilene M.*, 19 AD3d 106 [1st Dept 2005]). The fact that the children were not home at the time of respondent's arrest does not warrant a different determination.

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8214 In re Pedro Manuel Pena, Index 260193/11
Petitioner-Respondent,

-against-

Motor Vehicle Accident Indemnification Corporation,
Respondent-Appellant.

_____

Kornfeld, Rew, Newman & Simeone, Suffern, (William S. Badura of counsel), for appellant.

Brian D. Primes, Bronx (Victor A. Carr of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 20, 2011, which, in an action to recover for personal injuries allegedly sustained in a hit-and-run accident, granted petitioner's motion, pursuant to Insurance Law § 5218, for leave to bring an action against respondent, the Motor Vehicle Accident Indemnification Corporation (MVAIC), unanimously affirmed, without costs.

Supreme Court properly determined that petitioner satisfied the statutory conditions for commencing suit against MVAIC (*see* Insurance Law § 5218[b]; *Cardona v Martinez*, 61 AD3d 462 [1st Dept 2009]). To the extent the complaint report prepared by the New York City Police Department contradicts the allegations in

the petition, the conflict merely presents an issue of fact to be resolved in the plenary action.

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

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8215 In re Madison H.,

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

Demezz H.,
Respondent-Appellant,

Tabitha A.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

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

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

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child.

Second amended order of fact-finding and disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about November 29, 2011, which, to the extent appealed from as limited by the briefs, following a fact-finding hearing, determined that respondent father had neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f]; 1046[b]). The

evidence, including the testimony of the mother and medical experts, shows that the child suffered an injury that would not ordinarily occur absent an act or omission of a caretaker, and that the father was the caretaker of the child at the time the injury occurred (*see* Family Ct Act § 1046[a][ii]). The court cited the father's demeanor and disruptive courtroom behavior, and refused to credit the father's denial that he had abused the child. This credibility finding is entitled to great weight and we decline the invitation to find the contrary (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

Family Court, at the conclusion of the fact-finding hearing, properly amended the petition to conform to the proof of domestic violence. The record shows that the father had ample notice that domestic violence was at issue and an ample opportunity to cross-examine the mother about her claims (*see* Family Ct Act § 1051[b]; *Matter of Carmen L.*, 37 AD3d 468 [2d Dept 2007], *lv denied* 8 NY3d 814 [2007]). Moreover, the mother's testimony that the father had swung the child in his arm during an argument with the mother, was sufficient additional proof that the child's physical, mental, or emotional condition was in imminent danger

of impairment as a result of the father's domestic violence (*see* Family Ct Act § 1012[f][i]; *Matter of Ndeye D. [Benjamin D.]*, 85 AD3d 1026, 1027-1028 [2d Dept 2011]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8216 Annemarie Hadda, etc., et al., Index 109329/10
Plaintiffs-Respondents,

-against-

Lissner & Lissner LLP, et al.,
Defendants-Appellants.

Gordon & Rees, LLC, New York (Robert Modica of counsel), for appellants.

Glenn Backer, New York, for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered September 23, 2011, which denied defendants' motion to dismiss the complaint as time-barred, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendants made out a prima facie showing that the three-year statutory limitations period (CPLR 214[6]) expired before this legal malpractice action was commenced in July 2010. Plaintiffs failed to raise an issue of fact whether the doctrine of continuous representation applied here to toll the limitations period (*see Glamm v Allen*, 57 NY2d 87, 94 [1982]; *CLP Leasing Co., LP v Nessen*, 12 AD3d 226 [1st Dept 2004]). The only evidence plaintiffs submitted on this issue was an affidavit by

the husband of one of the plaintiffs, not a party to plaintiffs' retainer agreement with defendants, stating that he spoke to the individual defendant four times between January and May 2007. Even assuming the husband had the authority to speak for plaintiffs, the intermittent telephone contact between himself and defendants does not constitute "clear indicia of an ongoing, developing and dependent relationship between the client and the attorney" or of "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*see Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005] [internal quotation marks omitted]).

The causes of action for breach of fiduciary duty and breach of contract are duplicative of the malpractice cause of action, and are therefore also time-barred (*see* CPLR 214[6]; *6645 Owners Corp. v GMO Realty Corp.*, 306 AD2d 97 [2003]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8217-
8218 The People of the State of New York, Respondent,

Ind. 7348/02

-against-

David Anderson,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Roger S. Hayes, J.), entered on or about November 17, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed.

ENTERED: OCTOBER 9, 2012

CLERK

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

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8219 The People of the State of New York, Ind. 217/10
Respondent,

-against-

Michael Clinton,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered August 10, 2010, convicting defendant, after a nonjury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, 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 court's credibility determinations. The evidence established that defendant both threatened and used force to steal the victim's wallet from her pocket.

The court properly declined to consider petit larceny as a lesser included offense. The victim provided integrated testimony (*see People v Negron*, 91 NY2d 788 [1998]) establishing

a forcible taking. There was no reasonable view of the evidence, viewed most favorably to defendant, that he stole the wallet, but did so by some means other than force (*see e.g. People v Tucker*, 41 AD3d 210 [1st Dept 2007], *lv denied* 9 NY3d 882 [2007], *cert denied* 552 US 1153 [2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8220-
8221
M-3843

Gene Ann Criscenti,
Plaintiff-Respondent,

Index 104729/06
103728/07

-against-

Verizon, et al.,
Defendants-Appellants,

Carson Industries, LLP,
Defendant.

- - - - -

Gene Ann Criscenti,
Plaintiff-Respondent,

-against-

Communications Construction
Group, LLC, et al.,
Defendants,

JEK Communications, Inc.,
Defendant-Appellant.

Ledy-Gurren, Bass & Siff, L.L.P., New York (Deborah Bass of counsel), for Verizon New York Inc., Verizon Services Corp., Telesector Resources Group, Inc., and Verizon New York, Inc., appellants.

Purcell & Ingrao, P.C., Mineola (Terrance Ingrao of counsel), for Marble Heights of Westchester Inc., appellant.

McMahon, Martine & Gallagher, LLP, Brooklyn (Andrew D. Showers of counsel), for JFK Communications, Inc., appellant.

Gary E. Rosenberg, P.C., Forest Hills, for respondent.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered April 28, 2011 and August 3, 2011, which, to the

extent appealed from, denied defendants JEK Communications, Inc.'s, Marble Heights of Westchester's, Verizon, Verizon Services Corp., Inc., Telesector Resources Group, Inc., and Verizon New York, Inc.'s respective motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of said defendants dismissing the complaint as against them.

Plaintiff was injured when she slipped and fell on the cover of a Verizon utility box located in a common-area lawn in her condominium complex. Without a showing of notice to defendants, the fact that the utility box cover was slippery when wet does not raise an issue of fact as to negligence (*see Contreras v Zabar's*, 293 AD2d 362 [1st Dept 2002]). Nor do plaintiff's expert opinions raise an issue of fact, since they are unsupported either by the record or by specific, applicable safety standards (*see id.*).

Plaintiffs strict products liability claim fares no better. The record demonstrates conclusively that defendants did not

manufacture, sell or distribute the utility box (*see Reeps v BMW of N. Am., LLC*, 94 AD3d 475, 476 [1st Dept 2012]).

M-3843 - *Criscenti v Verizon et al.*

Motion to strike footnote denied.

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8222-
8223-
8224

In re Aniya C.,

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

Michelle C.,
Respondent-Appellant.

Administration for Children's Services,
Petitioner-Respondent,

Steven N. Feinman, White Plains, for appellant.

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

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

Order, Family Court, New York County (Rhoda J. Cohen, J.) entered on or about April 4, 2011, which, after a fact-finding hearing, found that appellant had neglected the subject child by using excessive corporal punishment, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (Family Ct Act § 1046 [b][i]) showing that appellant inflicted excessive corporal punishment (Family Ct Act § 1012 [f][i][B]), by beating her daughter with a belt that left bruises and marks on her neck, arms and legs (*see Matter of Alysha M.*, 24

AD3d 255 [1st Dept 2005], *lv denied* 6 NY3d 709 [2006]). Contrary to appellant's contention, petitioner was not required to demonstrate that the child suffered a "significant injury" (*see Matter of Jonathan F.*, 294 AD2d 121 [1st Dept 2002]).

The out-of-court testimony of the child to the ACS caseworker was corroborated by the caseworker's observation of the child's injuries, the photographs depicting the child's injuries, and the child's medical records related to the subject incident, which contained signed diagrams chronicling the location and/or size of the marks and bruises that were visible on the child's body approximately three days after the incident (*see Matter of Jazmyn R. [Luceita F.]*, 67 AD3d 495 [1st Dept 2009]; *Matter of Fred Darryl B.*, 41 AD3d 276 [1st Dept 2007]; *Matter of Maria Raquel L.*, 36 AD3d 425 [1st Dept 2007]).

No basis exists to disturb the court's credibility determinations (*see generally Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8225 Everest General Contractors, Index 602195/09
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

King & King, LLP, Long Island City (Brendan J. Hennessey of counsel), for appellant.

Kelly D. Macneal, New York (Lauren L. Esposito of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 14, 2010, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff failed to provide timely written notice of its intention to make a claim for damages arising out of defendant's delay, a condition precedent to commencing an action pursuant to section 23 of the parties' contract (*see A.H.A. Gen. Constr., Inc. v New York City Hous. Auth.*, 92 NY2d 20, 30-31 [1998]; *4-A Gen. Contr. Corp. v New York City Hous. Auth.*, 28 AD3d 261 [1st Dept 2006]). Plaintiff's July 26, 2004 letter which was allegedly sent to defendant, does not satisfy the requirement of written notice. The letter was not designated as a notice of claim, gave no indication of an intent to make a claim, and was

sent long before the March 2006 accrual of plaintiff's claim rather than within 20 days of the date the claim arose (*see Bat-Jac Contr. v New York City Hous. Auth.*, 1 AD3d 128 [1st Dept 2003]).

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

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8226 Juanita Birriel, Index 23328/02
Plaintiff-Appellant,

-against-

F.L. Smithe Machine Co., Inc.,
Defendant/Third-Party Plaintiff-Respondent.

-against-

New York Envelope Corporation,
Third-Party Defendant-Respondent.

_____

Philip Newman, P.C., Bronx (Paul Bibuld of counsel), for appellant.

Melli, Guerin, Wall & Frankland, P.C., New York (Michelle Wall of counsel), for F.L. Smithe Machine Co., Inc., respondent.

Haworth Coleman & Gerstman, LLC, New York (Scott Haworth of counsel), for New York Envelope Corporation, respondent.

_____

Order, Supreme Court, Bronx County (Patricia Ann Williams, J.), entered November 18, 2009, which granted the motion and cross motion of defendant F.L. Smithe Machine Co., Inc. and third-party defendant New York Envelope Corporation for reargument of the order (same court and Justice), entered July 11, 2008, granting their motions for summary judgment dismissing plaintiff's strict liability claim only, and, upon reargument, granted the motion and cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action alleging strict products liability, negligent design, and breach of the implied warranty, plaintiff, an employee of third-party defendant New York Envelope, was injured while operating an envelope-making machine manufactured by defendant F.L. Smithe Machine Co. that was substantially materially altered post manufacture (*see Birriel v F.L. Smithe Mach. Co., Inc.*, 23 AD3d 205 [1st Dept 2005]). Smithe met its burden of establishing that the machine was originally safe as manufactured, with an appropriate and difficult-to-remove safety feature installed, and that it neither performed nor authorized the alteration of the machine's safety mechanism (*see Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 480-481 [1980]; *Barnes v Pine Tree Mach.*, 261 AD2d 295 [1st Dept 1999]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's speculation that Smithe either performed or was aware of the alteration is unsupported by the record and insufficient to defeat summary judgment.

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: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8227 The People of the State of New York, Ind. 1522/09
Respondent,

-against-

Luis Vargas,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 26, 2010, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

Defendant's right of confrontation was not violated by testimony by the People's expert DNA analyst that made reference to data gathered by nontestifying technicians (*see People v Brown*, 13 NY3d 332 [2009]). *Williams v Illinois* (__US__, 132 S Ct 2221, 2242-2244 [2012]) provides further support for the proposition that the DNA evidence in this case did not violate the Confrontation Clause.

The court erred in ruling that class sign-in sheets from the

program defendant was enrolled in on the date of the crime were admissible under the business records exception to the hearsay rule. The evidence did not establish that these records were kept "regularly, systematically [and] routinely" *(People v Kennedy*, 68 NY2d 569, 579 [1986]), or that if kept in the regular course of business, they were "needed and relied on in the performance of the functions of the business" (*People v Cratsley*, 86 NY2d 81, 89 [1995]). There was no other basis for admissibility. However, the error was harmless in light of the overwhelming evidence of defendant's guilt, including the DNA match (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8228 The People of the State of New York, Respondent, Ind. 9821N/97

-against-

Dwayne Singleton, Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 5, 2010, resentencing defendant to an aggregate term of 11½ years, with 3 years' postrelease supervision, unanimously affirmed.

The court provided an appropriate reduction of defendant's sentence pursuant to CPL 440.46, and we perceive no basis for a further reduction. Although the new sentence extended defendant's period of supervision beyond what would have been the maximum expiration date of the original sentence, nothing in CPL 440.46 rendered this resentence impermissible. The resentence had the ameliorative effect of allowing defendant to gain early

release from prison, as a result of the relationship between the resentence and another sentence defendant was serving. The resentence was structured to benefit defendant, who received the exact sentence to which he had agreed (*see People v Mack*, 78 AD3d 520, 521 [1st Dept 2010], *lv denied* 16 NY3d 833 [2011]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8230-
8230A

Springwell Navigation Corp.,
Plaintiff-Respondent,

-against-

Sanluis Corporacion, S.A.,
Defendant-Appellant.

Ind. 600600/09

Wilk Auslander LLP, New York (Julie A. Cilia of counsel), for appellant.

Kasowitz Benson Torres & Friedman, LLP, New York (Thomas B. Kelly of counsel), for respondent.

Judgment, Supreme Court, New York County (Barbara Kapnick, J.), entered June 10, 2011, in plaintiff's favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 7, 2011, unanimously dismissed, with costs, as subsumed in the appeal from the aforesaid judgment.

In this breach of contract action, defendant does not deny that it issued the subject unrestricted global note (UGN), that it was obligated to make certain interest and principal payments thereunder, and that it failed to make the required payments. Its sole argument is that plaintiff failed to demonstrate that it was the holder of a beneficial interest in the UGN. We have already held that plaintiff had standing to bring this suit in the registered holder's stead (81 AD3d 557 [1st Dept 2011]).

Thus, plaintiff was not required to establish that it was the holder.

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

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom, J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8231 The People of the State of New York, Respondent, Ind. 8645/88

-against-

Luis Arana, also known as Fernando Franco, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about March 16, 2012, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded for a de novo determination.

The People correctly concede that defendant is entitled to be brought before the court, provided with assigned counsel if eligible, and offered an opportunity to be heard on his motion for resentencing on his class B felony convictions. Although the sentences at issue run concurrently with the life sentences defendant is serving on his class A-1 felony convictions, and this Court has upheld the denial of resentencing on those convictions (45 AD3d 311 [1st Dept 2007], *lv dismissed* 9 NY3d 1031 [2008]), the statutory procedural requirements still apply (*see People v Diaz*, 68 AD3d 497 [1st Dept 2009]). However, the

motion court is under no obligation to conduct an evidentiary hearing.

We have considered and rejected defendant's argument for additional relief.

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

ENTERED: OCTOBER 9, 2012

CLERK

Tom J.P., Mazzarelli, Catterson, Renwick, DeGrasse, JJ.

8232-
8232A

The People of the State of New York,
Respondent,

Ind. 6465/07
SCI: 1308/09

-against-

Phillip McQueary,
Defendant-Appellant.

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

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about August 10, 2009, and on or about August 10, 2009, as amended September 1, 2009,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: OCTOBER 9, 2012

CLERK

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

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8234 The People of the State of New York, Ind. 2542/02
Respondent,

-against-

Sharma Ross,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Thomas A. Farber, J.), rendered March 30, 2005, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

Defendant did not preserve his claim that a detective gave improper opinion testimony regarding defendant's guilt. After defense counsel made general objections, the court gave the jury a thorough instruction concerning the limited purpose for which this testimony was received. Accordingly, the limiting instruction "must be deemed to have corrected the [alleged] error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943,

944 [1994]; *see also People v Medina*, 53 NY2d 951, 953 [1981]).

We decline to review this claim in the interest of justice. As an alternative holding, we reject it on the merits. One of the material issues at trial was whether defendant's confession was the product of unduly prolonged interrogation. Since the detective's credibility was at issue with respect to the events leading to defendant's statement, it was permissible under the circumstances presented for the jury to hear the detective's explanation for persisting in his interrogation after defendant denied his involvement. The testimony was not offered to convey the detective's opinion of defendant's guilt, but only to explain the detective's own state of mind and how it affected his actions (*see People v Hudson*, 90 AD3d 437, 438 [1st Dept 2011]). Furthermore, the court's careful instruction, which it delivered during the testimony as well as during its main charge, made that distinction clear to the jury and was sufficient to prevent any prejudice. Finally, we reject defendant's assertion that the challenged testimony implied that the detective relied on information not presented at trial.

Since defendant's CPL 440.10 motion was denied, as was his motion for leave to appeal to this Court, our review of defendant's ineffective assistance of counsel claims is limited

to the trial record. To the extent the trial record permits review, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant was not deprived of effective assistance of counsel when his attorney agreed to stipulate to minor matters relating to the content of discovery materials and the timing of their disclosure. There was no significant contradiction between the stipulation and defendant's testimony (*compare People v Berroa*, 99 NY2d 134 [2002]). In any event, even if the prosecutor may have exaggerated the significance of the stipulation during summation, there is no reasonable possibility that the stipulation or the summation comment could have affected the verdict (*see Strickland*, 466 US at 694). Furthermore, the prosecutor's summation did not concede any legal issue presented on this appeal, and we reject defendant's argument to the contrary.

The remainder of defendant's ineffective assistance claims relate to trial counsel's failure to raise issues that defendant raises on appeal concerning such matters as the suppression proceedings, the prosecutor's summation and the court's charge.

Defendant has not shown that counsel's failure to raise these issues fell below an objective standard of reasonableness, that raising these issues would have resulted in favorable rulings from the trial court or on this appeal, or that, viewed individually or collectively, the alleged deficiencies deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice.

The court properly denied defendant's suppression motion. The totality of the circumstances establishes that defendant's confession was voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). At the suppression hearing, defendant did not raise his present claim that his state right to counsel had attached because of an unrelated warrant. While such a claim may be raised for the first time on appeal, "[a]ppellate review of such an unpreserved error is available, however, only when the error is established on the face of the record" (*People v McLean*, 15 NY3d 117, 119 [2010]; *see also People v Kinchen*, 60 NY2d 772, 773-74 [1983]). The hearing record is insufficient to support defendant's claim; to the extent it permits review, it supports an inference that the police questioning was permissible under the circumstances (*see People v Lopez*, 16 NY3d 375, 385-386

[2011]).

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

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8236 The People of the State of New York, Ind. 5214/08
Respondent,

-against-

Luis M. Serrano,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (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 (Edward J. McLaughlin, J.), rendered on or about October 22, 2009,

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: OCTOBER 9, 2012

CLERK

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

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8238 Lorna Pannell-Thomas, Index 303014/10
Plaintiff-Respondent-Appellant,

-against-

Gurprit S. Bath,
Defendant-Appellant-Respondent.

_____

Law Office of Belovin & Franzblau, LLP, Bronx (David A. Karlin of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about October 31, 2011, which denied defendant's motion for summary judgment dismissing plaintiff's complaint alleging serious injuries under Insurance Law § 5102(d), and denied plaintiff's cross motion for partial summary judgment on the issue of threshold injury, unanimously affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a "permanent consequential" or "significant" limitation of use of the spine by submitting the affirmed report of a neurologist noting the absence of permanent neurological disabilities, full ranges of motion, and negative objective tests (*see Barry v Arias*, 94 AD3d 499, 499 [1st Dept 2012]). Defendant

also made a prima facie showing that plaintiff's injuries were not causally related to the accident by submitting the affirmed MRI reports of a radiologist who concluded that the changes observed in the spine were degenerative (*Gibbs v Reid*, 94 AD3d 636, 637 [1st Dept 2010]).

In opposition, plaintiff raised a triable issue of fact as to existence of a permanent consequential or significant limitation of use of her lumbar spine. The affirmed report of her radiologist showed disc herniations, root impingements, and bulging discs, and her treating physician performed EMG studies confirming radiculopathies in the spine. The treating physician also reported quantified range-of-motion limitations and positive tests during the course of treatment (*see Williams v Tatham*, 92 AD3d 472, 473 [1st Dept 2012]). The treating physician's affirmation also raised a triable issue of fact as to causation, as she opined that plaintiff's injuries were causally related to the accident based on, among other things, the fact that plaintiff was asymptomatic and had an active lifestyle for several years before the accident (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Seck v Balla*, 92 AD3d 543, 544 [1st Dept 2012]).

As to the 90/180-day claim, although defendant did not submit any evidence disproving plaintiff's testimony that she was

unable to work for six months due to a medically determined injury, he met his prima facie burden by submitting evidence that plaintiff's injuries were not caused by the accident (*see James v Perez*, 95 AD3d 788, 789 [1st Dept 2012]). Plaintiff, however, raised an issue of fact and established prima facie existence of a 90/180-day injury by submitting her physician's affirmation stating that the injuries caused by the accident prevented plaintiff from working and performing her regular daily activities during the requisite period, that plaintiff returned to work six months after the accident against the doctor's medical advice, and that plaintiff was partially disabled during the period (*see Williams*, 92 AD3d at 473). Thus, defendant was properly denied summary judgment, and the issue of fact as to causation precludes granting plaintiff partial summary judgment.

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8240 The People of the State of New York, Ind. 5378/10
Respondent,

-against-

Jason P.,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about March 3, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8241-
8242

In re Ta Aisha H.,

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

Terrence H.,
Respondent-Appellant,

Patrice J.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Richard L. Herzfeld, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

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

Order of fact-finding, Family Court, Bronx County (Jane Pearl, J.), entered on or about June 7, 2011, which, after a hearing, found that respondent father had neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about June 22, 2011, which placed the child in the custody of the Administration for Children's Services until the completion of the next permanency hearing, to the extent not abandoned, unanimously dismissed, without costs, as moot.

A preponderance of the evidence supports the court's finding that respondent neglected the child by committing acts of domestic violence on the child's mother in the child's presence (*see Family Court Act* §§1012[f][i][B], 1046 [b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

The court properly exercised its discretion in limiting respondent's cross examination of the child's mother concerning her prior criminal conviction and prior arrest (*see People v Schwartzman*, 24 NY2d 241, 244 [1969]).

On appeal, respondent does not raise any arguments with respect to the dispositional order. In any event, to the extent the appeal from that order is not abandoned, it is moot since the placement terms of the order have expired (*see Matter of Adena I. [Claude I.]*, 91 AD3d 484 [1st Dept 2012]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8243-
8243A Sabotage, Inc., et al., Index 108431/06
Plaintiffs-Respondents,

-against-

Jean Touch, Inc.,
Defendant-Appellant,

Victor Harari, also known as Victor Hatari,
Defendant.

_____

Seligson, Rothman & Rothman, New York (Alyne Diamond of counsel), and Law Offices of Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

The Rand Law Firm, Babylon (Peter L. Rand of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered April 12, 2012, in favor of plaintiff Sabotage, Inc. and against defendant Jean Touch, Inc. (JTI), in the total amount of $137,492.95, unanimously affirmed, with costs. Order, same court and Special Referee, entered on or about September 16, 2011, which, pursuant to an order of reference dated September 21, 2010 (Michael Stallman, J.), determined after a hearing, that the parties' employment contract was enforceable, and directed that a judgment be entered in plaintiff Sabotage, Inc.'s favor in the amount of $87,467.98, plus statutory interest, costs and disbursements, unanimously

dismissed, without costs, as subsumed in the appeal from the judgment.

The Special Referee's implicit findings that the corporate plaintiff was wrongfully and prematurely terminated from its 13-month employment agreement with JTI are substantially supported by the record and there is no basis to disturb the Referee's credibility determinations (*see Bubul v Port Parties, Ltd.*, 83 AD3d 517 [1st Dept 2011]; *Cohen v Akabas & Cohen*, 71 AD3d 419 [1st Dept 2010]).

Although it appears that the Special Referee mistakenly suggested that the salary award is to compensate the corporate plaintiff for the first six months of work under the parties' employment agreement, the Referee clearly intended to compensate the corporate plaintiff for the salary to which it was entitled under the remaining portion of the contract as evidenced by the fact that the Referee offset the award by the amount plaintiffs earned in another's employ during that time.

Plaintiffs' summary sheets setting forth a synopsis of the client orders obtained and the alleged commissions earned were properly admitted into evidence. The unavailability of the original client orders was reasonably explained by testimony that they were in JTI's possession, and the individual plaintiff, who

prepared the summary sheets daily, testified regarding his compilation of the summaries and was available for cross-examination (*see generally Schozer v William Penn Life Ins. Co. Of N.Y.*, 84 NY2d 639, 643-644 [1994]).

JTI's argument that the corporate plaintiff was not entitled to commissions on either "house account" orders or new client orders absent an executed writing between the parties specifying such an understanding is unavailing. The parties' agreement specifically provided that the stated "account list" was "a work in progress" and although the agreement required an executed writing to alter the list, the parties' course-of-dealing, including testimony that JTI assigned house accounts to plaintiffs and paid commissions on those accounts, demonstrates that the parties waived this contractual requirement (*see generally RPI Professional Alternatives, Inc. v Citigroup Global Mkts. Inc.*, 61 AD3d 618, 619 [1st Dept 2009]).

The Referee properly admitted plaintiff's excerpted American Express bills into evidence. The individual plaintiff provided redacted copies of the bills to shield information regarding his personal expenditures for which he did not seek reimbursement.

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

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8244-
8245 Ronald Jackson, Index 117863/06
Plaintiff-Appellant,

-against-

Anthony S.C. Leung, et al.,
Defendants-Respondents.

Goidel & Siegel, LLP, New York (Andrew B. Siegel of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for Anthony S.C. Leung, respondent.

Marjorie E. Bornes, Brooklyn, for Nicolas Rosillo, respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered April 14, 2011, which granted defendant Anthony Leung's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), and order, same court and Justice, entered August 29, 2011, which, upon plaintiff's cross motion to reargue Leung's motion, adhered to its prior order, and granted defendant Nicolas Rosillo's motion for summary judgment on res judicata grounds, unanimously reversed, on the law, without costs, the cross motion granted, and the motions denied.

Defendant Leung failed to meet his prima facie burden of showing that plaintiff did not suffer a serious injury to his

lumbar spine since his sole medical expert, a neurologist, did not report the results of any range of motion testing, review the MRI film of plaintiff's spine, or offer any alternative opinion as to causation (*see Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car Sys, Inc.*, 98 NY2d 345, 350, 353 [2002]; *McCree v Sam Trans Corp.*, 82 AD3d 601 [1st Dept 2011]). Moreover, defendant's neurologist acknowledged a 50% deficit in straight leg raising, which provides objective evidence of lumbar injury (*see Brown v Achy*, 9 AD3d 30, 32 [1st Dept 2004]), and did not adequately explain that finding *(see Feaster v Boulabat*, 77 AD3d 440 [1st Dept 2010]). Thus, the burden did not shift to plaintiff, who, in any event, raised an issue of fact with respect thereto by submitting the affirmation of his treating physician, who found recent limitations of range of motion in all planes, and relied on objective evidence, including an EMG/NCS study and MRI report (*see Colon v Bernabe*, 65 AD3d 969, 970 [1st Dept 2009]; *Brown v Achy*, 9 AD3d at 31-32).

Furthermore, contrary to the Supreme Court's holding, it was not necessary for plaintiff to proffer evidence of range of motion deficits contemporaneous with the accident, and, in any event, the physician reported that such limitations existed then (*see Perl v Meher*, 18 NY3d at 217-218; *Paulino v Rodriguez*, 91

AD3d 559, 559-560 [1st Dept 2012]). Defendant Leung did not raise a gap in treatment argument in his motion papers (*Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]), and, in any event, plaintiff's treating physician proffered an explanation sufficient to raise an issue of fact (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]; *Jean-Louis v Gueye*, 94 AD3d 504, 505 [1st Dept 2012]).

The order purporting to deny plaintiff's cross motion to reargue addressed the merits and, in so doing, in effect, granted plaintiff's motion and, therefore, the appeal taken therefrom is properly before this Court (*see 21st Century Diamond, LLC v Allfield Trading, LLC*, 88 AD3d 558, 559 n 1 [1st Dept 2011]; *Matter of State Farm Mut. Auto. Ins. Co. v King*, 304 AD2d 390 [1st Dept 2003]). For the foregoing reasons, the cross motion to

reargue should have been granted and, upon doing so, the order granting defendant Leung's motion denied, and defendant Rosillo's motion denied.

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8246 The People of the State of New York, Ind. 6225/02
Respondent,

-against-

Lawrence Perkins,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Daniel FitzGerald, J.), rendered May 1, 2009, resentencing defendant to a 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 Lingle*, 16 NY3d 621 [2011]). We have no

authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8247 In re Donte W.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (William K. Chang of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 6, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence supports the inference that appellant, while acting in concert with other persons, attacked the victim with the

intent to injure him.

Appellant challenges a 911 call, in which a nontestifying declarant describes the ongoing incident and refers to appellant by name, as violating his right of confrontation and his right to notice of an identification procedure. Initially, we note that the court struck from evidence the reference to appellant, and that a judge sitting as trier of fact is presumed capable of disregarding inadmissible evidence (*see People v Moreno*, 70 NY2d 403, 405-406 [1987]). In any event, there was no Confrontation Clause violation because the call was made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]), and there was no need for notice under Family Court Act § 330.2(2) because there was no identification within the meaning of CPL 710.30(1)(b) (*see People v Irick*, 145 AD2d 507 [2d Dept 1988], *lv denied* 73 NY2d 978 [1989]). Moreover, the reference to appellant on the tape was cumulative to other evidence.

The placement was a proper exercise of the court's discretion, and it constituted the least restrictive alternative

consistent with appellant's needs and best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, JJ.

8248-
8248A

Francisco Garcia,
Plaintiff-Appellant-Respondent,

Ind. 301213/08
83971/08

-against-

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

Safeway Construction Enterprises, Inc.,
Defendant-Respondent-Appellant.

– – – – –

And a Third Party Action

Robin Mary Heaney, Rockville Centre, for appellant-respondent.

Rafter & Associates PLLC, New York (Howard K. Fishman of counsel), for respondent-appellant.

Law Office of Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for The City of New York and Consolidated Edison Company of New York, Inc., respondents.

Jeffrey M. Schwartz, New Rochelle, for 1515 Bruckner Blvd., LLC, and Citywide Contractors LLC, respondents.

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for Kaila Construction Corporation, respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 28, 2011, which, to the extent appealed from as limited by the briefs, granted defendant 1515 Bruckner's motion and defendant Kaila's cross motion for summary judgment, dismissing all claims and cross claims as against them, and

denied defendant Safeway's cross motion for summary judgment, unanimously modified, on the law, to deny 1515 Bruckner's motion, and otherwise affirmed, without costs. Order, same court and Justice and entry date, which, to the extent appealed from as limited by the briefs, granted the motion of defendant City and third-party plaintiff Consolidated Edison to vacate the court's May 27, 2011 order striking the City's answer, unanimously affirmed, without costs.

Supreme Court properly granted summary judgment to subcontractor Kaila, in this trip-and-fall action, since there is no evidence in the record that it caused or created the defective condition of the sidewalk (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). The deposition testimony and affidavit of Kaila's principal stating that Kaila did not replace the sidewalk until around several months after plaintiff's accident were sufficient to establish its prima facie entitlement to judgment as a matter of law. In opposition, plaintiff and Safeway failed to raise a triable issue of fact.

Supreme Court, however, improperly granted 1515 Bruckner's motion for summary judgment. As the owner of the property abutting the sidewalk, 1515 Bruckner was responsible for

maintaining the sidewalk in a reasonably safe condition (Administrative Code of City of NY § 7-201[a]). On a motion for summary judgment, a property owner has the initial burden of demonstrating that it neither created the defective condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Khaimova v City of New York*, 95 AD3d 1280, 1282 [2012]). Here, in its summary judgment motion, 1515 Bruckner failed to demonstrate that it did not have actual or constructive notice of the defective condition (*see Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [2011]).

Safeway's cross motion for summary judgment was properly denied, since issues of fact exist as to whether Safeway, as the excavation contractor, actually made cuts in the sidewalk and replaced that area of the sidewalk with a metal plate and asphalt, creating the allegedly dangerous condition (*see Barbitsch v City of New York*, 241 AD2d 472 [1st Dept 1997]).

The City provided both a reasonable excuse and a meritorious defense to the action to warrant vacatur of the court's order striking its answer and imposition of a lesser sanction of $5000 in costs (*see Catarene v Beth Israel Med. Ctr.*, 290 AD2d 213 [1st Dept 2002]). The City explained that it had failed to comply

with court-ordered discovery due, in large part, to its inability to obtain the identity of the emergency medical technicians who responded to the scene of plaintiff's accident. Con Edison, which agreed to defend and indemnify the City, also expended various efforts in attempting to obtain the necessary information. Further, Con Edison, which has not defaulted in providing discovery, would be unfairly penalized if the City's answer is stricken (*see McGarr v Guardian Life Ins. Co. of Am.*, 19 AD3d 254, 256-257 [1st Dept 2005]*; see also Magee v City of New York*, 242 AD2d 239, 239-240 [1st Dept 1997]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8249 The People of the State of New York, Ind. 731/09
Respondent,

-against-

Sean Best,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 26, 2010, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him, as a second felony offender, to a term of eight years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his plea (*see People v Frederick*, 45 NY2d 520 [1978]). "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). The record establishes the voluntariness of the plea. The court, which accorded defendant a suitable opportunity to be

heard, had sufficient information upon which to reject defendant's claim that medication affected his ability to understand the proceedings (*see People v Alexander*, 97 NY2d 482 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8250 The People of the State of New York, Ind. 6186/03
Respondent,

-against-

Christobal Martinez, etc.,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a order of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about April 12, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: OCTOBER 9, 2012

CLERK

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

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8251 In re Rocky H., etc., File 2604/08
Deceased.

- - - - -

Keiko Ono Aoki,
Petitioner-Respondent,

-against-

Kana Aoki Nootenboom, et al.,
Respondents-Appellants,

Devon Aoki, et al.,
Respondents.

_____

Holland & Knight, LLP, New York (Charles F. Gibbs, Brian P. Corrigan and Faith L. Carter of counsel), for appellants.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about November 16, 2010, which, to the extent appealed as limited by the briefs, granted respondents Kana Aoki Nootenboom, Kevin Aoki, Kyle Aoki and Kenneth Podziba's motion to direct petitioner to pay them $400,000 for the anticipated expenses of preparing and filing a supplemental accounting only to the extent of directing petitioner to pay $35,000, unanimously affirmed, without costs.

In the absence of documentation of the legal fees for which payment was requested, the Surrogate properly declined to direct payment of $365,000, "with the proviso that claimed trust expenses [would] be addressed in the context of the accounting."

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8252 Healthwave Incorporated, et al., Index 650234/09
Plaintiffs-Respondents,

-against-

New York Society for the Relief
of the Ruptured and Crippled
Maintaining the Hospital for Sepcial
Surgery, etc., et al.,
Defendants,

John R. Reynolds,
Defendant-Appellant.

Stillman & Friedman, P.C., New York (Michael J. Grudberg of counsel), for appellant.

Richard Radoccia, respondents pro se.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 1, 2011, which, insofar as appealed from, denied the motion of defendant Reynolds to dismiss the seventh cause of action alleging fraudulent inducement, unanimously affirmed, without costs.

Dismissal of the fraudulent inducement claim as against Reynolds was not warranted at this stage of the litigation. The record shows that plaintiffs raised the inference that their exercise of reasonable diligence was fruitless under the circumstances by alleging that defendants' fraudulent conduct was

not readily apparent and could not have been discovered through ordinary intelligence based upon a review of the available documents (*see e.g. Madison Apparel Group Ltd. v Hachette Filipacchi Presse, S.A.*, 52 AD3d 385 [1st Dept 2008]). Nor were plaintiffs required, under the circumstances, to engage in heightened due diligence.

The alleged representations made by Reynolds do not consist of non-actionable statements of future opinions, intentions or expectation. Rather, plaintiffs alleged misrepresentations of Reynolds' present intention, as well as future promises and statements of expectations, for which there are allegations that would support the inference that they were made with a present intention that they would not be carried out (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]; *Pease & Elliman, Inc. v Wegeman*, 223 App Div 682, 684 [1st Dept 1928]).

The parties' agreement contained a general merger clause, which does not operate to preclude plaintiffs' claim of

fraudulent inducement (*see LibertyPointe Bank v 75 E. 125th St., LLC*, 95 AD3d 706 [1st Dept 2012]; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d at 275).

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8253 The People of the State of New York, Ind. 574/10
Respondent,

-against-

Jamal Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cassandra Mullen, J.), rendered January 20, 2011, as amended February 10, 2011, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 6 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The prompt showup near the scene of the crime was not conducted in an unduly suggestive manner (*see e.g. People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Defendant did not preserve his current challenge to an officer's remark at the showup, and we decline to review it in the interest of justice. As an alternative holding, we find that the officer's statement simply cautioned the victim against making an

identification unless he was certain. This did not render the identification suggestive (*see People v Guitierres*, 82 AD3d 1116, 1117-1118 [2d Dept 2011]). Instead, it tended to reduce the risk of misidentification.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Moreover, the evidence was overwhelming. Regardless of any weaknesses in the victim's testimony, defendant's guilt was established by extensive circumstantial evidence.

By failing to object, by making belated objections (*see People v Romero*, 7 NY3d 911, 912 [2006]), or by failing to request any specific further relief after the court delivered a curative instruction (*see People v Heide*, 84 NY2d 943, 944 [1994]; *People v Medina*, 53 NY2d 951, 953 [1981]), defendant failed to preserve his present challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 9, 2012

CLERK

Sweeny, J.P., Richter, Abdus-Salaam, Román, JJ.

8254 Frederick B. Whittemore, Index 600742/10
Plaintiff-Respondent,

-against-

Edwin H. Yeo, et al.,
Defendants-Appellants,

_____

Kasowitz Benson Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for appellants.

Bushell, Sovak, Ozer & Gulmi, LLP, New York (Christopher J. Sovak of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 26, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a default judgment against defendants as to liability only, and denied defendants' cross motion to compel acceptance of their late answer and to dismiss the complaint against defendant Yeo Farms, LLC for lack of jurisdiction, unanimously affirmed, without costs.

The motion court providently exercised its discretion in finding that defendants' excuse for their more than five-month delay in answering was not reasonable (*see Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [1st Dept 2009]). Defendant Edwin Yeo's claim that other business commitments prevented him from engaging

counsel to respond is inadequate (*see e.g. Flannery v Stewart*, 22 AD2d 786 [1st Dept 1964]), particularly in view of the undisputed fact that his present counsel was aware of the complaint in mid-April 2010, less than one month after the unchallenged service of process on all of the defendants and more than five months before plaintiff moved for a default; moreover, his firm was representing the defendant Endurance entities in this State in another matter at the time, notwithstanding his assertion that his firm had not yet been formally retained in this matter. Defendant Yeo's failure to do anything during this period evinces willfulness (*see Casimir v Consumer Home Mtge., Inc.*, 65 AD3d 954 [1st Dept 2009][motion to vacate default]). Although the length of defendants' delay is not inordinate under the circumstances (*see e.g. American Intl. Ins. Co. v MJM Quality Constr., Inc.*, 69 AD3d 520 [1st Dept 2010]; *Rosa v 42 Holding Corp.*, 254 AD2d 213 [1st Dept 1998]), and plaintiff failed to carry his burden of showing that the delay was prejudicial (*see Pieretti v Flair Dé Art*, 99 AD2d 980 [1st Dept 1984]), these factors, and the policy preference for deciding cases on their merits, are outweighed in this instance by the strong evidence of willfulness. Nor do the circumstances warrant denial of a default in the interest of justice (*see generally New Media Holding Co. LLC v Kagalovsky*, 97

AD3d 463, 465 [1st Dept 2012]). Because a defendant opposing entry of a default judgment must demonstrate both a reasonable excuse and meritorious defenses (*id.*), it is unnecessary to consider defendants' claimed defenses. We note, however, that the breach of contract and breach of fiduciary duty causes of action were properly predicated on an oral limited partnership agreement pursuant to Delaware law, and that plaintiff was not precluded from reasonably relying on defendants' misrepresentations in light of the alleged failure to disclose certain diversions and defendants' failure to provide requested information regarding the allocation of plaintiff's investment in the limited partnership; the defenses to the other causes of action were also meritless.

Plaintiff carried his burden of asserting facts warranting a finding of long arm jurisdiction over Yeo Farms, LLC (*see Marie v Altshuler*, 30 AD3d 271, 272 [1st Dept 2006]). It is undisputed that Edwin Yeo, acting on behalf of Yeo Farms, met with plaintiff in New York to discuss the guaranty that is the subject of the

claim asserted; the factual disagreement as to whether the guaranty was requested or offered gratuitously presents an issue as to the merits, not one requiring a hearing as to jurisdiction.

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8255 In re The Port Authority of New York and New Jersey, Petitioner-Appellant, Index 403175/10

-against-

Port Authority Police Benevolent Association, Inc., Respondent-Respondent.

_____

James M. Begley, New York (Melissa L. Banks of counsel), for appellant.

Meyer, Suozzi, English & Klein, P.C., New York (Jessica Drangel Ochs of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 13, 2011, which, among other things, denied the petition to vacate an arbitration award, unanimously affirmed, without costs.

The award in this case was not "totally" irrational, nor did it violate public policy (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004], quoting *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). The arbitrator properly found that according to the contract language, there was no "emergency" that justified bypassing the contract's terms regarding assignment of personnel. Further, the award merely enforced the terms of the parties' contract, which

already addressed the public policy issues that petitioner raises on this appeal.

The arbitrator did not exceed her powers in making the award, as the contract language to which petitioner points does not address the situation at issue in this matter. Indeed, petitioner itself requested relief that was not specified in the relevant contract language, and therefore cannot now be heard to say that the award exceeded the scope of the arbitrator's authority.

We have considered the remaining contentions, including respondent's request for attorneys' fees and costs, and find them unavailing.

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

ENTERED: OCTOBER 9, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8256 [M-3833] James Cummings, Petitioner, Ind. 4750/11

-against-

Hon. Eduardo Padro, Respondent.

James Cummings, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew H. Meier of counsel), for 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: OCTOBER 9, 2012

CLERK

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

7703-
7704 Donerail Corporation N.V., Index No. 602108/09
Plaintiff-Respondent, 602187/09

-against-

405 Park LLC,
Defendant-Appellant.

- - - - -

405 Park LLC,
Plaintiff-Appellant,

-against-

Donerail Corporation N.V., et al.,
Defendants-Respondents.

_____

Meister Seelig & Fein, LLP, New York (Stephen B. Meister of counsel), for appellant.

Kelly Drye & Warren, LLP, New York (Michael C. Lynch of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 8, 2011, affirmed, without costs. Order, same court and Justice, entered September 27, 2011, affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

7703-
7704
Index 602108/09
602187/09

_____x

Donerail Corporation N.V.,
Plaintiff-Respondent,

-against-

405 Park LLC,
Defendant-Appellant.

- - - - -

405 Park LLC,
Plaintiff-Appellant,

-against-

Donerail Corporation N.V., et al.,
Defendants-Respondents.

_____x

405 Park LLC appeals from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 8, 2011, which, to the extent appealed from as limited by the briefs, denied its motion for summary judgment on its first cause of action for breach of contract and fourth cause of action for foreclosure of a common law contract vendee’s lien, and from the order of the same

court and Justice, entered September 27, 2011, which, to the extent appealed from as limited by the briefs, denied its motion for leave to renew its motion for summary judgment, denied its motion to compel discovery, granted Donerail Corporation N.V.'s motion for leave to renew its cross motion for summary judgment, and upon renewal, granted Donerail's cross motion for summary judgment on its first cause of action for breach of contract and its cross motion for summary judgment dismissing 405 Park's complaint.

Meister Seelig & Fein, LLP, New York (Stephen B. Meister, Kevin Fritz and Remy J. Stocks of counsel), for appellant.

Kelly Drye & Warren, LLP, New York (Michael C. Lynch, William C. Heck and Joel A. Hankin of counsel), for respondents.

RICHTER, J.

In this failed real estate transaction, we are asked to decide whether the seller, Donerail Corporation N.V., is entitled to retain the earnest money deposit paid by the purchaser, 405 Park LLC, pursuant to a contract for sale of an office building in New York City. When the time-of-the-essence closing failed to occur, 405 Park initiated an action against Donerail seeking return of the deposit, alleging that Donerail had breached the parties' contract by failing to tender an unencumbered title at closing. Donerail brought a separate action, asserting that it was entitled to retain the deposit because 405 Park had breached the agreement by failing to pay the balance of the purchase price. Because Donerail demonstrated that it was ready, willing and able to close the transaction, and 405 Park refused to close, we conclude that Donerail is entitled to retain the deposit.

On June 11, 2007, Donerail and 405 Park entered into a Purchase and Sale Agreement (the agreement) whereby Donerail agreed to sell, and 405 Park agreed to buy, a 17-story office building located at 405 Park Avenue in Manhattan. The purchase price was $178,500,000, and in accord with the agreement, 405 Park wired an earnest money deposit of $38,550,000 to Donerail's escrow agent. Several months later, the parties entered into a Second Amendment to the agreement (the amendment) pursuant to

which the earnest money deposit was released from escrow and delivered to an intermediary of Donerail, and $600,678.58 in accrued interest on the deposit, denominated "Pre-Effective Date Interest," was paid to 405 Park.

Pursuant to section 6.1 of the agreement, if 405 Park failed to complete the purchase for reasons other than Donerail's default, Donerail's sole remedy was to terminate the agreement and receive the earnest money, along with interest, as liquidated damages for the breach. The amendment further provided that if 405 Park defaulted in its obligation to close, 405 Park was required to pay Donerail the $600,678.58 in Pre-Effective Date Interest it had received. On the other hand, if the closing did not occur for reasons other than 405 Park's default, then the earnest money deposit, along with certain other sums, was to be refunded by Donerail to 405 Park.

Although the closing date was initially scheduled for January 15, 2008, the parties agreed to a number of extensions, and a final closing date was set for June 29, 2009. During the two-year period between the contract date and the closing date, there was a sharp decline in the market value of office buildings in Manhattan. At a December 10, 2008 meeting, Avi Banyasz, a representative of 405 Park, told David E. Barry, Donerail's president, that because of the decline in the market value of the

property, 405 Park could not complete the purchase for the $178,550,000 contract price.

According to Donerail, if 405 Park were to purchase the property, it would stand to lose upwards of $90,000,000. On the other hand, if 405 Park were to break the contract, its liability would be much lower — the amount of the earnest money deposit, $38,500,000, plus the $600,678.58 in accrued interest. Thus, Donerail maintains that the drop in real estate values made it more financially advantageous for 405 Park to simply walk away from the deal rather than complete the purchase. 405 Park's inclination not to close is evident from a May 27, 2009 e-mail between two of its investors. In that e-mail, the investors discussed a plan to "attend the closing and try for a defective tender and then sue on that basis." Even on appeal, 405 Park concedes that the real estate market had declined and that its preference was not to close.

At the time the agreement was entered into, the property was encumbered by an existing mortgage in the amount of approximately $25,000,000. The mortgage loan contained terms which were very favorable to Donerail at that time — it was interest-only until the maturity date and bore an interest rate of 5.03%. Although the promissory note secured by the mortgage did not allow for prepayment, Donerail could obtain a satisfaction of the mortgage

by a process defined in the note as "defeasance." Specifically, Donerail could purchase defeasance collateral in the form of securities, chosen by the mortgage lender, which would be used to pay the remaining amounts due under the loan. Thus, the securities would, in effect, be substituted as collateral for the loan, and the property would be released from the mortgage lien.

By letter dated May 15, 2009, Donerail declared that time was of the essence with respect to 405 Park's obligation to close on June 29, 2009, and stated that if 405 Park failed to perform its obligations under the agreement on that date, it would be in default. On June 23, 2009, Donerail sent 405 Park a draft closing statement detailing the disbursement of the funds to be provided to Donerail by 405 Park at closing. This schedule included a disbursement by 405 Park of $28,500,000 to pay the lender of the existing mortgage; 405 Park did not object to the closing statement. On June 24, 2009, the mortgage lender's counsel delivered to Fidelity, the title company identified in the agreement, an executed satisfaction of mortgage releasing the property from the existing mortgage. Lender's counsel instructed Fidelity to hold the satisfaction in escrow and not record the document until Fidelity received further instructions from counsel with respect to the defeasance transaction.

On June 29, 2009, the day of closing, Donerail authorized

Commercial Defeasance, LLC to purchase the defeasance securities that had been designated by the mortgage lender. Commercial Defeasance purchased the securities, on Donerail's credit, at a cost of approximately $27.7 million. This figure represented a premium of about $2.7 million over the $25 million principal amount of the loan because the securities would cover not just the principal but also future interest payments. As a result, Donerail owed Commercial Defeasance $27.7 million, which Donerail was prepared to pay at the closing. The defeasance transaction would take two days, and was scheduled to be complete on June 30, 2009, the day after the closing, after which the satisfaction of mortgage would be filed.

At the closing, Donerail announced that it was ready to close, and that the mortgage satisfaction was being held in escrow by Fidelity. Fidelity's title closer, who was present at the closing, confirmed that Fidelity was in possession of the satisfaction, and stated that the defeasance transaction was a two-day process. 405 Park expressed its full understanding of the defeasance process, and stated it was ready to pay the remainder of the purchase price, but objected to the use of its funds to pay for the securities.[1] In response, Donerail told 405

[1] 405 Park took this position despite the fact that it is accepted practice in real estate transactions to use the

Park that it was prepared to use its own funds to pay for the securities without using any portion of 405 Park's monies, provided that 405 Park concurrently pay the remainder of the purchase price.[2]

Donerail also told 405 Park that Fidelity was prepared to issue an owner's title insurance policy without exception for the mortgage upon 405 Park's payment of the remaining purchase price. Still, 405 Park refused to consummate the transaction. To address 405 Park's concerns, Donerail offered to allow 405 Park to retain, from the balance of the purchase price, $50 million — twice the amount of the mortgage — until the defeasance process was complete, and the mortgage was removed of record. Once again, 405 refused to close, insisting that the defeasance process had to be complete, and the existing mortgage discharged, before it would pay the balance of the purchase price. The closing ended without the transaction being completed.

The next day, June 30, 2009, Donerail sent a letter to 405 Park terminating the agreement, stating that it intended to

---

purchaser's moneys to pay off existing mortgages. Furthermore, 405 Park had made no previous objection to the draft closing statement which made clear that the mortgage would be paid off from the sale proceeds.

[2] Donerail was able to pay this amount with funds in its bank accounts and through a $10 million line of credit Donerail obtained, for this very purpose, on the closing date.

retain the earnest money deposit as a result of 405 Park's breach, and demanding return of the $600,678.58 interest. That same day, Donerail sold the securities it had purchased and suffered a loss of approximately $400,000; Donerail also claims it spent about $400,000 in closing expenses. By letter dated July 1, 2009, 405 Park demanded return of the deposit, asserting that Donerail breached the agreement due to its purportedly nonconforming tender of title. Donerail declined to return the deposit.

Donerail brought an action against 405 Park asserting a cause of action for breach of contract and seeking return of the $600,678.58 in interest 405 Park had previously received (Index No. 602108-2009).[3] 405 Park commenced its own action against Donerail asserting three breach of contract claims and a claim seeking imposition of a contract vendee's lien against the property.[4] 405 Park sought return of the earnest money, along with interest, and foreclosure of the lien (Index No. 602187-

[3] Donerail's complaint also included a cause of action alleging breach of the implied covenant of good faith and fair dealing and seeking $800,000 in damages.

[4] 405 Park also named Two Riverway Holdings LLC as a defendant, asserting a cause of action seeking to impose a constructive trust on property owned by Two Riverway that was allegedly purchased with a portion of the earnest money deposit released from escrow.

2009). Donerail interposed counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance. The two actions were subsequently consolidated.

405 Park moved for summary judgment on its first cause of action for breach of contract and fourth cause of action for foreclosure of the lien, and sought dismissal of Donerail's complaint and counterclaims. Donerail cross moved for summary judgment on its claims and counterclaims, and for dismissal of 405 Park's complaint. In an order entered February 8, 2011, the motion court denied both parties' motions. Each of the parties sought reargument and renewal, and 405 Park moved to compel discovery. In an order entered September 27, 2011, the court denied 405 Park's motions in their entirety and denied Donerail's reargument motion, but granted Donerail's motion to renew. Upon renewal, the court dismissed 405 Park's complaint, granted summary judgment to Donerail on its breach of contract cause of action, and referred the matter to a referee to hear and report on the amount of interest to which Donerail is entitled. 405 Park now appeals from both orders.

It is well-settled that absent a breach on the part of the seller, a purchaser who defaults on a real estate contract without lawful excuse cannot recover its down payment (*see*

Lawrence v Miller, 86 NY 131, 139-140 [1881]; *Rivera v Konkol*, 48 AD3d 347, 348 [1st Dept 2008]; *Uzan v 845 UN Ltd. Partnership*, 10 AD3d 230, 236 [1st Dept 2004]). Furthermore, when a party to a real estate contract declares time to be of the essence in setting a closing date, each party must tender performance on that date, and a failure to perform constitutes a default (*see Grace v Nappa*, 46 NY2d 560, 565 [1979]; *115-117 Nassau St., LLC. v Nassau Beekman, LLC*, 74 AD3d 537, 537 [1st Dept 2010]). Thus, where a seller seeks to hold a purchaser in breach of contract, the seller must establish that it was ready, willing, and able to perform on the time-of-the-essence closing date, and that the purchaser failed to demonstrate a lawful excuse for its failure to close (*see Diplomat Props., L.P. v Komar Five Assoc., LLC*, 72 AD3d 596, 600 [1st Dept 2010], *lv denied* 15 NY3d 706 [2010]; *Atlantic Dev. Group, LLC v 296 E. 149th St.*, LLC, 70 AD3d 528, 529 [1st Dept 2010]; *Pinhas v Comperchio*, 50 AD3d 1117 [2d Dept 2008]).

Applying these principles, we conclude that the motion court properly dismissed 405 Park's complaint and granted summary judgment to Donerail on its breach of contract claim. First, there is no question that Donerail declared time to be of the essence with respect to the June 29, 2009 closing date. Donerail's May 15, 2009 letter clearly and unequivocally stated

so, and further warned that 405 Park would be in default if it failed to perform its obligations on the closing date (*see 2626 Bway LLC v Broadway Metro Assocs., LP*, 85 AD3d 456, 457 [1st Dept 2011] ["seller's unilateral scheduling of a clear and unequivocal 'time of the essence' closing date on three-weeks' written notice was reasonable under the circumstances"]).

Nor is there any doubt that 405 Park failed to perform its contractual obligations at the closing. Section 4.3(a) of the parties' agreement states, in pertinent part, that "[a]t the closing, [405 Park] shall . . . pay to [Donerail] the Purchase Price . . . in immediately available wire transferred funds." Despite being told, numerous times, that Donerail was ready to complete the transaction, 405 Park repeatedly refused to pay the balance of the purchase price. Because 405 Park failed to tender performance on the time-of-the-essence closing date, it was in default (*see Rivera v Konkol*, 48 AD3d at 348 [purchaser's default in failing to deliver balance of the purchase price entitled sellers to retain down payment]).

Contrary to 405 Park's assertion, the record shows that Donerail was fully prepared to tender performance in compliance with the parties' agreement. Section 4.2(a) required Donerail to

deliver to 405 Park at closing a

> "bargain and sale deed without covenants against grantor's acts (the "Deed"), in recordable form conveying insurable title to the Land and Improvements, subject only to Permitted Exceptions, duly executed and acknowledged by Seller."

The existing $25,000,000 mortgage, although listed as an exception in the title report, was not a Permitted Exception under the agreement. Thus, Section 4.2(a) required Donerail to deliver "insurable title" with no exception made for the existing mortgage.[5]

Prior to the closing date, Donerail coordinated with Fidelity to be certain that Fidelity would insure title in compliance with Section 4.2(a). At the closing, 405 Park was informed that Fidelity was prepared to issue a title insurance policy without exception for the mortgage. Kristin Bellouny, Senior Underwriting Counsel for Fidelity, testified at her deposition that she was responsible for preparing the title for closing, and was authorized to decide whether any exceptions in the title report should be omitted. She confirmed that Fidelity was prepared to issue title insurance at the closing without exception for the existing mortgage based on Donerail's payment

[5] An exception to title is a matter for which the title company will not provide insurance.

for the defeasance securities on the first day of the two-day defeasance process. This evidence is sufficient to establish that Donerail was ready, willing and able to perform its obligations under Section 4.2(a).[6]

In seeking to excuse its nonperformance, 405 Park contends that Donerail failed to comply with Section 2.2 of the agreement. That section provides, in relevant part:

> "[Donerail] shall, on or prior to the Closing, pay, discharge or remove of record or cause to be paid, discharged or removed of record, at Seller's sole cost and expense, (a) all mortgages . . . encumbering the Property (other than the Permitted Exceptions). . . ."

Since the existing mortgage was not a Permitted Exception, and because the mortgage loan was not prepayable, 405 Park argues that this provision requires that the mortgage lien be actually discharged, and that a satisfaction of mortgage be delivered at closing, before 405 Park was obliged to remit the remainder of the purchase price. Donerail's position is that it fully complied with Section 2.2 because, at the closing, it was

---

[6] 405 Park argues that there is no evidence in the record that its own title insurance company, Royal Abstract, was willing to issue the required title insurance. However, the agreement only requires "insurable title," and does not specify any particular company. Moreover, Section 2.1 of the agreement designates Fidelity as "the '<u>Title Company</u>,'" and 405 Park makes no claim that Fidelity is not a reputable insurer.

prepared to, and in fact offered to, pay for the defeasance securities which would have entitled Donerail to a discharge and satisfaction of the mortgage.[7]

Contrary to 405 Park's contention, Section 2.2 does not require that Donerail provide 405 Park with a mortgage satisfaction at or before closing. Indeed, the language does not even mention a mortgage satisfaction. Nor does the provision require Donerail to actually discharge the mortgage. Instead, all that is required is that Donerail "pay, discharge *or* remove of record. . . [the existing] mortgage[] [emphasis added]."

We conclude that, in the context of this non-prepayable defeasible mortgage, the phrase "pay . . . [the] mortgage[]," means to pay for the defeasment securities which would entitle Donerail to a discharge and satisfaction of the mortgage. 405 Park unconvincingly argues that one cannot "pay" a "mortgage," but can only "pay" a "mortgage loan." To begin, Section 2.2 does not contain the phrase "mortgage loan," but instead allows Donerail to "pay . . . [the] mortgage[]." Furthermore, paying a mortgage loan and paying for the defeasment securities here are functionally equivalent — both result in removal of the mortgage

[7] Because Section 2.2 refers to "all mortgages," we reject Donerail's argument that it is limited to new objections to title.

lien. Thus, we agree with the motion court that "pay[ing] . . . [the] mortgage[]," as that phrase is used in Section 2.2, means satisfying the conditions that entitle the borrower to a discharge.

This construction makes perfect sense in the context of real estate closings where the property is encumbered by a mortgage. In the typical case, the mortgage is paid off on the day of closing contemporaneously with the remittal of the balance of the purchase price. Of course, no rational seller would pay off a mortgage in advance of the closing, because if the closing failed to occur, the seller would have lost the mortgage loan. This is precisely the situation here. As noted above, Donerail's mortgage loan contained very favorable terms and had an attractive interest rate. If Donerail paid for the defeasance securities and completed the defeasance process before the closing and 405 Park subsequently refused to close, Donerail would have lost its valuable loan.

405 Park complains that it had no guarantee that the defeasance process would be successfully completed the day after closing, and lists a parade of horribles it might have suffered in the ensuing twenty-four hours, including that Fidelity "could

go corrupt," or that its offices "would burn down."[8] 405 Park's alleged concerns were not reasonable, and appear to be pretextual, particularly in light of its expressed desire not to close. In truth, had 405 Park proceeded with the closing upon payment for the defeasance securities, it would have suffered no real prejudice. 405 Park was protected in two substantial ways. First, Fidelity had committed to insure title without exception for the mortgage. More importantly, Donerail offered to allow 405 Park to retain twice the amount of the mortgage — $50 million — from the purchase price until the defeasment process was complete, an offer 405 Park rejected. If 405 Park had legitimate concerns that the mortgage would not be successfully defeased, holding back $50 million from a $178,500,000 purchase price would have satisfied those concerns.[9]

In sum, Donerail demonstrated that it was ready, willing and able to close, and that 405 Park defaulted by refusing to remit the remainder of the purchase price without lawful excuse. As a result of 405 Park's breach, Section 6.1 of the agreement

---

[8] 405 Park's counsel made these statements at the October 14, 2010 oral argument on the summary judgment motions.

[9] 405 Park's reliance on Section 1.2 of the agreement is misplaced. Unlike Section 4.2, which sets forth what Donerail was required to tender at closing, Section 1.2 does not contain any closing obligations.

entitled Donerail to terminate the contract and retain the earnest money deposit as liquidated damages. Additionally, pursuant to Section 2(d) of the amendment, 405 Park is liable to Donerail for the Pre-Effective Date interest it previously received.

We have considered 405 Park's remaining contentions, and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 8, 2011, which, to the extent appealed from as limited by the briefs, denied 405 Park LLC's motion for summary judgment on its first cause of action for breach of contract and fourth cause of action for foreclosure of a common law contract vendee's lien, should be affirmed, without costs. The order of the same court and Justice, entered September 27, 2011, which, to the extent appealed from as limited by the briefs, denied 405 Park's motion for leave to renew its motion for summary judgment, denied 405 Park's motion to compel discovery, granted Donerail Corporation N.V.'s motion for leave to renew its cross motion for summary judgment, and upon renewal, granted Donerail's cross motion for

summary judgment on its first cause of action for breach of contract and its cross motion for summary judgment dismissing 405 Park's complaint, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 9, 2012

CLERK