SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 2, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12195 Fidelity National Title Insurance Company, Plaintiff-Appellant, Index 650727/10E

-against-

NY Land Title Agency LLC, et al., Defendants-Respondents.

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Fidelity National Law Group, New York (Donald G. Davis of counsel), for appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 21, 2012, which, to the extent appealed from, granted defendants' motion to dismiss the third through eleventh causes of action in the complaint, unanimously modified, on the law, to reinstate the seventh cause of action for fraud, and otherwise affirmed, without costs.

We find that plaintiff title insurer has adequately alleged fraud based on defendants' failure to report a mortgage held by Arbor Commercial Mortgage in the certificate of title or title policy, and their misrepresentation that the insured mortgage

would be a first position lien encumbering the property (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]). We therefore reinstate the seventh cause of action against all defendants.

On this motion pursuant to CPLR 3211(a)(1) and (7), the complaint presents not only a rational basis, but a compelling one "for inferring that the alleged misrepresentations" concerning the encumbrance on the title "were knowingly made" (*Oster v Kirschner*, 77 AD3d 51, 57 [1st Dept 2010] [internal quotation marks omitted]). Defendants offered no explanation, and left completely unanswered, the central questions of (1) how the certificate of title could possibly have constituted adequate disclosure of the Arbor mortgage when the certificate of title was not provided to plaintiff title insurer until *after the title policy had already been issued without plaintiff's required authorization*; and (2) why, despite their admitted knowledge of the Arbor mortgage, defendants failed to pay off or to except the Arbor mortgage from coverage. Indeed, defendants did not even file an opposition brief on appeal.

Defendants' concealment of the Arbor mortgage from Fidelity is the very act that enabled defendants to avoid paying off the Arbor mortgage and to allegedly misappropriate the escrowed funds. As noted by the motion court, the issuance of the policy

months before the certificate of title had been transmitted "defeated the entire purpose of the title search and rendered any purported disclosures entirely meaningless."

To show reliance, Fidelity must demonstrate that it was induced to act or to refrain from acting to its detriment by virtue of the alleged misrepresentation or omission (*see Foothill Capital Corp. v Grant Thornton L.L.P.*, 276 AD2d 437, 438 [1st Dept 2000]). At this stage, Fidelity has sufficiently alleged that it was induced to refrain from "taking steps . . . to protect its interests," to its detriment, as a direct result of defendants' failures to provide the certificate of title and disclose the Arbor mortgage prior to issuing the policy (*Foothill*, 276 AD2d at 438). The complaint alleges that in response to defendants' belated request for authorization, Fidelity "expressly raised the issue of the defendants' omission of the Arbor mortgage on the certificate of title." This suggests that defendants' earlier omissions and failures to disclose the Arbor mortgage did in fact induce Fidelity to refrain from taking steps to protect its interests. Indeed, the motion court itself recognized that the "failure to transmit the certificate of title to Fidelity until after the policy had been improperly issued, proximately caused [Fidelity's] losses" and denied "Fidelity the opportunity to cure the title problems or

change the terms of the policy before it was issued."

Fidelity relied upon defendant NY Land Title, its policy-issuing agent, and Land Title Associates, which ordered or obtained the title search, to determine whether there were any other pre-existing encumbrances on the property so as to assist it in determining whether, and under what conditions, to issue a title policy. Indeed, we have found, under similar circumstances, that the element of reliance should be presumed (*see Ackerman v Price Waterhouse*, 252 AD2d 179, 197-199 [1st Dept 1998]).

Fidelity has sufficiently pleaded that it was defendants' very misrepresentations and omissions that caused issuance of the title policy which now obligates Fidelity to insure against losses caused by the Arbor mortgage. The bringing of the foreclosure action was foreseeable under the circumstances – indeed, it was the very risk Fidelity sought to protect itself against.

The fraud claim is not duplicative of the contract claim as to defendant NY Land Title Agency LLC. Fidelity has specifically alleged that NY Land Title made collateral and fraudulent misrepresentations, in both the certificate of title and the title policy, that the insured mortgage would be in a first position lien encumbering the property, despite defendants'

actual knowledge that the Arbor mortgage was a pre-existing lien on the property.

The court properly dismissed the negligent misrepresentation claims against defendants Ephraim Frenkel and Land Title Associates. The complaint does not even allege that plaintiff had a special relationship with Land Title Associates (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). Although the complaint does allege that plaintiff had a special relationship with Frenkel, the factors mentioned by the complaint — Frenkel's position as managing member and sole member of both NY Land Title and Land Title Associates, and his control and domination of both entities — do not create a special relationship between him and plaintiff. Indeed, Frenkel does not "possess unique or specialized expertise" (*id.* [internal quotation marks omitted]), and "a special relationship of trust and confidence does not arise merely from an arm's-length business transaction" like the one at issue here (*Waterscape Resort LLC v McGovern*, 107 AD3d 571, 571 [1st Dept 2013]; *see also Greentech Research LLC v Wissman*, 104 AD3d 540, 540 [1st Dept 2013]).

As there is no special relationship between Frenkel and plaintiff, the court properly dismissed the negligence causes of action, which merely state that Frenkel owes a duty to plaintiff

based on their special relationship (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576-78 [2011]). The complaint does not specify what duty Land Title Associates owed plaintiff.

The court properly dismissed the unjust enrichment cause of action against NY Land Title. To adequately plead an unjust enrichment claim, plaintiff must allege, among other things, that NY Land Title was enriched at plaintiff's expense (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Although the complaint alleges that NY Land Title received a commission from plaintiff, the parties' contract shows that NY Land Title received a premium (presumably from the insured, Smithtown) and then remitted 15% to plaintiff. Hence, NY Land Title did not receive anything from plaintiff; rather, it received a premium from Smithtown (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 221, 229 [2011]; *cf. Corto v Fujisankei Communications Intl.*, 177 AD2d 397 [1st Dept 1991]).

The court also properly dismissed the unjust enrichment claim against all defendants, as that cause of action merely alleges that defendants have been unjustly enriched at Smithtown's, not plaintiff's, expense (*see ABN AMRO*, 17 NY3d at 221, 229).

The court properly dismissed plaintiff's claims for implied indemnification against Frenkel and Land Title Associates, since

Frenkel and Land Title Associates were not unjustly enriched at plaintiff's expense (*see Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). In addition, the complaint does not allege that either Frenkel or Land Title Associates owed a duty to Smithtown, the injured party (*see Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985]; *Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 556 [1st Dept 2009]). Defendants did not move to dismiss plaintiff's claim for contractual indemnification against NY Land Title, and plaintiff has been granted judgment on that cause of action, as well as on its breach of contract claim against NY Land Title.

The court properly found that NY Land Title did not owe plaintiff a fiduciary duty with respect to the funds that it allegedly misappropriated at the closing. The parties' contract states that NY Land Title is not an agent of plaintiff "for purposes of conducting a Closing." Since the parties did not create "their own relationship of higher trust," the court properly declined to "fashion the stricter duty for them" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012] [internal quotation marks omitted]; *cf. Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532 [1st Dept 2011]).

Plaintiff may not sue as Smithtown's equitable subrogee. The policy that NY Land Title (on behalf of plaintiff) issued to

Smithtown insured the latter that it had a valid first priority lien in the sum of $8 million; it did not insure Smithtown against defalcations by NY Land Title at the closing. Hence, even if NY Land Title breached a fiduciary duty to Smithtown by misappropriating funds, that is not a loss for which plaintiff "is bound to reimburse" Smithtown (*Federal Ins. Co. v North Am. Speciality Ins. Co.*, 47 AD3d 52, 62 [1st Dept 2007], quoting *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]).

Because plaintiff may not assert claims as Smithtown's equitable subrogee with respect to the funds that NY Land Title allegedly misappropriated at the closing, the court properly dismissed the cause of action for a constructive trust.

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13090 The People of the State of New York, Ind. 4923/12
Respondent,

-against-

Sandra Gonzalez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. 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 (Bonnie G. Wittner, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered on or about December 11, 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: OCTOBER 2, 2014

CLERK

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

Gonzalez, P.J., Saxe, Richter, Kapnick, JJ.

13092 In re Justin S., and Another,

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

Nereida V.,
Respondent-Appellant,

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

_____

Geanine Towers, P.C., Brooklyn (Geanine Towers of counsel), for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 20, 2013, which, to the extent appealed from as limited by the briefs, terminated respondent mother's parental rights to the subject children upon a finding that she had violated the terms of a suspended judgment, and committed the care, custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that it is in the children's best interest to terminate the mother's

parental rights so as to free the children for adoption by the foster mother, who has cared for them for more than five years (*see Matter of Star Leslie W.*, 63 NY2d 136, 147–148 [1984]). The record does not present "exceptional circumstances" that would warrant an extension of the suspended judgment (*see* Family Court Act § 633[b]; *Matter of Michael B.*, 80 NY2d 299, 311 [1992]). The mother violated the terms of the suspended judgment by testing positive for drug use, and she failed to demonstrate that she has made significant progress in overcoming her drug problem (*see e.g. Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 475 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]).

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13093 The People of the State of New York, Respondent, Ind. 1509/06

-against-

Arthur Richardson, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered on or about September 7, 2007, 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 [1st Dept 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: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Richter, Feinman, Kapnick, JJ.

13094 Eldrid Sequeira, Index 350086/08
Plaintiff-Appellant,

-against-

Rachel Sequeira,
Defendant-Respondent.

_____

Eldrid Sequeira, appellant pro se.

Stein & Ott, LLP, New York (Lara P. Ott of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered August 13, 2013, which modified the terms of the parties' custody agreement and granted sole legal custody of the parties' son to defendant mother, unanimously affirmed, without costs.

The determination that it is in the child's best interests to modify the parties' joint custody agreement to award respondent mother sole legal custody has a sound and substantial basis in the record (*Eschbach v Eschbach*, 56 N.Y.2d 167, 171 [1982]), which establishes that there was a complete breakdown in communication between the parties resulting in their inability to agree on issues concerning the child (*see Trapp v Trapp*, 136 AD2d 178, 181 [1st Dept 1988]). Indeed, the parties filed approximately nine motions, within a period of less than five years, seeking judicial intervention in various matters

concerning the child. The inability to communicate and the court's finding that the father's disdain for the mother is "palpable" constitute a sufficient change in circumstances warranting modification of the agreement.

Plaintiff's claims that his constitutional rights were violated by the court's modification of the parties' custody agreement is unavailing. "No agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest" (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]).

We have considered plaintiff's additional arguments and find them unavailing.

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13097 In re Nathaniel W.,

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

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Aleza Ross, Patchogue, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jenna L. Krueger of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 6, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The petition was facially sufficient (*see generally Matter of Rodney J.*, 83 NY2d 503 [1994]). The allegations adequately supported an inference of accessorial liability.

The court properly denied appellant's motion to suppress a showup identification. The showup, which was conducted in close spatial and temporal proximity to the crime, was justified by the

interest of making a prompt determination as to whether appellant was involved in the crime (*see People v Love*, 57 NY2d 1023, 1024 [1982]). The record fails to support appellant's assertion that the police made suggestive remarks to the victim in connection with the showup.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the court's determinations concerning credibility. The victim's testimony as to appellant's conduct before, during and after the crime supports the inference that he shared his companion's intent to steal the victim's phone and intentionally aided his companion in doing so.

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13098 David Hefter, Index 117014/09
Plaintiff-Appellant,

-against-

Citi Habitats, Inc., et al.,
Defendants-Respondents,

Jonathan E. Green, et al.,
Defendants.

_____

Stewart Occhipinti, LLP, New York (Frank S. Occhipinti of counsel), for appellant.

Saiber LLC, New York (Marc C. Singer of counsel), for Citi Habitats, Inc., NRT, LLC, The Corcoran Group, Inc. and Christine Toes, respondents.

Cantor Epstein & Mazzola, LLP, New York (Gary Ehrlich of counsel), for Orsid Realty Corp., respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered September 25, 2013, dismissing the complaint as against defendants Citi Habitats, Inc.; NRT, LLC; The Corcoran Group, Inc.; and Christine Toes (the broker defendants) and Orsid Realty Corp. (Orsid), unanimously affirmed, with costs.

Plaintiff contends that defendant Orsid, an agent for a disclosed principal, assumed an affirmative duty to him "to speak accurately and honestly" when it responded to his counsel's question whether maintenance fees for the cooperative apartment

he was contemplating purchasing were expected to increase, and that it breached this duty when it responded, "Unknown" (*see Greco v Levy*, 257 App Div 209, 211 [1st Dept 1939], *affd* 282 NY 575 [1939]). However, Orsid's answer to counsel's question was not inaccurate (*see J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [1st Dept 2005]; *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]). Plaintiff testified that counsel explained to him in March 2008 that his maintenance for January 1, 2009 would be calculated at 8% of the fair market value of the land, "an unknown figure."

Plaintiff also complains that Orsid failed to provide him with the minutes of the 2007 coop shareholders meeting, at which the potential increase in maintenance was discussed. However, the record reflects that, as a matter of coop policy, the minutes were available to plaintiff and his counsel on request. Plaintiff's failure to exercise due diligence to determine the true nature of the transaction he was about to enter into is fatal to his claim of fraud or deception (*see Ittleson v Lombardi*, 193 AD2d 374 [1st Dept 1993]).

Plaintiff's fraud and negligent misrepresentation claims against the broker defendants are predicated on defendant Toes's statement that she did not know how much the increase in

maintenance would be but guessed it might be 15%. This statement does not misrepresent any material existing fact, but is a statement merely of "expectation or prediction," and is therefore not actionable (*see Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Kapnick, JJ.

13099 Rosenhaus Real Estate, LLC, Index 601012/09
Plaintiff-Respondent,

-against-

S.A.C. Capital Management, Inc., et al.,
Defendants-Appellants,

Macklowe Properties, LLC, et al.,
Defendants.

_____

Jones Day, New York (Todd R. Geremia of counsel), for appellants.

Mandel & Mandel, LLP, New York (Stephen N. Weiser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about December 6, 2013, which, to the extent appealed from, denied defendants S.A.C. Capitol Management, Inc., S.A.C. Capital Management, LLC and S.A.C. Capital Advisers, LLP (collectively, SAC) motion for summary judgment dismissing the breach of contract cause of action against them, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against SAC.

In this action by plaintiff real estate broker to recover its commission, there are no issues of fact as to whether plaintiff had procured SAC's lease renewal and extension and as

to whether SAC had frustrated plaintiff's performance in bad faith in order to avoid payment of the commission. It is undisputed that SAC, plaintiff's principal, was entitled to deal directly on its own, as the parties' agreement gave plaintiff an exclusive agency, rather than an exclusive right to deal (*see Morpheus Capital Advisors LLC v UBS AG*, __ NY3d __, 2014 NY Slip Op 04112 [2014]; *Far Realty Assoc. Inc. v RKO Del. Corp.*, 34 AD3d 261, 262 [1st Dept 2006]). Plaintiff did not obtain a deal on the terms set by SAC or establish the requisite "direct and proximate link" between his efforts and the deal ultimately consummated (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 95 [1st Dept 2014]; *Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564, 565 [1st Dept 2013]). Plaintiff's alleged creation of an amicable atmosphere that led to the negotiations between its principal and the building's managing agent and owner is insufficient to demonstrate that plaintiff was the procuring cause of the deal (*see SPRE Realty*, 119 AD3d at 99).

Nor did SAC's January 2005 instruction that plaintiff refrain from acting on its behalf demonstrate that SAC frustrated plaintiff's performance in bad faith in order to deprive plaintiff of its commission. At that point, plaintiff's efforts were not "plainly and evidently approaching success" with respect to the November 2006 lease renewal and extension (*Goodman v*

Marcol, Inc., 261 NY 188, 191-192 [1933]; *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 384 [1881]). Indeed, the drafts for the renewal and extension were first circulated 1½ years after plaintiff ceased its efforts in this matter (*see Helmsley Spear, Inc. v 150 Broadway N.Y. Assoc.*, 251 AD2d 185, 186 [1st Dept 1998]; *cf. O'Connell v Rao*, 70 AD2d 982 [3d Dept 1979], *lv denied* 48 NY2d 609 [1979]). Given the 1½-year gap here, *Quantum Realty Servs., Inc. v ISE Am.* (214 AD2d 420, 421 [1st Dept 1995]), relied upon by the motion court for the proposition that a "limited" interruption in the sequence of events does not prevent the broker from obtaining its commission, is distinguishable.

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13100-
13100A-
13100B In re Edgardo Yadiel N.,
And Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Edwin N.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Bobette M. Masson-Churin of counsel), attorney for the children.

_____

Orders, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about May 10, 2013, which, inter alia, after findings of permanent neglect, terminated respondent father's parental rights to the subject children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The record demonstrates by clear and convincing evidence that the agency made diligent efforts to encourage and strengthen

respondent's parental relationship with the subject children (*see* Social Services Law § 384-b). The agency referred respondent to individual counseling and programs devoted to parenting skills, domestic violence and anger management. The agency also made efforts to assist respondent obtain suitable housing and arranged a visitation schedule with the children (*see Matter of Precious W.* [*Carol R.*], 70 AD3d 486 [1st Dept 2010]).

Despite these diligent efforts, respondent failed to plan for the children's future by refusing to undergo a mental-health evaluation or to comply with random drug and alcohol testing during the relevant time period. There is also a lack of evidence that respondent obtained adequate housing or stable employment (*see e.g. Matter of Paul Michael G.*, 36 AD3d 541 [1st Dept 2007]), and he frequently failed to attend scheduled visits with the children (*see Matter of Jenna Nicole B. [Jennifer Nicole B.]*, 118 AD3d 628 [1st Dept 2014]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13101-
13102 Index 650165/11

Blackstone Advisory Partners L.P.,
Plaintiff-Respondent,

-against-

Vinod Gupta,
Defendant-Appellant.

_____

Parness Law Firm, PLLC, New York (Hillel I. Parness of counsel), for appellant.

Fox Rothschild LLP, New York (Mitchell Berns of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered March 27, 2014, awarding plaintiff $8,737,514.46, unanimously affirmed, with costs. Appeal from order (same court and Justice), entered on or about December 10, 2013, which granted plaintiff's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to defendant's claim, the 2008 amendment to the parties' 2007 contract is not ambiguous (*see RM Realty Holdings Corp. v Moore,* 64 AD3d 434, 436 [1st Dept 2009]). The only reasonable interpretation is that the acquisition of nonparty InfoGroup, Inc. was a "Transaction" pursuant to the terms of the amendment, which defines transaction as "the acquisition . . . by

any party (other the [defendant]) . . . of a significant portion of [InfoGroup's] voting securities . . . ." Defendant's proposed interpretation improperly seeks to add words to the amenmdment (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]).

Defendant failed to raise a triable issue of fact as to whether plaintiff materially breached the parties' contract, such that he was excused from paying it the agreed upon fee (*see Robert Cohn Assoc., Inc. v Kosich*, 63 AD3d 1388, 1389-1390 [3d Dept 2009]). Neither plaintiff's refusal to be named in a March 2009 press release that defendant planned to issue, nor its alleged prejudice against him, "substantially defeated the parties' contractual objective" (*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 187 [1st Dept 2007], *affd* 14 NY3d 791 [2010]).

Even assuming that an issue of fact was raised regarding plaintiff's refusal to be named in the planned press release, defendant cannot rely on the refusal to avoid his obligations under the contract since he did not terminate the contract based on the alleged breach (*see Awards.com*, 42 AD3d at 188; *see also El-Ad 250 W. LLC v 30 Hubert St. LLC*, 67 AD3d 520, 521 [1st Dept 2009]).

We do not reach defendant's argument regarding his

affirmative defense of breach of the implied covenant of good faith and fair dealing, improperly raised for the first time in his appellate reply brief (*JPMorgan Chase Bank, N.A. v. Luxor Capital*, LLC, 101 AD3d 575, 576 [1st Dept 2012]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13103 The People of the State of New York, Respondent, Ind. 1313/09

-against-

Juan Lopez,
Defendant-Appellant.

_____

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered October 22, 2010, as amended October 28, 2010, convicting defendant, after a jury trial, of two counts of course of sexual conduct against a child in the second degree, and sentencing him to consecutive terms of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence. The testimony of the victims was sufficiently specific to warrant the conclusion that over a period of not less than three months defendant engaged in two or more acts of sexual conduct with children less than 11 years old, as required by Penal Law § 130.80(1)(a) (*see e.g. People v Paramore*, 288 AD2d 53 [1st Dept *lv denied* 97 NY2d 759 [2002]).

Defendant's arguments concerning the People's summation are

unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal, although some of the prosecutor's remarks would have been better left unsaid (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13104 The People of the State of New York, Respondent, Ind. 5929/11

-against-

Jose Velasquez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about September 11, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 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: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13105-
13106 In re Jenny F.,
Petitioner-Respondent,

-against-

Felix C.,
Respondent-Appellant.

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Douglas H. Reiniger, New York, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 22, 2013, which denied respondent father's motion to vacate a five-year order of protection entered after an inquest conducted upon his default, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about December 3, 2012, unanimously dismissed, without costs, as taken from a nonappealable paper.

Respondent failed to demonstrate a reasonable excuse for his failure to appear at the hearing on the family offense petition (*see* CPLR 5015[a][1]; *see e.g. Matter of Yadori Marie F.* [*Osvaldo F.*]), 111 AD3d 418, 419 [1st Dept 2013]). His contention that he "totally forgot" about the hearing date and thought his employer

would remind him of the date is unreasonable. Respondent was present during the scheduling of the hearing and it was his responsibility to ensure that he appeared on the scheduled date (*see e.g. Matter of Yadori*, 111 AD3d at 419). Further, the court properly denied his counsel's request for an adjournment, as counsel failed to offer any explanation for respondent's absence (*Matter of Keith H.* [*Logann M.K.*], 113 AD3d 555, 556 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]). Since respondent failed to offer a reasonable excuse for his default, we need not determine whether he offered a meritorious defense to the family offense petition (*see Yadori*, 111 AD3d at 419).

No appeal lies from the order of protection, which was entered upon respondent's default (CPLR 5511; *see e.g. Matter of Nyree S. v Gregory C.*, 99 AD3d 561, 562 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13107 Betty Godfrey, Index 14179/02
Plaintiff-Appellant,

-against-

Mancini Safe Corporation, et al.,
Defendants-Respondents.

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Raymond Schwartzberg & Associates, New York (Raymond Schwartzberg of counsel), for appellant.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for Mancini Safe Corporation, respondent.

Law Offices of Edward M. Eustace, White Plains (Patricia Mooney of counsel), for EXL Safe Corporation, respondent.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Schwab Corporation, respondent.

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

Plaintiff's failure to identify the defect that caused her injury and to attribute such a defect to defendants' negligence is fatal to her claims (*see Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011]). Plaintiff's speculation that a malfunction in a drawer of a metal safe caused the door of that

safe to strike her in the back is insufficient to create a triable issue of fact.

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13108 The People of the State of New York, Ind. 6058/08
Respondent,

-against-

Jose Guzman,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about October 6, 2009,

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: OCTOBER 2, 2014

CLERK

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

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13109 In re Kyle Jiggetts, Index 400358/13
Petitioner-Appellant,

-against-

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

_____

Kyle Jiggetts, appellant pro se.

Jackson Lewis, P.C., Melville (Mark L. Sussman of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered July 1, 2013, granting respondents' cross motion to dismiss the petition to set aside a determination of nonparty New York State Division of Human Rights (DHR), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The proceeding was properly dismissed on the basis that no personal jurisdiction was acquired over respondents. Petitioner failed to comply with CPLR 311(a)(1), which requires that the process server tender process directly to an authorized corporate representative, rather than an unauthorized person who later hands the process to an officer or other qualified representative (*see e.g Donley v Gateway 2000,* 266 AD2d 184 [2d Dept 1999]).

Petitioner also failed to properly effectuate service of

process by mail. Although he mailed the summons and petition to respondents, he did not include two copies of a "statement of service by mail" and an "acknowledgement of receipt" as required by CPLR 312-a (*see Matter of Bokhour v New York City School Constr. Auth.*, 70 AD3d 684 [2d Dept 2010]).

Petitioner's status as a pro se litigant does not excuse the defective service (*see Goldmark v Keystone & Grading Corp.*, 226 AD2d 143 [1st Dept 1996]), and the fact that respondents received actual notice does not confer jurisdiction upon the court (*id.*).

Dismissal of the proceeding was also appropriate based on petitioner's failure to name DHR, a necessary party, as a respondent (*see* 22 NYCRR 202.57[a]; *Matter of Rumman v Duane Reade*, 64 AD3d 715 [2d Dept 2009]).

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

ENTERED: OCTOBER 2, 2014

CLERK

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

13173-
13174 Nancy Ullmann-Schneider, et al.,
Plaintiffs-Respondents,

-against-

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

Index 653533/11

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellants.

Golenbock Eiseman Assor Bell & Peskoe, LLP, New York (Jeffrey T. Golenbock of counsel), for respondents.

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered August 6, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the first, second, third, fourth, and eighth causes of action, and granted plaintiffs' motion for summary judgment dismissing defendants' first and second affirmative defenses, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing the second, third and fourth causes of action, and otherwise affirmed, without costs.

In this action arising from defendants' legal representation of plaintiff's decedent, in connection with the estate accounting proceedings of decedent's deceased mother and a trust created under her will, the motion court properly found that, to the

extent the claims herein are governed by a three-year statute of limitations, this action is timely, having been commenced within six months after termination of a timely commenced proceeding in Surrogate's Court (*see* CPLR 205[a]). Plaintiffs' commencement of the Surrogate's Court proceeding in connection with decedent's mother's estate, based on the same series of events involved here, was timely made within three years of decedent's death. We note that the prior proceeding was dismissed on the ground that it was not brought "during the administration of an estate" (SCPA 2110), "without prejudice to renewal in the appropriate forum." Since SCPA 2110 merely served as the attempted vehicle for plaintiffs to pursue their claims, and did not create those claims, the requirement that the petition be brought during an estate's administration was not a condition precedent affecting plaintiffs' right to bring the underlying claims in Supreme Court (*see Matter of Morris Invs. v Commissioner of Fin. of City of N.Y.*, 69 NY2d 933, 935-936 [1987]).

As the motion court found, the breach of contract claim, which asserts, inter alia, that defendants overbilled them and performed unnecessary services, is not duplicative of the legal malpractice claim. The former claim, unlike the latter claim,

does not speak to the quality of defendants' work (*see Cherry Hill Mkt. Corp. v Cozen O'Connor P.C.*, 118 AD3d 514 [1st Dept 2014]). However, the claims for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment, which are based on the same allegations and seek the same damages as the breach of contract and legal malpractice claims should have been dismissed as duplicative (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014]).

The court properly dismissed defendants' first affirmative defense, based on the conduct of plaintiff Nancy Ullman-Schneider, decedent's daughter, who defendants claim fraudulently misrepresented her authority to act. This claim is not factually supported by the record and defendants did not establish that an alleged misrepresentation to the Surrogate's Court regarding the existence of decedent's will, which will was later disclosed, constituted a fraud on the court (*cf. Matter of Falanga*, 23 NY2d 860 [1969]). The second affirmative defense was also properly dismissed since decedent's daughter was duly appointed as a personal representative of the estate of her father, a non-domicilliary, and defendants have not shown that she did not have

a right to commence the subject action (*see* EPTL §13-3.5[a]).

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Saxe, Richter, Clark, JJ.

11819 Milton Guallpa, Index 301817/10
Plaintiff-Appellant-Respondent,

-against-

Leon D. DeMatteis Construction Corp., et al.,
Defendants-Respondents-Appellants.

_____

Asta & Associates, P.C., New York (Lawrence B. Goodman of counsel), for appellant-respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 22, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to liability under Labor Law § 240(1) and under Labor Law § 241(6) as predicated on a violation of Industrial Code (12 NYCRR) § 23-2.1(a)(1), granted so much of defendants' cross motion for summary judgment as sought to dismiss the Labor Law §§ 240(1) and 241(6) claims and denied so much of the cross motion as sought to dismiss the Labor Law § 200 and common-law negligence claims, unanimously affirmed, without costs.

Plaintiff, Milton Guallpa, an employee of non-party New Town Corporation (New Town), allegedly suffered an injury to his right knee while working at a construction site. Defendant Leon D.

DeMatteis Construction Corporation (DeMatteis) was hired by defendant New York City School Construction Authority, a division of defendant New York City Department of Education, to act as the general contractor on the construction of a school. New Town was subcontracted by DeMatteis to complete the masonry work on the project.

During construction, New Town received concrete stones on wooden pallets. Each pallet measured about three- to four-feet high. Because the construction site was open to the elements, the pallets were covered with a plastic tarp to keep the stones dry. On the day of the accident, plaintiff was constructing a scaffold near an open area where several of these pallets were located. As plaintiff walked by one of the pallets, a stone block that was resting on top of it allegedly fell and struck him on the right knee. The block weighed approximately 25 pounds. The record contains no evidence as to how the block could have come off the pallet.

Plaintiff commenced this action, asserting Labor Law §§ 200, 240(1), 241(6) and common-law negligence causes of action. Plaintiff then moved for partial summary judgment on liability on his §§ 240(1) and 241(6) claims. Defendants cross-moved for summary judgment dismissing the entire complaint. The motion court denied plaintiff's motion for summary judgment and granted

defendants' cross motion to the extent of dismissing the §§ 240(1) and 241(6) claims. The court declined to address defendants' cross motion on the § 200 and negligence claims, finding that this aspect of the cross motion was untimely.

The motion court properly granted defendants' cross motion to dismiss plaintiff's Labor Law § 240(1) claim. Section 240(1) does not apply automatically every time a worker is injured by a falling object (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *see also DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 654 [1st Dept 2012]). Rather, the "decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The worker must establish that the object fell because of the inadequacy or absence of a safety device of the kind contemplated by the statute (*Fabrizi* at 662-663; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9-10 [2011]). In order for something to be deemed a safety device under the statute, it must have been put in place "as to give proper protection" for the worker (§ 240[1]).

Here, we conclude that plaintiff's injury was not caused by

the absence or inadequacy of the kind of safety device enumerated in the statute (*see Fabrizi* at 663). Plaintiff does not contend that the block itself was inadequately secured. Instead, plaintiff argues that § 240(1) is applicable because his injuries were caused by defendants' failure to provide an adequate safety device to hold the plastic tarp in place. Specifically, plaintiff maintains that the plastic tarp was inadequately secured because, if it had been properly secured, such as with ropes and stakes, plaintiff's injury would not have occurred.

Plaintiff's argument is unconvincing. The plastic tarp was not an object that needed to be secured for the purposes of § 240(1) (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]), nor is there any indication that the tarp caused plaintiff's injuries. The tarp was in place to keep the stone blocks dry, not to secure the stones stacked on the pallet underneath it. The purpose of the tarp was to keep possible rain off the object, not to protect the workers from an elevated risk (*see Fabrizi* at 663; *Runner*, 13 NY3d at 603; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449-450 [1st Dept 2013]).

Wilinski and *Runner*, upon which plaintiff relies, are distinguishable. *Wilinski* primarily concerns the issue of what constitutes an elevation-related hazard under § 240(1). As we

find that plaintiff's injury was not the result of an inadequate safety device, we need not address the issue of elevation. We also note that *Wilinski* observes that, although an injury may have been caused by an elevation-related risk, it is still necessary that there be a "causal nexus between the worker's injury and a lack or failure" of a safety device as contemplated by the statute (18 NY3d at 9). Here, no such causal nexus was established.[1]

Nor does *Runner* require a different result. In *Runner*, the plaintiff sustained injuries to his hands when the pulley system that he was using to lower an 800-pound reel of wire failed to regulate the reel's descent. The Court found that § 240(1) applied because the plaintiff's injuries were directly caused by the failure of a safety device to protect him from harm "flowing from the application of the force of gravity to an object" (*Runner*, 13 NY3d at 604 [internal quotation marks and emphasis omitted]). There, the plaintiff was provided with an inadequate device, the pulley system, to complete a task that required him to lower a large amount of weight down several stairs and his injuries were caused by the failure of the defendants to provide him with a sufficient device to complete the undertaking. As the

[1] Indeed, we do not understand how the 25-pound concrete block moved and the record contains no evidence to explain this.

Court of Appeals observed, the purpose of § 240(1) "is to protect construction workers[,] not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials" (*id.* at 603). Here, in contrast to *Runner*, the block that allegedly struck plaintiff was not intended to protect him while he engaged in work that involved an elevated risk. Rather, the block, the only purpose of which was to hold down the plastic tarp, allegedly fell as plaintiff walked by the pallet. Therefore, § 240(1) is inapplicable.

The motion court properly dismissed plaintiff's § 241(6) claim predicated on a violation of Industrial Code § 23-2.1(a)(1). As plaintiff's injury occurred in an open work area, not in a passageway or a walkway, § 23-2.1(a)(1) is not applicable (*see Ghany v BC Tile Contrs., Inc.*, 95 AD3d 768, 769 [1st Dept 2012]; *Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [1st Dept 2008]). Further, there is no indication that the pallet was stored in an unstable or unsafe manner (*see Flynn v 835 6th Ave. Master L.P.*, 107 AD3d 614, 614-615 [1st Dept 2013]).

The motion court properly denied as untimely the portion of defendants' cross motion seeking dismissal of plaintiff's Labor Law § 200 and common-law negligence claims. Although a court may decide an untimely cross motion, it is limited in its search of the record to those issues or causes of action "nearly identical"

to those raised by the opposing party's timely motion (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007] [internal quotation marks omitted]; *see Alonzo*, 104 AD3d at 448-449). Here, defendants' cross motion as to plaintiff's § 200 and common-law negligence claims does not raise issues sufficiently related to the §§ 240(1) and 241(6) claims raised by plaintiff's timely motion and therefore consideration on the merits is not warranted (*see Filannino*, 34 AD3d at 281 [the plaintiff's untimely cross motion for summary judgment on his Labor Law § 240(1) claim was properly denied as the defendants' timely motion addressed only Labor Law §§ 200 and 241(6)]).

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

The Decision and Order of this Court entered herein on May 27, 2014 (117 AD3d 614 [1st Dept 2013]) is hereby recalled and vacated (*see* M-3600 and M-3672 decided simultaneously herewith).

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

ENTERED: OCTOBER 2, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12315 Paul DeSimone, Index 22656/05
Plaintiff-Appellant-Respondent, 85888/07

Joann DeSimone,
Plaintiff,

-against-

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

A.J. McNulty & Company, Inc.,
Defendant,

Hugh O'Kane Electric Co. LLC,
Defendant-Respondent-Appellant.

[And a Third-Party Action]

_____

Stefano A. Filippazzo, Brooklyn (Stefano A. Filippazzo of counsel), for appellant-respondent.

Faust Goetz Schenker & Blee, New York (Peter Kreymer of counsel), for Danco Electrical Contracting, Inc., respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 4, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing plaintiff Paul DeSimone's Labor Law § 241(6) claim, granted the motions of Maximum Security Products Corp., doing business as Hillside Iron Works Corp. (Hillside), and Danco Electrical Contractor, Inc. (Danco) for summary judgment dismissing the common-law negligence claims against them, denied

plaintiff's cross motion to submit an expert disclosure pursuant to CPLR 3101(d)(1)(I), and conditionally granted the motion of defendants Dormitory Authority of the State of New York (DASNY) and Bovis Lend Lease LMB, Inc. (Bovis) for contractual indemnification against defendant Hugh O'Kane Electric Co. LLC (O'Kane), unanimously modified, on the law, to reinstate the Labor Law § 241(6) claim as against the owner and general contractors, and any subcontractor that the court determines had the authority to supervise and control the lighting work in question such as would render it the general contractor's statutory agent, and otherwise affirmed, without costs.

The court dismissed the complaint as against the City in view of plaintiff's lack of opposition to its motion for summary judgment, and plaintiff does not present any basis to reverse this determination.

The court providently exercised its discretion in denying plaintiff's cross motion to submit a disclosure of his expert professional engineer, since it was first submitted in opposition to defendants' motions for summary judgment dismissing the complaint, and subsequent to the filing of the note of issue and certificate of readiness (*see Garcia v City of New York*, 98 AD3d 857, 858-859 [1st Dept 2012]).

Plaintiff's Labor Law § 241(6) claim was improperly

dismissed on the ground that plaintiff was not covered under the statute. Plaintiff testified that he was an onsite project manager, employed by one of multiple general contractors on the subject construction project, whose job pertained to financial issues such as billing of subcontractors and revenue projections for the project. He testified that he tripped and fell in a vestibule he was walking through, intending to conduct a visual inspection of a condition alleged by O'Kane to support a back charge for "additional work," in order to determine whether this claim was substantiated. Thus, plaintiff was not merely working in a building that happened to be under construction (*cf. Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468 [1st Dept 2008]). Rather, his job duties, including the inspection he was conducting at the time of the accident, were contemporaneous with and related to ongoing work on the construction project (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881 [2003]). Thus, plaintiff was covered under the statute even though he did not perform the "labor-intense aspects of the project" (*id.*).

The court properly dismissed plaintiff's common-law negligence and Labor Law § 200 claims against defendants Hillside and Danco. Plaintiff seeks to hold Hillside liable for the placement of steel handrails in an area of the fifth floor of the subject building, causing him to trip over them. He seeks to

hold Danco liable for inadequate temporary lighting in the area. However, both of these defendants met their burden by submitting evidence showing that they had no "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *see Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [1st Dept 1999]). The deposition testimony of project managers for Hillside and third-party defendant PII, LLC established that Hillside, a steel subcontractor, merely manufactured steel handrails and delivered them in a truck, which a Hillside driver would park outside the building as PII employees unloaded them. The remaining work to be done with these products, including their placement and storage in the building, was delegated by Hillside to PII pursuant to their subcontract.

Similarly, Danco met its burden by submitting testimony and documentary evidence indicating that it was retained by O'Kane, the prime electrical contractor, merely to perform the initial installation of temporary lighting, which was completed on the fifth floor well before the accident occurred. According to the relevant testimony, Danco had no continuing responsibility for maintaining or replacing the temporary lighting. Plaintiff is correct that the court improperly excluded some of his

submissions in opposition to Danco's motion. He relies on alleged business records of DASNY, the owner, referring to Danco's work repairing damaged wires on the fifth floor nine days before the accident, and on nearby floors on the subsequent days leading up to and including the accident. Although these records were admissible under the "party admission" exception to the hearsay rule (*see K&K Enters. Inc. v Stemcor USA Inc.*, 100 AD3d 415, 415-416 [1st Dept 2012]), there is no indication that any such repairs were connected to the temporary lighting; Danco also performed work on the building's fire alarm system. Plaintiff also testified that he heard the site safety manager for defendant Bovis, the general contractor or construction manager, discussing a power outage on the fifth floor and instructing electricians to fix it immediately. This testimony was admissible under the "principal/agent admission" exception to the hearsay rule (*Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246 [1st Dept 2002]). However, this evidence failed to raise an issue of fact as to whether Danco breached a duty to maintain or repair the temporary lighting.

The court properly conditionally granted summary judgment in favor of DASNY and Bovis's contractual indemnification claim against O'Kane. The relevant provision of the contract between DASNY and O'Kane broadly required O'Kane to indemnify DASNY and

Bovis for any injuries "caused by, resulting from, arising out of, or occurring in connection with the execution of the Work." It is uncontested that plaintiff's injuries were caused by or occurred in connection with O'Kane's work. Moreover, the indemnification provision precludes DASNY and Bovis from obtaining indemnification for their own negligence, if any. Under these circumstances, notwithstanding the pending negligence claims against DASNY and Bovis, the court properly granted conditional contractual indemnification (*see Burton v CW Equities, LLC*, 97 AD3d 462 [1st Dept 2012]; *Hughey v RHM-88, LLC*, 77 AD3d 520, 522-523 [1st Dept 2010]).

The Decision and Order of this Court entered herein on July 3, 2014 is hereby recalled and vacated (*see* M-3886 decided simultaneously herewith).

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

ENTERED: OCTOBER 2, 2014

CLERK

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

12531 The People of the State of New York, Ind. 3772/11
Respondent,

-against-

Christian Marinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at motion to controvert search warrant; Thomas Farber, J. at suppression hearing; Ronald Zweibel, J. at jury trial and sentencing), rendered August 17, 2012, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of nine years, unanimously reversed, on the law, the motion to suppress photographic evidence granted, and the matter remanded for a new trial.

The court should have granted defendant's motion to suppress photographs obtained from his cell phone. After the police arrested defendant and seized his phone, an officer looked through it without a warrant, and found two photos stored on the phone that depicted a pistol resembling the pistol recovered in

this case. It was not disputed that the search of defendant's cell phone was unlawful. Moreover, a recent decision of the United States Supreme Court holds that a cell phone is not a proper subject of a warrantless search incident to arrest (*Riley v California*, 573 US __, 134 S Ct 2473 [2014]).

After finding the photos on the phone, the same officer averred in an affidavit in support of an application for a search warrant, which specifically sought to search photographs among other things on the phone, that there was reasonable cause to believe that evidence concerning defendant's possession of a firearm existed on defendant's phone. This evidence demonstrated that the "decision to seek the warrant was prompted by what [the police] had seen during the initial entry" (*Murray v United States*, 487 US 533, 542 [1988]). Rather than applying for a warrant on the basis of mere probable cause, the officer "achieve[d] certain cause by conducting an unlawful confirmatory search," which "undermines the very purpose of the warrant requirement and cannot be tolerated" (*People v Burr*, 70 NY2d 354, 362 [1987] [internal citation and quotation marks omitted], *cert denied* 485 US 989 [1988]). Accordingly, even if there were independent probable cause for the warrant, it would not immunize the initial warrantless search, or permit the subsequently-granted warrant to render the photos admissible (*see id.*). Nor

may the inevitable discovery doctrine be applied to this evidence; the exception does not apply where "the evidence sought to be suppressed is the very evidence obtained in the illegal search" (*People v Stith*, 69 NY2d 313, 318 [1987]).

Given that defendant preserved his specific constitutional arguments for suppressing the photos, the error in denying his motion requires reversal unless it was "harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). We find that there was a "reasonable possibility that the error might have contributed to defendant's conviction" (*Crimmins*, 36 NY2d at 237). The weapon was not recovered from defendant's person, but was instead recovered from a place where, according to the police witnesses, defendant deposited it. Defendant's connection to the weapon rested entirely on the credibility of the officers, which was the principal issue at trial. The People not only presented the photos to the jury but also called two witnesses who testified extensively that the pistol shown in the photos was the same firearm recovered by the police. The

prosecutor also emphatically relied on the photos in summation (*see People v Hardy*, 4 NY3d 192, 199 [2005]).

Since we are ordering a new trial, we find it unnecessary to reach defendant's other arguments.

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13065 The People of the State of New York, Respondent, Ind. 4452/11

-against-

Jose Rosario, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered July 25, 2012, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to concurrent terms of five years and two to four years, respectively, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and his argument to the contrary is unavailing (*see People v Gray*, 86 NY2d 10 [1995]). We decline to review defendant's unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although the victim did not testify, the evidence established the element of physical injury, which

only requires proof that a victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]). The jury could have reasonably inferred that a bloody stab wound to the arm, inflicted by means of a sharpened screwdriver, caused substantial pain. In addition, this inference was supported by medical records, including the victim's plainly admissible characterization of his pain (*see* CPLR 4518[a]). The evidence, including eyewitness testimony, also supports the conclusion that defendant acted with the requisite intent.

The challenged portions of the prosecutor's summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The remarks at issue were generally responsive to issues raised by the defense, and to the extent there were inappropriate comments, the court's curative actions were sufficient to prevent prejudice.

We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13068 The People of the State of New York, Respondent, Ind. 2445/10

-against-

Salita Lee, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about July 25, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 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: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, JJ.

13070 Solomon Sharbat, et al., Index 600151/08
Plaintiffs-Appellants,

-against-

Law Offices of Michael B. Wolk, P.C., et al.,
Defendants.

- - - - -

Solomon Capital, LLC,
Nonparty Appellant,

-against-

The Nimkoff Firm, etc.,
Nonparty-Respondent.

_____

Bronstein, Gewirtz & Grossman, LLC, New York (Peretz Bronstein of counsel), for appellants.

The Nimkoff Firm, Syosset (Ronald A. Nimkoff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 6, 2013, which denied plaintiffs' (collectively, Sharbat) motion to vacate the judgment, entered October 4, 2011, pursuant to the determination and direction of a special referee, awarding legal fees to nonparty respondent (Nimkoff), and denied plaintiffs and nonparty appellant's joint motion to vacate a New York City sheriff's levy and execution, and certain information subpoenas and restraining notices served on TD Bank, unanimously modified, on the law, to the extent of vacating and declaring

void the judgment and related enforcement devices, and, as so modified, affirmed, without costs.

The court erred in failing to vacate the judgment entered by the Clerk of the Court upon the direction of the special referee. Where, as here, there is a determination that an attorney's withdrawal from a case is justifiable and that the attorney is entitled to recover for services rendered on the basis of quantum meruit, following a hearing determining these issues, including the amount of fees to be recovered, the withdrawing attorney may impose a retaining lien on the file or a charging lien on the proceeds of the underlying judgment (*see Matter of Mason v City of New York*, 67 AD3d 475 [1st Dept 2009]; *Bok v Werner*, 9 AD3d 318 [1st Dept 2004], and/or may file a plenary action for the reasonable value of the services rendered in order to obtain a judgment that may be exercised against all of the former client's assets (*see Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186 [1st Dept 2002]; *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 218-219 [1st Dept 1997]). While the special referee's fee determination entitles Nimkoff to bring a petition for a charging lien within the underlying action against the proceeds in that action and/or to file a plenary action against all of Sharbat's assets, the determination should not have resulted in the immediate issuance

of a judgment. Accordingly, the improperly issued judgment is vacated and declared void, along with the devices issued to enforce the judgment.

However, there are no grounds, based on a lack of personal jurisdiction defense or otherwise, to vacate the order directing a special referee to determine Nimkoff's legal fees or the special referee's legal fee determination. The order to show cause with respect to Nimkoff's request to withdraw as Sharbat's counsel was properly served, pursuant to CPLR 308(4), by "nail and mail" on Sharbat's dwelling place or usual place of abode. Given the claims made by Sharbat in a prior proceeding as to his Queens residency, which conflict with his claim in the instant proceeding that he has been living in Israel since 2010, Sharbat's self-serving rebuttal of the process server's affidavit was not believable and was insufficient to support a defense of lack of personal jurisdiction based on improper service of process or raise issues of fact requiring a traverse hearing (*see e.g. Grinshpun v Borokhovich*, 100 AD3d 551, 552 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]; *Board of Educ. of City School Dist.*

of City of N.Y. v Grullon, 65 AD3d 934 [1st Dept 2009]; *Matter of Commissioner of Social Servs. of City of N.Y. v Evans*, 170 AD2d 225 [1st Dept 1991]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13071 Jeremiah Francis, Index 108239/07
Plaintiff-Respondent, 591119/07
590676/10

-against-

Plaza Construction Corp.,
Defendant-Appellant.

- - - - -

Plaza Construction Corp.,
Third-Party Plaintiff-Appellant,

-against-

Sage Electrical Contracting, Inc.,
Third-Party Defendant-Respondent.

[And a Second Third-Party Action]

_____

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for appellant.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for Jeremiah Francis, respondent.

Camacho Mauro Mulholland, LLP, New York (Murad X. Agi of counsel), for Sage Electrical Contracting, Inc., respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 26, 2013, which, to the extent appealed from as limited by the briefs, denied defendant/third-party plaintiff Plaza Construction Corp.'s motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and denied Plaza's motion for summary judgment on its contractual and common-law indemnification claims against third-party defendant

Sage Electrical Contracting, Inc., unanimously modified, on the law, to the extent of granting Plaza's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, and granting Plaza's motion for summary judgment on its contractual indemnification claims against Sage, and otherwise affirmed, without costs.

The record demonstrates that plaintiff's injury was caused by the manner in which work was being performed by Sage (the electrical contractor), not by a defect or dangerous condition existing on the premises, and that Plaza did not exercise supervision or control over the injury-producing work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). That Plaza had a representative who would walk the site on a daily basis and had the authority to stop work for safety reasons is insufficient to raise a triable issue of fact with respect to whether Plaza exercised the requisite degree of supervision and control to sustain a Labor Law § 200 or common-law negligence claim (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477-478 [1st Dept 2011]). There is no evidence that Plaza's employees ever gave specific instructions to plaintiff, his employer (a subcontractor on the site), Sage, or any of the other subcontractors working on the deck at the time of the accident (*id.*). Moreover, the deposition testimony

showed that Plaza was not responsible for removing or clearing the piece of electrical conduit that allegedly caused plaintiff to trip.

The indemnity provision at issue provides, in relevant part, that Sage will indemnify Plaza for any liability or claims arising out of or connected with the performance of work by Sage. Since plaintiff's accident was, at least in part, caused by or occurred in connection with Sage's work of installing electrical conduit on the deck, Plaza is entitled to unconditional indemnification from Sage (*see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 463 [1st Dept 2014]). The indemnification provision is enforceable, as it expressly excludes indemnity for any claims caused by Plaza's "own negligence if not permitted by law" (*see id.* at 463-464; *see also* General Obligations Law § 322.1[1]). Moreover, there is no view of the evidence that Plaza was negligent (*see Guzman*, 115 AD3d at 464).

The court properly denied the branch of Plaza's motion that sought summary judgment on its common-law indemnification claim against Sage. Given that plaintiff has an outstanding Labor Law

§ 241(6) claim against Plaza, Plaza cannot not show, at this juncture, that it has been held vicariously liable for Sage's acts or omissions (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13072 The People of the State of New York, Respondent, Ind. 1385/12

-against-

Mary Ward,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner J. at plea; Carol Berkman, J. at sentencing), rendered on or about August 14, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 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: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13073 In re Stephany C.,
Petitioner-Appellant,

-against-

Jose C.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about October 17, 2013, which, after a hearing, dismissed the petition by appellant mother for custody of the subject child, unanimously affirmed, without costs.

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 nonfrivolous points which could be raised on this appeal. The record demonstrates that appellant voluntarily appeared and

submitted to the jurisdiction of the Circuit Court of Maryland, Baltimore County (Jan Marshall Alexander, J.), which rendered a judgment of divorce and custody that resolved the custodial issues raised in her custody petition (*see Matter of Tick v Tick*, 96 AD2d 657, 657-658 [3d Dept 1983]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13074-
13075 Index 653654/11

First Acquisition Funding LLC,
Plaintiff-Appellant,

-against-

1st Alliance Lending, LLC,
Defendant-Respondent.

_____

Mishcon de Reya New York LLP, New York (Timothy J. McCarthy of counsel), and Kellogg, Huber, Hansen Todd, Evans & Figel, PLLC, Washington, DC (Gregory G. Rapawy of the bar of the District of Columbia and Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for appellant.

DLA Piper LLP (US), New York (Andrew L. Deutsch of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 3, 2013, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 26, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a hedge fund, provided funding (or arranged for the provision of funding) in the form of a $20 million warehouse line of credit to defendant, an originator of mortgages, pursuant to a "Second Amended and Restated Fee Side Letter" (the Second Amended FSL) and the "Second Amended and Restated Master Repurchase Agreement" (the Second Amended MRA). Under the Second Amended FSL, the provision of an "Available Commitment" by

plaintiff to defendant was the consideration for which plaintiff was to be compensated. The parties' dispute centers on the meaning of "Available Commitment."

"Available Commitment" is defined, in relevant part, as "the commitment [of plaintiff] . . . to provide its own funds to [defendant] in support of the business of originating Mortgage Loans and selling such Mortgage Loans or securitizing such Mortgage Loans." Plaintiff argues that to be entitled to compensation it was only required to provide a "commitment" of funds, regardless of whether defendant exercised its right to use the funds. Defendant argues that plaintiff was required to provide actual funding (whether directly or indirectly) for specific loans before it would be entitled to a portion of profits derived from those loans. We find that the Second Amended FSL unambiguously supports defendant's interpretation (*see W.W.W. Assoc. v Giancontieri*, 77 NY 2d 157, 162 [1990]).

As the Second Amended FSL is unambiguous, the motion court correctly declined to consider the extrinsic evidence submitted by plaintiff (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13076 The People of the State of New York, Ind. 2542/02
Respondent,

-against-

James Henderson,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered March 2, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 18 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13077 James H. Brady, et al., Index 156825/12
Plaintiffs-Appellants,

-against-

Mark S. Friedlander, etc.,
Defendant-Respondent.

_____

Robert J. Adinolfi, New York, for appellants.

Winget, Spadafora & Schwartzberg LLP, New York (Kenneth A. McLellan and Keith Roussel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 12, 2013, which, to the extent appealed from, granted defendant's motion to dismiss the causes of action for violation of Judiciary Law § 487, legal malpractice, and misrepresentation, unanimously affirmed, without costs.

On or about September 30, 2009, defendant moved in Civil Court, New York County (Samuels, J.), to withdraw as counsel in the underlying nonpayment proceedings (*see IGS Realty Co., L.P. v James Catering, Inc.*, 99 AD3d 528 [1st Dept 2012]). Over plaintiffs' objection, the court granted the motion. Plaintiffs did not appeal from Civil Court's order. With respect to the cause of action for a violation of Judiciary Law § 487, the instant complaint alleges that defendant provided fabricated grounds in support of his motion, to wit, a conflict with

plaintiffs regarding strategy and a lack of trust in defendant's representation, in order to conceal the true reason, which was an unfounded belief that plaintiffs could or would not pay future legal bills. However, while the parties' communications as quoted in the complaint reflect that defendant was remarkably concerned with billing, which may have informed his decision to withdraw, the complaint also reflects that plaintiff Brady expressed disagreement with defendant as to strategy and questioned defendant's honesty and competency, thus providing support for defendant's stated grounds for the motion (*cf. Palmieri v Biggiani*, 108 AD3d 604 [2d Dept 2013]).

In granting the motion, over plaintiffs' objection, Civil Court implicitly determined that defendant had shown "just cause" to be relieved. That issue may not be re-litigated via the instant misrepresentation claim (*cf. Hass & Gottlieb v Sook Hi Lee*, 11 AD3d 230 [1st Dept 2004]).

With respect to the legal malpractice claim, plaintiffs failed to allege facts sufficient to show that "but for" defendant's conduct they would have not have sustained the damages they allege (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

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

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13078 In re Danaysha D.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about November 22, 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 assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

On this record, Family Court properly determined that an adjournment in contemplation of dismissal would not have been

consistent with appellant's needs and the community's need for protection. The underlying incident involved violence, and appellant's conduct and attendance at school, among other things, gave cause for concern.

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13079 The People of the State of New York, Ind. 2799/11
Respondent,

-against-

Anthony Jones,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 (Richard D. Carruthers, J.), rendered on or about October 3, 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: OCTOBER 2, 2014

CLERK

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

Friedman, J.P., Acosta, DeGrasse, Gische, JJ.

13080 The Board of Managers of the A Building Condominium, et al., Plaintiffs-Respondents, Index 100061/11 590536/12

-against-

13th & 14th Street Realty, LLC, et al., Defendants,

Crystal Curtain Wall System Corp., et al., Defendants-Respondents,

TingWall, Inc., et al., Defendants-Appellants.

[And a Third-Party Action]

_____

Law Office of Wallace Neel, P.C., New York (Wallace Neel of counsel), for appellants.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for The Board of Managers of the A Building Condominium, Anthony Amoia, Adam Bauer, Jonathan Behling, Renee Furini, Elbra Beitsaya, Christopher Mammone, Scott Center, Joon Choi, Yvonne Chung, Julissa Cruz, Giovanni Villamar, Greg Decter, Thomas Dobrowski, Peter Seth Ehrlich, Brandon Evans, Ryan Feeney, Tamara Finger, Thomas Gaissmaier, Phil Galfond, David Greenfield, Panayiota Yiannakourou, Layla M. Hashemi, Jack Hasler, Adriana Kertzer, William Knapp, Natalie Kollman, Brian Larson, Lisa LeFavi, Brian Poalillo, Joon Ma, David Silverstein, Milan Markovic, Heather Marks, Hillard Molodof, Zeena Molodof, Paul Mower, Theresa Mueller, Glenn Mueller, Kim Noble, Debra Pan, Ben Phillips, Kevin Potter, Zachary C. Present, Hope Provost, Phillip Provost, Ryan Rampersaud, Robert Reese, Kelly B. Scher, Michael Shanahan, Veronica Song, Andrew Steinthal, Hana Sykorova, Lawton Chase Taylor, Nicholas Tebelekian, Natasha Tillmanns, Joel Winnik, Barbara Winnik, Arielle Winnik, Ray Yeung, Angela Yim, Elinor Zach, Luke Baker, Emil Feurring, Lona Prasad, Joseph Del Rio, Khe Hy, Lauren Weisenthal and Brian Weisenthal, respondents.

Goldberg Segalla LLC, Garden City (Brendan T. Fitzpatrick of counsel), for Crystal Curtain Wall System Corp. and Crystal Window and Door Systems, Ltd., respondents.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 12, 2013, which denied the motion of defendants TingWall, Inc. and Advanced Building Systems, Inc. (ABS) (together, appellants) for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted.

Plaintiffs are the Board of Managers of a condominium and its residents. They have sued, inter alia, those allegedly responsible for the design, manufacture, and installation of the condominium's curtain wall and windows (appellants, Crystal Window & Door Systems Ltd., and Crystal Curtain Wall System Corp.), claiming that defects have led to water leaking into their units.

Plaintiffs' contract claim against appellants should have been dismissed because plaintiffs are not intended third-party beneficiaries of the license agreements between ABS and Crystal Window & Door (*see Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc.,* 190 AD2d 636, 637 [1st Dept 1993]; *see also Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 182 [2011]; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.,* 66

NY2d 38, 45 [1985]).

The fact that nonparty Dr. Raymond Ting (the principal of TingWall) attested a warranty given by Crystal Curtain does not mean that TingWall became a co-warrantor with Crystal Curtain; to attest means "to authenticate by signing as a witness" (Black's Law Dictionary 153 [10th ed 2014]).

Plaintiffs' malpractice claim against appellants should have been dismissed because the relationship between the parties was not the functional equivalent of privity (*see e.g. 905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]; *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]). Plaintiffs were not known parties to appellants (*see e.g. Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 373 [2010]).

Finally, plaintiffs' negligence claim against appellants should have been dismissed because appellants owed no duty to plaintiffs. As a "general rule," "a contractor does not owe a duty of care to a noncontracting third party" (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004]). There are three exceptions (*see Powell v HIS Contrs., Inc.*, 75 AD3d 463, 464 [1st Dept 2010]), but none is

applicable here.

We note that appellants did not move to dismiss Crystal's cross claim against them.

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13082 In re Mike R.,

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

_____

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

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

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about May 14, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding 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]). The record supports the inference that when appellant threw a crate of books at a teacher, he intended to cause physical injury, a natural and likely consequence of such an act (*see generally People v Getch*, 50 NY2d 456, 465 [1980]).

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation rather than ordering an adjournment in contemplation of dismissal. Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The court properly concluded that appellant was in need of the supervision that would be provided by way of a 12-month term of probation. Among other things, the underlying incident was violent, and appellant has a history of violent and aggressive behavior.

We have considered and rejected appellant's remaining claims.

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13083 The People of the State of New York, Respondent, Ind. 989/09

-against-

Bilroy Jackson, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered June 14, 2012, convicting defendant, upon his plea of guilty, of attempted burglary in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the provision of the order of protection that directed that it remain in effect until June 14, 2023 and remanding the matter for a new determination of the duration of the order, and otherwise affirmed.

As the People concede, the order of protection's expiration date is incorrect because it did not take into account the jail time credit to which defendant is entitled (*see People v Taveras*, 46 AD3d 399, 400 [1st Dept 2007], *affd* 12 NY3d 21 [2009]). We note that the error could have been corrected more expeditiously

by requesting relief from the sentencing court (*see People v Nieves*, 2 NY3d 310, 317-318 [2004]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Acosta, DeGrasse, Gische, JJ.

13084-
13085 Citibank, N.A.,
Plaintiff-Respondent,

-against-

John L. Fiorilla,
Defendant-Appellant.

- - - - -

John Leopoldo Fiorilla Trust,
etc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Citigroup Financial Products, Inc.,
Third-Party Defendant-Respondent.

Index 651702/10
591157/10

_____

Conway & Conway, New York (Kevin P. Conway of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (Barry J. Glickman of counsel), for Citibank, N.A., respondent.

Bressler, Amery & Ross, P.C., New York (Jeffrey L. Friedman and David I. Hantman of counsel), for Citigroup Financial Products, Inc., respondent.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 2, 2013, awarding plaintiff Citibank N.A. damages on its action to recover payment on a promissory note, and dismissing defendant John Fiorilla's counterclaim and the third-party complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered April 9, 2013, unanimously dismissed, without costs, as subsumed

in the appeal from the judgment.

Defendant John Fiorilla does not dispute that he signed a promissory note with plaintiff Citibank and failed to make payments on the note upon plaintiff's demand. Rather, he claims that the note is subject to rescission on the ground that he was fraudulently induced into executing it based on misrepresentations made by Citibank and its affiliates, Citigroup Financial Products, Inc. and Citigroup Global Markets, Inc., that the note would be secured by the value of an investment he made on behalf of his trust in a fund called UBP Selectinvest ARV LP (UBP Investment or UBP Position). Fiorilla further claims that he decided to invest in the UBP Position based on misrepresentations made by the Citibank entities that the investment was low risk. However, any allegation of reasonable reliance on the alleged misrepresentations concerning the riskiness and volatility of the UBP Investment was contradicted by the detailed representations and warranties in the UBP "Confirmation" and subsequent Amendment Agreement, both signed by Fiorilla on behalf of the trust, disclaiming reliance on any oral or written representations concerning the investment and any guarantees made concerning the fund's performance (*see Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985]; *Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]; *Champion Mtge. Co. v Elmore*, 5 AD3d

140 [1st Dept 2004]). We note that, contrary to his assertion, Fiorilla is a highly sophisticated individual who has a law degree and has managed and co-founded various firms in the finance industry (*see Shea v Hambros PLC*, 244 AD2d 39, 47 [1st Dept 1998]).

Citibank's motion for summary judgment was not premature, as Fiorilla failed to identify any unknown facts that could be discovered to salvage his deficient fraudulent inducement defense and claims (*see Hariri v Amper*, 51 AD3d 146, 152 [1st Dept 2008]). To the extent he asserts that discovery could lead to identification of the individuals at the three entities who allegedly conspired to defraud him, and communications among those individuals and entities, such additional information would not alter the absence of reasonable reliance on his part (*id.*).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13086-
13087 The People of the State of New York,
Respondent,

-against-

Alberto Polanco,
Defendant-Appellant.

Ind. 5431N/03

_____

Andrea Risoli, New York, for appellant.

Alberto Polanco, appellant pro se.

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

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Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J. at suppression motions; Charles H. Solomon, J. at severance motion; Robert H. Straus, J. at jury trial and sentencing), rendered May 12, 2005, as amended May 25, 2005, convicting defendant of criminal possession of a controlled substance in the first degree, conspiracy in the second and fourth degrees, and two counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 23 years, 12½ to 25 years, 3½ to 7 years, 3½ to 7 years and 2 to 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was

not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. There was extensive evidence to corroborate the testimony of accomplices, including evidence of intercepted communications, police observations, and the recovery of large amounts of cash.

The court properly exercised its discretion in limiting cross-examination of an accomplice witness concerning an alleged prior bad act (*see People v Corby*, 6 NY3d 231, 234 [2005]). The proposed line of inquiry had a potential for prejudice and confusion that outweighed its probative value. Furthermore, defendant received ample latitude in which to impeach the credibility of this witness. Accordingly, we find no violation of defendant's right of confrontation (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

The court properly exercised its discretion in denying defendant's motion to sever his trial from that of his codefendant. Defendant has not established that he was prejudiced in any way by the joint trial. There were no antagonistic defenses, and the evidence relating to the acts of the codefendant was admissible against defendant and necessary to

prove conspiracy (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]; *People v Council*, 98 AD3d 917, 918 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]).

The court properly denied defendant's motions to suppress evidence obtained through warrants. The record establishes that the warrants in question were properly issued. Defendant's claim that he was entitled to a de novo suppression proceeding after his first trial ended in a mistrial is unpreserved and without merit in any event (*see People v Evans*, 94 NY2d 499, 504-505 [2000]).

Defendant's arguments concerning expert testimony and the court's refusal to deliver a circumstantial evidence charge are similar to arguments this Court rejected on the codefendant's appeal (*People v* [*Ruben*] *Polanco*, 50 AD3d 587 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]), and we see no reason to reach a different conclusion.

Defendant's ineffective assistance of counsel claims, including those raised in his pro se supplemental brief, are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant made several CPL 440.10 motions, he failed to obtain permission from this Court to appeal, and those

motions are thus not before us. Accordingly, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13088 In re Jermaine J.,

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

Howard J.,
Respondent-Appellant,

Administration for
Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 16, 2013, which, after a fact-finding hearing, determined that respondent father neglected the subject child by inflicting excessive corporal punishment upon the child, unanimously affirmed, without costs.

Petitioner established by a preponderance of the evidence that the father neglected the child by hitting him with a belt, punching him in the face and stomach, and kicking him in the leg (*see* Family Court Act §§ 1012[f]; 1046[b]). The child's out-of-court statements were corroborated by the caseworker, the child's teacher, the school guidance counselor, the child protective

specialist, and by photographs of bruises on the child (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]). The caseworker also stated that the father admitted hitting the child with an open hand on his arms, legs and buttocks. Contrary to the father's contention, his conduct went well beyond any common-law right to use reasonable force to discipline his child (*compare Matter of Christy C.* [*Jeffrey C.*], 74 AD3d 561, 562-563 [1st Dept 2010]).

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

ENTERED: OCTOBER 2, 2014

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13089 John Moscoso, et al., Index 100759/10
Plaintiffs-Appellants,

-against-

Overlook Towers Corp.,
Defendant-Respondent.

_____

Grey & Grey, LLC, Farmingdale (Sherman B. Kerner of counsel), for appellants.

Mischel & Horn, PC, New York (Naomi M. Taub of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 9, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the negligence and Labor Law § 200 claims was proper in this action where plaintiff John Moscoso, an elevator mechanic, was injured when he slipped on ice and fell as he descended an exterior steel staircase that led from the roof of defendant's building to the elevator motor room. Plaintiff testified that there was a freezing rain falling at time that he slipped, and "[a] property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a

reasonable time thereafter" (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept 2013]). The climatological records submitted by plaintiff fail to raise a triable issue of fact inasmuch as they conflicted with plaintiff's own testimony as to the weather conditions at the time of the fall (*see Paucar v Solaro*, 111 AD3d 569 [1st Dept 2013]).

Furthermore, dismissal of the claims alleging violations of Labor Law §§ 240(1) and 241(6) was also appropriate as the record establishes that these sections have no application to the instant matter where plaintiff was engaged in the routine maintenance of the building's elevators (*see e.g. Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]; *Esposito v New York City Indus. Dev. Agency*, 305 AD2d 108 [1s Dept 2003], *affd* 1 NY3d 526 [2003]).

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

ENTERED: OCTOBER 2, 2014

CLERK