SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 13, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, Richter, Clark, JJ.

11333 In re Dean T., Jr. and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Dean T., Sr.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Carol L. Kahn, New York, for appellant.

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the child Dean T., Jr.

Tamara A. Steckler, The Legal Aid Society, New York (Adira J. Hulkower of counsel), attorney for the child Devonte T.

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Appeal from order, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 11, 2012, which, after a fact-finding hearing, determined that respondent father abused his eldest son and derivatively neglected his younger son, held in abeyance, pending an in camera review by the hearing court of the eldest son's mental health treatment records.

Respondent father moved to subpoena the eldest child's (the child) mental health treatment records. The Family Court, without conducting an in camera review of the requested records, denied the motion. Pursuant to Family Court Act (FCA) § 1038(d), the court must conduct a balancing test (*see Matter of B. Children*, 23 Misc 3d 1119[A], 2009 NY Slip Op 50841[U], *4 [Family Ct, Kings County 2009]). The statute requires that the court weigh "the need of the [moving] party for the discovery to assist in the preparation of the case" against "any potential harm to the child [arising] from the discovery." Here, the Family Court should have reviewed the child's mental health records in camera to determine if the records are relevant to the central issue of the child's credibility before making its disclosure ruling.

The record contains no physical evidence of the alleged abuse and the case against respondent relies almost entirely on the credibility of the child, placing a great amount of weight on the child's testimony (*see id.* at *5). Respondent asserts that the child is angry with respondent for hitting his mother in the past and brought these allegations in retaliation. Respondent also contends that the mother may be coaching the child, pointing out that the alleged abuse was not reported until after

respondent cross-petitioned for custody of the child.

Further, the significant delay in the reporting of the abuse,[1] as well as the fact that there is no testimony indicating that the alleged incidents of abuse were witnessed by anyone other than the child and respondent, place additional importance on the credibility of the child's testimony. Moreover, the medical records submitted by petitioner Administration for Children's Services note that the child had received counseling prior to the abuse alleged in the petition. These factors, taken together, indicate that the child's mental health records could be necessary to respondent's defense.

We recognize that the child's therapists objected to the disclosure and we concur with the trial court that automatic disclosure of the entire record would not be appropriate. The child's therapists do not specifically discuss in their letters to the court whether the records should be reviewed in camera, which obviously poses less of an intrusion. Therefore, the case is remanded for the Family Court to conduct an in camera review of the child's mental health treatment records in order to

[1] The child testified that he told his mother about the alleged abuse around February or March 2010, but the report was not made until July 2010.

determine if there is any information in these records that supports the father's claim that the mother is coaching the child or that the child has mental issues that affect his truth-telling capacity, and to decide whether the potential harm arising from discovery outweighs respondent's need for the record (*cf. Matter of Imman H.*, 49 AD3d 879, 880-881 [2d Dept 2008][court conducted an in camera review of child's psychiatric and social work treatment records]).

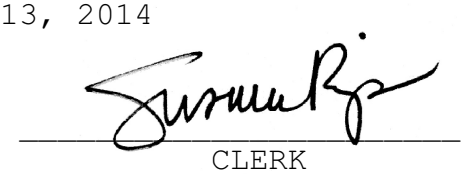
Respondent argues that the child placed his mental state in issue, pursuant to CPLR 3121, by stating that the incidents of abuse caused him to feel depressed, and therefore waived the psychologist-patient privilege (*see Matter of Richard SS.*, 29 AD3d 1118, 1124 [3d Dept 2006]["a party's mental health records are subject to discovery where that party has placed his or her mental health at issue"]). We disagree. Although "the child's mental health status may be relevant to assess whether the abuse occurred," his mental health is not in controversy in this case (*Richard SS.*, 29 AD3d at 1124; *see* CPLR 3121). Furthermore, respondent's contention that the privilege was automatically waived by the child's discussion of his emotional state fails to take into account both the balancing test required by FCA 1038(d) and the restrictions placed on the release of mental health

records by Mental Hygiene Law (MHL) § 33.13(c), which allows for the disclosure of clinical records only in select circumstances. The in camera review being ordered here will allow the court to determine whether "the interests of justice significantly outweigh the need for confidentiality" (MHL 33.13[c][1]).

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

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

ENTERED: MAY 13, 2014



CLERK

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

10911 In re Clarissa V.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 10, 2012, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of menacing in the third degree, and placed her on probation for a period of 12 months, reversed, as an exercise of discretion in the interest of justice, without costs, and the petition dismissed.

An adjournment in contemplation of dismissal would have been the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see e.g. Matter of Tyvan B.*, 84 AD3d 462 [1st Dept 2011]). This was appellant's first offense. She admitted the allegations of the petition but asserted, as did her mother, that the incident resulted from her having been bullied by the complainant with no corrective action taken by appellant's school. While appellant had truancy issues at school, at the time of the disposition she was employed, was being treated for depression, and was generally making progress. Based on all these factors, there is no reason to believe that appellant needed any supervision beyond that which could have been provided under an ACD. It should also be noted that under the terms of an ACD, the court could have required the Probation Department to monitor appellant, and her observance of a curfew and other requirements.

Since the period of probation has expired, we dismiss the petition.

All concur except Friedman, J.P. and Sweeny, J. who dissent in a memorandum by Sweeny, J. as follows:

SWEENY, J. (dissenting)

I dissent.

As the facts that formed the basis for a finding of menacing in the third degree are conceded, the only issue is the appropriate disposition.

Appellant admitted that she had repeatedly punched, kicked and pulled the hair of the victim "to put her I [sic] fear." She never asserted self-defense or justification for these violent acts.[1] In adjudicating her a juvenile delinquent, the court, as it had every right to do, looked at the violent nature of the act and appellant's total lack of remorse. The court also had before it school records showing appellant's abysmal attendance and GPA as well as her mental health records. The probation report determined appellant had a potential for reoffending and recommended a juvenile delinquency adjudication (*cf. Matter of Juan P.*, -AD3D-, 2014 NY Slip Op 00879 [1st dept 2014]). Even appellant's mother asked the court for its help in supervising her daughter because of her inability to do so alone.

[1]The majority makes reference to the fact that, notwithstanding the violent acts to which appellant pleaded, she seeks to minimize this by claiming she had been bullied by this victim in the past. Yet this was considered by the Family Court Judge and given such weight as the judge deemed appropriate.

Case law need not be cited for the well established proposition that a family court has wide discretion in matters such as these and its determinations are to be accorded great deference. Clearly, the Family Court Judge was in the best position to appreciate the circumstances of this case and to fashion a remedy that was in the best interest of the appellant and the community. It cannot be said, from all the above, that the adjudication and order of probation was not established by a preponderance of the evidence.

The dispositional order should be affirmed.

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

ENTERED: MAY 13, 2014

CLERK

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

11587 In re Selvin Adolph F., Jr.,

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

Edwin Gould Services For
Children Families,
Petitioner-Appellant,

-against-

Thelma Lynn F., et al.,
Respondents-Respondents.

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John R. Eyerman, New York, for appellant.

Andrew H. Rossmer, Bronx, for Thelma Lynn F., respondent.

Elizabeth Posse, Bronx, for Selvin Adolph F., Sr., respondent.

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

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Order, Family Court, Bronx County (Kelly A. O'Neill Levy, J.), entered on or about November 16, 2012, which dismissed, without prejudice, the petition seeking to terminate respondents' parental rights to the subject child for failure to plan for his future, unanimously reversed, on the law and the facts, without costs, the petition reinstated, a finding of permanent neglect entered against both respondents, and the matter remitted to Family Court for further proceedings.

There is no dispute that the agency has met the threshold requirement in a permanent neglect proceeding of showing it discharged its statutory obligation to exert diligent efforts to encourage and strengthen the parental relationships (*see* Social Services Law § 384-b[7][a]; *Matter of Jamie M.*, 63 NY2d 388, 390 [1984]). However, contrary to the findings by Family Court, there is clear and convincing evidence, the standard of proof required (*see Matter of Michael B.*, 58 NY2d 71, 74 [1983]), that despite the agency's diligence, neither parent has, "for a period of either at least one year or fifteen out of the most recent twenty-two months following the date [the] child came into the care of an authorized agency," shown sufficient planning for the child's future, as described in the Social Services Law, to warrant continuing parental rights (*see* Social Services Law § 384-b[7][a]; *Matter of Star Leslie W.*, 63 NY2d 136, 140 [1984]).

Planning for the future of the child under the Social Services Law requires that the parent take "necessary [steps] to provide an adequate, stable home and parental care for the child within a period of time which is reasonable"; at the very least, the parent must take steps to "correct the conditions" that resulted in the initial removal of the child from the home (*see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986] [internal

quotation marks omitted]; Social Services Law § 384-b[7][c]).

Here, the child has not lived with his mother since he was nine months old, in 2000. A finding of neglect was entered against the mother in April 2005; she was directed to undertake mental health treatment. The child was placed in the permanent custody of the father. In October 2006, a neglect petition was filed against both parents. The child had reported that he had been a passenger in the car driven by his father who had been drinking beer, and the car had swerved. On a different occasion, the father left the child unsupervised in the mother's care, although she had not yet received any mental health services. The child was accordingly placed into foster care. For the past few years, the child has lived in a kinship foster home.

The agency designed service plans for both parents, with the goal of providing sufficient skills and services to permit reunification with the child. The mother was referred for individual therapy and psychiatric treatment, and the father was referred for individual outpatient therapy.

On May 7, 2009, the Family Court entered neglect findings against both respondents. The court found child neglect on the part of the mother "by virtue of her failure to complete the necessary services - especially mental health - which were

components of the service plan under the prior dockets, for those subject children in foster care."[1] Child neglect on the part of the father consisted of "misuse of alcohol while the subject child was in his care and custody," and "failure to take appropriate measures of supervision for the child by allowing [him] to be unsupervised in the company of the [ ] mother."

New service plans were created which included, for the mother, the need for mental health care, and for the father, the need to attend mental health services and parenting skills classes and to submit to random drug and alcohol tests. The father successfully completed all the programs, and never tested positive for alcohol. However, he was arrested in 2007 and convicted in 2008 for driving while under the influence of alcohol. In January 2009, his son reported that his father, while intoxicated, punched him in the stomach after the boy failed to properly carry out a request. Although the father acknowledged to the caseworker that he had hit his son, he denied

[1] We take judicial notice of our two previous orders affirming the termination of the mother's parental rights to three of her other children based on permanent neglect, due to her "admitted failure to avail herself of mental health services" (*Matter of Jaffa Wally F.*, 60 AD3d 409, 409-410 [1st Dept 2009]) and her refusal to "comply with the court's order to enroll in therapy..." (*Matter of Qudra W.*, 297 AD2d 580, 580 [1st Dept 2002], *lv denied* 99 NY2d 506 [2003]).

his son was hurt. In April 2010, he was again arrested for driving while under the influence of alcohol.

Petitioners filed the instant petition on July 29, 2010 seeking termination of both parents' parental rights. At the termination hearing, Family Court credited the testimony of the mother and the agency that her visits with the child are positive and they have a good relationship, and that she has complied in most ways with the service plans. However, it is a fact that the mother's nine other living children have also been removed from her care over the years and, as argued by petitioners, respondent mother has never undertaken outpatient mental health care, although repeatedly referred and counseled to attend various mental health facilities. This demonstrates an inability to plan for the future and constitutes permanent neglect.

The mother claimed that in about 2008 she had undergone an intake evaluation and was told by the psychiatrist that she did not need mental health services. She testified that she "didn't get the connection" between the requirement for some kind of psychotherapy and the return of her son, since in her mind she had been found not to need services. Even on a cold record, this is not credible, as such an evaluation would have been provided to Family Court and included in the May 2009 findings that found

neglect on the part of the mother on the very ground that she had *not* completed mental health services as required "under the prior dockets, for those subject children in foster care." Thus, in 2012, it was error for Family Court to conclude that the agency was required to provide proof that the mother continued to need mental health services to rebut the mother's uncorroborated, previously rejected, self-serving testimony that in 2008 she was told she did not need any such services; rather, it was the agency's statutory burden to show that it had used diligent efforts to encourage and strengthen the mother's parental relationship with her son. The evidence is ample that the agency repeatedly counseled and also gave referrals to the mother. "In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent" (Social Services Law § 384-b[7][c]). The mother's failure to ever obtain mental health services shows a lack of planning for her son's future, and constitutes permanent neglect.

As to the father, Family Court credited the testimony of the agency caseworker and the father that he was fully engaged in numerous activities in the child's life, was a loving parent, and

had undertaken and completed all required programs. The court did not address the then-13-year-old child's desire, as related by his attorney at the termination hearing, not to return to either parent's care, with one of the reasons being that "on many occasions," his father drinks when the son is visiting overnight. Instead, based on his ready admission of his two DWI convictions and his understanding of the legal importance of not drinking while driving, Family Court concluded that the father had taken responsibility for the alcohol-related convictions, and had gained insight into and adequately addressed the reasons the child had been removed from his care.

While we are cognizant of the deference to be afforded to the nisi prius court's credibility determinations in a proceeding to terminate parental rights (*see Matter of Irene D.*, 38 NY2d 776, 777 [1975]), here, our reading of the record as it pertains to the father belies the factual findings reached by Family Court. Despite the two DWIs and his required attendance in alcohol abuse programs, the father referred to his drinking as a "little problem." He claimed not to know that refraining from alcohol and not driving while drinking were a part of his service plan or that failing to comply with those conditions would be a barrier to reuniting with his son. Rather, it was his belief

that he had complied with every aspect of the service plans, and that his son was not returned to him because the agency personnel had a "personal vendetta" against him.

A parent's refusal or failure to admit to alcohol problems or utilize services to strengthen the parental relationship with the child warrants finding that the parent failed to make realistic plans for the child's future, thus providing clear and convincing evidence of permanent neglect (*see Matter of Jennie EE*, 187 AD2d 877 [3d Dept 1992], *lv denied* 81 NY2d 706 [1993]). Even if we were to consider the father's post-petition successful completion of a several-month long alcohol abuse program in 2011 (*see Matter of Star Leslie W.*, 63 NY2d at 147), this does not mitigate the import of his son's statements made in 2012. Clearly, the father does not have insight into how his alcohol abuse has undermined his ability to create and maintain an adequate, stable home, or that it makes him less than a fit parent.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Moskowitz, Richter, Gische, JJ.

11745 In re Kevin Aoki, et al., Index 2604/08
Petitioners,

-against-

Echo Aoki, et al.,
Respondents,

- - - - -

Devon Aoki, et al.,
Respondents-Appellants,

Keiko Ono Aoki,
Respondent-Respondent.

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Pryor Cashman LLP, New York (David C. Rose of counsel), for appellants.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for Keiko Ono Aoki, respondent.

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Decree, Surrogate's Court, New York County (Rita Mella, S.), entered March 5, 2013, after a nonjury trial, invalidating two partial releases of a power of appointment executed by decedent Rocky Aoki, and bringing up for review an order, same court (Kristin Booth Glen, S.), entered April 27, 2010, which, insofar as appealed from, denied the motion of respondents-appellants Devon Aoki and Steven Aoki for summary judgment declaring said releases valid, based on the alleged constructive fraud of Rocky's attorneys, unanimously reversed, on the law, without costs, the decree vacated, the motion granted, and it is declared

that the releases are valid.

In 1998, decedent Rocky Aoki, the founder of the Benihana restaurant chain created the Benihana Protective Trust (BPT) to hold stock and other assets relating to Benihana. The BPT trust agreement gave Rocky the power to appoint the beneficiaries of the BPT through his will. He selected as trustees of the BPT two of his six children (petitioners Kevin Aoki and Kana Aoki) and his long-time attorney, Darwin C. Dornbush.

In July 2002, Rocky married respondent Keiko Ono Aoki. A few months later, Kana and Kevin met with Dornbush to express their concern that their father did not have a prenuptial agreement. Dornbush advised them that a postnuptial agreement would resolve their concerns. Rocky discussed this issue with Keiko but she refused to consent to such an agreement. Rocky thereafter met with Dornbush, Kevin and Kana to discuss their concerns regarding possible claims by Keiko against Benihana assets in the event of Rocky's death.

Norman Shaw, Dornbush's partner and an attorney experienced in estate work, recommended that Rocky could partially release his power of appointment under the BPT agreement so that he could appoint only to his descendants or trusts for his descendants, thereby restricting Benihana assets to members of his direct

family. Rocky, Kana and Kevin again met with Dornbush on September 23, 2002 and they reviewed what Dornbush characterized as a "close to final draft" of the partial release. The following day, Rocky met with all three again and signed the one-page document captioned "Partial Release of power of Appointment Under New York Estate, Powers & Trusts Law §10-9.2." The pertinent terms of the release are:

> "I hereby irrevocably partially release the power of appointment [in Article V(a) of the BPT agreement] so that, from now on, I shall have only the following power: I shall have a testamentary power to appoint any of the principal and accumulated net income remaining at my death to or for the benefit of any one or more of my descendants."

Rocky's relationship with his children began to deteriorate and reached the point where he commenced litigation against them and Dornbush in their capacities as trustees of the BPT. At his deposition in that litigation, Dornbush testified that he explained to Rocky that upon signing the release, disposition of the Benihana assets would now be limited to his children and their descendants, whereas before his appointment powers were unlimited. In that same action, Rocky testified that Dornbush just told him "sign here." However, both Rocky and Shaw testified that Shaw explained that the effect of the release was

that Rocky could appoint only to his descendants. It is also undisputed that Rocky had sufficient opportunity to read the one page release before signing it. On the same day that he signed the release, Rocky signed a codicil to his will and a consent to an amendment to the BPT agreement.

Because of a change in IRS regulations concerning bequests to non-resident aliens, Shaw prepared a "Further Partial Release of Power of Appointment Under New York Estate, Powers & Trusts Law §10-9.2" to cover that eventuality. This second release again provided that Rocky was "irrevocably" partially releasing his power of appointment under the BPT agreement, restricting his power to appoint only to his descendants, provided that they were not non-resident aliens. Rocky was given the opportunity to read this release before he signed it on December 27, 2002.

On August 4, 2003, Rocky executed a codicil which purported to exercise his power of appointment, giving 25% of the BPT outright to Keiko, and the income from the remaining 75%, to her for her lifetime. It also gave her the power to appoint the principal to one or more of Rocky's descendants in her will, and designated her as the executrix. The codicil was drafted by Keiko's regular counsel, Joseph Manson.

Manson thereafter wrote to Dornbush, advising him of the provisions of the codicil. He advised Dornbush that, at Rocky's suggestion, the two should meet to discuss the will "and other matters concerning the Aoki family." At their meeting, Manson asked Dornbush for an opinion from his firm as to whether Rocky's purported exercise of his power of appointment in the codicil was valid. On September 8, 2003, Shaw responded, opining that the portion of the codicil giving Keiko a beneficial interest in the BPT was invalid because the partial release signed by Rocky rendered Keiko an impermissible appointee of the trust. On September 22, 2003, Rocky executed an affidavit in which he stated that he did not understand that by signing the releases he could not leave his Benihana stock to anyone he chose through his will. He further stated: "If I had known that these documents prevented any changes to the disposition of my stock, I never would have signed the documents." The purpose of preparing this affidavit is unclear, in light of the fact that at no time prior to his death in July 2008 did Rocky take any steps to declare the releases invalid, or otherwise challenge their execution.

In fact, on September 7, 2007, almost four years after executing that affidavit, Rocky executed a new last will and testament. In it, he again purported to exercise his power of

appointment in the same manner as in his August 3, 2004 codicil. However, he added:

> "In the event that it is finally determined that the [above] exercise of my power of appointment . . . is invalid because, contrary to my wishes, the [September and December 2002 partial releases] are found to be valid, . . . I hereby exercise said power fifty percent . . . in favor of DEVON AOKI, . . .and fifty percent . . . in favor of STEVEN AOKI."

In February 2009, the trustees of the BPT brought this action to determine the validity of the partial releases. Devon and Steven answered. Keiko answered and asserted affirmative defenses, claiming, inter alia, that the proposed releases "are invalid as they are the product of fraud or were obtained through fraudulent devices."

After discovery was conducted, Devon and Steven moved for summary judgment to dismiss Keiko's affirmative defenses and to declare the releases valid. The Surrogate granted the motion in part and denied it in part, finding that Keiko had raised a triable issue of fact as to her affirmative defense of constructive fraud. After a bench trial, although the Surrogate found that Keiko had adduced no direct evidence that Rocky was unaware that the releases were irrevocable, the court held that the circumstantial evidence was sufficient to meet Keiko's burden

and that Devon and Steven failed to meet their burden of proving that Rocky's signing of the releases was voluntary and not the result of omission by his counsel. The Surrogate declared the releases invalid. We now reverse.

The principles underlying the concept of constructive fraud are of long-standing duration:

> "It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled." (*Cowee v Cornell*, 75 NY 91, 99-100 [1878]; *Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-699 [1978]).

"To avoid a release on the ground of fraud, a party must allege every material element of that cause of action with specific and detailed evidence in the record sufficient to

establish a prima facie case (*Shklovskiy v Kahn*, 273 AD2d 371, 372 [2d Dept 2000]). "In the absence of a fiduciary relationship between the parties to the release, the party seeking to avoid the release bears the burden of proving such fraud or other vitiating circumstances" (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]). Moreover, a release should "not be treated lightly" and "should never be converted into a starting point for renewed litigation" except in cases of "grave injustice" and then, only under "the traditional bases of setting aside written agreements" (*Touloumis v Chalem*, 156 AD2d 230, 231 [1st Dept 1989]).

Keiko relies on the fiduciary exception to support her contention that the releases are invalid. However, for constructive fraud to apply, the fiduciary must be a party to or have an interest in the subject transaction (*O'Hara*, 85 AD2d at 671). Here, neither Dornbush nor Shaw were parties to the releases and thus could not benefit from them. The Surrogate therefore erroneously shifted the burden of proof to Devon and Steven to prove that the releases were *not* procured by fraud.

The record does not support the claim that the releases are invalid because Rocky did not understand that he was irrevocably relinquishing his power to appoint the BPT assets to any person as he saw fit. Rocky's later allegations that he was not aware

he was signing an irrevocable waiver, that he did not read the document and did not understand it are not sufficient to set aside the releases. There is no evidence in the record that either Dornbush or Shaw ever represented to him that the waivers were anything but irrevocable, or misled him regarding their effect. There is nothing to indicate that the attorneys either concealed from or did not affirmatively provide Rocky with any information he needed to make an informed decision. In fact, despite his later disclaimer, Rocky testified at his deposition that Shaw did explain the effect of these waivers. The attorneys thus took all reasonable efforts to apprise Rocky of the effect of what he was signing. It is uncontested that Rocky had ample opportunity to read the documents and ask any questions regarding them. He chose not to do so, not once, but twice.

It is well established that a "party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms" (*Shklovskiy v Kahn*, 273 AD2d at 372; *Morby v Di Siena Assoc.*, 291 AD2d 604, 605 [3d Dept 2002]). The record is devoid of any excuse, let alone a valid excuse, for failing to read the release prior to signing it (*see Davis v Rochdale Vil., Inc.*, 109 AD3d 867 [2d Dept 2013]). Nor does the record support the allegations that Rocky did not understand the

waivers because they were in English. To the contrary, the record clearly demonstrates that Rocky was fluent in English, conducted his business affairs in English and gave his deposition in English. In any event, a claimed unfamiliarity with the English language will not support a claim of fraud where the proponent fails to demonstrate any efforts to have someone read and explain a document to him or her before signing it (*Shklovskiy*, 273 AD2d at 372; *Flusserova v Schnabel*, 92 AD3d 464, 465 [1st Dept 2012]). This is a common sense principle, for "to hold a release forever hostage to legal afterthoughts basically vitiates the nature of the release" (*Tajan v Pavia & Harcourt*, 257 AD2d 299, 306 [1st Dept 1999], *lv dismissed, denied* 94 NY2d 837 [1999]).

Most significantly however, it is undisputed that from at least the August 4, 2003 codicil, and most likely before, Rocky was aware that he signed irrevocable waivers. At no point did he make any attempt to have those waivers declared invalid, thereby calling into question his later allegations that the waivers did not represent his wishes. Accordingly, the releases should have

been given effect and the Surrogate's Court should have granted the motion for summary judgment.

In light of the foregoing, we need not reach appellants' remaining contentions.

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

ENTERED: MAY 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11941 Jackie J. Hill, Index 111309/10
Plaintiff-Respondent, 590873/11

-against-

Kerman Protection Systems, Inc.,
Defendant-Appellant.

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Kerman Protection Systems, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Map Lingerie, Inc.,
Third-Party Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about April 25, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 8, 2014,

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12146 Jenice McGinley, et al., Index 111278/09
Plaintiffs-Respondents,

-against-

Mystic West Realty Corp., doing business as Rosie O'Grady's, et al.,
Defendants-Appellants,

Apple Core Hotels, Inc., doing business as Comfort Inn,
Defendant,

The Church of St. Mary The Virgin Espiscopal Church, et al.,
Defendants-Respondents.

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Law Offices of James J. Toomey, New York (Kevin J. Spencer of counsel), for appellants.

Schlemmer & Maniatis, LLP, New York (William J. Maniatis of counsel), for McGinley respondents.

Lynch & Lynch, Garden City (Charlene I. Lund of counsel), for The Church of St. Mary the Virgin Episcopal Church, respondent.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for Times Square District Management Association, Inc. and Times Square District Management Association, respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered January 15, 2013, which, to the extent appealed from as limited by the briefs, denied the motion of defendants-appellants Mystic West Realty Corp., d/b/a Rosie O'Grady's, and Trel Restaurant Inc., d/b/a Rosie O'Grady's, for summary judgment

dismissing the complaint and cross claims as against them, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and cross claims as against those defendants.

Plaintiff Jenice McGinley alleges that she slipped and fell on a substance allegedly leaking from a garbage bag in front of defendant church. Defendants-appellants made a prima facie showing of their entitlement to judgment as a matter of law by submitting an affidavit from Mystic's general manager stating that neither entity was the owner of the abutting property and thus did not incur a statutory duty to maintain the sidewalk in reasonably safe condition pursuant to Administrative Code of City of NY § 7-210, and that neither entity ever placed garbage bags in front of the church's premises (*see Leary v Dallas BBQ*, 91 AD3d 519 [1st Dept 2012]).

The affidavits the church submitted in opposition to the motion were insufficient to raise an issue of fact. The affidavit of the church's rector was essentially hearsay, as it reported what he had learned from the church's porters concerning disposal of garbage by defendants-appellants, the Times Square defendants, and residents across the street. Further, the rector did not know if what he had learned concerned the day of

plaintiff's accident. The affidavit from the church's porter, while acceptable in form (*see* CPLR 2101[b]), did not supply non-hearsay evidence sufficient to raise an issue of fact (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [1st Dept 2010]). Indeed, it does not assert that defendants-appellants left garbage outside the church on or about the date of the accident. Rather, it states that the porter never saw garbage leaking from any garbage bag in front of the church, whether placed by the church, by defendants-appellants' employees or by anyone else.

In a reply affidavit, Mystic's general manager stated that, for the last 15 years, nightly trash pick up has been provided to the restaurant by a commercial garbage removal service between the hours of midnight and 1:00 a.m. With respect to photographs provided by plaintiffs depicting a public trash receptacle surrounded by trash bags, some bearing the logo "Times Square Alliance," he stated that the restaurant has never used trash bags of that type and never uses the public receptacle to dispose of its garbage.

Plaintiffs' assertions that workers from Mystic or Times Square Alliance or unidentified residents across the street may have deposited the leaking trash bag on church property are "mere

conclusions, expressions of hope or unsubstantiated allegations" that fail to comport with the requirement to tender proof in admissible form to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Nor have plaintiffs and the other opposing parties shown that discovery is necessary to oppose the motion (*see* CPLR 3212[f]). Indeed, they have expressed no more than "mere hope that somehow the plaintiffs will uncover evidence that will prove their case," which is insufficient to preclude the grant of summary judgment ([internal quotation marks omitted] *Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]).

All concur except Acosta and Saxe, JJ. who dissent in part in a memorandum by Saxe, J. as follows:

SAXE, J. (dissenting in part)

Plaintiff Jenice McGinley slipped and fell on the sidewalk in front of the Church of St. Mary the Virgin Episcopal Church, located at 145 West 46th Street in Manhattan. She identified the dangerous condition as "an accumulation of leaking trash bags." In addition to suing the Church, she sued Mystic West Realty, the owner of the Rosie O'Grady's restaurant located on the west side of the Church's property, along with Trel Restaurant Inc., the owner of another Rosie O'Grady's restaurant at a separate location, and Apple Core Hotels, Inc. d/b/a Comfort Inn, the owner of the property to the east of the Church.

The hotel successfully moved for summary judgment, based on the affidavit of its Director of Operations, who set forth the hotel's routine practices and asserted that the Hotel's garbage bags were not placed down the block in front of the Church.

Mystic and Trel thereafter made the underlying motion for summary judgment dismissing the complaint and cross claims as against them. They argued that they owed no duty to plaintiff, since they had no interest in the property owned by the Church, and, further they did not cause or create the leaking garbage condition that was alleged to have caused plaintiff's fall. They relied on the order granting the Hotel's motion, as well as

photographs of the accident location, and the affidavit of Mystic's general manager stating that Mystic had no garbage removal duties at the Church or on its sidewalk, performed no work in the area of the accident, and had never piled, stored, or otherwise disposed of its own garbage or garbage bags in the accident location. They contended that plaintiffs could not prove that they had notice, either actual or constructive, of any dangerous condition, or that they created such a condition.

Plaintiffs and the Church opposed the motion, arguing that there are triable issues of fact as to defendants' role in the placement of garbage in front of the Church's premises. The Church submitted the affidavits of its rector, Reverend Stephen Gerth, and porter, Mario Martinez, who were both employed by the Church before the accident.

The Church porter, Mario Martinez, stated that he puts out the Church's garbage bags at 2:00 p.m. on Tuesdays and Thursdays, since the Sanitation Department picks up garbage on Mondays, Wednesdays and Fridays between 7:00 and 8:00 a.m. After the garbage pickup, the sidewalk is swept clean and kept clear of any garbage until 2:00 p.m. on the day before the next pickup. Martinez also said that, in the past, he had repeatedly found that garbage from Mystic had been placed on the sidewalk in front

of the Church. When this happened, he stated, a Church employee complained to Mystic.

Reverend Gerth stated that he learned from the Church porters that over the years, Mystic has, from time to time, placed its garbage in front of the Church's property. Also, workers from Times Square Alliance, and residents from across the street, occasionally placed their garbage in front of the Church. He did not know if any of the foregoing happened on the date of plaintiff's accident. He did assert, however, that the Church had not placed its own garbage in front of the Church that morning, because on the date of plaintiff's accident they were anticipating a scheduled visit by the Church's presiding Bishop, and wanted to ensure the premises' best appearance.

The Church argued that Mystic was more likely to be the source of a leaking garbage bag, since the Church "predominantly" produced paper garbage while Mystic produced food residue, which can leak, and since Mystic had some history of placing its garbage on Church property for pickup.

Finally, both plaintiffs and the Church asserted a need for discovery; the Church had not deposed plaintiff concerning the exact accident location, what the garbage looked like, and other facts within her exclusive knowledge. Plaintiffs asserted that

discovery was needed with regard to defendants' procedures and process for garbage removal.

The motion court denied both defendants' motions.

Initially, summary judgment should have been granted dismissing the claims against defendant Trel Restaurant Inc., since it is undisputed that Trel had no interest in any premises near the accident location. However, summary judgment was properly denied as to Mystic.

Mario Martinez's affidavit, which was admissible since it did not contravene CPLR 2102(b), is sufficient to preclude a determination as a matter of law at this juncture eliminating any possibility that Mystic caused or created the leaking garbage condition that was alleged to have caused plaintiff's fall. His assertion that he had, at times, found that garbage from Mystic had been placed on the sidewalk in front of the Church, may not by itself be enough to establish that Mystic created the dangerous condition, but it certainly forms a good-faith basis for further inquiry into Mystic's past conduct and procedures regarding the disposal of its garbage, and for further inquiry by the Church to determine whether plaintiff might shed any further light over the exact nature of the condition she encountered.

Reverend Gerth's affidavit, while it is hearsay to the

extent he repeats what the porters told him, is admissible insofar as it reports his own first-hand experience in which Church porters spoke to him about Mystic employees leaving garbage on the Church's sidewalk in the past. In any event, "hearsay evidence may be considered when submitted in opposition to a summary judgment motion, so long as it is not the only proof submitted" (*Bishop v Maurer*, 106 AD3d 622, 622 [1st Dept 2013]).

The affidavit by Mystic's manager as to its use of a commercial garbage removal service, and the confirmatory letter from that company, while they weigh in Mystic's favor, do not preclude the possibility that a restaurant employee might have placed the restaurant's garbage on the nearby sidewalk where a municipal sanitation truck would remove it, as Martinez stated had occurred in the past. The opposing parties should have the opportunity to obtain discovery that might shed additional light on the issue.

The evidence that Times Square Alliance bags were sometimes left on the Church sidewalk, or that garbage was sometimes placed

there by others, merely creates a question as to whether some other nonparty may have been responsible for the claimed condition; it does not exonerate Mystic as a matter of law at this juncture.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12449-
12450 Bank of America, N.A., etc.,
Plaintiff-Respondent,

-against-

Howard Grufferman, et al.,
Defendants-Appellants,

New York City Transit Adjudication
Bureau, et al.,
Defendants.

Index 111508/10

_____

Michael Medina and Donald B. Cohen, New York, for appellants.

Buchanan Ingersoll & Rooney PC, New York (Tanya D. Bosi of counsel), for respondent.

_____

Judgment of Foreclosure and Sale, New York County (Eileen Rakower, J.), entered April 17, 2013, bringing up for review an order, same court and Justice, entered April 10, 2013, which, to the extent appealed from as limited by the briefs, following a traverse hearing, denied defendants-appellants' motion to dismiss the complaint for lack of jurisdiction, unanimously affirmed, with costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Service upon the doorman of defendants' apartment building was proper under CPLR 308(2), given that the process server was

denied access to defendants' apartment (*see F. I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797-798 [1977]). The court credited the process server's testimony that the doorman denied access to defendants' apartment, and matters of credibility are best determined by the motion court (*see Matter of Corcoran [Ardra Ins. Co.]*, 176 AD2d 508, 508 [1st Dept 1991]).

The motion court providently exercised its discretion to deny defendants' request to admit the doorman's logbook into evidence (*see Montes v New York City Tr. Auth.*, 46 AD3d 121, 123 [1st Dept 2007]). In any event, even if the court erred, the error was harmless in light of the court's credibility determinations, which are supported by the record.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12451 W. Douglas Mills, Index 601640/09
Plaintiff-Appellant,

-against-

Standing General Commission on
Christian Unity and Interreligious
Concerns, et al.,
Defendants-Respondents.

_____

Law Offices of Yomi Awoyinfa, Fresh Meadows (Obayomi Awoyinfa of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Allen B. Roberts of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about January 30, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff claims he was wrongfully terminated and seeks either reinstatement as Associate General Secretary of Dialogue and Interfaith Relations of defendant General Commission on Christian Unity and Interreligious Concerns (GCCUIC) or damages covering the balance of his alleged four-year term. He bases the claim on a paragraph in the recently amended Book of Discipline that provides that an Associate General Secretary of GCCUIC will be elected every four years. However, the GCCUIC's personnel

manual states, "All employees of the GCCUIC are employed at will and not by contract," and there is no question that plaintiff was aware of this provision. An employee at will may be freely terminated at any time (*Horn v New York Times*, 100 NY2d 85 [2003]; *Sabetay v Sterling Drug*, 69 NY2d 329 [1987]). The paragraph in the Book of Discipline providing for elections every four years does not constitute a contract for a four year term.

Moreover, the ministerial exception also bars plaintiff's claim, which primarily involves intra-church matters. "Under the 'ministerial exception' ..., a church's decision to hire, to fire, and to prescribe the duties of its minister are commonly held to be constitutionally protected" (*Second Episcopal Dist. African Methodist Episcopal Church v Prioleau*, 49 A3d 812, 817 [DC 2012]). Unlike the minister in *Prioleau*, plaintiff is not seeking damages for wages or benefits accrued prior to his termination.

Plaintiff was a "minister" for purposes of the ministerial exception while he was the Associate General Secretary of Dialogue and Interfaith Relations (*see e.g. Hosanna-Tabor Evangelical Lutheran Church & School v Equal Empl. Opportunity Commn.*, 565 US __, 132 S Ct 694 [2012]; *Bell v Presbyterian Church [U.S.A.]*, 126 F3d 328 [4th Cir 1997]). It is undisputed

that he is an ordained minister of the United Methodist Church (*see Hosanna-Tabor*, 565 US at __, 132 S Ct at 708 [Supreme Court considered it significant that plaintiff had been "ordained or commissioned as a minister"]). Furthermore, the position of Associate General Secretary of Dialogue and Interfaith Relations required a masters' level education in theology, and the position description said the focus of the position was to promote theological dialogue (*see id.* [Supreme Court noted that "significant religious training and a recognized religious mission underlie the description of the employee's position"]). Moreover, plaintiff's pension form recognized that GCCUIC was an "extension ministry" (*see Bell*, 565 US at __, 126 F3d at 330 [pointing out that, "(i)n its engagement letter, (defendant) Interfaith Impact recognized that Bell's service (as its executive director) would be an extension of his ministry"]), and he "claimed a special housing allowance on h[is] taxes that was available only to employees earning their compensation 'in the exercise of the ministry'" (*Hosanna-Tabor*, 565 US at __, 132 S Ct at 708; *see also Bell*, 126 F3d at 330, 332).

In view of the foregoing, we need not address the merits of whether plaintiff has stated claims for promissory estoppel and tortious interference.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12452-
12453 In re Male R., etc., and Others,

Dependent Children Under the Age of
Eighteen Years, etc.,

Patricia R.,
Respondent-Appellant,

St. Vincent's Services, Inc.,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about October 18, 2012, which, insofar as appealed from as limited by the briefs, terminated respondent mother's parental rights and transferred the custody and guardianship of the subject male children to petitioner agency and the Commissioner of the Department of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence at the dispositional hearing supported the determination that the best interests of the subject male children would be served by terminating the mother's

parental rights so the children may be adopted by their foster mother, with whom they have bonded and thrived (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Shaka Efion C.*, 207 AD2d 740 [1st Dept 1994]). Although the mother was issued a suspended judgment on consent with regard to her daughter, the same disposition is not warranted with respect to the male children who, unlike the daughter, have been living in a stable home since placement. The mother has failed to comply with her service plan, and it is not in the best interests of the male children to wait any longer for the mother to gain the ability to fulfill her parental obligations (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Janell J. [Shanequa J.]*, 88 AD3d 512 [1st Dept 2011]).

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12454 The People of the State of New York, Ind. 866N/12
Respondent,

-against-

Uhuru Adderley,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Robert Stolz, J.), rendered on or about May 23, 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 13, 2014

CLERK

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

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12455 Diana McLaughlin, et al., Index 302024/08
Plaintiffs-Respondents,

-against-

Thyssen Dover Elevator Company, et al.,
Defendants-Appellants.

_____

Babchik & Young, LLP, White Plains (Matthew J. Rosen of counsel), for appellants.

Rosenbaum & Rosenbaum, P.C., New York (Matthew T. Gammons of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 10, 2013, which denied defendants Thyssen Dover Elevator Company, Thyssen Elevator Company and Thyssenkrupp Elevator Corporation's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Diana McLaughlin fell upon stepping into an elevator that had misleveled about 1½ to 2 feet. It is undisputed that the misleveling condition was caused by defective level up, level down, and door zone relays, which were replaced after the accident.

An elevator company that agrees to maintain an elevator may be liable to a passenger for failure to correct conditions of

which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Koch v Otis El. Co.*, 10 AD2d 464, 467 [1st Dept 1960]).

Plaintiffs raised a triable issue of fact as to whether defendants had constructive notice of the misleveling condition or with reasonable care could have discovered and corrected the condition, by submitting the affidavit of their expert, who reviewed defendants' repair tickets and concluded that they revealed conditions related to the elevator's leveling function. Contrary to defendants' contention, the expert affidavit, which refuted defendants' proof of absence of prior misleveling problems by explaining how the prior defects were related to the leveling function, was not speculative (*see Stewart v World El. Co., Inc.*, 84 AD3d 491, 496 [1st Dept 2011]). To the extent the experts dispute whether the upward auxiliary relay and the subject leveling relays were similar, and whether the leveling relays were maintainable, this merely raises an issue of fact as to whether the subject relays were properly maintained or whether defendants could have reasonably inspected and maintained them

(*see Oettinger v Montgomery Kone, Inc.*, 34 AD3d 969, 970 [3d Dept 2006]; *Gleeson-Casey v Otis El. Co.*, 268 AD2d 406, 407 [2d Dept 2000]).

Issues of fact exist as to whether the doctrine of res ipsa loquitur applies here. The expert testimony conflicts as to whether the misleveling of the elevator would not ordinarily occur in the absence of negligence. It is, however, undisputed that defendants were exclusively responsible for maintenance and repair of the elevator, and the record is devoid of any evidence that plaintiff contributed to its misleveling (*Bryant v Boulevard Story, LLC*, 87 AD3d 428, 429 [1st Dept 2011]; *Gutierrez v Broad Fin. Ctr., LLC*, 84 AD3d 648 [1st Dept 2011]).

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.,

12456 Rosen's Café, LLC, Index 100770/09
Plaintiff-Appellant,

-against-

51st Madison Gourmet Corp., et al.,
Defendants-Respondents.

_____

Siegel & Reiner, LLP, New York (Richard H. Del Valle of counsel), for appellant.

Silver and Silver, LLP, New York (Herbert J. Silver of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about April 25, 2013, which, after a nonjury trial, directed that plaintiff recover the amount of $2,000 against the corporate defendant, and authorized defendants' counsel to release remaining monies held in escrow, less his fees, to defendants, unanimously affirmed, without costs.

Where the parties set down the terms of their agreement (for the sale of defendants' restaurant business to plaintiff) in a clear and unambiguous writing, the agreement should be enforced according to its plain meaning (*see generally W.W.W Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The trial court appropriately found the controlling terms for reimbursing plaintiff purchaser for costs expended to cure fire department

violations (¶ 16 of the Agreement) to be clear and unambiguous. Language in a written agreement is deemed to be clear and unambiguous where it is reasonably susceptible of only one meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Here, where the purchaser's costs to cure the violations exceeded $2,000, ¶ 16 explicitly provided that either the purchaser could cancel the contract, or, if the purchaser did not cancel and elected to close on the agreement (which it did), the seller would only be obligated to extend to purchaser a $2,000 maximum credit as against the purchase price, and that the purchaser would otherwise waive any claims it had in regard to violations existing against the property at the time of contracting. While plaintiff argues there was no evidence offered to indicate it had formally elected to close on the restaurant purchase agreement, the parties' conduct, on this record, affords a basis to support the trial court's finding that plaintiff opted to close on the agreement to purchase (*see e.g. Horsehead Indus. v Metallgesellschaft AG*, 239 AD2d 171 [1st Dept 1997]; *Matter of Shearer*, 94 AD3d 128 [1st Dept 2012]).

To the extent plaintiff argues that the parties provided for

a $25,000 to $50,000 escrow amount to be held by defendants' counsel, and that such escrow bespeaks the parties' intent to fully reimburse plaintiff for its expenses to cure the violations, such argument is unsupported by the language in the relevant agreements and, in any event, such assertion is refuted by the specific "waiver" language in ¶ 16. Where the intent of the parties is clear from the unambigous language of the parties' agreements, resort to extrinsic evidence in an attempt to vary the terms of the agreements will not be countenanced (*see generally Schron v Troutman Sanders LLP*, 20 NY3d 430 [2013]; *Gladstein v Martorella*, 71 AD3d 427 [1st Dept 2010]).

To the extent plaintiff argues that the "all claims" language found in the indemnification agreement executed by the seller at the time of the closing should be broadly construed to provide that the purchaser can recoup its monies expended to cure preexisting violations against the premises, such argument is unavailing. As the trial court found, the fire department violation against the premises, inclusive of any fines and/or necessary costs to cure, did not constitute a "claim" against the corporate defendant at the time it owned the premises. Not only did ¶ 16 of the parties' agreement specifically address the issue of preexisting violations against the premises along with the

rights and obligations of the parties vis-a-vis such violations (*see Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42 [1956] [specific provision controls over the more generalized provision]; *see also E-Z Eating 41 Corp. v H.E. Newport L.L.C.*, 84 AD3d 401 [1st Dept 2011]), but the indemnification agreement, when fairly construed in relation to the terms in the parties' purchase agreement, should be construed so as not to obviate the waiver language in ¶ 16, and, if reasonable, to permit all the provisions in all the parties' agreements to be found effective and enforceable (*see Muzak Corp.*, 1 NY2d at 46-47). Thus, the trial court reasonably found that the parties intended that the "any claims" language in the indemnification agreement (as against the corporate defendant) pertained to pre-closing slip and falls on the property, food poisoning, and similar liability claims, but not fire department violations.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12457 The People of the State of New York, Ind. 4366/12
Respondent,

-against-

Victoria Crawford,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered on or about January 23, 2013, 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 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12458 Lee & Associates NYC LLC, Index 653686/12
Plaintiff-Respondent,

-against-

The 1998 Alexander Karten Annuity Trust,
Defendant-Appellant.

_____

Cyruli Shanks Hart & Zizmor, LLP, New York (James E. Schwartz of counsel), for appellant.

Paul Frohman, P.C., New York (Paul Frohman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Edmead, J.), entered June 4, 2013, in favor of plaintiff Lee & Associates NYC LLC for the total sum of $178,108.85, unanimously affirmed, without costs.

The motion court properly found in favor of plaintiff broker on the issue of liability. The language of paragraph 13 of the lease rider obligated defendant landlord to pay the "agreed" brokerage fees to the named brokers, i.e., representatives of the defendant landlord and plaintiff broker (*see Helmsley-Spear, Inc. v. New York Blood Ctr.*, 257 AD2d 64, 67 [1st Dept 1999]). Plaintiff established that it was the procuring cause of the transaction (*see Kenneth D. Laub & Co., Inc. v 101 Park Ave. Assoc.*, 101 AD2d 744, 745 [1st Dept 1984]) through a series of

emails with defendant's representative, extending from March 21, 2012 to May 22, 2012, showing plaintiff's involvement in the essential terms of the lease negotiations. Further, the referee's award of $164,444, based on plaintiff's testimony regarding the customary rate in the community at the time services were rendered, is a reasonable commission (*see Kaplon-Belo Associates Inc. v Cheng*, 258 AD2d 622, 622 [2nd Dept 1999]). Since only the amount of plaintiff's commission remained unresolved, the amount of interest was properly calculated from the date the lease was signed (*see* CPLR 5001[b]). We note that contrary to defendant's contention that it is not part of the brokerage community, it was represented by a licensed broker who could have provided testimony to rebut the reasonableness of plaintiff's fee, but failed to do so.

The motion for additional discovery was properly denied. Defendant offered no evidence as to what it expected to elicit

that would lead to relevant evidence sufficient to defeat the motion for partial summary judgment (*see Lee v Ana Dev. Corp.*, 83 AD3d 545, 546 [1st Dept 2011]).

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12462 Crush Boone, Index 101509/11
Plaintiff-Appellant,

-against-

Elizabeth Taxi, Inc., et al.,
Defendants-Respondents.

_____

Levine & Gilbert, New York (Harvey A. Levine of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 7, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleged in his bill of particulars that, as a result of an accident in which he was thrown from his bicycle after being hit by defendants' taxi, he suffered cervical spine injury, and that he complained of neck and bilateral wrist pain after the accident, but that X rays taken at the time "apparently were negative." Plaintiff alleged, inter alia, injury under the permanent consequential limitations of use and 90/180-day categories of Insurance Law § 5102(d).

Defendants met their prima facie burden of demonstrating the absence of permanent consequential limitations of use injuries by submitting, inter alia, affirmed expert medical reports finding full range of motion in the cervical spine and wrists, negative test results and no objective evidence of permanent injury in plaintiff's cervical spine or wrists (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]). Defendants also submitted a report by their radiologist opining that plaintiff's claimed cervical spine injuries were chronic and degenerative, and not causally related to the subject accident (*see Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]).

In opposition, plaintiff failed to offer evidence of permanent consequential limitations of use of his cervical spine or wrists caused by the accident (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). Instead, plaintiff raised for the first time a new serious injury claim under Insurance Law § 5102(d), namely, that he sustained a fracture in his left wrist. In support, he offered the affirmation of a radiologist, which, contrary to the motion court's determination, was in sufficient compliance with the requirements of CPLR 2106 (*see e.g. Dennis v New York City Tr. Auth.*, 84 AD3d 579 [1st Dept 2001]). The radiologist had recently reviewed the post-accident left-wrist

MRI and averred that it showed a nondisplaced fracture of the scaphoid. However, it was error for the court to consider this new serious injury claim, since plaintiff did not plead a fracture injury in the bill of particulars (*see Christopher V. v James A. Leasing, Inc.*, 115 AD3d 462 [1st Dept 2014]; *Marte v New York City Tr. Auth.*, 59 AD3d 398 [2d Dept 2009]). Consideration of the new claim is especially inappropriate since there is no evidence that any of plaintiff's treating physicians ever diagnosed a left-wrist fracture, the radiologist who initially reviewed the left wrist MRI for plaintiff found no evidence of fracture, and plaintiff's new claim contradicts the allegations set forth in the verified bill of particulars and his deposition testimony.

Defendants also met their prima facie burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony in which he claimed that he was only confined to his bed and home for a month after the subject accident (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]). In opposition, plaintiff failed to submit competent medical evidence

contradicting this testimony and, furthermore, his submissions failed to address defendants' showing that his cervical spine injuries were degenerative and preexisting (*see Nova*, 112 AD3d at 436; *Bravo v Martinez*, 105 AD3d 458, 459 [1st Dept 2013]).

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12463 The People of the State of New York, Ind. 1232/09
Respondent,

-against-

Geronimo Velez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Jones Day, New York (Sarah J. Fox of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 22, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree, gang assault in the first degree and robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 14 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the jury's determinations concerning credibility. Aside from the testimony of a cooperating accomplice, there was strong circumstantial

evidence establishing defendant's participation in the attack on the victim, including, among other things, the presence of the victim's blood on defendant's jacket. Furthermore, there was ample evidence to support the conclusion that defendant acted with the requisite intent for each of the crimes.

The court's *Sandoval* ruling, permitting the People to inquire as to a portion of defendant's criminal record, balanced the appropriate factors and was a proper exercise of discretion (see *People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted the People to elicit two prior convictions and some of their underlying facts, since both involved purposeful behavior showing defendant's willingness to put his own interests above those of society, and neither was unduly prejudicial. Furthermore, the court correctly determined that defendant's direct testimony opened the door to a limited modification of the *Sandoval* ruling to permit elicitation of additional facts (*see generally People v Fardan*, 82 NY2d 638, 646 [1993]). We have considered and rejected defendant's remaining arguments concerning *Sandoval*-related issues. In any event, any errors regarding the *Sandoval* ruling or the cross-examination of defendant were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly admitted into evidence a letter sent by defendant to the accomplice witness, since the jury could have reasonably interpreted it as evincing defendant's consciousness of guilt, and any ambiguity was for the jury to consider (*see People v Yazum*, 13 NY2d 302, 304 [1963]). The court properly determined, after a hearing, that there was no basis for defendant's assertions that the prosecutor made the witness a government agent and arranged to have defendant meet the witness to solicit the letter (*see People v Cardona*, 41 NY2d 333 [1977]). Defendant's claim that the court should have charged the jury on evidence of consciousness of guilt is unpreserved, and we decline to review it in the interest of justice. Finally, we find that any error regarding the letter was likewise harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12464 Michael Marcano, Index 308961/08
Plaintiff-Appellant,

-against-

Hailey Development Group, LLC,
Defendant-Appellant,

Mark LaSala,
Defendant-Respondent,

LaSala Contracting Company, Inc., et al.,
Defendants.

_____

David Horowitz, P.C., New York (Steven J. Horowitz of counsel), for Michael Marcano, appellant.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for Hailey Development Group, LLC, appellant.

Law Office of Thomas K. Moore, White Plains (Kevin J. Philbin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 22, 2013, which granted defendant Mark LaSala's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Defendant Mark LaSala established that he was entitled to the exemption for "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 241[6]). LaSala never instructed plaintiff plumber on how to cut

the pipe nor did he provide the pipe or the chop saw that plaintiff was using at the time of his accident (*see Chambers v Tom*, 95 AD3d 666 [1st Dept 2012]). Although LaSala determined the location of shower bodies and fixtures and the location of sinks and toilets, such "participation was limited to discussion of the results the homeowner wished to see, not the method or manner in which the work was then to be performed" (*Affri v Basch*, 13 NY3d 592, 596 [2009]). Furthermore, even assuming that LaSala hired plaintiff's employer directly, and regularly visited the site, such evidence is insufficient to establish direction or control over plaintiff's work (*see Lopez v Dagan*, 98 AD3d 436, 437 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]).

The Labor Law § 200 claim was also properly dismissed as against LaSala. Regardless of the claimed dangerous condition of the worksite, which involved scattered debris, uneven flooring and poor lighting, plaintiff failed to show that LaSala had

either actual or constructive notice of such conditions (*see* *Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: MAY 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12465- Index 113150/10
12466N Koya Abe,
Plaintiff-Appellant,

-against-

Nancy Barton, et al.,
Defendants-Respondents.

_____

Jennifer L. Unruh, Astoria, for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Brian S. Kaplan of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 13, 2012, which, insofar as appealed, denied plaintiff's motion to rescind a stipulated order of reference to determine the issue of whether the parties should execute a confidentiality stipulation covering certain documents to be produced by defendants, as well as the terms of any such stipulation, unanimously affirmed, without costs. Order (same court, Ira Gammerman, J.H.O.), entered January 31, 2013, directing that the parties execute a confidentiality stipulation and that such stipulation be "so-ordered," unanimously affirmed, without costs.

The stipulation underlying the order of reference (reference stipulation), which stated that the parties were consenting to

the appointment of a referee pursuant to CPLR 4317(a) to determine "the issue of . . . terms of any confidentiality stipulation and order, if any," is unambiguous. Taken as a whole, it provides for the appointment of a referee to determine whether a confidentiality stipulation and order should be issued, and, if so, what its terms should be (*see Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446, 447 [2d Dept 2006]). Moreover, plaintiff's proposed construction, that the concluding words "if any" mean that he could unilaterally decide not to enter into a confidentiality stipulation, would defeat the purpose of the document, which was to appoint a referee to *determine* issues relating to a confidentiality stipulation. Even assuming that the reference stipulation is somehow ambiguous, warranting resort to extrinsic evidence (*see Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 [1st Dept 2008], *lv dismissed*, 14 NY3d 880 [2010]; *Aivaliotis*, 30 AD3d at 447), the extrinsic evidence to which plaintiff points is unavailing.

The entry of the September 2012 order rejecting the JHO's initial report as beyond the scope of the order of reference did not divest the JHO of power to issue the subsequent January 2013 order directing the parties to enter into the confidentiality stipulation, as the subsequent determination was within the scope

of the reference (*see 401 Hotel v MTI/Image Group*, 271 AD2d 228, 229 [1st Dept 2001]). Plaintiff's contention that the January 2013 order was issued after the 30 days provided for in CPLR 4319 is unavailing, since plaintiff never moved to compel the JHO to issue a determination (*see Cooper v Cooper*, 52 AD3d 429, 430 [1st Dept 2008]).

Taking into consideration the context of the order of reference and the nature of information sought to be protected as reflected in the parties' submissions, we find that the record supports the JHO's determination that a confidentiality stipulation is warranted. We further find that the JHO providently exercised his discretion in determining that the stipulation should take the form of defendants' proposed draft .

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 13, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Freedman, Richter, JJ.

12467N Robert Deacy, Index 300468/11
Plaintiff,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Respondents.

- - - - -

Iron Workers Locals 40, 361,
& 417 Union Security Funds,
Nonparty Appellant.

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Colleran, O'Hara & Mills L.L.P., Garden City (Alicia M. Shotwell of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 10, 2013, which granted in part defendants' motion to compel the compliance of nonparty Iron Workers Locals 40, 361, & 417 Union Security Funds (Security) with a subpoena duces tecum to produce the raw data used in developing actuarial reports, and denied Security's cross motion to quash the subpoena and for a protective order, unanimously affirmed, without costs.

Security seeks to quash a subpoena duces tecum served by defendants which sought information concerning the number of participants in their funds, including when they began

participating in the funds and the circumstances under which the participants exited the fund, i.e., regular retirement or disability retirement. Defendants asserted that such information would allow them to more accurately assess plaintiff's potential lost income. Under the circumstances presented and contrary to Security's contentions, the motion court properly concluded that such "raw data" is discoverable (*see Matter of New York City Asbestos Litig.*, 109 AD3d 7, 14 [1st Dept 2013], *lv dismissed* 22 NY3d 1016 [2013]).

Furthermore, defendants acknowledged the need for personal identifying information concerning the participants to be redacted from the documents produced, and have agreed, as the motion court directed, to pay for these and other costs associated with production of the documents.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12468 The People of the State of New York, Ind. 6675/06
Respondent,

-against-

Ernest Montgomery,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Carol Berkman, J.), rendered June 27, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points for defendant's failure to accept responsibility, based on his statements recorded in the presentence report reflecting an attempt to minimize his fault in the offense. In any event, regardless of whether defendant's correct point score is 110 or 120 points, he would still be a presumptive level three offender, and we find no basis for a

downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). The mitigating factors cited by defendant, including his age (early 50s) and lack of a prior sex crime conviction, are outweighed by his extensive criminal record, including the underlying offense, which was a crime of violence (*see e.g. People v Carter*, 60 AD3d 467 [1st Dept 2009], *lv denied* 12 NY3d 716 [2009]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12469 Steven T. Thornton, Index 308224/08
Plaintiff-Respondent, 83999/09

-against-

Riverbay Corporation,
Defendant-Appellant,

Allied Renovation Corp. et al.,
Defendants.
- - - - -
[And a Third-Party Action]

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Malapero & Prisco LLP, New York (Mark A. Bethmann of counsel), for appellant.

Bernard T. Callan, P.C., Central Islip (Bernard T. Callan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered June 4, 2013, which, to the extent appealed from, denied that part of the motion of defendant Riverbay Corporation (Riverbay) for summary judgment dismissing the Labor Law § 241(6) claim under Industrial Code (12 NYCRR) § 23-1.7(e)(1), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Riverbay dismissing the complaint as against it.

The record demonstrates that there is no triable issue of fact as to whether the proximate cause of plaintiff's injury was

a tripping hazard within a passageway (*see* 12 NYCRR 23-1.7[e][1]). Plaintiff's testimony and affidavit showed that his accident occurred when his jacket pocket caught on a doorknob, which caused him to "jerk[] back" and lose his balance and dislodged the roll of tar paper that had been holding the door open, allowing the door to close on his finger. Although plaintiff also testified that he tripped on the roll, this took place only after the roll had fallen from its original position propped against the door. There is no evidence that the roll was an obstruction or tripping hazard in its original position, and thus, plaintiff's injury was not caused by any violation of 12 NYCRR 23-1.7(e)(1) (*see Garcia v Renaissance Gardens Assoc.*, 242 AD2d 463, 464 [1st Dept 1997]; *see also Brown v New York City Economic Dev. Corp.*, 234 AD2d 33, 34 [1st Dept 1996]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12470 Kim Johnson, Index 309472/11
Plaintiff-Respondent,

-against-

Ann-Gur Realty Corporation,
Defendant-Appellant,

El Saboreo Deli Grocery LLC,
Defendant.

_____

White, Fleischner & Fino, LLP, New York (Jason Steinberg of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 16, 2013, which denied the motion of defendant Ann-Gur Realty Corporation (Ann-Gur) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Ann-Gur failed to establish its entitlement to judgment as a matter of law in this action where plaintiff was injured when he allegedly tripped and fell after stepping in a defect in the sidewalk that abutted premises owned by Ann-Gur. The record presents triable issues as to whether Ann-Gur's negligence in failing to maintain the subject sidewalk in a safe condition was

a proximate cause of plaintiff's accident. Ann-Gur presented evidence supporting two proximate causes of the accident, including plaintiff's testimony that he tripped on a hole in the sidewalk, and the report of Ann-Gur's medical expert opining that plaintiff was intoxicated at the time of his fall and that that was likely the cause of his fall. Under these circumstances, resolution of the issue of whether and to what extent plaintiff's condition contributed to his accident is a question of fact (*see Ruiz v 30 Real Estate Corp.*, 47 AD3d 432 [1st Dept 2008]; *compare McNally v Sabban*, 32 AD3d 340 [1st Dept 2006]). Similarly, any inconsistencies in plaintiff's testimony present credibility issues for a trier of fact (*see e.g. Hagensen v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, PC,* 108 AD3d 410, 411 [1st Dept 2013]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12471 In re Amari D.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about August 20, 2013, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of petit larceny, and placed her with the Administration for Children's Services for a period of 12 months in a nonsecure level of care, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent. Although the underlying offense was not serious, appellant was in need of a residential, nonsecure placement under the Close to Home Initiative program. The court properly declined to adjudicate appellant a person in

need of supervision (*see e.g. Matter of Na'Quana J.*, 50 AD3d 291 [1st Dept 2008]), particularly since appellant had already demonstrated, following a prior proceeding brought by her mother, that such a disposition would not control appellant's behavior. Accordingly, a juvenile delinquency adjudication was necessary to ensure appellant's compliance with residential treatment. "[T]he irony is presented that while the court may direct the PINS youth not to abscond, the statutory authority constraining the court essentially precludes an effective remedy should the youth abscond" (*Matter of Edwin G.*, 296 AD2d 7, 11 [1st Dept 2002]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12472 Forty Central Park South, Inc., et al., Plaintiffs-Respondents, Index 651841/13

-against-

Joseph Anza, Defendant-Appellant.

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Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for appellant.

Balestriere, Fariello & Abrams LLP, New York (John Balestriere of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 12, 2013, which denied defendant's motion to dismiss the complaint, unanimously modified, on the law, to grant the motion as to the fraudulent inducement and conversion causes of action, and otherwise affirmed, without costs.

Plaintiffs' failure to limit each paragraph in the complaint to a single allegation (*see* CPLR 3014) does not mandate dismissal since the purport of the complaint is plain, and defendant will have no difficulty answering the allegations (*see Michigan Mut. Liab. Co. v S.S. Silverblatt, Inc.*, 15 AD2d 649 [1st Dept 1962]).

Plaintiffs allege that in the monthly reports, generated after the Operating Agreement was entered into, defendant

misrepresented that the business venture had been profitable and that plaintiffs had been earning positive returns on their investment; that defendant in fact did not invest the funds as promised; and that they relied on the monthly reports in continuing their investment in the company. These allegations state a cause of action for fraud (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The disclaimers set forth in each monthly report do not preclude a finding of justifiable reliance since the alleged misrepresentations in the reports concerned facts peculiarly within defendant's knowledge (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]).

However, the complaint fails to state a cause of action for fraudulent inducement, since it essentially alleges that defendant did not intend to perform under the contract when he made the promissory statements, which gives rise only to a breach of contract claim (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1st Dept 1999]; *Non-Linear Trading Co. v*

Braddis Assoc., 243 AD2d 107, 118-119 [1st Dept 1998]). The conversion claim should be dismissed because it is merely restates the breach of contract claim (*see Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 [1st Dept 2008]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12476 The People of the State of New York, Ind. 6362/06
Respondent,

-against-

Gabriel Hernandez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi of counsel), for respondent.

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Order, Supreme Court, New York (Ronald A. Zweibel, J.), entered on or about March 7, 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.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two sexually violent offender adjudication. Defendant does not contest 65 of the 75 points required for a level two adjudication. The court properly assessed 10 points for forcible compulsion, based on evidence that defendant overpowered and grabbed the 11-year-old victim and took her to a stairway for the purpose of raping her, and tried

to place his hand over her mouth to prevent her from screaming. The court also properly assessed 15 points for failure to accept responsibility, based on statements by defendant that tended to minimize his guilt, and his unjustified refusal to participate in sex offender treatment even after a program in his native language was offered.

The court properly exercised its discretion in declining 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 already taken into account in 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 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12477 In re Tolita Hallums, Index 400795/12
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Tolita Hallums, petitioner pro se.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

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Determination of respondent, dated March 7, 2012, which, after a hearing, terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered October 18, 2012), dismissed, without costs.

Substantial evidence supports the determination that petitioner violated a 2010 stipulation that permanently excluded her son from her apartment based on his involvement in illegal drug activity (*see Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]). There exists no basis to disturb the credibility determinations of the Hearing Officer (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see Matter of Cruz v City of New York*, 106 AD3d 631 [1st Dept 2013]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12478- Index 152124/12
12479 Brandi A. Walzer,
Plaintiff-Appellant,

-against-

Metropolitan Transportation
Authority, et al.,
Respondents-Respondents,

Jane Does 1-5, et al.,
Respondents.

_____

Ivar Goldart, New York, for appellant.

Kristen Nolan, Brooklyn, for Metropolitan Transportation Authority and New York City Transit Authority, respondents.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for The City of New York, respondent.

_____

Orders, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 8, 2013, which granted defendants' motions to dismiss the complaint, unanimously modified, on the law, to the extent of reinstating the discrimination claims under the State and City Human Rights Laws, and otherwise affirmed, without costs.

Applying the liberal pleading standards applicable to employment discrimination claims under the State and City Human Rights Law (*see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140,

145 [1st Dept 2009]; Executive Law § 296[1][a]; Administrative Code of City of NY § 8-107[1][a]), plaintiff has stated causes of action for violations of the Human Rights Laws based on sex discrimination. Plaintiff, a former provisional road car inspector with defendant New York City Transit Authority, sufficiently alleged, inter alia, that despite similar, if not better qualifications, she was not hired to the position of cleaner while other former provisional road car inspectors, who were males, were hired to the same position (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

Plaintiff's claims for negligence and negligent hiring and supervision fail because she did not exhaust her administrative remedies as was required (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Furthermore, these claims, which seek to challenge an administrative agency's decision, are governed by CPLR article 78, and a four-month statute of limitations (*see* CPLR 217[1]), which plaintiff failed to meet.

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12480 Adam Andron, Index 110691/08
Plaintiff-Appellant,

-against-

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

_____

Philip J. Rizzuto P.C., Carle Place (Kenneth R. Shapiro of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey Wright, J.), entered June 19, 2013, which denied plaintiff's motion seeking to strike defendants' answer for willful concealment of discovery and intentional violation of prior court orders directing disclosure, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendants' cross motion as untimely, and otherwise affirmed, without costs.

The court properly denied plaintiff's motion to strike the City's answer for late disclosure of evidence. Whether the additional documents disclosed are relevant can be fully explored at trial.

However, the motion court abused its discretion in granting

leave for defendants to cross-move for summary judgment on the issue of lack of prior written notice, upon presentation of this late disclosure, on grounds unrelated to plaintiff's motion, and in the absence of good cause for the untimely motion (*see Brill v City of New York*, 2 NY3d 648 [2004]; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]). Were we to consider the merits of the cross motion on this issue, we would find that issues of fact preclude summary judgment (*see Sacco v City of New York*, 92 AD3d 529 [1st Dept 2012]).

Further, the motion court erred in considering the sufficiency of the notice of claim as a basis to dismiss plaintiff's action. This ground was not litigated or raised by the parties, and plaintiff was prejudiced, since he was unable to respond to the ground considered sua sponte by the court (*Greene v Davidson*, 210 AD2d 108, 109 [1st Dept 1994], *lv denied* 85 NY2d 806 [1995]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12482 The People of the State of New York, Ind. 2003/08
Respondent,

-against-

Kamal Thomas,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered June 20, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the fifth degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

As the People concede, the record does not establish a valid waiver of defendant's right to appeal. However, we perceive no basis for reducing the sentence.

Defendant's argument that his plea should be vacated in the event of this Court's reversal of another conviction has been rendered academic by our affirmance of that conviction (*People v Thomas*, __AD3d__, 2014 NY Slip Op 01564).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12483 The People of the State of New York, Ind. 2089/10
Respondent,

-against-

Lorenzo Smith,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about February 7, 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 13, 2014

CLERK

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

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12484 Edward L. Shugrue III, et al., Index 650912/13
Plaintiffs-Appellants,

-against-

Lee Stahl, et al.,
Defendants-Respondents.

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Katsky Korins LLP, New York (Joel S. Weiss of counsel), for appellants.

Rosenthal Curry & Kranz, LLP, East Meadow (Edward M. Rosenthal of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 26, 2013, which granted defendants' motion to dismiss plaintiffs' second cause of action for fraudulent inducement as against all defendants and to dismiss all claims against defendant Lee Stahl in his personal capacity, unanimously modified, on the law, to the extent of denying those portions of the motion seeking (1) dismissal of plaintiffs' second cause of action for fraudulent inducement as against all defendants, and (2) dismissal of the second through fourth causes of action asserted as against defendant Stahl, and otherwise affirmed, without costs.

Plaintiffs' fraudulent inducement claim was not duplicative of their claim for breach of contract, since it was based on

misrepresentations of then present facts that were collateral to the contract (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept [2010], *lv dismissed* 17 NY3d 782 [2011]), and involved a "breach of duty distinct from, or in addition to, the breach of contract" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998] [internal quotation marks omitted]). Indeed, the complaint alleged that defendant Lee Stahl, the chief executive officer and sole shareholder of the corporate defendants, misrepresented to plaintiffs that defendants had obtained all of the required permits and approvals and had completed the construction plans for their home renovation project, which induced plaintiffs to enter into the construction contract with defendants in October 2012.

Supreme Court properly dismissed plaintiffs' fifth cause of action against defendant Stahl, seeking alter ego liability and to pierce the corporate veil, since such a claim does not "constitute a cause of action independent of that against the corporation" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *Robinson v Day*, 103 AD3d 584, 588 [1st Dept 2013]).

Supreme Court properly dismissed the breach of contract cause of action as against defendant Stahl. There is no

indication that Stahl purported to bind himself individually to the construction contract (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 407-408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]).

The second, third, and fourth causes of action should not have been dismissed as against Stahl, since they allege sufficient facts to hold Stahl personally liable based on his alleged commission of various torts (*see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [1st Dept 2013]).

We have considered plaintiffs' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12485 Bonnie Edan, as Executrix of the Estate of Lawrence Saul, Deceased,
Plaintiff-Respondent,

-against-

Ruth C. Johnson, M.D., et al.,
Defendants,

Monique Girard, M.D.,
Defendant-Appellant.

Index 805223/12

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Gordon & Silber, P.C., New York (Eldar Mayouhas of counsel), for appellant.

Dinkes & Schwitzer, P.C., New York (Ellen Sundheimer of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered April 1, 2013, which denied defendant Monique Girard, M.D., motion to dismiss the complaint as against her for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff properly effected service upon defendant doctor at her actual place of business, defendant Hercules Medical, P.C., by leaving the summons and complaint with the receptionist at the practice, who was a person of suitable age and discretion (*see* CPLR 308[2]; *Colon v Beekman Downtown Hosp.*, 111 AD2d 841 [2d Dept 1985]). That defendant doctor was temporarily out on maternity leave when the service was effectuated is of no moment,

since she was clearly identified as a doctor working in the Hercules Medical practice, and resumed working there after her temporary four-month absence (*see Columbus Realty Inv. Corp. v Weng-Heng Tsiang*, 226 AD2d 259, 259 [1st Dept 1996]). Further, the service of process at Hercules Medical was reasonably calculated to afford her with notice of commencement of the action, since the receptionist could reasonably be expected to convey the message or papers to her, as the intended party (*see Charnin v Cogan*, 250 AD2d 513, 518 [1st Dept 1998]; *Grasso v Matarazzo*, 288 AD2d 185 [2d Dept 2011]).

A traverse hearing is not required, because defendant's claims are insufficient to rebut the prima facie proof of proper service pursuant to CPLR 308(2). Plaintiff's process server described how process was served, and the receptionist at Hercules Medical did not deny in her affidavit that she was a person of suitable age and discretion, that she was working on the date process was effectuated, or that her appearance matched the process server's description of the individual served (*see Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763, 764-765 [2d Dept 2012]).

Plaintiff's failure to comply with the 120-day deadline imposed by CPLR 306-b does not require dismissal of the action.

Indeed, the trial court properly exercised its discretion to deem the affidavits of service timely filed nunc pro tunc, because the record demonstrates that plaintiff's failure to timely file them was caused by her law firm's unfamiliarity with the electronic filing system (*see Bell v Bell, Kalnick, Klee & Green*, 246 AD2d 442, 443 [1st Dept 1998]). Moreover, the action was otherwise properly commenced (*see id.; Paracha v County of Nassau*, 228 AD2d 422, 423 [1st Dept 1996]).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12486 The People of the State of New York, Ind. 3155/12
Respondent,

-against-

Jesus Lopez,
Defendant-Appellant.

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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 (Renee A. White, J.), rendered on or about January 22, 2013, 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 13, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12487N In re 856 River Ave. Rest. Corp., doing business as "Billy's At The Stadium," Petitioner-Appellant, Index 260867/11

-against-

Style & Care, Inc., Respondent-Respondent.

Ricardo E. Oquendo, New York, for appellant.

Law Offices of Michael P. Giampilis, P.C., Mineola (Michael P. Giampilis of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 26, 2012, which denied petitioner's application pursuant to Lien Law § 19(6) for an order summarily discharging the mechanic's lien that respondent filed against it, unanimously affirmed, without costs.

Lien Law § 10(1) requires that a mechanic's lien be filed within eight months after the lienor finishes its work or last furnishes materials (Lien Law § 10[1]). Here, the lien was filed less than two months after April 30, 2011, the date that respondent represented in its verified notice of lien that it had completed its work. Although that date did not appear on respondent's itemized statement of work performed, respondent's

principal submitted an affidavit in opposition to the petition averring that work had been done on that date, which petitioner disputes. Because the lien was timely on its face, the court was not permitted to summarily discharge it on the basis of untimeliness (Lien Law § 19[6]; *Matter of Taocon, Inc. v Urban D.C. Inc.*, 110 AD3d 423 [1st Dept 2013]; *Slazer Enters. Owner, LLC v Gotham Greenwich Constr. Co., LLC*, 50 AD3d 341 [1st Dept 2008]). It is a trial, not a summary proceeding, that is the proper forum for resolving the factual disputes between these parties (*id.*).

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

ENTERED: MAY 13, 2014

CLERK

Tom, J.P., Andrias, DeGrasse, Manzanet-Daniels, Gische, JJ.

10314N In re Patrolmen's Benevolent Association of the City of New York, Inc., etc., et al., Petitioners-Respondents,

-against-

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

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Municipal Labor Committee, Amicus Curiae.

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Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for appellants.

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn of counsel), for respondents.

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

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2011, reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding dismissed.

Opinion by Andrias, J. All concur except Tom, J.P. and Gische, J. who dissent in an Opinion by Gische, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Leland G. DeGrasse
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

10314N
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In re Patrolmen's Benevolent Association of the City of New York, Inc., etc., et al.,
Petitioners-Respondents,

-against-

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

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Municipal Labor Committee,
Amicus Curiae.

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Respondents appeal from an order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2011, insofar as appealed from as limited by the briefs, enjoining respondents from implementing any termination or revocation of "Release Time" leave for the three individual petitioners pending resolution of arbitration proceedings commenced by petitioner Patrolmen’s Benevolent Association.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch and Pamela Seider Dolgow of counsel), for appellants.

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn and Mark T. Walsh of counsel), and Michael T. Murray, New York (Michael T. Murray, Gaurav I. Shah and David W. Morris of counsel), for respondents.

Greenberg Burzichelli Greenberg P.C., Lake Success (Harry Greenberg and Genevieve E. Peeples of counsel), for amicus curiae.

ANDRIAS, J.

Supreme Court granted petitioners a preliminary injunction enjoining respondents from denying or revoking "Release Time" to the individual petitioners, pending resolution of arbitration proceedings. Because petitioners have failed to establish a likelihood of success on the merits of the claim to be arbitrated, we reverse and vacate the preliminary injunction.

The individual petitioners were elected by members of petitioner Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) to four-year terms as the sole borough-wide PBA representatives for police officers assigned to the Bronx. On July 1, 2011, at the request of the PBA, the Office of Labor Relations (OLR) issued Release Time certificates to the individual petitioners pursuant to Mayor's Executive Order #75 (3/22/73) (EO 75) which approved full-time leave with pay and benefits.

On October 25, 2011, a grand jury indicted the individual petitioners in connection with an alleged ticket-fixing scheme. On October 28, 2011, pursuant to Civil Service Law § 75(3-a), the individual petitioners were suspended without pay for 30 days, after which they were restored to modified duty. Meanwhile, by letter dated November 3, 2011, the OLR rescinded their Release Time certificates. The PBA declined the OLR's offer to issue new

Release Time certificates for three employees of the union's choice, and filed a group grievance with the OLR.

After the grievance was denied, petitioners filed a request for arbitration with the New York City Office of Collective Bargaining seeking to reinstate the certificates on the ground that the rescission violated the parties' collective bargaining agreement and EO 75. In conjunction therewith, petitioners commenced this proceeding seeking a preliminary injunction pending arbitration, pursuant to CPLR 7502(c).

CPLR 7502(c) provides that the Supreme Court "may entertain an application for ... a preliminary injunction in connection with an arbitration that is pending ... but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." The party seeking the preliminary injunction must also demonstrate a probability of success on the merits, danger of irreparable injury in the absence of a preliminary injunction, and a balance of the equities in their favor (*see Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 [1st Dept 2009]; *Erber v Catalyst Trading*, 303 AD2d 165 [1st Dept 2003]). Applying these standards, even assuming that petitioners established that an award in their favor would be rendered ineffectual without provisional relief, as required by CPLR

7502(c), they have failed to make the requisite showing of a likelihood of success on the merits, and therefore have not established their entitlement to injunctive relief (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

The right of union-designated employees to be released from their job duties to perform union or joint labor-management activities is established in EO 75, which generally vests the City with broad oversight of employee representatives. Section 4(4) of EO 75 provides:

> "Organizing, planning, directing, or participating in any way in strikes, work stoppages, or job actions of any kind, are excluded from the protection or coverage of this Order. Any employees assigned on a full or part-time basis or granted leave of absence without pay pursuant to this Order who participate in such excluded activity may have such status suspended or terminated by the City Director of Labor Relations."

Section 4(10) provides: "Employees assigned on a full-time or part-time basis or granted leave without pay pursuant to this Order shall at all times conduct themselves in a responsible manner." Section 5 provides that "[n]othing contained in this Order shall be deemed to have the effect of changing the character of any subject matter hereof which is a managerial prerogative and as a non-mandatory subject of collective bargaining."

Enforcement of EO 75 is committed to the OLR Commissioner, who may issue implementing rules and regulations. The indictments of the individual petitioners on charges related to a ticket-fixing scheme that include allegations of grand larceny, official misconduct, tampering with public records, and criminal solicitation constitute a sufficient basis for the City to determine that the individual petitioners did not "at all times conduct themselves in a responsible manner" (*see generally Colon v City of New York*, 60 NY2d 78, 82 [1983]; *Jenkins v City of New York*, 2 AD3d 291 [1st Dept 2003]). Accordingly, OLR was entitled to unilaterally rescind the Release Time certificates.

The dissent believes that petitioners made a sufficient showing of a likelihood of success on the merits by virtue of their argument that EO 75's provision for cancellation of Release Time in two defined sets of circumstances (*see* EO 75 § 4[4],[7]) means that Release Time may not be cancelled for any other reason. However, EO 75 §4(4) focuses on strikes, work stoppages, and job actions, and makes clear that they are not protected. Although the subsection provides that any employee on a leave status who participates in such activity may be suspended or terminated, it does not state that this is the sole ground for rescission of leave status. EO 75 4(10) imposes a requirement that all employees on leave conduct themselves in a responsible

manner, the only reasonable inference from which is that there are consequences for non-compliance. Petitioners' proposed construction of EO 75 deprives the City of any authority to unilaterally revoke Release Time and would render section 4(10), the Order's catch-all provision, a nullity, which is an untenable construction (*see Namad v Salomon, Inc.*, 74 NY2d 751 [1989]; *People v Kates*, 77 AD2d 417, 418 [4th Dept 1980], *affd* 53 NY2d 591 [1981]). It is also inconsistent with the broad oversight of employee representatives that the Order vests in the City. Indeed, the Release Time certificates state on their face that they "MAY BE REVOKED, MODIFIED OR CANCELLED," and petitioners do not suggest any purpose section 4(10) might have, other than to vest the City with residual authority to rescind Release Time where warranted.

Since petitioners' interpretation of EO 75 is not plausible, they have not demonstrated a likelihood of success on the merits.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered December 30, 2011, insofar as appealed from as limited by the briefs, enjoining respondents from implementing any termination or revocation of "Release Time" leave for the three individual petitioners pending resolution of arbitration proceedings commenced by petitioner Patrolmen's Benevolent Association,

should be reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding dismissed.

All concur except Tom, J.P. and Gische, J.
who dissent in an Opinion by Gische J.

GISCHE, J. (dissenting)

I respectfully dissent and would affirm the order and judgment of the motion court. The court properly exercised its discretion in granting petitioner's motion for injunctive relief in aid of arbitration, enjoining respondents from terminating or revoking the release time previously issued to the individual petitioners pursuant to Executive Order 75 (EO 75) (*see* CPLR 7502[c]; *Kalyanaram v New York Inst. of Tech.*, 63 AD3d 435, 435 [1st Dept 2009]; see *Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270 [1st Dept 1996]). Petitioners met their burden of demonstrating that were they to prevail on their grievance at arbitration, any award in their favor would be rendered ineffectual without such provisional relief (CPLR 7502[c]). The motion court also found that under article 63 of the CPLR, petitioners had shown a "likelihood of success on the merits, irreparable injury in [the] absence of such relief and a balancing of the equities in [their] favor" (*Kalyanaram v New York Inst. of Tech.*, *supra*; *see Matter of H.I.G. Capital Mgt. v Ligator*, *supra*; *see also* CPLR 6301 *et seq.*).

On the merits, petitioner made a sufficient showing that the purpose of EO 75 is to provide standardized time and leave policies, practices and guidelines for City employees who serve as designated union representatives. Although EO 75 § 4(4)

allows the City's Office of Labor Relations (OLR) to suspend or terminate any employee who engages in "excluded activity," which is defined as "[o]rganizing, planning, directing, or participating in any way in strikes, work stoppages, or job actions of any kind," and EO 75 § 4(10) further requires that employees who are granted leave without pay "conduct themselves in a responsible manner," there is no language in EO 75 that would specifically allow the City to revoke any certificates previously granted in a situation where, as here, the employee has been charged with committing a crime. Both parties present strong arguments on the law. However, the issue whether the City can unilaterally revoke its previous grant of release time to these three officers, who have pleaded not guilty to charges that they were involved in a ticket fixing scheme, is the very issue of the grievance that is the subject of arbitration. Contrary to the City's arguments, the motion court did not decide the merits of the grievance.

I differ with the majority to the extent that it interprets EO 75 § 4(10) on this appeal. By interpreting this provision, the majority has resolved the very issue that is the subject of the grievance yet to be arbitrated. A party seeking a preliminary injunction does not have to provide conclusive proof of its ultimate right to such relief, and a preliminary

injunction can, in the court's discretion, be issued where the right to the ultimate relief sought is disputed (see *Datwani v Datwani*, 102 AD3d 616 [1st Dept 2013]).

The motion court did not abuse its discretion and we should not reverse. The motion court only decided that petitioners had satisfied the requirements of article 75 and article 63 and that a preliminary injunction in aid of arbitration was warranted to maintain the status quo until the ultimate issue was decided by the arbitrator. Contrary to the City's arguments, the status quo was that the individual petitioners had certificates of release time which allowed them to appear on behalf of the PBA as union representatives. The petitioners could not have sought relief from the court until the City had already acted by revoking those certificates.

Petitioners also showed that they would suffer irreparable harm without the preliminary injunction. The individual petitioners are officers who were designated by their union to act on behalf of its members. The City's offer, to allow the petitioners to substitute different representatives for the union and grant them release time for that purpose, does not ameliorate the harm because the union's chosen representatives are not fungible.

Petitioners also showed that the equities tip in their favor. Although agency heads must coordinate with the OLR in establishing reasonable limits on the number and titles of employees who spend their time on labor-related/union activities, EO 75 does not otherwise erode the independence of the unions in the administration of union matters.

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

ENTERED: MAY 13, 2014

CLERK