Corrected Order - December 5, 2013

Mazzarelli, J.P., Acosta, Saxe, Freedman, Clark, JJ.

10528 Petition for a Compulsory Accounting and Related Relief in the Ruth Bronner and Zwi Levy Family Sprinkling Trust, etc. — File 2271/12, 2271A/12, 2271C/12

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Petition for a Compulsory Accounting and Related Relief in the Ruth Bronner Trust, etc., et al.

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Petition for a Compulsory Accounting and Related Relief in the RB and ZL Family Sprinkling Trust created on January 14, 1993 by Zwi O. Levy, etc., et al.

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In re Ruth T. Bronner,
Petitioner-Respondent,

-against-

Warren R. Gleicher,
Respondent-Appellant.

Olshan Frome Wolosky LLP, New York (Thomas J. Fleming of counsel), for appellant.

Law Office of Brendan P. Kearse, New York (Brendan P. Kearse of counsel), for respondent.

Order, Surrogate's Court, New York County (Kristen Booth Glen, S.), entered October 23, 2012, which denied appellant's motion to dismiss compulsory accounting petitions, unanimously affirmed, without costs.

The Surrogate properly found that respondent, the trustee of three trusts of which petitioner was a beneficiary, failed to

conclusively demonstrate the integrity and fairness of the transaction which transferred the trusts' assets, or to establish that he fully informed petitioner of the effect and ramifications of the releases and waivers of accounting that she apparently signed *(see Matter of Gordon v Bialystoker Ctr. & Bikur Cholim,* 45 NY2d 692, 698 [1978]). Respondent also failed to show the complete repudiation of his duties as a fiduciary after the trusts were allegedly terminated in March 2006. He retained trust assets and filed tax returns on behalf of the trusts after the execution of releases and waivers representing that the trusts had been terminated *(see Westchester Religious Inst. v Kamerman,* 262 AD2d 231 [1st Dept 1999]). Thus, the Surrogate properly found that respondent's argument that the statute of limitations expired since more than six years had passed since the waivers and releases were signed is unavailing *(id.)*.

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

ENTERED: DECEMBER 5, 2013

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Clark, JJ.

10577 BX Third Avenue Partners, LLC, Index 305864/10
Plaintiff-Appellant,

-against-

Fidelity National Title Insurance Company,
Defendant-Respondent,

American Star Abstract, LLC,
Defendant.

____

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant.

Loeb & Loeb LLP, New York (Jonathan F. Hollis of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered January 8, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment against defendant Fidelity National Title Insurance Company on plaintiff's breach of contract claim, and denied plaintiff's motion for summary judgment dismissing Fidelity's first and second counterclaims, unanimously modified, on the law, to grant plaintiff's motion to dismiss the counterclaims, declare that Fidelity cannot avoid liability under the policy by virtue of its insured's alleged misrepresentation, and otherwise affirmed, without costs.

The court properly denied plaintiff's motion for summary

judgment on the issue of Fidelity's liability under the subject title insurance policy. Plaintiff's only evidence of the value of the subject property, an unsworn appraisal, was insufficient to establish the value of the title (and, as a result, the extent of defendant's liability) within the meaning of the policy.

Nor did plaintiff establish, as a matter of law, that Fidelity is estopped from disclaiming title insurance coverage after providing a full defense for plaintiff in the underlying foreclosure action (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 36 [1st Dept 2006]). Issues of fact exist as to whether plaintiff's managing member made a material misrepresentation inducing Fidelity to issue the policy, and whether Fidelity discovered the alleged misrepresentation when it conducted a coverage investigation after the conclusion of the foreclosure action. In any event, plaintiff did not establish that it was prejudiced by Fidelity's allegedly belated disclaimer. Thus, whether Fidelity is estopped from disclaiming coverage must be left to the trier of fact (*see 206-208 Main St. Assoc., Inc. v Arch Ins. Co.*, 106 AD3d 403, 407-408 [1st Dept 2013]).

The motion court erred, however, in denying plaintiff's motion to dismiss Fidelity's counterclaims for a declaration and for the costs of defending the foreclosure action. Fidelity

failed to raise a triable issue of fact as to whether plaintiff's alleged misrepresentation was material within the meaning of Section 3105(b)(1) of the Insurance Law. Indeed, in response to the motion, Fidelity failed to submit any evidence whatsoever concerning its underwriting practices, as was necessary to defeat the motion (*see Campese v National Grange Mut. Ins. Co.*, 259 AD2d 957 [4th Dept 1999]). Fidelity having failed to demonstrate that it would not have issued the title policy to plaintiff had the affidavit not represented "[t]here are not tenants" on the premises, plaintiff was entitled to dismissal of the counterclaims and a declaration that Fidelity cannot avoid liability under the policy by virtue of its insured's alleged misrepresentation.

We note, further, that Fidelity undertook the defense of the foreclosure action without a reservation of rights. Fidelity is therefore precluded from recouping defense costs from its own

insured (*see Allstate Ins. Co. v Oles*, 838 FSupp 46, 55 [ED NY 1993]; *see generally* 1 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes, § 5.07 [16th ed 2013]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10742 In re Arc on 4th St. Inc., Index 570639/11
Petitioner-Respondent,

-against-

Tony Quesada,
Respondent-Appellant.

____

Tony Quesada, appellant pro se.

Borah Goldstein Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about July 27, 2012, which affirmed (1) an order of the Civil Court, New York County (Arthur F. Engoron, J.), entered June 8, 2011, which denied respondent's motion to vacate a default final judgment, entered May 12, 2011, awarding possession to petitioner, (2) an order (same court and Judge), entered September 16, 2011, which, inter alia, denied respondent's renewed motion to vacate the judgment, and (3) an order (same court and Judge), entered October 17, 2011, which granted petitioner's motion for an amended warrant of eviction, unanimously affirmed, without costs.

Civil Court properly asserted subject matter jurisdiction over the instant holdover proceeding commenced against respondent, a legal occupant of the subject premises who lived

with the now deceased tenant of record.

Civil Court did not improvidently exercise its discretion in denying respondent's request for an adjournment after he voluntarily discharged his attorney on the day of trial (*see e.g.* CPLR 321[c]; *Davalos v Davalos*, 283 App Div 699 [1st Dept 1954] [discussing section 240 of the Civil Practice Act, the predecessor of CPLR 321], *lv denied* 283 AD 783 [1954]). That respondent did not specifically invoke CPLR 321(c) is of no moment since he argued that an adjournment should have been granted so that he could obtain a new attorney.

Although respondent is correct that he did not default on May 2, 2011, the day of the trial, since he was present and tried to participate, the judgment of possession was not a "default" judgment and possession was properly awarded to petitioner. The deed conveying the subject building to petitioner requires petitioner to offer leases to "residential tenants of the Premises who are in legal occupancy of the Premises as of the date of this Deed." It does not require petitioner to offer leases to "legal occupants" such as respondent.

While the notices of termination state, "Your occupancy rights are terminated because neither [the tenant of record] *nor you executed the lease offered to you* by the landlord" (emphasis added), respondent cites no authority for the proposition that

petitioner could evict him only if it proved that he had refused to execute a lease that was offered to him. Moreover, the 30-day notices of termination track the language of Real Property Law § 232-a which does not require a landlord to state the precise grounds for eviction (*Park Summit Realty Corp. v Frank*, 107 Misc 2d 318, 321 [App Term 1st Dept 1980], *affd* 84 AD2d 700 [1st Dept 1981], *affd* 56 NY2d 1025 [1982]).

Contrary to respondent's claim, the issue of whether the premises are rent-regulated is not dehors the record since it was previously raised. Before the building was conveyed to petitioner, it was not rent-regulated (*see* 9 NYCRR 2200.2[f][6] and 2520.11[b]). The parties debate whether after the conveyance on October 6, 2005, the building contained fewer than six housing accommodations (*see* 9 NYCRR 2520.11[d]). However, the deed states that it will include four residential units and, as respondent stated in his verified answers, the subject apartment consisting of units 7E and 7W, is a single, contiguous unit. Since the contiguous units constitute a single housing accommodation, the building has fewer than six housing accommodations and is not subject to rent regulation. Accordingly, there is no right of succession to the tenancy and

respondent, a legal occupant who was not the lessee, was a month-to-month tenant whose tenancy was properly terminated.

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: DECEMBER 5, 2013

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Gische, JJ.

10950 The People of the State of New York, Ind. 70236C/10
Respondent,

-against-

Mashon Baines,
Defendant-Appellant.

____

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

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Michael Gross, J.), rendered October 28, 2011, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing her to conditional discharge for a period of one year, 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, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of a series of surveillance photographs. We find that

the photos do not contradict the victim’s testimony; instead, they tend to corroborate it to the extent they support an inference that defendant pushed the victim and knocked her to the floor.

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11241 The People of the State of New York, Respondent, Ind. 1762/09

-against-

Milton Canada,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; A. Kirke Bartley, Jr., J. at plea and sentencing), rendered March 10, 2010, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his suppression claims. As an alternative holding

(*see People v Callahan*, 80 NY2d 273, 285 [1992]), we reject defendant's claims on the merits.

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11242-
11243 In re Radames S., and Others,

Children Under Eighteen
Years of Age, etc.,

Maria I.,
Respondent-Appellant,

Milka F.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

____

The Bronx Defenders, Bronx (Mary Anne Mendenhall of counsel), and Freshfields Bruckhaus Deringer US LLP, New York (Erik J. Lindemann of counsel), for appellant.

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

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

____

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 17, 2012, which, upon a fact-finding determination that respondent mother abused her daughter and derivatively neglected the child's two siblings, released the children to respondent's care with 12 months of supervision by petitioner Administration for Children's Services, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise

dismissed as moot, without costs. Appeal from fact-finding order, same court and Judge, entered on or about April 20, 2012, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

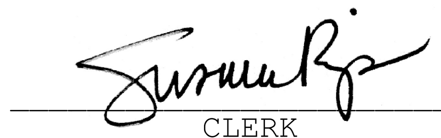
The determination that respondent abused her eight-month-old non-ambulatory daughter is supported by a preponderance of the evidence, including the undisputed fact that the child sustained three separate injuries – two skull fractures and a fracture of the humerus – that ordinarily would not have occurred absent acts or omissions of respondent and her mother, who were the child's only caretakers (*see* Family Court Act § 1046[a][ii], [b][I]; *Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]; *Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 72-73 [1st Dept 2012]).

Respondent failed to provide a reasonable explanation for the child's injuries (*see Matter of Philip M.*, 82 NY2d at 244). Her explanation that the child fell in her crib about a month earlier and hit the side of her head on a toy attached to the railing was not sufficient to explain the acute skull fracture or the humerus fracture, nor did it adequately explain the older skull fracture, which occurred on the back of the child's head (*compare Matter of Amir L. [Chantel B.]*, 104 AD3d 505, 506 [1st Dept 2013]).

Respondent's abuse of her daughter warrants the finding of derivative neglect as to the other two children, who both at times resided with her (*see Matter of Matthew O.*, 103 AD3d at 76).

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

ENTERED: DECEMBER 5, 2013



CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11245-
11246-
11247 Index 600212/10

Certain Underwriters at Lloyd's London
Subscribing to Policy Number SYN-1000263,
Plaintiff-Respondent,

-against-

Lacher & Lovell-Taylor, P.C., et al.,
Defendants-Appellants.

Eaton & Van Winkle, New York (Adam J. Rader of counsel), for appellants.

Harris Beach PLLC, New York (Antoinette Lyndon Banks of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 26, 2012, which granted plaintiff's motion for summary judgment declaring that it was not obligated to defend or indemnify defendants in the underlying estate proceeding, and on its cause of action for reimbursement of its defense costs, and order, same court and Justice, entered October 9, 2012, which, to the extent appealable, granted plaintiff's motion to modify the order to include summary judgment on its supplemental complaint, and order and judgment (one paper), same court and Justice, entered March 13, 2013, awarding plaintiff the total sum of $166,968.90 in defense costs from defendants, unanimously affirmed, with costs.

A claim for the return of legal fees is not a claim for "damages" in a legal malpractice action, as defined in the professional liability policy issued by plaintiff to defendants (*see Shapiro v OneBeacon Ins. Co.*, 34 AD3d 259, 260 [1st Dept 2006], *lv denied* 9 NY3d 803 [2007]). In support of each of the causes of action, the complaint alleges only that defendants overbilled their client in the underlying estate proceeding; it does not allege facts tending to show that but for their negligence, they could have achieved a better result for him (*see Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 162-163 [1992]; *Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423 [1st Dept 2007]). Moreover, plaintiff reserved its right to seek reimbursement of its defense costs in the event of a finding of no coverage (*see American Guar. & Liab. Ins. Co. v CNA Reins. Co.*, 16 AD3d 154 [1st Dept 2005]).

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

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11249 Guillermo Nova, Index 17018/07
Plaintiff-Respondent,

-against-

Robert Fontanez,
Defendant-Appellant.

____

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Dennis J. Monaco of counsel), for appellant.

____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about March 29, 2012, which, to the extent appealed from as limited by defendant's brief, denied defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to demonstrate that he suffered serious injury under the "significant limitation of use" and "permanent consequential limitation of use" categories, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant made a prima facie showing that plaintiff did not suffer a serious injury as a result of the subject motor vehicle accident. Defendant submitted, among other things, the affirmed report of his orthopedist who opined that plaintiff had no deficits in range of motion in any of the body parts claimed to have been injured in the subject accident, and the affirmed

report of a radiologist who opined that the MRI films of plaintiff's cervical spine, right knee and lumbar spine showed only chronic and degenerative conditions predating the accident (*see Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact as to causation. Plaintiff submitted an affirmed report from a physician who examined him once four years after the subject accident and acknowledged that plaintiff had preexisting arthritic conditions in each of the body parts claimed to have been injured. While the physician opined that his preexisting conditions were aggravated by the subject motor vehicle accident, he "failed to provide any basis for determining the extent of any exacerbation of plaintiff's prior injuries" (*Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]; *see also Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]). Moreover, the physician failed to explain the inconsistencies between plaintiff's treating

physician's findings of improved range of motion within four months of the accident and his present findings of deficits (*see Santos v Perez*, 107 AD3d 572 [1st Dept 2013]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11250 The People of the State of New York, Ind. 3350/11
Respondent,

-against-

James Chisholm,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Thomas A. Farber, J.), rendered on or about January 17, 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: DECEMBER 5, 2013

CLERK

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

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11251 In re Shahid Tanvir, Index 106868/10
Petitioner,

-against-

New York City Health and Hospitals
Corporation, etc., et al.,
Respondents.

____

Shahid Tanvir, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

____

Determination of respondent New York City Health and Hospitals Corporation (HHC), dated January 28, 2010, terminating petitioner's employment, 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 [Cynthia S. Kern, J.], entered September 17, 2010), dismissed, without costs.

Substantial evidence supports HHC's determination that petitioner engaged in misconduct consisting of insubordination by refusing orders to engage in training for a new position after being reassigned to the hospital's chemistry department, and subsequent absence without leave for more than 11 months (*see Ricketts v New York City Health and Hosps. Corp.*, 88 AD3d 593 [1st Dept 2011]). The evidence established that HHC's

requirement that petitioner participate in processing training was not in excess of its authority and the new assignment did not pose a risk to patient health and safety. Petitioner failed to show that any exceptions to the rule of “work now, grieve later” apply (*Matter of Ferreri v New York State Thruway Auth.*, 62 NY2d 855, 856-857 [1984]).

The penalty of termination is not so disproportionate to petitioner’s offense as to shock our sense of fairness (*see Matter of Pryce v New York City Hous. Auth.*, 69 AD3d 497 [1st Dept 2010]; *Matter of Strokes v City of Albany*, 101 AD2d 944, 945 [3d Dept 1984]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11254 The People of the State of New York, Ind. 4229/10
Respondent,

-against-

Darwin Nunez,
Defendant-Appellant.

____

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

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

____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about July 17, 2012, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether the court properly assessed defendant 15 points for infliction of physical injury, defendant still qualifies as a level two offender, and there is no basis for a discretionary downward departure to level one (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]). The underlying offense,

committed against a child, was serious, and the mitigating factors cited by defendant were generally taken into account by the risk assessment instrument.

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11255 The People of the State of New York, Ind. 4925/10
Respondent,

-against-

Yasmeen N. Ellison,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E. A. Crowley 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 (Rena K. Uviller, J.), rendered on or about December 7, 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: DECEMBER 5, 2013

____
CLERK

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

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11256- Index 602448/08
11257 SSM Consulting LLC, 602772/08
Plaintiff-Appellant,

-against-

CTI Teksource LLC, et al.,
Defendants-Respondents.
- - - - -
CTI Teksource LLC, et al.,
Plaintiffs-Respondents,

-against-

CTI Teksource I Inc., etc., et al.,
Defendants-Appellants.

____

Cardillo & Corbett, New York (Tulio R. Prieto of counsel), for appellants.

Ellenoff Grossman & Schole LLP, New York (Anthony Galano, III of counsel), for respondents.

____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 1, 2012, to the extent that it denied the motion for summary judgment of defendants CTI Teksource I Inc., Steven Tucker and SSM Consulting, unanimously affirmed, with costs.

The motion court properly found the exception to the non-compete clauses ambiguous (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]). Given the ambiguity, there are issues

of fact as to the specific conduct defendant Tucker was prohibited from engaging in and whether his conduct was impermissibly competitive or de minimis.

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11258- Ind. 1826/00
11259 The People of the State of New York,
Respondent,

-against-

William Allen,
Defendant-Appellant.

____

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

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

____

Judgment of resentence, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered November 20, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 57 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11262 Greater New York Mutual Insurance Company, as subrogee of Bauman 34th Street, LLC, et al., Plaintiffs-Appellants, Index 106354/08

-against-

Coach, Inc.,
Defendant,

Gateway Enterprises, Inc.,
Defendant-Respondent.

____

Gwertzman Lefkowitz Burman Smith & Marcus, New York (Roberta Burman of counsel), for appellants.

Quirk and Bakalor, P.C., New York (Robert E. Quirk of counsel), for respondent.

____

Order, Supreme Court, New York County (Paul Wooten, J.), entered July 17, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to amend the complaint to add a new defendant, and granted defendant Gateway Enterprises, Inc.'s cross motion for summary judgment, unanimously modified, on the law, to deny Gateway's cross motion, and otherwise affirmed, without costs.

Given the numerous statements and evidentiary items plaintiff received that indicated nonparty LJG performed work on the job in question, plaintiff's failure to make diligent inquiry into LJG's role precludes the application of the relation back

doctrine here (*Tucker v Lorieo*, 291 AD2d 261, 262 [1st Dept 2002]). Further, plaintiff failed to establish that defendant Gateway would be vicariously liable for any acts by LJG. Thus, notwithstanding some overlap of ownership and officers, there was no unity of interest between Gateway and LJG (*Mercer v 203 E. 72nd St. Corp.*, 300 AD2d 105, 106 [1st Dept 2002]). However, the statements by Gateway that it was the contractor on the job, coupled with other evidence of its role on the job and the fact that it may have supervised the work in question, precludes the grant of summary judgment in its favor.

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11263N Macedonia Church of the Nazarene, etc., Plaintiff-Appellant, Index 301516/07

-against-

Art Alexander, et al.,
Defendants-Respondents.

Lorna A. McGregor, Bronx, for appellant.

Aspinall & Cohen, Bronx (Michael H. Aspinall of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 5, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion for summary judgment to the extent of finding that defendant The Advisory Board of the Metro New York District Church of the Nazarene is entitled to legal title to the subject property, unanimously affirmed, without costs.

The motion court properly determined that defendant was authorized, pursuant to the terms of the church's governing manual, to transfer the subject property from plaintiff after its

withdrawal from the Church of the Nazarene (*see generally First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.*, 62 NY2d 110, 117-118 [1984], *cert denied* 469 US 1037 [1984]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11264N- Index 23012/06
11265N-
11266N Ramsen A., etc., et al.,
Plaintiffs-Respondents,

-against-

New York City Housing Authority,,
Defendant-Appellant.

____

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellant.

Law Offices of Michael Stewart Frankel, New York (Richard H. Bliss of counsel), for respondents.

____

Orders, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered April 12, 15, and 16, 2013, which granted plaintiffs' motion to substitute their medical expert after their prior expert died; denied defendant's motions to preclude plaintiffs' experts, including their newly substituted expert; and denied defendants' request for leave to conduct further independent medical examinations of the plaintiff child, unanimously modified, on the law and the facts, to grant defendants' request for leave to conduct further independent medical examinations, and otherwise affirmed, without costs.

This discovery dispute arises from an action for personal injuries allegedly resulting from the ingestion of lead paint by minor plaintiff while he lived in a building that was owned and

operated by defendant New York City Housing Authority (NYCHA).

CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time (*see LaMasa v Bachman*, 56 AD3d 340 [1st Dept 2008]). "[E]ven where one party requests trial expert disclosure during discovery pursuant to CPLR 3101(d)(1)(i), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert's trial testimony" (*see Rivers v Birnbaum*, 102 AD3d 26, 36-37 [2d Dept 2012]).

Although plaintiffs served their expert disclosure regarding Dr. Rosen after the filing of the note of issue, the court did not improvidently exercise its discretion by denying NYCHA's motion to exclude either Dr. Rosen or Dr. Bithoney from testifying as plaintiffs' expert, because defense counsel had the disclosure regarding Dr. Rosen approximately two months prior to the trial, which was then scheduled for January 9, 2013, which is not the eve of trial (*see Sanchez v City of New York*, 97 AD3d 501, 505 [1st Dept 2012]; *Peguero v 601 Realty Corp.*, 58 AD3d 556, 564 [1st Dept 2009]). In addition, NYCHA has not claimed that Dr. Bithoney's proposed testimony will not be materially similar to Dr. Rosen's, and there is no evidence that plaintiffs' request to substitute Dr. Bithoney as their expert after Dr.

Rosen’s death was either willful delay or prejudicial to the defense (*see Mateo v 83 Post Ave. Assoc.*, 12 AD3d 205, 205-206 [1st Dept 2004]). Moreover, even assuming that plaintiff was required to show “good cause” (CPLR 3101[d][1][i]), its proffered reason for the substitution of experts, namely, Dr. Rosen’s death, established such good cause (*see Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 73 AD3d 629, 630 [1st Dept 2010]).

The court should have determined that NYCHA was entitled to additional independent medical examinations(IMEs) of the infant plaintiff. Plaintiffs proposed to offer expert evidence based on additional medical examinations of the infant plaintiff, conducted years after the commencement of the action, for the purpose of establishing the nature of the child’s disabilities at a time closer to trial. If plaintiffs are to be permitted to present this evidence, fairness demands that defendant be permitted to have additional IMEs performed at this later stage of the infant plaintiff’s development and not be relegated to reliance on IMEs conducted years before. Logically, plaintiffs

cannot propose to present expert evidence based on the later examinations and, at the same time, assert that the expert evidence based on the later examinations will not materially change the nature of the injuries for which recovery is sought.

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11267 The People of the State of New York, Ind. 2617/11
Respondent,

-against-

Richard Gonzalez,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression hearing; Patricia M. Nunez, J. at jury trial and sentencing), rendered May 24, 2012, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The officer had probable cause to arrest defendant for disorderly conduct. At the very least, defendant recklessly created a risk of "public inconvenience, annoyance, or alarm" (Penal Law § 240.20) in a crowded subway station by loudly and angrily cursing police officers, violently waving his arms, screaming at passersby to complain of the police officers' conduct, and forcing subway riders to get out of his way. This escalated

defendant’s initially individual interaction with the police officer so as to create a “potential or immediate public problem” (*People v Weaver*, 16 NY3d 123, 128 [2011]; *compare People v Baker*, 20 NY3d 354, 359 [2013]). We note that the evidence adduced at the hearing was only required to demonstrate probable cause to believe defendant had committed disorderly conduct, as opposed to a legally sufficient case or proof beyond a reasonable doubt. The record also supports the court’s alternative grounds for denying suppression.

The court properly instructed the jury that the knowledge element would be satisfied by proof establishing defendant’s knowledge that he possessed a knife in general, and did not require proof of defendant’s knowledge that the knife met the statutory definition of a gravity knife (*see e.g. People v Neal*, 79 AD3d 523, 524 [1st Dept 2010], *lv denied* 16 NY3d 799 [2011]; *People v Berrier*, 223 AD2d 456 [1st Dept 1996], *lv denied* 88 NY2d 876 [1996]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11268 American Transit Insurance Company, Index 151346/12
Plaintiff-Appellant,

-against-

Pablo Leon, et al.,
Defendants,

Stand-Up MRI of Bensonhurst, P.C.,
Defendant-Appellant.

____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 26, 2013, which denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff insurance company has no obligation to pay defendant Stand-Up MRI's claims.

Plaintiff demonstrated its entitlement to judgment as a matter of law by submitting competent evidence that it mailed the notices scheduling the injured defendant's independent medical examinations (IMEs) and that he failed to appear for the examinations (*see American Transit Ins. Co. v. Lucas*, __ AD3d __, 2013 NY Slip Op 07273 [1st Dept 2013]; *American Tr. Ins. Co. v Solorzano*, 108 AD3d 449, 449 [1st Dept 2013]). Defendant provider's contention that plaintiff failed to prove the mailing

of IME notices to the assignor’s attorney, absent competent proof in the record establishing that the assignor was represented by counsel with regard to the subject no-fault claim, is unavailing (*see Center for Orthopedic Surgery, LLP v New York Cent. Mut. Fire Ins.*, 31 Misc 3d 128[A], 2011 N.Y. Slip Op. 50473[U] [App Term 1st Dept 2011]).

Attendance at a medical examination is a condition of coverage. Accordingly, there is no requirement that the claim denial be timely made (*see American Transit Ins. Co. v. Lucas*, __ AD3d __, 2013 NY Slip Op 07273*; Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2012]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11269 Lorenzo Williams, Index 18620/05
Plaintiff-Appellant,

-against-

Sayed B. Kadri, etc., et al.,
Defendants-Respondents.

____

Law Office of Peter Wessel, PLLC, New York (Gergely Klima of counsel), for appellant.

Brand, Glick & Brand, P.C., Garden City (Andrew B. Federman of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered May 13, 2013, which denied plaintiff's motion for partial summary judgment on liability, unanimously reversed, on the law, without costs, and the motion granted.

The record shows that the limousine operated by plaintiff was struck in the rear by defendants' taxi, while stopped at a red traffic light on East 75th Street and First Avenue. Defendant driver testified that he drove "very slowly" because of snowy conditions and ice on the roadway, but when he tried to stop, the taxi slid on ice and struck plaintiff's vehicle. Defendant driver could not estimate the distance between his taxi and plaintiff's limousine when he applied the brakes, or his speed.

It is well settled that a rear-end collision with a stopped

or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]). Defendants' explanation that the taxi slipped on ice was inadequate because a driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions *(see LaMasa v Bachman*, 56 AD3d 340 [1st Dept 2008]).

Defendants provide alternative explanations for the accident, including that plaintiff's vehicle stopped short, and that the snow created an emergency condition. We decline to consider these arguments, which were improperly raised for the first time on appeal and are unsupported by nonhearsay evidence in the record. In any event, these defenses are insufficient to rebut the presumption of defendants' negligence. Even if plaintiff's vehicle had stopped short in front of defendants' taxi, defendant driver failed to provide evidence that he maintained a safe distance between his cab and plaintiff's

vehicle. Additionally, the emergency doctrine is inapplicable because defendant driver was aware of the icy road conditions and should have accounted for them properly (*see Renteria v Simakov,* 109 AD3d 749 [1st Dept 2013]; *Corrigan v Porter Cab Corp,* 101 AD3d 471 [1st Dept 2012]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11270-
11271 In re Davina A.,

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

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

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

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 29, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the fourth degree, menacing in the second degree, attempted assault in the third degree, and that she also committed the act of unlawful possession of a weapon by a person under 16, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court’s finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court’s credibility

determinations. The victim’s testimony established each of the charged offenses.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing her on probation rather than adjudicating her a person in need of supervision. This was the least restrictive dispositional alternative consistent with appellant’s needs and the community’s need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in view of appellant’s violent conduct in the underlying incident, which included threatening her mother with a knife, as well as appellant’s history of violence and other misconduct (*see e.g. Matter of Jade Q.*, 41 AD3d 327 [1st Dept 2007]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11272 Production Resource Group L.L.C., Index 602442/09
Plaintiff-Appellant,

-against-

William Zanker,
Defendant-Respondent,

The Learning Annex, et al.,
Defendants.

____

The Marantz Law Firm, Rye (Neil G. Marantz of counsel), for appellant.

Cohen & Coleman, LLP, New York (John A. Coleman, Jr. of counsel), for respondent.

____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 14, 2012, which, to the extent appealed from, upon reargument, adhered to the original determination granting defendant William Zanker's motion for summary judgment dismissing the complaint as against him, and vacated the original determination granting plaintiff's motion for summary judgment against defendant LA Expo, LLC, unanimously modified, on the law, to reinstate the grant of summary judgment against LA Expo, LLC, and otherwise affirmed, without costs.

For approximately one and a half years, starting in the fall of 2006, plaintiff or its predecessor sent proposals to "Learning Annex"; nonparty Mark Cummings verbally approved the proposals;

plaintiff or its predecessor performed the work and sent invoices to "Learning Annex"; Cummings approved the invoices; and plaintiff or its predecessor was paid, often in the form of checks from LA Expo, LLC. In the instant action, plaintiff seeks to recover on its last few invoices, which were not paid. "Learning Annex" is not a legal entity; it is merely a trade name.

LA Expo, LLC, which was dissolved well after plaintiff finished providing the services for which it seeks payment, was owned by nonparty Learning Annex, LLC. In April 2009, Learning Annex, LLC changed its name to Benson Acquisition, LLC. In a portion of the order that has not been appealed from, the court granted summary judgment to plaintiff against Benson. Zanker is Benson's president and was the president of Learning Annex, LLC, and LA Expo, LLC.

Claiming that "Learning Annex" was a well known trade name used by Zanker, plaintiff seeks to recover against Zanker personally. It may not do so. An individual who acts on behalf of a nonexistent corporation can be held personally liable (*see e.g. Bay Ridge Lbr. Co. v Groenendaal*, 175 AD2d 94, 96 [2d Dept 1991]; *Tarolli Lbr. Co. v Andreassi*, 59 AD2d 1011, 1012 [4th Dept 1977]). However, Zanker did not interact with plaintiff; Cummings did.

Plaintiff contends that Cummings was Zanker's agent. However, Cummings's claim that he was Zanker's authorized representative cannot be used to prove the fact of agency (*see Moore v Leaseway Transp. Corp.*, 65 AD2d 697, 698 [1st Dept 1978], *affd* 49 NY2d 720 [1980]; *see also Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 18 AD3d 286, 287 [1st Dept 2005]).

Nor did Cummings have apparent authority (*see Ford v Unity Hosp.*, 32 NY2d 464, 473 [1973]; *Greene v Hellman*, 51 NY2d 197, 204 [1980]; *1230 Park Assoc., LLC v Northern Source, LLC*, 48 AD3d 355 [1st Dept 2008]). There was no conduct by Zanker toward plaintiff that clothed Cummings with apparent authority; indeed, plaintiff did not interact at all with Zanker.

In the motion court, defendants took the position that only LA Expo, LLC should be liable to plaintiff. Furthermore, they have not opposed the portion of plaintiff's appeal that seeks to reinstate summary judgment against LA Expo, LLC.

On appeal, plaintiff seeks summary judgment against "Learning Annex." However, in its motion for reargument, plaintiff did not seek to reargue the portion of the prior order

that denied summary judgment against "Learning Annex." On the contrary, it took the position that no independent judgment need be entered against "Learning Annex" because it was merely a trade name.

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, JJ.

11273 Gina DeFrancesco, Index 113453/09
Plaintiff-Appellant,

-against-

Metro-North Railroad, et al.,
Defendants-Respondents.

____

Steven L. Barkan, PC, Lake Success (Steven L. Barkan of counsel), for appellant.

Seth J. Cummins, New York (Joshua R. Fay of counsel), for respondents.

____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 20, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims under the New York State Human Rights Law (State HRL) and New York City Human Rights Law (City HRL) for discrimination and retaliation, unanimously affirmed, without costs.

Plaintiff's claims for retaliation under the State and City HRLs were properly dismissed since plaintiff failed to demonstrate that she was engaging in a protected activity or that there was a causal connection between the activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-13 [2004]). Defendant Metro-North Railroad demonstrated that plaintiff was terminated for the nonretaliatory reason that she

refused to use an electronic ticket issuing machine (TIM), which was mandatory for her position as a conductor. Plaintiff has failed to come forward with any evidence from which a "jury could find defendant liable under any of the evidentiary routes" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

The motion court also correctly found that, although plaintiff did not establish a recognized disability under either the State or City HRL, Metro-North engaged in a good faith interactive process and offered plaintiff a choice of positions that did not require use of the TIM, which she rejected (*see Phillips v City of New York*, 66 AD3d 170, 175 [1st Dept 2009]). Metro-North was not obligated to exempt plaintiff from the system-wide mandatory use of the TIM *(see Pimentel v Citibank, N.A.*, 29 AD3d 141, 145-146 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11274-
11275 "Jane Doe," etc.,
Plaintiff-Appellant, Index 108647/07

-against-

Brian A. Goldweber, M.D., et al.,
Defendants,

Somerset Surgical Associates,
P.C., et al.,
Defendants-Respondents.

____

Morrison & Wagner, LLP, New York (Eric H. Morrison of counsel), for appellant.

Ellenberg & Partners, LLP, New York (Charles Lim of counsel), for Somerset Surgical Associates, P.C., Frank Cohen, M.D., Norman Sohn, M.D., Michael A. Weinstein, M.D., respondents.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao and John L.A. Lyddane of counsel), for Abbe J. Carni, M.D. and Abbe J. Carne, M.D., P.C., respondents.

____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about December 15, 2011, which, to the extent appealed from as limited by the briefs, granted defendants Somerset Surgical Associates, P.C. and Frank Cohen, M.D.'s motion to dismiss plaintiff's negligent hiring claim as against them, unanimously affirmed, without costs. Order, same court and Justice, entered June 5, 2012, which granted defendants Abbe J. Carni, M.D. and Abbe J. Carni, M.D., P.C.'s motion to reargue the portion of the December 15, 2011 order denying their motion for

summary judgment dismissing the negligent hiring claim as asserted against them and, upon reargument, dismissed such claim, unanimously modified, on the law, to deny dismissal, and otherwise affirmed, without costs.

Plaintiff alleges that she contracted the hepatitis C virus as a result of the medical malpractice of Dr. Brian Goldweber, an anesthesiologist, arising from his reuse of a syringe from a source patient in a vial of propofol, in breach of sterile protocols, and then administering plaintiff propofol from the same contaminated vial. At the time, plaintiff was undergoing a colonoscopy performed by Dr. Frank Cohen at the ambulatory surgery offices of Somerset Surgical Associates, P.C. Dr. Goldweber's services were provided by Abbe J. Carni, M.D., P.C., an anesthesiology placement company owned by Dr. Abbe Carni.

In the absence of any indication that Somerset and Dr. Cohen were on notice of Dr. Goldweber's propensity to commit the conduct alleged, the court properly dismissed the negligent hiring claim asserted as against them (*see White v Hampton Mgt. Co., L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]; *see also Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878, 881 [2d Dept 2006]). However, triable issues of fact exist as to whether Abbe J. Carni, M.D., P.C. may be liable for negligently hiring Dr. Goldweber. Dr. Carni, acting for Abbe J. Carni, M.D., P.C.,

failed to investigate a seven-month gap in Dr. Goldweber's employment, which would have revealed his disciplinary history, including a three-year suspension from the practice of medicine, stayed by consent, arising from his negligent administration of anesthesia (*see Corbally v Sikras Realty Co.*, 161 AD2d 107 [1st Dept 1990]). Indeed, Dr. Carni admitted that a gap in employment of a few months would have raised a red flag as to potential disciplinary problems, and should have been investigated. An employer may be liable for negligent hiring when it knew or should have known of the employee's propensity to commit injury even if the injury committed was not identical to the prior injury (*see e.g. T.W. v City of New York*, 286 AD2d 243, 245-246 [1st Dept 2001]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11276 The People of the State of New York, Ind. 1273/11
Respondent,

-against-

Charles Lewis,
Defendant-Appellant.

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

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

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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 20, 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: DECEMBER 5, 2013

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CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11277 The People of the State of New York, Ind. 952/08
Respondent,

-against-

Austin Moses,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Herbert Adlerberg, J.H.O. and Gregory Carro, J. at suppression proceedings; Bruce Allen, J. at jury trial and sentencing), rendered August 13, 2009, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to concurrent terms of five years, unanimously affirmed.

The court properly denied defendant's motion to suppress two written statements. There is no basis for disturbing the court's credibility determinations. The People elicited sufficient evidence to satisfy their burden of establishing the voluntariness of these statements, notwithstanding some lack of recollection on the part of police witnesses (*see generally People v Witherspoon*, 66 NY2d 973 [1985]). Between the two

written statements, defendant made an oral statement that the court suppressed. Defendant asserts that the second written statement was the product of the suppressed statement. However, the court suppressed the statement solely on the ground of the officer's inability to recall the details and circumstances of that statement, and it made no express finding that the statement was unlawfully obtained. It is thus unclear whether the court was suppressing the oral statement as involuntary, or on other grounds not necessarily within the proper scope of a suppression hearing, which is not concerned with the trial issue of whether a statement was actually made (*see People v Garcia*, 197 AD2d 380 [1st Dept 1993], *lv denied* 82 NY2d 849 [1993]). In any event, regardless of the reason for suppression of the oral statement, there is nothing to indicate that defendant gave the second written statement as a result of the oral statement (*see People v Tanner*, 30 NY2d 102, 105-106 [1972]; *People v Rifkin*, 289 AD2d 262, 263 [2d Dept 2001], *lv denied* 97 NY2d 759 [2002]). Finally, defendant did not preserve his claim that the police used coercive tactics to obtain either or both of his written statements, and we decline to review it in the interest of justice. As an alternative holding, we find that it is not supported by the record.

By failing to make timely and specific objections, defendant

failed to preserve his challenges to the prosecutor’s summation (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D’Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

The court’s instruction on temporary and innocent possession, which tracked the language of the Criminal Jury Instructions, correctly stated the law.

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11278 In re Berish Welz, etc., Index 116891/09
Petitioner-Appellant,

-against-

Congregation Anshe Meseritz,
also known as Congregation Esath
Lei Israel Anshei Meseritz Synagogue,
Respondent-Respondent.

____

Samuel Katz, New York, for appellant.

Siegel & Reiner, LLP, New York (Charles E. Knapp of counsel), for respondent.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 7, 2012, which, after a hearing, dismissed the petition brought pursuant to Not-For-Profit Corporation Law § 621 seeking to inspect and copy the books and records of respondent Congregation Anshe Meseritz a/k/a Congregation Esath Lei Israel Anshei Meseritz Synagogue, unanimously affirmed, without costs.

The court properly determined that petitioner failed to demonstrate that he was a member of respondent's congregation (*see* Religious Corporation Law § 195). The record shows that the in the one-year period between July 2008 and July 2009, petitioner's attendance at services was sporadic and his financial contributions to respondent were not sufficient to

support a finding of membership. Contrary to petitioner's contention, analysis of the one-year period to determine membership was agreed upon by the parties.

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

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11279 Rebecca S. Serdans, Index 100675/12
Plaintiff-Respondent,

-against-

The New York and Presbyterian Hospital,
Defendant-Appellant.

____

Epstein Becker & Green, P.C., New York (Kenneth J. Kelly of counsel), for appellant.

Arce Law Group, P.C., New York (Bryan S. Arce and W. Gordon Kaupp of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 7, 2013, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint's first, second, fourth, and fifth causes of action, unanimously modified, on the law, to dismiss the complaint's second and fifth causes of action for retaliation under the State and City Human Rights Laws and to dismiss so much of the first and fourth causes of action as asserts claims for disability discrimination premised on theories other than defendant's failure to reasonably accommodate plaintiff's disability, and otherwise affirmed, without costs.

Plaintiff is a registered nurse and nurse practitioner specializing in critical care. She suffers from a neurological disorder for which she was treated with deep brain stimulus (DBS)

through electrodes permanently implanted in her brain. Plaintiff’s DBS system is sensitive to electromagnetic radiation such as that emitted by magnetic resonance imaging systems.

The record indicates that, on November 2, 2007, the parties reached an agreement to accommodate plaintiff’s disabling condition by having her assigned to work exclusively in the hospital’s cardio-thoracic intensive care unit (CTICU).

In light of, among other evidence, plaintiff’s testimony that, during the months after she was mistakenly assigned to work in defendant’s medical intensive care unit (MICU), defendant frequently cancelled her work assignments and ultimately ceased offering her work altogether, for purposes of plaintiff’s claim of disability-based discrimination under the New York State and City Human Rights Laws (HRL), issues of fact exist as to whether plaintiff suffered an adverse employment action under the State HRL (*see Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]) or was treated differently under the City HRL (*see Askin v Department of Educ. of the City of New York*, __ AD3d __, 2013 NY Slip Op 06991, **1 [1st Dept Oct. 29, 2013]).

Plaintiff’s claims of disability-based employment discrimination must nonetheless be dismissed, however, as she has failed to point to evidence raising an inference of

discriminatory animus (*see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]; *Askin*, 2013 NY Slip Op 6991 at **1). Remarks by hospital staff testified to by plaintiff, to the effect that she had "brought [her situation] upon [herself]" and should "take [her] assets elsewhere" were not of themselves derogatory or indicative of discriminatory animus. At most, plaintiff has shown only "[s]tray remarks" which, "even if made by a decision maker, do not, without more, constitute evidence of discrimination" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 125 [1st Dept 2012]). Plaintiff's testimony that unidentified persons laughed at her "behind [her] back" likewise does not raise an issue of fact as to discriminatory animus (*see Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d 81, 91 [2d Cir 1996]).

Plaintiff's complaint about defendant's alleged failure to implement the parties' agreement to accommodate her disability (as distinct from her initial request for an accommodation) does constitute a protected activity for purposes of her State and City HRL claims of retaliation (*see Brook v Overseas Media, Inc.*, 69 AD3d 444, 445 [1st Dept 2010]; *cf. Witchard v Montefiore Med. Ctr.*, 103 AD3d 596, 596 [1st Dept], *lv denied* __ NY3d __, 2013 NY Slip Op 88924 [Oct. 22, 2013]). As evidence of a causal nexus between her complaint and the alleged adverse action under the

State HRL (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]) or disadvantageous action under the City HRL (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]), however, plaintiff points to the same constellation of evidence which she relies upon in support of her claim of disability discrimination. These factors do not constitute evidence of retaliatory animus for the same reasons.

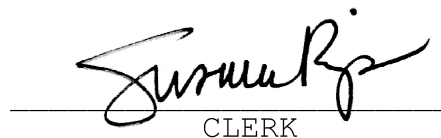
Plaintiff essentially concedes that defendant engaged in the requisite good faith interactive process in arriving at an agreement to accommodate her disability by assigning her exclusively to work in the CTICU (*see Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]). Issues of fact exist, however, as to whether defendant failed to implement the agreement, by, among other things, as testified to by plaintiff, frequently cancelling her work assignments and ultimately ceasing to assign her work altogether.

Finally, the exclusivity provisions of the Workers' Compensation Law do not preclude plaintiff's claim for personal injuries she allegedly sustained as a result of defendant's violations of the State and City HRL, including by exposure to

electromagnetic interference in the MICU on November 10, 2007 (*see Matter of Grand Union Co. v Mercado*, 263 AD2d 923, 925 [3d Dept 1999]; *Belanoff v Grayson*, 98 AD2d 353, 357-358 [1st Dept 1984]).

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

ENTERED: DECEMBER 5, 2013



CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11280 Tiffany Rickert, Index 307917/09
Plaintiff-Respondent,

-against-

Pedro L. Diaz, et al.,
Defendants,

Confesor Reyes,
Defendant-Appellant.

____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for appellant.

Law Office of Arnold Treco, Jr., Bronx (Arnold Treco, Jr. of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about October 1, 2012, which denied defendant Confesor Reyes's motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff Tiffany Rickert was sitting in the back seat of a livery cab driven by defendant Confesor Reyes when another vehicle struck the right passenger side of the cab in the right rear door area, where plaintiff was sitting. She commenced this action under Insurance Law § 5102(d), alleging that she sustained

“permanent and lasting” injuries to her left knee, right shoulder, cervical spine, and lumbar spine as a result of the accident.

Defendant established prima facie absence of “permanent consequential” serious injury by submitting the affirmed report of his expert radiologist and orthopedist. The affirmed MRI reports of defendant’s radiologist explaining in detail that the symptoms observed in the MRI films of the cervical spine, right shoulder, and left knee were preexisting degenerative changes established prima facie absence of causation as to those parts of the body (*Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512 [1st Dept 2013]; *Coley v DeLarosa*, 105 AD3d 527, 527-528 [1st Dept 2013]). In addition, defendant’s expert orthopedist found, based upon an examination conducted over four years postaccident, that plaintiff had full range of motion and negative clinical test results in all the claimed injured parts of the body (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]; *Valdez v Benjamin*, 101 AD3d 622 [1st Dept 2012]). Moreover, with respect to the lumbar spine, the orthopedist found that the MRI film showed multilevel disc degeneration, and opined that plaintiff suffered, at most, a “temporary soft tissue injury superimposed on underlying degenerative processes” (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). The orthopedist’s opinion was

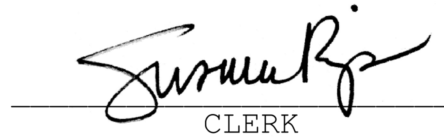
consistent with an x-ray taken at the hospital which revealed degenerative disc disease, and plaintiff’s testimony that she sought treatment only for her knee and shoulder complaints after her initial postaccident treatment. Thus, defendant presented sufficient evidence to establish prima facie that plaintiff suffered no permanent consequential or significant limitation of use injury caused by the accident (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]).

Plaintiff failed to raise a triable issue of fact, as none of her experts’ reports were affirmed under CPLR 2106. To the extent some were submitted as certified business records, those reports contain medical opinions and diagnosis and cannot be admitted as business records under CPLR 4518 (*Matter of Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2nd Dept 2006]; *Komar v Showers*, 227 AD2d 135 [1st Dept 1996]). In any event, even if the reports were properly affirmed, her doctors failed to explain why degeneration could not be ruled out as the cause of plaintiff’s injuries, or even to offer any clear opinion as to causation (*see Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011]). Further, the limitations in the shoulder set forth in the report of plaintiff’s most recent examination are minor and insufficient to raise a triable issue of fact as to a permanent consequential

limitation (*see Dufel v Green*, 84 NY2d 795, 798 [1995]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]). The examining physician also did not compare her findings in the knee to normal, and did not examine the cervical spine or lumbar spine at all.

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

ENTERED: DECEMBER 5, 2013



CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11281 The People of the State of New York, Ind. 3464/10
Respondent,

-against-

Michael Shaia,
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 (Richard Nahas of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about April 13, 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: DECEMBER 5, 2013

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11282 Betty Rainey,
Plaintiff-appellant,

Index 117056/09
591155/10

-against-

Frawley Plaza, LLC, et al.,
Defendants-Respondents.

- - - - -

Frawley Plaza, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Iveragh Construction Corp.,
Third-Party Defendant-Respondent.

____

Mitchell Dranow, Sea Cliff, for appellant.

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for Frawley Plaza, LLC., Putnam Holding Corp. and UA Development Corp., respondents.

Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for Iveragh Construction Corp., respondent.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 11, 2013, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

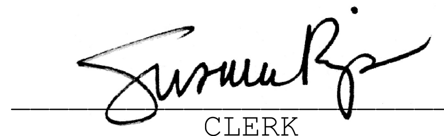
Dismissal of the complaint was appropriate in this action where plaintiff was injured when she allegedly slipped and fell on dust while descending stairs in the lobby of the building in which she lived. Defendants Frawley Plaza, LLC, Putnam Holding

Corp., and UA Development Corp. were the owners and property managers of the building, and Iveragh Construction Corp. was performing renovations in the building. Defendants submitted evidence that they lacked notice of the allegedly defective condition by showing that the twice-daily cleaning schedule of the lobby was followed on the day of and the day before plaintiff's fall (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]).

Plaintiff's opposition failed to raise a triable issue of fact as to notice. In the same vein, plaintiff's claim that Iveragh caused and created the dust condition was speculative (*see Morales v Foodways, Inc.*, 186 AD2d 407 [1st Dept 1992]).

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

ENTERED: DECEMBER 5, 2013



CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11284 The People of the State of New York, Ind. 989/12
Appellant,

-against-

Gregory Martin,
Defendant-Respondent.

____

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

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and White & Case LLP, New York (Kimberly A. Haviv of counsel), for respondent.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about September 21, 2012, which granted defendant's motion to suppress physical evidence and statements, unanimously affirmed.

There is no basis for disturbing the credibility determinations upon which the court granted suppression. "[T]he determination of the hearing court, which actually saw and heard the witnesses testify, is entitled to deference, and it is not

our practice to substitute our own fact findings for those under review unless the latter are plainly unjustified or clearly erroneous” (*People v Greene*, 84 AD3d 540, 541 [1st Dept 2011][internal quotation marks omitted]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11286 The People of the State of New York, Ind. 3655/10
Respondent,

-against-

Mark Acevedo,
Defendant-Appellant.

____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 19, 2011, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the murder conviction to a term of 20 years to life, and otherwise affirmed.

The court properly declined to submit manslaughter in the first degree as a lesser included offense. There was no reasonable view of the evidence, viewed most favorably to defendant, that he merely intended to inflict serious physical injury but not to cause death. Defendant, after grazing one victim in the side with a bullet, pointed a gun at another

victim, and from between 4 and 10 feet away, shot him three times, including in the chest and back, as he turned to flee (*see e.g. People v Ramsey*, 59 AD3d 1046, 1047 [4th Dept 2009], *lv denied* 12 NY3d 858 [2009]).

Defendant was not entitled to be present during legal argument on the admissibility of expert testimony on gangs, as well as related legal issues. References to the prosecution's factual allegations did not transform the legal issue into a factual or mixed issue, there was no fact-finding procedure, and there was nothing valuable that defendant could have contributed by his personal presence (*see People v Rojas*, 15 AD3d 211 [1st Dept 2005], *lv denied* 4 NY3d 856 [2005]). In any event, the court excluded almost all of the evidence the People offered at this colloquy.

Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner. The report was not testimonial (*see People v Freycinet*, 11 NY3d 38 [2008]; *People v Hall*, 84 AD3d 79 [1st Dept 2011], *lv denied* 18 NY3d 924 [2012]), and neither *Bullcoming v New Mexico* (564 US __, 131 S Ct 2705 [2011]) nor any other decision of the Supreme Court of the United States is to the

contrary (*see United States v James*, 712 F 3d 79, 87-88 [2d Cir 2013]). To the extent defendant argues that the report should have been redacted to exclude the portion reflecting the author's opinions as to the cause and manner of death, that claim is unpreserved, as defendant never asked the court for such a redaction (*see Hall*, 84 AD3d at 85), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal, because those opinions were not contested at trial.

Defendant's remaining evidentiary arguments and assertions of prosecutorial misconduct are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find them to be without merit, except that some portions of the prosecutor's summation were improper but harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's ineffective assistance of counsel claims regarding counsel's failure to preserve these issues are unreviewable on direct appeal because they involve matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record 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]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]).

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 5, 2013

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11288N Klaus Thymann, Index 650465/10
Plaintiff-Respondent,

-against-

AFG Management,
Defendant-Appellant.

____

Gallet Dreyer & Berkey LLP, New York (Morrell I. Berkowitz of counsel), for appellant.

Sam P. Israel, P.C., New York (Sam P. Israel of counsel), for respondent.

____

Appeal from order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 18, 2012, which, insofar as appealed from, granted plaintiff's application to resettle the court's order dated August 29, 2012 to reinstate his conversion claim against additional parties, Pier 59 Studios, LP and Frederico Pignatelli, unanimously dismissed, without costs.

Defendant is not "[a]n aggrieved party" within the meaning of CPLR 5511 by the order it now challenges. Defendant does not stand to be affected by the court's permission to grant plaintiff leave to add a conversion claim against Pignatelli and Pier 59, which had separate definable interests. If the order were reversed, defendant, as an entity, would not have its right to a full judgment in its favor directly affected (*see Boyle v City of*

New York, 237 AD2d 230 [1st Dept 1997]; *see also Midland Ins. Co. v Lewis*, 178 AD2d 146, 147 [1st Dept 1991]). "That the adjudication may remotely or contingently affect interests which the party represents does not give it a right to appeal" (*State of New York v Phillip Morris Inc.*, 61 AD3d 575, 578 [1st Dept 2009], *appeal dismissed* 15 NY3d 898 [2010] [internal quotation marks omitted]).

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

ENTERED: DECEMBER 5, 2013

CLERK

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10829-
10829A-
10829B Venecia V., Index 305594/04
Plaintiff-Respondent,

-against-

August V.,
Defendant-Appellant.

____

August V., New York, appellant pro se.

Venecia M., respondent pro se.

Jo Ann Douglas, New York, attorney for the children.

____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered August 30, 2011, affirmed, without costs. Order, same court and Justice, entered on or about March 23, 2012, affirmed, without costs. Order, same court and Justice, entered March 26, 2012, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
David B. Saxe
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

10829
10829A
10829B
Index 305594/04

_______________________________________x

Venecia V.,
Plaintiff-Respondent,

-against-

August V.,
Defendant-Appellant.

_______________________________________x

Defendant appeals from the order of the Supreme Court, New York County (Matthew F. Cooper, J.), entered August 30, 2011, which, to the extent appealed from as limited by the briefs, set forth a parenting access schedule in accordance with an interim March 7, 2011 order and the parties' May 11, 2011 so-ordered stipulation and directed plaintiff to cooperate in having the parties' daughter participate in all activities leading up to her first holy communion; the order, same court and Justice, entered on or about March 23, 2012, which, to the extent appealable, denied his motion to renew and reargue orders dated August 23, 2010, September 16, 2011 and September 26, 2011, which, inter alia, awarded plaintiff a cost of living increase in child support, and directed him to pay support arrears and add-on expenses; and

order, same court and Justice, entered March 26, 2012, which granted the motion of the attorney for the children to direct him to pay outstanding fees, and awarded the attorney for the children additional fees for making the application.

August V., New York, appellant pro se.

Venecia M., respondent pro se.

Jo Ann Douglas, New York, attorney for the children.

SAXE, J.

This appeal, arising in the context of a contentious post-divorce dispute, raises a variety of challenges to the court's determinations involving custody, visitation and expenses. While the bulk of these issues may be briefly addressed seriatim, we must address at greater length the unresolved question of whether parents who are directed to pay the fees of the attorney appointed to represent the children may raise the defense of legal malpractice to that attorney's claim for fees. Determination of this issue requires us to decide whether, as defendant father claims, *Mars v Mars* (19 AD3d 195 [1st Dept 2005], *lv dismissed* 6 NY3d 821 [2006]) gives him legal standing to assert the legal malpractice defense.

The divorced parents have three children, now ages 17, 14 and 11. In the divorce action, although the parties stipulated to joint custody, it was left to the trial court to direct that plaintiff mother would have primary residential custody in the marital apartment in Manhattan. Substantial further litigation ensued beginning in 2009, when the mother moved for an order allowing her to relocate with the children to Demarest, New Jersey, approximately 12 miles outside Manhattan, and the father responded by moving for a change of custody. The motion court appointed the attorney for the children in this context.

On November 22, 2011, the attorney for the children moved for an order directing the father to pay the outstanding fees he owed in the amount of $2,034.60, and for an additional sum covering the cost of making the enforcement application. The attorney for the children stated that the father never objected to any of her bills and had previously paid his 30% share of the fees billed.

The motion court granted the motion by the attorney for the children, ordering the father to pay the sum of $2,034.60 for his share of outstanding fees, as well as $1,500 for fees she incurred in making the application. It rejected the argument that this Court's ruling in *Mars v Mars* gave a parent the right to challenge the fee of an attorney for the child on the ground of malpractice. In any event, it found no factual basis for the malpractice claim.

In *Mars v Mars* (19 AD3d at 196), this Court held that a parent may assert legal malpractice as an affirmative defense to a Law Guardian's fee application "to the extent of challenging that portion of the fees attributable to advocacy, as opposed to guardianship." Our ruling was limited by the then-prevailing view that attorneys appointed as law guardians for children in divorce cases often functioned in a role similar to a guardian ad litem, advocating for what they believed to be the best interests

of the child, as opposed to what the child desired. Accepting the rule of *Bluntt v O'Connor* (291 AD2d 106 [4th Dept 2002], *lv denied* 98 NY2d 605 [2002]), which held that absent special circumstances, a parent in a visitation dispute lacks standing to bring a legal malpractice claim against a child's court-appointed law guardian, we limited our ruling to the portion of the law guardian's fee representing the work that consisted of advocacy rather than guardianship.

However, in 2007, the role of the law guardian was changed by a newly-promulgated Rule of the Chief Judge (22 NYCRR § 7.2) that renamed the position "attorney for the child," and required those attorneys to "zealously advocate the child's position." The rule states that the attorney for the child must "consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances" (§ 7.2[d][1]). It further requires that the attorney for the child should be directed by the child's wishes after fully explaining the available options and making recommendations to the child, as long as the child is capable of knowing, voluntary and considered judgment (§ 7.2[d][2]). Only when the attorney is convinced that the child lacks the capacity for knowing, voluntary and considered judgment, or if following the child's wishes is likely

to result in a substantial risk of imminent, serious harm to the child, may the attorney advocate a position contrary to the child’s wishes, and even then the attorney must inform the court of the child’s articulated wishes if the child wants the attorney to do so (§ 7.2[d][3]).

Accordingly, after 2007, the distinction made by our ruling in *Mars* is no longer necessary in cases such as this; where the child is capable of decision-making, the task of the attorney for the child is generally solely advocacy, rather than guardianship, as long as the child is capable of knowing, voluntary and considered judgment. The portion of the *Mars* decision allowing a parent to raise malpractice as a defense to a fee application for that portion of the fee earned by advocacy has become applicable to the attorney’s entire fee claim. Rule 7.2 does not in any way vitiate the *Mars* ruling; on the contrary, it renders it more generally applicable.

We reaffirm the essence of the *Mars v Mars* ruling, namely that a parent may assert legal malpractice as an affirmative defense to the fee claim of an attorney for a child. The attorney for the child, no less than the attorneys for the parties, is serving as a professional and must be equally accountable to professional standards. That the children cannot hire and pay for their own attorneys, leaving it to the court to

make the necessary appointment, does not alter the applicable standards, or the means by which they may be raised.

The attorney for the children protests that if this type of defense is allowed generally, parents dissatisfied with the results of their custody claims will use malpractice challenges to avoid paying, resulting in a proliferation of applications for enforcement of ordered fees. She also suggests that the threat of malpractice claims from disgruntled parents will have a negative impact on the effectiveness of attorneys for children, by giving those parents control over the representation of their children.

We disagree. The possibility that a parent who feels aggrieved over the developments in a custody or visitation dispute may claim malpractice as a means of avoiding payment of the attorney's fee does not warrant granting these attorneys complete immunity against the defense of legal malpractice.

However, we emphasize that asserting such a defense will not necessitate further evidentiary proceedings in every case. Notwithstanding that the father may have standing to assert such a defense, we agree with the motion court that the father's accusations here do not establish a prima facie showing of legal malpractice and disciplinary violations; no hearing is warranted.

The father's claim of legal malpractice is based on his

assertion that the children's attorney ignored her professional duty by advocating the position advanced by two out of the three children, that they wanted to relocate with their mother, when the children lacked the "capacity for knowing, voluntary and considered judgment," and that she violated the rules governing professional conduct in matrimonial matters. More specifically, he argues that the children's attorney "ignored abundant evidence that her clients' judgment was not voluntary and in fact was manipulated by their mother," including the forensic expert's observations and conclusions that the mother controlled and manipulated the children, and purposely alienated the children from him. He further argues that the attorney failed to consider post-relocation events, engaged in improper ex parte communications with the court, and assisted the mother in reducing his visitation.

As the motion court found, the record reflects that the attorney for the children properly advocated the positions of the children, representing them zealously, competently, and professionally. There is no merit to the father's contention that the children's expressed positions regarding the proposed move to New Jersey were not voluntary. Nothing in the record establishes that the children lacked the capacity for voluntary judgment as required by rule 7.2. Nor is there any merit to the

accusation that the attorney for the children ignored the forensic expert's findings, or other evidence of alienation. The rule actually prohibits the attorney for the child from advocating a position contrary to the child's stated position unless the attorney is "convinced" that "the child lacks the capacity for knowing, voluntary and considered judgment" (7.2[d][3]). There is no evidence that the children lacked the requisite capacity. While the forensic expert indicated his view that the mother had engaged in behavior that alienated the children from their father, he also found that the father had estranged himself from the children by his own actions. Moreover, the court held a *Lincoln* hearing at which it heard directly from the children, and determined that the children were not rehearsed or coached, and that they desired to move to New Jersey. Evidence of overreaching or bad behavior by one parent that may influence a child caught in the middle of a custody dispute does not automatically require the child's attorney to be "convinced" that the child's stated position is involuntary.

The cross-examination of the father by the attorney for the children did not improperly undermine the forensic expert's testimony. Indeed, her role as the children's advocate required her to do so. Regardless of whether the children's position aligned with the mother's, it was neither malpractice nor a

violation of disciplinary rules for her to advocate for that position. Nor was there anything inappropriate about the attorney for the children questioning the father at the relocation trial about the various schooling options. Her examination of him was essential to her role as an advocate for the children; its purpose was not to be degrading.

There is no basis for the father's claim that the motion court's decision was dictated, or inordinately affected, by the attorney for the children, nor anything substantiating the claim that the attorney for the children committed disciplinary violations or engaged in improper ex parte communications with the court, or that such communications influenced the court.

Finally, the father never objected to any of the bills presented by the attorney for the children despite the fact that they were in his possession for a significant amount of time (*see Pedreira v Pedreira*, 34 AD3d 225 [1st Dept 2006]). The court therefore acted properly in ordering him to pay the fees under an account stated theory (*see Shaw v Silver*, 95 AD3d 416, 416 [1st Dept 2010]).

Turning to the remaining issues raised: we note that the November 9, 2010 interim order, which directed the mother to ensure that two of the children attend Catholic religion classes, was superseded by the August 26, 2011 order which incorporated a

March 7, 2011 order and only required the mother to cooperate in having the parties' daughter participate in all activities leading up to her first holy communion. There is no dispute that the parties' daughter attended the classes and had her first communion, and thus this issue has been rendered academic.

To the extent the father challenges the modification of visitation, we find that the motion court did not abuse its discretion in doing so and considered the best interests of the children. Matters of custody and visitation are within the sound discretion of the trial court (*Sequeira v Sequeira*, 105 AD3d 504 [1st Dept 2013], *lv denied* 21 NY3d 1052 [2013]; *Matter of Thompson v Yu-Thompson*, 41 AD3d 487 [2nd Dept 2007]), and its findings should be accorded great deference on appeal. In modifying the interim visitation schedule, which it expressly stated it would revisit, the motion court properly considered the children's schedule, including various extracurricular activities, which require them to be in New Jersey, and made a determination that is in their best interest while also ensuring that the father has significant visitation.

To the extent the father seeks enforcement of his visitation rights, any enforcement or contempt applications must be brought in Supreme Court.

To the extent the father appeals from the denial of his

motion to reargue various orders concerning add-on expenses and COLA increases, no appeal lies from an order denying reargument (*see Stratakis v Ryjov*, 66 AD3d 411 [1st Dept 2009]). To the extent the father appeals from the denial of his renewal motion concerning add-on expenses and COLA increases, the motion court properly denied renewal as no new facts were offered that were not previously presented (CPLR 2221).

In any event, while there is no dispute that the parties' 2005 agreement requires them to equally share the cost of add-on expenses, in its September 16, 2011 order the motion court properly set down any unresolved add-on expenses for a hearing, which was to take place on December 5, 2011. Thus, the court did not err in separately granting certain add-on expenses to the mother in that same order. Indeed, in two separate orders issued on August 23, 2010, each party was ordered to pay the other for certain add-on expenses. Given that the court specifically planned to deal with these expenses following a hearing, to the extent that these add-on expenses were not resolved, the father's recourse is to make a motion in Supreme Court.

As for the cost of living increases, the father claims that this issue was not properly before the court because there was no pending motion for such arrears. However, the decision and order granting such increases states that it was resolving motion

sequence numbers 11 and 12, which are not contained in the record. Moreover, according to the order of the motion court, in those motions the mother requested COLA increases and arrears.

There is also no merit to the father's contention that the parties' agreement regarding COLA increases was vague and unenforceable. The relevant clause in the parties' 2005 agreement clearly designated 2005 as the base year, thus indicating that increases would begin in 2006. The clause is also clear that basic child support would be subject to an annual cost of living adjustment, but that the maximum adjustment would be 3% in any given year.

Finally, while the court initially mistakenly held that the COLA increases were subject to the annual $200,000 cap, it properly amended its earlier order by striking any reference to the cap. While the court in 2005 had capped the parties' income at $200,000 for the purpose of calculating basic child support, there was no cap placed on COLA increases.

Accordingly, the order of the Supreme Court, New York County (Matthew F. Cooper, J.), entered August 30, 2011, which, to the extent appealed from as limited by the briefs, set forth a parenting access schedule in accordance with an interim March 7, 2011 order and the parties' May 11, 2011 so-ordered stipulation and directed plaintiff to cooperate in having the parties'

daughter participate in all activities leading up to her first holy communion, should be affirmed, without costs. The order of the same court and Justice, entered on or about March 23, 2012, which, to the extent appealable, denied defendant's motion to renew and reargue orders dated August 23, 2010, September 16, 2011 and September 26, 2011, which, inter alia, awarded plaintiff a cost of living increase in child support, and directed defendant to pay support arrears and add-on expenses, should be affirmed, without costs. The order of the same court and Justice, entered March 26, 2012, which granted the motion of the attorney for the children to direct defendant to pay outstanding fees, and awarded the attorney for the children additional fees for making the application, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 5, 2013

CLERK