SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 23, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

11871 Orly Genger, etc., Index 109749/09
Plaintiff-Respondent,

-against-

Dalia Genger, et al.,
Defendants-Appellants.

_____

Pedowitz & Meister, L.L.P., New York (Robert A. Meister of counsel), for Dalia Genger, appellant.

Morgan, Lewis & Bockius LLP, New York (John Dellaportas of counsel), for Sagi Genger and TPR Investment Associates, Inc., appellants.

Ira Daniel Tokayer, New York, for D&K GP LLC, appellant.

Zeichner Ellman & Krause LLP, New York (Brian D. Leinbach of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 31, 2013, which, insofar as appealed from, denied the motions of defendants TPR Investment Associates, Inc. (TPR) and D & K GP LLC (D&K GP) to amend their answers and for summary judgment dismissing the claims against them, granted plaintiff's cross motion for sanctions against TPR, D&K GP, defendant Dalia

Genger (Dalia), and defendant Sagi Genger (Sagi), sanctioned defendant Leah Fang (Fang), and denied Fang's motion for summary judgment dismissing the claims against her, unanimously modified, on the law and the facts, to delete the sanctions against Dalia, Sagi, and Fang, and to grant Fang's motion for summary judgment dismissing the claims against her, and otherwise affirmed, without costs.

Contrary to the motion court's statement, plaintiff did not cross-move for sanctions against Fang. Furthermore, Fang did not disobey the 2010 and 2011 injunctions – she resigned as trustee of indirect plaintiff the Orly Genger 1993 Trust (Orly Trust) in January 2008 and had nothing to do with the 2011 and 2012 settlements challenged by plaintiff. Hence, there was no basis for sanctioning Fang.

Plaintiff's *cross* motion for sanctions was improper as against Dalia and Sagi, who were not movants (*see e.g. Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

TPR and D&K GP contend that they should not have been sanctioned because they did not violate the 2010 and 2011 injunctions. This argument is unavailing. Assuming, arguendo, that the 2010 order merely enjoined transfers, sales, pledges, assignments, or other dispositions of TPR shares (as opposed to

transfers, etc., of the Orly Trust's interest in double-derivative plaintiff D&K LP), Orly Trust disclaimed any interest in any shares of TPR via the settlement agreements.

It is true that the October 2011 settlement predated the December 2011 injunction; however, the parties to the settlement amended and restated their agreement in March 2012, i.e., after the injunction. The 2011 order enjoined Sagi, TPR, and Dalia "from making demands upon and using or spending the proceeds derived from the purported sale by TPR . . . to [nonparty] Trump Group . . . of . . . the Orly Trust[']s shares of nonparty Trans-Resources, Inc. (TRI)] . . ., pending the determination by a court of competent jurisdiction [of] the beneficial ownership of such shares." The promissory note which is a part of both settlement agreements – and which replaced a note that D&K LP had given in 1993 (the 1993 Note) – provides that the principal and accrued interest shall be due "[i]mmediately upon [Orly Trust]'s receipt of the proceeds from the sale of [its] TRI shares."

In sum, the motion court properly found that TPR and D&K GP had disobeyed "a lawful mandate of the court" (Judiciary Law § 753[A][3]) and properly ordered them to pay plaintiff's attorneys' fees (*see Davey v Kelly*, 57 AD3d 230 [1st Dept 2008]).

For the reasons discussed in the following paragraph, it was

a provident exercise of the IAS court's discretion to deny TPR's and D&K GP's motions to amend their answers to add the defense of release, based on the release contained in the October 2011 and March 2012 settlement agreements, because the proposed amendment lacked merit and would be futile (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]). For the same reasons, the court correctly denied the motions by TPR and D&K GP for summary judgment dismissing the claims against them based on the same release.

When a fiduciary has a conflict of interest in entering a transaction and does not disclose that conflict to his/her principal, the transaction is "voidable at the option of" the principal (*Wendt v Fischer*, 243 NY 439, 443 [1926]). Moreover, "an agent cannot bind his principal . . . where he is known to be acting for himself, or to have an adverse interest" (*Manhattan Life Ins. Co. v Forty-Second St. & Grand St. Ferry R.R. Co.*, 139 NY 146, 151 [1893]). In entering into the aforementioned October 2011 and March 2012 settlement agreements with TPR and D&K LP on behalf of Orly Trust, of which she was sole trustee, Dalia had a conflict of interest. The new promissory notes executed by Dalia on behalf of Orly Trust pursuant to the settlement agreements

contained provisions that were plainly intended to entrench her as sole trustee of Orly Trust, notwithstanding the ongoing disputes and litigation between herself and plaintiff, the trust's beneficiary. Specifically, the replacement notes provided that Dalia's resignation or removal as trustee of Orly Trust, or the appointment of any additional trustee, would constitute an event of default rendering the notes immediately due and payable by Orly Trust. Further, the purported settlement of the derivative claims that plaintiff asserts on behalf of Orly Trust in this action — which was already pending at the time the settlement agreements were executed — required the court's approval, which was never sought. Moreover, as previously discussed, the settlements were entered into in violation of the aforementioned 2010 and 2011 injunctions. For these reasons, the settlements are voidable and, given the expressed intention of plaintiff (the beneficiary of Orly Trust) to void them, the purported releases they contain are not enforceable.

Fang moved for summary judgment based on additional releases given to her by Dalia (as trustee of Orly Trust) in December 2007 and January 2008. As no infirmity has been demonstrated in the December 2007 and January 2008 releases, the IAS court should have granted Fang summary judgment based on these instruments.

This determination renders moot the portion of Fang's motion that sought summary judgment based on the infirm releases in the 2011 and 2012 settlement agreements.

> The Decision and Order of this Court entered herein on March 4, 2014 is hereby recalled and vacated (*see* M-1592 and M-1606 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12951 In re Transparent Value, LLC, etc., Index 602440/09
Petitioner-Appellant,

-against-

Wade Emory Johnson,
Respondent-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Ira Gammerman, JHO), entered on or about December 2, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 15, 2014,

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels, Feinman, JJ.

12630 In re Board of Education of the City School District of the City of New York, et al., Petitioners-Appellants, Index 400108/11

-against-

Steven Ostrin, Respondent-Respondent.

_____

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

Law Office of Richard E. Casagrande, New York (Oriana Vigliotti of counsel), for respondent.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 16, 2012, denying the petition, which sought to modify the penalty imposed in an arbitration award, dated December 27, 2010, granting respondent's cross motion to dismiss the petition and confirm the award, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

The Hearing Officer's determination to suspend respondent teacher for one-half year without pay, rather than terminate him, was rational and supported by the evidence (*see City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 452-453 [1st Dept 2010], *affd* 17 NY3d 917 [2011]). There is no basis to disturb

the Hearing Officer's findings that respondent did not commit sexual misconduct on the date in question, and that he did not engage in a pattern of misconduct warranting the penalty of dismissal. The Hearing Officer made clear that the case turned entirely on the credibility of the witnesses, and such determinations "are largely unreviewable" (*Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]; *see also McGraham*, 75 AD3d at 452). Further, the imposed penalty does not violate public policy (*see McGraham*, 75 AD3d at 450).

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

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12965 The People of the State of New York, Ind. 1411/08
Respondent,

-against-

Quadaun James,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered March 12, 2012, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 10 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination. Defendant did not make a valid waiver of the right to appeal, and, in any event, the right of an eligible

defendant to such a determination is not waivable (id. at 499). Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12966 In re Dexter A.,
Petitioner-Appellant,

-against-

Georgia G.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for respondent.

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

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Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about August 31, 2013, which, to the extent appealed from as limited by the briefs, denied, after a hearing, petitioner father's application to relocate to Virginia with the parties' minor child, unanimously reversed, on the law, and the facts, without costs, the application granted, and the matter is remanded to the trial court to set an access schedule for the mother.

The record does not support the referee's determination that the child's best interests would be served by denying the father's relocation application (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]).

While not determinative, the child has indicated a preference to relocate to Virginia with the father. There is sufficient evidence to support the father's claim that there will be economic and educational benefits to the child, and the child's contact with his mother will not be substantially impacted because the father has offered liberal access to the mother.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12967 Mazel 315 West 35th LLC, Index 652627/11
Plaintiff-Respondent,

-against-

315 W. 35th Associates LLC, et al.,
Defendants,

Jon Lefkowitz,
Defendant-Appellant.

_____

Jon A. Lefkowitz, Brooklyn, appellant pro se.

Meister Seelig & Fein LLP, New York (Kevin A. Fritz of counsel), for respondent.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered April 24, 2013, which, insofar as appealed from as limited by the briefs, denied defendant Lefkowitz's motion for summary judgment dismissing the cause of action for violation of Judiciary Law § 487 as against him, unanimously affirmed, with costs.

Defendant failed to demonstrate that the Judiciary Law § 487 cause of action has no merit. Plaintiff's evidence showing that defendant presented false assignment documents for recordation in the City Register and sent a letter to the justice stating falsely that his client was the true owner of the notes and mortgages establishes an egregious act of intentional deceit of

the court sufficient to support the cause of action (*see Kurman v Schnapp*, 73 AD3d 435, 435 [1st Dept 2010]). Defendant denies that he was involved in the recordation of the false documents and asserts that he did not intend to deceive the court. These assertions are insufficient to warrant judgment as a matter of law in defendant's favor; they merely raise issues of fact. Moreover, the parties dispute many of the underlying facts of this matter, and no discovery has been conducted. Since defendant has not established that he had no intent to deceive, his contention that he is immune from liability because he was merely engaged in zealous advocacy is unavailing (*see Lazich v Vittoria & Parker*, 189 AD2d 753 [2d Dept 1993], *appeal dismissed* 81 NY2d 1006 [1993]; *Alliance Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 859-860 [Sup Ct, NY County 2014]).

Defendant's remaining arguments are unpreserved for our review and in any event without merit.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12968 In re La Casa Di Arturo Inc., doing business as Arturo's Restaurant & Pizzeria, Petitioner, Index 103151/12

-against-

The New York City Department of Consumer Affairs, Respondent.

_____

DiTomasso & DiTomasso, New York (John J. Hayes of counsel), for petitioner.

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

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Determination of respondent, Department of Consumer Affairs (DCA), dated March 2, 2012, which, after a hearing, found that petitioner violated the Administrative Code of the City of New York §20-224(a), and imposed a civil fine of $1,000.00, unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Manuel J. Mendez, J.], entered March 12, 2013), granted.

Petitioner, the owner of a restaurant located in New York County, challenges DCA's determination that it engaged in unlicensed sidewalk café activity on September 21, 2011 because

its café seating was located on the public sidewalk (*see* Administrative Code of City of NY §§ 20-223[a], §19-101[d]; *see also* Vehicle and Traffic Law §144). On three prior occasions spanning more than two decades, DCA's administrative tribunals dismissed notices of violation against petitioner based on essentially identical factual allegations, finding that respondent failed to prove that the outdoor café was sited on public property. In the most recent of those decisions, issued less than four years before the inspection at issue, the tribunal specifically afforded DCA an opportunity to obtain evidence from the Department of Buildings regarding the location of the property line and DCA failed to present any such evidence. Similarly, at the October 18, 2011 hearing concerning the violation at issue, DCA's inspector admitted that he did not know where the property line is located and DCA did not offer any evidence establishing that the tables and chairs petitioner set up on the sidewalk extended past the property line onto the public sidewalk. Respondent's failure to adhere to its own prior precedent, without providing a sufficient reason for reaching a different result on identical facts, is arbitrary and capricious,

requiring reversal (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519-20 [1985]; *Klein v Levin*, 305 AD2d 316, 317-318 [1st Dept], *lv denied* 100 NY2d 514 [2003]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12969-
12969A

Orix Venture Finance LLC,
Plaintiff-Respondent,

-against-

Eagle Ltd., et al.,
Defendants-Appellants.

Index 651285/12

_____

Coughlin Duffy LLP, New York (Joseph C. Amoroso of counsel), for appellants.

Wollmuth Maher & Deutsch LLP, New York (Michael Ledley and Fletcher W. Strong of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered April 18, 2013, granting plaintiff's motion for summary judgment, and awarding plaintiff $3 million in general damages on its first and second causes of action as against defendants, prejudgment interest totaling $303,287.67 from March 4, 2012 through the judgment entry date, postjudgment interest at 9% until satisfaction of the judgment, and attorney's fees in an amount to be determined by a special referee following a hearing, unanimously affirmed, with costs. Appeal from underlying order, same court and Justice, entered November 26, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order and judgment.

Defendants' interpretation of the language in the parties'

loan purchase agreement - that the acceleration term therein only applied to purchase loan installments that had already become due and remained unpaid - disregards general contract principles that the contracting parties' intent be gleaned from their written agreement as a whole, with an understanding that the interpretation is to give effect to the writing's general purpose, and that the plain meaning of terms utilized is to apply, unless they are otherwise defined (*see generally William Press v State of New York*, 37 NY2d 434, 440 [1975]; *Triax Capital Advisors, LLC v Rutter*, 83 AD3d 490 [1st Dept 2011], *appeal dismissed* 17 NY3d 804 [2011]; *Banco Espirito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100 [1st Dept 2012]). Application of these principles supports the motion court's finding, as a matter of law, that the contested acceleration language authorized plaintiff lender to resort to any remedy at law or in equity, including acceleration of defendants' full obligations under the agreement. The corporate defendant did not dispute its failure to cure its default on an obligation to tender a minimum one million dollar payment owing to plaintiff by a date specified in the agreement, and the acceleration provision obligated the corporate defendant to make full payment of all obligations due under the agreement.

Defendants' interpretation of the acceleration language is rejected, as it fails to give meaning to all the terms in the remedies provision, and it effectively renders part of the contract meaningless (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

Defendants' argument that summary judgment was improperly awarded to plaintiff because plaintiff failed to establish prima facie that the defendants caused the plaintiff injury, and failed to establish the amount of damages, was refuted by the record, which includes contract documents that clearly define the parties' respective obligations and the amounts due thereunder (*see generally General Acceptance Corp. v Masmo, Inc.*, 33 AD2d 57 [1st Dept 1969]). The plain terms of the contract documents refute defendants' defenses (*see id.*), and establish the individual defendant's obligation as an unconditional guarantor

of the corporate defendant's performance under the agreement.

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

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12970 The People of the State of New York, Ind. 203/10
Respondent,

-against-

Ramon Lalondriz-Castillo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 3, 2014, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, and sentencing him to a term of 15 years, unanimously affirmed.

Assuming that defendant's right to challenge his sentence survives his waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12971-
12972 In re Adam Christopher S., and Others,

Children Under the Age of
Eighteen years, etc.,

Deborah D.,
Respondent-Appellant,

Administration for
Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children.

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about October 2, 2013, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 2, 2013, which found that respondent neglected the child Adam Christopher S. and derivatively neglected the other children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence, which demonstrates that respondent inflicted excessive corporal punishment on her son Adam, then eight years old. On one occasion she slapped Adam in the face, leaving red marks, and nine days later she beat him over the course of 10 hours, using a belt on his legs and attempting to pry his mouth open while trying to force him to eat (*see* Family Court Act § 1046[b]; *Matter of Joshua R.*, 47 AD3d 465 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]). That the physical injuries sustained by her son did not warrant medical attention does not preclude a finding of neglect against respondent based on excessive corporal punishment (*see Matter of Joseph C. [Anthony C.]*, 88 AD3d 478 [1st Dept 2011]). Further, the court found that respondent showed no remorse or insight into the impact of her conduct on her children.

By establishing that respondent neglected her son by using excessive corporal punishment on him, petitioner demonstrated respondent's derivative neglect of the other three children (Family Court Act § 1046[a][1]; *Matter of Jason G. [Pamela G.]*, 3 AD3d 340 [1st Dept 2004], *lv denied* 2 NY3d 702 [2004]). Respondent's behavior demonstrated a level of parental judgment

so impaired as to create a substantial risk of harm to any child in her care (*see Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12974 SSA Holdings LLC, Index 654329/12
Plaintiff-Appellant,

-against-

Howard Kaplan, et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael J. Bowe of counsel), for appellant.

Kaplan Rice LLP, New York (Michelle A. Rice of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 15, 2013, which granted defendants' motion to dismiss the fraudulent concealment cause of action and to stay the declaratory judgment cause of action pending resolution of another action (the AKR action), unanimously affirmed, with costs.

The complaint failed to state a cause of action for fraudulent concealment, as defendants had no duty to disclose the alleged material information (*see e.g. Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]). Defendants — nonmanaging minority members of plaintiff, a Delaware limited liability company — owed no fiduciary duties to plaintiff or its manager, Stanley S. Arkin, a nonparty to this action (*see Coventry Real*

Estate Advisors, L.L.C. v Developers Diversified Realty Corp., 84 AD3d 583, 584 [1st Dept 2011]). Nor did the duty to disclose arise under the special facts doctrine, as the complaint does not allege that defendants had superior knowledge of essential facts (*see Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005]). Indeed, defendants allegedly failed to disclose that they "*considered* themselves to have stopped practicing law with [Mr. Arkin] on a full-time basis as his partners as of January 6, 2012" (emphasis added). "While there may have been concealment of opinions, there was no concealment of the facts upon which those opinions were based" and defendants "were not bound to volunteer their opinions" (*Amherst Coll. v Ritch*, 151 NY 282, 322 [1897]). Moreover, there was no allegation of superior knowledge, as defendants' belief that AKR had been dissolved as of January 6, 2012 was based on Mr. Arkin's own email of that date.

The motion court providently exercised its discretion by staying the declaratory judgment cause of action (*see e.g. Uptown Healthcare Mgt., Inc. v Rivkin Radler LLP*, 116 AD3d 631 [1st Dept 2014]). A stay is proper, since the determination of the AKR action may dispose of or limit issues involved in this action (*see Belopolsky v Renew Data Corp.*, 41 AD3d 322, 323 [1st Dept

2007]). Indeed, plaintiff requested, among other things, a declaration that defendants were not entitled to any distributions from plaintiff after the date of dissolution of Arkin Kaplan Rice LLP — a nonparty to this action. The dissolution date will be determined in the AKR action. If, after that determination, the parties in this case disagree whether the dissolution date was the date as of which defendants were no longer entitled to distributions from plaintiff, this issue may be raised when the stay in this action is lifted.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12975-
12976 The People of the State of New York,
Respondent,

-against-

Brandy Pretto,
Defendant-Appellant.

Ind. 5662N/10
2591/11

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

Judgments, Supreme Court, New York County (Michael Sonberg, J.), rendered on or about March 13, 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: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12977 The People of the State of New York, Respondent, Ind. 90152/05

-against-

Joshua Nowrang, Defendant-Appellant.

_____

Law Offices of Randall D. Unger, Bayside (Randall D. Unger of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered January 10, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. The circumstantial proof led to the inevitable conclusion that it was defendant, and not some unknown perpetrator, who killed defendant's wife, dismembered her body, and disposed of the body parts.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not

reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), concerning defense counsel's strategic decisions. This is not one of the rare cases where the trial record itself permits review of an ineffective assistance of counsel claim challenging counsel's strategy. Among other things, counsel may have reasonably concluded that lengthy cross-examinations and futile objections would have been counterproductive. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of his ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]).

Defendant's hearsay claims are rejected. The evidence at issue was not admitted for its truth, but for legitimate

nonhearsay purposes (*see People v Bierenbaum*, 301 AD2d 119, 145-146 [1st Dept 2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]), and the court provided thorough limiting instructions.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12978 In re Jaquan F.,
Petitioner-Respondent,

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

Alexis F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

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

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

_____

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about May 6, 2013, which, upon a fact-finding determination that respondent mother neglected the subject child, placed the child with petitioner agency until the next permanency hearing, and directed respondent to comply with certain conditions, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that respondent neglected the special needs child by failing to properly supervise him and failing to attend numerous medical appointments. The court was within its discretion in crediting

the testimony of petitioner's medical expert (*see Matter of Cerda*, 114 AD2d 795, 795-796 [1st Dept 1985]).

A preponderance of the evidence also supports the court's finding of neglect based on the child's excessive absences from school. The record shows that between September 11, 2011 and February 7, 2012, the child missed 52 days of school. The court rejected respondent's explanation that she missed numerous medical appointments for the child because of inclement weather and lateness, resulting in the child being unable to obtain a prescription for a new protective helmet that was required for him to attend school and causing his absence from school for more than two months until the new helmet was obtained, and there is no basis for disturbing the court's credibility determination *(see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943 [1st Dept 2011]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12979 The People of the State of New York, Ind. 4543/10
Respondent,

-against-

Nigel Davis,
Defendant-Appellant.

_____

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

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

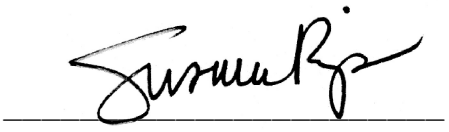
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 4, 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: SEPTEMBER 23, 2014



CLERK

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

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12980-
12981 Index 350037/11

Erika Klauer,
Plaintiff-Respondent,

-against-

Asa Abeliovich,
Defendant-Appellant.

_____

Grant + Applebaum, P.C., New York (Patricia Ann Grant of counsel), for appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for respondent.

Jo Ann Douglas, New York, attorney for the child.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 15, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion to vacate the July 1, 2013 on-the-record custody agreement, unanimously affirmed, without costs. Appeal from so-ordered transcript of the custody agreement, same court and Justice, entered on or about September 24, 2013, unanimously dismissed, without costs.

Supreme Court properly denied defendant's motion to set aside the open-court custody agreement, as there was no showing of fraud, overreaching, mistake, or duress (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]). The parties were

represented by able and experienced counsel, had been negotiating custody for some time, and spent an entire day resolving the agreement. Defendant was actively involved in the negotiations and many of his requested additions and modifications were incorporated into the agreement. Further, Supreme Court conducted a proper allocution of defendant and properly determined that he voluntarily and knowingly accepted the terms of the stipulation (*see Matter of Strang v Rathbone*, 108 AD3d 565, 566 [2d Dept 2013]). Defendant's contentions that he felt "forced into settling" and pressured by his attorneys are insufficient to establish mistake or duress so as to warrant setting aside the stipulation (*id.*).

Defendant did not demonstrate any change in circumstances since the time of the stipulation that would warrant the modification he seeks (*see Matter of Iris R. v Jose R.*, 74 AD3d 457 [1st Dept 2010]). Nor is there any basis for finding that the agreement is against the child's best interests (*see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]). The agreement ensures regular parental access, equal vacation and holiday time, requires plaintiff to consult defendant on all major decisions, and gives defendant a say in medical decisions and in some extracurricular activities. The forensic report was

not in evidence and, in any event, is not binding on the court (*see Matter of John A. v Bridget M.*, 16 AD3d 324, 332 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]). Accordingly, defendant was not entitled to a hearing on custody (*see Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [1st Dept 2007]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P, Acosta, Saxe, Gische, Kapnick, JJ.

12982 The People of the State of New York, Ind. 1824/08
Respondent,

-against-

Sean Fincher,
Defendant-Appellant.

_____

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.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered on or about July 3, 2012,

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

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

ENTERED: SEPTEMBER 23, 2014

CLERK

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

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12983-
12984-
12985 In re Yesennia B., etc.,

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

Angel N.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about December 11, 2013, which, upon a fact-finding determination that respondent sexually abused the subject child, released the child to the custody of her mother, and directed respondent to comply with the terms and conditions specified in the final one-year order of protection, to attend a sex-offender program, and to remain under the supervision of the Administration for Children's Services for one year, unanimously affirmed, without costs. Appeals from orders, same court and Judge, entered on or about November 27, 2013 and on or about

December 10, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Application by respondent's assigned counsel to be relieved as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed the record and agree with counsel that there are no nonfrivolous issues that could be raised on this appeal.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12986 The People of the State of New York, Ind. 448/11
Respondent,

-against-

Kenneth Quantano,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Natalia B. Bedoya of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 27, 2011, convicting defendant, after a jury trial, of criminal contempt in the first degree, sentencing him, as a second felony offender, to a term of 1½ to 3 years, and imposing a final order of protection that remains in effect through October 26, 2022, unanimously affirmed.

The evidence was legally sufficient to prove defendant's guilt of first-degree criminal contempt. The evidence supports the inference (*see generally People v Getch*, 50 NY2d 456, 465 [1980]) that defendant intentionally violated a part of an order of protection that required him to "stay away from the person... on whose behalf the order was issued" (Penal Law § 215.51[c]). A duly served order of protection directed defendant to stay away

from his grandmother's person, home, school, business and place of employment. At the time of the incident that resulted in the present conviction, the police observed defendant in his grandmother's bedroom, and his grandmother was in a nearby room. Even if the grandmother was not home at the time defendant entered, defendant knew this was his grandmother's apartment, and the evidence supports the conclusion that he expected her to be home.

The nontestifying grandmother's statements to the police were properly admitted, not for their truth, but for the legitimate nonhearsay purpose of explaining police actions that would otherwise have made little sense to the jury (*see e.g. People v Rivera*, 96 NY2d 749 [2001]). Moreover, the court provided appropriate limiting instructions. Accordingly, there was no violation of the hearsay rule or the Confrontation Clause. In any event, any error in admitting this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the order of protection issued by the sentencing court in the present case are without merit. Contrary to defendant's argument, the order properly specified an expiration date.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12987 The People of the State of New York, Ind. 2296N/12
Respondent,

-against-

Tomas Acosta,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about December 6, 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: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12988N In re Allstate Insurance Company, Index 21890/13
Petitioner-Appellant,

-against-

Felicia Rolon, et al.,
Respondents,

José R. LaFontaine, et al.,
Proposed Additional Respondents,

GEICO General Insurance Company,
Proposed Additional Respondent-
Respondent.

_____

Law Office of Karen L. Lawrence, Tarrytown (David Holmes of counsel), for appellant.

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for GEICO General Insurance Company, respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 15, 2013, which denied the petition for a stay of arbitration or, in the alternative, for a framed-issue hearing and to join proposed additional respondents and proposed additional respondent-respondent as parties, unanimously reversed, on the law, with costs, proposed additional respondents GEICO, Cecere and LaFontaine joined as parties, the petition granted, and the arbitration permanently stayed.

Petitioner seeks a stay of arbitration of respondents Rolon

and Peralta's claim for uninsured motorist insurance coverage in connection with an accident involving a vehicle owned and operated by Rolon and carrying Peralta as a passenger and, inter alia, a vehicle owned by additional proposed respondent Cecere and operated by additional proposed respondent LaFontaine, or a framed-issue hearing and joinder of the proposed additional respondents. Petitioner established prima facie that Cecere's vehicle was insured by additional proposed respondent GEICO by submitting the police accident report, which shows the vehicles' insurance code designations, and GEICO does not dispute that it insured Cecere's vehicle. GEICO's opposition to the petition, based on its denial of coverage to LaFontaine on the ground that he had been operating the vehicle without Cecere's permission (*see* Vehicle and Traffic Law § 388[1]), was insufficient because GEICO failed to come forward with any admissible supporting evidence, such as an affidavit by Cecere (GEICO's insured) or a police report of the vehicle's theft. Accordingly, since GEICO failed to raise any issue of fact as to whether LaFontaine's

operation of the vehicle was permissive, and thus covered by Cecere's GEICO policy, the petition should have been granted. Since this determination affects the rights of GEICO, Cecere and LaFontaine, we join them as respondents to this proceeding.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Kapnick, JJ.

12989 In re Daniel Silvera Index 200102/11
[M-2872] Petitioner,

-against-

Hon. Sherry Klein Heitler, etc., et al.,
Respondents.

_____

Alexander Potruch, LLC, Garden City (Alexander Potruch of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Sherry Klein Heitler, respondent.

The Law Offices of Anthony A. Capetola, Williston Park (Anthony A. Capetola of counsel), for Rebecca Chusid, 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.

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12991 In re Ana A.,
Petitioner-Respondent,

-against-

Joseph C.,
Respondent-Appellant.

_____

Law Office of Karen B. Steinberg, New York (Karen B. Steinberg of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondent.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about December 21, 2012, which denied respondent father's objections to the order of the Support Magistrate, dated August 15, 2012, directing him to pay child support in the amount of $2,271.00 per month, unanimously affirmed, without costs.

The Support Magistrate properly precluded the father from providing additional financial documentation at the child support proceeding (*see* Family Ct Act § 424-a[b]). The father failed to provide an updated sworn net worth statement in compliance with Family Court Act § 424-a(a), never produced proof of his pension and other income, despite numerous directions from the Support Magistrate, and has not explained his noncompliance. The father also gave varying accounts of his income in the course of the

proceedings. Given the father's noncompliance and the insufficient evidence regarding his gross income, the Support Magistrate correctly ordered child support based on the child's needs (*see* Family Ct Act § 413[1][k]; *Matter of Darren F. v Marie-Amina T.*, 58 AD3d 493, 494 [1st Dept 2009], *lv dismissed and denied* 12 NY3d 879 [2009]).

We find the father was accorded due process. Further, the proceedings were adjourned numerous times to permit the father to obtain new counsel and for new counsel to familiarize themselves with the matter.

The court was not bound by the agreement entered into between the parties in connection with the divorce proceedings that were later dismissed (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]; *Linda R. v Ari Z.*, 71 AD3d 465, 466 [1st Dept 2010]).

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

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12992 The People of the State of New York, Ind. 1475N/12
Respondent,

-against-

Robert Russell,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura Ward, J.), rendered on or about July 30, 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: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12993 Natacha L. Quezada, Index 303247/13
Plaintiff-Appellant,

-against-

Topside Systems Inc., et al.,
Defendants-Respondents.

_____

Subin Associates, L.L.P., New York (Robert J. Eisen of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 16, 2013, which denied plaintiff's motion for summary judgment on the issue of liability, without prejudice to renewal following discovery, unanimously affirmed, without costs.

No discovery has been conducted, and the parties' affidavits are inconsistent as to how the accident occurred (*see generally Licurgo-Cruz v Ahmed*, 118 AD3d 420 [1st Dept 2014]; CPLR 3212[c], [f]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12994 In re Yick Wing Chan, et al., Index 654588/12
Petitioners,

-against-

The New York Industrial Board
of Appeals, et al.,
Respondents.

_____

Dimas Law Group PC, New York (Simos C. Dimas of counsel), for petitioners.

Eric T. Schneiderman, Attorney General, New York (C. Michael Higgins of counsel), for respondents.

_____

Determination of respondent New York Industrial Board of Appeals (IBA), dated October 17, 2012, after a hearing, affirming, as amended, respondent New York State Commissioner of Labor's Order to Comply, dated October 9, 2008, which directed petitioners to pay unpaid wages due eight claimants for the period April 1, 2002 to March 31, 2006, plus interest and penalties, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Peter H. Moulton, J.], entered June 20, 2013), dismissed, without costs.

The determination is supported by substantial evidence in

the record (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-181 [1978]). Petitioners, who had the burden of proof at the hearing (*see* State Administrative Procedure Act § 306[1]; 12 NYCRR 65.30), provided testimony about the transfer of ownership of the restaurant that was too general to satisfy petitioners' burden of establishing that the corporate petitioner could not be held liable for its predecessor's acts. Thus, the burden never shifted to the Commissioner of Labor to establish successor liability. Petitioners' submissions to this Court of material that was never presented to the IBA will not be considered.

The determination that petitioner Chan was an "employer" as defined by Labor Law § 190(3) is supported by substantial evidence, including Chan's own testimony that he "took over" the operation of the business in 2002, that he created a system by which to track employees' work hours and instructed his staff as to using the system, and that he had to "keep an eye" on an "unreliable manager," as well as the employees' testimony that Chan was the "boss," that he transferred workers from another location to the restaurant, and that he gave one of the claimants

a raise, set his hours of work, and directed his work (*see Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12995-
12996 The People of the State of New York,
Appellant,

-against-

Elias McFarland,
Defendant-Respondent.

Ind. 5329/02

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

Seymour W. James, Jr., The Legal Aid Society, New York (Lorca Morello of counsel), for respondent.

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about June 21, 2012, which granted defendant's Correction Law § 168-*o*(2) petition and modified his sex offender classification from a level three sexually violent offender to level two, unanimously reversed, on the law, without costs, the petition denied, and defendant's original classification reinstated.

While we recognize that a court has discretion to grant a modification of a sex offender classification, the court improvidently exercised such discretion in this case. Defendant failed to meet his burden under Correction Law § 168-*o*(2) of presenting clear and convincing evidence that a downward modification of his risk level is warranted.

Defendant's apparent sobriety while incarcerated and during the first 17 months after his release to parole supervision was not a reliable predictor of his risk for reoffense, or of the threat he poses to public safety, in light of his extensive history of alcohol abuse and prior parole violations for alcohol-related offenses (*see People v Watson*, 112 AD3d 501, 502-503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2013]; *People v Gonzalez*, 48 AD3d 284, 285 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]). Defendant's age (76 years) at the time of his release was not a reliable factor in determining his risk of reoffending, notwithstanding actuarial evidence, since defendant committed his most recent sex offense (a violent attack on an 86-year-old woman) at the age of 68 (*see People v Harrison*, 74 AD3d 688 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]). Furthermore, defendant's relationship with his wife was not sufficiently shown to be a mitigating factor since he was married to, and living with, his wife in 2002 when he committed his most recent sex offense. The impact that defendant's level three designation had on his ability to reside with his wife at the senior citizen housing facility they shared before his most recent conviction had no bearing on defendant's risk of a repeat offense or the threat he posed to the public safety (*see* Correction Law § 168-l[5]).

The remaining factors considered by the court involved matters already adequately taken into consideration by the guidelines, and thus did not warrant a departure from the presumptive risk level. Moreover, defendant expressly stated in his petition that he was not challenging the point assessment and presumptive risk level determination made by the court at his original classification hearing.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12997 In re Godwin R.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Nicholas J. Murgolo of counsel), for presentment agency.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 25, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of burglary in the third degree, criminal trespass in the third degree, petit larceny, and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's evaluation of expert testimony. The

presentment agency's fingerprint expert testified about the basis for his conclusion that appellant's known fingerprint matched a latent print recovered from a school-owned laptop computer after it and 13 other computers were found discarded outdoors in the same location where the police saw three youths dropping garbage bags and a metal bin while fleeing. Appellant's contention that the expert's testimony carried little weight due to his inexperience is unavailing, given that the expert had received extensive training, and had analyzed more than 1,000 fingerprints over the course of about two years. Appellant's theory that he could have innocently possessed the computer was refuted by the testimony that the computer was assigned only to students at a school which appellant did not attend, and that the students' computers were not permitted to be removed from the school (*see e.g. People v Texeira*, 32 AD3d 756 [1st Dept 2006], *lv denied* 7

NY3d 904 [2006]).

Appellant's remaining argument is unpreserved, and we decline to review it in the interest of justice.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

12999 The People of the State of New York, Ind. 3743/10
Respondent,

-against-

Marc Payen,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered July 18, 2011, as amended August 2, 2011, convicting defendant, after a jury trial, of scheme to defraud in the first degree, grand larceny in the third degree, grand larceny in the fourth degree (two counts), forgery in the second degree (two counts), and criminal possession of a forged instrument in the second degree (three counts), and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, with restitution in the amount of $17,179.05, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations. The evidence amply demonstrated that defendant obtained money in exchange for fraudulent immigration services, and that he forged documents.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, JJ.

13000 Mia Henderson-Jones, etc., et al., Index 115360/06
Plaintiffs-Appellants,

-against-

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

Sgt. John VanOrden, et al.,
Defendants.

_____

Warren J. Willinger, Mount Kisco, for appellants.

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

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about July 16, 2013, which, to the extent appealable, determined that a prior order of this Court striking the answers of defendants City of New York and Raymond W. Kelly did not preclude individual defendants Detective Michael Sierra and Sergeant Wendie Gomez-Smith from contesting their liability at trial, unanimously affirmed, without costs.

The order on appeal, which requires a full trial concerning the liability of individual defendants Sierra and Gomez-Smith, affects a substantial right and is therefore appealable (*see Matter of Eisenberg*, 93 AD3d 413 [1st Dept 2012], *lv dismissed* 19 NY3d 1011 [2012]). On a prior appeal, we affirmed an order

striking the answer of defendants City of New York and Raymond Kelly (*see Henderson-Jones v City of New York*, 87 AD3d 498 [1st Dept 2011]). Since plaintiffs' motion did not seek relief against defendants Sierra and Gomez-Smith, such relief was not afforded by this Court and those individual defendants cannot be precluded from defending the merits of the claims against them at trial (CPLR 2214; *Phoenix Enters. Ltd. Partnership v Insurance Co. of N. Am.*, 130 AD2d 406, 407 [1st Dept 1987]). The default judgment entered against the City and Kelly does not bind Sierra or Gomez-Smith, or otherwise affect their substantive rights (*State Farm Ins. Co. v Frias*, 66 AD3d 997, 999 [2d Dept 2009]).

However, while Sierra and Gomez-Smith will be permitted to contest their liability at a trial, the same is not true for the City and Kelly, who are limited to an inquest on damages. The striking of their answer effectively resolved all of plaintiffs' claims against them, including any claims of vicarious liability and negligent hiring and training, even if Sierra and Gomez-Smith are found to have no liability (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 3 [1st Dept 2011] ["the striking of an answer ... effectively resolves a claim against the nondisclosing defendant"]). The City and Kelly, having had default judgments entered against them, cannot rely on any defenses raised by the

individual defendants to escape liability themselves, but are limited to an inquest at which they can contest the extent of plaintiffs' damages (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730-731 [1984]).

The portion of the order declining to resolve plaintiffs' in limine motion seeking to preclude testimony by defendants' expert witness is not appealable, as the issue remains pending and undecided (*see Scalise v Adler*, 267 AD2d 295, 296 [2d Dept 1999]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13001-
13002 In re Jasmine A., etc.,
and Others,

Children Under the Age
of Eighteen Years, etc.,

Albert G.,
Respondent-Appellant,

Sabrina A.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 12, 2013, which, after a fact-finding hearing, found that respondent father neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1012[f][i][B]). The record shows that respondent repeatedly allowed the mother to return to the family home despite his awareness of the mother's history of

drug use and the history of domestic violence. Additionally, respondent permitted the mother to return to the home in violation of an existing order of protection (*see Matter of Diamond Tyneshia. [Aisha K.]*, 109 AD3d 740 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

The children's out-of-court statements regarding the mother's history of violence against respondent, were cross-corroborated by each others' statements, by their statements to petitioner agency's caseworkers, and by respondent's own statements (*see Matter of Alex R. [Maria R.]*, 81 AD3d 463 [1st Dept 2013]; *Family Ct Act §* 1046[a][vi]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13005 In re Adaliza H.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Hanh H. Le of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 3, 2013, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute attempted assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating her a juvenile delinquent and imposing a conditional discharge. In light of the seriousness of the underlying incident, appellant's history of disciplinary problems at school and home, and the short duration of any

supervision that an ACD might have provided, the court adopted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13006-
13006A

Benjamin Morales,
Plaintiff-Appellant,

-against-

Jorge Garzon, et al.,
Defendants-Respondents.

Index 301781/07

Sakkas, Cahn & Weiss, LLP, New York (Matthew Sakkas of counsel), for appellants.

Ginsberg, Becker & Weaver, LLP, New York (Robert D. Becker of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 20, 2013, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 10, 2013, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants established under any version of the facts that plaintiff was negligent, by demonstrating that, while under a darkened overpass, their tractor-trailer was struck in the rear

by plaintiff's box truck. Plaintiff failed to provide a nonnegligent explanation for the collision (*see Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13007 The People of the State of New York Ind. 5058/03
Respondent,

-against-

Raymond Lopez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered February 22, 2012, resentencing defendant to a term of 14 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13008 The People of the State of New York, Ind. 950/97
Respondent,

-against-

Pedro Torres,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia B. Bedoya-McGinn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel McCullough, J.), entered on or about April 18, 2013, which denied defendant's Correction Law §168-*o*(2) petition to modify his sex offender classification from level three to level one, unanimously affirmed, without costs.

Defendant failed to meet his burden under Correction Law §168-*o* of presenting clear and convincing evidence that a downward modification of his risk level is warranted. Defendant made a showing of positive factors, including the fact that he did not commit any additional sex crimes in the 12 years since his release from prison. Nevertheless, in light of the seriousness of the underlying conviction, and his prior felony conviction for a sex crime, the court providently exercised its

discretion in denying the downward modification (*see People v Cabrera*, 91 AD3d 479 [1st Dept 2012], *lv denied* 19 NY3d 801 [2012]). We also note that defendant did not disclose or explain three convictions that occurred after his release, including one for failure to report a change in address as required by SORA. Defendant's procedural objection to the court's disposition of the petition is unpreserved, and is in any event without merit.

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13009 Lorna May Francis, Index 302598/11
Plaintiff-Appellant,

-against-

New York Yankees Partnership,
Defendant-Respondent.

_____

Martin L. Ginsberg, P.C., Kew Gardens (Susan R. Nudelman of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered April 16, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff allegedly sustained personal injuries when, to avoid a golf cart coming toward her in the basement concourse of defendant's baseball stadium, she stepped to the left and tripped over a handlebar protruding from the bottom of one of defendant's batting screens. She contends, among other things, that the handlebar constituted a hidden trap, as it was not readily visible.

Defendant failed to make a prima facie showing that it neither created nor had actual notice of the alleged hazardous

condition — namely, the placement of the batting screens in the basement concourse (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75 [1st Dept 2004]). Although defendant argues that the batting screens were not inherently dangerous, that is not a relevant inquiry. The salient issue is whether the handlebars at the bottom of the screens were readily visible and protruded into the concourse so as to constitute a reasonably foreseeable tripping hazard (*see id.* at 75-76; *Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [1st Dept 2004]; *compare Figueroa v New York City Bd. of Educ.*, 104 AD3d 544 [1st Dept 2013]). Plaintiff has raised a triable issue of fact as to whether that was the case. Whether the golf cart coming toward plaintiff constitutes an intervening act that breaks the causal nexus should await jury resolution (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13010 Metropolitan Property and Casualty Insurance Company, et al., Plaintiffs-Appellants, Index 152586/12

-against-

John R. Braun, Phd, et al. Defendants-Respondents.

_____

Bruno, Gerbino & Soriano, LLP, Melville (Mitchell L. Kaufman of counsel), for appellants.

Gary Tsirelman, PC, Brooklyn (Daniel Grace of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about May 8, 2013, which denied plaintiffs' motion for a default judgment and granted defendants' cross motion for an extension of time to interpose an answer, unanimously affirmed, without costs.

The motion court providently exercised it discretion in granting defendants' cross motion for an extension of time to interpose an answer. Under the circumstances, although defendants' assertion of law office failure "is not particularly compelling, it constitutes good cause for the delay" (*Lamar v City of New York*, 68 AD3d 449, 449 [1st Dept 2009] [internal quotation marks omitted]). There is no evidence that plaintiffs

have been prejudiced, and the record shows that plaintiffs had previously agreed to an extension of time for defendants to answer. Contrary to plaintiffs' contentions, a meritorious defense was not required for defendants to be granted an extension of time to answer (*see Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]; *Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [1st Dept 2009]).

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

ENTERED: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13012 The People of the State of New York, Ind. 2586N/11
Respondent,

-against-

Jeffrey DeJesus,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered on or about November 10, 2011, 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: SEPTEMBER 23, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Richter, Feinman, JJ.

13014 [M-3215] In re Orchard Hotel, LLC., Petitioner,

-against-

Hon. Charles E. Ramos, etc., et al., Respondents.

Index 850044/11

Morrison Cohen, LLP, New York (Jerome Tarnoff of counsel), for petitioner.

John W. McConnell, Office of Court Administration, New York (Pedro Morales of counsel), for Hon. Charles E. Ramos, 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.

ENTERED: SEPTEMBER 23, 2014

CLERK