SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 16, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8279 The People of the State of New York, Respondent, Ind. 3139/09

-against-

Darnell Credel,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 14, 2010, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and forgery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The chain of circumstances surrounding defendant's receipt of a fraudulent debit card from the codefendant, as observed by a police officer, and defendant's

use of the card supported the inference that defendant knew it was forged (*see e.g. People v Price*, 16 AD3d 323 [1st Dept 2005], *lv denied* 5 NY3d 767 [2005]). Furthermore, defendant's trial testimony explaining his acquisition of the card was incredible, and this testimony contained material admissions that further supported the inference of knowledge. The element of fraudulent intent was established by defendant's use of the card, which had been altered so that a third party would be billed for the transaction, to make an expensive purchase.

Any error in instructing the jury on the presumption arising from possession of two or more forged cards (Penal Law § 170.27) was harmless. There is no reasonable possibility that the jury based its verdict on an improper theory (*see People v Ray*, 254 AD2d 189 [1st Dept 1998], *lv denied* 92 NY2d 985 [1998]; *compare People v Martinez*, 83 NY2d 26, 33-34 [1993], *cert denied* 511 US 1137 [1994]).

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8280-
8281 In re Alexis C., etc., and Another,

Dependent Children Under
the Age of Eighteen, etc.,

Jacqueline A.,
Respondent-Appellant,

Graham-Windham Services to
Families and Children,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), attorney for the children.

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Orders, Family Court, New York County (Jody Adams, J.), entered on or about August 23, 2011 and September 29, 2011, respectively, which, upon fact-findings of permanent neglect, terminated respondent mother's parental rights and committed custody and guardianship of the subject children to petitioner agency and the Commissioner of Social Services, unanimously affirmed, without costs, with respect to the fact-findings, and the appeals otherwise dismissed, without costs, as moot.

The court providently exercised its discretion in denying the mother's request for an adjournment to review the case

record. The mother's counsel received the case record well in advance of the fact-finding hearing and was familiar with it from prior proceedings (*see Matter of Breeana R.W. [Antigone W.]*, 89 AD3d 577, 578 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). In any event, any error was harmless, as the mother does not identify any particular progress notes that were improperly admitted or prejudicial. Nor has the mother demonstrated that she was deprived of meaningful representation and suffered actual prejudice as a result of her counsel's alleged deficiencies (*Matter of Aaron Tyrell W.*, 58 AD3d 419, 420 [1st Dept 2009]).

Clear and convincing evidence supports the court's findings that the mother had permanently neglected the subject children within the meaning of Social Services Law § 384-b(7)(a) (*see* § 384-b[3][g][i]). Indeed, despite petitioner agency's diligent efforts to encourage and strengthen the parent-child relationship by, among other things, scheduling visitation and referring the mother to various programs (*see Matter of Sheila G.*, 61 NY2d 368, 384 [1984]), the mother failed to comply with mental health services and failed to address the issues that interfered with her ability to care for the children (*see Matter of Laqua'sha Renee G. [Sheila Renee M.]*, 94 AD3d 625, 625 [1st Dept 2012]). The court properly relied on past findings of neglect and could draw a negative inference from the mother's failure to testify

(*see Matter of Devante S.*, 51 AD3d 482 [1st Dept 2008]).

The appeals from the dispositional portion of the orders have been rendered moot by the adoption of the children by their respective foster parents. Were we to review those parts of the orders, we would find that a preponderance of the evidence supports the court's findings that it is in the children's best interests to terminate the mother's parental rights and free them for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8283 LaSalle Talman Bank, F.S.B., etc., Index 601386/07
Plaintiff-Appellant,

-against-

Weisblum & Felice, et al.,
Defendants-Respondents.

Vedder Price P.C., New York (Daniel C. Green of counsel), for appellant.

Rubin, Fiorella & Friedman, LLP, New York (Shelley R. Halber of counsel), for Weisblum & Felice and Jon B. Felice, respondents.

Steinberg & Cavaliere, LLP, White Plains (James F. Creighton of counsel), for The Law Offices of Jordan S. Katz, P.C. and Jordan S. Katz, respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered April 14, 2011, which, in an action to recover damages for alleged malpractice, to the extent appealed from as limited by the briefs, granted defendants' cross motions, pursuant to CPLR 3126, to dismiss the complaint, unanimously affirmed, without costs.

The complaint was properly dismissed, given that plaintiff failed to comply with two court orders despite the fact that the second order clearly warned plaintiff that its action would be dismissed unless it complied. Plaintiff's supplemental discovery response was late and incomplete, its excuse for failing to respond in a timely manner lacks merit, and it has not offered

any excuse for those documents that it has still not exchanged. Thus, it can be reasonably inferred that plaintiff's conduct has been willful and contumacious (*see Johnson v City of New York*, 188 AD2d 302, 303 [1st Dept 1992]).

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 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8284-
8285 In re Gabriel J., and Another,

Children Under Eighteen Years
of Age, etc.,

O'Neill H., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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

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Order of fact-finding, Family Court, Bronx County (Jane Pearl, J.), entered on or about September 15, 2011, which, following a fact-finding hearing, determined that respondents-appellants had neglected the subject children, unanimously affirmed, without costs.

The findings of neglect were supported by a preponderance of the evidence showing that respondent boyfriend had inflicted excessive corporal punishment on the children (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]), and that respondent mother knew or

should have known about the abuse but failed to take any steps to protect her children (*see Matter of Rayshawn R.*, 309 AD2d 681, 682 [1st Dept 2003]; *Matter of Alena O.*, 220 AD2d 358, 362 [1st Dept 1995]). The children's out-of-court statements that the mother's boyfriend, among other things, kicked the youngest child in the groin area, leaving a bruise, were corroborated by medical records and the mother's testimony that she observed the bruise the day after the incident (*see* Family Ct Act § 1046[a][vi]; *Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011]; *Matter of Charnel T.*, 49 AD3d 427 [1st Dept 2008]). The court was entitled to draw the strongest possible inference the opposing evidence permits against the boyfriend due to his failure to testify (*see Matter of Eugene L. [Julianna H.]*, 83 AD3d 490 [1st Dept 2011]). Further, there is no basis for disturbing the court's evaluation of the evidence, including its credibility determinations (*see Matter of Ilene M.*, 19 AD3d 106, 106 [1st Dept 2005]).

We have considered respondents-appellants' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels JJ.

8286-
8287 Michael Goldmuntz, doing business as MGR Diamonds, Plaintiff-Respondent, Index 109033/09

-against-

Michelle Schneider, doing business as MCS Style, Defendant-Appellant.

Ackerman, Levin, Cullen, Brickman & Limmer, LLP, Great Neck (John M. Brickman of counsel), for appellant.

Gregory Mason, Mineola, for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 27, 2011, which awarded plaintiff damages in the amount of $205,000, plus interest, costs, and disbursements, and bringing up for review an order, same court and J.H.O., entered September 21, 2010, which granted plaintiff's motion for summary judgment as to liability, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action for breach of contract and account stated, the record conclusively establishes that defendant, formerly a close family friend of plaintiff, who ran a jewelry business, was liable for the sale or return of jewelry that was entrusted to

her on July 3, 2007 and August 6, 2007. Indeed, the parties entered into a written contract on August 6, 2007, characterized as a "promissory note," which memorialized that a binding agreement was made as to all essential terms (*see generally Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]). This document, which referenced defendant by name, called for two payments to be made totaling $205,000 — the wholesale value of the jewelry conveyed in the July 3, 2007 statement and the jewelry conveyed in the August 6, 2007 statement. This document makes no reference to a consignment and clearly pledged defendant's own property as collateral in the event the payments were not made.

Even if the statements that accompanied the jewelry were unclear as to the type of transaction at issue, the evidence shows that the parties treated the arrangement as a "sale or return" contract, not as a "consignment" (*Rahanian v Ahdout*, 258 AD2d 156, 157-159 [1st Dept 1999]). Indeed, defendant had the power to sell the jewelry without obtaining permission from plaintiff, there was no indication that plaintiff retained any control over the price defendant was to charge, and there was no evidence that defendant was to be paid a commission. In short, there was no evidence that plaintiff exercised any control over defendant as an employee or agent (*see Dark Bay Intl., Ltd. v*

Acquavella Galleries, Inc., 12 AD3d 211 [1st Dept 2004], *lv denied* 4 NY3d 705 [2005]).

Contrary to defendant's assertion, even if there was no contract, defendant's receipt and retention of plaintiff's invoices without objection over a reasonable period of time gave rise to an account stated (*see Rockefeller Group v Edwards & Hjorth*, 164 AD2d 830, 830 [1st Dept 1990]).

Defendant makes no meritorious argument that summary judgment was premature, as she points to no facts essential to her opposition that are in plaintiff's control (*see* CPLR 3212[f]), and plaintiff attested that he searched his records and did not have any additional emails or correspondence with respect to this matter, or any surveillance videos or phone records from the period in question.

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8288 Edwin Galarza, Index 302190/08
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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Edward T. Chase, Mount Vernon, for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 29, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's claim of personal injuries allegedly sustained as a result of a defective gas stove in his former apartment began to accrue, at the latest, on September 13, 2007, the date that he was diagnosed with carbon monoxide poisoning (*see* CPLR 214-c[3]). Plaintiff's failure to serve defendant with a notice

of claim within 90 days thereof requires dismissal of the complaint (*see* General Municipal Law § 50-e[1]).

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 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8289 The People of the State of New York, Respondent, Ind. 5491/08

-against-

Elvin Munoz, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes 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 (Gregory Carro, J.), rendered on or about July 8, 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 16, 2012

CLERK

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

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8290-
8291 Nineteen Eighty-Nine, LLC, Index 600056/10
Plaintiff-Respondent, 150040/10

-against-

Icahn Enterprises L.P., et al.,
Defendants-Appellants.

- - - - -

Carl C. Icahn, et al.,
Plaintiffs-Appellants,

-against-

Geoffrey Raynor, et al.,
Defendants-Respondents.

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Herbert Beigel & Associates LLC, Tucson, AZ (Herbert Beigel of the bar of the State of Arizona, admitted pro hac vice, of counsel), and Robert R. Viducich, New York, for appellants.

Zeichner Ellman & Krause LLP, New York (Jeff I. Ross of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 6, 2012, which, upon reargument of defendants Icahn Enterprises L.P., Icahn Enterprises Finance Corp., Chelonian Subsidiary, LLC and Carl C. Icahn's (Icahn defendants) motion to dismiss, adhered to its prior order, entered June 2, 2011, which, inter alia, denied dismissal of plaintiff Nineteen Eighty-Nine, LLC's (1989) remaining two causes of action for breach of contract, unanimously affirmed, with costs. Order, same court and Justice, entered June 23, 2011, which granted the

motion of defendants Geoffrey Raynor; R2 Investments, LDC; Nineteen Eighty-Nine, LLC; Amalgamated Gadget, LP; Sceptor Holdings, Inc.; Q Funding, LP; Acme Widget, LP and Brandon Teague (Raynor defendants) to dismiss the complaint of Carl C. Icahn, Icahn Enterprises, LP, Icahn Enterprises Finance Corp. and Icahn Enterprises Holdings, LP (Icahn plaintiffs), and denied the Icahn plaintiffs' request for leave to amend, unanimously affirmed, with costs.

1989's allegations that the Icahn defendants breached the parties' LLC and Side Letter Agreements by transferring shares of Federal Mogul Corporation to an Icahn affiliate and causing that affiliate to institute a bond offering without disclosing 1989's interest in the shares to potential investors, thereby encumbering the shares and endangering 1989's interest, were sufficient to withstand the Icahn defendants' motion to dismiss (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010], *Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006]).

The Icahn plaintiffs offer no support for their assertion that 1989's filing of a Schedule 13D with the SEC in 2010 is not entitled to protection under the Noerr-Pennington doctrine because the document was simply a "disclosure document." The 13D was filed *because* the 2010 litigation was commenced, and thus, it

was incidental to that litigation and falls squarely within the protection of the Noerr-Pennington doctrine (*see Aircapital Cablevision, Inc. v Starlink Communication Group, Inc.*, 634 F Supp 316, 323-324 [D Kan 1986] [finding publicity that was "[c]learly . . . bully-type conduct" that undoubtedly hurt defendant's business to be "incidental to the lawsuit"]). Here, as in *Aircapital*, the filing of the Schedule 13D amendment was incidental to the lawsuit, and thus protected, even if, as the Icahn plaintiffs argue, the 13D was only a glorified press release meant to frighten away investors, and even if the Raynor defendants would have been "better advised to have refrained from [so filing]" (*Aircapital Cablevision, Inc.*, 634 F Supp at 324). As such, the court properly dismissed both the tortious interference and prima facie tort claims as precluded by Noerr-Pennington (*see Concourse Nursing Home v Engelstein*, 278 AD2d 35 [1st Dept 2000] [dismissing tortious interference and prima facie tort claims as precluded by Noerr-Pennington]). Because these claims are precluded by Noerr-Pennington, this court need not consider whether they were otherwise well pled.

The court also properly dismissed the remainder of the Icahn plaintiffs' claims.

The Icahn plaintiffs attempt to exclude from absolute immunity to claims of injurious falsehood, certain statements

made by the Raynor defendants specifically in the Schedule 13D. As found by the lower court, however, the absolute privilege applies "even in quasi-judicial hearings and administrative hearings, and the privilege 'attaches not only to the hearing stage, but to every step of the proceeding even if it is preliminary and/or investigatory, and irrespective of whether formal charges are ever presented'" (quoting *Cicconi v McGinn, Smith & Co., Inc.*, 27 AD3d 59, 62 [1st Dept 2005], *appeal dismissed* 6 NY3d 807 [2006]). Here, the Raynor defendants filed the Schedule 13D amendment as part of the broad regulatory scheme required by the SEC and kicked into gear by the Icahn plaintiffs' commencement of the bond offering process. The Icahn plaintiffs, thus, offer no basis to deny absolute privilege to the statements made in the Schedule 13D amendment, and the injurious falsehood claim was appropriately dismissed.

The gravamen of the Icahn plaintiffs' abuse of process claim is that the Raynor defendants abused the legal process by filing the 2010 lawsuit with malicious intent. This fact is borne out by review of the actual language of the cause of action, which states that "the conduct in the filing of the Lawsuit" – not the filing of the Schedule 13D – was the abuse of process. Such a claim cannot stand (*see I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 207 [1st Dept 2005]).

Finally, the court properly denied the Icahn plaintiffs' motion to amend, as any amendment would be "palpably insufficient or clearly devoid of merit" (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]), given that three of the claims at issue are barred by immunity doctrines and that no amendment can alter the fact that the filing of a complaint, alone, is not an abuse of process.

We have considered the parties' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8292 Julio Rebollo, Index 115289/08
Plaintiff-Appellant,

-against-

Nicholas Cab Corp., et al.,
Defendants-Respondents.

Soliris Columbus, et al.,
Defendants.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Craig W. Phemister of counsel), for appellant.

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

Order, Supreme Court, New York County (George J. Silver, J.), entered July 6, 2011, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion for summary judgment dismissing plaintiff's serious injury claims regarding his right knee, right ankle, and cervical and lumbar spine injuries, unanimously modified, on the law, to deny the motion with respect to plaintiff's claimed right ankle fracture, and otherwise affirmed, without costs.

Defendants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of "permanent consequential limitation of use" and "significant limitation of use" of his right knee, right ankle, and cervical and lumbar

spine (Insurance Law § 5102[d]).

Plaintiff raised an issue of fact with respect to his right ankle injuries by presenting evidence of a fracture (*see id.*). Plaintiff also raised a triable issue of fact as to his right shoulder injuries which are not at issue on this appeal.

Should the jury determine that plaintiff has met the threshold for serious injury on his shoulder and/or ankle, it may award damages for all of plaintiff's injuries causally related to the accident, even those not meeting the serious injury threshold (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8293 The People of the State of New York, Ind. 930/05
Respondent,

-against-

Thomas S.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson 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 (Carol Berkman, J.), rendered on or about March 15, 2012,

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 16, 2012

CLERK

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

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8294 The People of the State of New York, Respondent, Ind. 5391/08

-against-

Charlie Flow, etc., Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and DLA Piper LLP, New York (Robert C. Santoro of counsel), for appellant.

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

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 27, 2010, convicting defendant, after a jury trial, of robbery in the first degree (four counts) and robbery in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The five bank robberies formed such a distinctive pattern, and were so interconnected, that they could only have been committed by the same person. Fingerprint evidence established defendant's guilt of one of the robberies, thereby connecting him circumstantially to all of them, and his

challenges to the fingerprint evidence are unavailing. In addition, there were reliable identifications as to four of the robberies, as well as other evidence such as surveillance videotapes and photographs.

The court properly declined to reopen the *Wade* hearing based on trial testimony about conversations between witnesses that occurred before the witnesses separately made lineup identifications. This testimony could not have had any effect on the suppression issue (*see People v Clark*, 88 NY2d 552, 555 [1996]). The new information revealed at trial did not contradict any hearing testimony (*compare People v Olmo*, 153 AD2d 544 [1st Dept 1989]), and it went to the weight to be accorded the identifications rather than their admissibility (*see People v Bazil*, 309 AD2d 596, 597 [1st Dept 2003], *lv denied* 1 NY3d 568 [2003]).

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8295 Doris Santos, et al., Index 307082/09
Plaintiffs-Appellants,

-against-

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

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

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

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 21, 2011, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law. Their orthopedist's unexplained findings of significant limitations in the cervical and lumbar spine (*see Yamamoto v Carled Cab Corp.*, 66 AD3d 603 [1st Dept 2009]) conflict with their findings of an absence of serious injury to the spine (*Feaster v Boulabat*, 77 AD3d 440, 440-441 [1st Dept 2010]). Defendants also failed to submit objective evidence of the absence of any spinal injuries or

abnormalities. Nor did they submit any expert opinion that plaintiff's alleged injuries were not caused by the accident. Because defendants failed to meet their burden, their motion must be denied, regardless of the sufficiency of the opposing papers (*see Escotto v Vallejo*, 95 AD3d 667, 668 [1st Dept 2012]).

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8296-
8296A-
8297 July Fernandez, Index 402886/08
Plaintiff-Respondent-Appellant,

-against-

Stockbridge Homes, LLC,
Defendant-Respondent-Appellant,

Stratis Builders, LLC,
Defendant-Appellant-Respondent,

HARC Maintenance & Contracting Corp.,
Defendant.

- - - - -

Stratis Builders, LLC,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Sanita Construction Company, Inc.,
Third-Party Defendant-Respondent-Appellant.

- - - - -

Stockbridge Homes, LLC, etc.,
Second Third-Party Plaintiff-Appellant-Respondent,

-against-

Sanita Construction Company, Inc.,
Second Third-Party Defendant-Respondent-Appellant.

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Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for appellant-respondent.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for July Fernandez, respondent-appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Stockbridge Homes, LLC, respondent-appellant/appellant-respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 25, 2011, which, to the extent appealed from as limited by the briefs, granted in part and denied in part defendant Stratis Builders LLC's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered January 30, 2012, which to the extent appealed from (and brought up for review pursuant to CPLR 5517[b]) as limited by the briefs, granted plaintiff's and defendant Stockbridge Homes LLC's motions for reargument, and upon reargument, adhered to its prior order dismissing plaintiff's Labor Law § 241(6) claim, and denied so much of Stockbridge's motion for summary judgment as sought dismissal of plaintiff's Labor Law § 240 claim as against it, or, in the alternative, indemnification by co-defendant Stratis Builders LLC and third-party defendant Sanita Construction Company, unanimously affirmed, without costs. Appeal by Sanita Construction Company from the February 25, 2011 order, unanimously dismissed, without costs, as abandoned.

The motion court correctly granted defendants summary judgment dismissing plaintiff's Labor Law § 241(6) claim, in support of which plaintiff alleged a violation of the Industrial Code § 23-1.16, which sets protocols and standards for certain safety devices. An alleged violation of this section cannot be

maintained as a predicate for § 241(6) liability where there is no evidence that a plaintiff has been provided with any of the safety devices enumerated therein (*see D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 107-108 [1st Dept 2002]).

The motion court also correctly denied defendants' motions for summary judgment on plaintiff's Labor Law § 240(1) claim. There are questions of fact concerning how the accident occurred, and whether there were adequate safety devices provided to plaintiff that he elected not to use. Insofar as defendant Stratis contends that despite being the general contractor, it exercised no supervision or control over plaintiff's work, there is, at the very least, at question of fact concerning whether Stratis was authorized to exercise such supervision or control. The broad language of the agreement between Stratis and the property owner authorized Stratis to supervise all work on the construction project at issue (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

The motion court properly denied that branch of Stockbridge's motion seeking summary judgment on its cross claim against Stratis and its third-party claim against Sanita for contractual indemnification since Stockbridge did not establish, as a matter of law, that the plaintiff's accident resulted from "negligent acts or omissions" on the part of Stratis or Sanita,

as required by the defense and indemnification clause of its contracts with them (*see Coque v Wildflower Estates Dev.*, 31 AD3d 484, 488-489 [2nd Dept. 2009]; cf. *Pope v Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523, 690 [2nd Dept. 1999] [indemnification clause did not require proof of negligence]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8298 The People of the State of New York, Respondent, Ind. 4398/09

-against-

Cesar Urbina, Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Rahul Sharma of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered August 24, 2010, as amended September 16, 2010, convicting defendant, after a jury trial, of attempted sexual abuse in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 4 years and 3½ to 7 years, respectively, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made after the investigating detective stated, contrary to a prior ruling by the court, that he was currently assigned to the Sex Offender Monitoring Unit. The court's curative instruction made it clear that the

reassignment had no relevance to this case (*see People v Santiago*, 52 NY2d 865 [1981]), and there is no reasonable possibility that the jury could have been misled into thinking that defendant was being monitored as a sex offender at the time of his arrest.

Defendant did not preserve his challenges to testimony about the victim's disclosure of the attack to a workplace supervisor, and testimony by the victim about the psychological aftereffects of the crime, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The report to the supervisor was admissible as a prompt outcry under the circumstances of the case (*see People v McDaniel*, 81 NY2d 10, 16 [1993]; *People v Fabian,* 213 AD2d 298 [1st Dept 1995], *lv denied* 85 NY2d 972 [1995]), and defendant's defense opened the door to the victim's brief and limited testimony about psychological injury. In any event, any error in receiving any of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's ineffective assistance of counsel claims are generally unreviewable on direct appeal (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find 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 claims his trial counsel rendered ineffective assistance by failing to raise the issues that defendant raises on appeal concerning the prompt outcry and psychological trauma evidence. 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 favorable rulings on one or both of these issues would have affected the outcome of the case.

Defendant also claims his counsel ineffectively represented him at sentencing in connection with a motion. We find that claim to be without merit. Defendant made a pro se CPL 330.30 motion, based primarily on matters outside the record, to set aside the verdict on the ground of ineffective assistance. Counsel acted properly by calling the court's attention to the potential conflict of interest and suggesting the appointment of

a new attorney. The motion was both procedurally defective and meritless, and the court properly denied it without assigning new counsel.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8299 The People of the State of New York, Respondent, Ind. 4317/09

-against-

Jose Ortiz, Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about June 2, 2010, 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 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8300N The Board of Managers of Parc Vendome Condominium, Petitioner-Appellant, Index 109008/10

-against-

George Cambourakis, et al., Respondents,

Bright Horizons Family Solutions LLC, Respondent-Respondent.

_____

Seyfarth Shaw LLP, New York (Elizabeth D. Schrero of counsel), for appellant.

Dunnington, Bartholow & Miller LLP, New York (Eva Adaszko of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered April 11, 2011, which, insofar as appealed from, denied petitioner Board's petition for an order directing discovery in aid of arbitration, unanimously affirmed, with costs.

The court properly denied the petition seeking discovery from respondent Bright Horizons, a nonparty in the underlying arbitration proceeding, because the parties to the arbitration

did not stipulate to conduct discovery of Bright Horizons (*see* CPLR 3102[b], [c]; *cf. Matter of ACE Am. Ins. Co.*, 6 Misc 3d 1005[A], 2004 NY Slip Op 51732[U] [Sup Ct, NY County 2004], *and Textron, Inc. v Unisys Corp.*, 138 Misc 2d 124, 126 [Sup Ct, NY County 1987]).

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

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

ENTERED: OCTOBER 16, 2012

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8301N Carol A. Sigmond, etc., Index 107757/10
Petitioner-Respondent,

-against-

The Board of Managers of
Parc Vendome Condominium,
Respondent-Appellant.

Seyfarth Shaw LLP, New York (Elizabeth D. Schrero of counsel), for appellant.

Dunnington, Bartholow & Miller, LLP, New York (Eva Adaszko of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy Friedman, J.), entered April 11, 2011, inter alia, quashing the subpoenas served by respondent on nonparty Bright Horizons Children's Centers, Inc., and denying respondent's motion to dismiss the petition to quash, unanimously affirmed, with costs.

The court properly quashed the subpoenas served by respondent on nonparty Bright Horizons because the parties did not stipulate to conduct discovery of Bright Horizons (*see* CPLR 3102[b], [c]; *compare Textron, Inc. v Unisys Corp.*, 138 Misc 2d 124, 126 [Sup Ct, NY County 1987]; *Matter of ACE Am. Ins. Co.*, 6 Misc 3d 1005[A] [Sup Ct, NY County 2004]).

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

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

ENTERED: OCTOBER 16, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7540 Fairway Prime Estate Management, LLC,
Plaintiff-Appellant,

-against-

First American International Bank,
Defendant-Respondent.

Index 603410/09

_____

Anthony Y. Cheh, New York, for appellant.

Cozen O'Connor, New York (Melissa F. Brill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered on or about April 4, 2011, which granted defendant's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(7), unanimously modified, on the law, the motion denied as to plaintiff's breach of contract claim, and otherwise affirmed, without costs.

In 2007, plaintiff, a developer, obtained a loan from United Commercial Bank (UCB) to purchase land located at 42-18/28 Bowne Street in Flushing, Queens, for the purpose of building a mixed residential and commercial use condominium on the property upon obtaining additional capital for the construction. On or about August 27, 2008, plaintiff received a commitment letter from defendant First American International Bank in which the bank committed to an aggregate loan of $10 million, which would

include the original UCB land loan of $2.38 million, to be converted into a participation in the total $10 million, at an interest rate of prime plus 1.5%, with a minimum interest rate of 7.5%, subject to certain conditions. One of the conditions was "a satisfactory appraisal report from an appraiser acceptable to the Bank indicating the value of the 'newly built' Premises of an amount of at least $25,100,000.00 as Gross Sell Out Market Value, and $22,400,000 as Discounted Net Sell Out Value, which appraisal is reasonably satisfactory to the Bank" (boldface deleted). Capital Appraisal Services, Inc. had provided such an appraisal.

On September 24, 2008, the New York City Council passed a zoning resolution for the area in which the subject property was located that decreased the maximum amount of buildable square footage allowed to a level below the amount plaintiff planned to use. Therefore, in October 2008, the parties agreed to extend the commitment through March 31, 2009 to allow plaintiff time to obtain a variance from the Board of Standards and Appeals (BSA).

On January 27, 2009, the BSA granted plaintiff a variance. Plaintiff immediately advised defendant that the variance had been obtained and delivered a copy of the BSA resolution to defendant. On February 23, 2009, plaintiff's lawyer sent the resolution and other documents to defendant's lawyer so that the parties could schedule a closing. However, plaintiff alleges,

defendant avoided closing, instead demanding a further extension agreement authorizing it to obtain a new appraisal to replace the first appraisal, which was dated August 15, 2008.

Plaintiff's owner, Henry Zheng, asserts that on or about March 24, 2009, he met with Dick Liao, defendant's Vice President and Department Manager for Trade Finance and Commercial Lending. According to Zheng's affidavit, Liao told Zheng that "I [Zheng] could do things the easy way, or the hard way. He ... sa[id] the easy way to make sure the Loan would take place would be for me to sign[] a document on behalf of [plaintiff], agreeing to extend the time to make the Loan ... He ... told me that if I did not, [defendant] would make it very difficult or impossible for the Loan to take place and I should not look forward to fighting with a bank." Zheng also asserts that Liao explained to him that defendant "was under significant pressure because of the deterioration in the credit markets," and that Liao told him "that no bank was still doing construction financing, but ... assured [him that defendant] would go forward with [the] Loan, if [he] signed the document on behalf of [plaintiff]." Liao was aware that if Zheng did not sign the document, plaintiff and Zheng "would ... lose millions of dollars [they] had invested toward development of the subject property." Zheng felt he had no choice but to sign the March 23, 2009 extension agreement,

because otherwise he would forfeit the loan. Notably, the extension agreement provided that "[a]ll other terms and conditions remain unchanged."

On April 1, 2009, Capital Appraisal issued a "restricted" appraisal, i.e., one that "[did] not include discussions of the data, reasoning, and analysis that were used in the appraisal process," estimating that, as of April 1, 2011, the gross sellout market value of the condominium would be $25 million, and the discounted net sellout value would be $21,300,000.

In or about May 2009, plaintiff completed the foundation for the property, as requested by defendant.

Defendant never terminated the August/September 2008 commitment (as extended in October 2008 and March 2009) in the manner required by its terms. Instead, on June 10, 2009, defendant sent plaintiff a new commitment letter, bearing the same loan number as the original commitment but decreasing the amount of the loan from $10 million to $8.38 million and imposing a number of onerous new conditions that had to be met within 45 days, including an additional bank balance totaling $2,000,000 to be used for the project and the inclusion in the general contractor's contract of a personal completion guarantee. Defendant allegedly told plaintiff that the new terms were "take it or leave it." Plaintiff did not countersign and return the

letter within the imposed deadline, and defendant refused to lend the funds previously agreed to.

Plaintiff sued for breach of contract and fraud, and defendant moved to dismiss the complaint. The motion court granted defendant's motion and dismissed plaintiff's amended complaint. With regard to the fraud claim, it found that the claim was duplicative of the contract claim, and as to the contract claim, it held that the pleaded facts failed to establish that plaintiff had satisfied the contract's condition precedent that an appraisal report indicate that the discounted net sellout value of the property be at least $22.4 million, in view of Capital Appraisal's second appraisal report, dated April 1, 2009, estimating that, as of April 1, 2011, the discounted net sellout value would be $21,300,000.

We agree with the motion court's dismissal of plaintiff's fraud claim. "A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (*HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] [emphasis removed]).

However, we conclude that plaintiff pleaded a viable cause of action for breach of contract. Although the second appraisal's values are very slightly lower than the amounts required by the contract's condition precedent -- an appraised gross sellout market value of $25 million, compared to the required valuation of $25,100,000, and a discounted net sellout value of $21,300,000, compared to the required valuation of $22,400,000 -- there are several reasons for finding that the appraisal does not establish the failure of a condition precedent as a matter of law.

First, the appraisal itself is subject to question, given its "restricted" nature and the appraised values' variation by less than 5% from the contract requirements. Such factors as the appraisal's margin of error and the "data, reasoning and analysis" that the appraiser used to arrive at its conclusions must be examined to determine whether reliance on those valuations is justified.

Second, "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]). If, as plaintiff alleges, defendant delayed closing on the commitment despite plaintiff's satisfaction of all pre-conditions, including a

timely appraisal within the dictated range, solely in order to avoid its contractual obligation by justifying its later insistence on a new appraisal, then defendant may be said to have frustrated or prevented plaintiff's compliance with that condition precedent. Furthermore, since "all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]), the timing and circumstances of defendant's insistence on obtaining a new appraisal may support plaintiff's claim of a breach of the implied covenant of good faith.

Even if the second appraisal alone established a failure of the condition precedent, however, defendant's moving papers failed to establish as a matter of law that it effectively terminated its loan obligation in the manner required by the contract. If it failed to effectively terminate the contract, then defendant may have remained bound by its terms (*see Maxton Bldrs. v Lo Galbo*, 68 NY2d 373 [1986]).

Because plaintiff has since found alternative financing, the question of whether specific performance is available for a

contract to lend money is moot. Defendant's argument that plaintiff's damages are speculative is also refuted by the financing that plaintiff has obtained.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

7802- Index 109087/10
7803- 100206/10
7803A-
7804N-
7805N-
7805NA

The People of the State of New York
Ex Rel. Joel Danishefsky, et al.,
Petitioners-Appellants,

-against-

Roderick Covlin, et al.,
Respondents-Respondents,

Jo Ann Douglas,
Nonparty Respondent.

- - - - -

Philip Danishefsky, et al.,
Petitioners-Appellants,

-against-

Roderick Covlin, et al.,
Respondents-Respondents,

Jo Ann Douglas,
Nonparty Respondent.

Blank Rome LLP, New York (Marilyn B. Chinitz of counsel), for appellants.

Steven N. Feinman, White Plains, for Roderick Covlin, respondent.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin of counsel), for David Covlin and Carol Covlin, respondents.

Jane B. Friedson Family Law and Mediation, New York (Jane B. Freidson of counsel), attorney for the child Myles Covlin.

Jo Ann Douglas, New York, respondent pro se, and attorney for the child Anna Covlin.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered January 11, 2010, which, to the extent appealed from, appointed Jo Ann Douglas, Esq., as attorney for the children Anna and Myles Covlin and directed that petitioners Philip Danishefsky and Peggy Danishefsky pay 50% of Douglas's compensation, unanimously affirmed, without costs. Amended order, same court and Justice, entered on or about November 9, 2010, which, to the extent appealed from, directed Philip Danishefsky and Peggy Danishefsky to pay 50% of the fees of Jane B. Freidson, Esq., the court-appointed attorney for Myles Covlin, unanimously affirmed, without costs. Judgment, same court and Justice, entered April 19, 2011, awarding Jo Ann Douglas the sum of $15,154.69 against Philip Danishefsky and Peggy Danishefsky for necessaries provided by Douglas to Anna Covlin, unanimously affirmed, without costs. Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about August 12, 2010, which, to the extent appealed from, appointed Jane B. Freidson, Esq., as attorney for the child Myles Covlin and directed Joel Danishefsky and Jaelene Danishefsky to pay 100% of Freidson's fees, unanimously affirmed, without costs. Order, same court and Justice, entered on or about August 12, 2010, which, to the extent appealed from, appointed Jo Ann Douglas, Esq., as attorney for the child Anna Covlin and directed Joel Danishefsky and Jaelene Danishefsky to pay 100% of Douglas's compensation, unanimously affirmed, without costs. Judgment,

same court and Justice, entered April 19, 2011, awarding Jo Ann Douglas the sum of $18,204.63 against Joel Danishefsky and Jaelene Danishefsky for necessaries provided by Douglas to Anna Covlin, unanimously affirmed, without costs.

Petitioners in both habeas corpus proceedings argue on appeal that the court below lacked the authority to order them to pay the fees of the attorneys for the subject children. Petitioners were directed to pay the disputed fees by the orders appointing the attorneys for the children. Petitioners did not move to vacate the orders and even made partial payments of the attorneys' fees pursuant to the court's directives. Petitioners voiced no challenge to the court's authority to direct payment until months later when the attorneys for the children had already rendered their services and Douglas made motions for orders directing the payment of her outstanding fees in proceeding No. 1. To be sure, petitioners in proceeding No. 1 (Philip Danishefsky and Peggy Danishefsky) consented to one of the orders that directed further payment of the fees. We find that it was incumbent on petitioners to make their present objections known to the court before the attorneys rendered services in reliance on their acquiescence. Petitioners are therefore estopped from making the arguments they now make on

appeal (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). We have considered petitioners' remaining arguments for affirmative relief in both proceedings and find them unavailing.

Unlike the judgments before us, the orders issued in both proceedings are not appealable as of right because they did not decide motions on notice (CPLR 5701[a][2]). However, in the interest of judicial economy, we nostra sponte deem the notices of appeal from the orders motions for leave to appeal, which we grant (*see Winn v Tvedt,* 67 AD3d 569 [1st Dept 2009]).

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

ENTERED: OCTOBER 16, 2012

CLERK

Andrias, J.P., Sweeny, Catterson, Moskowitz, Manzanet-Daniels, JJ.

8169 Ian Gavigan, Index 109761/06
Plaintiff-Respondent-Appellant,

-against-

The City of New York,
Defendant-Appellant-Respondent,

Petrocelli Electric Company, Inc.,
Defendant-Respondent,

Consolidated Edison of New York, Inc.,
Defendant.

_____

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for appellant-respondent.

Peters Berger Koshel & Goldberg, P.C., Brooklyn (Marc A. Novick of counsel), for respondent-appellant.

D'Amato & Lynch, LLP, New York (Bill V. Kakoullis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 15, 2009, which, insofar as appealed from, denied defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it and granted defendant Petrocelli Electric Company's (Petrocelli) motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously modified, on the law, Petrocelli's motion denied, and otherwise affirmed, without costs.

Plaintiff sanitation worker was injured when, in the course

of his duties, he sustained an electric shock after touching a lamppost. An inspection of the lamppost's control box showed that an exposed copper wire was touching the side of the base. Petrocelli had contracted with the City for the maintenance and inspection of certain electrical equipment in the City, including the subject lamppost.

The motion court properly declined to dismiss the action as against the City. Assuming that the subject lamppost is an "encumbrance" or "attachment" to the sidewalk thereby requiring that there was prior written notice of the defective condition in accordance with Administrative Code of City of New York § 7-201(c) (*see e.g. Tucker v City of New York*, 84 AD3d 640 [1st Dept 2011], *lv denied* 17 NY3d 713 [2011]; *see also Bisulco v City of New York*, 186 AD2d 84 [1st Dept 1992]), the record presents triable issues of fact as to whether there was notice to the City. Such evidence included Petrocelli's records showing that it had received a complaint from the City concerning an unauthorized access to a lamppost's electrical wiring at the subject intersection. There were also complaints about traffic lights malfunctioning at the intersection.

The record also demonstrates that Petrocelli's motion should have been denied. Triable issues exist as to whether Petrocelli performed its duty to inspect the lamppost in accordance with the

terms of its contract with the City, and if it did not, whether this failure created or exacerbated the defect which allegedly caused plaintiff's injury (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 16, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

8274 In re Charles F. Bryant, Index 113361/09
Petitioner-Respondent,

–against–

New York City Department
of Education,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellant.

Charles F. Bryant, respondent pro se.

_____

Order and judgment (one paper), Supreme Court, New York County (Emily Jane Goodman, J.), entered November 9, 2010, which vacated respondent's determination terminating petitioner as a school teacher, remanded the matter for a new investigation and hearing under the auspices of a different investigator nunc pro tunc, and sub silentio denied respondent's cross motion to dismiss the petition, unanimously modified, on the law, the judgment vacated, respondent directed to serve an answer within 20 days of service of a copy of this order, and otherwise affirmed, without costs.

Petitioner has sufficiently alleged that the investigator from the Office of Special Investigations acted in bad faith in making the determination that formed the basis for terminating petitioner. Therefore, respondent's motion to dismiss was

properly denied. However, the motion court erred in determining the merits of the proceeding without affording respondents an opportunity to serve an answer upon the denial of its motion to dismiss (*see Matter of Samuel v Ortiz*, 105 AD2d 624, 626-627 [1st Dept 1984]).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8302 The People of the State of New York, Respondent, Ind. 4800/97

-against-

Jose Martinez, Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about December 20, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court considered the appropriate factors and properly exercised its discretion in concluding that substantial justice dictated a denial of resentencing. The underlying drug crime involved a very large quantity of cocaine, and defendant's plea of guilty to a third-degree sale was in satisfaction of an A-I felony charge. After being released on parole in 2001, defendant

was convicted of federal drug charges and sentenced to 10 years' incarceration. These factors outweighed the mitigating factors cited by defendant (*see e.g. People v Rodriguez*, 83 AD3d 419 [1st Dept 2011], *lv denied* 17 NY3d 800 [2011]).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8303 In re Nyree S., etc.,
Petitioner-Respondent,

-against-

Gregory C.,
Respondent-Appellant.

George E. Reed Jr., White Plains, for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Ashley S. Miller of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

Appeal from order, Family Court, Bronx County (Alma Cordova, J.), entered on or about December 9, 2010, which granted the petition seeking a five-year order of protection in favor of petitioner mother and the parties' child upon a determination that respondent father had committed the family offenses of harassment and stalking, unanimously dismissed, without costs, as taken from a nonappealable paper.

The record shows that the incarcerated respondent appeared telephonically at a hearing and was grossly disrespectful to the court. When the court admonished respondent, he responded in a manner indicating that he had no respect for the court's authority. The court therefore acted properly in excluding respondent from the proceedings by disconnecting his telephone

connection, and his conduct constituted a knowing and willful default (*see Matter of Anita L. v Damon N.*, 54 AD3d 630 [1st Dept 2008]; *Matter of Kondratyeva v Yapi*, 13 AD3d 376 [2d Dept 2004]; *Matter of McConnell v Montagriff*, 233 AD2d 512 [2d Dept 1996]). Accordingly, since no appeal lies from an order entered upon the aggrieved party's default, the appeal is dismissed (*see* CPLR 5511; *Anita L.*, 54 AD3d at 631).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8304 The People of the State of New York, Ind. 3912/04
Respondent,

-against-

Courtney Greely,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about November 1, 2006,

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 16, 2012

CLERK

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

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

8305 Joseph Sanchez, etc., et al., Index 305669/08
Plaintiffs-Respondents,

-against-

The Citizens' Advice Bureau, Inc.,
Defendant-Appellant.

_____

Barry, McTiernan & Moore, New York (David H. Schultz of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diane W. Bando of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 13, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Thirteen-year-old plaintiff Joseph Sanchez was injured while roller skating on a trip sponsored by defendant. The record shows that Joseph was told by his father, plaintiff Jose Sanchez, that he did not want him going on the trip because Joseph had previously broken his arm. The dispute as to whether Jose consented for Joseph to go roller skating does not preclude summary judgment, nor is it dispositive that defendant transported Joseph to the rink and paid for his skates. Assuming the issue of consent is resolved in plaintiffs' favor,

defendant's actions simply "set the occasion" for or "facilitate[d]" the accident, as opposed to proximately causing it (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 219 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]). Plaintiffs have shown no causal connection between defendant's alleged negligent supervision and the occurrence of the accident, because without any specific allegations as to what precipitated Joseph's fall, plaintiffs' claim that defendant proximately caused his injury due to negligent supervision as he was roller skating is speculative (*see Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009]).

Moreover, there is no evidence as to how defendant's alleged lack of supervision increased the obvious risk associated with roller skating. Joseph testified that the rink was not overly crowded, no one was near him prior to his fall, and he fell while trying to stop (*see Fintzi v New Jersey YMHA-YWHA Camps*, 97 NY2d 669, 670 [2011]; *Gaspard v Board of Educ. of City of N.Y.*, 47 AD3d 758 [2d Dept 2008]).

Inasmuch as we are reversing we need not reach the other issue raised by defendant.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8306 Ernesto Amaro, Index 24978/05
Plaintiff-Respondent, 85371/06

Luis Hiraldo,
Plaintiff,

-against-

American Medical Response of New York, Inc., et al.,
Defendants-Appellants,

Laidlaw USA, Inc.,
Defendant.

- - - - -

[And a Third Party Action]

Billig Law, P.C., New York (Darin S. Billig of counsel), for appellants.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 20, 2010, which, to the extent appealed from as limited by the brief, denied the motion of defendants American Medical Response of New York, Inc. and Moises Nunes for summary judgment dismissing plaintiff Ernesto Amaro's complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of "significant limitation of use" and/or "permanent consequential limitation of

use" of her cervical and lumbar spine injuries (*see* Insurance Law § 5102[d]). They submitted expert medical reports of a radiologist who opined that changes shown in MRIs of the lumbar spine of the then 26-year-old plaintiff were degenerative, and that the MRI of the cervical spine showed no injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [2011]).

In opposition, plaintiff submitted the affirmations of his physician, who found limitations in the range of motion of plaintiff's cervical and lumbar spine shortly after the accident and five years later. Plaintiff also submitted the MRI reports of his radiologist noting disc bulges in the cervical spine and a herniated disc in the lumbar spine. This evidence raises triable issues of fact as to whether plaintiff sustained serious injuries of the cervical and lumbar spine (*see Fuentes v Sanchez*, 91 AD3d 418 [2012]; *Johnson v Garcia*, 82 AD3d 561 [2011]). Plaintiff's physicians also addressed the defense expert's findings of degeneration by opining that his injuries were causally related to the accident (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]; *Grant v United Pavers Co., Inc.*, 91 AD3d 499 [2012]).

Plaintiff did not submit any proof of a recent medical examination showing a loss of range of motion in his right knee

(*see Townes v Harlem Group, Inc.*, 82 AD3d 583 [2011]), or MRI evidence of his knee injuries. Nevertheless, once a serious injury is established, a plaintiff is entitled to recover damages for all injuries causally related to the accident, even those that do not meet the serious injury threshold (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [2010]).

Defendants have not met their burden with respect to plaintiff's 90/180-day claim, since they first raised this claim in their reply papers (*see Tadesse v Degnich*, 81 AD3d 570 [2011]; *McNair v Lee*, 24 AD3d 159, 160 [2005]). Were we to address this claim, we would find it to be without merit (*see Singer v Gae Limo Corp.*, 91 AD3d 526 [2012]).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8307 Vitro S.A.B. de C.V., Index 650997/11
Plaintiff-Appellant,

-against-

Aurelius Capital Management, L.P., et al.,
Defendants-Respondents.

_____

Susman Godfrey L.L.P., Los Angeles, CA (Bryan J.E. Caforio of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Dechert LLP, New York (Robert A. Cohen of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 8, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff, a bankrupt glass manufacturer based in Mexico, seeks to hold defendants liable for damages allegedly incurred in connection with statements published in a press release issued in advance of plaintiff's public launch of a proposed reorganization plan. The motion court properly dismissed the breach of contract claim against the non-signatory defendants because in the absence of a contract, there could be no breach (*see Pevensey Press v Prentice-Hall, Inc.*, 161 AD2d 500, 501 [1st Dept 1990]). Plaintiff also failed to state a claim for breach of contract

against the sole signatory defendant, Lord, Abbett & Co., LLC, as the press release merely evaluated plaintiff's proposed plan, a permitted use of confidential material, and did not disclose any specific confidential terms. Moreover, this expression of opinion is constitutionally protected and cannot serve as the basis for plaintiff's injurious falsehood claim (*see Kidd v Epstein*, 79 AD3d 650 [1st Dept 2010]).

In the absence of any tortious conduct, the element of "wrongful means," necessary to support a claim for tortious interference with prospective economic advantage, is lacking (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]). Plaintiff also failed to establish malice as the sole motive for defendants' actions. As creditors, defendants have a clear economic interest in this matter, separate from any possible malicious motive (*see Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317 [1st Dept 2007]).

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

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8308 In re Kiera R.,

A Child Under Eighteen
Years of Age, etc.,

Kinyetta R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Todd D. Kadish, Brooklyn, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

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

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Order of fact-finding and disposition, Family Court, New York County (Rhoda J. Cohen, J.F.C.), entered on or about November 30, 2010, which, upon a fact-finding determination that respondent mother neglected the subject child, placed the subject child in the custody of the Commissioner of the Administration for Children's Services, unanimously affirmed, without costs, as to the fact-finding, and the appeal therefrom otherwise dismissed, without costs, as moot.

The finding of neglect is supported by a preponderance of the evidence, which established that respondent neglected the subject child by failing to provide her with proper supervision and guardianship. The child frequently left respondent's home

for days at a time and respondent failed to provide alternate living arrangements, forcing the child, for at least part of the time, to live on the streets (Family Ct Act §1012[f][i]). Further, the evidence showed that respondent failed to seek professional counseling or therapy for the child, whose behavior was uncontrollable, even though such counseling had been recommended by medical professionals (*see e.g. Matter of Perry S. v Cynthia S.*, 22 AD3d 234, 235 [1st Dept 2005]; *Matter of Deanna R.G.*, 83 AD3d 1064 [2d Dept 2011]).

Respondent did not object to the court's entry of a dispositional order without a formal dispositional hearing, and her present objection is, therefore, unpreserved (*see Matter of Crystal P.*, 93 AD3d 576 [1st Dept 2012]). In any event, given that a final discharge of the instant case became effective on March 7, 2012, the child's 18th birthday, the appeal from the dispositional order is moot (*see e.g., Matter of Brianna R. (Marisol G.)*, 78 AD3d 437, 439 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8309 Lenders Capital LLC, Index 380425/08
Plaintiff,

-against-

Ranu Realty Corp., et al.,
Defendants-Respondents,

New York State Department of
Taxation & Finance, et al.,
Defendants,

Viktoriya Zavelina,
Intervenor-Appellant.

_____

Stern & Stern, Brooklyn (Pamela Smith of counsel), for intervenor-appellant.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 6, 2011, which, in this mortgage foreclosure action, to the extent appealed from, granted the motion of defendants Ranu Realty Corp. and Azizur Rahman to vacate the foreclosure sale, and denied intervenor-appellant's cross motion to direct the referee to complete the sale, unanimously reversed, on the law and facts, defendants' motion denied and intervenor's cross motion granted, without costs.

The motion court erred in finding that a stay was in effect at the time of the foreclosure sale and that the sale was a nullity. Even assuming that, about two hours before the sale took place, the referee's office had been served with the order

to show cause staying the sale, the record demonstrates that defendants failed to comply strictly with the methods of service provided for in the order to show cause and failed to present proof of service on the return date of the motion (*see Kue Mee Realty Corp. v Louie*, 295 AD2d 263 [1st Dept 2002]).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8310 The People of the State of New York, Respondent, Ind. 3356/08

-against-

Xavier Rayan, Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Margaret E. Knight of counsel), and Jones Day, New York (James A.A. Kirk 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 (Robert M. Stolz, J.), rendered September 16, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of six months, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters of strategy not reflected in, or not fully explained by, the trial record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find 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 has not shown that counsel's alleged deficiencies deprived defendant of a fair trial or affected the outcome.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8311 Vito Nicoletta, Index 115987/07
Plaintiff-Appellant,

-against-

Berkshire Life Insurance Company, et al.,
Defendants-Respondents.

Law Offices of Christopher P. Foley, LLC, Katonah (Christopher P. Foley of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Robert A. Spolzino of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 15, 2011, which, in this breach of contract action to recover disability income benefits under an insurance policy issued by defendant Guardian Life Insurance Company of America to plaintiff, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Under the subject policy, "total disability" is defined to mean that, due to sickness or injury, an insured cannot perform the major duties of his or her occupation. "Occupation," in turn, is defined as "the regular occupation (or occupations, if more than one) in which [the insured is] engaged at the time [the insured] become[s] disabled."

The evidence in the record, including plaintiff's testimony, establishes that, at the time plaintiff purportedly became

disabled, he held himself out as a self-employed airline maintenance consultant. Plaintiff admitted that he was able to perform the duties of a consultant, and the fact that he earned no income from such activity does not alter the conclusion that this was his occupation at the time he allegedly became disabled (*see Erreca v Western States Life Ins. Co.*, 19 Cal 2d 388, 397, 121 P2d 689, 695 [1942]). Contrary to plaintiff's contention, defendants did not waive their right to assert that plaintiff was a consultant at that time. Indeed, where, as here, "the issue is the existence or nonexistence of coverage . . . the doctrine of waiver is simply inapplicable" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]). Further, even if, as plaintiff asserts, he was unemployed at that time, he was not entitled to disability benefits under the terms of the policy (*see Scherer v Equitable Life Assur. Soc. of U.S.*, 2006 WL 1520212, *4, 2006 US Dist LEXIS 35609, *13 [SD NY, May 31, 2006, No. 01-Civ-10193(CSH)], *affd* 262 Fed Appx 324 [2d Cir 2008]).

Equally unavailing is plaintiff's argument that he is totally disabled because he cannot perform certain inspection and mechanical duties he claimed to have performed when he was employed at AOG Sheet Metal. These duties contrast significantly with the job duties listed in plaintiff's application for disability income insurance, in which he stated that he was

president of the company and that his job duties were 50% technical management and planning and 50% customer relations and personnel planning. In any event, even considering plaintiff's claimed job duties at AOG, the argument fails, as plaintiff admitted that he can still perform business management duties.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8312 Della Robinson, Index 304393/09
Plaintiff-Respondent,

-against-

Mary Joseph, et al.,
Defendants,

Adama Mbaye, et al.,
Defendants-Appellants.

Law Offices of William B. Baier, Bohemia (William B. Baier of counsel), for appellants.

Paris & Chaikin PLLC, New York (Ian M. Chaikin of counse), for respondent.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about July 1, 2011, which denied defendants Adama Mbaye and Krukman, LLC'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), unanimously affirmed, without costs.

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury to her cervical spine and lumbar spine by submitting the affirmations of a physiatrist and neurologist, both of whom found that plaintiff's cervical spine and lumbar spine demonstrated full ranges of motion in

every plane, comparing plaintiff's values to normal (*see Perl v Meher*, 18 NY3d 208 [2011]; *Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]). Contrary to plaintiff's contention, it was unnecessary, for defendants to meet their prima facie burden, for their experts to specifically address the positive diagnostic findings within plaintiff's medical records (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660-661 [1st Dept 2010]; *Shumway v Bungeroth*, 58 AD3d 431 [1st Dept 2009]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [1st Dept 2008]).

Nevertheless, plaintiff raised an issue of fact in opposition as to both her cervical and lumbar spines. She submitted the affirmation of a radiologist explaining that the MRIs of her cervical spine revealed, among other things, disc herniations at multiple levels, and affirmed results of EMG tests which revealed lumbar and cervical radiculopathy. Further, plaintiff submitted the affirmed reports of three treating physicians, all of whom found that plaintiff's cervical and lumbar spine suffered diminished ranges of motion (*see Lavali v Lavali*, 89 AD3d 574 [1st Dept 2011]; *Colon v Bernabe*, 65 AD3d 969, 970 [1st Dept 2009]). Moreover, plaintiff's physical medicine and rehabilitation expert stated in his affirmation that the disc herniations and radiculopathies were causally connected

to the accident (*see e.g. Fuentes v Sanchez*, 91 AD3d 418 [2012].

Defendants failed to meet their initial burden as to plaintiff's 90/180-day claim, since they relied only on the reports of their medical experts who did not examine plaintiff during the relevant statutory period and did not address plaintiff's condition during the relevant period (*see Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [1st Dept 2011]). Viewing the evidence in a light most favorable to plaintiff, as we must at this procedural posture, Supreme Court properly denied defendants' motion as to the 90/180-day claim (*see Cruz v Rivera*, 94 AD3d 576 [1st Dept 2012]; *Morris v Cisse*, 58 AD3d 455, 456 [1st Dept 2009]; *Alexandre v Dweck*, 44 AD3d 597 [2nd Dept 2007]).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8313 The People of the State of New York, Respondent, Ind. 4094/10

-against-

Shawn Thomas, 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 (Sheila L. Bautista 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 (Michael Sonberg, J.), rendered on or about February 22, 2011,

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

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

ENTERED: OCTOBER 16, 2012

CLERK

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

Andrias, J.P., Sweeny, Renwick, Román, JJ.

8314 In re John Dickinson, Index 112573/10
Petitioner,

-against-

New York State Unified Court System, etc.,
Respondent-Respondent.

_____

Raymond Nardo, Mineola, for petitioner.

John W. McConnell, Office of Court Administration, New York (Pedro Morales of counsel), for respondent.

_____

Determination of respondent, dated May 24, 2010, which found petitioner guilty of certain disciplinary charges and terminated his employment as an associate court clerk, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Martin Schoenfeld, J.], entered March 2, 2011) dismissed, without costs.

Substantial evidence supports respondent's determination (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Petitioner was charged with both misconduct and incompetency due to excessive absenteeism and lateness. Although petitioner correctly notes that misconduct "requir[es] a showing of willfulness or intentional misconduct"

(*Matter of Weatherblow v Board of Educ. of Jamestown City School Dist.*, 236 AD2d 855, 856 [4th Dept 1997] [internal quotation marks omitted]), "a finding of incompetence ... only requires evidence of some dereliction or neglect of duty" (*Matter of Phillips v Le Page*, 4 AD3d 704, 705 [3d Dept 2004] [internal quotation marks omitted]). Excessive absenteeism, even if nonwillful, constitutes incompetence (*see Cicero v Triborough Bridge & Tunnel Auth.*, 264 AD2d 334, 336 [1st Dept 1999]), and contrary to petitioner's contention, respondent was not required to warn him that his absences and tardiness could lead to dismissal (*see e.g. Smack v Pattison* (80 AD2d 874, 874 [2d Dept 1981] [no indication that the respondent warned the petitioner before terminating him for being "repeatedly late or absent from work without appropriate excuse"]).

Respondent did not violate due process by relying on evidence of absences and tardiness outside the time period delineated in the specification of charges. Respondent relied on such evidence to determine the appropriate sanction, not to determine petitioner's guilt (*see Matter of Bigelow v Board of Trustees of Inc. Vil. of Gouverneur*, 63 NY2d 470, 474 [1984]). Nor did respondent violate due process by considering a time sheet that was not introduced at petitioner's hearing. Petitioner had "notice sufficient to afford him a reasonable

opportunity to prepare and present a defense or explanation" for his post-hearing absences (*Matter of Kieffer v New York State Thruway Auth.*, 135 AD2d 1017, 1019 [3d Dept 1987]).

The penalty of termination does not shock our sense of fairness (*see Matter of Rannacher v McGuire*, 85 AD2d 521 [1st Dept 1981]; *Matter of De Stefano v Village of Port Chester*, 211 AD2d 716 [2d Dept 1995]). Being present at work is an essential job function (*see e.g. Corr v MTA Long Is. Bus*, 27 F Supp 2d 359, 366 [ED NY 1998], *affd* 199 F3d 1321 [2d Cir 1999]), and petitioner's "disability ... may not be used to shield him from the adverse consequences of inadequate job performance" (27 F Supp 2d at 369).

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8315 In re Steven C.,

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 9, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that if committed by an adult, would constitute the crime of criminal mischief in the fourth degree, and placed him on probation for 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request to convert the proceeding to a person in need of supervision proceeding, and instead adjudicated him a juvenile delinquent and placed him on probation. The underlying incident was a violent attack on appellant's mother that involved a weapon. In addition, appellant had a history of physical altercations and intimidation, both in the home and at school, as

well as a poor school record (*see e.g. Matter of Rosemary R.*, 29 AD3d 309 [1st Dept 2006]). The court properly concluded that probation pursuant to a juvenile delinquency adjudication was necessary in order to provide the proper level of control over appellant's behavior, and we reject appellant's arguments to the contrary.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8316 The People of the State of New York, Respondent, Ind. 2340/07

-against-

Kanjy Felipe, Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Rahul Sharma of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J. at plea; Eugene Oliver, J. at sentencing), rendered on or about April 9, 2010, 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 16, 2012

CLERK

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

8318 Arkady Menkin, Index 109931/09
Plaintiff-Appellant,

-Against-

AAA Superior Pest Control, LLC,
Defendant-Respondent,

M&T Real Estate Inc., et al.,
Defendants.

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

Gallo Vitucci & Klar, New York (Daniel P. Mevorach of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 21, 2011, which granted the motion of defendant AAA Superior Pest Control (AAA) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

The motion court erred in dismissing the complaint as against AAA, in this action where plaintiff allegedly slipped and fell on "yellow granules" of pest bait on the floor of the locker room in the sub-basement of the building in which he worked; AAA, a pest-control services company, serviced the building. The record shows that a triable issue of fact exists as to whether AAA failed "to exercise reasonable care in the performance of [its] duties, [and] launche[d] a force or instrument of harm"

(*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal quotation marks omitted]), which caused plaintiff's fall.

The evidence demonstrates that plaintiff observed the granular bait on the walkway of the locker room floor on the morning of his accident, and AAA's own witness observed the bait on the floor during his inspection the day after the accident, and took photographs. While defendant asserts that the granular bait on the day of the inspection was in the corners and under appliances, as it should be, this does not establish, as a matter of law, that it was not placed in the walkway by AAA, which admittedly placed granular bait in the days prior to plaintiff's fall. Although AAA contends that it did not place the bait in the walkway, a jury could reasonably conclude otherwise based on plaintiff's testimony that the bait was in the walkway only one or two days after AAA had placed it. Moreover, plaintiff's inability to recognize the bag of granular bait that was shown to him at his deposition, which AAA asserts is the type of bait it

uses, does not warrant dismissal of the action. Plaintiff identified the substance on the floor in the photos of the locker room area as being the type he slipped on, and AAA did not deny that the substance depicted in the photos was its granular bait.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8319 The People of the State of New York, Respondent,

Ind. 710/08

-against-

Lloyd Nicholson,
Defendant-Appellant.

- - - - -

Correction Officers' Benevolent Association,
Amicus Curiae.

Virginia Boccio, Farmingdale, for appellant.

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

Leslie H. Ben-Zvi, New York, for amicus curiae.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 6, 2010, convicting defendant, after a nonjury trial, of gang assault in the second degree and assault in the second degree, and sentencing him to an aggregate term of 6 years, unanimously affirmed.

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

Defendant, a correction officer, directed a large group of inmates to attack two other inmates while defendant remained nearby. Defendant was properly convicted of second-degree

assault under Penal Law § 120.05(7), because, although not an inmate himself, he acted in concert with inmates (*see* Penal Law § 20.05[3]). The same proof also established the elements of second-degree gang assault (Penal Law § 120.06). The evidence warrants the conclusion that defendant intended to cause physical injury to the victims, and that defendant's order that the victims not be hit in the face was merely intended to minimize visible injuries.

We perceive no basis for reducing the sentence.

We have considered and rejected the arguments raised in the amicus curiae brief.

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

ENTERED: OCTOBER 16, 2012

CLERK

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

8320N In re Alvin Rosenthal, et al., File 2968/07

- - - - -

The American Society for the Prevention of Cruelty to Animals, et al.,
Proposed Interveners-Appellants,

David Panzirer, et al.,
Respondents-Respondents.

McDermott Will & Emery LLP, New York (Henry Christensen III of counsel), for The American Society for the Prevention of Cruelty to Animals, appellant.

Arnold & Porter LLP, New York (Charles G. Berry of counsel), for The Humane Society of the United States and Maddie's Fund, appellants.

Ronald S. Rolfe, New York, for David Panzirer, Walter Panzirer, Sandor Frankel and John Codey, respondents.

Eric T. Schneiderman, Attorney General, New York (Leslie B. Dubeck of counsel), for Attorney General, respondent.

Order, Surrogate's Court, New York County (Nora Anderson, S.), entered April 15, 2011, which, insofar as appealed from, denied the motion by The Humane Society of the United States, Maddie's Fund, and The American Society for the Prevention of Cruelty to Animals (collectively, movants) to intervene in the Surrogate's Court proceeding, for a construction under SCPA 1420 and 2101, and to vacate a prior Surrogate's Court order entered February 19, 2009, unanimously affirmed, without costs.

There is no merit to movants' assertion that the Surrogate

lacked the jurisdiction to decide the trustees' petition in the proceeding underlying this application. On the contrary, the Surrogate's Court's jurisdiction encompasses all matters that affect the affairs of a decedent (*Matter of Piccione*, 57 NY2d 278, 287 [1982]). Thus, there is no basis to vacate the order underlying movants' application.

Turning to the merits of the application, we find that Surrogate's Court acted well within its discretion to deny movants' motion to intervene under either CPLR 1012 or 1013 (*see Matter of Pace-O-Matic, Inc. v New York State Liq. Auth.*, 72 AD3d 1144 [3d Dept 2010]; *see also State of New York v Philip Morris Inc.*, 269 AD2d 268 [1st Dept 2000].

First, with respect to a trust, under EPTL 8-1.1(f), only the Attorney General may enforce the trust provisions insofar as the beneficiaries are concerned (*see Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465-66 [1985]; *see also Board of Educ. of Mamaroneck Union Free School Dist. v Attorney General of State of N.Y.*, 25 AD3d 637, 638-39 [2d Dept 2006], *lv denied* 7 NY3d 807 [2006]). This status is conferred upon the Attorney General even if, as here, his position does not necessarily comport with that

of the charitable entities (*Matter of Notkin*, 45 AD2d 849, 850 [2d Dept 1974]; *see also Matter of May*, 213 AD2d 838, 839-840 [3d Dept 1995], *lv dismissed* 85 NY2d 1032 [1995]). Second, movants cannot fulfill the requirement under CPLR 1012 that the judgment may adversely affect their interests (*Matter of Rapoport*, 91 AD3d 509 [1st Dept 2012]; *see also Matter of Vaughn*, 267 AD2d 763, 763-764 [3rd Dept 1999]). As a result, movants lack standing to intervene. Nor do movants fall within an exception to the general standing rule, as they are not within a class of potential beneficiaries that is "sharply defined and limited in number" (*Alco Gravure*, 64 NY2d at 465, citing Restatement [Second] of Trusts § 391, Comment *c* [1959]). For both these reasons, movants lack standing to intervene.

In light of our conclusions, we need not address the parties' remaining contentions.

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

ENTERED: OCTOBER 16, 2012

CLERK

Tom, J.P., Andrias, Catterson, Abdus-Salaam, Román, JJ.

6200-
6201 U.S. Bank National Association,
Plaintiff-Respondent,

-against-

APP International Finance Company,
B.V., et al.,
Defendants-Appellants.

Index 600405/04

Schnader Harrison Segal & Lewis LLP, New York (Benjamin P. Deutsch of counsel), for appellants.

Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 15, 2011, affirmed, with costs.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Sheila Abdus-Salaam
Nelson S. Román, JJ.

6200-6201
Index 600405/04

_____x

U.S. Bank National Association,
Plaintiff-Respondent,

-against-

APP International Finance Company,
B.V., et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 15, 2011, which, inter alia, denied their motion to vacate a judgment and to quash the information subpoenas, subpoenas duces tecum and subpoenas ad testificandum served upon them, or stay their enforcement.

Schnader Harrison Segal & Lewis LLP, New York (Benjamin P. Deutsch, Kenneth R. Puhala and Alizah Z. Diamond of counsel), for appellants.

Seward & Kissel LLP, New York (Dale C. Christensen, Jr. and John J. Galban of counsel), and Wilk Auslander LLP, New York (Jay S. Auslander, Jessica Taran and Adam (Aari) Itzkowitz of counsel) for respondent.

CATTERSON, J.

Once more, we are called upon to resolve matters in this case where the plaintiff's attempts to enforce a billion dollar judgment, due under three promissory notes executed by the defendants between 2002 and 2006, have been repeatedly thwarted by the defendants. The defendants' strategy of delay has revolved around the procurement of various court orders in Indonesia to frustrate the plaintiff and the jurisdiction of the courts in New York.

Initially, the defendants contend that the judgment they seek to vacate, which was awarded to the plaintiff on three of its seven causes of action, should be vacated because the court did not sever the remaining causes of action. The defendants waived that issue when they failed to raise it on appeal from the $851 million judgment six years ago. 29 A.D.3d 394, 815 N.Y.S.2d 66 (1st Dept. 2006), lv. dismissed, 8 N.Y.3d 830, 828 N.Y.S.2d 291, 861 N.E.2d 107 (2007).

In that case, the record was clear that the defendants were not appealing on the ground that the motion court had somehow failed to sever the Trustee's remaining causes of action for indemnification, and the costs and expenses of collection, including attorneys' fees. Having failed to raise the issue on their appeal from the judgment or on their reargument motion

before this Court or on their motion for leave to appeal to the Court of Appeals, the defendants have waived any argument based on severance. See Goncalves v. Stuyvesant Dev. Assoc., 244 A.D.2d 267, 268, 664 N.Y.S.2d 764, 765 (1st Dept. 1997) ("Since third-party plaintiff's challenge to the validity of the summary judgment order ... could have been raised in its prior appeal of that order, which culminated in this Court's affirmance, the point is waived"); Katz v. City of New York, 231 A.D.2d 448, 448, 647 N.Y.S.2d 85, 85 (1st Dept. 1996) (refusing to consider issue on appeal where it "should have been raised on ... prior appeal of the ... order in this case, which culminated in this Court's affirmance").

Moreover, the defendants once more assert that this Court should resort to the doctrine of comity to forestall progress in the instant case. The defendants now assert that we should accord recognition to a provisional injunction of a court in Indonesia. Specifically, the provisional injunction of the Indonesian court orders the defendants to produce statements and information on their assets to an Indonesian company, Indah Lestari. The injunction prohibits disclosure to any other entity. Thus, the apparent purpose of the Indonesian injunction is to grant Indah Lestari the ability to examine the assets of the Indah Lestari defendants, which it can attach in order to

satisfy its Indonesian judgment. Yet, in three years, it is undisputed that Indah Lestari has not attached a single asset in satisfaction of its judgment.

In a prior appeal by the defendants in a related action, we noted the international legal gamesmanship perpetrated by the defendants, particularly with regard to the defendants' procurement of injunctions in Indonesia. In relevant part, we determined as follows:

> "Even if the defendants were found to be in violation of an Indonesian court order, they clearly are the engine of their own misfortune. After the IAS court granted summary judgment against them, they started a competing lawsuit in Indonesia. While a state (e.g., New York) may not require a person to do an act in another state (e.g., Indonesia) that is prohibited by the law of that state, orders of foreign courts are not entitled to comity if the litigants who procure them have 'deliberately courted legal impediments' to the enforcement of a federal court's orders. Motorola Credit Corp. v. Uzan, 388 F.3d 39, 60 (2d Cir. 2004), cert. denied, 544 U.S. 1044, 125 S.Ct. 2270, 161 L.Ed.2d 1080 (2005)(internal quotation marks and citations omitted).
>
> "The defendants claim that the IAS court decided that the above standard had not been met. However, that decision was rendered in another context: the IAS court was denying the plaintiffs' motion to enjoin the defendants from prosecuting the Indonesian lawsuit. Even if the IAS court found that the defendants were not acting in bad faith, the ruling is not binding on this Court. We find that the defendants clearly are engaging in

> conduct evincing bad faith; they challenged a standard and legitimate indenture that is governed by New York law and managed to procure an Indonesian court order declaring the indenture invalid on the ground that it violated Indonesian law."

Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V., 41 A.D.3d 25, 37, 836 N.Y.S.2d 4, 13 (1st Dept. 2007), lv. denied, 10 N.Y.3d 705, 857 N.Y.S.2d 38, 886 N.E.2d 803 (2008). The instant appeal presents the same issues regarding the doctrine of comity as were presented in the prior appeal.

Although not required to do so, the New York courts generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity, which is the equivalent of full faith and credit given by the courts to judgments of sister States. Absent some showing of fraud in the procurement of the foreign country judgment or that recognition of the judgment would do violence to some strong public policy of New York State, a party who properly appeared in the action is precluded from attacking the validity of the foreign country judgment in a collateral proceeding brought in a New York court. Greschler v. Greschler, 51 N.Y.2d 368, 376, 434 N.Y.S.2d 194, 198, 414 N.E.2d 694, 697-698 (1980).

Under New York law, judgment creditors are entitled to broad disclosure in aid of judgment enforcement. See ICD Group v.

Israel Foreign Trade Co. (USA), 224 A.D.2d 293, 638 N.Y.S.2d 430 (1st Dept. 1996). Thus, the plaintiff maintains that this Court should not accord comity to a foreign order that would frustrate this State's public policy favoring judgment enforcement.

It is patent that, pursuant to CPLR 5223, "'all matter relevant to the satisfaction of the judgment'" is discoverable and "the public policy is to put no obstacle in the path" of those seeking to enforce a judgment. Siemens & Halske GmbH. v. Gres, 77 Misc. 2d 745, 745, 354 N.Y.S.2d 762, 763 (Sup. Ct., NY County 1973), aff'd 43 A.D.2d 1021, 353 N.Y.S.2d 395 (1st Dept. 1974).

Moreover, "[t]here is no public policy favoring the repeated assertion of unsustainable arguments, a pattern of delaying tactics designed to inflict extensive costs on the adversary, dishonesty or disingenuousness with the court ... or contempt of court orders." 1050 Tenants Corp. v. Lapidus, 39 A.D.3d 379, 384, 835 N.Y.S.2d 68, 73 (1st Dept. 2007), lv. denied, 9 N.Y.3d 807, 843 N.Y.S.2d 536, 875 N.E.2d 29 (2007). In addition, as set out above, we have made clear that comity is not appropriate where litigants have "deliberately courted legal impediments." Gryphon, 41 A.D.3d at 37, 836 N.Y.S.2d at 13 (internal quotation marks omitted).

The record establishes that the defendants have, once again,

sought to engineer such "legal impediments" to disclosure and obedience to New York court orders. By their own admission, the first time the defendants petitioned the Indonesian court for "permission to provide information and statements regarding assets to creditors in the United States" was on October 8, 2008 -- almost four months after the Indonesian court entered the Indonesian injunction. The defendants failed to inform the Indonesian court of their longstanding obligations through years of litigation in the courts in New York, until after the Indonesian injunction was issued. This, in and of itself, precludes the extension of comity to the Indonesian injunction. See Bouas v. Sociedad Maritima San Nicholas, S.A., 252 F. Supp. 286, 287 (S.D.N.Y. 1965) ("Defendants (1) having failed to inform the Greek court of the action here, and (2) having failed to raise the matter of the so-called Greek settlement for almost four years during which they engaged in lengthy pre-trial proceedings with the plaintiff's attorneys, are not now in a position to raise a question of comity between two courts neither of which was informed as to what was happening in the other"), cert. denied, 382 U.S. 1025, 86 S.Ct. 646 (1966); Matter of Weil, 202 A.D.2d 838, 839, 609 N.Y.S.2d 375, 376 (3d Dept. 1994) (refusing to extend comity where, among other things, individual failed to inform Israeli court that action related to 1974 will

in a New York proceeding seeking probate of same will or of existence of 1986 will).

Finally, we note that by memorandum and order dated April 17, 2009, the District Court in Export-Import Bank of U.S. v. Asia Pulp & Paper Co., (2009 WL 1055673, 2009 U.S.Dist. LEXIS 33096 (S.D.N.Y. 2009)), chose not to grant comity to the provisional Indonesian injunction, relying on an expert opinion on Indonesian law that "the injunction itself [is] unusual because it appears contrary to the normal practice of simply attaching assets" and noting that "this sort of injunction is susceptible to abuse, as it could be agreed to by [d]efendants and a customer in order to frustrate other litigation." 2009 WL 1055673, *4, 2009 U.S.Dist. LEXIS 33096, *14.

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 15, 2011, which, inter alia, denied the defendants' motion to vacate a judgment and to quash the information subpoenas, subpoenas duces tecum and

subpoenas ad testificandum served upon them, or stay their enforcement, should be affirmed, with costs.

All concur.

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

ENTERED: OCTOBER 16, 2012

CLERK