SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 1, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

11798N John Diggs, Index 24963/01
Plaintiff-Appellant,

-against-

Karen Manor Associates, LLC,
Defendant-Respondent,

La Placita Latina,
Defendant.

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Stuart R. Lang, New York, for appellant.

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 3, 2012, which granted defendant Karen Manor's motion to vacate a default judgment, affirmed, without costs.

In April 2001, plaintiff fell through an open trapdoor in the floor of a grocery store and sustained injuries. Plaintiff commenced an action against, inter alia, the out-of-possession owner, Karen Manor, by service on the Secretary of State, which had an outdated address for Karen Manor. Karen Manor did not

answer and the court granted a default on September 3, 2002. An order directing entry of a default judgment was entered 10 months later in July 2003. Plaintiff did not file a certificate of readiness or note of issue for an inquest on damages until 2006, which was then held in 2007, and did not enter the $300,000 judgment awarded until September 12, 2011.

Karen Manor updated its address with the Secretary of State in 2004, but all notices were served upon it at the former address. By affidavit of its principal Stuart Morgan, Karen Manor attests that it never received any notices in connection with the action prior to entry of judgment in 2011, and did not learn of the lawsuit until 2012 when a search of the public lien record disclosed the judgment. Defendant timely moved for vacatur on March 29, 2012 pursuant to CPLR 5015(a). The trial court found that defendant had proffered a reasonable excuse for its default and demonstrated a meritorious defense. It further found that plaintiff would not suffer prejudice by the passage of time, noting that "part of the problem was Plaintiff's delay in settling Order, moving for inquest and entering judgment."

While Karen Manor may not have demonstrated a sufficient excuse for its default entitling it to vacatur of the judgment under CPLR 5015(a) because of its failure to update its address

with the Secretary of State, we affirm the vacatur in accordance with CPLR 317. Karen Manor demonstrated that it lacked actual notice of the action in time to defend and that it had a meritorious defense (*see Olivaria v Lin & Son Realty Corp.*, 84 AD3d 423 [1st Dept 2011]; *Arabesque Recs. LLC v Capacity LLC*, 45 AD3d 404 [1st Dept 2007]). With respect to notice, plaintiff mailed the summons and complaint and all other papers, including the note of issue and certificate of readiness, and notice of inquest, to the old address from which Karen Manor had moved in 1998 even though the Secretary of State had recorded its new address by 2004.

Contrary to the dissent's finding, the record demonstrates that plaintiff never sent papers to Karen Manor's actual business address, even though the address could have been ascertained during the course of the 10 years that transpired. The dissent's argument that Karen Manor must have received notice because it filed a change of address form with the Post Office some years before plaintiff commenced this action, and because it may have remained in some contact with the superintendent at its old address, does not constitute proof that Karen Manor received papers that were not properly addressed to it. We find that under the totality of the circumstances, Karen Manor has made a

sufficient showing of lack of notice (*see Shanker v 119 E. 30th, Ltd.*, 63 AD3d 553 [1st Dept 2009]; *Arabesque Recs. LLC*, 45 AD3d 404).

The case cited by the dissent, *Baez v Ende Realty Corp.* (78 AD3d 576 [1st Dept 2010]), is distinguishable. In *Baez*, the court rejected as incredible the claim by the defendant corporation that it had not been notified when the plaintiff had mailed papers not to the defendant's old address on file with the Secretary of State, but to the new address to which the defendant had moved.

Karen Manor also presents a meritorious defense in that plaintiff's injury, which occurred when he fell through an open trapdoor, is likely to have been caused by the codefendant tenant's negligence for which Karen Manor, as an out-of-possession landlord, would not be liable. The failure to attach the lease requiring indemnification was not the issue. Although the first affidavit that Karen Manor submitted was defective because it was not accompanied by a certificate in accordance with CPLR 2309(c), Karen Manor submitted a second affidavit, in admissible evidentiary form, sufficient to raise the meritorious defense.

As the trial court found, plaintiff's delay in both

prosecuting this matter and entering its default judgment also militates in favor of vacatur. Plaintiff obtained a default order in July 2003 and the inquest awarding $300,000 was in 2007, but judgment was not entered until September 2011, and the roughly eight-year delay cost Karen Manor approximately $225 thousand in accrued interest on the award.

In view of the foregoing, and in consideration of the strong public policy that matters be resolved on their merits (*see Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257 [1st Dept 2001]), we find that the trial court providently exercised its discretion by vacating the default judgment.

All concur except Gonzalez, P.J. and Manzanet-Daniels, J. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

As the majority recognizes, there is no basis for the motion court's finding that defendant Karen Manor demonstrated a reasonable excuse for the default pursuant to CPLR 5015(a), since defendant failed to notify the Secretary of State of its change of address for several years after it moved (*see e.g. On Assignment v Medasorb Tech., LLC*, 50 AD3d 342 [1st Dept 2008]).

However, I disagree with the majority to the extent they conclude that vacatur is warranted under CPLR 317. CPLR 317 provides that "[a] person served with a summons other than by personal delivery to him or to his agent . . . [and] who does not appear" may nonetheless be allowed to defend the action within one year after he obtains knowledge of the entry of judgment, if the court finds that he lacked notice of the summons in time to defend and that he has a meritorious defense. It is uncontroverted that at the time of the service of the summons and complaint, on or about October 5, 2001, defendant's old address was still on file. The mere denial of receipt of the summons and complaint, where it is undisputed that plaintiff served defendant at the address on file, is insufficient to establish lack of actual notice (*see Baez v Ende Realty Corp.*, 78 AD3d 576 [1st Dept 2010]). Indeed, the record supports the conclusion that

defendant's failure to receive notice of the summons was the result of a deliberate attempt to avoid notice. The fact that the address on file was changed years after service of the summons[1] is of no legal relevance in determining whether vacatur is justified under CPLR 317.

The bare assertion that defendant never received a copy of the summons and complaint is further belied by defendant's admissions that it filed a change of address form whereby all mail addressed to defendant at the old address would be forwarded to the new address, and that the mail, in any event, would have been received by the superintendent at the old address, who was still in contact with Mr. Morgan, a member of defendant.

It is also not clear that defendant has adequately set forth a meritorious defense. The original affidavit of Mr. Morgan was not in admissible evidentiary form. The lease agreement that purports to grant indemnification in favor of defendant is with a party other than codefendant, La Placita Latina, from whom

[1] Defendant's member averred that the Secretary of State "has been aware of this address change . . . since at least 2004," i.e., long after the summons and complaint had been served. Indeed, even the granting of plaintiff's motion for a default judgment (by order dated September 3, 2002), and the court's order directing that judgment be entered in plaintiff's favor (by order dated July 3, 2003), predate the address change.

defendant claims a right to indemnification. Mr. Morgan's allegation that the lease was "assumed" by La Placita Latina is insufficient in the absence of written proof of any such assumption. In order to be valid and enforceable, an assignment of a lease for real property for a term exceeding one year must be in writing (General Obligations Law § 5-703).

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

ENTERED: MAY 1, 2014

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Freedman, Kapnick, JJ.

12521-
12521A-
12521B

Index 117294/08

In re East 91st Street Crane Collapse Litigation

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Maria Leo, etc., et al.,
Plaintiff-Respondent,

-against-

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

New York Crane & Equipment Corp., et al.,
Defendants-Appellants.

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Leon D. DeMatteis Construction Corporation,
Third-Party Plaintiff,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-Appellant.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for New York Crane & Equipment Corp., James F. Lomma, J.F. Lomma Inc. and Tes Inc., appellants.

Nicoletti Hornig & Sweeny, New York (Scott D. Clausen of counsel), for 1765 First Associates, LLC, appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Leon D. DeMatteis Construction Corporation, appellant.

Cartafalsa Slattery Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for Sorbara Construction Corp., appellant.

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for respondent.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 27, 2013, November 27, 2013, and November 29, 2013, which, insofar as appealed from as limited by the briefs, denied defendants Leon D. DeMatteis Construction Corp.'s, 1765 First Associates, LLC's, Sorbara Construction Corp.'s, and New York Crane and Equipment Corp., James F. Lomma, J.F. Lomma Inc., and T.E.S. Inc.'s motions to preclude plaintiff from introducing at trial any evidence of her decedent's intention to relocate to San Diego and start a business there, unanimously reversed, on the law, without costs, and the motions granted.

Plaintiff seeks to support her claim for future lost earnings by presenting evidence of her decedent's alleged intention to relocate to San Diego and start a business there with his father. This evidence of a purported plan to start a business in the future is speculative and could not establish lost earnings with "the requisite degree of reasonable certainty"

(*Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647, 648 [1st Dept 2009] [internal quotation marks omitted], *lv dismissed* 14 NY3d 737 [2010]; *Galaz v Sobel & Kraus*, 280 AD2d 427 [1st Dept 2001]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Acosta, Andrias, Richter, JJ.

11870 Bruno E. Iciano, etc., Index 24580/06
Plaintiff-Appellant,

-against-

Franklin Nursing Home,
Defendant-Respondent.

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Robert G. Spevack, New York, for appellant.

Rivkin Radler, LLP, Uniondale (Henry M. Mascia of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 15, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The complaint describes plaintiff's decedent as a then 60-year-old man with an extensive medical history that included diabetes and peripheral vascular disease, which caused him to develop ulcerations on his lower extremities. It is alleged that he suffered an injury on August 22, 2006 when, while being transferred into a wheelchair, his left ankle struck the footrest, opening an old ulcer that was scabbed over. The wound expanded and worsened over the following weeks and eventually became gangrenous, necessitating a below-the-knee amputation six

months later.

The record reflects that as a result of an injury to the left pretibial area (shin) sustained in October 2005, decedent was treated at the Wellington Regional Medical Center (WRMC) in Florida. A diagnosis of "necrotic eschar with ulceration down to the tibial bone" was made and "the possibility of limb loss given the extent of disease" was discussed. Decedent returned to WRMC in July 2006 "for non healing ulcer in the left proximal leg and knee region." A diagnosis of "[l]eft proximal tibial osteomyelitis with significant soft tissue compromise in a patient with multiple comorbidities" was rendered and decedent advised to undergo an above-the-knee amputation. The prognosis for salvaging the leg was deemed to be unfavorable due to poor circulation and significant soft tissue compromise and because co-morbidities including diabetes and peripheral vascular disease made healing "very difficult."

Decedent was discharged from WRMC in August 2006 against medical advice and began treatment at New York Hospital Medical Center of Queens (NYHQ), where the ulcer was noted as not healing. Decedent was then discharged directly to defendant nursing facility on August 18, 2006. Upon admission, he was observed to have two stage IV ulcers on the left leg, meaning the

loss of skin and subcutaneous tissue, exposing muscle and bone. On readmission to NYHQ subsequent to the alleged incident for treatment of pneumonia in October of that year, an MRI was inconclusive as to whether osteomyelitis was still present. Below-the-knee amputation of the left leg was ultimately performed at Montefiore Medical Center in February 2007, allegedly as a result of the injury suffered on August 22, 2006.

In support of the motion, defendant argued that statements made by its staff members during the course of an investigation indicate that decedent gave conflicting accounts of when the injury to his ankle occurred – upon transfer to the wheelchair following a physical therapy session or earlier in his room. In any event, the affidavit of defendant's expert witness states that amputation "was inevitable long before Mr. Iciano was admitted to Franklin." It opines that defendant had promptly noted that the ulceration had opened and had responded with medically appropriate treatment, including cleaning and dressing the wound and administering a course of antibiotics. It should further be noted that amputation had been recommended seven months earlier by a surgeon in Florida and that the tissue damage resulting from peripheral vascular disease commonly causes ulcers with "a continuous cycle of healing and breakdown and

recurrence."

In response, plaintiff's expert attributed amputation to the injury complained of. However, he did not specify the basis for his conclusion, noting only that "no other extremity required amputation" and that other, larger ulcerations had healed.

The complaint was properly dismissed. The amputation of decedent's leg was "the unavoidable result of [] preexisting, chronic conditions, as well as other risk factors" (*Negron v St. Barnabas Nursing Home*, 105 AD3d 501, 501 [1st Dept 2013]). The observation by plaintiff's medical expert that an above-the-knee amputation had been avoided does not axiomatically warrant the conclusion that a below-the-knee amputation should likewise have been avoidable. As remarked by defendant's medical expert, a May 2006 report from WRMC noted that while decedent's left popliteal artery pulse (taken behind the knee) was weak, the dorsal pedis and posterior tibial pulses (at the ankle) were completely absent. Thus, plaintiff failed to overcome defendant's prima

facie showing that it did not depart from accepted medical practice because amputation was required prior to decedent's admission to defendant's nursing facility (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Acosta, Andrias, Richter, JJ.

11873 Melissa C. D., Index 313679/10
Plaintiff-Respondent,

-against-

Rene I. D., Jr.,
Defendant-Appellant.

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P.D., and Another, etc.,
Non-Party Appellants.

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Burger & Green, LLP, New York (Nancy M. Green of counsel), for appellant.

James E. Iñiguez, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children P.D. and S.D.

Carol L. Kahn, New York, attorney for the child T.D.

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Order, Supreme Court, New York County (Ann E. O'Shea, J.), entered November 9, 2012, which, after a nonjury trial, inter alia, awarded plaintiff mother sole physical and legal custody of the children Tallulah and Scarlet, and allowed the child Pascal to continue to live with defendant father, with the parties having joint decision-making authority with respect to Pascal's education and serious medical care, provided that plaintiff would have final decision-making authority in the event of a conflict or defendant's failure or refusal to communicate with plaintiff,

and granted plaintiff the authority to change the children's therapists, unanimously modified, on the law and the facts and in the exercise of discretion, to vacate the award of custody of Scarlet to plaintiff and to award sole legal and physical custody of Scarlet to defendant, and to remand the matter to Supreme Court for the determination of appropriate visitation rights, and to vacate the grant of authority to plaintiff to change the children's therapists and final decision-making authority with respect to Pascal's education and serious medical needs, and to award sole legal and physical custody of Pascal to defendant, and otherwise affirmed, without costs.

The parties were married on July 25, 1990 and have three children, Pascal, born July 15, 1996, Scarlet, born March 21, 2000, and Tallulah, born December 11, 2008. On October 23, 2010, the mother left the marital home in Manhattan to move in with her lover on Long Island, taking Tallulah with her. Pascal and Scarlet continued to live with the father in Manhattan, and have expressed a very strong preference to remain in his custody, a position, we note, supported by the court-appointed neutral forensic evaluator and advocated by the attorney for Pascal and Scarlet.

"It is axiomatic that in considering issues of child

custody, a court must determine what is in the best interests of the child, and what will promote the child's welfare and happiness" (*Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). Factors to be considered include "the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see also Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The court is obligated to examine the totality of circumstances, and "the existence or absence of any one factor cannot be determinative" (*Eschbach,* 56 NY2d at 174). However, although "the express wishes of [the] child[ ] are not controlling, they are entitled to great weight, particularly where [the child's] age and maturity would make [his or her] input particularly meaningful" (*Matter of Stevenson v Stevenson*, 70 AD3d 1515, 1516 [4th Dept 2010] [internal quotation marks omitted], *lv denied* 14 NY3d 712 [2010]).

When viewed in light of these principles, the court's finding that the best interests of Scarlet would be served by immediately awarding sole legal and physical custody to her

mother, and that Scarlet be forbidden from having any contact with her brother and father for six weeks after the transfer of custody, lacks a sound and substantial basis in the record. It would not be in the best interests of Scarlet, now 14, to disrupt her life by removing her, against her wishes, from her father and brother in Manhattan, where she has always lived, and placing her with her mother and her mother's lover, a situation that she is not comfortable with, on Long Island, in a community that she does not know.

Indeed, the court recognized that such a change of custody would be seriously distressing and disruptive to Scarlet and "may well make Scarlet very angry and cause her significant emotional upset, even turmoil in the short-term." In the absence of any expert testimony, the court's conclusion that this turmoil "will be temporary and far less emotionally destructive than abandoning her to an unfit parent, which may well leave her with permanent emotional scars," is speculative, as is the court's finding that "Scarlet still has a strong, albeit hidden, bond with her mother."[1]

[1]As discussed below, we do not agree with the trial court's determination that the father's alleged parental interference was so egregious as to render him an "unfit parent."

In disregarding Scarlet's wishes and the importance of maintaining stability in her life, the court erred by placing undue emphasis on a single factor, the father's alleged alienation of Pascal and Scarlet, and erroneously found that Pascal and Scarlet are "vindictive, cruel, angry, and broken children," whose "expressed wishes . . . are the product of Defendant's poisonous efforts to alienate them from their mother."

A custodial parent's conduct may warrant a change of custody if it reaches "the level of deliberately frustrating, denying or interfering with" the parental rights of the noncustodial parent so as to raise doubts about the custodial parent's fitness (*see Matter of Lawrence C. v Anthea P.*, 79 AD3d 577, 579 [1st Dept 2010]). However, even egregious conduct in this regard must be viewed within the context of the child's best interests (*see Matter of Lew v Sobel*, 46 AD3d 893, 895 [2d Dept 2007] ["While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child, here, the children's bond to the alienating parent is so strong that a change of custody would be harmful to the children without extraordinary efforts by both parents and extensive therapeutic, psychological intervention"]; *Matter of Charpentier v Rossman*,

264 AD2d 393 [2d Dept 1999][father properly awarded sole custody, notwithstanding his interference with relationship between mother and child, based on strong preference for father expressed by 17-year-old child]). Although we agree with the trial court that the father should have been more restrained in the comments he made about the mother in the presence of Pascal and Scarlet, his conduct in this case does not rise to the level of deliberately frustrating, denying or interfering with the parental rights of the mother so as to raise doubts about his custodial fitness.

Significantly, in performing its analysis, the court failed to give sufficient weight to the mother's role in the alienation of Pascal and Scarlet's affections, as well as her inability to accept any responsibility for the deterioration of her relationship with them (*see Matter of Muzzi v Muzzi*, 189 AD2d 1022, 1024 [3d Dept 1993] [it was inappropriate for Family Court to favor one party's contentions where neither party blameless]). The record demonstrates that while the mother was still married and living in the marital home, she confided to Pascal that she had rented a home with her lover on Long Island, and encouraged Pascal to keep it a secret, inappropriately placing him in the middle of the marital difficulties she had with the father. The mother also invited her lover to the marital home to meet Pascal,

against his express wishes. When Scarlet asked the mother if she was going to move out, the mother falsely assured her that she would not be leaving.

The court found that although the mother "may have exercised poor judgment," the children's rejection of the mother "cannot be attributed to those lapses in judgment." However, the record demonstrates that those actions contributed to Scarlet and Pascal's feelings of abandonment and anger, and were a significant factor in undermining their relationship with the mother. For example, the supervisor of therapeutic visitation acknowledged that when visitation began the children's "affect was one of great sadness and resentment and rejection of their mother based on the fact that she left them in the manner that she did," and that on occasion Scarlet would cry throughout the visit.

The court also failed to give any weight to the fact that during the course of visitation, the mother continued to engage in conduct that undermined Scarlet and Pascal's trust. For example, the mother assured Scarlet that she could continue to live with the father, while simultaneously seeking sole custody, and she used a visit that Pascal and Scarlet had with their sister Tallulah to secretly record their conversations. When

Scarlet and Pascal discussed their feelings with the mother in therapy, the mother discounted those sentiments as the result of their father's brainwashing, which, as counsel for Tallulah recognizes, "had to frustrate the older children and would make it reasonable for Scarlet to believe she wasn't being heard." In addition, the supervisor of therapeutic visitation testified that there were occasions when the mother made negative statements about the father, to which Pascal and Scarlet responded in a hurt manner.

Although there were occasional problems with visitation, the record does not support a finding that they "the [father] intentionally interfered with visitation or that [his] conduct rose to such a level that [he] should be deprived of custody" (*Matter of Krebsbach v Gallagher*, 181 AD2d 363, 366 [2d Dept 1992], *lv denied* 81 NY2d 701 [1992]). The children attended 30 supervised visits with the mother, and the therapeutic visitation supervisor acknowledged that Pascal and Scarlet were not anxious to see her, and the father had to work very hard to get them to attend. While the children were occasionally late, the record supports the conclusion that this was due, at least in part, to their reluctance to engage with the mother, whose conduct, as set forth above, also contributed to the problems surrounding

visitation (*see Skolnick v Skolnick*, 142 AD2d 570 [2d Dept 1988]). While the visits were suspended at times, that was, at least in part, because the father, who was ordered to pay 80% of the cost, had financial difficulties, and the supervisor refused to provide further services in the absence of payment.

Furthermore, the court-appointed neutral forensic evaluator, the only disinterested witness who interviewed both parents and, the children, testified that there was no evidence that either Scarlet or Pascal had been subject to parental alienation, and the court improvidently disregarded her testimony and placed undue emphasis on the testimony of the mother's expert, who, unlike the court-appointed neutral evaluator, did not interview both parents and the children (*see Matter of Chebuske v Burnhard-Vogt*, 284 AD2d 456, 457-58 [2d Dept 2001]).

Insofar as the court found that the mother was virtually the exclusive caregiver for the children, we note that Pascal and Scarlet are now mature teenagers who have lived with the father since October 2010. They have a very strong relationship, and the continuity and stability of the existing custody arrangement weighs in favor of the father. We have considered the mother's remaining arguments and find them unavailing.

Accordingly, sole legal and physical custody of Scarlet

should be awarded to the father. The mother should be granted meaningful interaction and regular visitation, and we remand for a determination as to appropriate visitation. For the same reasons, we vacate the court's award to the mother of final decision-making authority with respect to the selection of the children's therapist and medical and educational issues relating to Pascal, now 17, and award the father sole legal and physical custody of Pascal. Sole legal and physical custody of Tallulah shall remain with the mother.

Lastly, we caution the father to consider the effects of his comments to the children, to refrain from any interference with the children's relationship with the mother, and to do all that is within his power to encourage and support their relationship with her.

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

ENTERED: MAY 1, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12251 The People of the State of New York, Ind. 1554/10
Respondent,

-against-

Francisco Alvarez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at speedy trial motion; Lewis Bart Stone, J. at jury trial and sentencing), rendered December 20, 2011, convicting defendant, of robbery in the second degree, and sentencing him to a term of 10 years, unanimously affirmed.

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

undermine, the victim's testimony. The evidence established that defendant used or threatened the use of force for the purpose of stealing money (*see* Penal Law § 160.00; *People v Smith*, 79 NY2d 309 [1992]).

The court properly denied defendant's speedy trial motion. Regardless of whether defendant's CPL 30.30(2)(a) motion for release is rightly considered a "pre-trial motion" for the purpose of computing excludable time under CPL 30.30(4)(a), the maximum possible includable time falls short of the 184 days necessary to qualify for dismissal in this case. When the court denied the release motion on May 10, 2011, the People requested a 14-day adjournment to May 24, 2011. The court adjourned the case to May 31, 2011 due to its calendar congestion. The seven days beyond the 14-day adjournment the People requested were properly excluded (*see People v Urraea*, 214 AD2d 378 [1st Dept 1995]). The court also properly excluded the period from September 6 to September 13, 2011. The People requested only a two-day adjournment, after which their detective would be available. It was defense counsel's intervening vacation and related request for an adjournment from August 19 until September 6 that caused the matter to be adjourned until September 13, 2011, after the

detective's vacation (*People v Jenkins*, 286 AD2d 634 [1st Dept 2001], *lv denied* 97 NY2d 683 [2001]). Based on the above, the total includable time was 181 out of the 184 days in which the People were required to be ready for trial.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12347 The People of the State of New York, Ind. 5128/10
Respondent,

-against-

Lee Stanton,
Defendant-Appellant.

_____

The Legal Aid Society, New York (Steven Banks of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Adam J. Bernstein of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; Lewis Bart Stone, J. at jury trial and sentencing), rendered July 14, 2011, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

Defendant's challenges to the prosecutor's summation are entirely unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Although some of the prosecutor's remarks were improper, they were not so egregious as to deprive defendant of a fair trial, and the court's curative remarks were sufficient to prevent any undue prejudice.

Since the record establishes that defense counsel had notice of a jury note reporting that the jury was deadlocked, defendant's contention that the court failed to fulfill its responsibilities under *People v O'Rama* (78 NY2d 270, 277-278 [1991]) requires preservation (*see People v Williams*, 21 NY3d 932, 934-935 [2013]), and we decline to review this unpreserved claim in the interest of justice. As an alternate holding, we find that defendant failed to overcome the presumption of regularity associated with the proceeding (*see e.g. People v Fishon*, 47 AD3d 591 [1st Dept 2008], *lv denied* 10 NY3d 958 [2008]). The court stated that it had shared the note with counsel and although it did not specifically state that it had heard counsel's positions on how to respond to the note, the court's demonstrated practice with respect to jury notes in this case was to show the note to the parties and confer with them off

the record before instructing the jury on the record.

Defendant's challenge to the showup identification is without merit. The showup was not rendered unduly suggestive by factors "[i]nherent in any showup" (*People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Moreover, the police conducted the showup in a manner that tended to minimize suggestiveness, to the extent practicable.

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12348 Sheila Phillip, Index 302967/11
Plaintiff-Appellant,

-against-

Young Men's Christian Association
of Greater New York,
Defendant-Respondent.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 10, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant met its initial burden of demonstrating lack of notice of the wet condition of the locker room floor where plaintiff allegedly slipped by submitting evidence that it followed its routine maintenance and inspection procedures, and that the condition was not observed either by defendant's staff when they inspected the area, or by plaintiff and her

daughter (*see Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636, 637 [1st Dept 2012]; *Guttierez v Lenox Hill Neighborhood House*, 4 AD3d 138, 139 [1st Dept 2004]).

Plaintiff's and her daughter's testimony that they had seen water on the floor of the locker room on several other occasions and that the daughter had complained about it demonstrates, at most, that defendant had a general awareness of a wet condition, which is insufficient to raise a triable issue of fact as to notice (*see Piacquadio v Recine Realty Corp*, 84 NY2d 967, 969 [1994]; *Guttierez*, 4 AD3d at 139; *Gallais-Pradal v YWCA of Brooklyn*, 33 AD3d 660, 600 [2d Dept 2006]). The affidavit of plaintiff's expert was conclusory, and failed to cite any accepted industry practice, standard, code or regulation that was violated by defendant (*see Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006]).

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: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12350 The People of the State of New York, Ind. 1973/12
Respondent,

-against-

Sharon Berry,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about December 12, 2012, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12351 Vincent Casale, et al., Index 109412/10
Plaintiffs-Respondents,

-against-

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

John Doe, et al.,
Defendants.

- - - - -

Darlene C. Hogan,
Third-Party Plaintiff,

-against-

Kevin Maltezo, et al.,
Third-Party Defendants-Respondents,

Officer M. Kahn, etc.,
Third-Party Defendant-Appellant.

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Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Fay Ng of counsel), for appellants.

McCabe Collins McGeough & Fowler, LLP, Carle Place (Allison Jill Henig of counsel), for Maltezo, respondents.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 5, 2012, which denied the City defendants' motion to dismiss the complaint and all cross claims against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Vincent Casale alleges that he was injured when the vehicle operated by third-party defendant Kevin Maltezo, in which he was a passenger, was struck while proceeding through a green light by a vehicle operated by defendant/third-party plaintiff Darlene Hogan after Hogan was waved through a red light by third-party defendant Officer M. Kahn. The City defendants cannot be held liable for Vincent's injuries, even if the injuries resulted from Officer Kahn's negligence, because Kahn was engaged in the discretionary governmental function of traffic control (*see Valdez v City of New York*, 18 NY3d 69, 75 [2011]; *McLean v City of New York*, 12 NY3d 194, 202 [2009]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12352- Index 602286/09
12353 Atlantic Aviation Investments LLC,
Plaintiff-Appellant-Respondent,

-against-

MatlinPatterson Global Advisers LLC,
et al.,
Defendants-Respondents-Appellants.

[And a Third-Party Action]

- - - - -

Atlantic Aviation Investments LLC,
Plaintiff-Respondent,

-against-

MatlinPatterson Global Advisers LLC,
et al.,
Defendants-Appellants.

[And a Third-Party Action]

_____

Cleary Gottlieb Steen & Hamilton LLP, New York (Jeffrey A. Rosenthal of counsel), for appellant-respondent/respondent.

Simpson Thacher & Bartlett LLP, New York (Thomas C. Rice of counsel), for respondents-appellants/appellants.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 17, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on damages, but specifically found that plaintiff's Transaction Percentage was 10%, and order, same court

and Justice, entered December 4, 2013, which denied defendants' motion to renew the prior order's finding that plaintiff's Transaction Percentage was 10%, unanimously affirmed, with costs.

This Court previously affirmed an order (the Liability Order) holding that defendants are obligated to ratably share with plaintiff the proceeds their affiliate, VarigLog, received for the sale of VRG (*see Atlantic Aviation Invs. LLC v MatlinPatterson Global Advisers LLC*, 92 AD3d 461 [1st Dept 2012]). Plaintiff subsequently moved for partial summary judgment on the damages owed by defendants in connection with that finding of liability. The motion court properly denied the motion on the ground that issues of fact remain as to the consideration received by VarigLog for the sale of VRG. The court's statement in the background section of the Liability Order as to the amount of consideration was dictum and not the law of the case (*see Sudarsky v City of New York*, 247 AD2d 206, 206 [1st Dept 1998], *appeal dismissed* 92 NY2d 845 [1998], *lv denied* 92 NY2d 815 [1998], *cert denied* 528 US 813 [1999]). Further, the evidence submitted by plaintiff failed to make a prima facie showing that the consideration actually paid was $320 million. Since the court properly denied partial summary judgment on this ground, we need not address plaintiff's

contentions regarding costs and losses.

The motion court found that the amount owed to plaintiff (the Transaction Percentage) was 10% of the actual consideration received, rejecting defendants' argument that there was a valid basis for diluting that percentage based on plaintiff's failure to subscribe to additional loans made by defendant Volo to VRG. We hold that the court's finding as to the non-dilution of the 10% Transaction Percentage was correct, albeit for different reasons. Pursuant to Section 1.1.1(h)(iii) of the parties' amended memorandum of understanding (MOU), which is the only section implicated under the circumstances of this case, plaintiff's lack of subscription to the additional loans made by Volo to VRG could result in the dilution of plaintiff's Transaction Percentage only if the loans were "required" (i.e., requested) by VRG. There is no evidence that the loans were requested by VRG; therefore, the loans were not the type that could give rise to dilution under Section 1.1.1(h)(iii) of the MOU.

The purported new evidence and arguments offered by defendants in their motion to renew do not address whether the

loans were requested by VRG, and therefore provide no basis for changing our determination (*see* CPLR 2221[e]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12355 Rolando Pagan, an Infant by his Mother and Natural Guardian, Milagros Rivera, et al., Plaintiffs-Appellants, Index 28504/03

-against-

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

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Raymond Schwartzberg & Associates, PLLC, New York (Hilary M. Schwartzberg of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 14, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Summary judgment was improperly granted in this action where the infant plaintiff injured his shoulder when, while playing football during recess in defendants' school playground, he tripped over a crack in the pavement and fell to the ground. The evidence, including photographs of the playground submitted by plaintiff raise triable issues as to whether the subject crack had been present for a sufficient period time to give rise to

constructive notice (*see Batton v Elghanayan*, 43 NY2d 898, 899-900 [1978]; *see also Calderon v Noonan Towers Co. LLC*, 33 AD3d 495 [1st Dept 2006]). Furthermore, although defendants established an absence of proximate causation between their alleged negligent maintenance of the premises and the accident by submitting their employee's testimony and the accident report showing that the infant plaintiff did not initially identify the cause of his accident (*see Acunia v New York City Dept. of Educ.*, 68 AD3d 631 [1st Dept 2009]), the infant plaintiff's affidavit stating that he tripped and fell on the crack while playing football raises an issue of fact, sufficiently connecting the accident to the defect (*see Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012]; *cf. McNally v Sabban*, 32 AD3d 340 [1st Dept 2006]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12356 Cuman Cropper, Index 114878/06
Plaintiff-Respondent,

-against-

M.D. Stewart, et al.,
Defendants,

New York Cit Transit Authority,
Defendant-Appellant,

Paper Cab Corporation, et al.,
Defendants-Respondents.

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Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for Cuman Cropper, respondent.

Marjorie E. Bornes, Brooklyn, for Paper Cab Corporation and Said N. Faoui, respondents.

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Judgment, Supreme Court, New York County (Donna Mills, J.), entered November 15, 2012, upon a jury verdict in favor of plaintiff which, to the extent appealed from as limited by the briefs, found defendant New York City Transit Authority (NYCTA), liable for plaintiff's injuries, unanimously reversed, on the law, without costs, the judgment vacated and the complaint dismissed as against NYCTA. The Clerk is directed to enter judgment accordingly.

A defendant is not liable where he or she is faced with a sudden and unforeseen occurrence that was not of his own making (*see Mendez v City of New York*, 110 AD3d 421 [1st Dept 2013]). Here, defendant cab driver opened his driver's side door, causing plaintiff to be thrown from his bicycle into the path of an oncoming bus. Testimony concerning the length of time that elapsed from plaintiff being thrown from his bike and the impact with the bus consistently stated that it was only an instant or a second, an insufficient length of time to constitute actionable negligence (*see Mendez* at 422; *see also Splain v New York City Tr. Auth.*, 180 AD2d 454 [1st Dept 1992], *lv denied* 80 NY2d 759 [1992]). The only evidence that could have served as the basis for the jury's verdict against NYCTA was erroneously admitted, since it was based in whole or in part upon NYCTA's internal rules and standards which hold NYCTA to a higher standard of care

than the common law (*see Williams v New York City Tr. Auth*, 108 AD3d 403, 404 [1st Dept 2013]).

In light of the foregoing, we need not consider appellant's remaining contentions.

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12357 The People of the State of New York, Ind. 36944C/05
Respondent,

-against-

Oneil Edwards,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about April 2, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Initially, we decline to dismiss this appeal on the ground that defendant has been deported (*see People v Scott*, 113 AD3d 491 [1st Dept 2014]). To the extent the People are arguing that the principles set forth in *People v Ventura* (17 NY3d 675 [2011]) should not apply to civil appeals, we note that the alleged civil/criminal distinction does not support dismissal. A civil appellant's physical location is not normally a reason to dismiss an appeal. A notable exception is the fugitive disentitlement

doctrine, which applies to "those who evade the law while simultaneously seeking its protection," particularly where "the appellant's absence frustrates enforcement of the civil judgment" (*Wechsler v Wechsler*, 45 AD3d 470, 472 [1st Dept 2007]). No such considerations are relevant here; defendant is an involuntary deportee, not an absconder (*compare People v Rodriguez*, 67 AD3d 596, 597 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]). In addition, the People have not established that defendant's absence from the United States renders this appeal moot.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate any mitigating factors not taken into account by the risk assessment instrument that would warrant a downward

departure, given the seriousness of the underlying conduct, committed against a child.

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12358-
12359-
12360 In re Tiffany H., etc.,

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

Administration for Children's
Services,
Petitioner-Appellant,

Mark H.,
Respondent-Respondent.

- - - - -

In re Tatianna S.,

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

Mark H.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Zachary W. Carter, Corporation Counsel, New York (Kathy H. Chang of counsel), for Administration for Children's Services, appellant/respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Mark H., respondent/appellant.

Steven N. Feinman, White Plains, attorney for the child Tiffany H.

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

_____

Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about April 15, 2013, which, upon a fact-finding determination that respondent sexually abused the subject child Tatianna S., inter alia, released the child to her mother under ACS supervision for a period of one year, unanimously affirmed, without costs, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, as its terms expired. Appeal from order of fact-finding, same court and Judge, entered on or about April 15, 2013, unanimously dismissed, without costs, as superseded by the appeal taken from the order of disposition. Order (same court and Judge), entered on or about April 15, 2013, which, upon a finding that respondent derivatively neglected the subject child Tiffany H., dismissed the petition pursuant to Family Court Act § 1051(c) on the ground that the aid of the court was no longer required, unanimously reversed, on the law and the facts, without costs, the derivative neglect finding reinstated and the matter remanded for a dispositional hearing.

The testimony of Tatianna S. at the fact-finding hearing provided competent evidence that respondent sexually abused her and the absence of physical injury or other medical corroboration

does not require a different result (*see Matter of Ashley M.V.* [*Victor V.*], 106 AD3d 659, 660 [1st Dept 2013]). The court properly credited Tatianna's testimony and any inconsistencies in the testimony were peripheral (*see id.; Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556 [1st Dept 2012]).

The determination that respondent, by sexually abusing Tatianna, a person for whom he was legally responsible, derivatively neglected Tiffany H., his biological daughter, is supported by a preponderance of the evidence (*Matter of Ashley M. V. (Victor V.)*, *supra*, 106 AD3d at 660). The court improperly dismissed the petition on the ground that the aid of the court is no longer necessary to protect Tiffany from harm. Given the serious nature of respondent's actions, as well as his continued contact with and close proximity to Tiffany, the court's aid is necessary (*compare Matter of Eustace B. [Shondella M.]*, 76 AD3d 428 [1st Dept 2010]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12361 The People of the State of New York, Ind. 4363/11
Respondent,

-against-

Vaughn Jones,
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 (Nicole Coviello of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about March 21, 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: MAY 1, 2014

CLERK

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

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12362 Seferiana Gutierrez, etc., Index 350058/09
Plaintiff-Respondent,

-against-

Hoyt Transportation Corp., et al.,
Defendants-Appellants.

_____

Schnader Harrison Segal & Lewis, LLP, New York (Allison Snyder of counsel), for appellants.

Thomas Torto, New York (Jason Levine of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered July 18, 2012, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's infant daughter, Deyandely, was struck by a school bus as she ran across the Grand Concourse while fleeing a melee that had erupted on the sidewalk near where she had been walking. The bus driver's deposition testimony that there was no traffic around him or in or in any of the north- or southbound lanes to his left, which Deyandely had crossed before colliding with the bus, raises an issue of fact as to whether he failed to see that which he should have seen with the proper use of his

senses (*see Persaud v Shark Patrol*, 267 AD2d 41, 42 [1st Dept 1999]; *see also Ohlhausen v City of New York*, 73 AD3d 89, 92 [1st Dept 2010]).

Defendants' reliance on the emergency doctrine in support of their contention that, with only seconds to react and take evasive measures, the driver acted reasonably and prudently as a matter of law, is predicated on the contention that the emergency with which the driver was confronted arose at the moment he perceived children in the street. The issue is whether he should have seen the children sooner. Thus, whether the driver was confronted with "a sudden and unforeseen occurrence" to which the emergency doctrine is applicable is a question for the factfinder (*see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12363 The People of the State of New York, Ind. 6049/04
Respondent,

-against-

James Campbell,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about October 7, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion for resentencing (*see e.g. People v Gonzalez*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]) in light of his "chronic inability to control his behavior while at liberty" (*People v Correa*, 83 AD3d 555, 556 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]). Defendant has numerous felony convictions, including convictions for felonies committed while on parole, as

well as an unfavorable prison disciplinary record, and he has not established that his physical condition has rendered him unlikely to commit any future offenses.

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12364N Mosaic Caribe, Ltd., Index 651798/12
Plaintiff-Appellant,

against-

AllSettled Group, Inc.,
Defendant-Respondent.

_____

Arent Fox LLP, New York (James M. Westerlind of counsel), for appellant.

Cozen O'Connor, New York (Jill L. Mandell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about July 29, 2013, which denied plaintiff Mosaic Caribe, Ltd.'s motion for leave to file an amended complaint, unanimously affirmed, with costs.

Contrary to plaintiff's assertions, the court applied the correct standard in reviewing its motion for leave to amend the complaint. The court correctly noted that if the proposed amendments are totally devoid of merit and legally insufficient, leave to amend should be denied (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]; *see also MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]).

Regarding the fraud claim, the court correctly concluded that plaintiff failed to allege loss causation, namely, that the misrepresentation caused plaintiff to lose the deposit that it had paid to acquire the life insurance policy at issue (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). Plaintiff alleged that it agreed to purchase the policy and pay the deposit based on the misrepresentation of proposed defendant Krasnerman, CEO of defendant AllSettled Group, Inc. (ASG), that one of his companies owned the policy; however, this merely shows that the alleged misrepresentation caused plaintiff to enter into the transaction (*id.*). It does not show that the misrepresentation actually caused plaintiff to lose its deposit (*see Friedman v Anderson*, 23 AD3d 163, 164 [1st Dept 2005]). Among other things, plaintiff fails to allege that it ever paid the balance of the $3 million purchase price for the policy after paying the initial $350,000 deposit, or that ASG, as the purchasing agent, was contractually obligated to acquire the life insurance policy absent plaintiff's payment of the full price. Thus, there are no allegations establishing that the alleged misrepresentation, as opposed to plaintiff's failure to pay for the life insurance policy, caused plaintiff's loss.

Furthermore, plaintiff failed to sufficiently allege

justifiable reliance on that misrepresentation. Plaintiff, who agreed to purchase the policy at issue at least a year after the alleged misrepresentation, should have sought verification of ownership of the policy before agreeing to purchase it for $3 million. Plaintiff cannot credibly claim that it had no available means of verification, as such information would have been available from defendant or the proposed defendants had plaintiff requested it (*Mountain Cr. Acquisition LLC v Intrawest U.S. Holdings, Inc.*, 96 AD3d 633, 634 [1st Dept 2012]; *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]; *see also HSH Nordbank AG v UBS AG*, 95 AD3d 185, 197-198 n 9 [1st Dept 2012]).

In any case, the fraud claim was duplicative of the breach of contract claim. Among other things, apart from an unelaborated request for punitive damages in connection with the fraud claim, the proposed amended complaint seeks the same damages as the breach of contract claim, specifically, return of the deposit plaintiff paid pursuant to the contract (*see e.g. Manas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [1st Dept 2008]; *Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1st Dept 1998]).

The concerted action claim was also totally devoid of merit.

As discussed above, Mosaic failed to allege that Krasnerman or ASG fraudulently induced Mosaic to transfer its deposit, and thus, that they acted tortiously or that either defendant committed a tortious act in pursuance of the agreement (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 295 [1992]). Furthermore, that AFG benefitted by receiving the deposit does not suffice to show that it had any understanding that any of the defendants would defraud Mosaic, or that it acted tortiously (*see National Westminster Bank v Weksel*, 124 AD2d 144, 147 [1st Dept 1987], *appeal denied* 70 NY2d 604 [1987]).

The court properly concluded that there was no viable civil conspiracy, having concluded that there was no viable fraud claim that formed the overt act for the conspiracy.

The cause of action for breach of fiduciary duty was properly deemed duplicative of the breach of contract claim as it alleges the very same facts as the breach of contract claim (*Leather v United States Trust Co. of N.Y.*, 279 AD2d 311, 312 [1st Dept 2001]; *Perl v Smith Barney*, 230 AD2d 664, 666 [1st Dept 1996], *lv denied* 89 NY2d 803 [1996]). Mosaic failed to allege that ASG had any duty to Mosaic apart from that set forth in the contract, and thus, that it had any independent fiduciary duty to acquire the life insurance policy at issue, or return Mosaic's

deposit.

The claim for money had and received, a quasi contract claim, seeks return of Mosaic's deposit. The deposit was paid pursuant to the underlying contract. Absent a valid fraud claim calling into question the validity of the underlying contract, this claim may not be maintained (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]).

As the intentional tort claims are all devoid of merit, the court properly concluded that Mosaic failed to allege any conduct that was sufficiently egregious to warrant punitive damages arising from a breach of contract (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; *AXA Mediterranean Holding, S.P. v ING Ins. Intl., B.V.*, 106 AD3d 457, 457-458 [1st Dept 2013]).

Finally, based on the above, the court correctly concluded that it lacked jurisdiction over proposed defendants Krasnerman and AFG, who are undisputedly non-domiciliaries. Jurisdiction does not lie over Krasnerman pursuant to New York's long arm statute because the complaint fails to sufficiently allege that he committed any tortious act, including making any fraudulent

misrepresentation, in New York (CPLR 302[a][2]). Absent a valid conspiracy claim, no personal jurisdiction exists over AFG or Krasnerman based on such a conspiracy (*see Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12365N In re The Port Authority of New York and New Jersey, Petitioner-Appellant, Index 450991/12

-against-

Local Union No. 3, etc., Respondent-Respondent.

James M. Begley, New York (Toby J. Russell of counsel), for appellant.

Greenberg Burzichelli Greenberg P.C., Lake Success (Harry Greenberg of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered December 24, 2012, confirming an arbitration award, unanimously affirmed, without costs.

The parties' Memorandum of Agreement (MOA) provides: "During the term of the Agreement [June 4, 2002 through June 3, 2006], employees in the covered membership will continue to be eligible to receive employee commutation passes and personal passes as per the current practice," and, in MOU Exhibit U setting forth a pass allowance schedule based on length of service, "Retired employees . . . receive the same allowance to which they would be entitled if their Port Authority service was

not interrupted."

The arbitrator's conclusion that this language supports the union's position that the Port Authority may not unilaterally eliminate the "E-ZPass" benefit, i.e., free passage at Port Authority bridges and tunnels, for retirees does not "give[] a totally irrational construction to the contractual provisions in dispute" and thus does not remake the contract for the parties (*see Matter of Riverbay Corp. (Local 32-E, S.E.I.V., AFL-CIO)*, 91 AD2d 509, 510 [1st Dept 1982]; CPLR 7511[b][1][iii]).

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

ENTERED: MAY 1, 2014

CLERK

Tom, J.P., Friedman, Andrias, Saxe, DeGrasse, JJ.

12366 Ind. 3323/12
[M—793] In re Robert Bornstein, Esq.,
on behalf of Anthony Urbistondo,
Petitioner,

-against-

Hon. Robert E. Torres, etc.,
et al.,
Respondents.

_____

Steven Banks, The Legal Aid Society, New York (Robert Bornstein of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for State respondents.

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington and Clorisa L. Cook of counsel), for District Attorney, respondent.

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

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

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12367 The People of the State of New York, Ind. 5956/11
Respondent,

-against-

Michael White,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Dechert LLP, New York (Deborah S. Sohn of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 25, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. Late at night, in a particularly robbery-prone area, the police saw defendant and his two companions engaging in a pattern of movements that was sufficiently unusual to attract the officers' attention (*see People v Ocasio*, 85 NY2d 982, 985 [1995]), even if "not necessarily indicative of criminality" (*People v McIntosh*, 96 NY2d 521, 525 [2001]). Accordingly, the record supports the

hearing court's finding that the police had an objective credible reason to approach the men to request information.

In any event, at this point, regardless of their subjective intentions, the police did nothing more than stop their car and get out. Defendant and a companion turned and fled immediately upon seeing the plainclothes officers, who reasonably believed they had been recognized as the police (*see People v Collado*, 72 AD3d 614 [1st Dept 2010], *lv denied* 15 NY3d 850 [2010], and cases cited therein). As defendant ran, other members of the police team, who were in another car, saw defendant "clutching" at his waistband in a manner that indicated the presence of a weapon. The officers gave detailed testimony establishing that, based on their experience, defendant clearly appeared to have a firearm in his waistband, even though the officers could not see a weapon. Based on all these factors, the police had reasonable suspicion of criminality justifying their pursuit of defendant (*see People v Stephens*, 47 AD3d 586, 588-589 [1st Dept 2008], *lv denied* 10 NY3d 940 [2008]). The record fails to support defendant's assertion that the police were already chasing defendant before making the observations regarding his waistband.

Therefore, the weapon defendant discarded in the course of his flight was lawfully obtained. The record also supports the

court's alternative finding that defendant's independent act of discarding the weapon during the chase was a strategic, calculated decision and not a spontaneous reaction to police activity (*see People v Boodle*, 47 NY2d 398, 402 [1979], *cert denied* 444 US 969 [1979]).

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12369 In re Dorothy Desuzia, et al., Index 260392/12
Petitioners-Appellants,

-against-

The Board of Directors of Concourse Village, Inc., et al.,
Respondents-Respondents.

_____

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (Howard S. Levine of counsel), for appellants.

Norris McLaughlin & Marcus, P.A., New York (Dean M. Roberts of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 5, 2012, which, in this CPLR article 78 proceeding, denied petitioners' application for an order preliminarily and permanently enjoining respondents from conducting meetings or taking any action without a quorum of two-thirds of all members of respondent Board of Directors of Concourse Village, Inc., and rescinding and annulling all of the Board's past actions taken without a two-thirds quorum, unanimously affirmed, without costs.

The Board has 13 members, of whom 5 are the petitioners here and 8 are individual respondents. The parties dispute whether the Board may act only with a supermajority quorum of two-thirds

(i.e., nine) of its members, as petitioners contend, or by a simple majority (i.e., seven), as respondents maintain. This dispute, in turn, hinges on whether Business Corporation Law (BCL) § 707 or Not-for-Profit Corporation Law (N-PCL) § 707 governs Board quorum requirements. BCL § 707 provides that supermajority quorum requirements for the Board of a subject corporation may be effected only through its Certificate of Incorporation (COI). N-PCL § 707, however, permits a supermajority quorum requirement to be imposed through the corporate bylaws. Concourse Village's COI has never made provision for any supermajority quorum, but its bylaws have been amended to provide for the Board to act only when two-thirds of its members are present.

In contending that the N-PCL governs, petitioners rely on Private Housing Finance Law § 13-a, which provides, in pertinent part, that "[N-PCL] applies to every company heretofore or hereafter formed under [the Limited-Profit Housing Companies Law] and the [N-PCL]" (Private Housing Finance Law § 13-a[1]). Although Concourse Village was formed pursuant to the Limited-Profit Housing Companies Law (LPHCL), contrary to petitioners' contentions, Concourse Village's formative history indicates that it was never formed under the N-PCL.

Indeed, as stated in its original COI, Concourse Village was formed in 1960 pursuant to the LPHCL, at that time codified in the Public Housing Law, and the then-existing General Corporation Law and Stock Corporation Law. In 1961, the General Corporation Law and Stock Corporation Law were succeeded by the BCL (*see* L 1961, ch 855), while the LPHCL was moved, without material substantive change, from article XII of the Public Housing Law to article II of the Private Housing Finance Law, where it presently resides (*see* L 1961, ch 803). The LPHCL did not contain any analog to current Private Housing Finance Law § 13-a. In 1968, Concourse Village's COI was amended to effect changes to stockholders' voting rights. The amendment was effected pursuant to the LPHCL and "Section 805 of the" BCL, thereby reinforcing the incorporators' understanding that Concourse Village was subject to the BCL. In 1969, nine years after Concourse Village's formation, the Legislature promulgated the N-PCL. In 1971, 11 years after Concourse Village's formation, the Legislature added section 13-a to the LPHCL (*see* L 1971, ch 547).

Accordingly, pursuant to section 13-a, the N-PCL does not apply to Concourse Village, since Concourse Village was never formed under the N-PCL. Instead, the BCL governs, including BCL § 707, which provides that a majority of a corporation's board

shall constitute a quorum, unless a greater proportion is required by the COI. As discussed, Concourse Village's COI has never required a supermajority quorum. Accordingly, Concourse village's bylaw amendments purporting to impose a two-thirds quorum requirement were ineffective, and the Board has always been able to, and continues to be able to, act with a quorum of a simple majority of its members.

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12370 The People of the State of New York, SCI 6379/09
Respondent,

-against-

Asif Jabin,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan M. Merchan, J.), rendered on or about March 21, 2011,

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

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

ENTERED: MAY 1, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12373 In re Uni-Rty Corporation, et al., Index 157621/12
Petitioners-Respondents,

-against-

New York Guangdong Finance, Inc.,
et al.,
Respondents,

Guangdong Building Inc., et al.,
Respondents-Appellants.

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Cooley LLP, New York (Laura Grossfield Birger of counsel), for Guandong Building, Inc., The Estate of Joseph Chu, Alexander Chu, Centre Plaza, LLC and Eastbank, N.A., appellants.

White & Case LLP, New York (Dwight A. Healy of counsel), for China Construction Bank and Agricultural Bank of China, appellants.

Law Offices of Samuel Chuang, Flushing (Samuel Chuang of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about July 25, 2013, which, to the extent appealed from, denied respondents Guangdong Building Inc., The Estate of Joseph Chu, Alexander Chu, Centre Plaza, LLC, and Eastbank, N.A.'s (collectively, the Chu respondents) motion to dismiss the petition and denied in part respondents China Construction Bank and Agricultural Bank of China's (together, the Banks) motion to dismiss the petition, unanimously affirmed, without costs.

Respondents are barred by the doctrine of collateral estoppel from challenging petitioners' capacity to commence the instant proceeding in the dissolved corporations' names, since this issue was raised and decided against them in a prior action (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

Petitioners' fraudulent conveyance claims under Debtor and Creditor Law (DCL) § 276 were correctly sustained, since it does not "conclusively" appear from the pleadings and respondents' submissions that petitioners had knowledge of facts from which the fraud could reasonably have been inferred more than two years before they commenced this proceeding (*see Trepuk v Frank*, 44 NY2d 723, 725 [1978]; *Miller v Polow*, 14 AD3d 368 [1st Dept 2005]; *Feinberg v Shaw*, 298 AD2d 272 [1st Dept 2002]).

The fraudulent conveyance claims under DCL § 276 are pleaded in sufficient detail to satisfy the heightened particularity requirement of CPLR 3016(b) (*see Marine Midland Bank v Zurich Ins. Co.*, 263 AD2d 382 [1st Dept 1999]). Petitioners properly relied on various "badges of fraud" to show actual intent to defraud or hinder present or future creditors (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]).

Petitioners' allegations that respondents – officers and shareholders of respondent New York Guangdong Finance, Inc. –

conveyed assets from the corporation to themselves without fair consideration (leaving the corporation insolvent and therefore unable to pay the judgment) state a cause of action under DCL § 273-a, since "preferential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith" (*Matter of P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 [1st Dept 2002]).

Contrary to the Banks' contention, petitioners supported this turnover petition brought pursuant to CPLR 5225 and 5227 with competent evidence that the Banks hold assets of the judgment debtor in China. The "separate entity" rule is inapplicable here, since these foreign banking institutions are not mere garnishees of their client's accounts, but direct recipients of alleged constructively fraudulent conveyances as shareholders of the judgment debtor (*see Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101 [1st Dept 2000]).

The court properly denied the Banks' request either to dismiss or stay the proceeding pending the appeal in the federal action, since that action does not involve any issues of fraudulent conveyance (*see* CPLR 2201).

The Banks lack standing to appeal from the denial of petitioners' request for the appointment of a receiver since they are not aggrieved by the denial (*see* CPLR 5511).

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

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12374 In re Saleh A. Ahmed, Index 401064/12
Petitioner-Appellant,

-against-

David H. Yin, etc., et al.,
Respondents-Respondents.

_____

Saleh A. Ahmed, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered on or about October 11, 2012, denying the petition seeking to compel respondents to disclose, among other things, a presentence report (PSR) pursuant to the Freedom of Information Law (FOIL), and granting respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents denied petitioner's FOIL request on the ground that the PSR had been destroyed in accordance with a records retention schedule. "Nothing in [FOIL] shall be construed to require any entity to prepare any record not possessed or maintained by such entity," except for certain categories of records not at issue here (Public Officers Law § 89[3][a]).

Thus, respondents were "not required (nor able) to provide petitioner with the requested records" (*Matter of Adams v Hirsch*, 182 AD2d 583, 583 [1st Dept 1992]).

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

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12375 The People of the State of New York, Ind. 5841/10
Respondent,

-against-

Enroy Bishop,
Defendant-Appellant.

_____

Kliegerman & Joseph, LLP, New York (Michael P. Joseph of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered February 29, 2012, convicting defendant, after a jury trial, of assault in the first degree and gang assault in the first degree and second degrees, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The evidence was legally sufficient to establish defendant's guilt of each of the charges of which he was convicted (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the testimony of various witnesses in the light of a surveillance videotape. The evidence permitted the jury to reasonably infer that a group of men attacked the victim with a community of purpose and a shared intent to cause serious

physical injury, that one of these men stabbed the victim while the others aided the stabber by punching and kicking the victim, and that defendant was either the actual stabber or was accessorially liable for the stabbing (*see* Penal Law § 20.00; *Matter of Juan J.*, 81 NY2d 739 [1992]). The People were not required to prove any type of plan or premeditation (*see People v Allah*, 71 NY2d 830 [1988]), and the fact that defendant was the only person prosecuted does not undermine his criminal liability (*see* Penal Law § 20.05[2]).

For similar reasons, defendant's challenges to the court's jury instructions on accessorial liability are unavailing. The People never limited themselves to a theory that defendant was the actual stabber, or that he acted alone. As indicated, there was a reasonable view of the evidence that if defendant was not the actual stabber, he acted in concert with that person. The charge sufficiently explained the required mental culpability.

Because gang assault does not require that the "aiders" share the mens rea of the principal, but only that they render aid (*People v Sanchez*, 13 NY3d 554, 566 [2009]), the court erred in instructing the jury that its acting in concert charge applied to the gang assault counts. However, the error was plainly harmless because the errant instruction increased the People's

burden of proof rather than lessening it, and the evidence satisfied this additional burden.

Defendant's claim that the court's response to a jury note constituted an improper missing witness charge is unpreserved, and we decline to review it in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12376 Elena Titova, Index 304115/10
Plaintiff-Appellant,

-against-

Bezabeth D'Nodal,
Defendant-Respondent.

_____

Subin Associates, LLP, New York (Brooke Lombardi of counsel), for appellant.

Law Offices of Karen L. Lawrence, Tarrytown (David Holmes of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered November 20, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that her property abutting the sidewalk where plaintiff allegedly fell is a two-family, owner-occupied residence, exempt from Administrative Code of City of NY § 7-210(b), and that she did not create or cause the alleged hazardous condition (*see Rios v Acosta*, 8 AD3d 183, 184-185 [1st Dept 2004]). The motion court properly considered defendant's son's affidavit and the attached photographs of the sidewalk and driveway at issue (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 565 n 1 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's argument that defendant is not exempt from Administrative Code § 7-210(b) because defendant used the premises for commercial purposes is improperly raised for the first time on appeal. The issue, which is not purely legal and apparent on the face of the record, requires resolution of facts that were not brought to defendant's attention on the motion (*see Botfeld v Wong*, 104 AD3d 433, 433-434 [1st Dept 2013]). In addition, plaintiff failed to offer any basis from which it could be reasonably inferred that defendant's snow-removal efforts "created or heightened" the alleged hazardous condition (*Rios*, 8 AD3d at 185 [internal quotation marks omitted]). Plaintiff's affidavit attesting that, at the time of her accident, the sidewalk contained ice and snow contradicts her deposition testimony that she did not see any ice or snow on the sidewalk. Accordingly, it is insufficient to raise a genuine issue of fact

(*see Joe v Orbit Indus.*, 269 AD2d 121, 122 [1st Dept 2000]).

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: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12378 The People of the State of New York, Ind. 2364N/11
Respondent,

-against-

Ronald Calderon,
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 (Brian R. Pouliot of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about March 14, 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: MAY 1, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12379 Shkelzen Murati, Index 305840/11
Plaintiff-Appellant, 873987/11

-against-

Steven Harris, et al.,
Defendants-Respondents,

TJ Montana Enterprises, L.L.C.,
et al.,
Defendants.

[And a Third Party Action]

_____

Robinson & Yablon, P.C., New York (Andrew M. Laskin of counsel), for appellant.

Burke, Gordon & Conway, White Plains (Ashley E. Sproat of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered November 4, 2013, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff was allegedly injured when he fell from a ladder while performing work at a house owned by defendants Steven and Bernice Harris. Defendants attempted to sell the house at a 60% markup only months after purchasing it, continuously attempted to sell it or rent it, discontinued cable and telephone service

there in the same year that a tenant occupied it, and removed much of the furnishings from the home. However, defendant Steven Harris testified that his wife was no longer able to use the home because she could not climb stairs after she underwent knee surgery five months before defendants first listed the home for sale, and that he continued to use the house as a weekend home. Accordingly, there is conflicting evidence as to whether defendants intended to use the home for commercial or residential purposes, and therefore an issue of fact exists as to whether they are entitled to the homeowner exemption under Labor Law § 240(1) (*see Davis v Maloney*, 49 AD3d 385 [1st Dept 2008]; *see generally Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991]).

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Gische, Kapnick, JJ.

12380 Kristan L. Peters, Index 150078/11
Plaintiff-Respondent-Appellant,

-against-

Collazo Florentino & Keil LLP,
Defendant-Appellant-Respondent.

_____

Francis Carling, New York, for appellant-respondent.

Kristan Peters, respondent-appellant pro se.

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Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered November 14, 2012, confirming an arbitration award in favor of defendant that, inter alia, awarded prejudgment interest at 2% per annum, and dismissing the complaint, unanimously affirmed, with costs.

Defendant failed to timely move to modify the award to raise the prejudgment interest rate from 2% to 9% (CPLR 7511[a]). In any event, the arbitrator properly set the prejudgment interest rate at 2% (*compare* CPLR 5001[a] *with* CPLR 5004).

Contrary to plaintiff's contention that arbitration should have proceeded under 22 NYCRR 137, her consent to arbitrate under the New York City Bar Association's Rules for Mediation and Arbitration Among Attorneys and her full participation in the arbitration constitutes a waiver of rights under 22 NYCRR 137

including any claim that the arbitrator lacked jurisdiction over her or that there was no valid agreement to arbitrate (*see Matter of Naroor v Gondal*, 17 AD3d 142 [1st Dept 2005], *lv dismissed* 5 NY3d 757 [2005]; *see also Elul Diamonds Co. Ltd. v Z Kor Diamonds, Inc.*, 50 AD3d 293 [1st Dept 2008]).

In any event, the claims and counterclaims asserted in this dispute involve "substantial legal questions, including professional malpractice or misconduct," and "claims against an attorney for damages or affirmative relief other than adjustment of the fee," which are not subject to arbitration under 22 NYCRR part 137 (22 NYCRR 137.1[b][3], [4]).

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

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12381 Bolivar Amill, Index 107467/07
Plaintiff-Respondent,

-against-

Lawrence Ruben Company, Inc.,
et al.,
Defendants,

Four Little Ones, LLC,
Defendant-Appellant.

_____

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 2, 2013, which denied the motion of defendant Four Little Ones, LLC (Four Little) for leave to file an untimely summary judgment motion, and for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Four Little failed to establish good cause to make its second summary judgment motion more than 120 days after the note of issue was filed (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 128-129 [2000]; CPLR 3212[a]). Successive summary judgment motions should only be entertained where there is a "showing of newly discovered evidence or other justification" (*Jones v 636*

Holding Corp., 73 AD3d 409 [1st Dept 2010]), such as an intervening appellate decision in the same case that clarifies or changes the controlling law (*see Pludeman v Northern Leasing Sys., Inc.*, 106 AD3d 612, 616 [1st Dept 2013]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 894 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]).

Here, this Court's decision in the prior appeal (100 AD3d 458 [1st Dept 2012]) does not provide a justification for Four Little's second, untimely motion. On the prior motion, certain codefendants demonstrated they could not be held liable as out-of-possession landlords for a nonstructural defect that did not violate a specific statutory safety provision, and another codefendant showed that it was an employer entitled to rely on the exclusivity provision of the Workers Compensation Law (*id.*). We further held that Four Little had not established entitlement to summary judgment on the sole issue it raised, namely, whether it had established its entitlement to rely on the Workers Compensation Law defense.

Four Little now argues that it is entitled to summary judgment because the accident arose out of the means and methods of plaintiff's work and not from a defective condition on the premises for which it could be held liable. Four Little's

current arguments could have been raised on the prior motion, and it is well established that "[p]arties [are] not permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment" (*Phoenix Four v Albertini*, 245 AD2d 166, 167 [1st Dept 1997] [internal quotation marks omitted]). In any event, the legal conclusions in our prior decision do not require judgment for Four Little, which, as the commercial tenant of the premises, had a common-law duty to maintain the premises in reasonably safe condition (*see e.g. DeMatteis v Sears, Roebuck & Co.*, 11 AD3d 207, 208 [1st Dept 2004]).

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

ENTERED: MAY 1, 2014

CLERK

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12382 The People of the State of New York, Ind. 2842/11
Respondent,

-against-

Kevin Alicea,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi 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 (Maxwell Wiley, J.), rendered on or about December 21, 2011,

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

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

ENTERED: MAY 1, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Feinman, Gische, Kapnick, JJ.

12383-
12384 Index 652203/11

36 East 57th Street LLC,
Plaintiff-Respondent,

-against-

Simon Falic,
Defendant-Appellant.

_____

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for appellant.

Bowles Lutzer & Newman LLP, New York (Eric H. Newman of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Anil C. Singh, J.), entered December 6, 2012, which denied defendant's motion for leave to amend his answer and granted plaintiff's motion for summary judgment on the issue of liability with respect to defendant's guaranty of a lease, unanimously affirmed, with costs.

Defendant's contention that this action is moot because plaintiff admitted that all rent arrears up to the filing of the complaint (on August 8, 2011) have been paid is unavailing. Plaintiff admitted that all rent arrears through February 3, 2011 -- the date on which the tenant abandoned the premises -- have been paid. Plaintiff applied a September 2012 payment to March

and April 2012 (*i.e.*, post-commencement) rent. However, the lease gives plaintiff the right to apply payment to the arrears. A November 1, 2012 invoice shows that pre-commencement items (above and beyond replenishing the security deposit) were still due.

The motion court did not improvidently exercise its discretion in denying defendant's motion to amend the answer to assert the defenses of failure of a condition precedent and surrender by operation of law since the proposed defenses lack merit (*see Spitzer v Schussel*, 48 AD3d 233, 233-234 [1st Dept 2008]). The guaranty that defendant signed is absolute and unconditional, "foreclos[ing] as a matter of law the defenses and counterclaims based on . . . failure to perform a condition precedent" (*Citibank v Plapinger*, 66 NY2d 90, 93 [1985]; *see also Gard Entertainment, Inc. v Country in N.Y., LLC*, 96 AD3d 683, 683-684 [1st Dept 2012]). Defendant's proposed defense of surrender by operation of law is foreclosed by sections 3a, 3b, and 3c of the guaranty.

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: MAY 1, 2014

CLERK