SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 28, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10170 The People of the State of New York, Appellant, Ind. 2390/06 3051/06

-against-

Frank Ruiz, also known as Hector Cortez, Defendant-Respondent.

_____

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

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered April 26, 2012, resentencing defendant to concurrent terms of 8½ years, and bringing up for review an order of the same court and Justice, entered on or about February 23, 2012, which granted defendant's CPL 440.20 motion to set aside his the sentences as a second violent felony offender, and directed that he be resentenced as a first violent felony offender, unanimously reversed, on the law, the judgment of resentence vacated, and the matter remanded for resentencing

consistent with *People v Boyer* (22 NY3d 15 [2013]).

In view of the Court of Appeals' recent decision in *Boyer*, defendant was not entitled to relief under 440.20 from his original sentencing as a second violent felony offender. Accordingly, we vacate the judgment of resentence and remand for resentencing in accordance with the rule stated in *Boyer*.

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

ENTERED: JANUARY 28, 2014

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

9997 Edison Ronquillo, etc., Index 111679/03
Plaintiff-Appellant,

-against-

American Express Company, et al.,
Defendants-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about January 13, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 12, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 28, 2014

CLERK

Friedman, J.P., Acosta, Moskowitz, Manzanet-Daniels, Clark, JJ.

10001 Andrew Bell, et al., Index 310030/10
Plaintiffs-Respondents, 83760/11

-against-

Tower Insurance Company of New York,
Defendant-Appellant,

Morant Insurance Agency, Inc.,
Defendant.

[And a Third-Party Action]

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about May 10, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 7, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 28, 2014

CLERK

Friedman, J.P., Acosta, Manzanet-Daniels, Gische, JJ.

11373 Dkt. 12148/12
[M-5822] & 67130/12
M-5914 In re Daryl Perry, et al.,
Petitioners,

-against-

Hon. Steven L. Barrett,
Respondent.

- - - - -

Joseph Anthony, et al.,
Intervenors.

_____

The Bronx Defenders, Bronx (Justine J. Olderman of counsel), and Debevoise & Plimpton LLP, New York (Courtney M. Dankworth of counsel), for petitioners.

Eric T. Schneiderman, Attorney General, New York (Andrew H. Meier of counsel), for respondent.

Dechert LLP, New York (Matthew L. Mazur of counsel), for intervenors.

_____

Petition pursuant to CPLR article 78 for a writ of prohibition against the enforcement of a protective order of respondent Justice, which conditioned the disclosure of certain eavesdropping materials to petitioners upon their execution of nondisclosure agreements, unanimously denied as to petitioner Daryl Perry, unanimously denied as moot as to petitioner Javier Reyes, and the proceeding dismissed, without costs.

At the time they brought this proceeding, both petitioners

were defendants in cases pending in Criminal Court. Petitioners asserted that eavesdropping evidence gathered in a ticket-fixing investigation may contain exculpatory or impeachment material concerning the arresting officers in petitioners' underlying cases.

Prohibition is not available to prevent the enforcement of respondent Justice's protective order. Petitioners assert that respondent Justice lacked jurisdiction to issue an order that affects discovery in cases that are not before him. However, there was no infringement of petitioners' discovery rights, which were actually ruled upon by Criminal Court in petitioners' underlying cases. After petitioners demanded disclosure of any evidence of their arresting officers' alleged involvement in ticket-fixing, Criminal Court (Linda Poust-Lopez, J.) ruled that the People had satisfied their obligations under *Brady v Maryland* (373 US 83 [1972]) by offering disclosure of such materials to petitioners upon the condition that they sign the nondisclosure agreement provided in respondent Justice's order. Criminal Court noted that it reached this conclusion independently of any purportedly binding effect of the protective order. Moreover, there is no clear legal right to obtain unlimited access to eavesdropping evidence, the disclosure of which is strongly

safeguarded under state law (*see generally People v Washington*, 46 NY2d 116 [1978]).

Under these circumstances, petitioners fail to identify any arrogation of power infringing a clear legal right, and thus the extraordinary remedy of prohibition is not available (*see Matter of Rush v Mordue*, 68 NY2d 348, 352-353 [1986]). In any event, respondent Justice's protective order provided reasonable safeguards that serve to protect the rights of persons who may be accused of ticket-fixing as well as the rights of persons against whom the alleged ticket-fixers may be called to testify.

The petition is moot as to petitioner Reyes, because he signed the nondisclosure agreement, as well as because he pleaded guilty. This case does not fall under the narrow exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

We have considered petitioners' remaining arguments and find them unavailing.

M-5914 - *Perry v Barrett*

Motion seeking to intervene granted.

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11564 The People of the State of New York, Respondent, Ind. 6425/08

-against-

The John Galt Corporation, Defendant-Appellant.

_____

David Wikstrom, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 18, 2011, convicting defendant, after a nonjury trial, of reckless endangerment in the second degree, and sentencing it to conditional discharge for a period of one year and a $5,000 fine, unanimously affirmed.

The verdict was based on legally sufficient evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Defendant was properly convicted under the statutory standards for a misdemeanor prosecution of a corporation based on the conduct of its agents (*see* Penal Law § 20.20[2][c]). The evidence supports the inference that defendant's employees, "acting within the scope of [their] employment and in behalf of the corporation," committed acts constituting reckless

endangerment in the second degree. During the course of abatement work being performed in the Deutsche Bank Building's basement, defendant's foreman directed another worker employed by defendant to remove a 42-foot section of the building's standpipe, notwithstanding that the foreman was aware that the standpipe was necessary to provide water to firefighters in the event of a fire, thereby creating a substantial risk of serious physical injury to another person (Penal Law § 120.20).

The court did not improperly amend the indictment by referring to the acts of four of defendant's employees who had not been specifically mentioned in the People's bill of particulars. The bill of particulars cannot be reasonably construed as limiting the People's theory of prosecution, especially with regard to the sole charge upon which defendant was convicted, to the acts committed by the two employees who

were individually charged with crimes (*see e.g. People v Fronjian*, 22 AD3d 244 [2005], *lv denied* 6 NY3d 776 [2006]; *People v Basciano*, 54 AD3d 637 [1st Dept 2008]).

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11565-
11565A

Justina Torres, etc.,
Plaintiff-Respondent,

-against-

Zara Realty Holding Corp.,
Defendant-Appellant.

Index 6123/99

Epstein Gialleonardo & Rayhill, Elmsford (Jonathan R. Walsh of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 20, 2011, which denied defendant's motion for summary judgment dismissing the complaint on the ground that it was untimely, unanimously affirmed, without costs. Order, same court and Justice, entered April 17, 2012, which denied defendant's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

In this action for personal injuries allegedly sustained by plaintiff's decedent while he was working at defendant's premises as an assistant elevator mechanic, the note of issue was filed on March 3, 2009, and the decedent died of unrelated causes on June 13, 2009, resulting in an automatic stay of all proceedings until a proper substitution was made (*see* CPLR 1015[a]; *Noriega v*

Presbyterian Hosp. in City of N.Y., 305 AD2d 220, 221 [1st Dept 2003]). Defendant moved for summary judgment on June 24, 2009, within 120 days after the note of issue was filed, but while the action was stayed. Thus, the order granting the motion on default was properly vacated as a nullity (*see Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820 [1st 1985]).

Decedent's daughter was substituted as party plaintiff on May 10, 2010, and defendant concededly had notice of the substitution as of August 17, 2010. Defendant did not attempt to renew its motion for summary judgment until October 28, 2010, more than 120 days after the filing of the note of issue, excluding the tolling period. Moreover, after the motion was automatically denied without prejudice due to defendant's failure to comply with the court rules of the trial part, defendant waited until May 3, 2011 to make the motion in accordance with the applicable rules. By that time, the motion was untimely under any view of the facts (*see* CPLR 3212[a]).

Defendant's proffered excuses for the delay in moving following substitution are insufficient to excuse its failure to remain apprised of the status of the case and comply with the applicable deadlines (*see Miceli v State Farm Mut. Auto Ins. Co.*,

3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]).

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

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11566 In re Jerome Silverstein, Index 119998/93
Petitioner-Respondent,

-against-

Max Goodman, etc.,
Respondents,

Viola Goodman,
Respondent-Appellant.

- - - - -

Paul R. Sklar,
Nonparty-Respondent.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Mark L. Lubelsky and Associates, New York (Mark L. Lubelsky of counsel), for Paul Risklar respondent.

_____

Judgment and order (one paper), Supreme Court, New York County (Louis Crespo, Special Referee), entered July 17, 2012, which approved the final accounting of the successor court-appointed receiver (Paul R. Sklar, Esq.), awarded Sklar $31,361.46 in commissions, and awarded Sklar's attorney (Mark L. Lubelsky, Esq.) $115,375.05 in fees and disbursements, unanimously affirmed, with costs.

Respondent Viola Goodman's argument that Sklar's account should have been rejected because it lacked documentary support is unavailing. It is true that Sklar's April 2011 account was a

mere spreadsheet, without back-up. However, Sklar submitted backup documentation in June and December 2011; thus, Goodman and her lawyer had ample time to review the documents before the March 2012 hearing before the Special Referee. Even now, Goodman does not point to any inaccuracy in Sklar's account.

Goodman's contention that Sklar's commission should be less than the statutory maximum of 5% of sums received and disbursed is moot because the Special Receiver awarded Sklar only 3.75% of the income of the receivership.

Goodman's argument that Sklar is not entitled to any commission because he delegated all of his duties to a managing agent (Mitchell Kaufman) and Lubelsky is unavailing. The Special Referee found that Sklar supervised Kaufman and performed services in addition to such supervision. "The decision of a fact-finding court should not be disturbed upon appeal unless it is obvious that its conclusions could not have been reached under any fair interpretation of the evidence, particularly where the findings of fact largely rest upon considerations relating to the credibility of witnesses" (*Cohen v Akabas & Cohen*, 71 AD3d 419, 420 [1st Dept 2010]). Here, as in *Cohen*, the Special Referee "considered the proof before him . . . [and] provid[ed] a detailed, well-reasoned explanation for his ruling" (*id.*).

"There is, thus, no basis for setting aside his decision, which is supported by the evidence presented at the hearing" (*id.*; *see also Matter of Jakubowicz v A.C. Green Elec. Contrs., Inc.*, 25 AD3d 146, 150 [1st Dept 2005] ["Reimbursement for expenses, including the services of a managing agent, is recoverable"], *lv denied* 6 NY3d 706 [2006]).

As for Goodman's argument that Sklar delegated duties to Lubelsky, the Special Referee did not compensate Lubelsky for services that Sklar could have performed, such as telephone calls to contractors. Thus, Goodman is not being charged twice for the same work.

In sum, we uphold the Special Referee's award of commissions to Sklar (*see Chang v Zapson*, 67 AD3d 435, 436 [1st Dept 2009]). We also uphold the Special Referee's award of fees to Lubelsky (*see Brookman & Brookman P.C. v Joseph Fleischer Natural Coiffures, Inc.*, 13 AD3d 196, 197 [1st Dept 2004]; *David Realty & Funding, LLC v Second Ave. Realty Co.*, 26 AD3d 257, 258 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]). We have considered Goodman's objections to the fee award and find them unavailing. For example, we note that the Special Referee awarded only 60% of the hours that Lubelsky spent on Sklar's failed motion to sell

the premises, that he did not award all of the other hours that Lubelsky requested, that he reduced the hours that he did award by 10% due to Lubelsky's block billing, and that he awarded no fees for the associate who did no legal work.

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11567-
11568 In re Diamond S.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
New York State Office of Children
and Family Services,
Petitioner-Respondent.

_____

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

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondent.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about September 12, 2013, which extended appellant's placement with petitioner Office of Children and Family Services for nine months, unanimously affirmed, without costs.

The court properly determined that the petition was timely (*see* Family Ct Act § 355.3[2]). The petition was filed more than 60 days before the expiration of appellant's period of placement, as adjusted for the 24 days that she was absent without authorization from her original nonsecure facility (*see* Executive Law § 510-b[7]). In any event, the court also properly

determined that even if the petition was not timely, OCFS established good cause for an untimely filing. The good cause was not based entirely on events that had occurred before the expiration of the period of placement (*compare Matter of Heriberto A.*, 198 AD2d 191 [1st Dept 1993]). Instead, OCFS relied on its own evaluation of appellant and her behavior, made after she was transferred to OCFS's custody.

The petition was not barred by a prior unsuccessful extension petition filed by the Administration for Children's Services. Regardless of whether the two agencies should be considered to be in privity, the court had discretion to permit a renewed petition based on additional information (*see e.g. Garner v Latimer*, 306 AD2d 209 [1st Dept 2003]), and appellant's collateral estoppel argument is without merit.

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11569 Fernando Roman, et al., Index 301224/10
Plaintiffs,

Liberty Mutual Insurance Company,
as subrogee of Julia Román,
Plaintiff-Respondent,

-against-

Silvia B. Cabrera,
Defendant,

Frank Lawrence, IV,
Defendant-Appellant.

_____

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, White Plains (Montgomery L. Effinger of counsel), for appellant.

KLG Luz & Greenberg LLP, New York (Luke Tynan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about April 12, 2013, which denied the motion by defendant Lawrence, for summary judgment dismissing the complaint and all cross claims as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The subject motor vehicle accident occurred on the northbound side of Interstate 95 in the Town of Mamaroneck. Plaintiff Fernando Roman was struck by an automobile that was

being operated by defendant Silvia B. Cabrera. At the time of the accident, Roman was changing a tire on a vehicle that was parked on the right shoulder of the highway. According to a police report prepared by State Trooper Rosado, the accident occurred at 7:29 a. m. near milepost marker 8.7. Lawrence, who alleges that he did not see plaintiff's accident, testified that his automobile was stuck in the left lane and disabled after it struck the median divider on the left side of the roadway. A second police report, prepared by State Trooper Bozier, indicates that Lawrence's collision occurred at 7:22 a. m. near milepost 8.6.

Plaintiffs assert that there are triable issues of fact as to whether Lawrence was negligent and whether such negligence was a proximate cause of the contact between Cabrera's vehicle and Roman. Cabrera, who appeared by counsel, did not submit an affidavit and was apparently not deposed. Nonetheless, plaintiffs opposed the motion solely on the basis of a notation in Trooper Rosado's report to the effect that "Cabrera swerved to avoid Mr. Lawrence's vehicle and in so doing lost control of her vehicle, striking Mr. Román . . . ." This police accident report is insufficient to raise an issue of fact since it recites hearsay and was prepared by an officer who had not observed the

accident (*see Singh v Stair*, 106 AD3d 632 [1st Dept 2013]). Moreover, plaintiffs have not demonstrated an excuse for their failure to offer proof on the issue in admissible form (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1068 [1979]).

Even if it were admissible, the police report would still be insufficient to raise a triable issue of fact. Liability may not be imposed on a party who merely furnishes the condition or occasion for the occurrence of the event, but was not one of its causes (*see Sheehan v New York*, 40 NY2d 496, 503 [1976]). The report would not have raised an inference that Lawrence's conduct caused the emergency condition created when his vehicle hit the median divider as he tried to avoid colliding with third unidentified car, which allegedly swerved into his lane (*see Paulino v Guzman*, 85 AD3d 631, 632 [1st Dept 2011]).

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11570 In re Kenneth H.,
Petitioner-Respondent,

-against-

Fay F.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Michael S. Bromberg, Sag Harbor, for respondent.

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

_____

Order, Family Court, New York County (Pamela Scheininger, Referee), entered on or about December 3, 2012, which, inter alia, after a hearing, awarded custody of the subject child to petitioner, unanimously affirmed, without costs.

The court's conclusion, based on a totality of the circumstances, that an award of sole custody to petitioner would be in the best interests of the child is supported by a sound and substantial basis in the record, and is entitled to deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Matter of Naomi S. (Hadar S.)*, 87 AD3d 936 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). The record supports the court's findings that, notwithstanding petitioner's reportedly troubled past, since the

child was placed into his care in December 2007, after being removed from respondent's care following a finding of neglect, he has taken good care of her without incident, and provided her with a safe, loving and stable home (*see Matter of David C. v Laniece J.*, 102 AD3d 542 [1st Dept 2013]). Petitioner has also demonstrated an ability to place the child's feelings above his own, by making the child available for visits and encouraging her to maintain telephone contact with respondent following the suspension of visitation (*see generally Matter of Nelissa O. v Danny C.*, 70 AD3d 572, 573 [1st Dept 2010]).

The record shows that respondent has continued to behave erratically, inappropriately and unpredictably in the presence of the child, and has acted out irrationally and physically, which led to an order limiting her supervised visitation with the child. The court properly credited the testimony of the expert psychiatrist, who opined that respondent had a mood disorder with

paranoid and narcissistic features, and that it would be detrimental for the child to observe such volatile and explosive behaviors in her mother.

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11571 The People of the State of New York, Ind. 1007/09
Respondent,

-against-

Luis Ramos,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County, (Martin Marcus, J.), rendered April 25, 2011, as amended May 24, 2011, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him, as a second felony offender, to a term of 22 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning

identification and credibility. Defendant was identified by three witnesses, each of whom knew defendant from prior occasions.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2014

CLERK

CORRECTED ORDER - FEBRUARY 4, 2014

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11573 The People of the State of New York, Dkt. 50730C/11
Respondent,

-against-

Osvald Ramos-Medina,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Emily Anne **Aldridge** of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered March 21, 2011, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to a conditional discharge for a period of one year, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The fact that the court may have discredited some aspects of the victim's testimony does not warrant a different conclusion. As trier of fact, the court was entitled to disregard so much of any witness's testimony as it found to have been untruthful, and accept so much of it as it found to have been truthful and accurate (*see People v Hill*, 110

AD3d 410 [1st Dept 2013]).

The evidentiary issues raised by defendant do not warrant reversal. Any error regarding those issues was harmless, particularly in the context of a nonjury trial (*see generally People v Moreno*, 70 NY2d 403, 405-406 [1987]).

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11574 Davis & Partners, LLC., et al., Index 108041/10
Plaintiffs-Respondents-Appellants,

-against-

QBE Insurance Corporation,
Defendant-Appellant-Respondent.

_____

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross of counsel), for appellant-respondent.

Max W. Gershweir, New York, For respondents-appellants.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 22, 2013, which denied defendant's motion for summary judgment dismissing the complaint and declaring that it is not obligated to indemnify and defend plaintiffs Davis & Partners, LLC and RFD 425 Fifth Avenue, L.P. in the underlying personal injury action, granted so much of plaintiffs' motion as sought a judgment declaring that defendant is so obligated, and denied, as moot, so much of plaintiffs' motion as sought a judgment declaring that defendant's insurance coverage is primary to plaintiff State National Insurance Company's insurance coverage, unanimously modified, on the law, to deny the part of plaintiffs' motion seeking a declaration that defendant is obligated to indemnify and defend Davis & Partners and RFD 425 Fifth Avenue in the underlying action, and grant defendant's motion to the extent of declaring that defendant is not so

obligated, and affirmed, without costs, with respect to the denial of the part of defendant's motion seeking summary judgment dismissing the complaint, and the appeal therefrom otherwise dismissed, without costs, as academic.

The parties agree that under New Jersey law defendant's failure to show that it was prejudiced as a result of the untimely notice of occurrence it received pursuant to the subject insurance policy would render its disclaimer of coverage on that ground invalid. However, New York law, although it now requires a showing of prejudice, did not require such a showing at the time the policy was issued (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]; Insurance Law § 3420, as amended by L 2008, ch 388, §§ 2 to 6, eff January 17, 2009). Having been provided to defendant 18 months after the occurrence and 3 months after the underlying litigation was commenced, the notice of occurrence was untimely as a matter of law (*see e.g. Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632 [1st Dept 2011]). Thus, the validity of defendant's disclaimer of coverage on the ground of late notice of occurrence turns on whether New York law or New Jersey law governs this dispute.

We find, under the standard "grouping of contacts" analysis, that New York law governs (*see Matter of Midland Ins. Co.*, 16 NY3d 536, 543 [2011]; *Illinois Natl. Ins. Co. v Zurich Am. Ins.*

Co., 107 AD3d 608 [1st Dept 2013]). The contract between contractor Jansons Associates, Inc. and the construction manager was related to a project located in New York (at 425 Fifth Avenue in Manhattan). It appears to have been executed in New York. It required Jansons to carry insurance and to name Davis & Partners and RFD 425 Fifth Avenue, both New York entities, as additional insureds under the policy. It contains a choice-of-law provision naming New York as the forum and the governing law of choice. The "occurrence" under the policy and the ensuing litigation occurred in New York. These factors outweigh the fact that Jansons's principal place of business is in New Jersey. As the "principal location of the insured risk," New York has "the most 'significant relationship to the transaction and the parties'" (*Matter of Midland Ins. Co.*, 16 NY3d at 544). Thus, defendant was not required to show prejudice as a result of the untimely notice, and its disclaimer of coverage on the ground of late notice was valid.

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11578 The People of the State of New York, Ind. 3178N/09
Respondent,

-against-

Jose Sotomayer,
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 (Natalia B. Bedoya 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 (Laura A. Ward, J.), rendered on or about February 8, 2010,

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

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

ENTERED: JANUARY 28, 2014

CLERK

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

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11579 Robin Robinson, etc., Index 309982/09
Plaintiff-Respondent,

-against-

Bronx-Lebanon Hospital Center,
Defendant-Appellant.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Sari Havia of counsel), for appellant.

Fitzgerald Law Firm PC, Yonkers (Mitchell L. Gittin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 14, 2013, which denied the motion of defendant hospital for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On October 8, 2008, Koran Robinson was born prematurely at defendant hospital with a gestational age of 25 weeks and birth weight of one pound, nine ounces. He had low Apgar scores and his respiratory rate was irregular. Koran was intubated and transferred to the neonatal intensive care unit. Despite treatment and monitoring, he exhibited complications during the early morning of November 6, 2008, and was pronounced dead on the evening of November 7th due to necrotizing enterocolitis (NEC).

The detailed, nonconclusory, factually supported affirmation of defendant's expert established prima facie that the hospital

did not depart from good and accepted practice in treating Koran before his death (*see Foster-Sturrup v Long*, 95 AD3d 726, 728 [1st Dept 2012]; *Callistro v Bebbington*, 94 AD3d 408 [1st Dept 2012], *affd* 20 NY3d 945 [2012]).

In opposition, plaintiff raised a triable issue of fact as to whether the hospital departed from good and accepted practice in failing to timely recognize Koran's hyperglycemia and treat him, including performing a sepsis workup, on November 3, 2008. Contrary to defendant's contention, the opinion of plaintiff's expert was not conclusory, but was based on Koran's medical records, which showed a spike in his blood glucose level on November 3, 2008 and high glucose levels on subsequent days (*see McManus v Lipton*, 107 AD3d 463, 464 [1st Dept 2013]; *Ashton v D.O.C.S. Continuum Med. Group*, 68 AD3d 613 [1st Dept 2009]). Further, the expert's opinion that hyperglycemia was a sign of sepsis, which is a sign of NEC, is supported by the deposition testimony of a resident and attending doctor who treated Koran,

and further supports the conclusion that the baby was developing NEC as early as November 3, 2008.

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

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11580 High Tech Enterprises & Electrical Services of NY, Inc., Plaintiff-Respondent, Index 601176/08

-against-

Expert Electrical, Inc., et al., Defendants-Appellants.

_____

Robert L. Folks & Associates, LLP, Melville (Cindy A. Kouril of counsel), for appellants.

Bryan A. McKenna, New York, for respondent.

_____

Appeal from order, Supreme Court, New York County (Marvin L. Schweitzer, J.), entered October 23, 2012, deemed an appeal from the judgment, same court and Justice, entered February 19, 2013, in plaintiff's favor in the amount of $197,041.32, and, so considered, said judgment unanimously reversed, on the law, without costs, the judgment vacated, that portion of defendant's motion seeking summary judgment dismissing plaintiff's first (breach of contract), second (payment bond) and fourth (account stated) causes of action granted, and plaintiff's cross motion for summary judgment with respect to those causes of action denied. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is not entitled to summary judgment on its first cause of action for breach of contract against defendant Expert

Electric, Inc., sued here as Expert Electrical, Inc. (Expert). Contrary to plaintiff's claim, Expert did not stipulate to plaintiff's performance under the contract. Rather, it stipulated that Expert invoiced the City of New York $136,837.62 for plaintiff's work and received payment from the City in that amount. The evidence submitted by defendants regarding plaintiff's work included affidavits stating that plaintiff walked off the job, leaving its work largely incomplete and, in some instances, unsatisfactorily performed (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Further, defendants' motion for summary judgment dismissing the cause of action for breach of contract should have been granted. Plaintiff refused to comply with paragraph 11 of the subcontract between plaintiff and Expert which required plaintiff to furnish an affidavit stating that all labor and material have been paid for in full, and that no payments were due to plaintiff.

Defendants' motion for summary judgment dismissing the fourth cause of action (account stated, against Expert) should have been granted and plaintiff's cross motion for summary judgment on this claim should have been denied. Plaintiff failed to comply with Expert's request for documentation, including payroll reports, so that Expert could process plaintiff's

requisitions (*see* Labor Law § 220[3-a][a][iii]). Pursuant to the public works contract Expert entered into with the City, the filing of payrolls is a "condition precedent" to payment for work done on the project. Plaintiff's invoices (*i.e.*, requisitions) do not constitute an account stated because plaintiff failed to satisfy the condition precedent for payment, namely, the submission of payroll reports (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]).

The motion court should have granted defendants' motion for summary judgment dismissing the second cause of action (for payment on the bond issued by defendant Arch Insurance Group, Inc., d/b/a Arch Insurance Company [Arch]), and should have denied plaintiff's cross motion for summary judgment on this claim. Plaintiff claims that it is entitled to summary judgment against Arch because Expert has no defenses to the claims for nonpayment. However, as indicated above, Expert has defenses to nonpayment.

The motion court properly granted plaintiff's cross motion for summary judgment dismissing the first counterclaim and properly denied defendants' motion for summary judgment on this claim seeking damages for plaintiff's failure to pay the prevailing wage since there is no private right of action for underpayment of wages pursuant to Labor Law § 220 until there has

been an administrative determination that has either gone unreviewed or been affirmed in the claimants-employees' favor (*see Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998]) and the private right of action belongs only to the employees who have been underpaid (*see P & T Iron Works v Talisman Contr. Co., Inc.*, 18 AD3d 527, 528 [2d Dept 2005]). We note that there is no evidence of any complaints by plaintiff's employees and that the time to bring such a claim has expired (*see* Labor Law § 220-b[2][a][1]).

Plaintiff's cross motion for summary judgment dismissing the third and fourth counterclaims (wilful exaggeration of a lien [*see* Lien Law §§ 39 and 39-a]) was properly granted since this is not an action for foreclosure and the lien has since expired (*see Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 166-167 [1st Dept 2000]).

The motion court properly granted plaintiff's cross motion for summary judgment dismissing the fifth counterclaim for attorneys fees and properly denied defendants' motion for summary judgment on this claim because paragraph 17 of the contract which provides that plaintiff "will not file any lien . . . against any moneys due or to become due to the Contractor from the Owner" and requires plaintiff to "reimburse the Contractor for any and all damages, including attorney's fees" if a lien is filed, is

unenforceable as against public policy (*see* Lien Law § 34).

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

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11581 The People of the State of New York, Ind. 1865/11
Respondent,

-against-

Khalif Akbar,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee 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 September 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: JANUARY 28, 2014

CLERK

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

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11582N-
11583N-
11583NA

Index 305719/08

Expo Development Corp.,
Plaintiff-Respondent,

-against-

824 South East Boulevard Realty Corp.,
Defendant-Appellant,

New York State Department of
Taxation and Finance,
Defendant.

_____

Manuel D. Gomez, New York, for appellant.

Charles R. Cuneo, Huntington, for respondent.

_____

Orders, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 14, 2010, February 3, 2011, and May 9, 2011, which, insofar as appealed from as limited by the briefs, denied defendant's motions to vacate a judgment of foreclosure and sale and a referee's deed granted on default, unanimously affirmed, without costs.

Defendant failed to set forth a reasonable excuse for its failure to defend against this action to foreclose on a mechanic's lien, since it offered no financial proof of its claim that it was unable to afford counsel (*see Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602 [1st Dept 2013]). Absent a reasonable excuse for the default, we need not determine whether

defendant demonstrated a potentially meritorious defense (*see* CPLR 5015[a][1]; *Benson Park Assoc., LLC v Herman*, 73 AD3d 464 [1st Dept 2010]).

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

ENTERED: JANUARY 28, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11584 In re Vincent Warren Ind. 2179/99
[M-6482] Petitioner,

-against-

Hon. John N. Byrne, et al.,
Respondents.

- - - - -

Robert T. Johnson, District Attorney,
Bronx County,
Nonparty Respondent.

_____

Vincent Warren, petitioner pro se.

Robert T. Johnson, District Attorney, Bronx (Marc Ian Eida of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11585 The People of the State of New York, Ind. 30067/09
Respondent,

-against-

Jermaine Jackson,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 11, 2011, convicting defendant, upon his plea of guilty, of violation of probation, revoking his sentence of probation and resentencing him to a term of 13 to 39 months, unanimously affirmed.

Defendant did not preserve the specific claim he raises on appeal regarding the delayed determination of his violation of probation proceeding (*see People v Douglas*, 94 NY2d 807 [1999]; *People v Kyem*, 272 AD2d 136 [1st Dept 2000], *lv denied* 95 NY2d 836 [2000]), and we decline to review it in the interest of justice. As an alternate holding, we conclude that there was no excessive delay, or loss of jurisdiction to impose an incarceratory sentence. After pleading guilty to violation of probation, defendant consented to delays that were intended to

benefit him (*see id.*). The court gave defendant extensive opportunities for rehabilitation, which proved to be unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11586 Mahamadou Gory, Index 303856/07
Plaintiff-Respondent, 94146/09

-against-

Neighborhood Partnership Housing Development Fund Company, Inc.,
Defendant-Appellant,

A Aleem Construction, Inc., et al.,
Defendants.

[And a Third Third-Party Action]

_____

French & Casey, LLP, New York (Douglas R. Rosenzweig of counsel), for appellant.

Buttafuoco & Associates, PLLC, Woodbury (Jason Murphy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 17, 2013, which, to the extent appealed from, denied defendant Neighborhood Partnership Housing Development Fund Company, Inc.'s motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240(1) claims and the Labor Law § 241(6) claim predicated upon Industrial Code (12NYCRR) § 23-3.3(c) as against it and summary judgment on its indemnification claims against defendant West 132nd Street, LLC, and granted plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, unanimously modified, on the law, to grant Neighborhood's motion for summary judgment dismissing

the common-law negligence, Labor Law §§ 200 and 241(6) claims and summary judgment on its contractual indemnification claim against West 132nd Street, and otherwise affirmed, without costs.

Contrary to defendant Neighborhood's contention, the fact that the stairway on which plaintiff was working when he was injured was originally constructed as a permanent structure does not remove it from the reach of Labor Law § 240(1). Not only had the stairway provided the sole means of access to the floors of the building during the demolition phase, but, in addition, it was an elevated surface on which plaintiff was required to work to complete his task of breaking up the marble pieces covering each step. The surrounding walls had been demolished, and the staircase had no guard rails. Thus, "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

Since plaintiff contends that his injury arose from a dangerous condition of the workplace, Neighborhood established prima facie that it was not liable under common-law negligence principles or Labor Law § 200 by submitting a sworn affidavit by its principal stating that no one from Neighborhood ever visited the demolition site or otherwise had notice of the dangerous

condition of the staircase (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]). In opposition, plaintiff failed to submit admissible evidence raising an issue of fact whether Neighborhood created or had actual or constructive notice of the dangerous condition.

We assume without deciding that the motion court properly allowed plaintiff to amend his bill of particulars, without leave of court, a week after Neighborhood moved for summary judgment, to add a new Labor Law § 241(6) claim predicated on a violation of Industrial Code (12 NYCRR) § 23-3.3(c). However, plaintiff offered no competent evidence that his injury was proximately caused by a failure to conduct continuing inspections during the demolition process "to detect any hazards resulting from weakened or deteriorated floors or walls or from loosened materials" (12 NYCRR 23-3.3[c]). Furthermore, it is undisputed that plaintiff's supervisor inspected the subject staircase before permitting plaintiff to begin his assignment.

Given the absence of any evidence of negligence on its part,

Neighborhood is entitled to summary judgment on its contractual indemnification claim against defendant West 132nd Street (*see Mahoney v Turner Constr. Co.*, 37 AD3d 377, 380 [1st Dept 2007]).

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11588 Chris Stier, Index 103134/09
Plaintiff-Appellant,

-against-

One Bryant Park LLC, et al.,
Defendants-Respondents.

_____

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

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani of counsel), for respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered October 4, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law on plaintiff's Labor Law § 200 and common-law negligence claims, and plaintiff failed to raise a triable issue of fact as to such claims. Defendants' evidence established that they neither created the allegedly dangerous condition nor had actual or constructive notice of it. While an employee of defendant Tishman Construction Corporation of New York testified that the duct tape securing the masonite in the general area outside the elevators at the C-2 level needed "sprucing up"

because it was starting to "deteriorate," this testimony is insufficient to establish that defendants had actual notice that the subject masonite was unsecured at the time of plaintiff's accident (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529 [1st Dept 2013]). Contrary to plaintiff's claim, there was no evidence of a recurring condition at the subject piece of masonite that routinely went unaddressed (*compare Hill v Lambert Houses Redevelopment Co.*, 105 AD3d 642 [1st Dept 2013]).

Moreover, the evidence demonstrates that defendants did not have the authority to control the activity bringing about plaintiff's injury to enable them to avoid or correct an unsafe condition (*cf. Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353 [1998]). Nor did they have responsibility for maintenance of the masonite on the floor where plaintiff's injury occurred, since that level of the building had been turned over to a nonparty entity, which continued construction on that floor level.

Dismissal of plaintiff's Labor Law § 241(6) claim was warranted. There was no evidence that plaintiff's accident was the result of a failure to remove or cover a foreign substance, and masonite is not a slipping hazard contemplated by 12 NYCRR 23-1.7(d) (*see Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]).

Furthermore, 12 NYCRR 23-1.7(e), which requires work areas to be kept free of tripping hazards, is inapplicable because plaintiff does not allege that he tripped on an accumulation of dirt or debris. Rather, he testified that he slipped on an unsecured piece of masonite, which was not a tripping hazard (*see Purcell v Metlife, Inc.*, 108 AD3d 431 [1st Dept 2013]).

We decline to consider plaintiff's fact-based argument that his accident arose from a slippery condition caused by construction dust since it is raised for the first time on appeal (*see DeLeon v New York City Hous. Auth.*, 65 AD3d 930 [1st Dept 2010]). Were we to consider the argument, we would find that the it lacks support in the record.

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11589- Index 16763/04
11590- 84872/05
11591 Neil Reese, et al.,
Plaintiffs,

-against-

100 Church Street LLC, et al.,
Defendants,

Lionshead 100 Development LLC, et al.,
Defendants-Respondents,

Marsons Contracting Co. Inc.,
Defendant-Appellant.
- - - - -
Lionshead 100 Development LLC, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

KSW Mechanical Services, Inc.,
Second Third-Party Defendant-Appellant.
- - - - -
Neil Reese, et al.,
Plaintiffs-Appellants,

-against-

100 Church Street LLC, et al.,
Defendants,

Lionshead 100 Development LLC, et al.,
Defendants-Respondents.
- - - - -

Lionshead 100 Development LLC, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

KSW Mechanical Services, Inc.,
Second Third-Party Defendant-Respondent.

_____

Appeals having been taken to this Court by the above-named appellants from orders of the Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about January 19, 2012 and July 19, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 7, 2014,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11592 The People of the State of New York, Ind. 4772/09
Respondent,

-against-

Radhames Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 19 2012, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury could have reasonably concluded that when defendant beat the

victim with the handle of a machete, resulting in multiple injuries, this object constituted a dangerous instrument under the circumstances in which it was used, within the meaning of Penal Law § 10.00(13).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11594 The People of the State of New York, Ind. 2729/07
Respondent,

-against-

Richard Garcia,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered June 29, 2011, as amended July 26, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously modified, on the law, to the extent of reducing the amounts of the mandatory surcharge and crime victim assistance fee to $250 and $20, respectively, and otherwise affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning

credibility and identification. The principal witness, who had seen defendant on prior occasions, made a strong identification, and her unwillingness to identify defendant's photograph while subsequently selecting him from a lineup was fully explained. In addition, defendant's absence for almost two years after the crime evinced his consciousness of guilt (*see People v Allen*, 61 AD2d 619, 622 [1st Dept 1978], *affd* 48 NY2d 760 [1979]).

The court properly permitted the People to introduce evidence that the victim's nontestifying sister told a detective that the victim had been having an unspecified "problem" with defendant, who was the victim's long-term acquaintance. This testimony was presented not for the truth of the matter asserted, but to explain why the police focused on defendant and spent years attempting to locate him (*see People v Tosca*, 98 NY2d 660, 661 [2002]; *People v Rivera*, 96 NY2d 749 [2001]; *People v Barnes*, 57 AD3d 289, 290 [2008], *lv denied* 12 NY3d 781 [2009]; *see also People v Morris*, 21 NY3d 588 [2013]). While defendant objected to this evidence as hearsay, that objection did not preserve his present Confrontation Clause claim (*see People v Kello*, 96 NY2d 740, 743-744 [2001]; *People v Maher*, 89 NY2d 456, 462-463 [1997]; *compare People v Hardy*, 4 NY3d 192, 197 n 3 [2005]), and we decline to review this claim in the interest of justice. As an

alternative holding, we find no Confrontation Clause violation, because the evidence was admissible for a legitimate purpose other than its truth (*see Tennessee v Street*, 471 US 409 [1985]; *United States v Reyes*, 18 F3d 65, 70-71 [1994]). However, the court should have given a limiting instruction. Nevertheless, any error in receiving the evidence or in failing to deliver a limiting instruction was harmless, because neither the evidence nor the absence of an instruction could have affected the verdict. In particular, we note that rather than misusing the out-of-court statement in summation, the prosecutor essentially gave the jury the same limiting instruction that the court should have given.

Since the crime was committed before the effective date of the legislation increasing the mandatory surcharge and crime victim assistance fee, defendant's sentence is unlawful to the extent indicated. We otherwise perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11596 In re Keith H., Jr.,

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

Logann M. K., etc.,
Respondent-Appellant,

Administration for Children Services
of the City of New York
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

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

_____

Order of fact-finding and disposition, Family Court, New York County (Jody Adams, J.), entered on or about November 28, 2012, which, following a fact-finding inquest and based upon a prior fact-finding determination that respondent mother had inflicted excessive corporal punishment against two of the child's older siblings, determined that respondent derivatively neglected the subject child, Keith H. Jr., and placed him into the care and custody of petitioner, the Commissioner of the Administration for Children's Services, unanimously affirmed, without costs.

Contrary to respondent's contentions the record is sufficiently complete to allow this Court to make an independent factual review and draw its own conclusions as to whether the child is a derivatively neglected child (*see Matter of Allen v Black*, 275 AD2d 207, 209-210 [1st Dept 2000]).

The record demonstrates by a preponderance of the evidence that respondent posed an imminent danger of harm to the child, even though he was not abused by her, because there are prior orders finding that she had neglected and derivatively neglected her other children by inflicting excessive corporal punishment upon two of the child's siblings (*see Matter of Andre B. [Wilner G.B.]*, 91 AD3d 411, 412 [1st Dept 2012]; *Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606, 607 [1st Dept 2011]). The prior orders finding neglect, rendered before the child was born, were affirmed on appeal (*Matter of Jeremy H. [Logann K.]*, 100 AD3d 518 [1st Dept 2012]), and supported a finding of derivative neglect as to all other siblings (*see Matter of Jacob H. [Logann K.]*, 94 AD3d 628 [1st Dept 2012], *lv dismissed* 19 NY3d 952 [2012]).

Moreover, the instant petition was filed within four months after the Family Court's finding of neglect as to the child's older siblings, and respondent does not argue that the neglect finding was too remote in time to the instant proceeding to

support a reasonable conclusion that the condition still exists (*see Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]; *Matter of Kylani R. (Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]; *Matter of Cruz*, 121 AD2d 901, 902-903 [1st Dept 1986]).

The facts that respondent had completed a court-ordered mental health evaluation, parenting skills and anger management programs, and participated in regular visitation with the child and his siblings before the instant proceeding commenced does not preclude a finding of derivative neglect (*see Matter of Jason G.*, 3 AD3d 340 [1st Dept 2004], *lv denied* 2 NY3d 702 [2004]). Despite an otherwise good relationship between respondent and her children, her inability to acknowledge her previous behavior supports the conclusion that she has a faulty understanding of the duties of parenthood sufficient to infer an ongoing danger to the subject child (*see Matter of Umer K.*, 257 AD2d 195, 199 [1st Dept 1999]). Moreover, respondent tried to hide from petitioner the fact that she had given birth to the subject child while the previous neglect proceedings against her were still pending, which demonstrates she continues to have a faulty understanding of her duties as a parent.

Contrary to respondent's contention, the Family Court stated

on the record that it was entering a finding of neglect as to the subject child based upon the testimony of petitioner's two case worker witnesses and on the four exhibits submitted in evidence during the fact-finding hearing, which do not involve post-petition events.

Given the failure of counsel to offer any explanation for respondent's absence, the Family Court providently exercised its discretion in initially denying the application for an adjournment (*see Matter of Angie N.W. [Melvin A.W.]*, 107 AD3d 907, 908-909 [2d Dept 2013]). Respondent's reliance upon Family Court Act § 262(a) is misplaced under the circumstances presented here, because the record demonstrates that she was represented by substitute counsel while her assigned counsel was absent. Respondent has failed to demonstrate that she was prejudiced by the court's determination that it would proceed with the fact-finding hearing by inquest, because the record demonstrates that once respondent arrived at the hearing, the court adjourned the matter and her assigned counsel was able to review the transcript and had the opportunity to cross-examine the witness who had testified while counsel was absent.

The Family Court did not abuse its discretion by denying the child's maternal aunt's application to have custody of the child

returned to her, based on evidence that she had a tumultuous relationship with respondent and that the child was doing well in his current home. Lastly, respondent does not assert that there was a material change in circumstances warranting reassessment of the child's nonkinship foster placement.

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11597 Daniel Friedman, et al., Index 110361/11
Plaintiffs-Appellants,

-against-

16 Madison Square Housing Corp.,
Defendant-Respondent.

_____

Edelman, Krasin & Jaye, PLLC, Carle Place (Carl Binder of counsel), for appellants.

Law Office of Charles J. Siegal, New York (Christopher A. South of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered June 13, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court correctly dismissed the complaint because "there is another action pending between the same parties for the same cause of action" in Supreme Court (CPLR 3211[a][4]). The court, sua sponte, dismissed defendant's first counterclaim, not, as plaintiffs contend, because it confused the counterclaim with the complaint, but because the counterclaim is identical to a claim of defendant in the pending action. Indeed, the court expressly ordered that this action proceed as to the counterclaims to the extent they are not precluded by the pending action.

In light of the foregoing, the motion court should not have addressed whether the complaint states a cause of action (CPLR 3211[a][7]).

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11598 The People of the State of New York, Ind. 236/11
Respondent,

-against-

Claude McCree,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 26, 2011, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously reversed, on the law, the motion to suppress physical evidence and defendant's statement granted, and the indictment dismissed.

Defendant's waiver of his right to appeal was not knowingly, intelligently, and voluntarily made, as neither the court nor defense counsel made clear on the record that defendant understood that the right to appeal is separate and distinct from the numerous other trial rights automatically forfeited upon pleading guilty (*see People v Brathwaite*, 73 AD3d 656, 657 [1st

Dept 2010], *lv denied* 15 NY3d 849 [2010]; *see also People v Lopez*, 6 NY3d 248, 256 [2006]). Nor did the written waiver cure any ambiguity in the on-the-record discussion, as it did not ensure that defendant understood this concept (*compare People v Carvajal*, 68 AD3d 443 [1st Dept 2009], *lv denied* 14 NY3d 799 [2010]).

The court should have granted defendant's suppression motion. As the People concede, under the facts presented the handcuffing of defendant elevated his seizure to an arrest requiring probable cause, and probable cause was absent at the time of the handcuffing. On appeal, the People rely entirely on a claim that the incriminating statement and physical evidence were attenuated from the illegality.

Although the unlawful seizure did not yield any incriminating evidence, the evidence obtained moments later was not sufficiently attenuated (*see generally Brown v Illinois*, 422 US 590, 603-605 [1975]; *Wong Sun v United States*, 371 US 471, 486 [1963]). Immediately after defendant and his companion were frisked, while still handcuffed, they asked why they had been stopped, and the officer said, "[Y]ou have a stolen card," to which defendant replied, "I found it." After defendant's statement, the officer searched him and found a stolen credit

card. These events were a direct result of and came seconds after the unlawful arrest and frisk, without any intervening events. Therefore, the card and defendant's statement should have been suppressed as fruit of the initial illegality, notwithstanding that the statement was not the product of any interrogation or coercion (*see People v Packer*, 49 AD3d 184 [1st Dept 2008], *affd* 10 NY3d 915 [2008]).

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11600 Leroy Humphrey, Index 304279/10
Plaintiff-Appellant-
Respondent,

-against-

Park View Fifth Ave. Associates LLC, et al.,
Defendants-Respondents-
Appellants.

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Sacks & Sacks, LLP, New York (Scott Singer of counsel), for appellant-respondent.

Newman Myers Kreines Gross Harris, P.C., New York (Stephen N. Shapiro of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 9, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, and denied the cross motion of defendants property owner and construction manager for summary judgment dismissing the common-law negligence and Labor Law § 200 claims, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim. Plaintiff testified that he was injured when an aluminum beam

fell from above him, struck the 18-foot long wooden stringer that he was carrying on his shoulder, and knocked him to the ground (*see Agresti v Silverstein Props., Inc.*, 104 AD3d 409 [1st Dept 2013]). The fact that plaintiff did not see the beam hit the stringer or know where the beam fell from does not preclude partial summary judgment in his favor, as the testimony demonstrates that the beam came from somewhere above plaintiff and was a proximate cause of his injuries (*see Mercado v Caithness Long Is. LLC.*, 104 AD3d 576, 577 [1st Dept 2013]). That plaintiff was the sole witness to the accident also does not bar summary judgment in his favor (*see De Oleo v Charis Christian Ministries, Inc.*, 106 AD3d 521 [1st Dept 2013]). Furthermore, regardless of how high the beam was above plaintiff when it fell, the height differential was not de minimis, given the amount of force the aluminum beam was able to generate during its descent (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]).

Defendants are not entitled to dismissal of the common-law negligence and Labor Law § 200 claims. Because the accident arose out of the manner of the work of plaintiff's employer (Pinnacle), as opposed to a defect on the premises, the relevant inquiry is whether defendants had supervisory authority over

plaintiff's work (*see Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [1st Dept 2000]). The record shows that an employee of defendant construction manager testified that he would walk around with Pinnacle employees "and ma[d]e sure that they're doing what they're supposed to" after he became the site safety manager, and that he would "mention it" when he saw something wrong with Pinnacle's work while he was still working in the first-aid office. Such testimony raises a triable issue of fact as to whether the construction manager supervised or controlled plaintiff's work. Moreover, defendants did not submit any proof showing that defendant property owner did not have any such supervisory authority.

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

ENTERED: JANUARY 28, 2014

CLERK

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11601 The People of the State of New York, Ind. 1169/08
Respondent,

-against-

Robert Morales,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered June 29, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal sale of a firearm in the second degree, and sentencing him to concurrent terms of seven years, unanimously affirmed.

Although the record does not establish a valid waiver of defendant's right to appeal, we find that the court properly

exercised its discretion in denying youthful offender treatment, and we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2014

CLERK

Corrected Order - January 28, 2014

Acosta, J.P., Saxe, Moskowitz, Feinman, JJ.

11602N-
11602NA Index **350116/03**

Scott R. Trepel,
Plaintiff-Appellant,

-against-

Rosanne Trepel,
Defendant-Respondent.

Hennessey & Bienstock, LLP, New York (Peter Bienstock of counsel), for appellant.

Grant & Appelbaum, P.C., New York (Michael W. Appelbaum of counsel), for respondent.

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered May 24, 2012, which, to the extent appealed from as limited by the briefs, upon defendant's motion for an award of certain unpaid cost-of-living (COLA) increases in child support and distributive award interest, and for counsel fees, awarded her $38,994 in arrears and $2,500 in counsel fees, unanimously affirmed, without costs. Order, same court and justice, entered on or about February 5, 2013, which denied plaintiff's motion to renew, granted his motion to reargue, and, upon reargument, adhered to the original determination, unanimously affirmed, without costs.

The "Voluntary Payments" clause in the parties' stipulation of settlement provides that "[a]ny payments made by either party to the other . . . shall not alter that party's legal obligations

hereunder (except to the extent it discharges or satisfies such obligations), nor create any precedent for the future." This clause clearly and unambiguously expresses the intent of the parties (*see e.g. Matter of Meccico v Meccico*, 76 NY2d 822 [1990]). Since the payments to defendant that plaintiff was not obligated to make, however generous, did not satisfy any of his obligations under the stipulation, he is liable for the unpaid COLA increases and distributive award interest required by the stipulation.

Plaintiff failed to support his motion for renewal with reasonable justification for not submitting the purportedly new facts on the original motion (*see* CPLR 2221[e]). In any event, the new facts would not have changed the original determination.

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

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

ENTERED: JANUARY 28, 2014

CLERK

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

9786 Penguin Group (USA) Inc., Index 650214/12
Plaintiff-Appellant,

-against-

Time/Warner Retail Sales
& Marketing Services, Inc.,
Defendant-Respondent.

_____

Dorsey & Whitney LLP, New York (Jonathan M. Herman of counsel), for appellant.

Cravath, Swaine & Moore LLP, New York (Rowan D. Wilson of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 28, 2012, reversed, on the law, without costs, defendant's cross motion denied, and plaintiff granted partial summary judgment on its breach of contract claim. The Clerk is directed to enter judgment accordingly.

Opinion by Andrias, J.P. All concur.

Order filed.

CORRECTED ORDER - JANUARY 28, 2014

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Karla Moskowitz
Helen E. Freedman
Sallie Manzanet-Daniels
Paul G. Feinman, JJ.

9786
Index 650214/12

Penguin Group (USA) Inc.
Plaintiff-Appellant,

-against-

Time/Warner Retail Sales
& Marketing Services, Inc.,
Defendant-Respondent.

Plaintiff appeals from the order of the, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 28, 2012, which denied its motion for summary judgment on its breach of contract claim and granted defendant's cross motion for summary judgment dismissing the complaint.

Dorsey & Whitney LLP, New York (Jonathan M. Herman and Joshua Colangelo-Bryan of counsel), for appellant.

Cravath, Swaine & Moore LLP, New York (Rowan D. Wilson and Heather L. Cannady of counsel), for respondent.

ANDRIAS, J.

By agreement made as of January 1, 1997, which was amended and extended several times, plaintiff granted defendant "the exclusive right to distribute to independent distributor wholesalers" certain categories of books published by plaintiff. As part of its duties, defendant booked orders and collected payments from the wholesalers, which had the right to return unsold books to plaintiff for full credit. Defendant received commissions for its services, made payments to plaintiff based on the total price of the books shipped, less returns, and agreed to bear any losses for uncollectible accounts.

The agreement terminated effective December 31, 2010. At issue is whether the amount due plaintiff, as of the termination date, for books distributed by defendant to nonparty wholesaler Anderson News should be computed using actual returns pursuant to paragraph 13(d) of the agreement or a historical return rate pursuant to paragraph 16. The parties have resolved all outstanding balances pertaining to the agreement except for this issue and have agreed that the amount relating to the dispute is $2,353,478.89 (as discussed below).

The motion court found that paragraph 16 unambiguously allowed defendant to compute the "Net Sales" to Anderson using a historical return rate because Anderson was placed in involuntary

bankruptcy in March 2009 and ceased processing returns from its retailers, even though Anderson returned all of the unsold books in its warehouses. Accordingly, in the order appealed from, the court granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on its breach of contract claim. We now reverse and hold that paragraph 13(d) governs and that defendant is only entitled to a credit based on the actual returns and that plaintiff is entitled to recover the sum of $2,353,478.89 on its breach of contract claim.

On February 7, 2009, Anderson issued a press release announcing that it had "suspended normal business activities effective immediately." On February 19, 2009, Anderson issued a memo to its retailers stating that News Group Distribution Services, Inc. (the News Group) had acquired certain of its assets and that for certain areas would return books "currently in warehouses" and "process book product in transit or returned by a[n] Anderson News retailer." On February 25, 2009, the News Group advised retailers that the deadline for returns was February 28, 2009, and that thereafter it would have "no further responsibility to process routine customer or warehouse inventory returns on behalf of [Anderson]."

In March 2009, Anderson was placed in involuntary

bankruptcy. From April to July 2009, defendant deducted a total of $4,970,104.69 from its monthly payments to plaintiff based on the historical average rate at which plaintiff's books had been returned as unsold. In December 2009, plaintiff advised defendant that it had recovered books from Anderson's warehouses valued at $2,616,625.80 and issued defendant a credit in that amount. Plaintiff then commenced this action seeking to recover the sum of $2,353,478.89, representing the difference between the $4,970,104.69 defendant deducted based on the historical return rate and the $2,616,625.80 credit plaintiff issued based on actual returns.

"When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations" (*131 Heartland Blvd. Corp. v C.J. Jon Corp.*, 82 AD3d 1188, 1189 [2d Dept 2011]). "'Form should not prevail over substance and a sensible meaning of words should be sought'" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]).

Paragraph 13(d) of the agreement, as amended, provides that:

> "Notwithstanding the provisions of subparagraph 12(a), with respect to shipments of Books for which a payment has not been made as of the last day of the term

> hereof, whether the term ends by expiration or earlier termination (the 'unsettled Books'), Warner shall pay Publisher a sum one hundred five (105) days after the end of the term (the 'Finalization Payment'), which shall be equal to the shipments less actual returns of any unpaid Books less any Deductible Charges as defined in Paragraph 13(a)."[1]

By its express terms, paragraph 13(d) governs the "Finalization Payment" due plaintiff upon the agreement's termination and establishes defendant's obligation to make a payment equal to the shipments less actual returns. Paragraph 16, entitled "Wholesaler Bankruptcy - Computation of Net Sales," does not require otherwise under the circumstances before us.

Paragraph 16 provides:

> "In the event that any Wholesaler voluntarily or involuntarily takes advantage of any federal or state insolvency law for relief of debtors, including reorganization, or shall cease its business operation with the effect that such Wholesaler fails to return its unsold copies of the Books, Warner shall be entitled to compute Net Sales applicable to the uncollected amount on a per-title basis for all unsettled titles for the period of such failure on the basis of the average Net Sales of Books reported by such Wholesaler for the twelve (12) months (or such lesser period if applicable) prior to the period of such failure. Warner shall use all reasonable efforts to prevent the copies of Books in such Wholesaler's inventory from re-entering the market in returnable condition, including the purchase by Warner of such

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[1]Paragraph 13(a), among other things, allows defendant to deduct from payments to plaintiff "actual returns" and "any overpayments and all other proper charges, payments or other reimbursements due Warner pursuant to the terms of this Agreement or otherwise authorized by Publisher hereunder."

inventory copies if same are generally offered for sale or auction and are available to Warner for purchase."[2]

In holding that paragraph 16 governs the amount due with respect to books sold to Anderson, the motion court rejected plaintiff's argument that the phrase "with the effect that such Wholesaler fails to return its unsold copies of the Books" applies to both bankruptcy and the cessation of business operations. The court reasoned that if the phrase applied to both, "then there would be a comma after the word 'operation' in ¶ 16." Thus, the court found that "the period in which a wholesaler is in bankruptcy is itself a 'failure'," even if the wholesaler returns all copies of the books. However, "[i]t is a cardinal principle of contract interpretation that mistakes in grammar, spelling or punctuation should not be permitted to alter, contravene or vitiate manifest intention of the parties as gathered from the language employed" (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 109 [1st Dept 2012]). There is no dispute that the purpose of paragraph 16 was to account for circumstances under which the normal

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[2]The agreement defines "Net Sales" as "the number of copies of the Book shipped by Publisher pursuant to Warner's instructions, minus all copies returned pursuant hereto" and "Net Billings" as "the Wholesale Price of the Book multiplied by Net Sales, minus 'Warner's Commission' as set forth in paragraph 10 below."

processing of returns would likely be interrupted, so that the actual rate of returns would be an unreliable indicator of actual copies sold. "[I]t is untenable that the parties would have intentionally left the meaning of their agreement to such vagaries as placement and punctuation" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 68 [1st Dept 2008], *affd* 13 NY3d 398 [2009], *supra*). Paragraph 16 addresses a wholesaler's failure to return unsold books during the period of the failure; Anderson returned more than $2.6 million worth of books in its possession after it ceased operations and was placed into involuntary bankruptcy.

Defendant asserts that Anderson has not processed returns from its retailers, but provides no proof of its assertion. Indeed, according to the affidavit of an Anderson vice president, after the commencement of the bankruptcy proceeding, "Anderson News began making arrangements to return to all book publishers books that Anderson News still held in stock, including books that had been returned for credit to Anderson News by its retail customers."

In holding that paragraph 16 governs, the motion court also found that the defined term "Net Sales" has "always been included [in] and never [been] removed" from paragraph 13(d). In so ruling, the court ignored the plain language of the agreement.

Paragraph 13(d) makes no reference to "Net Sales" and refers only to actual returns.

The motion court also opined that a calculation based on actual returns would result in an overpayment to plaintiff. However, defendant cannot suffer any adverse financial consequence in connection with the unsold books unless they are actually returned and it issues a credit for those returns without receiving a corresponding credit from plaintiff. Significantly, defendant is not offering to distribute to retailers the nearly $2.4 million it has withheld based on the historical return rate. Moreover, defendant, which agreed to bear any losses for uncollectible accounts, has filed a proof of claim in the Anderson bankruptcy seeking $81,138,884 for magazines and books shipped to Anderson, including $6,447,918.67 owed for plaintiff's books.

Accordingly, the order of the, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 28, 2012, which denied plaintiff's motion for summary judgment on its breach of contract claim and granted defendant's cross motion for summary

judgment dismissing the complaint, should be reversed, on the law, without costs, defendant's cross motion denied, and plaintiff granted partial summary judgment on its breach of contract claim in the amount of $2,353,478.89. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: JANUARY 28, **2014**

CLERK