SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 14, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12660 Francisca Rodriguez, Index 103679/09
Plaintiff-Appellant,

-against-

Willie Woods, et al.,
Defendants,

City of New York,
Defendant-Respondent.

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Ephrem J. Wertenteil, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 11, 2013, which granted defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it, reversed, on the law, without costs, and the complaint reinstated.

In this action for personal injuries allegedly sustained by plaintiff on December 23, 2008, when she fell on a sidewalk, plaintiff testified at her deposition that the area where she fell was "dirty" with "snow layers on top of layers," which she later clarified to mean "slushy ice" that was "clean, like

slippery, flat" and had a little snow on top of it. In opposition to the City's motion for summary judgment, plaintiff submitted an affidavit in which she explained that she fell on a patch of snow and ice that was about two feet wide by three feet long, and that the patch of snow and ice was "one (1) inch thick, flat, hard, and dirty, as if it had existed for several days." This deposition testimony and affidavit, taken together, cannot reasonably be construed as being inconsistent or feigned. Any inconsistencies in how plaintiff described the patch of snow and ice on which she slipped simply create a triable issue of fact (*see Rodriguez v New York City Hous. Auth.*, 194 AD2d 460 [1st Dept 1993]). Further, we have held, contrary to the City's argument, that snow and ice left on a sidewalk after a storm can constitute an "unusual and dangerous condition" (*see Ferguson v City of New York*, 201 AD2d 422, 424 [1st Dept 1994]).

The main point of contention on this appeal is whether plaintiff raised an issue of fact as to whether the ice on which she slipped formed within a sufficient amount of time prior to the accident for the City to have cleared it. The City disputes plaintiff's claim, and her expert meteorologist's opinion, that the ice was created during a four-inch snowfall that occurred four days prior to the accident, leaving the City adequate time to address the condition (*see Ferguson*, 201 AD2d at 424).

Instead, it argues that the meteorological history for the dates in question establishes, as a matter of law, that there was insufficient time.

The parties agree on the history itself: that four inches of snow fell on December 19th (four days before the accident), one-half inch on December 20th (three days before) and two-tenths of an inch on December 21st (two days before). After the third snowfall, non-freezing rain fell, and temperatures remained above freezing for several hours. On the day of the accident, the average temperature was 25 degrees, with a high of 31 degrees and a low of 18 degrees. However, the City offered no analysis or interpretation of this raw data, and offered no support for its attorney's conclusory statement that the ice formed 48 hours before the accident, too soon for the City to have addressed it. Plaintiff, on the other hand, submitted the affidavit of an expert meteorologist, who opined that the combination of the freezing temperatures, together with the warmer temperatures and falling rain on December 21, melted the small amounts of snow that fell on December 20th and 21st. According to the expert, because the rain that fell on December 21 would not have frozen, the patch of ice that plaintiff attested to have slipped on resulted from the December 19th storm.

"Summary judgment in a snow or ice case is proper where a defendant demonstrates, *through climatological data and expert opinion*, that the weather conditions would preclude the existence of snow or ice at the time of the accident" (*Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 566 [1st Dept 2011] [emphasis added]]). Accordingly, because it failed to offer an expert opinion, in addition to the meteorological records, the City's motion should have been denied without regard to the sufficiency of plaintiff's papers in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). While, as the dissent notes, no expert affidavit was required by this Court in *Daley v Janel Tower L.P.* (89 AD3d 408 [1st Dept 2011]), it is worth noting that there it was hardly needed. That is because in *Daley* "the climatological reports showed that it last snowed more than one week prior to plaintiff's fall and that during the three-day period prior to plaintiff's fall, temperatures remained well above freezing" (89 AD3d at 409). Here, by contrast, the climatological reports showed that, except for a few hours of above-freezing temperatures and non-freezing rain, temperatures generally remained below freezing for the entire period between the December 19 storm and the accident four days later. Plaintiff's expert opined that these conditions were suitable for the ice that formed as a result of the initial storm to remain,

but not for the formation of new ice, which the City would have had insufficient time to clear. Without an expert to interpret the meteorological record in a way that would disprove this theory, the City failed to establish a right to judgment as a matter of law.

In any event, plaintiff raised an issue of fact through her submissions. There was no basis for the motion court to characterize her expert's affidavit as "all speculation." It was based on undisputed meteorological records, took plaintiff's description of the ice into account, and explained how the meteorological events led to the formation of that particular patch of ice (*compare Perez v New York City Hous. Auth.*, 114 AD3d 586, 586 [1st Dept 2014] [rejecting defendant's expert affidavit as speculative "because it failed to take into account plaintiff's testimony that the snow and ice had been on the sidewalk for approximately four days after NYCHA employees had piled it up onto the curb, and only addressed the general conditions in the vicinity rather than the origin of the specific ice and snow condition on which plaintiff alleges she fell"]).

"Once there is a period of inactivity after cessation of [a] storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable" (*Powell v MLG Hillside Assoc.*, 290 AD2d 345, 346 [1st Dept 2002]). Accordingly, it is

for a jury to decide whether the ice on which plaintiff slipped was formed four days before the accident, as plaintiff contends, and whether that temporal gap was a sufficient period of time for the City to remedy the condition. We reject the City's reference to *Valentine v City of New York* (86 AD2d 381 [1st Dept 1982], *affd* 57 NY2d 932 [1982]), which dealt with "a severe ice storm, described as the second worst in the preceding 50 years." There is no suggestion that the storm that allegedly precipitated plaintiff's fall was comparably severe such that it would have been impossible for the City to clear the sidewalk within a four-day period. Certainly the City's witness, a supervisor with the Department of Sanitation, gave no such indication.

Finally, we note the irony of the City's witness having testified unequivocally that, as part of its snow and ice removal operations after any storm, the City does not perform any work on sidewalks. Accordingly, even if the City is ultimately vindicated in its position that it had insufficient time to clear the sidewalk before plaintiff fell, the truth will be that it would not have availed itself of that opportunity. Nevertheless, the question goes to the City's duty, and the City cannot be

found liable in the absence of such a duty having arisen at the time of the accident.

All concur except DeGrasse, J. who dissents in a memorandum as follows:

DEGRASSE, J. (dissenting)

In my view, the motion court properly granted the summary judgment motion made by defendant the City of New York. Plaintiff was injured when she fell on a public sidewalk on December 23, 2008 at approximately 1:30 to 2:00 p.m. Plaintiff alleges that her fall was caused by ice that had formed as a result of a December 19, 2008 snowstorm. Citing *Ferguson v City of New York* (201 AD2d 422 [1st Dept 1994]) and other cases, plaintiff and the majority posit that there is an issue of fact as to whether the City failed to take measures to correct the condition despite having had a reasonable opportunity to do so. I dissent because the undisputed meteorological evidence shows otherwise.

Local climatological data shows that it snowed four inches on December 19, 2008, one half inch on December 20, 2008 and two-tenths of an inch on December 21, 2008. The same data indicates that the first snowstorm lasted from 11:00 a.m. on December 19 to 8:00 a.m. on December 20, 2008; the second was from 8:00 p.m. on December 20 to 2:00 p.m. on December 21, 2008. Accordingly, the last snowfall ended approximately 48 hours before plaintiff's accident. "The rule is well established that a municipality is not liable in negligence for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time

has elapsed between the end of the storm giving rise to the icy condition and the occurrence of the accident" (*Valentine v City of New York*, 86 AD2d 381, 383 [1st Dept 1982], *affd* 57 NY2d 932 [1982][citations omitted]). In this case, the City established its prima facie entitlement to summary judgment by showing that plaintiff's accident occurred within two days of the last of two back-to-back snowfalls that dumped at least 4 ½ inches of snow on the City. For example, in *Martinez v Columbia Presbyt. Med. Ctr.* (238 AD2d 286 [1st Dept 1997]), this Court reversed an order denying the City's motion for summary judgment on the ground that the city established that it was under no obligation to remove snow and ice from the location of an accident "some 48 hours after the last of the two storms" (*id.* at 287).

Although cited by the majority, *Massey v Newburgh W. Realty, Inc.* (84 AD3d 564 [1st Dept 2011]) does not support its position that the City's motion was deficient for lack of an affidavit of an expert meteorologist. As noted by the majority, we stated in *Massey* that "[s]ummary judgment in a snow and ice case is proper where a defendant demonstrates, through climatological data and expert opinion, that the weather conditions would preclude the existence of snow or ice at the time of the accident" (*id.* at 566). *Massey* does not apply here because the motion before us does not involve an issue as to whether snow or ice existed.

That much is undisputed. The issue here is whether a reasonable time for the City to remove the hazard had elapsed between the last snowfall and plaintiff's accident. More importantly, it cannot be deduced from the language quoted above that an expert's affidavit is a necessary component of a motion for summary judgment in a snow and ice case. We certainly imposed no such requirement in *Daley v Janel Tower L.P.* (89 AD3d 408 [1st Dept 2011]) where we granted the defendants' motion for summary judgment on the basis of climatological reports indicating that an icy condition could not have formed at the time of the alleged injury (*see also Epstein v City of New York*, 250 AD2d 547 [1st Dept 1998]; *Martinez*, 238 AD2d 286). In this case, as it was in *Martinez*, expert opinion is not necessary to establish the undisputed fact that plaintiff's accident occurred within two days of the last snowfall.

For the reasons set forth by the motion court, the affidavit of plaintiff's expert meteorologist fails to raise an issue of fact because it lacks probative force. Plaintiff's meteorologist states the following in his affidavit:

> "According to plaintiff she was caused to slip and fall on a patch of ice that was approximately one (1) inch thick, flat, hard and dirty. Based upon plaintiff's description of the icy and hazardous condition, as well as my review of the relevant weather data, it is my opinion to a reasonable degree of meteorological certainty, that the subject ice/snow condition that

caused plaintiff to fall resulted from the storm of December, 19, 2008."

The description of ice that was hard and one inch thick is not contained in plaintiff's deposition but is set forth in her affidavit opposing the City's motion. In this regard, plaintiff's affidavit conflicts with the following testimony that she gave at the deposition:

"Q. At the place of your accident, did you see anything on the ground before you fell?

"A. It was dirty. It had snow.

"Q. It was dirty with what?

"A. There was snow layers on top of layers.

"[PLAINTIFF'S COUNSEL]: Just ask her to clarify when she says snow she means snow or ice.

"A. Slushy ice."

"Slush" is not hard ice. It is commonly defined as "partly melted or watery snow" (*see* Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/slush). This is more than a matter of semantics because the meteorologist's opinion is based on the premise that plaintiff slipped on a patch of hard ice. Accordingly, the meteorologist's opinion is indeed speculative because its factual underpinning is based upon plaintiff's affidavit which itself contradicts her prior sworn testimony (*cf. Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327,

327-328 [1st Dept 2006]). In *Epstein*, we granted the City's motion for summary judgment rejecting speculation that an injury was caused by an icy accumulation attributable to an "old" as opposed to a more recent snowfall (250 AD2d at 548). We should have reached a similar conclusion here. Finally, as stated above, the determinative issue is whether the City had reasonably sufficient time to clear the sidewalk before plaintiff's fall.

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

ENTERED: OCTOBER 14, 2014

CLERK

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

13066-
13067 Index 380805/11

Indymac Venture, LLC,
Plaintiff-Respondent,

-against-

Tibbett, LLC,
Defendant-Appellant,

New York City Environmental
Control Board, et al.,
Defendants.

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Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for appellant.

Stim & Warmuth, P.C., Farmingville (Paula J. Warmuth of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 8, 2013, which, among other things, granted plaintiff's motion for summary judgment against defendant Tibbett, LLC on its claims for foreclosure of a mortgage on real property and for reform of the mortgage nunc pro tunc to describe the encumbered property as "Block 5827 Lot 1634, formerly part of Lot 1635 on the Tax Map of the City of New York," unanimously affirmed, with costs.

The documentary evidence submitted by plaintiff, including a copy of a mortgage and note executed by defendant in June 2007, applications prepared by defendant stating an intention to

subdivide the mortgaged property into two lots, and releases showing partial payment on the mortgage and release of the mortgage on one of the subdivided lots, shows that the unpaid portion of the mortgage encumbered the lot upon which plaintiff seeks to foreclose (*see generally 71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583, 584 [1st Dept 2014]). Defendant's vague protests that the mortgage does not encumber this property are insufficient to raise a triable issue of fact.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13178 The People of the State of New York, Respondent, Ind. 8241/99 9877/99

-against-

Daniel Lugo, Defendant-Appellant.

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

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

Appeal from order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about February 28, 2013, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed as moot.

Because defendant has completed his entire sentence, this appeal is moot (*see People v Paulin*, 17 NY3d 238, 242 [2011]), and, we conclude that the exception to the mootness doctrine does not apply. In any event, defendant's arguments are unavailing.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13179 Jaffe Ross & Light, LLP, Index 158984/12
Plaintiff-Appellant,

-against-

Ezra Mann,
Defendant-Respondent.

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Jaffe Ross & Light LLP, New York (Lawrence Fechner of counsel), for appellant.

Jon Lefkowitz, Brooklyn, for respondent.

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Order, Supreme Court, New York County (Cynthia Kern, J.), entered September 17, 2013, which, to the extent appealed from, upon reargument, granted defendant's motion for summary judgment dismissing plaintiff's claim to recover attorney's fees and expenses incurred in connection with an action in Bronx County, unanimously reversed, on the law, without costs, the motion denied, and the claim reinstated.

In support of its motion for summary judgment on an account stated theory, plaintiff law firm submitted invoices it sent, between 2006 and October 2011, addressed to defendant "Ezra Mann c/o Furniture Zone," at an address in Queens County, with respect to two lawsuits, one in Queens County in which defendant was sued individually and one in Bronx County in which defendant's business, nonparty Furniture World of Jerome Avenue, Inc., was

the plaintiff. Each invoice set forth the services rendered, time spent, and billing rates, and indicated partial payments received. Defendant opposed and cross moved for summary judgment, averring that he never agreed to be personally responsible for attorney's fees incurred in connection with the Bronx matter, and that plaintiff agreed to take that matter on a contingency fee basis, accepting the lesser of its hourly rates or one third of any recovery.

Plaintiff established that defendant received the invoices for the work performed in both matters for an extended period, without objection, and made partial payment in both matters (*see Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562 [1st Dept 2006], *lv dismissed* 8 NY3d 840 [2007]). Although addressing letters to an individual in care of a corporation may be indicative of an intent to deal with that person in his or her corporate capacity (*see Roth Law Firm, PLLC v Sands,* 82 AD3d 675 [1st Dept 2011]), such an inference is not warranted here since plaintiff regularly addressed all of the invoices with respect to both matters to defendant in care of Furniture Zone, a corporation that was not a party to either lawsuit. Further, since defendant agreed to be personally responsible for the bills in the Queens lawsuit, there is no basis for inferring that invoices addressed to him in the exact same way with respect to

the Bronx lawsuit were intended to be addressed to him in a corporate capacity.

Plaintiff's failure to comply with the letter of engagement rule (22 NYCRR 1215.1) does not preclude it from recovery of legal fees under a theory of account stated (*Roth Law Firm, PLLC*, 82 AD3d at 676; *see Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 62-64 [2d Dept 2007]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13180 In re Milagros C.,

A Child Under Eighteen Years
of Age, etc.,

Rosa R.,
Respondent-Appellant,

-against-

Administration for Children's Services,
Petitioner-Respondent.

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

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

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

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about November 15, 2013, which, inter alia, determined that respondent mother abused the subject child, unanimously affirmed, without costs.

Abuse was made out by a preponderance of the credible evidence establishing that the child informed the mother of the sexual abuse by the child's brother, and that the child made statements to several people that, on one occasion, the mother walked in on them as her brother was forcing her to engage in

sexual activity with him (*see Matter of Jaquay O.*, 223 AD2d 422 [1st Dept 1996], *lv denied* 88 NY2d 801 [1996]). The court properly exercised its discretion in finding that the child's out-of-court statements were corroborated by the brother's guilty plea to criminal sexual act in the third degree, as well as the detail, consistency and specificity of the child's statements to numerous individuals (*see* Family Court Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 119-120 [1987]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13181-
13181A Index 653078/12

In re Emerald Claims Management for
Ullico Casualty Insurance Company,
as Subrogee of Randolph Myers,
Petitioner-Respondent,

-against-

A. Central Insurance Company,
Respondent-Appellant.

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Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for appellant.

Jones Jones LLC, New York (Jacqueline R. Mancino of counsel), for respondent.

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Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 10, 2013, for petitioner in the total amount of $39,935.19, and bringing up for review an order, same court and Justice, entered on or about December 12, 2012, which granted the petition to confirm two arbitration awards against respondent, unanimously affirmed, with costs. Appeal from order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Petitioner's insured, while driving a van during the course of his employment, was involved in a motor vehicle accident with another vehicle, driven by a nonparty who was insured under a policy issued by respondent. Petitioner paid workers'

compensation benefits to its insured in lieu of no-fault benefits, and then sought "loss transfer" reimbursement from respondent pursuant to Insurance Law § 5105, under the mandatory arbitration procedure. Respondent asserted, as an affirmative defense to petitioner's claim, that it had disclaimed coverage to its insured on the ground of noncooperation.

As this matter involves compulsory arbitration, the awards will be upheld so long as there is evidentiary support, and they are not arbitrary and capricious (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). Here, the arbitrators rationally construed Insurance Law § 5105(a) as providing petitioner insurer a direct right to recover loss transfer reimbursement from respondent, an adverse insurer of a tortfeasor who had a policy in effect at the time of the accident, regardless of respondent's disclaimer of coverage on noncooperation grounds (*see Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1110-1112 [2d Dept 2005]; *see also* Insurance Law § 5102[j] [defining "covered person" as having an insurance policy "in effect"]). The loss transfer recovery right of petitioner under Insurance Law § 5105(a) is separate from the personal right of the insured tortfeasor (and his heirs, assignees, or subrogees) to receive a

defense and indemnification from respondent (*see Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 [1986]; *Matter of Liberty Mut. Ins. Co. [Hanover Ins. Co.]*, 307 AD2d 40, 42 [4th Dept 2003]; *State Farm Mut. Auto. Ins. Co.*, 21 AD3d at 1110-1112).

Respondent waived any argument that the arbitrators lacked jurisdiction, since it participated fully in the arbitration proceedings, never sought a stay of the arbitration, and did not raise the argument before the arbitrators or before the Supreme Court (*see Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 583 [1977]; *Matter of Philadelphia Ins. Co. [Utica Natl. Ins. Group]*, 97 AD3d 1153, 1153 [4th Dept 2012], *appeal dismissed* 20 NY3d 984 [2012]). Nor did respondent assert any argument before the arbitrators that the combined awards exceeded the policy limits. In any event, the argument is unavailing.

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

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13182- Ind. 2716/12
13183 The People of the State of New York, 408/12
Respondent,

-against-

Alex Garcia,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about June 14, 2013,

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

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

ENTERED: OCTOBER 14, 2014

CLERK

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

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13184 Xiao Jia Lin, Index 112811/11
Plaintiff-Appellant,

-against-

Patricia A. Engleton,
Defendant-Respondent.

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Alexander J. Wulwick, New York, for appellant.

Leahey, & Johnson, P.C., New York (Peter James Johnson of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 18, 2013, which granted defendant's motion to vacate a prior order granting plaintiff's motion for summary judgment on the issue of liability upon defendant's default, and, upon vacating the prior order, denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Supreme Court exercised its discretion in a provident manner in determining that defendant provided a reasonable excuse for her default in opposing plaintiff's motion for summary judgment (CPLR 5015[a][1]). The record shows that the failure of defendant's counsel to oppose the motion was isolated and unintentional with no evidence of willful neglect (*see Mejia v Ramos*, 113 AD3d 429 [1st Dept 2014]; *Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597 [1st Dept 2010]), and there is a strong public

policy favoring disposition of cases on the merits (*see Chelli v Kelly Group, P.C.*, 63 AD3d 632 [1st Dept 2009]).

Furthermore, there is no dispute that defendant set forth a meritorious defense in this case, involving a traffic accident at a controlled intersection.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13185 The People of the State of New York, Ind. 4094/08
Respondent,

-against-

Nelson Flores,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh 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, Bronx County (Efrain Alvarado, J.), rendered on or about July 26, 2011,

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

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

ENTERED: OCTOBER 14, 2014

CLERK

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

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13186-
13187 In re Krystopher D'A.,

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

Amakoe D'A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

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

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Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 14, 2012, which, following a hearing, found that respondent father neglected the subject child by inflicting excessive corporal punishment upon him and committing an act of domestic violence upon the child's mother while in the child's presence, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about May 29, 2013, which awarded custody of the subject child to petitioner mother upon respondent's default at the hearing, unanimously dismissed, without costs, as taken from a

nonappealable paper.

A preponderance of the evidence supports the Family Court's determination that respondent inflicted excessive corporal punishment upon the child (Family Ct Act §§ 1012[f][i][B], 1046[b][i]). The child's out-of-court statements made during his interview with an investigator from the Child's Advocacy Center and an ACS caseworker were corroborated by the photographs depicting his injuries and by his mother's testimony.

Regardless of whether there was a valid reason for disciplining the child, the resulting bruising reflects that the discipline was not appropriate in form or degree (*see Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]; *Matter of Alena O.*, 220 AD2d 358, 359-360 [1st Dept 1995]). That the child's injuries resulted from a single incident does not render the finding of neglect insufficient, given the photographs in evidence and respondent's admission that he struck the child with a wooden spoon "at least twenty times" (*see Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569, 570 [1st Dept 2014]; *Matter of Rachel H.*, 60 AD3d 1060, 1061 [2d Dept 2009]). Respondent's testimony regarding the incident and his failure to acknowledge the severity of the child's bruising as a result of his actions demonstrates that his parental judgment is strongly impaired and exposes the child to a risk of substantial harm (*see*

Matter of Cevon W. [Talisha W.], 110 AD3d 542, 542 [1st Dept 2013]).

Contrary to respondent's contention, the finding that he neglected the child by committing an act of domestic violence against the mother while in the child's presence is supported by a preponderance of the evidence. The child's out-of-court statement to a caseworker that respondent pushed the mother into the bathtub and "started to choke her" was corroborated by the mother's testimony. The child's statement that he was frightened by the altercation between his parents demonstrates that he was at imminent risk of emotional and physical impairment (*see Matter of Kaila A. [Reginald A. - Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012]).

The appeal from the final order of custody is dismissed, because the order was entered upon respondent's default (*see Matter of Michael B.M. v Gnama I.*, 118 AD3d 619 [1st Dept 2014]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13193 Spyridon Livathinos, Index 106791/08
Plaintiff-Respondent-Appellant,

-against-

Roberta F. Vaughan, etc.,
Defendant-Appellant-Respondent,

287 Realty Corp., et al.,
Defendants.

_____

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale (Jeffrey G. Stark of counsel), for appellant-respondent.

Goldberg & Lasson, Brooklyn (Donald Drew Goldberg of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 31, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment dismissing defendant Roberta F. Vaughan's (Vaughan) affirmative defense of duress and first counterclaim, denied plaintiff's motion to estop Vaughan from admitting to the existence of an agreement that defendant James S. Vaughan is a 50% shareholder in Trinity Stewart Associates, Inc. (Trinity), granted Vaughan's motion for summary judgment dismissing the seventh and eighth cause of action, and denied her motion as to the first, second, third, fifth, sixth, ninth, eighteenth and twenty-first causes of action, unanimously modified, on the law,

to grant plaintiff's motion to estop Vaughan from admitting to the existence of an agreement that James S. Vaughan is a 50% shareholder of Trinity, and otherwise affirmed, without costs.

Having declared on the income tax returns filed for Trinity from 2001 through 2008 that she owned 100% of the company's stock, Vaughan may not assert in this litigation that defendant James S. Vaughan owned 50% of the company's stock (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]).

Vaughan's affirmative defense of duress fails because Vaughan did not promptly repudiate the subject agreement, and indeed accepted its benefits (*see Matter of Guttenplan*, 222 AD2d 255 [1st Dept 1995], *lv denied* 88 NY2d 812 [1996]).

Issues of fact exist whether a binding contract was formed between plaintiff and Vaughan by their signing of the April 2004 note.

Summary dismissal of the first and second causes of action, which seek a constructive trust, is precluded by issues of fact whether plaintiff and Vaughan were fiduciaries, whether Vaughan promised plaintiff an ownership interest in the subject project, and whether plaintiff transferred his profits from his construction work and his home equity line of credit to the

project (*see generally Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). The fifth cause of action, alleging breach of oral agreements, is not barred by the statute of frauds, which does not render void oral partnership or joint venture agreements to deal in real property (*see Malaty v Malaty*, 95 AD3d 961 [2d Dept 2012]; General Obligations Law § 5-703[3]). In light of Vaughan's contention that no agreement existed between her and plaintiff, plaintiff may plead unjust enrichment (the ninth cause of action) as well as breach of contract (*Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405 [2d Dept 2003]).

Defendant's arguments in support of summary dismissal of the sixth (breach of fiduciary duties), the eighteenth (accounting), and the twenty-first (fraudulent conveyance) causes of action are unpreserved for review and, in any event, without merit.

Vaughan's first counterclaim was untimely (CPLR 203[d]).

Plaintiff's fraud causes of action are duplicative of his contract causes of action (*see Orix Credit Alliance v Hable Co.*, 256 AD2d 114 [1st Dept 1998]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13194 The People of the State of New York, Respondent, Ind. 4814/11

-against-

Paul McDonald, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about March 28, 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 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13195 The People of the State of New York, Respondent, Ind. 1140/11

-against-

Thomas Little,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Benjamin Mills and Avi Gesser of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J. at suppression hearing; Lewis Bart Stone, J. at plea and sentencing), rendered November 17, 2011, convicting defendant of attempted criminal possession of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. Police officers heard women screaming from inside an apartment in an area where a series of burglaries and robberies had taken place. They found the door to the building unlocked and defendant standing in the vestibule with a companion, with the women pointing at them and continuing to scream. Defendant gave a false explanation for his presence, and effectively admitted

that he was at least a trespasser. The circumstances facing the officers, with particular reference to the women's demeanor (*see e.g. People v Hicks*, 279 AD2d 332 [1st Dept 2001], *lv denied* 96 NY2d 801 [2001]), provided them with reasonable suspicion that defendant had committed, or was about to commit, a burglary or robbery. This justified an immediate protective frisk for weapons (*see People v Mack*, 26 NY2d 311 [1970], *cert denied* 400 US 960 [1970]). The police lawfully recovered drugs in the course of the protective frisk.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13196 Daniel Alvarez, Index 306974/09
Plaintiff-Respondent,

-against-

Jose Beltran, et al.,
Defendants-Respondents,

The City of New York,
Defendant-Appellant,

P.O. LaMastro, etc.,
Defendant.

_____

Zachary W. Carter, Corporation Counsel, New York (Elizabeth Connolly of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for Daniel Alvarez, respondent.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for Jose Beltran and Shila Lynn Rosario, respondents.

_____

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 7, 2013, after a jury trial, finding defendant Shila Lynn Rosario 60% liable and defendant the City of New York 40% liable, and awarding plaintiff damages, unanimously reversed, on the law and the facts, without costs, the judgment vacated, the complaint dismissed as against the City, and the matter remanded for a new trial on liability.

On January 23, 2009, a sergeant responded to a radio call regarding a disorderly group on Melrose Avenue, in the Bronx, in

front of a barber shop owned by plaintiff. The testimony, as credited by the jury, reflects that, upon arriving at the scene, the sergeant parked his marked police car in the middle of the road, partially on the double yellow lines that separate northbound and southbound traffic. The sergeant then motioned plaintiff to approach the police car, which direction plaintiff obeyed, placing him in the northbound lane of travel. After briefly questioning plaintiff, the sergeant discharged him, advising plaintiff to "go ahead." Plaintiff then proceeded to cross the street when he was struck by a northbound vehicle owned by defendant Jose Beltran and driven by defendant Shila Lynn Rosario.

The City is immune from liability for plaintiff's injuries, even if they were sustained as a result of the sergeant's negligence, because the sergeant was engaged in the discretionary governmental functions of police investigation and traffic control (*see Valdez v City of New York*, 18 NY3d 69, 75-76 [2011]; *Shands v Escalona*, 44 AD3d 524 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]).

The jury's initial verdict apportioned 20% of the fault for the accident to plaintiff. Although the jury found plaintiff to have been negligent, it also found that his negligence was not a substantial factor in causing the accident. The inconsistency of this verdict was not remedied by the court's instruction that the jury reconsider only the question of apportionment (*see* CPLR 4111[c]). The court should have instructed the jury to reconsider its "answers and verdict" (*id.*), not just its answer on apportionment. While, upon reconsideration, a jury is free to change its verdict to reflect its real intention, the court's instruction prevented the jury from being able to do so (*cf. Mateo v 83 Post Ave. Assoc.*, 12 AD3d 205, 206 [1st Dept 2004]). Accordingly, we remand for a new trial on the issue of liability.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13197 In re William M.,
Petitioner-Respondent,

-against-

Elba Q.,
Respondent-Appellant.

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Tennille M. Tatum-Evans, New York, for appellant.

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Order of protection, Family Court, New York County (Susan R. Larabee, J.), entered on or about May 2, 2012, against respondent, after a fact-finding determination that respondent committed the family offenses of harassment in the second degree, menacing in the third degree, and disorderly conduct, unanimously affirmed, without costs.

A fair preponderance of the evidence supports Family Court's finding that respondent committed the offenses of harassment in the second degree, menacing in the third degree, and disorderly conduct (*see* Family Court Act § 832). Petitioner's testimony that respondent attempted to stab him with a knife pulled from her coat pocket, causing him to become afraid and run away, supports the court's determination that respondent committed harassment in the second degree and menacing in the third degree

(Family Court Act § 821[1]; Penal Law §§ 120.15; 240.26[1]; *Matter of Tamara A. v Anthony Wayne S.*, 110 AD3d 560 [1st Dept 2013]; *Matter of Denzel F.*, 44 AD3d 389, 390 [1st Dept 2007]). Moreover, petitioner testified that respondent wielded the knife in the stairwell of an apartment building and that on another occasion, while petitioner and his son were standing outside their apartment building, respondent shouted obscenities at the son from a sixth-floor window, which supports the court's determination that respondent committed the family offense of disorderly conduct (Penal Law §§ 240.20[1]; 240.20[3]; *see e.g. Matter of Miriam M. v Warren M.*, 51 AD3d 581 [1st Dept 2008]; *see also Tamara A. v Anthony Wayne S.*, 100 AD3d at 560).

We find no basis for disturbing the court's determination crediting petitioner's version of events over respondent's version (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541 [1st Dept 2008]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13198 The People of the State of New York, Respondent, Ind. 4688/99 3238/00

-against-

Burton Maskow, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

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Order, Supreme Court, New York County (Patricia Nunez, J.), entered February 5, 2013, which adjudicated defendant a level two sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant's correct point score is 105 points or, as he claims, 95 points, the court properly exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, __NY3d__, 2014 NY Slip Op 04117, *11 [2014]; *People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Given the

seriousness of the underlying crime, defendant's flight from the United States for four years, his disciplinary history while incarcerated and his failure to take responsibility, his advanced age did not warrant a downward departure.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Feinman, Gische, Kapnick, JJ.

13199 Richard B. Sachs, Index 603930/03
Plaintiff-Respondent,

-against-

Katayone Adeli,
Defendant-Appellant,

Sean P. Barron, et al.,
Defendants.

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Reiss Sheppe LLP, New York (Matthew Sheppe of counsel), for appellant.

Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 10, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to confirm the special referee's report recommending an award of attorneys' fees to plaintiff from defendant Katayone Adeli in the amount of $838,874, unanimously affirmed, with costs.

Although it appears that the referee engaged in a deliberative process by directing that one attorney from California appear in person to testify at an attorney's fees hearing, but permitting two other attorneys to testify by videoconference, the referee erred by not articulating on the record the basis for such an exercise of his discretion (*see e.g.*

American Bank Note Corporation v Daniele, 81 AD3d 500 [1st Dept 2011]). However, in light of defendant's failure to demonstrate prejudice to any substantial right, we find the error harmless (*see* CPLR 2002).

The special referee's recommendation as to the award of attorneys' fees has substantial support in the hearing record (*see David Realty & Funding, LLC v Second Ave. Realty Co.*, 26 AD3d 257 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]). The fees are reasonable in view of the attorneys' experience, expertise, and educational background, the applicable billing rates in the New York and California legal communities, and, most significantly, defendant's vigorous litigation over a seven-year period, as well as her decision to improperly transfer her assets immediately before filing for bankruptcy (*see e.g. Sempra Energy Trading Corp. v PG&E Tex. VGM*, 284 AD2d 253 [1st Dept 2001]). Defendant's contention that the New York firm duplicated legal work performed by the California attorneys is not borne out by the record. In any event, it is undisputed that the New York firm discounted its legal fees by 65% in light of defendant's bankruptcy. Contrary to defendant's contention, Supreme Court's finding that the total of attorneys' fees claimed by all counsel was reasonable was not based solely on a misconception that all the attorneys discounted their fees by 65%. The California

attorney whose hourly rate increased upon changing law firms remained plaintiff's primary counsel on the bankruptcy matter and secured a favorable result for him in the Ninth Circuit; defendant does not challenge either his evident competence or the reasonableness of his hourly rate compared to hourly rates charged within the applicable legal community.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13200 The People of the State of New York, Respondent, Ind. 1437/12

-against-

Ron Singleton,
Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered on or about January 23, 2010, 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 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13201 The People of the State of New York, Respondent, Ind. 5072/09

-against-

Jose Ramos,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 25, 2011, convicting defendant, after a jury trial, of sexual abuse in the first degree, endangering the welfare of a vulnerable elderly person in the second degree, and endangering the welfare of an incompetent or physically disabled person, and sentencing him to an aggregate term of 7 years, unanimously affirmed.

Defense counsel's argument that the lack of vaginal injury refuted the testimony that defendant had sexual intercourse with the victim opened the door to the victim's testimony that defendant had inserted his fingers into her vagina on previous occasions. The parties submitted conflicting expert testimony as to the effect of such prior conduct on the likelihood that physical injury would result from forcible penetration. The

court properly declined to hold a hearing on the issue of whether the victim's claims as to the uncharged crimes were reliable. The court had already found the victim competent to testify under oath, notwithstanding any cognitive or communicative limitations resulting from her medical condition, and it properly permitted the jury to assess the reliability and credibility of her testimony about defendant's prior conduct (*see People v Dominguez*, 247 AD2d 282 [1st Dept 1998], *lv denied* 91 NY2d 1007 [1998]).

Defendant's challenge to the jury charge is essentially a claim of duplicitousness, which requires preservation (*see People v Becoats*, 17 NY3d 643, 650-651 [2011], *cert denied* 566 US__, 132 S Ct 1970 [2012]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find defendant's claim unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13202-
13203 In re Josee Louise L.H.,

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

DeCarla L.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

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

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Order of fact-finding and disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about December 3, 2013, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about May 30, 2013, which denied respondent's application pursuant to Family Court Act § 1028 for the return of the child, unanimously dismissed, without costs, as moot.

A preponderance of the evidence supports the court's finding that the then three-year-old child's health was at imminent risk of impairment as a result of being exposed to unsanitary and deplorable living conditions, including the odor of dead vermin, the presence of dog feces on the floor, bedbugs in the beds and sofa, and otherwise filthy conditions in the apartment where she was staying with respondent (Family Court Act §§ 1046[b]; 1012[f][i]; *Matter of Isaac J. [Joyce J.]*, 75 AD3d 506 [2nd Dept 2010]). These conditions did not consist merely of clutter and odors that were not attributable to respondent (*see Matter of Clydeane C. [Annetta C.]*, 74 AD3d 486 [1st Dept 2010]).

Since respondent never moved to dismiss the petition against her pursuant to Family Court Act § 1051(c), the issue of whether the petition should have been dismissed is not preserved for our review (*see Matter of Cherish C. [Shanikwa C.]*, 102 AD3d 597 [1st Dept 2013]). In any event, the court's continued aid was required (*see Matter of Naomi S. [Hadar S.]*, 87 AD3d 936 [1st Dept 2011], *lv denied* 18 NY3d 304 [2012]). Although respondent contends that she obtained safe, clean living quarters after

moving out of the apartment, she refused to provide the address of her new home to the court, the agency or her counsel so that the new home could be assessed, and it was not known whether the dangers posed to the child had passed.

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

ENTERED: OCTOBER 14, 2014

CLERK

Friedman, J.P., Moskowitz, Feinman, Gische, Kapnick, JJ.

13204N In re The Estate of Manny E. Duell, Deceased. Index 4835/77

- - - - -

Andrew Duell,
Petitioner-Respondent-Appellant,

-against-

Thea Duell, et al.,
Objectants-Appellants-Respondents.

_____

Law Office of Laraine Pacheco, New York (Laraine Pacheco of counsel), and Kaye Scholer LLP, New York (Arlene Harris of counsel), for appellants-respondents.

Leclair Ryan, New York (Thomas E. Butler of counsel), and Ferrell Fritz, P.C., Uniondale (John R. Morken of counsel), for respondent-appellant.

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Decree, Surrogate's Court, New York County (Rita Mella, S.), entered on or about August 1, 2013, to the extent appealed from as limited by the briefs, awarding petitioner $3,749,186.07 (representing $4,071,096.46 in executor's commissions pursuant to Surrogate's Court Procedure Act [SCPA] § 2307[1], less $321,910.39 in surcharges, which represented some of objectants' legal fees) and ordering that petitioner be reimbursed from the estate for his legal fees and costs in the amount of $2,052,847.60, unanimously modified, on the facts and in the exercise of discretion, to reduce the award by $3,787.50,

representing an additional surcharge, and otherwise affirmed, with costs.

We defer to the Surrogate's analysis of the benefits and detriments the executor provided to the estate in making an award of commissions.

We do, however, impose an additional surcharge of $3,787.50, representing the fees incurred by objectant Thea Duell and former (now deceased) objectant Irene Duell to expand the powers of the court-appointed fiduciary so that he could end the deadlock between the two executors appointed by the will. These legal fees benefitted the estate as a whole (*see Matter of Wallace*, 68 AD3d 680 [1st Dept 2009]).

The Surrogate's allowance of $2,052,847.60 of petitioner's legal fees was proper (*see e.g. Wallace*, 68 AD3d at 680).

The Surrogate properly declined to award petitioner an additional $4,721,855.30 in commissions under SCPA 2307(6). Petitioner's own testimony shows that he already received rental commissions: Nonparty Morgan Holding received 5% of the gross rents and paid out all but a nominal amount of profit to petitioner and his coexecutor. Morgan's expenses were properly deducted from the 5% (*see Matter of Wendel*, 159 Misc 900, 902 [Sur Ct, NY County 1935], *affd* 248 App Div 713 [1st Dept 1936], *affd* 273 NY 532 [1937]).

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

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13205-
13206 The People of the State of New York,
Respondent,

-against-

Milton Lesta,
Defendant-Appellant.

Ind. 570935/10

_____

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

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

_____

Orders of the Appellate Term of the Supreme Court, First Department, entered on or about February 1, 2013, which affirmed an order of the Criminal Court, New York County (Marc J. Whiten, J.), entered on or about September 29, 2010, adjudicating defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Criminal Court properly assessed 15 points under the factor for drug abuse, based on defendant's long history of drug-related convictions (*see People v Valentine*, 57 AD3d 268 [1st Dept 2008], *lv denied* 12 NY3d 705 [2009]), and his admissions to the Department of Probation and to an evaluating psychologist. Criminal Court also properly assessed 10 points for the use of

forcible compulsion, based on the allegations contained in the complaint (*see People v Mingo*, 12 NY3d 563, 572 [2009]), and undisputed in defendant's own plea allocution. Under the circumstances, the fact that the case was disposed of by way of a plea to sexual misconduct does not undermine the inference of forcible compulsion for purposes of this assessment of points.

Criminal Court properly exercised its discretion when it declined to grant a downward departure to level one (*see People v Gillotti*, __ NY3d __, 2014 NY Slip Op 04117, *11 [2014]). There were no mitigating factors that were not adequately taken into account by the guidelines.

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13207 In re Frederick, A.,
Petitioner-Respondent,

-against-

Lisa C.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Steven N. Feinman, White Plains, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Saira Wang of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (David B. Cohen, J.), entered on or about March 20, 2013, which granted petitioner father's petition to modify an earlier order awarding sole custody to respondent mother, and awarded sole legal and physical custody to the father with visitation to the mother, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for the court's determination that the best interests of the child are served by awarding sole legal and physical custody to the father (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The record shows that following issuance of the earlier custody order in 2007, the mother's living conditions changed to the extent that the child lacked a stable and secure home environment. The mother moved

several times between different shelters and her mother's home, where the child was exposed to verbal abuse and incidents of violence. A police officer who witnessed custody exchanges testified that the child would cry when she had to leave her father to go stay with her mother. The mother also interfered with the father's visitation, including disappearing with the child for several months, and failing to consult with him on the child's education needs, as required by the prior order. Such actions indicated an unwillingness to support and encourage a relationship between the child and the father (*see Matter of Gregory L.B. v Magdelena G.*, 68 AD3d 478 [1st Dept 2009]; *Bliss v Ach*, 56 NY2d 995, 998 [1982]).

Furthermore, the father has a stable home for the child, and stable employment, including flexible hours to care for the child. The court properly credited the testimony of the expert in child psychology who concluded that it was in the best interests of the child for the father to have sole custody, with

visitation to the mother. The attorney for the child also supports the award of sole custody to the father (*see Matter of Osbourne S. v Regina S.*, 55 AD3d 465, 466 [1st Dept 2008], *lv dismissed* 13 NY3d 782 [2009]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13208 Roger Martinez, Index 305453/09
Plaintiff-Appellant,

-against-

Robert Bauer, et al.,
Defendants-Respondents.

_____

Law Offices of Lawrence P. Biondi, White Plains (Richard Mandel of counsel), for appellant.

Gladstein Keane & Flomenhaft PLLC, New York (John J. Bruno of counsel), for Robert Bauer, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Abowitz respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 8, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, unanimously affirmed, without costs.

Plaintiff Roger Martinez sustained injuries while delivering a custom made desk/hutch to defendants Yitzcho Abowitz and Shoshana Abowitz's apartment when the rope that was hoisting a piece of the furniture broke, causing the furniture piece to fall on him. He commenced this action alleging violation of Labor Law §§ 240(1) and 241(6).

The court properly dismissed the Labor Law § 240(1) claim. Defendants' deposition testimony showing that the furniture unit was freestanding and not secured to the wall in any way established prima facie that plaintiff was not engaged in "altering" of a building under the statute; plaintiff failed to raise a triable issue of fact sufficient to defeat summary judgment. His deposition testimony shows at most only that the unit was to be anchored to the wall to prevent it from falling. Even if true, such would not result in a significant physical change to the configuration or composition of the building (*see Joblon v Solow*, 91 NY2d 457, 465 [1998]; *Acosta v Banco Popular*, 308 AD2d 48, 50-51 [1st Dept 2003]). Plaintiff's argument that the invoice described the unit as "built-in" is unavailing, as it is based on his unilateral and self-serving interpretation of the term. Indeed, he did not submit any proof rebutting his employer's testimony that the unit was freestanding and that the term "built in" meant something different in his employer's native language.

The Labor Law § 241(6) claim was properly dismissed, as plaintiff's accident did not occur in connection with construction, demolition, or excavation work (*see Nagel v D & R Realty Corp.*, 99 NY2d 98, 101-103 [2002]; *Maes v 408 W. 39 LLC*, 24 AD3d 298, 300-301 [1st Dept 2005], *lv denied* 7 NY3d 716

[2006]).

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

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13209 The People of the State of New York, Ind. 927/12
Respondent,

-against-

Angelo Parlagreco,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about August 7, 2012,

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

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

ENTERED: OCTOBER 14, 2014

CLERK

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

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13210 In re State of New York - Unified Court System, Petitioner-Respondent, Index 450848/12 451679/12

-against-

District Council 37, et al., Respondents-Appellants.

- - - - -

In re State of New York - Unified Court System, Petitioner-Respondent,

-against-

Citywide Association of Law Assistants, et al., Respondents-Appellants.

_____

Greenberg Burzichelli Greenberg P.C., Lake Success (Seth H. Greenberg of counsel), for appellants.

John W. McConnell, Office of Court Administration, New York (Lee A. Adlerstein of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered July 30, 2013, permanently staying arbitration, unanimously affirmed, without costs.

The second petition to stay arbitration was not time-barred, although it was served five months after respondents had made a demand for arbitration, because the demand failed to include the requisite notice of the 20-day period for applying for a stay

(*see* CPLR 7503[c]; *Matter of Blamowski [Munson Transp.]*, 91 NY2d 190, 195 [1997]; *Cooper v Bruckner*, 21 AD3d 758 [1st Dept 2005]). Nor is the petition barred by laches, given that the parties had stipulated to 30-day pauses in the proceedings pending, inter alia, a decision by the United States Court of Appeal for the Second Circuit in an action involving claims similar to those raised in respondents' arbitration demand and given respondents' failure to show any prejudice resulting from the five-month delay in filing the petition.

Supreme Court correctly found that respondents waived their right to arbitration by commencing an action in the U.S. District Court for the Eastern District of New York (*see Sherrill v Grayco Bldrs.*, 64 NY2d 261 [1985]; *Tengtu Intl. Corp. v Pak Kwan Cheung*, 24 AD3d 170 [1st Dept 2005]). The claims asserted in the federal action are virtually the same as those asserted in the arbitration proceeding, namely, that petitioner's alleged unilateral action violated the negotiated contract rights of respondents' members, as well as placed a financial burden on the members. Indeed, respondents state that they sought in the

federal forum to protect "all claims arising from [petitioner's] unlawful unilateral changes." Moreover, in addition to filing a complaint, respondents opposed petitioner's motions to dismiss and to change venue, without moving to compel arbitration.

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13211 Margaret M. DeJesus, Index 102346/12
Petitioner-Appellant,

-against

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

_____

John P. Rudden, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered October 19, 2012, denying the petition to annul respondents' determination dated August 24, 2011, which denied petitioner's applications for accidental disability and ordinary disability retirement benefits and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the matter remanded to respondent Board of Trustees for further proceedings consistent herewith.

The record does not demonstrate that the presidents of the Captain's Endowment Association (CEA) and the Sergeant's Benevolent Association (SBA) properly designated representatives to act in their absence in connection with the August 11, 2010 vote denying petitioner's applications for accidental and ordinary disability benefits, or that the individuals from the

CEA and the SBA who were present at the meeting were authorized to vote (*see* Administrative Code of City of NY § 13-216[a][1-12], [d]). The record is also unclear as to the vote of the Detective Endowment Association, which appeared to have two representatives present. Although the Board of Trustees is entitled to rely on the judgment of the Medical Board, a determination by a properly constituted Board of Trustees is required *(see Matter of Seiferheld v Kelly*, 16 NY3d 561, 564 [2011]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Clark, JJ.

13212 In re Deborah Glick, et al., Index 103844/12
Petitioner-Respondents-Appellants,

-against-

Rose Harvey, etc., et al.,
Respondents,

Veronica M. White, et al.,
Respondents-Appellants-Respondents,

New York University,
As a Necessary Third-Party,
Appellant-Respondent.

_____

Cooley LLP, New York (Alan Levine of counsel), for New York University, appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for municipal appellants-respondents.

Gibson, Dunn & Crutcher LLP, New York (Caitlin J. Halligan, Randy M. Mastro and Sarah Vacchiano of counsel), for respondents-appellants.

_____

Order and judgment (one paper), Supreme Court, New York County (Donna M. Mills, J.), entered January 10, 2014, to the extent appealed from as limited by the briefs, granting the amended petition's first cause of action to the extent of declaring that the City respondents had alienated public parkland without approval by the New York State Legislature in violation of the Public Trust Doctrine, and enjoining respondent New York University (NYU) from beginning any construction, in connection

with the expansion project at issue, that will result in any alienation of the three parcels found by the court to be public parkland, unless and until the State Legislature authorizes the alienation of any parkland to be impacted by the project, and granted so much of the cross motions of the City respondents and NYU as sought dismissal of the causes of action alleging violations of the New York State Environmental Quality Review Act (SEQRA) and the New York City Uniform Land Use Review Procedure (ULURP), unanimously modified, on the law, to grant the cross motions to dismiss the first cause of action, vacate the declaratory and injunctive relief, deny the petition, and dismiss the proceeding brought pursuant to CPLR article 78, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Where, as here, there is no formal dedication of land for public use, an implied dedication may exist when the municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate (*Riverview Partners v City of Peekskill*, 273 AD2d 455, 455 [2d Dept 2000]; *see also Powell v City of New York*, 85 AD3d 429, 431 [1st Dept 2011], *lv denied* 17 NY3d 715 [2011]). In determining whether a parcel has become a park by implication, a court should consider the owner's acts and declarations and the circumstances surrounding the use of the

land (*see Matter of Angiolillo v Town of Greenburgh*, 290 AD2d 1, 11 [2d Dept 2001], *lv denied* 98 NY2d 602 [2002]). The burden of proof rests on the party asserting that the land has been dedicated for public use (*id.*).

Here, petitioners have failed to meet their burden of showing that the City's acts and declarations manifested a present, fixed, and unequivocal intent to dedicate any of the parcels at issue as public parkland. While the City has allowed for the long-term continuous use of parts of the parcels for park-like purposes, such use was not exclusive, as some of the parcels (like LaGuardia Park) have also been used as pedestrian thoroughfares (*see Powell*, 85 AD3d at 431). Further, any management of the parcels by the Department of Parks and Recreation was understood to be temporary and provisional, pursuant to revocable permits or licenses (*see id.*). Moreover, the parcels have been mapped as streets since they were acquired by the City, and the City has refused various requests to have the streets de-mapped and re-dedicated as parkland (*see id.*).

The court correctly found that the project-approval process complied with ULURP and SEQRA. There is no basis to conclude that the City respondents blocked open debate about the project or refused to adequately scrutinize NYU's purported need for more faculty housing. Further, the court correctly concluded that

there was no need to restart the ULURP process to review modifications reducing the project's size and scale (*see Matter of Windsor Owners Corp. v City Council of City of N.Y.*, 23 Misc 3d 490, 501-502 [Sup Ct, NY County 2009]). Nor was it necessary for the Final Environmental Impact Statement (FEIS) to consider the environmental impacts of locating the project in a different neighborhood, as the purpose of the project is for NYU to expand its facilities in the Washington Square Area (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

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

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13213-
13214 In re Brian T., and Another,

Children Under Eighteen
Years of Age, etc.,

Jeannette F., et al.,
Respondents-Appellants,

Catholic Guardian Society
and Home Bureau,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Jeannette F., appellant.

Steven N. Feinman, White Plains, for Thelmo T., appellant.

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

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

_____

Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about May 20, 2013, which, upon a fact-finding determination that respondents parents had permanently neglected the subject children, terminated their parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The findings that respondents permanently neglected the subject children are supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The agency provided an adequate foundation for admission of the case records, through the testimony of a caseworker familiar with the agency's record-keeping practices (*see Matter of Breeana R.W. [Antigone W.]*, 89 AD3d 577 [1st Dept 2012], *lv denied* 18 NY3d 805 [2012]; CPLR 4518[a]), and the records establish that the agency made diligent efforts to strengthen respondents' relationship with the children by scheduling regular visitation and referring them to multiple parenting skills and anger management programs, as well as sex abuse therapy for respondent father (*see* Social Services Law § 384-b[7][f]; *Matter of Breeana*, 89 AD3d at 578). Although the parents completed some of the required services, they did not complete all of them, and they failed to consistently visit the children or to gain insight into the reasons for the children's placement into foster care (*see Matter of Sheila G.*, 61 NY2d 368 [1984]; *Matter of Dina Loraine P. [Ana c.]*, 107 AD3d 634, 634 [1st Dept 2013]).

A preponderance of the evidence supports the finding that termination of respondents' parental rights is in the children's best interests (*see Matter of Emily Jane Star R. [Evelyn R.]*, 117

AD3d 646 [1st Dept 2014]). The children were placed into foster care more than nine years ago, after the underlying neglect findings regarding the sex abuse of the mother's daughter by respondent father, and have remained with the same foster mother who has cared for them and provided a stable home. The children have expressed their preference to be adopted (*see id.*). A suspended judgment is not appropriate under the circumstances. It would result in unnecessarily prolonging the children's time in foster care and perpetuate a situation of uncertainty (*see Matter of Isabella Star G.*, 66 AD3d 536 [1st Dept 2009]).

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

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13215 The People of the State of New York, Ind. 4742/11
Respondent,

-against-

William Rivera,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Seth Steed 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 (Carol Berkman, J.), rendered on or about March 7, 2012,

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

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

ENTERED: OCTOBER 14, 2014

CLERK

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

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13216 The People of the State of New York, Ind. 4445/02
Respondent,

-against-

Robert Montgomery,
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 (Ronald Zweibel, J.), rendered July 16, 2010, resentencing defendant, as a second violent felony offender, to a term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13217-
13218 In re Jacob L.,

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

Chasitiy P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 7, 2013, upon a fact-finding that appellant mother neglected the subject child, and order of fact-finding, same court and Judge, entered on or about October 2, 2013, unanimously affirmed, without costs.

The court properly determined that petitioner proved by a preponderance of the evidence that appellant had neglected the subject child by reason of her untreated mental condition and failure to provide adequate supervision and guardianship, which placed the child's physical, mental, and emotional condition at

imminent risk of becoming impaired (*see Matter of Immanuel C.-S. [Debra C.]*, 104 AD3d 615 [1st Dept 2013]). The hospital records and the expert witnesses' testimony indicate that the mother suffers from, among other things, psychosis, bipolar disorder and paranoia, as evidenced by her beliefs that she is a famous actress, and someone is hacking into her computer. The mother testified to multiple extended hospitalizations for mental illness, and the record demonstrated her lack of insight into her illness and repeated relapses due to her noncompliance with treatment and prescribed medication (*see Matter of Naomi S. [Hadar S.]*, 87 AD3d 936 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]).

Petitioner was not obligated to prove that the child suffered past or present harm, since the evidence demonstrated that he was at risk of harm based on demonstrable conduct by the mother (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13220 Peter Jennings, Index 306342/10
Plaintiff-Respondent,

-against-

Chase Home Finance, LLC, et al.,
Defendants-Appellants.

Norman W. Leon, et al.,
Defendants.

- - - - -

Chase Home Finance, LLC, et al.,
Third-Party Plaintiffs,

-against-

Maryrose Mlayi, et al.,
Third-Party Defendants.

_____

Dorf & Nelson LLP, Rye (Jonathan B. Nelson of counsel), for appellants.

Law Office of Michael O. Adeyemi, Brooklyn (Michael O. Adeyemi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered February 27, 2014, which, insofar as appealed from as limited by the briefs, denied defendants/third-party plaintiffs' motion for summary judgment declaring, upon the first cause of action in the third-party complaint, that they are entitled to indemnification by third-party defendant Maryrose Mlayi for any sums they owe to plaintiff, unanimously affirmed, with costs.

Mlayi has not answered the third-party complaint, and indeed

there has been no showing that she was properly served with it. Hence, issue has not been joined, and the motion for summary judgment as against her must be denied (CPLR 3212[a]; *Republic Natl. Bank of N.Y. v Luis Winston, Inc.*, 107 AD2d 581, 582 [1st Dept 1985]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13221 The People of the State of New York, Ind. 1676/95
Respondent,

-against-

James Rizzo,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about February 8, 2013, which adjudicated defendant to be a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C) unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, __NY3d__, 2014 NY Slip Op 04117, *11 [2014]; *People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d

416, 421 [2008]). Neither defendant's age nor any other factors cited by defendant warranted a downward departure, particularly in light of the seriousness of the underlying sex crime.

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13222 The People of the State of New York, Respondent, Ind. 5533/12

-against-

Angel Marquez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J. at plea and sentencing), rendered on or about January 23, 2010, 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 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13223 In re Gina Romano, Index 402336/12
Petitioner-Appellant,

-against-

The New York City Housing Authority, et al.,
Respondents-Respondents.

_____

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

Kelly D. MacNeal, New York City Housing Authority, New York (Andrew M. Lupin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 26, 2013, which denied the petition to vacate the determination of respondent New York City Housing Authority, dated August 1, 2012, terminating petitioner's tenancy, unanimously affirmed, without costs.

The record shows that investigators discovered petitioner's son, without his shirt or shoes on, in the apartment. The son told investigators that petitioner had let him the day before when he went there to pick up clothing, which he stored there, and that he decided to spend the night (*see Matter of Liverman v New York City Hous. Auth.*, 118 AD3d 580 [1st Dept 2014]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see Matter of*

Horne v New York City Hous. Auth., 113 AD3d 575 [1st Dept 2014]). Petitioner allowed her son, who had stabbed someone to death while he was an authorized occupant in her apartment, to enter the apartment after he had been excluded. Although the penalty imposed will likely have significant adverse consequences for petitioner, the other residents of the development should not be placed at risk by the criminal activities of petitioner's son (*see Featherstone v Franco*, 95 NY2d 550, 555 [2000]; *Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631 [2013]; *Gibbs*, 82 AD3d at 413).

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13224 The People of the State of New York, Respondent, Ind. 4313/04

-against-

Garland Graves, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about April 9, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant did not preserve his contention that the court applied the wrong standard in determining his application for a downward departure, and we decline to review it in the interest of justice. As an alternate holding, we find that although the court should have applied a preponderance of the evidence standard (*see People v Gillotti*, __NY3d__, 2014 NY Slip Op 04117, *11 [2014]), application of such a standard would not have

affected the result because defendant failed to establish that the mitigating factors he alleged were of a kind or to a degree not adequately taken into account by the guidelines.

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13225 The People of the State of New York, Respondent, Ind. 2803/12

-against-

Victor Sanchez, etc., Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about August 1, 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.

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13226N In re Bowery Residents' Committee, Inc., Petitioner-Respondent

-against-

Lance Capital, LLC, Respondent-Appellant.

Index 651184/13

Cater Ledyard & Milburn LLP, New York (Jeffrey S. Boxer of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 4, 2013, which granted the petition to the extent of vacating the portion of an arbitration award that directed each party to bear its own legal expenses, vacating the arbitrator's denial of petitioner's request for a modification of the award, and remanding the matter to a different arbitrator for a determination of those expenses, unanimously affirmed, with costs.

Pursuant to CPLR 7511(b)(1)(iii), an arbitration award shall be vacated when, inter alia, an arbitrator exceeds a specifically enumerated limitation on his power (*see Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90-91 [2010]; *Matter of Local 345 of Retail Store Empls. Union*

[Heinrich Motors], 63 NY2d 985, 987 [1984]). The arbitration provision in the parties' agreement unambiguously provided that "[t]he arbitrator will have no authority to make any ruling, finding or award that does not conform to the terms and conditions of this Agreement. Each party shall bear its own costs in any arbitration, with the prevailing party entitled to recover its commercially reasonable attorneys' fees, costs and disbursements." There is no dispute that petitioner was the prevailing party in the underlying arbitration proceeding. Hence, the arbitrator lacked any discretion under the agreement to decline to award petitioner its reasonable legal fees, as the prevailing party, and the refusal to do so was clearly in excess of his power, thus warranting vacatur of the award (*see id*; *Matter of Port Auth. Police Benevolent Assn. [Port Auth. of N.Y. & N.J.]*, 235 AD2d 359 [1st Dept 1997]).

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

ENTERED: OCTOBER 14, 2014

CLERK

Tom, J.P., Sweeny, Renwick, Andrias, Clark, JJ.

13227 [M-4274] In re James D. Lee, Petitioner,

-against-

Hon. Maxwell Wiley, etc., et al., Respondents.

Ind. 1916/14

James D. Lee, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Maxwell Wiley, respondent.

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

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

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

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

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

ENTERED: OCTOBER 14, 2014

CLERK

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

13293-
13294 Index 652293/12

Mohammed Al Sari,
Plaintiff-Respondent,

-against-

Alishaev Bros., Inc.,
Defendant-Appellant.

_____

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for appellant.

Debevoise & Plimpton LLP, New York (Julie Calderon Rizzo of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 14, 2014, which granted plaintiff's motion for summary judgment dismissing defendant's counterclaim, unanimously reversed, on the law, without costs, and the motion denied. Order, same court and Justice, entered February 27, 2014, unanimously affirmed insofar as it denied defendant's cross motion for sanctions against plaintiff, and the appeal from the portion thereof that denied defendant's cross motion to renew plaintiff's motion for summary judgment dismissed, without costs, as academic in light of the foregoing.

As is evident from his brief before the motion court, plaintiff moved to dismiss only the part of the counterclaim dealing with nonparty Daniela Diamonds LLC. Thus, the portion of

the counterclaim involving nonparty Signature Diamonds should not have been dismissed.

The motion court improvidently exercised its discretion in deeming paragraph 3 of plaintiff's statement of undisputed facts admitted. Defendant clearly disputed this paragraph in paragraph 13 of its statement. While it would have been better for defendant to submit a paragraph-by-paragraph response to plaintiff's statement, "blind adherence to the procedure set forth in rule 19-a" of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70) is not required (*Abreu v Barkin & Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]).

In opposition to plaintiff's motion for summary judgment, defendant raised a triable issue of fact whether plaintiff owed Daniela $553,606.25 by submitting an affidavit by one of Daniela's principals (Eliazarov) and documents that Eliazarov swore were Daniela's business records. It is for a trier of fact to decide whether the Daniela documents were in fact business records and whether, as plaintiff contends, Eliazarov's affidavit is false (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]; *see also D'Angelo v State of New York*, 39 NY2d 781 [1976]).

Plaintiff did not demonstrate that the assignment to defendant of Daniela's claim against him was champertous as a matter of law since an issue of fact exists whether Daniela's claim was legitimate (*see Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 201 [2009]). Furthermore, the assignment from Daniela to defendant did not create strife, discord, or harassment, since plaintiff was already suing defendant, defendant already had a counterclaim against plaintiff based on Signature's purchases from defendant, and defendant and Daniela are related (*see id.* at 199).

The court providently exercised its discretion in denying defendant's cross motion for sanctions against plaintiff. The small note from nonparty Gopi that plaintiff threw away was not key evidence (*see Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998]). Defendant could have deposed Gopi.

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

ENTERED: OCTOBER 14, 2014

CLERK