SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 31, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13511N Gloria Doomes, etc.,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants-Respondents,

SIM Corp., doing business as
Prison Gap, et al.,
Defendants,

Warrick Industries, Inc., doing
business as Goshen Coach,
Defendant-Appellant.

- - - - -

Ana Jiminian, etc.,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants-Respondents,

Ford Motor Co., et al.,
Defendants,

Warrick Industries, Inc., doing
business as Goshen Coach,
Defendant-Appellant.

- - - - -

Index 16893/94
16954/96
17408/94

Kelli Rivera,
Plaintiff-Respondent,

-against-

Best Transit Corp., et al.,
Defendants-Respondents,

Operation Prison Gap, Inc., et al.,
Defendants,

Warrick Industries, Inc., doing
business as Goshen Coach,
Defendant-Appellant.

_____

Shaub, Ahmuty, Citrin & Spatt, LLP, Lake Success (Timothy R. Capowski of counsel), for appellant.

Kahn Gordon Timko & Rodriguez, PCA, New York (Nicolas I. Timko of counsel), for Gloria Doomes, respondent.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for, Ana Jiminiam, respondent.

Shramko & DeLuca, LLP, New York (Adrienne DeLuca of counsel), for Kelli Rivera, respondent.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for Best Transit Corp. and Wagner M. Alcivar, respondents.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 9, 2013, which, to the extent appealed from as limited by the briefs, denied defendant Warrick Industries, Inc.'s motions for a "full scope" retrial and to preclude defendant Best Transit Corp. from participating in the retrial,

unanimously modified, on the law, to the extent of directing a full unified retrial, and otherwise affirmed, without costs.

Plaintiffs were passengers in a bus that was involved in a single-vehicle rollover accident. The bus was owned by Best Transit and had been constructed by Warrick. The now pending claims against Best Transit are based on a theory of negligence on its driver's part. Those against Warrick are predicated on the absence of seat belts under a second collision or crashworthiness theory of liability. On a prior appeal, this Court reversed and vacated judgments entered against Warrick after a jury trial, finding that the verdict sheet was confusing and the jury's answers to the interrogatories inconsistent and contrary to the evidence (92 AD3d 490 [1st Dept 2012]). We remanded the matter for a new trial.

An examination of the second collision doctrine leads to the conclusion that a unified trial is required by our prior order. To prevail under the doctrine, plaintiffs must show by independent proof that the absence of seatbelts was a defect that "caused enhanced injuries" (*see Garcia v Rivera*, 160 AD2d 274, 276 [1st Dept 1990], *lv denied* 77 NY2d 801 [1991]). Accordingly, the issues of Warrick's liability and plaintiffs' damages are clearly intertwined (*see e.g. Smith v McClier Corp.*, 38 AD3d 322,

323 [2007]). A limited scope retrial would cause untold confusion in any attempt by the trial court to apply the second collision doctrine pursuant to *Garcia*. We also note that the judgment's reversal under our prior order vacates the awards of damages. "[W]hen an appellate court reverses a judgment, the rights of the parties are left 'wholly unaffected by any previous adjudication'" (*Ceravole v Giglio*, 186 AD2d 170, 170 [2d Dept 1992], quoting *Taylor v New York Life Ins. Co.*, 209 NY 29, 34 [1913]). In light of *Taylor* and *Ceravole*, we find that the trial court properly denied Warrick's motion to preclude Best Transit from participating in the retrial. Moreover, as this Court vacated the original jury's fault determinations, the retrial jury will not be able to properly allocate fault absent Best Transit's participation.

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

ENTERED: MARCH 31, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Richter, Clark, JJ.

14046- Index 100328/11
14047 Jorge Ceron,
Plaintiff-Appellant,

-against-

Yeshiva University,
Defendant-Respondent.

_____

The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered November 7, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 30, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this personal injury action, plaintiff, a delivery truck driver for Coca-Cola, seeks to recover damages for injuries he allegedly sustained when he slipped and fell while delivering soda to defendant's premises. At his deposition, plaintiff testified that it had been raining on the day of the accident, but the rain had stopped "a few minutes" before he arrived at the

premises. After arriving, plaintiff attempted to pull a hand truck filled with 160 pounds of soda up a removable metal ramp, which led to a delivery entrance. The ramp was approximately two and a half feet wide and five or six feet long. Plaintiff testified that he did not notice any debris or substances on the ramp. Plaintiff stepped backwards while pulling the hand truck and slipped and fell at the bottom of the ramp.

Amit Selimoski, defendant's housekeeping supervisor, testified at his deposition that he had never received any complaints about the ramp and had not been aware of any "accidents involving delivery persons with respect to the ramp" prior to the date of plaintiff's accident. When asked whether he had ever seen anyone slip on the ramp prior to the date of the accident, he replied, "Yes." However, there is no further information in the deposition transcript regarding when, how many times, or under what circumstances he saw someone slip on the ramp.

Defendant submitted an expert affidavit by professional engineer James J. Bernitt, in which he stated that he tested the ramp's frictional characteristics and found that, under both wet and dry conditions, the ramp was a "safe surface" and "not a slip hazard." In opposition to defendant's summary judgment motion,

plaintiff submitted an expert report by professional engineer Scott Silberman. Silberman looked at the ramp two and a half years after the accident, but did not perform any tests on it. Silberman observed that the ramp was "worn, smooth and polished" and that friction tape had been installed at approximately seven-inch intervals.

To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury *(see Mercer v City of New York*, 88 NY2d 955, 956 [1996]; *Kelly v Berberich*, 36 AD3d 475, 476 [1st Dept 2007]). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence (*see Manning v Americold Logistics*, LLC, 33 AD3d 427 [1st Dept 2006]). Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*see Kesselman v Lever House Rest.*, 29 AD3d 302, 303-304 [1st Dept 2006]).

The motion court properly found that defendant made a prima facie showing that there was no dangerous condition in existence when plaintiff slipped and fell, and that it was therefore entitled to summary judgment. In opposition, plaintiff failed to raise a triable issue of fact.

Plaintiff testified that he slipped on the wet ramp minutes after it had stopped raining, and that he did not see any debris, substances, or other defects on the ramp prior to his attempted ascent. Mere wetness on a walking surface due to rain does not constitute a dangerous condition (*McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434 [1st Dept 2010]; *see Kalish v HEI Hospitality, LLC,* 114 AD3d 444, 445 [1st Dept 2014]). Moreover, there is no evidence that defendant created the condition that caused plaintiff's accident, nor does the record show that defendant had constructive notice of a problem with the ramp.

As to constructive notice, plaintiff's expert report merely described the surface of the ramp as "worn, smooth and polished," concluded that "the wet condition . . . would have made the ramp slippery and dangerous." This conclusion, unsupported by any empirical data obtained by scientific analysis, was insufficient to demonstrate an issue of material fact (*see Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533-534 n 2 [1991] [if an "'expert

states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever'"]; *Joseph v New York City Tr. Auth.*, 66 AD3d 842, 843 [2d Dept 2009]). Although the expert stated in his report that the ramp should have been covered with slip-resistant material, his opinion was based on the New York City Building Code and a publication titled "Standard Practices for Safe Walking Surfaces." This presented new theories of liability raised for the first time in opposition to defendant's motion, which was filed after the note of issue (*see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]). Accordingly, the motion court properly refrained from considering them. We note, however, that the publication referred to by the expert sets forth safety guidelines for "walkways" for "pedestrians," which is immaterial to a case involving a removable ramp designed for deliveries.

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

ENTERED: MARCH 31, 2015

CLERK

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

14097 Hilda Valverde, Index 401377/12
Plaintiff-Respondent,

-against-

Great Expectations, LLC, et al.,
Defendants-Appellants,

Mansion Ridge, LLC, et al.,
Defendants,

Andrew Jimenez,
Defendant-Respondent.

[And a Third-Party Action]

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Joseph Laird of counsel), for appellants.

Thomas K. Miller, New York, for Hilda Valverde, respondent.

Seymour W. James, Jr., The Legal Aid Society, New York (Joshua Goldfein of counsel), and Patterson Belknap Webb & Tyler LLP, New York (R. James Madigan III of counsel), for Andrew Jiminez, respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered March 21, 2014, which denied defendants Great Expectations, LLC and American Golf Corporation's (defendants) motion for summary judgment dismissing the complaint, affirmed, without costs.

Defendants failed to make a prima facie showing that they neither created nor had actual or constructive notice of the alleged defective golf course path (*see Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460, 460-461 [1st Dept 2010]). In particular, defendants failed to submit evidence that they regularly inspected the accident location, that they received no complaints prior to the incident regarding the complained-of conditions, and that they had no similar accidents at the subject location. Third-party defendant's employee's testimony that he was not aware of any complaints from anyone about the condition of the golf course or its carts does not establish that defendants lacked notice, because he was not defendants' employee at the time of the accident. Moreover, defendants' employee never testified regarding whether defendants had received complaints about the accident location or as to when the accident location was last inspected. Defendants' expert's opinions regarding the condition of the path lack probative value, because he never stated when he inspected the accident location or that the property has remained in the same condition since the accident (*see Snauffer v 1177 Ave. of the Ams. LP*, 78 AD3d 583 [1st Dept 2010]; *Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210, 210 [1st Dept 1998]). Defendants' failure to make a prima facie

showing of their entitlement to judgment as a matter of law requires denial of their motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

DEGRASSE, J. (dissenting)

Plaintiff was injured when she was thrown from her seat on a golf cart that was being operated by defendant Andrew Jimenez. The accident occurred near the parking lot of a golf course that was owned by defendant Great Expectations, LLC and managed by defendant American Golf Corporation. This appeal is from an order denying a motion for summary judgment that was made by Great Expectations and American Golf. Moving defendants made a prima facie showing of entitlement to judgment as a matter of law. Such evidence included depositions given by plaintiff and Jimenez.

When questioned about the cause of the accident, plaintiff testified that Jimenez "was going down a hill so he was going pretty fast and he was going full speed on the golf cart and there was a sharp turn right before getting on to the driveway, so he hit that sharp turn really hard, full speed." Plaintiff estimated Jimenez's speed to be between 20 and 30 miles per hour and stated that she had warned him to slow down. In describing Jimenez's speed, plaintiff testified that he was "going way too fast" and that "his foot was on the floor." Jimenez testified that during the 30 minutes preceding the accident, he drove the cart over the accident site twice without incident. This

testimony establishes that the accident was caused by Jimenez's operation of the golf cart and not by any act or omission on the part of moving defendants. The affidavit of plaintiff's architectural expert was insufficient to raise an issue of fact insofar as he opines that warnings should have been posted because the cart path was on what he described as a dangerous steep slope. To the contrary, plaintiff described the hill as "a small slope" that was "not even that steep." Plaintiff's description is confirmed by what is depicted in photographs she identified at her deposition. Nonetheless, the steepness of the hill provides no basis for liability because, as shown by the photographs, it is an open topographical feature of the golf course (*cf. Rose v Tee-Bird Golf Club, Inc.*, 116 AD3d 1193 [3d Dept 2014]; *see also Bockelmann v New Paltz Golf Course*, 284 AD2d 783, 784 [3d Dept 2001], *lv denied* 97 NY2d 602 [2001]). Moreover, "a landowner has no duty to warn of an open and obvious danger" (*Tagle v Jakob*, 97 NY2d 165, 169 {2001]).

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14612- Index 100061/11
14612A The Board of Managers of the 590536/12
A Building Condominium, et al.,
Plaintiffs,

-against-

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

Hudson Meridian Construction Group, LLC,
sued herein as Hudson Meridian
Construction Group,
Defendant-Appellant,

American Hydrotech, Inc.,
Defendant-Respondent.

- - - - -

Hudson Meridian Construction Group, LLC,
Third-Party Plaintiff,

-against-

Demar Plumbing Corp., et al.,
Third-Party Defendants,

Bay Restoration Corp.,
Third-Party Defendant-Appellant.

_____

Marshall, Dennehey, Warner Coleman & Goggin, New York (James Freire of counsel), for Hudson Meridian Construction Group, LLC, appellant.

Faust Goetz Schenker & Blee LLP, New York (Damian Fischer of counsel), for Bay Restoration Corp., appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Barbara Jaffe, J.), entered September 3, 2013 and October 25, 2013, which to the extent appealed from, granted summary judgment to defendant American Hydrotech (Hydrotech) dismissing the complaint against it, unanimously affirmed, without costs.

Even if Hydrotech's motion to dismiss should not have been converted to a motion for summary judgment, dismissal of the complaint was warranted pursuant to CPLR 3211(a)(1), based on Hydrotech's unambiguous Watertightness Warranty (*see Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987]; *see also 401 W. 14th St. Fee LLC v Mer Du Nord Noordzee, LLC*, 34 AD3d 294, 295 [1st Dept 2006]). The warranty expressly pertains solely to the watertightness of Hydrotech's product, which it sold to third-party defendant Bay Restoration for installation on the roof of plaintiffs' condominium, and did not pertain to any damage to the base over which the product was installed, the building structure, or any improper installation (*see* UCC 2-316[1]; *see also West 63 Empire Assoc., LLC v Walker & Zanger, Inc.*, 107 AD3d 586, 586 [1st Dept 2013]). Further, the warranty expressly limits the buiding owner's remedies to the repair of the product or the repayment of the original cost of the product, the latter of which Hydrotech chose to do (*see* UCC 2-316[4]). Accordingly,

under the express terms of the warranty, Hydrotech's liability to plaintiffs thereunder immediately ceased upon repayment.

The limitation of remedies does not fail in its essential purpose (*see* UCC 2-719[2]), as plaintiffs received the benefit of their bargain (*see Cayuga Harvester v Allis-Chalmers Corp.*, 95 AD2d 5, 11 [4th Dept 1983]).[1]

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

ENTERED: MARCH 31, 2015

CLERK

[1] We note that American Hydrotech's motion called for a dismissal of the complaint only. Accordingly, the orders appealed from made no disposition of any cross claims. We therefore do not address such cross claims on this appeal.

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14644 The People of the State of New York, Ind. 2085/10
Respondent,

-against-

Maurice Seymore,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh 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 (Denis J. Boyle, J.), rendered on or about January 24, 2013,

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: MARCH 31, 2015

CLERK

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

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14645-
14646 Index 153150/12

Emigrant Mortgage Company, Inc.,
Plaintiff-Respondent,

-against-

Commonwealth Land Title Insurance Company,
Defendant-Appellant,

Robert J. Hopp Associates, LLC, et al.,
Defendants.

_____

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

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Ronald M. Terenzi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 13, 2014, which denied defendant Commonwealth Land Title Insurance Company's (Commonwealth) motion for summary judgment dismissing the breach of contract claim, and granted plaintiff Emigrant Mortgage Company, Inc.'s (Emigrant) cross motion for summary judgment on the issue of liability on the claim, unanimously affirmed, with costs. Order, same court and Justice, entered August 22, 2014, which, upon reargument, adhered to the March 13, 2014 determination, unanimously dismissed, without costs, as academic.

While the court did not misapprehend Emigrant's cause of action, it should not have granted Emigrant's cross motion for summary judgment on the issue of liability on the ground that Commonwealth failed to properly investigate the chain of title at the time it issued the title insurance policy (*see Citibank v Chicago Tit. Ins. Co.*, 214 AD2d 212, 216-219 [1st Dept 1995], *lv dismissed* 87 NY2d 896 [1995]).

Contrary to the court's finding, there was no issue of fact as to whether Emigrant gave Commonwealth timely notice of the adverse interest possessed by the Estate of Dillard Matthews, Jr. against the property. The record establishes that Emigrant provided Commonwealth with such notice at the time Emigrant initiated the title claim process in October 2009 (*see Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581-582 [1992]). Thus, the proper basis upon which Emigrant's cross

motion should have been granted, and Commonwealth's motion denied, was that Emigrant refuted Commonwealth's late notice defense, and was entitled to indemnification and payment on its claim pursuant to the subject insurance policy.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14647 In re Hector Lopez, Dkt. 40688/12
Petitioner-Appellant,

-against-

The New York City Police Department
Records Access Appeals Officer,
Respondent-Respondent.

_____

Hector Lopez, appellant pro se.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered August 22, 2012, denying the petition to compel respondent to disclose certain records pertaining to the arrest of a third party pursuant to the Freedom of Information Law (FOIL), and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent satisfied its statutory obligations by disclosing an arrest report and certifying that it had conducted a diligent search and failed to locate any further responsive records (*see Matter of Alicea v New York City Police Dept.*, 287 AD2d 286 [1st Dept 2001]; *Mitchell v Slade*, 173 AD2d 226 [1st Dept 1991], *lv denied* 78 NY2d 863 [1991]). Petitioner failed to "articulate a

demonstrable factual basis to support his contention that [further] requested documents existed and were within [respondent]'s control" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996]; *see Matter of New York Envtl. Law & Justice Project v City of New York*, 286 AD2d 307, 307 [1st Dept 2001]).

Contrary to petitioner's contention, the court properly declined to waive his $50 filing fee, since waiver of an inmate's filing fee is not permitted pursuant to CPLR 1101(f)(2) (*see Gomez v Evangelista*, 290 AD2d 351 [1st Dept 2002]).

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14648 In re Lieutenant Daniel Modell, etc., Index 101061/13
Petitioner,

-against-

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

_____

Edwin Ira Schulman, Kew Gardens, for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated April 1, 2013, finding that petitioner police officer engaged in conduct prejudicial to the good order, efficiency or discipline of the police department by soliciting the assistance of other officers in preventing the prosecution of summonses issued to other individuals on two occasions between September 2010 and September 2011, and imposing a penalty of one year of suspended-dismissal probation, five days of suspension, and the forfeiture of 25 vacation days, 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 [Cynthia S. Kern, J.], entered November 21, 2013), dismissed, without costs.

Substantial evidence supports respondent's determination that petitioner asked other officers for help in preventing the prosecution of summonses issued to other individuals on two occasions between September 2010 and September 2011 (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The inference of the hearing officer that petitioner engaged in this conduct on two occasions is rationally based on petitioner's admission that he requested of another officer that a summons be "taken care of" "[a] couple of times" during that period. We see no basis in the record for disturbing the hearing officer's credibility findings (*see Matter of Berenhaus*, 70 NY2d at 443).

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

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14649 The People of the State of New York, Ind. 4184/08
Respondent,

-against-

Michael Service,
Defendant-Appellant.

_____

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

Michael Service, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 13, 2011, convicting defendant, after a jury trial, of murder in the second degree, assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 45 years to life, unanimously modified, on the law, to the extent of directing that the sentence for the weapon possession conviction (pursuant to Penal Law § 265.03[1][b]) under the fifth count of the indictment be served concurrently with the sentence for the murder conviction, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for suppression of defendant's second and third

statements. Approximately seven hours after defendant made an undisputedly voluntary initial statement, a detective preceded renewed interrogation with a reference to the fact that defendant had received *Miranda* warnings before his initial statement. This remark could not have reasonably been understood by defendant to mean that his prior waiver of rights was irrevocable, and "there was no reason to believe that defendant had forgotten or no longer understood his constitutional rights" (*People v Hotchkiss*, 260 AD2d 241, 241 [1st Dept 1999], *lv denied* 93 NY2d 1003 [1999]).

As the People concede, the sentence on the murder conviction should run concurrently with the sentence on the weapon possession conviction that requires unlawful intent (Penal Law § Penal Law 265.03[1][b]), because the latter offense was not complete until defendant shot the victims (*see People v Wright*, 19 NY3d 359, 363 [2012]). However, defendant's claim regarding the legality of other consecutive sentences is without merit (*see*

People v Lopez, 15 AD3d 232 [1st Dept 2005], *lv denied* 4 NY3d 888 [2005]). We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14650-
14651 In re Stephauan P.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for presentment agency.

_____

Orders of disposition, Family Court, Bronx County (Jeanette Ruiz, J., at summary denial of suppression motion; Peter J. Passidomo, J., at speedy trial motion, fact-finding hearing and disposition), entered on or about October 21, 2013, which adjudicated appellant a juvenile delinquent upon fact-finding determinations that he committed acts that, if committed by an adult, would constitute two counts of attempted robbery in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

Appellant waived his right to challenge the adjournment beyond the prescribed 60 day period since he consented to the adjournment (*see Matter of Irene B.*, 244 AD2d 226 [1st Dept 1997]

lv denied 91 NY2d 809 [1998]). The record supports the motion court's finding that there was no effective subsequent withdrawal or modification of appellant's consent.

The petition challenged by appellant on appeal was not jurisdictionally defective. By alleging that appellant and a companion tugged and grabbed at the victim's book bag and reached into the victim's pockets until one of the assailants finally said, "Let him go," the petition sufficiently alleged an attempted forcible taking (*see People v Smith*, 22 NY3d 1092 [2014]).

The court properly concluded that the police identification procedure was merely confirmatory (*see Matter of Raul F.*, 186 AD2d 74 [1st Dept 1992]). In any event, appellant was not prejudiced by the absence of a *Wade* hearing.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14652 The People of the State of New York, Ind. 3955/11
Respondent,

-against-

Francisco Fernandez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Fernando Tapia, J.), rendered September 27, 2013, convicting defendant, after a nonjury trial, of endangering the welfare of a child and menacing in the third degree, and sentencing him to an aggregate term of three years' probation, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no reason to disturb the court's credibility findings. The fact that the court acquitted defendant of attempted assault in the third

degree does not warrant a different conclusion. That crime requires a specific intent to cause physical injury, and such intent is not required for either of the crimes of which defendant was convicted.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14653 David Simpson, Index 105666/11
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

325-327 East 93rd Owners Corp., et al.,
Defendants-Appellants.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Worby Groner Edelman LLP, White Plains (Michael L. Taub of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered September 9, 2014, which denied defendants 325-327 East 93rd Owners Corp. and Mautner-Glick Corp.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was allegedly injured after he slipped and fell on ice that was on the public sidewalk in front of the building where he lived, which was owned by defendant 325-327 East 93rd Owners Corp. and managed by defendant Mautner-Glick Corp.

The motion court properly denied defendants' motion for summary judgment since they failed to establish their prima facie

entitlement to judgment as a matter of law. The climatic records submitted by defendants in support of the motion are not dispositive as to the weather conditions prior to the accident, because the weather data collected for the relevant time period was from La Guardia Airport, which is in Queens County, whereas the accident location is located in New York County, closer to the Central Park climatic observatory (*see Lebron v Napa Realty Corp.*, 65 AD3d 436 [1st Dept 2009]).

In addition, defendants failed to demonstrate that they lacked actual or constructive notice of the alleged condition, because they failed to proffer an affidavit or testimony based on personal knowledge as to when their employees last inspected the sidewalk before the accident (*see Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]). The testimony from the managing agent for the subject premises as to the general cleaning procedures for the premises is insufficient to satisfy defendants' burden of establishing that they lacked notice of the alleged condition of the sidewalk prior to the accident (*see Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]).

Even if defendants had met their initial burden on the motion, plaintiff's submission of his expert meteorologist's opinion, based on the applicable meteorological data, that the

subject ice condition was created after the precipitation stopped falling at 6:30 p.m., the night before the accident, raises a question of fact as to whether the four-hour time period to remove the precipitation from the sidewalk as set forth in section 16-123(a) of the Administrative Code of the City of New York had expired prior to plaintiff's fall (*see Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]).

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14654 The People of the State of New York, Ind. 4627/10
Respondent,

-against-

Eddie Wagner,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jashua L. Haber 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 (Lewis B. Stone, J.), rendered on or about January 12, 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: MARCH 31, 2015

CLERK

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

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14655- Index 653689/12
14656-
14657 MPEG LA, L.L.C.,
Plaintiff-Respondent,

-against-

GXI International, LLC,
Defendant-Appellant,

GXI Outdoor Power, LLC, et al.,
Defendants.

- - - - -

MPEG LA, L.L.C.,
Plaintiff-Appellant,

-against-

GXI International, LLC,
Defendant,

GXI Outdoor Power, LLC, et al.,
Defendants-Respondents.

_____

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Jon R. Grabowski of counsel), for GXI International, LLC, appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Craig P. Murphy of counsel), for MPEG LA, L.L.C., respondent/appellant.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Elizabeth M. DeCristofaro of counsel), for GXI Outdoor Power, LLC, GXI Parts & Service, LLC, Access HD, LLC and Gordon Jackson, respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 13, 2013, which, inter alia, granted

plaintiff's motion to dismiss defendants' counterclaims, unanimously affirmed, with costs. Amended order, same court and Justice, entered October 18, 2013, which granted defendants GXI Outdoor Power, LLC, GXI Parts & Service, LLC, Access HD, LLC, and Gordon Jackson's motion to dismiss the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered September 24, 2013, unanimously dismissed, without costs, as superseded by the appeal from the amended order.

Defendants' counterclaims, which allege violations of antitrust law, are conclusory and fail to adequately allege a harm to competition attributable to the alleged conspiracy, in view of defendants' own allegations as to external forces affecting the market (*see Global Reins. Corp.-U.S. Branch v Equitas Ltd.*, 18 NY3d 722, 732 [2012]; *Continental Guest Servs. Corp. v International Bus Servs., Inc.*, 92 AD3d 570, 574-575 [1st Dept 2012]). In any event, the counterclaims are time-barred.

Plaintiff's factual allegations in support of piercing the corporate veil against defendants GXI Outdoor Power, LLC, GXI Parts & Service, LLC, Access HD, LLC, and Gordon Jackson to hold them liable for outstanding royalties under plaintiff's licensing agreement with GXI International, LLC (GXI) are sufficient to

survive the motion to dismiss (*see Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]; *see also* CPLR 3013). The assertion that Jackson exercised complete control over GXI and the affiliated entities is supported by allegations and evidence of overlap in the ownership, officers, directors, and personnel of those entities: Jackson and his wife were the sole members and managers of each entity, and Jackson was the president; common office space, addresses, and phone number; disregard of corporate formalities and lack of independent business discretion: the trademark in the television converter boxes was assigned from GXI to GXI Outdoor Power, and converter boxes were cross-sold, cross-warranted and cross-serviced; and inadequate capitalization of GXI: Jackson failed to reserve funds from the sale revenues to pay plaintiff's accumulating royalty bills. Plaintiff further alleges that defendants abused the corporate forms to harm it by

purporting to "wind down" GXI without paying a large amount of the royalties incurred in selling converter boxes, and then offering converter boxes for sale from GXI Outdoor Power.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14658 NYCTL 1998-2 Trust, et al., Index: 382383/09
Plaintiffs-Respondents,

-against-

Ambu Trans Holding Corp.,
Defendant-Respondent,

New York City Department
of Finance, et al.,
Defendants,

Homechester Realty LLC,
Intervenor-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (John A. Barone, J.), entered on or about August 20, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 9, 2015,

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14659-
14660 The People of the State of New York,
Respondent,

-against-

Jaquan Paugh,
Defendant-Appellant.

Ind. 3215N/12
3083N/12

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

Judgments, Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about June 27, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14661 Stanislaw Terepka, Index 306952/10
Plaintiff-Appellant-Respondent,

-against-

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

_____

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for appellant-respondent.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 9, 2013, which, to the extent appealed from as limited by the briefs, granted so much of defendants' motion for summary judgment as sought to dismiss the Labor Law § 240(1) claim, and denied so much of the motion as sought to dismiss the Labor Law § 241(6) claim, unanimously modified, on the law, to deny so much of the motion as sought to dismiss the § 240(1) claim as against defendant City of New York, and to grant so much of the motion as sought to dismiss the § 241(6) claim against all defendants, and otherwise affirmed, without costs.

Plaintiff seeks damages for back injuries he allegedly suffered in November 2009 while performing exterior masonry work at a job site in the Bronx. He testified that he was injured

while raising a cement-filled bucket from the ground to his position on a scaffold, approximately 20-25 feet above ground, with an electrical extension cord, which he was forced to use because defendants did not provide him with the proper equipment to carry the bucket from one elevation to another.

Plaintiff concedes that all claims should be dismissed as against defendants Department of Education and School Construction Authority.

The City failed to establish prima facie that plaintiff's injuries were not caused by the type of elevation-related hazard encompassed by Labor Law § 240(1), i.e., were not "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The inconsistencies between plaintiff's testimony at his General Municipal Law § 50-h hearing and his deposition testimony do not alter our conclusion that the City is not entitled to summary dismissal of the § 240(1) claim; plaintiff's injuries would fall within the coverage of the statute whether he injured his back while simply raising the cement-filled bucket or while trying to grasp the scaffold to prevent falling off while raising the bucket.

Plaintiff concedes that the provisions of the Industrial Code that he cited in his complaint and bill of particulars are inapplicable and that his Labor Law § 241(6) claim insofar as it is predicated on those provisions should be dismissed. The remainder of the § 241(6) claim, predicated on Industrial Code (12 NYCRR) § 23-6.1(h), should be dismissed because plaintiff did not allege a violation of that provision until he improperly submitted a supplemental bill of particulars six months after the note of issue was filed and without leave of the court (*see e.g. Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520 [1st Dept 2012]).

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: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14663 Carlos Fajardo, Index 305728/13
Plaintiff-Appellant,

-against-

Rosa Alejandro,
Defendant-Respondent,

John Doe,
Defendant.

_____

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

Law Offices of John Trop, Yonkers (David Holmes of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 10, 2014, which granted defendant Rosa Alejandro's motion to dismiss the complaint on forum non conveniens grounds, unanimously affirmed, with costs.

This action, commenced in Bronx County, arises from an accident that occurred in New York County, in which plaintiff, a resident of Connecticut, allegedly was hit by a car owned by defendant, a resident of New Jersey. Defendant established that the only connection between the action and the State of New York is that the accident occurred here – an insufficient connection to warrant retention of the action in New York (*see Economos v*

Zizikas, 18 AD3d 392, 394 [1st Dept 2005]). The case has no connection at all to Bronx County. Plaintiff failed to show that there were special circumstances warranting retention (*see id.* at 393-394; *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287-288 [1st Dept 2006]). He submitted affidavits by two witnesses to the accident, neither of whom indicated that he lived in New York State or that testifying in another venue would pose any hardship.

As to plaintiff's expressed concern about the availability of an alternate forum, the parties acknowledge that, during the pendency of this appeal, plaintiff filed another action in Bergen County, New Jersey, and defendant waived his affirmative defenses based on jurisdiction and the statute of limitations.

We have considered plaintiff's remaining argument, which relies on conflict of laws principles, and find it unavailing.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14664-
14665 The People of the State of New York,
Respondent,

-against-

Andre Scott,
Defendant-Appellant.

Ind. 5511/09

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

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

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered April 14, 2011, convicting defendant, after a nonjury trial, of rape in the first degree, assault in the second degree, two counts of assault in the third degree, and two counts of aggravated harassment in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed. Order, same court (Abraham L. Clott, J.), entered January 9, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment, 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 court's credibility determinations, including its evaluation of the victim's delay in reporting the

rape and any inconsistencies in her testimony.

The court properly denied defendant's CPL 440.10 motion, alleging a violation of the People's disclosure obligations. After defendant's conviction, the People disclosed a brief portion of a videotape that was made by a television network for a documentary film. In the videotape, two prosecutors discuss defendant's case, and express opinions on the anticipated difficulty of obtaining a conviction. In particular, a prosecutor expresses the opinion that the victim was "slow," and may not have understood that defendant's conduct constituted rape. To the extent that these comments could be viewed as a source of impeachment material, we find that there was no reasonable possibility that timely disclosure would have affected the outcome (*see e.g. People v Fuentes*, 12 NY3d 259, 263-265 [2009]). This information was similar to impeachment material available to defendant at trial, including a document he actually used in cross-examination. Furthermore, the undisclosed video clip had little or no probative value on the issue of whether defendant actually had forcible sexual intercourse with the victim, and his claim that this material could have led to significant impeachment is speculative (*see People v Garrett*, 23 NZY3d 878, 891-892 [2014]).

Defendant's claim that the court should have admitted a recording containing his own exculpatory statement is unpreserved and expressly waived, and we decline to review it in the interest of justice. To the extent that defendant sought admission of the statement, he abandoned that request and accepted a different remedy offered by the court. As an alternate holding, we find that defendant was not entitled to introduce his self-serving statement, and that, unlike the situation in *People v Carroll* (95 NY2d 375, 385-387 [2000]), the People did not open the door to admission of the statement.

Defendant failed to preserve his constitutional challenge to former Penal Law § 240.30(1)(a), which has been declared unconstitutional (*see People v Golb*, 23 NY3d 455, 467-468 [2014]) and we decline to vacate his aggravated harassment convictions in the interest of justice. The unconstitutionality of a statute is not exempt from the requirement of preservation (*see e.g. People v Dozier*, 52 NY2d 781 [1980]), and the fact that *Golb* is applicable to cases pending on appeal does not relieve defendant of that requirement. Although *Golb* had not yet been decided at the time of defendant's trial, defendant had the same opportunity as the defendant in *Golb* to raise the issue (*see People v Stewart*, 67 AD3d 553, 554, *affd* 16 NY3d 839 [2011]), and the

argument that an "appellant should not be penalized for his failure to anticipate the shape of things to come" is without merit (*People v Reynolds*, 25 NY2d 489, 495 [1969]; *see also People v Hill*, 85 NY2d 256, 262 [1995]). Defendant has not demonstrated that the interest of justice would be served by relieving him of these convictions.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14666 In re Franklin Douglas, Index 401876/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Franklin Douglas, petitioner pro se.

David I. Farber, New York (Laura Ruth Bellrose of counsel), for respondent.

_____

Determination of respondent, dated September 23, 2013, which terminated petitioner's tenancy on the ground of nondesirability, 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 [Alexander W. Hunter, Jr., J.], entered April 9, 2014), dismissed, without costs.

The propriety of respondent's determination terminating petitioner's tenancy did not depend upon whether petitioner knew that drugs were being stored in and sold from his apartment (*see Matter of Grant v New York City Hous. Auth.*, 116 AD3d 531, 531-532 [1st Dept 2014]; *Matter of Satterwhite v Hernandez*, 16 AD3d 131, 131 [1st Dept 2005]). Respondent's determination is supported by substantial evidence, including the testimony and

record evidence that established petitioner was present in the apartment when police executed the first search warrant and recovered drugs, drug packaging materials, and an operable firearm. Nine months later, after reports of narcotics sales at petitioner's apartment "all hours of the day and all night," police executed a second warrant and recovered drug paraphernalia and packaging materials, and petitioner's son, an authorized occupant of the apartment, pleaded guilty to criminal possession of a controlled substance in the seventh degree (*see Matter of Prado v New York City Hous. Auth.*, 116 AD3d 593, 593 [1st Dept 2014]; *Matter of Johnson v New York City Hous. Auth.*, 111 AD3d 515, 516 [1st Dept 2013]).

The hearing officer's determination was therefore rational, and the penalty imposed, terminating the petitioner's tenancy, is not so disproportionate to the offense as to be shocking to one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]), "since the use of the petitioner's apartment as a base for drug activity represented a danger to the health and safety of other tenants who resided in the same public housing community" (*Matter of Gibson v Blackburne*, 201 AD2d 379, 380 [1st Dept 1994]). The

fact that petitioner was a long-term tenant of public housing without any prior problems does not change this result (*see Matter of Walker v Franco*, 275 AD2d 627, 628 [1st Dept 2000], affd 96 NY2d 891 [2001]).

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

ENTERED: MARCH 31, 2015

CLERK

Tom, J.P., Andrias, Saxe, Manzanet-Daniels, Kapnick, JJ.

14668 [M-6294] In re Montgomery Distributors LLC, Petitioner, Index 651762/12

-against-

Hon. Melvin L. Schweitzer, etc., Respondent.

_____

White & Wolnerman, PLLC, New York (Randolph E. White of counsel), for petitioner.

Eric T. Schneiderman, New York (Charles F. Sanders of counsel), for 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: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14669 The People of the State of New York, Ind. 1386/11
Respondent,

-against-

Alonzo B. Hardy,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan Merchan, J.), rendered on or about August 1, 2013,

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: MARCH 31, 2015

CLERK

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

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14671 Levar T. Henry, Index 304637/09
Plaintiff-Appellant,

-against-

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

_____

Tracie A. Sundack & Associates, L.L.C., White Plains (Jeffrey R. Pollack of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 25, 2013, which denied plaintiff's motion to reargue the denial of his motion for a default judgment against defendant Captain "John" Cruz, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff designated the motion that resulted in the order appealed from as one for reargument, set forth the standard for a motion to reargue in his motion papers, and did not present any new facts on the motion. The court unambiguously denied the request for reargument, and it is well established that no appeal

lies from an order denying reargument (*see e.g. Cangro v Park S. Towers Assoc.*, 123 AD3d 602 [1st Dept 2014]; *D & A Constr., Inc. v New York City Hous. Auth.*, 105 AD3d 464 [1st Dept 2013]).

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14673 The People of the State of New York, Ind. 1903N/11
Respondent,

-against-

Islime Duvivier,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 23, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second and fourth degrees and criminal possession of a controlled substance in the second degree, and sentencing him to an aggregate term of three years, unanimously affirmed.

Defendant's challenges to the factual portion of his plea allocution and to the court's discussion of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Tyrell*, 22 NY3d 359, 364 [2013]; *People v Peque*, 22 NY3d 168, 182 [2013]). We decline to review these claims in the interest of justice.

As an alternate holding, we find no basis for reversal. The plea was knowing, intelligent and voluntary. Viewing the plea proceeding as a whole, we find that defendant's factual recitations did not cast significant doubt on his guilt *(see People v Toxey*, 86 NY2d 725 [1995]). We also find that the court sufficiently advised defendant of the rights he was giving up by pleading guilty (*see Tyrell*, 22 NY3d at 365; *People v Harris*, 61 NY2d 9, 16 [1983]).

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14674 In re Raymond Rivera, Index 401156/13
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Neighborhood Defender Service of Harlem, New York (Regina Gennari of counsel), for petitioner.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent (NYCHA), dated March 28, 2013, which, after a hearing, terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alexander W. Hunter, Jr., J.], entered February 27, 2014), dismissed, without costs.

Petitioner concedes that there is substantial evidence to support the conclusion that he breached NYCHA rules and regulations by engaging in drug activity (*see Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433 [1st Dept 2011]). He contends that there is not substantial evidence to support the hearing officer's finding that although he has

demonstrated that "he is making a good faith effort to rehabilitate himself, an insufficient amount of time has elapsed to draw any definitive and reasonable conclusions as to his rehabilitation." However, it is appropriate to consider the passage of time since the misconduct in evaluating rehabilitation (*see Matter of Wiesner*, 94 AD3d 167, 173 [1st Dept 2012]). At the time of the hearing, petitioner was still on probation, had completed only one of the two programs he was required to complete, and was still subject to drug testing.

The penalty of termination of tenancy is not shocking to our sense of fairness (*see e.g. Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]).

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14675 In re Jaquan C.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 6, 2014, 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 criminal possession of a weapon in the second degree and fourth degrees, criminal possession of a firearm, and possession of pistol or revolver ammunition, and also committed the act of unlawful possession of a weapon by persons under 16 (two counts), and placed him with the Administration for Children's Services for a period of 18 months, with placement in a residential facility for a period of 6 months, unanimously affirmed, without costs.

The court properly denied defendant's suppression motion. The presentment agency established by clear and convincing evidence that appellant's sister, an adult with authority over the premises, voluntarily invited the police to enter her apartment and "look around," and also voluntarily signed a consent form authorizing the police to search the apartment (*see generally People v Gonzalez*, 39 NY2d 122 [1976]). There was no threatening behavior by the police and the atmosphere was not unduly coercive. Consent was freely given by appellant's sister, who was 24 years old, and had prior experience with law enforcement. We have considered and rejected appellant's remaining claims.

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14677 The People of the State of New York, Ind. 3502/12
Respondent,

-against-

Anthony Gatling,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered February 26, 2013, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of 1 year, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248 [2006]). The court did not conflate the right to appeal with the rights automatically forfeited as the result of a guilty plea, it expressly stated that by pleading guilty a defendant does not give up the right to appeal, and it explained that, in return for the negotiated plea and sentence, defendant was additionally agreeing to waive his right to appeal (*see e.g. People v Chavez*, 84 AD3d 630 [1st Dept 2011], *lv denied*

17 NY3d 858 [2011]). Defendant also executed a written waiver

This waiver forecloses defendant's suppression claims. As an alternative holding, we also reject them on the merits. The search warrant was based on probable cause.

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14678 Endurance American Specialty Insurance Company, et al., Plaintiffs-Appellants, Index 650703/13

-against-

Utica First Insurance Company, Defendant-Respondent,

CFC Contractor Group, Inc., Defendant.

_____

White Fleischner & Fino, LLP, White Plains (Janet P. Ford of counsel), for appellants.

Farber Broocks & Zane, LLP, Garden City (Sherri N. Pavloff of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered November 22, 2013, inter alia, declaring that defendant Utica First Insurance Company has no duty to defend or indemnify plaintiffs in the underlying lawsuit, unanimously affirmed, with costs.

Utica's disclaimer of liability for coverage by letter dated November 21, 2011 to its named insured, defendant CFC Contractor Group, Inc., did not constitute notice to additional insured plaintiff Adelphi Restoration Corp. pursuant to Insurance Law § 3420(d)(2) (*see Sierra v 4401 Sunset Park, LLC*, 24 NY3d 514 [2014]). However, its January 29, 2013 disclaimer of liability

to Adelphi was not unreasonably late in light of its uncontroverted statement in the disclaimer letter that it did not receive the written contract between CFC and Adelphi until January 28, 2013 (*see Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144 [1st Dept 1998]). Plaintiffs contend that the disclaimer was unreasonably late because the exclusion for employees of an insured on which it was based was apparent from the face of multiple earlier tenders. However, Adelphi's additional insured status was conferred by a blanket additional insured endorsement, i.e., for any entity that CFC was required by a written contract to name as an additional insured; Adelphi was not named in the policy, and was required to prove its status by providing a copy of its written contract with CFC. Plaintiffs acknowledge that Utica "conducted an investigation as to Adelphi's status as an additional insured on its policy, and only

when it confirmed that Adelphi was an additional insured did it issue its coverage position for Adelphi's tender." Indeed, Utica issued its disclaimer the day after it received the CFC/Adelphi contract.

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14679 The People of the State of New York, Ind. 1380N/12
Respondent,

-against-

Joseph Danclaire,
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 (Laura A. Ward, J.), rendered on or about March 11, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14680 Maureen Leroy, Index 25432/02
Plaintiff-Appellant,

-against-

Morningside House Nursing Home Company, Inc.,
Defendant-Respondent.

_____

Litman & Litman, P.C., Woodbury (Jeffrey E. Litman of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 4, 2013, which denied the motion of Karen Leroy, the administrator of the estate of Maureen Leroy, for an order, among other things, amending the caption to substitute her as plaintiff, and dismissed the action with prejudice, unanimously affirmed, without costs.

The court correctly found that a prior order dismissing the complaint for want of prosecution pursuant to CPLR 3216 was a nullity, because it was issued after plaintiff's death and before the substitution of a legal representative for her (*see Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]; *see also Cueller v Betanes Food Corp.*, 24 AD3d 201 [1st Dept 2005], *lv denied* 6 NY3d

708 [2006]). The court also properly denied the motion to substitute the administrator as plaintiff and properly dismissed the matter on the merits, since the motion was not made "within a reasonable time" (CPLR 1021). The Administrator offered no explanation for failing to seek substitution until nearly 10 years after plaintiff's death, and the delay prejudices defendant's ability to defend the action (*see Cueller*, 24 AD3d at 201; *see also Quijano v City of New York*, 76 AD3d 937, 938 [1st Dept 2010]).

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

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14681 Christian Udoye, etc., et al., Index 14842/06
Plaintiffs-Appellants,

-against-

Westchester-Bronx OB/GYN, P.C., et al.,
Defendants-Respondents.

_____

Andrew Rosner & Associates, Garden City (Andrew Rosner of counsel), for appellant.

Garbarini & Scher, P.C., New York (Wiiliam D. Buckley of counsel), for Westchester-Bronx OB/GYN, P.C., Patricia T. Calayag, M.D., Daniel R. Miller, M.D., Neil C. Goodman, M.D., Paul T. Gleason, M.D., Denis T. Sconzo, M.D. and Regina M. Fitzgerald, M.D., respondents.

Turken & Heath, LLP, New York (Jason D. Turken of counsel), for Peter K. Keller, M.D., P.C., Danny Woo, M.D. and Bryan Russell Latzman, M.D., respondents.

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for Lawrence Hospital Center, respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 9, 2013, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants are the obstetricians and the Obstetrics Group that rendered prenatal care to plaintiff's decedent Obianuju Udoye, the cardiologists and the Cardiology Group to whom she was referred for a heart murmur, and the hospital where she delivered

her second child.

Plaintiff alleges that all defendants departed from accepted medical practices in failing to diagnose viral myocarditis in decedent, which resulted in her death about six weeks after she gave birth. At two months pregnant, the decedent presented to the Obstetrics Group with a suspected heart murmur. Referral to defendants cardiologists and the Cardiology Group resulted in a normal EKG and an echocardiogram showing no structural heart defects. On September 14, 2004, during her pregnancy, plaintiff experienced a dizzy spell at the Obstetrics Group, which referred her to the hospital. Decedent's obstetrician found a normal EKG and dizziness abated with the introduction of I-V fluids. A second dizzy spell, on October 6, 2004, the day after she gave birth, where she fainted getting out of bed, was alleviated when she received ammonia inhalant (smelling salts).

The physician defendants established prima facie that they did not depart from accepted medical practice (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Rivera v Greenstein*, 79 AD3d 564 [1st Dept 2010]). The Obstetrics Group's expert opined that the obstetricians properly referred plaintiff to a cardiologist and were not advised of any other signs or symptoms of heart disease. The Cardiology Group's expert opined

that the cardiologists performed heart testing in March 2004, and never saw plaintiff after that date.

Lawrence Hospital established prima facie entitlement to summary judgment, since decedent was under the care of her private attending physicians, and the hospital's staff followed these physician's orders (*see Suits v Wyckoff Hgts. Med. Ctr.*, 84 AD3d 487, 488 [1st Dept 2011]).

In opposition, plaintiff failed to raise an issue of fact. The court properly found, after a hearing, that plaintiff's expert, a pathologist, was not qualified to render an opinion as to the standard of care as to obstetrics or cardiology (*see Nguyen v Dorce*, ___ AD3d ___, 2015 NY Slip Op 01716 [1st Dept 2015]). In any event, the expert's opinion, that decedent's cardiac abnormalities were consistent with myocarditis, which caused arrhythmias during and after the pregnancy, which arrhythmias caused the patient to experience dizziness, was belied by the record. Decedent had no documented arrhythmias, a finding that the expert later conceded under oath. Thus, his opinion was unfounded (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Moreover, since there was no basis for the expert's opinion that alleged arrhythmias caused decedent's fainting episode at

the hospital (*see id.*), the contention that the nurse should have called an attending or ordered consultations has no merit, even assuming that this theory of liability had been timely pleaded (*see Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]).

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14683 The People of the State of New York, Ind. 3494/12
Respondent,

-against-

Allen Turner,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Lewis Bart Stone, J.), rendered on or about August 23, 2012,

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

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

ENTERED: MARCH 31, 2015

CLERK

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

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14684- Index 150338/12
14685-
14686 Richard Silver,
Plaintiff-Respondent,

-against-

Murray House Owners Corp.,
Defendant-Appellant.

_____

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for appellant.

Lewis and Garbuz, P.C., New York (Michael Andrews of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 13, 2013, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered February 24, 2014, which, to the extent appealed from, denied defendant's motion to renew its motion for summary judgment, unanimously affirmed, without costs. Order, same court and Justice, entered March 14, 2014, which, to the extent appealed from, granted plaintiff's motion for leave to amend the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Pursuant to the proprietary lease between the parties, defendant's consent to plaintiff's alteration shall not be unreasonably withheld or delayed. Thus, the motion court correctly determined that defendant's actions must be reasonable and, accordingly, are not sheltered from review by the business judgment rule (*see Rosenthal v One Hudson Park,* 269 AD2d 144, 145 [1st Dept 2000]; *Seven Park Ave. Corp. v Green,* 277 AD2d 123 [1st Dept 2000], *lv dismissed* 96 NY2d 853 [2001]). The court also properly found that there are issues of fact as to whether defendant's action "was in fact reasonable, i.e., legitimately related to the welfare of the cooperative" (*Seven Park Ave.,* 277 AD2d at 123; *see Rosenthal,* 269 AD2d at 145). Contrary to defendant's claim, the court's denial of defendant's summary judgment motion was not based solely on a new theory of liability that plaintiff had failed to plead in his complaint.

The court correctly rejected defendant's argument that plaintiff had unclean hands (*see National Distillers & Chem. Corp. v Seyopp Corp.,* 17 NY2d 12, 15-16 [1966]). Based on his experience on defendant's board, plaintiff had a good-faith belief that merely replacing his previously-approved HVAC units did not constitute an "alteration" within the meaning of paragraph 21(a) of the proprietary lease.

The court properly denied defendant's motion to renew since defendant failed to proffer "new facts ... *that would change the prior determination"* (CPLR 2221[e][2] [emphasis added]).

The motion court improvidently exercised its discretion in granting plaintiff's motion because the proposed amendment lacks merit (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]). Plaintiff added a cause of action for "selective enforcement" which is defined as "[t]he practice of *law-enforcement officers* who use wide or even unfettered discretion about when and where to carry out certain laws" (Black's Law Dictionary 1564 [10th ed 2014] [emphasis added]), and does not lie against a private actor (*see National Assn. of Sec. Dealers, Inc. v Fiero*, 33 AD3d 547, 548 [1st Dept 2006], *revd on other grounds sub nom. Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12 [2008]). Accordingly, we deny plaintiff's motion for leave to amend.

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14687 Candela Entertainment, Inc., Index 150553/11
Plaintiff-Respondent,

Cynthia Newport,
Plaintiff-Respondent-Appellant,

-against-

Davis & Gilbert, LLP,
Defendant-Appellant-Respondent.

_____

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Vincent J. Syracuse of counsel), for appellant-respondent.

Scarinci & Hollenbeck, LLC, New York (Dan Brecher of counsel), for respondent-appellant and respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 14, 2014, which, to the extent appealed from as limited by the briefs, granted defendant law firm's motion to dismiss the first cause of action, alleging legal malpractice, as asserted by the individual plaintiff, and denied dismissal of that cause of action as asserted by the corporate plaintiff, unanimously modified, on the law, to dismiss the first cause of action in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the amended complaint.

Plaintiffs' allegations failed to establish that plaintiffs had a cause of action for legal malpractice. The pleadings, affidavits and documentary evidence submitted on the motion established that the law firm's alleged malpractice did not proximately cause plaintiffs any injury (*see generally Borges v Placeres*, 123 AD3d 611, 611 [1st Dept 2014], *and Barnett v Schwartz*, 47 AD3d 197, 205 [2d Dept 2007]). Plaintiffs never alleged that they would have abandoned or postponed the assignment of film rights and attendant intellectual property from the individual plaintiff's nonparty, nonprofit corporation to the plaintiff corporation, had they been advised by the law firm that the film involved licensing issues necessitating licensor consents in order to be freely marketable. The individual plaintiff had secured the licenses for materials used in the film before the assignment, and plaintiffs do not allege that they were unable to secure consents after the assignment.

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Moskowitz, Richter, Clark, JJ.

14688 The People of the State of New York, Ind. 3/10
Respondent,

-against-

Charles Mack,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered March 13, 2013, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

After considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion. Although there was substantial delay, it was satisfactorily explained, and relatively little of it was attributable to the People. Among other things, the delay was occasioned by the complexity of this 15-defendant check fraud case, extensive motion practice including defendant’s multiple pro se motions and requests for new counsel, adjournment requests by various defense

counsel, and a lengthy period during which defendant's mental competency was at issue. Furthermore, defendant has not demonstrated that his ability to defend himself against the charges was impaired by the delay.

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

ENTERED: MARCH 31, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14691N In re Motor Vehicle Accident Indemnification Corporation,
Petitioner-Appellant,

-against-

American Country Insurance Company,
Respondent-Respondent.

Index 452014/12

_____

Marshall & Marshall, PLLC, Jericho (Jeffrey D. Kadushin of counsel), for appellant.

Dwyer & Taglia, New York (Joshua T. Reece of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 14, 2014, which, upon granting reargument, vacated the amended order, same court and Justice, entered June 6, 2013, confirming an arbitration award in favor of petitioner and denying respondent's cross petition seeking to vacate the arbitration award, and granted the cross petition, unanimously affirmed, without costs.

Respondent made a prima facie showing that the offending vehicle in this no-fault arbitration was insured by Global Liberty Insurance of New York, by submitting a Department of Motor Vehicle expansion, indicating that Global had insured the vehicle subsequent to respondent's coverage (*see Eagle Ins. Co. v*

Kapelevich, 307 AD2d 927 [2d Dept 2003]; *lv denied* 1 NY3d 503 [2003]; *Matter of State Farm Mut. Auto. Ins. Co. v Youngblood*, 270 AD2d 493 [2d Dept 2000]). By operation of Vehicle and Traffic Law § 313(1)(a), the subsequent coverage terminated respondent's coverage of the same vehicle as of the effective date and hour of Global's coverage, irrespective of whether respondent had otherwise complied with the cancellation requirements of the Vehicle and Traffic Law (*see Employers Commercial Union Ins. Co. of N.Y. v Firemen's Fund Ins. Co.*, 45 NY2d 608, 611 [1978]). Thus, it was arbitrary and capricious for the arbitrator to find that respondent was the insurer of the vehicle at the time of the accident because it failed to demonstrate that it had properly cancelled its policy. The arbitration award was also in excess of the arbitrator's authority, where it awarded coverage when none existed (*cf. Countrywide Ins. Co. v Sawh*, 272 AD2d 245 [1st Dept 2000]; *Matter of State Farm Ins. Co. v Credle*, 228 AD2d 191 [1st Dept 1996]).

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

ENTERED: MARCH 31, 2015

CLERK

Sweeny, J.P., Andrias, Moskowitz, Richter, Clark, JJ.

13904-
13904A The People of the State of New York,
Respondent,

-against-

Jameek Stilley,
Defendant-Appellant.

Ind. 5672/00
4863/06

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 24, 2008, and judgment of resentence, same court (Michael Corriero, J.), rendered December 6, 2007, affirmed.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Richard T. Andrias
Karla Moskowitz
Rosalyn H. Richter
Darcel D. Clark, JJ.

13904-13904A
Ind. 5672/00
4863/06

_____x

The People of the State of New York,
Respondent,

-against-

Jameek Stilley,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered July 24, 2008, convicting him, after a jury trial, of murder in the second degree, robbery in the first degree (two counts), robbery in the second degree and criminal possession of a weapon in the second and third degrees, and imposing sentence, and from the judgment of resentence, same court (Michael Corriero, J.), rendered December 6, 2007, resentencing defendant for a violation of probation.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

RICHTER, J.

Defendant stands convicted of felony murder, robbery and weapon possession arising from a May 20, 2006 shootout that resulted in the death of an innocent bystander. The principal evidence at trial consisted of both a written and videotaped confession by defendant. In those confessions, defendant stated that on the day of the incident, he and two of his friends, Kwame Edwards and Dana Booth, traveled to upper Manhattan to rob a drug dealer, Andres Santana. Defendant and his friends, all of whom were carrying guns, approached Santana and told him they wanted to purchase marijuana. Shortly after, defendant and Booth met up with Santana in the lobby of a nearby building, where Santana handed the marijuana to defendant. Booth pretended he was taking money out of his wallet, but Santana realized Booth did not have any money, and signaled to one of his cohorts. Defendant pulled his gun on Santana, said, "[A]ll I want is the weed," and instructed Santana to go to the back of the building.

In the confessions, defendant further stated that he went outside and saw Edwards with his gun drawn. Santana then reappeared and threatened to call the police. Edwards fired off a shot and defendant and his friends fled. Defendant looked back and saw one of Santana's cohorts reach for a gun at his waist. Defendant warned Edwards, and Edwards spun around and fired

another shot. Defendant heard a woman scream as if she was hurt, and shot three times in the air, at an angle. The woman was hit by one of the bullets fired that afternoon and subsequently died. Defendant and his friends fled to a nearby subway station, went to Edwards's house in Brooklyn and divided up the marijuana. The police began their investigation into the shooting and arrested Edwards and Booth soon thereafter. Defendant learned that the police were looking for him, and he fled upstate to Utica. He was subsequently apprehended and brought back to New York, where he made his two confessions.

At trial, Santana was called as a witness by the People and gave testimony consistent with defendant's confessions. In the direct examination, the trial prosecutor elicited that Santana used to sell marijuana and had 9 to 10 prior arrests, but had never been convicted of a crime. On cross-examination, defense counsel asked Santana if he continued selling drugs after the May 20, 2006 incident for which defendant was on trial. Santana replied that he stopped dealing drugs and had turned his life around, and that the day of the incident was the last time he had ever sold drugs.

The jury returned its verdict on November 13, 2007, and sentencing was adjourned several times at the People's request. On the February 22, 2008 adjourned date, the trial prosecutor

told the court that the People were still were not ready to proceed to sentencing and asked to explain the reasons ex parte.[1] During that ex parte proceeding, the trial prosecutor disclosed that two days after the verdict, he retrieved a voice mail from another prosecutor (the investigating prosecutor) stating that Santana had sold drugs to an undercover officer. The trial prosecutor told the court that "there was a voice mail message for me from [the investigating prosecutor] asking me, saying, hey, when is [Santana] going to testify, because one of my officers bought from him over the weekend." The trial prosecutor further explained that the investigating prosecutor subsequently "looked into it and she determined that the first buy they made from him was the day he testified [November 5, 2007], the evening of the day he testified."

In this same ex parte proceeding, the trial prosecutor explained that Santana was still being investigated, and that the police were trying to purchase A-1 weight drugs and guns from him. The trial prosecutor told the court that although he believed the information should be disclosed to the defense, he wanted to wait until the investigation was completed to protect its integrity. The court expressed concern over how long the

[1] Defendant was aware there would be an ex parte colloquy but did not object.

investigation would last and scheduled a future date, February 28, 2008, for a supervising prosecutor to provide further information. The proceedings resumed in open court and the court adjourned the sentencing. No disclosure was made at that time.

On February 28, 2008, the trial prosecutor and the supervising prosecutor appeared ex parte before the court. The court asked both prosecutors about when the District Attorney's Office first learned that Santana had sold drugs on the evening he testified at defendant's trial. The trial prosecutor assured the court that he did not learn of it until after the verdict. The supervising prosecutor replied that, at that moment, he could not state with certainty when either his office or the police learned that the individual who had made the drug sale was Santana, but offered to return to court to provide that information. Although the court again stressed the importance of learning "when somebody found out that [Santana] had testified falsely about his drug dealing," the court did not instruct the People to return to court with that critical information, nor did it order immediate disclosure to the defense.

In a criminal court complaint dated March 27, 2008, Santana was charged with 10 separate drug sales, including cocaine, ecstasy and marijuana. Two of the alleged ecstasy sales took place on November 8 and 11, 2007, which was after Santana

testified but before the verdict was rendered. On April 9, 2008, the trial prosecutor disclosed to defense counsel that Santana had sold marijuana on the night he testified, and was the subject of a long-term narcotics investigation. The following week, the court unsealed the two ex parte proceedings. On April 18, 2008, defendant moved pursuant to CPL 330.30 to set aside the verdict, arguing that the People's withholding of Santana's drug sales deprived him of a fair trial. The court denied the motion and ultimately sentenced defendant, and this appeal ensued.

On appeal, defendant's principal claim is that the People violated their obligations under *Brady v Maryland* (373 US 83 [1963]) and its progeny. It is well established that a defendant has the right, under both the State and Federal Constitutions, to discover favorable evidence in the People's possession that is material to guilt or punishment (*Brady v Maryland*, 373 US at 87; *People v Fuentes*, 12 NY3d 259, 263 [2009]). Furthermore, the People's *Brady* obligations apply to both exculpatory and impeachment evidence (*see Giglio v United States*, 405 US 150, 154 [1972]). Such evidence, however, "is subject to *Brady* disclosure only if it is within the prosecution's custody, possession, or control" (*People v Garrett*, 23 NY3d 878, 886 [2014]). "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either

exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d at 263).

Defendant contends that the People violated their *Brady* and *Giglio* obligations by failing to disclose, before the end of the trial, that Santana had sold drugs after he testified. There is no question, and the People do not argue otherwise, that Santana's drug sales constitute impeachment material subject to disclosure under *Brady* and *Giglio*. Santana's sale of drugs is not only criminal conduct relevant to his general credibility, but also is evidence that Santana lied during his trial testimony when he claimed that he had turned his life around and stopped selling drugs.

Nevertheless, defendant has failed to establish that a *Brady* violation occurred because there is no conclusive showing, on the limited record here, that the information about Santana's drug dealing was in the People's custody, possession or control before the trial ended. In the ex parte proceedings, the trial prosecutor told the court that he only learned of Santana's drug activity two days after the verdict, and there is no definitive proof that the investigating prosecutor, or anyone else in the District Attorney's Office, knew of Santana's drug dealing before

the verdict. Although Santana's drug sales to the undercover officer occurred during the trial, there is no indication in the record whether the police learned, prior to the verdict, that the individual who made the sales was, in fact, Santana.

Because almost all of the record here was made ex parte and little detail was provided to the court, many unanswered questions remain. Most importantly — did anyone in the District Attorney's Office have knowledge, prior to the verdict, that Santana had sold drugs on the very day he testified in this case? It is undisputed that the investigating prosecutor knew who Santana was before the trial because Santana had surfaced during an earlier unrelated search warrant overseen by the investigating prosecutor.[2] Likewise, it is clear from the ex parte proceedings that the investigating prosecutor was aware that Santana was a witness in defendant's trial. Indeed, according to the trial prosecutor, the investigating prosecutor's voice mail asked when Santana would be testifying. Further, a fair inference can be made that the investigating prosecutor was involved at some point in the operation that led to Santana's arrest because in her

[2] Before Santana testified, defense counsel inquired about the execution of a search warrant involving Santana. The trial prosecutor told the court that the search warrant was connected to an unrelated investigation conducted by the investigating prosecutor, and that the investigating prosecutor had spoken with Santana.

voice mail, she stated that "one of *my* officers bought from [Santana]" [emphasis added]. However, the record before us is insufficient to definitively resolve the critical question of when the investigating prosecutor, or the police, knew of Santana's resumed drug dealing, and when they learned his identity. Because no CPL 440.10 motion to expand the record was made, the myriad questions presented here cannot be resolved on this appeal.

Likewise, the record does not adequately resolve questions about the significant delay between the trial prosecutor's discovery of Santana's drug sales and his disclosure of that fact to the court and defense counsel. The trial prosecutor acknowledged that he learned of Santana's drug dealing on November 15, 2007, two days after the verdict was rendered. Yet, he did not inform the court of this discovery until February 22, 2008, more than three months later, and then waited an additional six weeks before telling defense counsel. Although the People contend the delay was due to the desire not to compromise an ongoing investigation, the record developed here is sparse, and it is unclear why some limited disclosure to defense counsel could not have been made sooner. Of course, the interest in protecting the investigation would not excuse the nondisclosure if the People knew of Santana's drug sales during the trial.

Even when the disclosure to the court was made, the People could not provide the exact date the District Attorney's Office learned of Santana's resumed drug dealing. Although the court asked that very question at the first ex parte proceeding, no one from the prosecutor's office could provide that information at the next ex parte colloquy, nearly a full week later. And when the supervising prosecutor offered to return to court to provide more detail, the court did not follow up. If the People or the court had made a more complete record, or if the record had been developed with defense counsel present, we might have been able to ascertain what actually happened. Nevertheless, despite these unanswered questions, any post-verdict delay in disclosure caused no prejudice to defendant, who had a full opportunity to litigate the *Brady* issue before sentencing.

Despite our concerns, we nevertheless conclude that the judgment of conviction should be affirmed. It is axiomatic that there can be no *Brady* violation unless the suppressed information is "material" (*People v Fuentes*, 12 NY3d at 263). Where, as here, a defendant has made a specific request for the undisclosed information, "the materiality element is established provided there exists a reasonable possibility that it would have changed the result of the proceedings" (*id.* [internal quotation marks omitted]). Under this standard, even if the information about

Santana's recent drug sales had been disclosed before the end of trial, there is no reasonable possibility that the verdict would have been different.

Even if we assume that the jury would have discounted Santana's testimony entirely had the additional drug sales been revealed, the proof against defendant was overwhelming. Defendant admitted, in two confessions, all of the facts necessary to establish his guilt beyond a reasonable doubt of felony murder, robbery and weapon possession (*see People v Dishaw*, 30 AD3d 689, 691 [3d Dept 2006], *lv denied* 7 NY3d 787 [2006] [no reasonable possibility of a different verdict particularly in light of the defendant's oral and written confessions]). In those confessions, defendant stated that, on the day of the incident, he traveled with his two friends to upper Manhattan to rob Santana. Defendant described the incident in detail, admitting that he pulled a gun on Santana while he and his cohorts robbed him of marijuana. Defendant also admitted that he and Edwards fired shots as they fled, and that he heard a woman scream. Defendant further explained that he traveled to Brooklyn and divided up the marijuana, and that when he learned the police were looking for him, he fled upstate to Utica.

Defendant's confessions were corroborated by other evidence at trial. Surveillance cameras from nearby businesses captured

defendant and his accomplices running from the scene immediately after the incident. Defendant's girlfriend testified that before the incident, defendant told her that he was going uptown to rob a marijuana location. After the shooting, defendant told his girlfriend that he had committed the robbery, that Edwards fired a gun at a drug dealer that was chasing them, that defendant heard a woman scream, and that defendant himself shot three times in the air. Defendant's consciousness of guilt was shown by the fact that immediately after the shooting, he asked his girlfriend to take the braids out of his hair. Edwards's girlfriend testified that after the incident, defendant and his cohorts talked about engaging in a "shoot out in broad daylight." And while in Utica, defendant told another woman that he was "on the run" from a robbery that had gone "bad" where "a lady died." In sum, the overwhelming evidence at trial eliminates any reasonable possibility that the verdict would have been different had the jury disregarded Santana's testimony.

The court properly denied defendant's motion to suppress his statements. There is no basis for disturbing the court's credibility determinations, including its finding that one of the testifying detectives had a better and more reliable recollection of the facts than that of the other detective. The record establishes that defendant did not make any statements until

after the administration of *Miranda* warnings. Before the warnings, the detectives made introductory remarks about the evidence in the case, but directed defendant not to say anything at that point, an instruction defendant followed.

We perceive no basis for reducing the sentence, which was much closer to the minimum than the maximum.

Accordingly, the judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered July 24, 2008, convicting defendant, after a jury trial, of murder in the second degree, robbery in the first degree (two counts), robbery in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 18 years to life, and the judgment of resentence, same court (Michael Corriero, J.), rendered December 6, 2007, resentencing defendant to a concurrent term of 1⅓ to 4 years for a violation of probation, should be affirmed.

All concur.

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

ENTERED: MARCH 31, 2015

CLERK