SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 24, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11720N In re Elizabeth Mason, etc., Index 115352/03
Petitioner/Respondent-Appellant,

-against-

City of New York,
Respondent,

Michael Strohbehn, etc.,
Respondent/Petitioner-Respondent.

_____

Elizabeth A. Mason, New York, appellant pro se.

Schwartz & Blumenstein, New York (Clifford E. Schwartz of counsel), for Michael Strohbehn, respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 27, 2012, which, following an evidentiary hearing, found that respondent/cross-petitioner-respondent Michael Strohbehn was not discharged for cause and is entitled to receive a quantum meruit attorney's fee in the amount of $109,425.39, unanimously modified, on the facts and in the exercise of discretion, to the extent that the quantum merit attorney's fee is reduced to $72,220, and otherwise affirmed, without costs.

The hearing court's determination, based largely on its assessment of the credibility of the witnesses, is supported by a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Thus, there is no basis to disturb its finding that Strohbehn was not discharged for cause.

Given Strohbehn's experience, the difficulty of the case, and the amount of work he and his staff dedicated to the matter prior to and during the first trial, the hearing court providently exercised its "broad discretion" in finding that he is entitled to a quantum meruit attorney's fee (*Matter of Hoffmann*, 38 AD3d 366, 367 [1st Dept 2007], *lv denied*, 9 NY3d 801 [2007]). However, in the exercise of our discretion, we find that the court gave undue weight to Strohbehn's contribution to the ultimate result in the case. Therefore, we reduce the attorney's fee to $72,220.

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

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

ENTERED: JUNE 24, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11726 In re Joshua Kiess, Index 110044/11
Petitioner-Respondent,

-against-

Raymond Kelly, etc., et al.,
Respondents-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for appellants.

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered October 15, 2012, granting the petition to annul respondents' determination, dated May 11, 2011, which denied petitioner accident disability retirement pension benefits, to the extent of remanding the matter to the Medical Board for further processing, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

Petitioner resigned from the New York City Police Department on January 30, 2008. Since there is no evidence that any of the municipal respondents acted in bad faith with respect to petitioner's separation from city service (*see Matter of Bellman v McGuire*, 140 AD2d 262, 266 [1st Dept 1988]), the Board of Trustees was "required by law" to deny his application for

accidental disability retirement benefits (*Matter of Sheridan v Ward*, 125 AD2d 274, 275 [1st Dept 1986], *lv denied* 69 NY2d 609 [1987]; *see* Administrative Code of City of NY §§ 13-215, 13-252).

Although respondents could have, but failed to, raise the issue of petitioner's separation from city service during a prior appeal to this Court (*see* 75 AD3d 416 [1st Dept 2010] [*Kiess I*]), the doctrine of res judicata does not preclude them from doing so now, as there has never been a final adjudication on the merits to support application of that doctrine (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). Nor are respondents precluded from raising the issue by the doctrines of collateral estoppel and law of the case. *Kiess I* was decided solely on the ground of the Medical Board's failure to adequately review petitioner's application. In that prior appeal, no party made an argument based on the effect of petitioner's separation of service, and this Court did not pass on or decide that issue (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]; *cf. Scofield v Trustees of Union Coll.*, 288 AD2d 807, 808 [3d Dept 2001]).

Even assuming that the elements of equitable estoppel are met here, there is no basis for estopping the municipal respondents from denying petitioner's application, which they are statutorily mandated to do (*see Walter v City of New York Police Dept.*, 256 AD2d 8, 9 [1st Dept 1998]).

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

ENTERED: JUNE 24, 2014

CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11850 Braulio Milton Penaranda, Index 100963/10
Plaintiff-Appellant-Respondent, 590179/11

-against-

4933 Realty, LLC,
Defendant/Third-Party
Plaintiff-Respondent-Appellant,

-against-

NY Construction Work Inc. doing
business as K&S Construction,
Third-Party Defendant-Respondent.

_____

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for appellant-respondent.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondent-appellant.

Kral Clerkin Redmond Ryan Perry & Van Etten LLP, Melville (Joseph C. Bellard of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 13, 2012, which granted defendant-respondent landlord's motion for summary judgment dismissing plaintiff's complaint and granted third-party defendant tenant's motion to dismiss the third-party complaint against it, unanimously modified, on the law, to the extent of reinstating the Labor Law § 240(1) claim and holding the motion to dismiss the third-party complaint for indemnification in abeyance, and otherwise affirmed, without costs.

Plaintiff was injured while employed by third-party defendant tenant K&S Construction when he was thrown from a "Bobcat" front-end loader. Defendant landlord had contracted with third-party defendant tenant, plaintiff's employer, to construct a concrete curb around the perimeter of the nearby parking lot. Plaintiff was helping to remove plywood, which was allegedly interfering with the construction project, and was positioned on the Bobcat in order to provide balance or serve as a counterweight for the plywood in the Bobcat's front bucket. He was thrown off when the two back wheels of the Bobcat lifted up unexpectedly.

The issue is whether plaintiff was engaged in construction work when moving the plywood so as to afford him the protection of the Labor Law. If, as plaintiff alleges, the plywood was being moved to clear the work site where the curb was under construction, plaintiff was "altering" the premises within the meaning of Labor Law § 240(1) (*see Santiago v Rusciano & Son, Inc.*, 92 AD3d 585, 586 [1st Dept 2012]). Since the landlord and K&S Construction submitted evidence that the accident occurred in the warehouse and that the construction work and plaintiff's activity were unrelated, a question of fact has been raised.

Assuming that plaintiff was engaged in construction work, we find that falling from the Bobcat is the type of gravity-related

event contemplated by the Court of Appeals in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]). In *Potter v Jay E. Potter Lbr Co., Inc.* (71 AD3d 1565 [4th Dept 2010]), the Fourth Department, relying on *Runner*, similarly found that a worker, who like plaintiff here, was positioned as a counterweight for a load on a forklift and was catapulted forward when the forklift became unstable, was entitled to the protection of Labor Law § 240(1). To the extent that our holding in *Modeste v Mega Contr., Inc.* (40 AD3d 255 [2007]), is to the contrary, we depart from it based on the holding in *Runner.*

The provisions of the Industrial Code invoked by plaintiff do not support his Labor Law § 241(6) claim, and, accordingly, that claim was properly dismissed (see *Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004 [2d Dept 2009] [NYCRR 1223-9.2(b)(1) requirements are merely restatement of common-law rule] and *Modeste*, 40 AD3d at 256 [NYCRR 1223-9.29(c) [excessive loading prohibitions insufficient to support Labor Law § 241(6) claim]).

The motion to dismiss the third-party complaint for indemnity should be held in abeyance pending the determination of whether plaintiff was engaged in performing work under the construction contract and whether defendant landlord had any direct role. Defendant landlord alleges that it is entitled to contractual indemnity pursuant to the construction agreement

between it and third-party defendant K&S. We note that defendant landlord did not plead entitlement to indemnity pursuant to the lease.

The Decision and Order of this Court entered herein on March 11, 2014 is hereby recalled and vacated (*see* M-1781 decided simultaneously herewith).

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

ENTERED: JUNE 24, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11964-
11965 Index 651185/12

Plymouth Financial Company, Inc.,
Plaintiff-Respondent,

-against-

Plymouth Park Tax Services LLC,
Defendant-Appellant.

_____

Montgomery McCracken Walker & Rhoads, LLP, New York (Charles Palella of counsel), for appellant.

Ira Daniel Tokayer, New York, for respondent.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 5, 2013, in plaintiff's favor, and bringing up for review an order, same court and Justice, entered on or about April 18, 2013, which, inter alia, granted plaintiff's motion for summary judgment, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion for summary judgment denied, defendant's cross motion for summary judgment granted, and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties disagree as to how much of a $1 million "hold-back payment" detailed in their asset purchase agreement (APA)

defendant must pay to plaintiff. Defendant contends that it is entitled to reduce the amount of its payment by the amount of an indemnification found in the APA's section 8.1(a)(v), for costs associated with a specifically identified litigation matter known as the "MRS Litigation." Plaintiff argues that defendant must pay the full $1 million and cannot deduct the indemnification, because its affiliate company acquired separate counsel in the MRS Litigation and, according to section 8.6 of the APA, this separate counsel was obtained at defendant's expense.

The motion court correctly determined that section 8.6 was intended to apply only to future third-party claims, while the indemnification in section 8.1(a)(v) was intended to apply specifically to the then-pending MRS Litigation. However, the court incorrectly applied the provisions of section 8.6 to the MRS Litigation indemnification regardless of this distinction. Section 8.1(a)(v) evinces the parties' clear intent to place the risk of "any and all losses" connected to the MRS Litigation, including legal fees, "whether arising before or after the Closing," squarely on plaintiff. The provisions of section 8.6 cannot be read to limit the indemnification found in section 8.1(a)(v), as this interpretation would vitiate the language of section 8.1(a)(v), rendering it meaningless (*see US Bank N.A. v Lightstone Holdings LLC*, 103 AD3d 458, 459 [1st Dept 2013]).

Accordingly, defendant is correct in asserting that it is entitled to reduce the amount of its $1 million hold-back payment by the amount of the MRS Litigation indemnification. Therefore, plaintiff's claim for breach of contract must be dismissed.

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

ENTERED: JUNE 24, 2014

CLERK

Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels, Feinman, JJ.

12746 In re Aidan Doorley, Index 103576/12
Petitioner-Appellant.

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered February 11, 2013, denying the petition to annul respondents' determination, dated May 11, 2012, which denied petitioner's application for accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Credible evidence supported the denial of petitioner's application for accidental disability benefits (*see generally Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]). The Medical Board reviewed voluminous medical records concerning petitioner, and resolved the conflict in the medical evidence by relying on its

physical examinations and medical judgment (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]). The Medical Board reasonably rejected the findings of petitioner's doctors based on the emergency room records from the day of the accident, which reflected that petitioner sustained a minor facial abrasion.

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: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12840 The People of the State of New York, Respondent, Ind. 1549/09

-against-

Joseph Richards, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Denise Fabiano 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 (Patricia M. Nunez, J.), rendered April 7, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, criminal possession of a forged instrument in the second degree and unlicensed driving, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

The court did not deprive defendant of his right of self-representation. Defendant failed to make a clear and unequivocal request to represent himself (*see People v McIntyre*, 36 NY2d 10, 17 [1974]; *People v Ramos*, 35 AD3d 247 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]), and thus did not express the "definitive commitment to self-representation" (*People v LaValle*, 3 NY3d 88, 106 [2004]) that would trigger the need for a full inquiry by

the court as to whether it should permit him to proceed pro se (*compare People v Lewis*, 114 AD3d 402 [1st Dept 2014] [defendant unequivocally requested self-representation following denial of request for new counsel]). "So that convicted defendants may not pervert the system by subsequently claiming a denial of their pro se right, the pro se request must be clearly and unconditionally presented to the trial court" (*McIntyre*, 36 NY2d at 17). Although defendant made remarks that may have suggested that he wanted to represent himself, when the court tried to clarify the situation, defendant made confusing statements such as "I am not an attorney to go pro se."

The court properly instructed the jury that the knowledge element for possession of a gravity knife 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 Parrilla*, 112 AD3d 517 [1st Dept 2013]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12841 Yarn Trading Corp., et al., Index 115708/10
Plaintiffs-Respondents,

-against-

United Pads & Trim Inc., et al.,
Defendants-Appellants.

_____

Law Office of Michael J. Sweeney, P.C., Yonkers (Michael J. Sweeney of counsel), for appellants.

Weisberg & Weisberg, New York (Harold H. Weisberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered December 6, 2012, which denied defendants' motion for partial summary judgment seeking a declaration that plaintiffs, lessors of machinery equipment, lacked ownership rights in said equipment, and for summary judgment dismissing the action against the individual defendant, unanimously affirmed, with costs.

In this action for breach of the parties' one-year lease agreement for manufacturing equipment with an option to buy, there is a dispute regarding who is the rightful owner of the equipment. Plaintiffs allege that they purchased the equipment from the deceased owner's widow. Defendants allege that the equipment is owned by the deceased's estate and that only they were authorized by the estate to use the equipment. The evidence

submitted, including, inter alia, the individual plaintiff's (plaintiff corporation's principal) sworn statements, a bill of sale, and a check from plaintiff corporation made payable to the estate's subsequently appointed administrator, raises triable issues of fact as to whether the deceased's heirs should be estopped from contesting plaintiffs' alleged ownership of the deceased's business assets (*see generally Favill v Roberts*, 50 NY 222, 225-226 [1872]; *Ford v Livinston*, 140 NY 162, 167 [1893]), and, if so, whether defendants should be precluded from disclaiming their machinery lease obligations to plaintiffs.

The deposition testimony, affidavits, and lease agreement also raise triable issues as to whether the individual defendant negotiated, as well as signed, the lease agreement in his personal capacity or only as an agent on behalf of the corporate defendant (*see e.g. Parrot v Logos Capital Mgt. LLC*, 91 AD3d 488 [1st Dept 2012]; *Gullery v Imburgio*, 74 AD3d 1022 [2d Dept 2010]).

To the extent defendants contest a subsequent order, same court and Justice, entered January 16, 2014, which denied their motion denominated as one for renewal and reargument, they did not file a notice of appeal therefrom and, in any event, no appeal lies from the denial of reargument (*see DiPasquale v Gutfleisch*, 74 AD3d 471 [1st Dept 2010]), and no new facts

previously unavailable were offered to warrant renewal (CPLR 2221[e], *Rosado v Home Depot*, 4 AD3d 204 [1st Dept 2004]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12842-
12843 In re Jessica Marie C.,

A Child Under Eighteen
years of Age, etc.,

Anthony H.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

- - - - -

In re Anthony H.,
Petitioner-Appellant,

Administration for Children's Services,
Respondent.

_____

Kenneth Walsh, New York, for appellant.

John R. Eyerman, New York, for Edwin Gould Services for Children and Families, respondent.

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

_____

Order of custody and disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 21, 2012, which, after a hearing, dismissed appellant father's petition for custody of the subject child, and committed custody and guardianship of the child to petitioner agency and respondent Administration for Children's Services (ACS) for the purpose of adoption, unanimously affirmed, without costs.

The court providently exercised its discretion in combining the dispositional hearing with the hearing as to whether extraordinary circumstances warranted awarding custody of the child to a nonparent.

The court properly found that extraordinary circumstances warranted denying the father's custody petition, in that he failed to assume a primary parental role during most of the child's life, and had a persistent pattern of criminal conduct which resulted in many convictions and long periods of incarceration. The father acknowledged that, although he lived with the child until she was three months old, he visited her only once during the time she was in foster care, and waited until the child was over three years old to file a custody petition, and that during his numerous incarcerations, the child developed a stable and loving relationship with her preadoptive foster mother (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544-546 [1976]).

The court correctly determined that it was in the best interests of the child to commit custody and guardianship of her to the agency and ACS for the purpose of adoption, in that she was loved and cared for by the foster mother for most of her

life, barely knew the father, and was thriving in the foster home (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Colon v Delgado*, 106 AD3d 414, 414-415 [1st Dept 2013]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12844-
12845 Index 8133/01

Vincent L., Jr., an Infant by
His Mother and Natural Guardian,
Chanel T., et al.,
Plaintiffs-Appellants-Respondents,

-against-

AKS 183rd St. Realty Corp.,
Defendant-Respondent,

1211 Wheeler LLC,
Defendant-Respondent-Appellant.

_____

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

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

Furey, Furey, Leverage, Manzione, Williams & Darlington, P.C., Hempstead (Kenya S. Hargrove of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered September 19, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion to strike defendants' answers to the extent of precluding defendant 1211 Wheeler LLC (Wheeler) from introducing evidence that it lacked notice of a hazardous lead paint condition, and denied Wheeler's motion to compel plaintiffs to produce authorizations for the medical and educational records of the infant plaintiff's nonparty siblings, unanimously modified, on the law and the

facts, to grant plaintiffs' motion to the extent of striking Wheeler's answer, and otherwise affirmed, without costs.

During the pendency of a stay of this action, Wheeler sold the premises where the infant plaintiff was allegedly exposed to lead, and all the building records and tenant files were lost. We find that since the loss of these records deprived plaintiffs of the means of establishing their prima facie case, the extreme sanction of striking Wheeler's answer is warranted (*see e.g. Gray v Jaeger*, 17 AD3d 286 [1st Dept 2005]; *see also Herrera v Matlin*, 303 AD2d 198 [1st Dept 2003]).

We agree with the motion court that defendant AKS 183rd St. Realty Corp. substantially complied with discovery notices and orders.

Wheeler failed to demonstrate its entitlement to the medical and academic records of the infant plaintiff's nonparty siblings (*see Vazquez v New York City Hous. Auth.*, 79 AD3d 623 [1st Dept 2010]; *Monica W. v Milevoi*, 252 AD2d 260, 262 [1st Dept 1999]).

In any event, plaintiff mother did not waive the physician-patient privilege with respect to the siblings' medical records (*see* CPLR 4504[a]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12846 Ebony D. Washington, Index 311100/11
Plaintiff-Respondent,

-against-

Mehdi Janati,
Defendant-Appellant.

_____

Mehdi Janati, appellant pro se.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered March 5, 2013, which denied defendant's motion to vacate the judgment of annulment entered upon his default and replace it with a judgment of divorce, unanimously affirmed, without costs.

Defendant failed to demonstrate a reasonable excuse for his default (*see* CPLR 5015[a]; *Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]). His bare contentions that he did not understand the consequences of the fraud ground in Domestic Relations Law § 140(e) and that he could not afford an attorney do not constitute reasonable excuses for his failure to appear in the action.

In the absence of a reasonable excuse, we need not consider whether defendant demonstrated a meritorious defense to the annulment action (*M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [1st Dept 2009]).

In any event, however, we note that defendant does not dispute that he consented to the annulment.

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12848-
12849 The People of the State of New York, Ind. 870/07
Respondent,

-against-

Brian Carmichael,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about December 14, 2012, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered December 10, 2007, unanimously affirmed.

The motion court correctly rejected defendant's claim of ineffective assistance of counsel. Defendant has not established that any of his trial counsel's alleged errors or omissions resulted in prejudice under the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Regardless of whether counsel should have sought to suppress defendant's statement on the ground of violation of the right to counsel, defendant has not shown a reasonable probability that

such a claim would have been successful. Under all the circumstances, defendant's comments that "maybe" he should talk to a lawyer did not constitute an unequivocal request for counsel (*see Davis v United States*, 512 US 452, 459 [1994] *People v Wilson*, 93 AD3d 483 [2012], *lv denied* 19 NY3d 978 [2012]).

Regardless of whether counsel should have made a more detailed attempt to establish a prima facie case of discrimination pursuant to *Batson v Kentucky* (476 US 79 [1986]), defendant has not shown that such efforts would have ultimately resulted in the seating of any jurors peremptorily challenged by the prosecutor. In any event, defendant has not shown that any *Batson* violation resulted in an unfair jury (*see Morales v Greiner*, 273 F Supp 2d 236, 253 [ED NY 2003]).

Defendant has not established that his counsel's decision not to call certain potential witnesses deprived defendant of a fair trial or had a reasonable probability of affecting the outcome of the case. At best, these witnesses would have suggested an innocent explanation for minor portions of the prosecution's case. Moreover, the submissions on the 440.10 motion establish that counsel made a strategic decision not to call these witnesses, and we conclude that this strategy did not

fall below an "objective standard of reasonableness" (*Strickland*, 466 US at 688).

Defendant's challenges to the prosecutor's opening statement and summation are not cognizable by way of a CPL 440.10 motion, and are without merit in any event.

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12850 Dorothy Vaughn, Index 118311/09
Plaintiff-Appellant,

-against-

Harlem River Yard Ventures II, Inc., et al.,
Defendants-Respondents.

_____

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

Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 26, 2013, which, insofar as appealed from as limited by the briefs, granted the motion of defendants News America Incorporated and NYP Holdings, Inc. d/b/a The New York Post for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that she tripped and fell on a cracked and broken curb of a sidewalk. Defendants submitted, inter alia, deposition testimony showing that they did not create, and had no prior actual or constructive notice of the allegedly defective condition of the curb (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact. Her testimony that she had given notice of a similar condition at different locations is insufficient to constitute prior notice of the specific defect (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]). The court properly disregarded plaintiff's claim, in an affidavit, to have observed delivery trucks scraping or driving over the area at issue, as being contradicted by her deposition testimony (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008]; *Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). Plaintiff's reliance on the testimony of a nonparty witness was misplaced as the witness had not see the alleged defect before the accident and had not observed any vehicles scrape the curb in that area, and the only repairs he observed took place after plaintiff's accident. Furthermore, there was nothing in the photographs depicting the area from which one "could [] infer[] from the irregularity, width, depth and appearance of the defect

. . .that the condition had to have come into being over such a length of time that knowledge thereof should have been acquired by the defendant in the exercise of reasonable care" (*Taylor v New York City Tr. Auth.*, 48 NY2d 903, 904 [1979]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12852 Maria Webster Benham, Index 101160/11
Plaintiff-Respondent,

-against-

eCommission Solutions, LLC,
etc., et al.,
Defendants-Appellants.

_____

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Michael A. Miranda of counsel), for appellants.

Fensterstock & Partners LLP, New York (Alison G. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 9, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint's first through seventh and tenth causes of action, sounding in disability- and gender-based discrimination in violation of the New York State and City Human Rights Laws (HRL), breach of contract, promissory estoppel, unjust enrichment, and intentional infliction of emotional distress, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Because the alleged conduct occurred while plaintiff was physically situated outside of New York, none of her concrete

allegations of harassing behavior or other discriminatory conduct had the "impact" on plaintiff in New York required to support claims under the State and City HRL (*Hoffman v Parade Publ.*, 15 NY3d 285, 289-291 [2010]; *Shah v Wilco Sys., Inc.*, 27 AD3d 169, 175-176 [1st Dept 2005], *lv dismissed* 7 NY3d 859 [2006]). Plaintiff's HRL claims must thus be dismissed for lack of subject matter jurisdiction, since the statutes do not apply to the conduct at issue (*see* CPLR 3211[a][2]; *Hoffman*, 15 NY3d at 289).

Plaintiff's argument that, because she filed New York State nonresident income tax returns and paid income taxes here, she is entitled to the "protections, benefits and values" of New York government, including the State and City HRL (*Matter of Zelinsky v Tax Apps. Trib. of State of N.Y.*, 1 NY3d 85, 95 [2003], *cert denied* 541 US 1009 [2004]; *see Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 4 NY3d 427, 438 [2005], *cert denied* 546 US 976 [2005]), is unavailing. Whether New York courts have subject matter jurisdiction over a nonresident plaintiff's claims under the HRLs turns primarily on her physical location at the time of the alleged discriminatory acts, and not on her taxpayer status (*see Hardwick v Auriemma*, 116 AD3d 465 [1st Dept 2014]; *Sorrentino v Citicorp*, 302 AD2d 240 [1st Dept 2003]; *see also* Executive Law § 298-a [distinguishing among claims by residents and nonresidents]).

Viewed in the light most favorable to plaintiff as non-movant, the record indicates that, at most, the parties had a mere "agreement to agree" that plaintiff should receive some sort of equity stake in defendant eCommission Solutions, LLC (ECS), with the terms of that stake subject to future negotiations and approval. The failure of the parties to agree on the precise form of the equity stake causes plaintiff's contract claim to fail for lack of definiteness in the material terms of her equity compensation (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *Mark Bruce Intl. Inc. v Blank Rome, LLP*, 60 AD3d 550, 551 [1st Dept 2009]. Defendants are entitled to summary judgment dismissing plaintiff's claim for breach of contract. The lack of definiteness in the promise of equity compensation is similarly fatal to plaintiff's promissory estoppel claim (*New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]; *see Glanzer v Keilin & Bloom*, 281 AD2d 371, 372 [1st Dept 2001]).

Plaintiff's unjust enrichment claim, which seeks precisely the same damages as her claim for breach of contract, is "indistinguishable from [her] claim for breach of contract" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 484 [1st Dept 1991]), and must be dismissed as duplicative of the

contract claim (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791 [2012]; *Walter H. Poppe Gen. Contr. v Town of Ramapo*, 280 AD2d 667, 668 [2d Dept 2001]).

Plaintiff's allegations fall well short of the level of outrageousness necessary to establish a claim of intentional infliction of emotional distress (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]; *Zephir v Inemer*, 305 AD2d 170, 170 [1st Dept 2003]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12855 Lower East Side II Associates, L.P., Index 653362/11
Plaintiff-Respondent,

-against-

349 E. 10th Street, LLC,
Defendant-Appellant.

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Eli Raider of counsel), for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 25, 2013, which denied defendant's motion for leave to renew plaintiff's motion for partial summary judgment on the issue of liability on its causes of action for encroachment and trespass, unanimously affirmed, with costs.

The court properly denied defendant's motion for leave to renew, as the expert affidavit it submitted in support of the motion does not contain "new" facts unknown to defendant at the time of plaintiff's prior motion (CPLR 2221[e][2]; *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]). Indeed, defendant retained the expert two weeks before the due date of its opposition papers to plaintiff's motion, yet it failed to timely submit the affidavit. Moreover, it has not offered a reasonable justification for its failure

(*see* CPLR 2221[e][3]).

In any event, the affidavit would not have changed the prior determination (*see* CPLR 2221[e][2]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12856 Associated Community Bancorp, Inc., et al., Plaintiffs-Appellants, Index 651047/12

-against-

St. Paul Mercury Insurance Company, Defendant-Respondent.

Willkie Farr & Gallagher LLP, New York (Francis J. Menton of counsel), for appellants.

Loss, Judge & Ward, LLP, Washington DC (Thomas J. Judge of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 11, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court correctly found that the underlying claims against plaintiffs brought by investors following the revelation of the Ponzi scheme of Bernard L. Madoff are subject to certain exclusions from coverage under the "Bankers Professional Liability Insuring Agreements" issued to plaintiffs by defendant.

The Loss of Money Exclusion bars coverage for claims for "the actual loss of money, securities, property or other items of value in the custody or control of [the bank]." Contrary to plaintiffs' contention, the investors' allegation that the money in their accounts with Bernard L. Madoff Investment Securities

(BLMIS) was stolen, unlawfully retained, or misappropriated is a claim for an actual loss of money (*see Blenzak Black, LLC v Allied World Natl. Assur. Co.*, 2012 WL 1365973, *2-3 [NJ Super Ct App Div 2012]). Moreover, "[a]n insurance policy is not illusory if it provides coverage for some acts; 'it is not illusory simply because of a potentially wide exclusion'" (*ACE Capital Ltd. v Morgan Waldon Ins. Mgt., LLC*, 832 F Supp 2d 554, 572 [WD Pa 2011]). The subject policies provide a broad range of coverage for liability that may arise in connection with plaintiffs' provision of ordinary banking services.

The Personal Profit and Advantage Exclusion bars coverage for loss "based upon, arising out of, or attributable to [the] Insured gaining in fact any personal profit, remuneration or financial advantage to which such Insured was not legally entitled." The investors' allegation that plaintiff Westport National Bank used incoming funds to pay its own fees and to sustain its custodial business and continue to generate its fees implicates a "profit" and a "financial advantage to which [Westport] was not entitled" (*see Plainview Milk Prods. Coop. v Westport Ins. Corp.*, 182 F Supp 2d 852, 855 [D Minn 2001]). Nor is the exclusion inapplicable because the insured is a corporate "person" (*id.*).

The Sale of Securities Exclusion bars coverage for any claim "based upon, arising out of, or attributable to: (a) the [bank's] underwriting, syndication, or promotion of equity or debt securities; (b) the [bank's] investment banking activities, including the sale and distribution of a new offering of securities; [or] . . . (e) any disclosure requirements in connection [therewith]." The underlying regulatory action against plaintiffs alleges that, by depositing the investors' funds in omnibus accounts and allocating shares in those accounts to the investors, plaintiffs engaged in the sale or promotion of unregistered securities and failed to provide the required disclosures. Thus, the exclusion bars coverage of the claims asserted in the regulatory action.

The Insolvency Exclusion bars coverage for loss "based upon, arising out of, or attributable to the insolvency . . . of . . . any . . . investment company, investment bank, or any broker or dealer in securities or commodities." Insolvency exclusions have been held to apply despite the fact that the underlying claims are made against parties that are "independent of the insolvent entity" (*Coregis Ins. Co. v American Health Found., Inc.*, 241 F3d 123, 130-131 [2d Cir 2001]). Further, the courts of Connecticut (whose law applies to this action) have interpreted broadly the

term "arising out of" in insurance policies (*see Board of Educ. of the City of Bridgeport v St. Paul Fire & Marine Ins. Co.*, 801 A2d 752, 758 [Conn 2002]). The investors' claims certainly are "connected with," "had [their] origins in," "grew out of," "flowed from" or "[were] incident to" Madoff's Ponzi scheme and the insolvency of BLMIS (*see id.* [internal quotation marks omitted]). Thus, the Insolvency Exclusion bars coverage for those claims.

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12857 Casler Masonry, Inc., Index 602431/08
Plaintiff-Respondent,

-against-

Barr & Barr, Inc.,
Defendant/Third-Party Plaintiff-Appellant-Respondent,

-against-

Liberty Mutual Insurance Company,
Third-party Defendant-Respondent-Appellant.

_____

Duane Morris LLP, New York (Mark A. Canizio of counsel), for appellant-respondent.

Sheats & Bailey, PLLC, Brewerton (Edward J. Sheats of counsel), for respondent-appellant and respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 15, 2014, to the extent it denied defendant's motion for summary judgment declaring that Change Orders No. 2 and No. 13 are "cost plus" change orders and dismissing the cause of action for an account stated, and denied third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously affirmed, with costs, and appeal from the part of the order that denied as premature defendant's motion to preclude plaintiff from offering expert testimony at trial as to "fixed price" change orders, unanimously dismissed, without costs, as taken from a nonappealable paper.

The motion court correctly found that change order 2 is ambiguous, since the notation on the first page that the "Total Not-to-Exceed Cost" is $622,323 and the statement on the second page that "[t]he Contract Value will be changed by this Subcontract Change Order in the amount of $622,323" appear to contradict each other, and that therefore the meaning of the change order cannot be determined as a matter of law (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

In accordance with the foregoing, the cause of action for an account stated cannot be determined as a matter of law.

Issues of fact preclude summary dismissal of defendant's cause of action on the performance bond issued by third-party defendant guaranteeing plaintiff's performance of the subcontract. While third-party defendant contends that plaintiff completed its contract work, including the remediation, thereby relieving third-party defendant of its obligation, an affidavit submitted by defendant states that plaintiff did not perform all the remedial work and indeed refused to do certain portions of the work, which defendant hired another subcontractor to complete.

No appeal lies from the denial of defendant's motion to preclude evidence (*see Santos v Nicolas*, 65 AD3d 941 [1st Dept 2009]).

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12858 The People of the State of New York, Respondent, Ind. 2561/10

-against-

Anthony Singletary, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 16, 2011, as amended September 29, 2011, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of three years, with two years' postrelease supervision, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

Defendant's plea agreement provided that he would receive a sentence of one year to be followed by one year of postrelease supervision, on the condition that, among other things, he appear for sentencing. The court advised defendant that if he violated the terms of his plea agreement, the sentencing agreement would be vacated and the court could impose a prison sentence of up to nine years. However, the court did not mention that the enhanced

sentence would also include PRS. When defendant failed to appear for sentencing and was returned to court involuntarily, the court imposed a sentence that included two years' PRS.

The court was required to advise defendant that his enhanced sentence would include PRS, and was also required to specify the length of the term of PRS to be imposed (*see People v McAlpin*, 17 NY3d 936 [2011]). The prosecutor's mention of PRS immediately before sentencing was not the type of notice under *People v Murray* (15 NY3d 725 [2010]) that would require defendant to preserve the issue (*see People v Shanks*, 115 AD3d 538 [1st Dept 2014]; *People v Rivera*, 91 AD3d 498 [1st Dept 2012], *appeal withdrawn* 18 NY3d 961 [2012]). Accordingly, defendant is entitled to vacatur of the plea.

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12862 The People of the State of New York, SCI 1202/12
Respondent,

-against-

Finesse Thomas,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 12, 2012, convicting defendant, upon her plea of guilty, of grand larceny in the third degree and identity theft in the first degree, and sentencing her to concurrent terms of six months, with five years' probation, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination.

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12863N Domineck Carriero, Index 105779/10
Plaintiff-Respondent,

-against-

New York City School Construction Authority, et al.,
Defendants-Appellants.

_____

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

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 3, 2013, which denied defendants' motion for leave to amend their answer, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Leave to amend should have been granted, since the proposed affirmative defense of a setoff has merit (*see Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]; *see also Herrick v Second Cuthouse*, 100 AD2d 952, 953 [2d Dept 1984], *affd* 64 NY2d 692 [1984]). Indeed, defendants may be successive tortfeasors entitled to a setoff under General Obligations Law § 15-108, given that plaintiff settled another lawsuit 13 years ago against different defendants in which, as here, he claimed to

be "permanently disabled" from working as an electrician (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 82-84 [1986]; *see also Herrick*, 100 AD2d at 953). Defendants may also be entitled to a setoff under CPLR 4545, as the prior settlement may have reimbursed plaintiff for the same "loss of earnings" for which he now sues (CPLR 4545[a]; *see Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]). Plaintiff's argument that evidence of the prior settlement should be excluded at trial is premature, given that this action is only at the pleading stage.

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

ENTERED: JUNE 24, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

12864N Anthony Colarossi, Index 154632/12
Plaintiff-Respondent,

-against-

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

_____

Cartafalsa, Slattery, Turpin & Lenoff, New York (Louis A. Carotenuto of counsel), for appellants.

Morgan Levine Dolan, P.C., New York (Matthew Tomkiel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 21, 2013, which granted plaintiff's motion for leave to serve a late notice of claim, unanimously reversed, on the law, without costs, and the motion denied.

The court improvidently exercised its discretion in granting plaintiff's motion. Plaintiff's excuse of law office failure is not a reasonable excuse for failing to timely serve a notice of claim (*see Walker v City of New York*, 46 AD3d 278, 281 [1st Dept 2007]). Although the failure to proffer a reasonable excuse is not alone fatal to a motion for leave to serve a late notice, plaintiff also failed to show that defendants (City) acquired actual notice of the essential facts within 90 days after the

claim arose or a reasonable time thereafter (*see Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]).

Plaintiff's Workers' Compensation Board form dated May 2, 2011 (C-3 form), appears to have been prepared by plaintiff's employer, and there is no evidence that plaintiff's employer was acting as an agent of the City when it reported the accident to its workers' compensation carrier (*see Mehra v City of New York*, 112 AD3d 417 [1st Dept 2013]). Even if plaintiff's employer was acting as an agent of the City and the City received the C-3 form, the form fails to provide the City with actual notice because it fails to connect the incident to any claim against the City.

The C-3 form states that plaintiff injured his right knee while working at Randall's Island after his jackhammer "kicked" him back causing him to step on a rock. However, the C-3 form makes no mention of plaintiff's present claim that the City caused his injury by allowing the bottom of a sewage tank at Wards Island to have an uncovered hole that contained rocks and other debris (*see Matter of Casale v City of New York*, 95 AD3d 744, 745 [1st Dept 2012]).

Plaintiff also failed to demonstrate that the City has not been prejudiced by the year-and-90-day delay given the transitory nature of the alleged defective condition (*see McClatchie v City of New York*, 105 AD3d 467 [1st Dept 2013]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12867-
12868 Index 103120/12

Solomon Holding Corp., et al.,
Petitioners-Respondents,

-against-

Humphrey Stephenson, et al.,
Respondents-Appellants.

_____

Yamicha Stephenson, New York, for Humphrey Stephenson, appellant.

Elaine Cereta Davis-Stephenson, appellant pro se.

Law Offices of Jay S. Markowitz, P.C., Fresh Meadows (Jay S. Markowitz of counsel), for Solomon Holding Corp., respondent.

Michael A. Zimmerman, Melville, respondent pro se.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered August 8, 2013, which, to the extent appealable, denied respondents' motion for renewal of the petition for an order directing the sale of their home to satisfy two unrelated judgments held by petitioners, for vacatur of the Zimmerman judgment, and for attorneys' fees, unanimously modified, on the facts and in the interest of justice, to grant the motion for renewal, and, upon renewal, deny the petition, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 7, 2013, unanimously dismissed, without costs, as superseded by the August 8, 2013 order.

Respondents, husband and wife, live in a property they own that is represented to be worth more than $1 million. Petitioner Solomon Holding Corp. is the assignee of a default judgment in the amount of $41,820.21 obtained against respondent Humphrey Stephenson in Pennsylvania and entered in New York State in 2001. Petitioner Zimmerman obtained an order setting the amount of his fees in a matrimonial action in which he represented respondent Davis-Stephenson that was subsequently converted to a judgment in the amount of $54,835.71. An earlier proceeding brought by Zimmerman to enforce the judgment through the sale of respondents' property was denied on the ground that less drastic enforcement measures are available, pursuant to CPLR 5240, in light of the fact that the property is the residence of both respondents, who hold it as tenants by the entirety, and an order of protection was issued in favor of respondents. Zimmerman and Solomon then commenced the instant proceeding for an order directing the sale of the property to satisfy both judgments.

In their motion to renew, respondents demonstrated that Solomon's lien had expired by the time this proceeding was commenced more than 10 years after the judgment was docketed (CPLR 5203[a]; *Gletzer v Harris*, 12 NY3d 468, 473 [2009], *affg* 51 AD3d 196 [1st Dept 2008]; *Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677 [2d Dept 2011]). Solomon does not dispute that

its judgment lien is more than 10 years old and that it never sought a renewal judgment, which "requires commencement of a new plenary action between the same parties" (*see* CPLR 5014; *Gletzer*, 51 AD3d at 198). It contends that respondents waived their right to contest the enforceability of the judgment by failing to raise a statute of limitations defense before Supreme Court. However, since there was no lien to enforce when this proceeding was commenced, the statute of limitations defense has no application. Solomon has no interest in the property, and, despite the failure to satisfy the rigorous requirements of a motion to renew, respondents' motion should be granted (*Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]; *see also Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003] ["courts have discretion to relax this requirement [newly discovered facts that could not be offered on the prior motion] and to grant such a motion in the interest of justice"]).

Respondents contend that the Zimmerman judgment is also unenforceable because the requirements of 22 NYCRR 1400.5(a) were not met. However, in light of respondents' showing that Solomon's lien had expired before this proceeding was commenced, we need not decide this issue. As Supreme Court recognized in issuing the order of protection in favor of respondents in the prior proceeding, the sale of the home that respondents hold as

tenants by the entirety, to satisfy a judgment against one of them, would have the unnecessarily drastic result of depriving the non-debtor of his home.

We have considered respondents' contentions in support of vacatur of the Zimmerman judgment and an award of attorneys' fees and find them unavailing.

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12869 Felipe Ortega-Estrada, Index 101336/11
Plaintiff-Respondent,

-against-

215-219 West 145th Street LLC, et al.,
Defendants-Appellants.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered on or about March 26, 2013, which granted plaintiff's motion for partial summary judgment on the issue of liability on his claim pursuant to Labor Law § 241(6), and denied defendants' cross motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, unanimously affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law on the issue of liability in this action where he alleges that he was injured while using a table saw that was not equipped with a blade guard or spreader (*see* 12 NYCRR 23-1.12[c][2], [3]). That plaintiff was the sole witness to the accident does not

warrant a different determination (*see De Oleo v Charis Christian Ministries, Inc.*, 106 AD3d 521 [1st Dept 2013]; *see also Noble v 260-261 Madison Ave., LLC*, 100 AD3d 543, 544-545 [1st Dept 2012]).

In opposition, defendants failed to raise an issue of fact. Defendants' challenges to plaintiff's credibility are unpersuasive and although comparative negligence is a viable defense to a Labor Law § 241(6) claim, no evidence of culpable conduct on the part of plaintiff was presented by defendants (*see Once v Service Ctr. of N.Y.*, 96 AD3d 483 [1st Dept 2012], *lv dismissed* 20 NY3d 1075 [2013]).

In view of the grant of summary judgment to plaintiff on the issue of liability on the § 241(6) claim, defendants' contentions regarding the Labor Law § 200 and common-law negligence claims are academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12870 The People of the State of New York, Ind. 1499N/09
Respondent,

-against-

Tonia Page,
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 (Michael Sonberg, J.), rendered on or about June 12, 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: JUNE 24, 2014

CLERK

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

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12871-
12872 In re Lillian Roberts, etc., et al.,
Petitioners-Respondents,

-against-

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

- - - - -

The City of New York,
Petitioner-Appellant,

-against-

District Council 37
(AFSCME, AFL-CIO), et al.,
Respondents-Respondents.

Index 152902/12
401356/12

_____

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for appellants.

Robin Roach, New York (Jesse Gribben of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about January 9, 2013, which granted the article 75 petition of the District Council 37 petitioners to confirm an arbitration award, dated March 19, 2012, reducing a disciplinary penalty from termination to suspension, unanimously affirmed, without costs. Order, same court and Justice, entered January 7, 2013, which denied the petition of The City of New York to vacate the aforementioned arbitration award, confirmed

the award, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

Respondent Darryl King, a twenty-two year employee of New York City Department of Parks and Recreation (Parks Department), was involved in a traffic accident while driving a Parks Department vehicle under the influence of alcohol. He was arrested, charged in Criminal Court, and ordered to undergo what the arbitrator termed a "rigorous" alcohol monitoring and treatment program. He completed the program and complied with all conditions imposed upon him by the court. After a hearing at which both sides presented testimonial and documentary evidence, an arbitrator rejected appellants' preferred penalty of termination, instead ruling that the unpaid suspension, which lasted nearly two years, imposed on King immediately after the accident was a sufficient penalty for an employee who had an otherwise unblemished employment history, and who had admitted his addiction to alcohol and taken full responsibility for his misconduct. The arbitrator, while noting King's remorse and completion of his rehabilitation programs, ordered him reinstated as a Parks Department employee to a position commensurate with his experience, but ruled that the Parks Department did not have to restore him to a position requiring that he drive department vehicles until it was confident that he had been rehabilitated.

Given this record and the express findings made by the arbitrator, we find that appellants did not establish that the arbitration award should be vacated (*see* CPLR 7511; *Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]; *Matter of New York State Nurses Assn. [Nyack Hosp.]*, 258 AD2d 303 [1st Dept 1999], *lv denied* 93 NY2d 810 [1999]). The award did not violate public policy, as appellants failed to demonstrate that any law prohibited, in an absolute sense, the subject matter of the arbitration, nor did they cite to any well-defined constitutional, statutory or common law principle that the award violated (*see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79-80 [2003]).

In addition, as the arbitrator grounded his reasoning in the evidence, including an assessment of the employee as frank and apologetic, appellants failed to show that there was "no proof whatever to justify the award so as to render it entirely irrational" (*Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]). Accordingly, appellants' claim that

termination is the only appropriate penalty is without merit (*see City School Dist. of City of N.Y. v McGraham*, 17 NY3d 917, 920 [2011]).

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

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12874-
12875 Index 302192/10

Jose Vladimir Jerez,
Plaintiff-Appellant-Respondent,

-against-

Tishman Construction Corporation
of New York, et al.,
Defendants-Respondents-Appellants.

_____

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for appellant-respondent.

Segal McCambridge Singer & Mahoney, LTD, New York (Robert Rigolosi of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 13, 2014, which denied plaintiff's motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted. Appeals from order, same court and Justice, entered January 7, 2014, which denied so much of defendants' motion for summary judgment as sought dismissal of plaintiff's Labor Law § 241(6) claims, granted so much of defendants' motion as sought dismissal of plaintiff's Labor Law § 200 claim and OSHA article 1926 claim, and denied plaintiff's cross motion for partial summary judgment on the issue of defendants' liability under Labor Law § 241(6), unanimously dismissed, without costs, as academic.

Plaintiff, a carpenter, made a prima facie showing of his entitlement to judgment as a matter of law on the issue of defendants' liability under Labor Law § 240(1). Indeed, he submitted evidence that he was injured while working at the construction of the new World Trade Center building when the brace he had secured his lanyard to gave way, causing him to fall 14 feet to the plywood floor below (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [1st Dept 2008]). In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries (*id.* at 565). Indeed, defendant Port Authority's witness plainly testified that plaintiff was not provided with two lanyards for 100% fall protection.

Since plaintiff is entitled to summary judgment as to liability on his section 240(1) claim, we need not address plaintiff's Labor Law § 200, § 241(6), or OSHA article 1926 claims (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]). In any event, were we to reach those claims, we would hold that while Supreme Court properly dismissed plaintiff's Labor Law § 200 and OSHA article 1926 claims, it should have granted plaintiff summary judgment on the issue of defendants' liability under Labor Law § 241(6), insofar as it is predicated on a violation of Industrial Code (12 NYCRR) § 23-

1.16(b). That provision of the Industrial Code is sufficiently specific to warrant the imposition of liability (*see Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560, 560 [1st Dept 2010]; *see e.g. Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510 [1st Dept 2009]). Further, the record demonstrates that the regulation was violated, as the "approved safety belt or harness" was not "properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline" (12 NYCRR 23-1.16[b]), and the attachments plaintiff was using were clearly not arranged to prevent him from falling more than five feet (*see id.*). The remaining Industrial Code provisions plaintiff cited in support of his section 241(6) claim are either insufficiently specific or inapplicable.

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12876-
12877 Index 115531/07

Nidia E. Rodriguez,
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Manuel A. Romero, P.C., Brooklyn (Jonathan M. Rivera of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered September 18, 2012, dismissing the complaint pursuant to an order, same court and Justice, entered July 16, 2012, which granted defendant's motion for summary judgment, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant's motion for summary judgment was properly granted since defendant demonstrated that it did not create or have actual or constructive notice of the alleged defective condition, oil on the stairs, which allegedly caused plaintiff to fall (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 [1st

Dept 1984], *affd for reasons stated below* 64 NY2d 670 [1984]). Defendant presented, among other things, the affidavit of an employee who averred that one hour prior to plaintiff's accident, she cleaned and inspected the stairs where plaintiff fell and "left the ... staircase clean, dry, well lit and free of foreign substances" (*see Gautier v 941 Intervale Realty, LLC*, 108 AD3d 481 [2013]). Contrary to plaintiff's argument, this affidavit, which was sworn to and notarized, is admissible, even though it does not contain the words "under the penalties of perjury," since such language is only required for affirmations from attorneys, physicians, osteopaths or dentists (CPLR 2106).

Plaintiff has offered no admissible evidence raising a triable issue of fact as to notice. The purported hearsay statement of an unidentified "MTA woman," "station cleaner" or "token booth agent" does not qualify under the speaking agent exception to the hearsay rule (*see Gordzica v New York City Tr. Auth.*, 103 AD3d 598 [1st Dept 2013]), since there is no evidence supporting such a designation, nor is there evidence as to how it was known that this person was an "MTA" employee. Plaintiff's assertion that defendant had constructive notice because the station agent and booth were only a few feet from where plaintiff fell, is not supported by the record.

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: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12878 In re Michael B. M.,
Petitioner-Appellant,

-against-

Gnama I.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Daniel R. Katz, New York, for respondent.

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

_____

Appeal from order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about April 10, 2013, which, inter alia, upon petitioner father's default, granted respondent mother's petition for modification of a 2008 order of custody and visitation by changing the father's visitation with the subject child from unsupervised to supervised, unanimously dismissed, without costs, as taken from a nonappealable paper.

The appeal is dismissed because the father failed to appear at the fact-finding hearing, his counsel had no excuse for his

absence, and the father never moved to vacate his default (*see* CPLR 5511; *Matter of Aaron C. [Grace C.]*, 105 AD3d 548, 548-549 [1st Dept 2013]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12879 Palisades Tickets, Inc., Index 101690/12
Plaintiff-Appellant,

-against-

Gerald Daffner,
Defendant-Respondent.

_____

Wincig & Wincig, New York (Owen Wincig of counsel), for appellant.

Law Office of Steven A. Morelli, P.C., Garden City (Laura M. Dilimetin of counsel), for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 16, 2013, which granted defendant's motion to dismiss the complaint sounding in fraud, fraudulent concealment, and conspiracy on the ground that plaintiff lacked capacity to sue pursuant to Business Corporation Law § 1312(a), unanimously modified, on the law and in the exercise of discretion, to grant plaintiff leave to replead, and otherwise affirmed, without costs.

Plaintiff Palisades Tickets, Inc. commenced this action against defendant Gerald Daffner, an attorney admitted to practice in New York State, alleging that he conspired with his clients, judgment debtors on an underlying judgment rendered in favor of plaintiff, to use his escrow accounts to conceal the debtors' assets so as to impede plaintiff from collecting on the

judgment. While it is undisputed that plaintiff is a foreign corporation and is unauthorized to do business in New York State, defendant has not established entitlement to dismissal of the action pursuant to Business Corporation Law § 1312(a), which bars suits by foreign corporations that do business in New York without authorization. Even if the underlying judgment arose from a business transaction with the judgment debtors, who are New York residents and corporations, evidence of a single transaction is insufficient to sustain defendant's burden of showing that the corporation engaged in "systematic and regular" business activities in this State (*see Acno-Tec Ltd. v Wall St. Suites, L.L.C.*, 24 AD3d 392, 393 [1st Dept 2005]; *Nick v Greenfield*, 299 AD2d 172, 173 [1st Dept 2002])).

Defendant argues as an alternative ground for affirmance that the action is barred by the doctrine of collateral estoppel and that plaintiff failed to plead fraud with sufficient particularity. The action is not barred by collateral estoppel since the issue of whether defendant engaged in fraudulent conduct or other improprieties was not necessarily decided in the prior action (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1983]). The complaint should nevertheless be dismissed to the extent it alleges fraud and fraudulent concealment since it does not allege that there was a misrepresentation or that any such

misrepresentation induced justifiable reliance by plaintiff (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]), nor does it allege that defendant owed a duty to disclose information to plaintiff (*see PT Bank Cent. Asia, N.Y. v ABN AMRO Bank, N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). Leave to replead is granted to the extent the complaint alleges that defendant knowingly assisted his clients' fraudulent concealment or conveyance of assets to allege with greater specificity the elements of this cause of action (*see Syllman v Calleo Dev. Corp.*, 290 AD2d 209 [1st Dept 2002]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12880-
12881 The People of the State of New York, Ind. 5208/10
Respondent, 2981/11

-against-

Patrick Alcindor,
Defendant-Appellant.

_____

Dershowitz, Eiger & Adelson, P.C., New York (Nathan Z. Dershowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 6, 2012, as amended March 13, 2012, convicting defendant, after a jury trial, of attempted grand larceny in the third degree (three counts), tampering with physical evidence (two counts), and attempted grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 6½ to 13 years, 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 was ample evidence, including evidence of defendant's managerial role, to support the inference that defendant committed the unlawful acts necessary to establish

each of the charges, either personally or by causing a subordinate to do so, and that defendant committed each offense with the necessary mental state (*see e.g. People v Kahn*, 82 AD3d 44, 50-52 [1st Dept 2011], *affd* 18 NY3d 535 [2012]; *People v Silberzweig*, 58 AD3d 762, 762-63 [2d Dept 2009], *lv denied* 12 NY3d 920 [2009]). The overall pattern of conduct had no reasonable explanation except that defendant was criminally responsible for the unlawful acts, even if he committed them through other persons (*see* Penal Law § 20.00). Although we may consider defendant's acquittals of other charges, we do not find that the acquittals undermine the sufficiency or weight of the evidence supporting the convictions (*see People v Abraham*, 22 NY3d 140 [2013]; *People v Rayam*, 94 NY2d 557 [2000]), and we note that an acquittal "does not make the evidence of the [acquitted conduct] disappear" for purposes of our review (*People v Johnson*, 73 AD3d 578, 580 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]). The evidence also supported the inference that the applicable statutory monetary threshold was met. We have considered and rejected defendant's remaining arguments concerning the sufficiency and weight of the evidence.

The court properly exercised its discretion in precluding a line of cross-examination that the court properly deemed irrelevant. There was no violation of defendant's right to

confront witnesses and present a defense (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

Defendant did not preserve his challenge to the court's reasonable doubt charge, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court's instructions, viewed as a whole, properly conveyed to the jurors the relevant standards, and they were not constitutionally defective (*see People v Cubino*, 88 NY2d 998 [1996]; *see also People v Umali*, 10 NY3d 417, 426-427 [2008]; *People v Drake*, 7 NY3d 28, 33 [2006]). The charge generally followed the Criminal Jury Instructions, with differences in phrasing that did not affect the substance of the definition of reasonable doubt.

We perceive no basis to reduce the sentence.

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: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12882- Index 600811/09
12882A-
12882B-
12882C-
12882D Amy Kantor doing business as Worth Street Veterinary Hospital, etc.,
Plaintiff-Appellant,

-against-

75 Worth Street, LLC, et al.,
Defendants-Respondents.

_____

Berry Law PLLC, New York (Eric W. Berry of counsel), for appellant.

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for respondents.

_____

Appeals from orders, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 26, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' posttrial motion for judgment notwithstanding the verdict to the extent of dismissing plaintiff's breach of contract claims and granting defendants judgment as a matter of law on their counterclaim for construction costs; upon reargument, adhered to its original determination granting defendants' motion during trial for judgment as a matter of law on defendants' counterclaim for rent; and denied plaintiff's motions for spoliation sanctions, deemed appeals from judgment, same court and Justice,

entered February 21, 2014, awarding defendants the total amount of $915,750.90, including costs, interest and attorneys' fees, and, so considered, said judgment unanimously modified, on the law, to deny so much of defendants' posttrial motion for judgment notwithstanding the verdict as sought judgment as a matter of law on their counterclaim for construction costs, and to reinstate the jury verdict on that counterclaim, to deny so much of defendants' motion during trial as sought judgment as a matter of law on their counterclaim for additional rent, and to dismiss that counterclaim, to vacate the award of attorneys' fees and remand that issue to Supreme Court for further proceedings in accordance herewith, and otherwise affirmed, without costs.

Plaintiff argues that an implied contract between herself and defendants arose from defendants' conduct in allegedly agreeing with nonparty United Western Bank (UWB) to provide collateral to secure a loan to plaintiff. At trial plaintiff entered into evidence various UWB documents suggesting that defendant Jodi Richard had agreed with UWB to provide a second mortgage on property she controlled at 75 Worth Street in Manhattan to secure a loan to plaintiff to establish a business at that location. However, regardless of any understanding or agreement between defendants and UWB, plaintiff's emails of December 19, 2008 and January 8, 2009, which were entered into

evidence, along with her own testimony, refute any claim that defendants agreed with plaintiff to provide collateral for her loan. Indeed, in plaintiff's December 19, 2008 email she admitted that she never believed "real estate was involved" in the terms of defendants' guarantee. On January 8, 2009 Richard sent plaintiff an email explaining that UWB was requiring the property as collateral for the full amount of the loan, to which plaintiff responded, "That is shocking news -- am sorry you were so mislead [sic], as was I." Moreover, plaintiff testified at trial that she did not know the terms of the guarantee. We reject plaintiff's reliance on the various UWB documents entered into evidence to suggest that Richard had agreed with UWB to collateralize plaintiff's loan with a mortgage on the 75 Worth Street property; these emails and plaintiff's admission that she did not know the terms of defendants' guarantee demonstrate that plaintiff did not believe that such an agreement had been made. Thus, there was no meeting of the minds between plaintiff and defendants that defendants would provide a mortgage on the property to guarantee plaintiff's loan, and no valid line of reasoning existed for the jury to reach that conclusion (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Accordingly, Supreme Court properly granted defendants' motion pursuant to CPLR 4404 dismissing plaintiff's breach of contract claims. Given the

foregoing conclusion, there is no need to consider whether Supreme Court improperly invoked the statute of frauds to bar enforcement of the alleged agreement.

Supreme Court properly denied plaintiff's motions for spoliation sanctions, as there was no showing of prejudice (*see Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [1st Dept 2009]). Indeed, the documents defendants failed to produce during discovery do not change the outcome here.

Supreme Court erred, however, in granting defendants judgment as a matter of law on their counterclaim for construction costs. Emails between plaintiff and Richard entered into evidence reveal that defendants paid contractors to build out the suite plaintiff was leasing before plaintiff and defendants agreed that plaintiff would repay the money. Further, plaintiff testified that she repeatedly told Richard that she would not be able to pay Richard back unless she obtained a bank loan. She also entered into evidence two emails in which she expressed hope that she would be able to pay Richard back upon receiving the loan. Thus, there existed sufficient evidence for the jury to conclude, as it did, that plaintiff's obligation to repay defendants for construction costs was conditioned on obtaining a bank loan (which she never obtained).

Supreme Court also erred in granting defendants a directed

verdict on their counterclaim for additional rent. Although defendants entered into evidence a bill sent to plaintiff for rent and additional rent due, defendant pointed to no evidence establishing plaintiff's obligation to pay "additional rent," what this consisted of, or how it was calculated.

Supreme Court should not have awarded defendants attorneys' fees in connection with the prosecution and defense of all the claims in this litigation. Defendants' entitlement to attorneys' fees arose under section 19.4 of the lease addressing defendant LLC's remedies for a default by plaintiff under the lease. The lease specifically states that defendant landlord is entitled to, among other things, "amounts (including reasonable attorneys' fees and disbursements) in instituting, prosecuting or defending any legal action by or against [plaintiff] Tenant, or in connection with any dispute under this lease, in which Landlord prevails." Because the phrase "in which Landlord prevails" must apply to each clause setting forth the landlord's entitlement to attorneys' fees, so too must the preceding, parallel phrase "under this lease." This conclusion is reinforced by the purpose of the provision — namely, to provide remedies for defaults of lease obligations (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). Thus, while defendants are entitled to reasonable attorneys' fees in connection with prosecuting their

claim for rent due under the lease, the lease does not entitle them to attorneys' fees for any duties that did not arise from the lease. Accordingly, the issue of attorneys' fees must be remanded to Supreme Court for a determination of reasonable attorneys' fees in connection with defendants' counterclaim for rent owed under the lease.

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12883 In re Barbara Denise Files, Index 100397/11
Petitioner-Appellant,

-against-

The Department of Education of
the City of New York, et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 14, 2013, which, to the extent appealed from, denied the petition seeking to annul respondents' determination denying petitioner tenure and terminating her employment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to demonstrate that she acquired tenure by estoppel, since, as the record demonstrates, she did not perform the duties of a teacher beyond her probationary term (*Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.*, 87 NY2d 183, 187 [1995]; *Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993]). On the contrary, the DOE made clear to petitioner that she would not be given tenure and, at most would be offered an extension of her

probationary period, which she declined (*see Matter of Ronga v Klein*, 81 AD3d 567, 568 [1st Dept 2011], *lv denied* 17 NY3d 704 [2011]).

Petitioner was not placed in a classroom nor did she perform any traditional teaching functions prior to the expiration of her probationary period. Instead, the record demonstrates that she performed administrative tasks instead of traditional teaching duties (*compare e.g. Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist.*, 90 NY2d 110, 119 [1997]; *Ricca v Board of Educ. of City School Dist. of City of N.Y.*, 47 NY2d 385, 392 [1979]).

Petitioner further failed to sustain her burden of showing that the DOE engaged in bad faith when it terminated her employment since she received two letters of misconduct and an unsatisfactory performance rating (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]; *Matter of Thomas v Abate*, 213 AD2d 251, 251-252 [1st Dept 1995]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12884 Allstate Insurance Company, Index 110700/11
Plaintiff-Respondent,

-against-

William Staib,
Defendant,

Kayla L., etc., et al.,
Defendants-Appellants.

_____

Mainetti, Mainetti & O'Connor, P.C., Kingston (Michael A. Mainetti of counsel), for appellants.

Lewis Johs Avallone Aviles, LLP, Islandia (Amy E. Bedell of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered June 5, 2013, which granted plaintiff insurer's motion for summary judgment declaring, among other things, that it had no duty to defend or indemnify defendant William Staib in the underlying personal injury action, and so declared, unanimously affirmed, without costs.

Defendant Staib sought coverage under an automobile insurance policy issued by plaintiff for injuries sustained when an unrestrained and unattended dog sitting in Staib's parked car bit Staib's niece, the infant defendant, as she walked by the vehicle. The policy provides that plaintiff "will pay for all damages an insured person is legally obligated to pay . . .

because of bodily injury or property damage . . . from claims for accidents arising out of the ownership, maintenance or use, loading or unloading of an insured auto." The infant defendant's injuries did not arise out of the "ownership, maintenance or use" of the automobile. Indeed, the vehicle itself did not produce the injury, nor did the accident arise out of the inherent nature of the vehicle (*see Eagle Ins. Co. v Butts*, 269 AD2d 558, 558-559 [2d Dept 2000], *lv denied* 95 NY2d 768 [2000]). Rather, the vehicle was merely the situs of the accident, which is not sufficient to trigger coverage under the plain terms of the subject policy provision (*see Walden v Smith*, 2014 WL 1428525, *12, 2014 Mo App LEXIS 432, *38 [Mo Ct App WD, April 15, 2014, No. WD 75982]; *Maine Mut. Fire Ins. Co. v American Intern. Underwriters Ins. Co.*, 677 A2d 1073, 1075 [Me 1996]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12885 The People of the State of New York, Respondent, Ind. 3209/11

-against-

David Rivera, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 24, 2012, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and three counts of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 5½ to 16½ years, to be served consecutively to three concurrent terms of 4 years, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. The charges to which defendant pleaded guilty, and the sentencing consequences, were adequately

set forth at the time of the plea, and defendant's complaint about the sequence in which the court conducted the allocution is without merit (*see Matter of Leon T.*, 23 AD3d 256 [1st Dept 2005]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they largely involve matters not reflected in, or fully explained by, the record (*see e.g. People v Harmon*, 50 AD3d 318 [1st Dept 2008], *lv denied* 10 NY3d 935 [2008]; *People v Rice*, 18 AD3d 351 [1st Dept 2005], *lv denied* 5 NY3d 768 [2005]). 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 in connection with his guilty plea (*see People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]; *see also Lafler v Cooper*, 566 US __, 132 S Ct 1376 [2012]).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12886 Jin Lee, Index 600919/09
Plaintiff-Respondent,

-against-

Manchester Real Estate and
Construction, LLC,
Defendant-Appellant.

_____

Cohen & Gresser LLP, New York (Daniel H. Tabak of counsel), for appellant.

Karlinsky LLC, New York (Martin E. Karlinsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered February 25, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment on its counterclaim for breach of fiduciary duty, unanimously affirmed, with costs.

The motion was properly denied since triable issues of fact exist as to whether plaintiff, the former Chief Investment Officer of defendant (Manchester), usurped corporate opportunities by forwarding emails sent to Manchester containing real estate investment opportunities to Royalton Capital, Inc. (Royalton), a business owned and operated by her husband. Manchester failed to eliminate triable issues as to whether it had a tangible expectancy in the investment opportunities, or

simply harbored a mere desire or hope of pursuing them, directly as a purchaser/investor or indirectly as a lender to other purchasers or investors (see *Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 247-248 [1st Dept 1989]). Manchester failed to identify a particular deal in which it specifically would have invested or acted as lender, or any similar deals on which it actually closed. Furthermore, the emails in question were not forwarded exclusively to Manchester, but rather were sent to a number of individuals and/or entities.

Contrary to Manchester's arguments, the "tangible expectancy" test was, in this case, a proper means to identify a corporate opportunity. Courts have generally applied the tangible expectancy test, but no one test alone is "consistently sufficient" to address what constitutes a corporate opportunity in every case (*Alexander & Alexander*, 147 AD2d at 248; *see also Samantha Enters. v Elizabeth St.*, 5 AD3d 280 [1st Dept 2004]).

Even under the line-of-business test urged by Manchester, it failed to eliminate all triable issues regarding whether it is in the same line of business as Royalton. It is unclear that the smaller opportunities at issue are the same as those typically pursued by Manchester, or were necessary to its business (see *Alexander & Alexander*, 147 AD2d at 248). Further, this Court has rejected a broad construction of, or "rigid adherence" to, the

"line of business" test (*Fender v Prescott*, 101 AD2d 418, 423 [1st Dept 1984], *affd* 64 NY2d 1077 [1985]; *see also Burg v Horn*, 380 F2d 897, 901 n 3 [2d Cir 1967]).

Even were we to conclude that the deals in question involved corporate opportunities, triable issues exist concerning whether Manchester consented to the conduct at issue (*see Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 [1st Dept 1993]; *Alexander & Alexander*, 147 AD2d at 246).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12887 The People of the State of New York, Ind. 4480/11
Respondent,

-against-

Anthony Anderson,
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 (Naomi C. Reed of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughin, J.), rendered on or about January 18, 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: JUNE 24, 2014

CLERK

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

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12888 In re Jenna Nicole B., etc.,

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

Jennifer Nicole B., etc.,
Respondent-Appellant,

-against-

Lutheran Social Services of New York,
Petitioner-Respondent,

James M.,
Respondent.

_____

Harris Beach PLLC, New York (Peri A. Berger of counsel), for appellant.

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

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about October 23, 2012, which upon a fact-finding determination that respondent mother had permanently neglected the subject child, terminated her parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence of the mother's failure, for the relevant time period, to maintain contact with the subject child or plan for her future, notwithstanding the agency's diligent efforts to strengthen the mother's relationship with the child (Social Services Law § 384-b[7][a]; *see Matter of Star Leslie W.*, 63 NY2d 136, 144 [1984]; *Matter of Sheila G.*, 61 NY2d 368, 385 [1984]). Although the agency arranged for regular visitation, the mother's visitation was inconsistent, and there were periods of time during which the mother did not visit (*see Matter of Brooke Louise H.*, 158 AD2d 425, 425-426 [1st Dept 1990]). The mother also failed to comply with all random drug test requests, failed to complete required mental health evaluations, and failed to complete a substance abuse treatment program during the relevent period (*Matter of Elijah Jose S. [Jose Angel S.]*, 79 AD3d 533, 534 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]).

A preponderance of the evidence establishes that termination of the mother's parental rights is in the child's best interests (*Star Leslie W.*, 63 NY2d at 147-148). The child has been living with her foster mother, her maternal grandmother, since November 2007, and her grandmother intends to adopt her. The record demonstrates that the grandmother has provided loving care to the child and has attended to her emotional needs (*see Matter of*

Jaileen X.M. [Annette M.], 111 AD3d 502, 503 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]). Moreover, although the mother made some recent positive strides, overall, because she had no realistic plan for the child's future, and in light of her continued incarceration, a suspended judgment is not warranted (*see id.*).

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

ENTERED: JUNE 24, 2014

CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12889 The People of the State of New York, Ind. 8844/98
Respondent,

-against-

Shahid Rashad,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about August 6, 2007, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in finding defendant a level three risk, based on his extensive criminal history, including the seriousness of a prior conviction involving the death of one victim and serious injury to another, and of the underlying sex crime, which involved choking the victim until she was unconscious and multiple sexual acts. These aggravating factors were not adequately accounted for in the risk

assessment instrument (*see e.g. People v Jardin*, 57 AD3d 229 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]), and, as a result, there was no improper double counting.

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

ENTERED: JUNE 24, 2014

CLERK