SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 19, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13854N Jose Marin, et al., Index 111531/07
Plaintiffs,

-against-

Constitution Realty, LLC, et al.,
Defendants.
- - - - -
Sheryl Menkes, Esq.,
Nonparty Appellant,

-against-

David B. Golomb, Esq., et al.,
Nonparty Respondents.

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Ballard Spahr Stillman & Friedman LLP, New York (John B. Harris of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for David B. Golomb, respondent.

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for Jeffrey A. Manheimer, respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 21, 2014, which, insofar as appealed from, denied nonparty appellant's motion to fix nonparty respondent David B. Golomb, Esq.'s share of net attorneys' fees at 12% and

to determine nonparty respondent Jeffrey A. Manheimer, Esq.'s share of net attorneys' fees on a quantum meruit basis, granted Golomb's motion to fix his share of net attorneys' fees at 40%, and granted Manheimer's motion to fix his share of net attorneys' fees at 20%, affirmed, without costs.

In February 2009, nonparty appellant Sheryl Menkes, as attorney of record for plaintiffs in this personal injury action, entered into an agreement with Jeffrey A. Manheimer under which he would, inter alia, act as cocounsel, provide advice to Menkes, and attend certain depositions and the trial in exchange for 20% of net attorneys' fees. In June 2009, the agreement was amended to specify that Manheimer would act in an advisory capacity only and would not contact the court or others involved in the litigation without Menkes's consent. Neither Manheimer nor Menkes informed plaintiffs of their arrangement or Manheimer's involvement in the case. In August 2009, Menkes wrote to Manheimer discharging him. Menkes stated that from that point forward, she "preferred 'to handle this matter alone'."

In 2012, plaintiffs were granted summary judgment on liability. In February or March 2013, Menkes sought assistance from David Golomb to handle "a scheduled May 2013 mediation." In an email to Menkes dated March 12, 2013, Golomb proposed to

handle the mediation, including preparation of the case for mediation, for 12% of the attorneys' fees when the case was resolved. He further proposed that "[i]f the case [did] not resolve at the mediation, presently scheduled for May 20, 2013," he would be entitled to 40% of net attorneys' fees. Menkes and Golomb exchanged a series of emails clarifying, among other things, that the total amount of fees Golomb would be entitled to would be 40%, should the case not settle at mediation. The final language regarding compensation was added at Menkes's request. Plaintiffs were notified of this arrangement and consented to it in writing.

Counsel for the parties and representatives of various insurers attended a mediation sponsored by JAMS on May 20, 2013. During this mediation, plaintiffs reduced their demand to $8.5 million and the insurers raised their offer from $2 million to the full extent authorized by excess insurance carriers, which was either $7 million or $7.5 million. The mediation session thereafter ended, although the mediator stated he would attempt to speak with the excess carriers to see if they would negotiate directly with plaintiffs' counsel. It is undisputed that the case was not resolved on that date.

The following day, Menkes and Golomb exchanged emails

discussing cash that would be available to plaintiffs under a $7.5 million structured settlement and the effect that a "significant" Workers' Compensation lien would have on the amounts received by plaintiffs.

On May 22, the mediator called Golomb to inform him that he had not heard from the excess carriers and would reach out to them. Golomb told the mediator that the Workers' Compensation lien could not be negotiated downward. That same day, JAMS invoiced Menkes for her portion of five hours of mediation services for the May 20 session.

Menkes emailed Golomb on May 28th and asked whether there was "any news." She proposed to Golomb that perhaps they should take a harder line in negotiations and directly advise the excess carriers that "if we do not settle by a date certain we will not accept settlement and will be prepared to let the jury decide the value of the case." Golomb told Menkes that the mediator advised him that he was going to try and contact the insurers.

Three days later, on May 31, the mediator called Golomb to convey an offer of $8 million, which plaintiffs accepted. The mediator thereafter had no further discussions with any party. The parties then directly negotiated the terms of the structured settlement, including who would act as plaintiffs' structured

settlement broker, plaintiffs' option in choosing an annuity company, etc. The final terms were memorialized in a letter dated June 3, 2013, which was executed on June 5.

Almost immediately thereafter, a dispute arose over the percentage of the fees due to Golomb and Manheimer. Menkes took the position that the mediation did not end on May 20, and, since it continued thereafter and resulted in a settlement, Golomb was only entitled to 12% of the fees. Golomb argued that the mediation ended on May 20, and, since the settlement did not occur as a result of the mediation, he was entitled to 40% of the fees. With respect to Manheimer, Menkes argues that he was entitled to fees based on a quantum meruit basis since he breached the terms of their agreement. Manheimer contends that the agreement clearly states that he is entitled to 20% of the fees since the agreement was terminated without cause by Menkes.

The issue before us is one of simple contract interpretation. Under well established precedent, agreements are to be generally construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966 [1985]). The best evidence of the parties' intent is "what they say in their writing" (*Schron v Troutman SandersLLP*, 20 NY3d 430, 436 [2013], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "[W]hen parties set

down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giacontieri*, 77 NY2d 157, 162 [1990]; *Jet Acceptance Corp. v Quest Mexicana S.A.*, 87 AD3d 850, 954 [1st Dept 2011]). This rule is particularly applicable where the parties are sophisticated and are negotiating at arm's length (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Language in a written agreement is deemed to be clear and unambiguous where it is reasonably susceptible of only one meaning or interpretation (*see White v Continental Cas. Co.*, 9 NY3d 264 [2007]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Finally, "[e]xtrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document" (*Jet Acceptance Corp.*, 87 AD3d at 854, citing *W.W.W. Assoc.*, 77 NY2d at 163).

Here, as the dissent agrees, the language of the contract is unambiguous. Menkes argues that she interpreted the term "mediation" to constitute an ongoing process that would not be limited to a single session but rather would continue until an impasse or other termination had occurred. However, the assertion by a party to a contract that its terms mean something

to him or her "where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract" is not sufficient to make a contract ambiguous so as to require a court to divine its meaning (*see Vesta Capital Mgt. LLC v Chatterjee Group*, 78 AD3d 411, 411 [1st Dept 2010]). The specific fee language that Menkes now claims supports her position was added to the agreement at her request. She takes the untenable position that she was never advised that the mediation reached an impasse or had been terminated. Yet despite the fact that the agreement went through several revisions, neither party saw fit to add any language to that effect. Both parties to the agreement are attorneys and thus know the importance of precision in the words used (*see Vermont Teddy Bear Co.*, 1 NY3d at 475). These clear terms, under these circumstances, need no interpretation by the court.

We agree with the dissent that the agreement in question must be read as a whole. When so read, however, the unambiguous language of this agreement does not support Menkes's interpretation that Golomb was required to take steps to prepare the case for trial in order to be entitled to the higher fee. In fact, the language referenced by the dissent states just the opposite. The two pertinent paragraphs of the agreement provide

in full:

> "I have agreed to review the file, provide whatever services are needed, with your and your office's assistance, to prepare it for the mediation and to handle the mediation. For those services, I will be receive [sic] twelve (12%) percent of all attorneys' fees whenever the case is resolved, whether by settlement, verdict after trial or appeal, calculated after the attorneys have been reimbursed for all expenses laid out. This percentage due shall become fixed and owed upon execution of this agreement.
>
> "If the case does not resolve at the mediation, presently scheduled for May 20, 2013, then I will be responsible, with your and your office's assistance as requested, for preparing for trial and trying the case. After such mediation, I will be entitled to forty (40%) percent of all attorneys' fees whenever the case is resolved, whether by settlement, verdict after trial or appeal, calculated after the attorneys have been reimbursed for all expenses laid out. In the event, this matter has to be tried, the total of all attorneys fees to which I am entitled for all of the services set forth, including mediation, shall be forty (40%) percent of all attorneys' fees whenever the case is resolved, whether by settlement, verdict after trial or appeal, calculated after the attorneys have been reimbursed for all expenses laid out."

The first paragraph makes reference to "the mediation," not the "process" of mediation. The second paragraph again uses the term "the mediation" and further defines it as "presently scheduled for May 20, 2013." Although the dissent contends the inclusion of the date is merely "descriptive" and "does nothing more than identify when the mediation was to commence," the clear language of the paragraphs does not support that conclusion.

Further, there is nothing contained in these paragraphs or the remainder of the agreement that conditions Golomb's entitlement to the higher fee upon his commencing or taking any steps to prepare for trial.

The record clearly reflects that Menkes's current position was part of the *original draft* of the agreement. As noted, she requested a number of revisions that were agreed to by Golomb before both signed the agreement.

In short, Menkes's argument could best be described as constituting "buyer's remorse," asking us to reform a contract that is clear on its face and to insert terms that were not contemplated by the parties because of unforeseen results.

The dissent's adoption of Menkes's argument that mediation is a "process" misses the point. We are not concerned here with mediation in the abstract or what Menkes claims the term meant to her. The unambiguous terms of the contract speak for themselves. The dissent, however, relies on Menkes's expert for the proposition that mediation is an ongoing process and interpreting the contract as we do to limit it to one session would essentially produce an absurd result. To accept Menkes's argument in this regard is to admit extrinsic evidence to an admittedly unambiguous contract which is prohibited by long-

standing precedent (*see W.W.W. Assoc.*, 77 NY2d at 163). Moreover, the expert's affirmation does no more than set forth general principles of mediation and his particular practices, and assumes for purposes of his affirmation that the May 20 mediation session was "adjourned," despite the fact that there is nothing in the record indicating such an "adjournment." In effect, his affirmation sets forth the general practice and custom in the industry. Since the contract is unambiguous, this evidence should not be considered (*see e.g. Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; OFSI *Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

As our dissenting colleague makes reference to the JAMS website for general propositions applicable to all mediations, we do the same. Under the heading, "The Joint Meeting," the website states:

"When all of the procedures have been agreed to and a mediation agreement has been signed, the mediation *session* or sessions are scheduled" (http://www.jamsadr.com/guide-mediation) (emphasis added). Thus, as in this case, and contrary to the expert's opinion, mediation can, and obviously does on occasion, consist of only one session. It is important to remember that

Menkes entered into the agreement with Golomb *after* the mediation session had already been scheduled, hence the phrase "at the mediation, presently scheduled for May 20, 2013." If she anticipated, as she now claims, that the mediation would be an ongoing process, and that a term such as impasse or other specific language formally terminating the mediation was required to activate Golomb's entitlement to 40% of the net attorneys' fees, she had more than ample opportunity to make the appropriate revisions to the agreement before signing it, as she did with several other terms, as noted above. The acceptance of her argument would constitute the addition of a provision to an otherwise unambiguous contract that the parties did not intend to include. More importantly, as discussed herein, Menkes's conduct during settlement negotiations undermines the arguments she now makes in support of her claim that the contract entitles Golomb to only a 12% portion of the attorneys fee.

The parsing of and positioning of the number of commas in this contract, as advanced by Menkes and adopted by the dissent, is simply an attempt to create ambiguity where none exists. As this grammatical argument was raised for the first time in Menkes's reply brief, we decline to consider it (*OFSI Fund II*, 82 AD3d at 538). Were we to consider it, we would find that the

plain language of the agreement fails to support it. There is nothing in this agreement or in the record, that indicates that the parties contemplated additional mediation sessions or that the May 20 session was "adjourned," as the expert posits. JAMS billed Menkes for only five hours on May 20, indicating that the mediation had ended. Significantly, despite plaintiff's present contention that the mediation was ongoing, her actions bespeak an acknowledgment that this was not the case. Her email to Golomb of May 28 regarding taking a harder line with the insurers in order to get them to increase their offer indicates her awareness that the mediation had ended and that some action had to be taken by her and Golomb to get the insurers to commence further discussions with a view toward a possible settlement. Thus, her argument that the contract anticipated additional sessions or a "process" of continuing mediation is belied by the record.

At the end of the day on May 20, the mediation ended because the carriers reached the limits of their authority. There was no commitment by them to seek approval for an increase in their offer or even to discuss settlement further. There was no agreement by the parties to continue negotiations through the mediator, although some may have anticipated that negotiations would continue in some form or other. As of May 28, the excess

carriers had not called either the mediator or Golomb to continue negotiations. That the mediator offered to reach out to the excess carriers to see if they would increase their offer does not change the fact that the mediation had ended. At the conclusion of the mediation session on May 20, the parties were not even close to a settlement. They were at least $1 million apart. There were other significant issues such as whether the Workers Compensation lien could be negotiated and in what amount (as noted, Golomb subsequently advised the mediator that the lien could not be negotiated downward); whether any settlement amount could be structured and what surety would do such structuring; whether attorneys' fees could be structured; the net amount to the clients after paying the lien if the offer of $7 million was accepted, as well as several other issues that needed to be resolved before a settlement amount could even be agreed upon.[1] Notably, the mediator took no action for several days, and the excess carriers did not contact either the mediator or Golomb during that time, and did not increase their offer for 11 days after the mediation session ended. As noted, Menkes herself wanted to take a harder line with the carriers to bring them back

[1]These matters hardly constitute "loose ends" as referenced by the dissent.

to the negotiating table, a distinct change in her position and one that does not indicate that the mediation "process" was ongoing. The claim that the parties anticipated further mediation is simply not supported by this record.

It is a stunning proposition advanced by Menkes and adopted by the dissent that our ruling today creates a situation where an attorney would intentionally violate the Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.7 in order to maximize his or her fee. There is an inherent tension between the interests of attorneys and their clients in settlement negotiations. However, the attorney is bound to resolve such tension in favor of the client by using his or her best judgment in doing what is in the best interests of the client, not his or her own best interests. In any event, such speculation is unwarranted here, since it is undisputed that Golomb did everything he could to settle the case at the mediation session on May 20.

Menkes's invocation of equity in arguing that the motion court's decision was an "absurdly harsh" interpretation of the contract also falls short, since there is no question that Golomb took the lead at the mediation, handled the negotiations during and after the mediation session ended, and even prepared the final settlement documents, which admittedly was beyond Menkes's

ability and was outside the scope of Golumb's his duties under the agreement. It has long been the rule that an agreement between attorneys regarding division of their legal fees is valid and enforceable and courts will not inquire into the precise worth of their services as long as each contributed, particularly where, as here, there is no claim that each refused to contribute more substantially (*Benjamin v Koeppel*, 85 NY2d 549, 556 [1995]).

With respect to Manheimer, Menkes offers no evidentiary support for her contention that he is only entitled to compensation on a quantum meruit basis because he breached his agreements with her by exceeding his role as set forth in those agreements. She made no claim of such breach at the time she discharged him, and there is nothing in the record to indicate that he did anything in contravention of the agreements. Nor can Menkes void the agreements by citing Manheimer's failure to comply with Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.5(g), formerly Code of Professional Responsibility DR 2-107(a)(2) (22 NYCRR 1200.12[a][2]), which prohibits the division of legal fees between counsel from different firms except with the client's consent and where the division is proportionate to the work performed by each. Since she violated the rule, she cannot seek to void the agreements by which she agreed to be

bound and of which she received the benefit, and plaintiffs were not harmed by the violation (*see Samuel v Druckman & Sinell, LLP*, 12 NY3d 205, 210 [2009]; *Law Offs. of K.C. Okoli, P.C. v Maduegbuna*, 62 AD3d 477 [1st Dept 2009], *lv dismissed* 13 NY3d 771 [2009]).

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

ANDRIAS, J. (concurring in part and dissenting in part)

This appeal involves a fee-sharing dispute between nonparty appellant, Sheryl Menkes, Esq., the attorney of record for plaintiffs in this personal injury action, and the successive attorneys she retained to act as cocounsel. The action was settled for $8,000,000.

I agree with the majority that nonparty respondent Jeffrey A. Manheimer, Esq., the first attorney retained by Menkes, is entitled to 20% of the net attorneys' fees under the terms of their agreement, as modified. However, because the action was settled as a direct result of "the mediation" commenced on May 20, 2013, I disagree with the majority's holding that nonparty respondent David B. Golomb, Esq., the second attorney retained by Ms. Menkes, is entitled to a 40% share, rather than a 12% share, of the net attorneys' fees under the terms of their agreement. Therefore, I dissent from that part of the decision.

By letter agreement dated March 12, 2013, at which point plaintiffs had already been granted summary judgment as to liability and a trial had been scheduled on damages, Ms. Menkes retained Mr. Golomb to "assume responsibility for representing plaintiffs in this case." The agreement, drafted on Mr. Golomb's letterhead, provided in relevant part:

> "I have agreed to review the file, *provide whatever services are needed, with your and your office's assistance, to prepare it for the mediation and to handle the mediation*. For those services, I [] will receive twelve (12%) percent of all attorney's fees whenever the case is resolved, whether by settlement, verdict after trial or appeal, calculated after the attorneys have been reimbursed for all expenses laid out. This percentage shall become fixed and owed upon execution of this agreement [emphasis added].
>
> "If the case does not resolve at the mediation, presently scheduled for May 20, 2013, *then I will be responsible, with your and your office's assistance as requested, for preparing for trial and trying the case*. After such mediation, I will be entitled to forty (40%) percent of all attorneys' fees whenever the case is resolved, whether by settlement, verdict after trial or appeal, calculated after the attorneys have been reimbursed for all expenses laid out" (emphasis added).

On May 20, 2013, at 2:00 p.m., a mediation session was held at JAMS before retired Justice Alan Hurkin-Torres. Plaintiffs initially demanded $19,000,000 and defendants offered $2,000,000. By the time the session ended at 7:00 p.m., plaintiffs' demand had been reduced to $8,500,000 and defendants' offer had increased to $7,000,000. However, defendants' offer was not final; they needed to obtain additional authority from their excess insurance carrier for any additional amounts. Consequently, although no adjourned date was set, the mediator, with the parties' consent to his ongoing involvement, continued his negotiations with the carriers and Mr. Golomb, which resulted

in an agreement in principle for an $8 million settlement on May 31, which was memorialized in a letter from Mr. Golumb to defense counsel dated June 3, 2013.

Supreme Court denied Ms. Menkes's motion to fix Mr. Golomb's share of net attorneys' fees at 12% and granted Mr. Golomb's motion to fix his share at 40%. The court found that the phrase, "If the case does not resolve at the mediation, presently scheduled for May 20, 2013," was unambiguous and meant that if the case did not settle at the mediation session held on that specific date, Mr. Golomb would be entitled to a 40% share of net attorneys' fees, even if the settlement was the direct result of the mediation process that began that day. A majority of the panel in this Court agrees.

The court's function in interpreting a contract is to apply "the meaning intended by the parties, as derived from the language of the contract in question" (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]). "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977] [internal quotation marks omitted]; *see also Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516,

518 [1st Dept 2010]).

"[A] contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties" (*Cole v Macklowe*, 99 AD3d 595, 596 [1st Dept 2012]). In examining a contract to find the parties' intent as to a particular section, a court should read "the entirety of the agreement in the context of the parties' relationship," rather than isolating discrete provisions out of an entire agreement (*Matter of Riconda*, 90 NY2d 733, 738 [1997]).

In the first paragraph of the letter agreement, Mr. Golomb agreed to "provide whatever services are needed . . . to prepare [the file] for the mediation and to handle the mediation" in return for 12% of the net attorneys' fees. In the second paragraph, the parties agreed that "[i]f the case [did] not resolve at the mediation, presently scheduled for May 20, 2013," Mr. Golomb would be responsible for "preparing for trial and trying the case," and would receive 40% of the net attorneys' fees.

The majority focuses on the phrase "at the mediation, presently scheduled for May 20, 2013," in the second paragraph to conclude that the agreement unambiguously provided that Mr. Golomb would be entitled to a 40% fee unless the case settled at

the May 20 session. However, in performing its analysis, the majority misconstrues the first paragraph, which does not restrict "the mediation" to a single date or session, and expressly obligates Mr. Golomb to "provide whatever services are needed" with respect to the mediation. The majority also gives no weight to the language in the second paragraph regarding Mr. Golomb's obligation to "prepar[e] for trial and try[] the case" if it is not resolved at the mediation. By misconstruing this language in the first and second paragraphs, which does not limit the services required of Mr. Golomb in furtherance of "the mediation" and ties his entitlement to the higher fee to post-mediation services, the majority violates the basic rules of construction, which "require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, [that] no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also James v Jamie Towers Hous. Co.*, 294 AD2d 268, 269 [1st Dept 2002] [the courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms], *affd* 99 NY2d 639 [2003]).

Had the intent of the parties been to state or imply that the mediation process was confined to a single session on May 20,

different language, such as "at a single one-day mediation session" could or should have been incorporated in the agreement; there is no such language here. The agreement did not state that the 40% fee vested if the case settled after the conclusion of the May 20 session. Rather, the agreement made a distinction between the fee due after a successful mediation and the fee due if the case was not resolved by mediation and Mr. Golomb had to prepare the case for trial, and to try it if necessary. In contrast, under the majority's view, even if the parties reached a monetary settlement on May 20, but loose ends remained that did not require the mediator's input or assistance to resolve, the matter would not be considered settled "at" mediation, and Mr. Golomb would be entitled to a 40% share, an absurd result.

The majority rejects this analysis, finding that it was Ms. Menkes's obligation to include language indicating that the mediation was an ongoing process and required to end before the 40% fee vested. However, this is what the first paragraph contemplated when it provided that Mr. Golomb would "provide whatever services are needed . . . to prepare [the file] for the mediation and to handle the mediation" in return for 12% of the net attorneys' fees, without limitation, and what the second paragraph contemplated when it obligated Mr. Golomb to prepare

the case for trial and to try it if necessary as consideration for the increased fee.

Furthermore, an analysis of the language employed in the second paragraph does not support the majority's view. The term "presently scheduled for May 20, 2013," separated by commas, is a descriptive term, not one of limitation (*see Gravatt v General Star Indem. Co.*, 1998 WL 842351, 4 n 5, 1998 US Dist Lexis 18827, *13 n5 [SD NY 1998] ["These commas indicate a non restrictive clause. Nonrestrictive clauses do not limit or define, but merely expand upon the meaning of the words to which they relate"; *see also* Gertrude Block, *"Language Tips,"* 72-JUN NY St BJ 54, 54 [2000] ["Commas enclose non-restrictive relative clauses; no commas are used around restrictive clauses"; non-restrictive clauses do not "define" the terms they follow, but merely add information]; *NACS v Board of Governors of Fed. Reserve Sys.,* 746 F3d 474, 487 [DC 2014], *cert denied* _ US _, 135 S Ct 1170 [2015]). Although the phrase identifies the start date of the mediation, it does not limit Mr. Golomb's responsibilities with respect to "the mediation" to that single date. Thus, when read as a whole, the agreement unambiguously provides for a 12% fee if the case resolves through the mediation and a 40% fee if the mediation was unsuccessful and the case has

to proceed towards trial.

The majority states that this parsing of commas is an attempt to create an ambiguity where none exists. However, it is in fact a straightforward grammatical analysis of the language employed. As the Court observed in *Massachusetts Mut. Life Ins. Co. v Aritech Corp.* (882 F Supp 190, 195 [D Mass 1995]):

> "The distinction may be analogized to the lessons everyone learned in junior high school about defining and non-defining relative clauses. Thus, the sentence 'Lawyers who are charlatans should be flogged' is quite different from the sentence 'Lawyers, who are charlatans, should be flogged.' In the first sentence the relative clause, not being set off with commas, *defines* a certain class of lawyers; the clause limits its antecedent. In the second sentence, because of the commas, the relative clause is merely descriptive, and all lawyers take a beating."

Here, as set forth above, the phrase "at the mediation, presently scheduled for May 20, 2013," is separated by commas, and the reference to the date is descriptive; it does nothing more than identify when the mediation is to commence.

The majority states that we should not review this argument because it is raised for the first time on appeal. However, Ms. Menkes did argue before the motion court that the reference to "at" the mediation did not state or imply that the mediation process was confined to May 20. Moreover, the argument is properly considered because it involves a question of law

appearing on the face of the record that could not have been avoided by Mr. Golomb if brought to his attention in a timely manner (*see Ellington v EMI Music Inc.*, 106 AD3d 401 [1st Dept 2013], *affd* 24 NY3d 239 [2014]).

Even if the phrasing in the parties' agreement is viewed as ambiguous, which it is not, an affirmation by David Brodsky, a professional mediator/arbitrator who specializes in complex commercial and financial disputes, was submitted by Ms. Mendes for the proposition that mediation is often a process that does not begin and end in a single day (*see also,* Robin Gise, Jed Melnick, Vivien Shelanski, John Wilkinson, *Mediation Starts from the First Phone Call–Practice Pointers and Helpful Hints for Lawyers Going to Mediation*, *11 Cardozo J. Conflict Resol.* 463, 475-476 ["Mediation is a process that may incorporate a day of face-to-face negotiations, and there may or may not be a settlement on that day. To suggest, however, that there is such a thing as 'after the mediation' is to force mediation into a 'one day' paradigm that undermines the true potential of mediation. Rather, a mediation starts the moment the first call comes in, and it should not end until the parties have put the

dispute behind them"]).[1]

This view is consistent with the information provided on the JAMS website, which states, "Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences" (http://www.jamsadr.com/mediation-defined). The JAMS Mediation Guide states, under "Follow up," that "[i]n some cases, telephone conferences occur following mediation sessions if no agreement has yet been reached. Sometimes, further information is required for the process to continue or additional people may need to be involved in the decision making process." Under "Agreement," the guide states, "The mediator will work with counsel to finalize a settlement agreement and determine the procedures necessary for implementation. The mediator is available to provide assistance throughout the process" (http://www.jamsadr.com/mediation-guide/).

Although Mr. Golomb's performance was exemplary, and he diligently worked towards obtaining a settlement beneficial to

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[1]Contrary to the majority's implication, this analysis is presented as an alternative grounds for reversing the award of a 40% fee, should the agreement be deemed ambiguous. My primary holding is that the agreement unambiguously entitles Mr. Golomb to only 12%, which does not rely on prohibited extrinsic evidence as the majority contends.

plaintiffs, the trial court's interpretation would create a perverse incentive to avoid settling a case at mediation, even if the parties were close to agreement, where an attorney's retainer provided that he or she would receive a greater fee thereafter. It would also discourage the efforts of an outstanding mediator, such as the one the parties selected here, to continue his or her efforts where the parties were on the verge of reaching a settlement, even though a specific mediation session had ended.

The majority finds that the mediation ended on May 20 and that the fact that the mediator offered to reach out to the carriers to see if they would increase their offer thereafter is of no consequence. However, this interpretation again ignores that mediation is a process that often takes time to produce an agreement, especially where the case involves multiple responsible parties, complex injuries, and a large claim for damages. More importantly, it is not supported by the record, which demonstrates that further action by the mediator was expected when the May 20 session ended, and that the $8 million settlement was the direct result of the mediator's efforts.

As Supreme Court observed:

> "co-defendant General Restoration Associates's counsel ... avers in his supplemental affirmation that although [the parties] did not schedule another in-person

> session, he understood that the Mediator would continue efforts to bridge the gap after the May 20 session by contacting the excess carriers and plaintiffs' attorneys to continue negotiations."

Consistent with this statement, emails between Mr. Golomb and Ms. Menkes demonstrate that Mr. Golomb was still negotiating with the mediator after May 20.

In an email dated May 21 addressing plaintiffs' "WC [Workers' Compensation] situation," Mr. Golomb advised Ms. Menkes, "For now, if we can come to agreement via [the mediator] on the number, we can say subject to approval by WC and approval by clients."

In an email dated May 22, Mr. Golomb advised Ms. Menkes, "[The mediator] has not yet called back." In another email that day, Mr. Golomb advised Ms. Menkes that the mediator had called back and "hasn't heard from the excess people and is going to reach out to them [and] hopes to get back to me by Friday." The mediator also advised Mr. Golomb that the Workers' Compensation lien could be negotiated. In an email dated May 28, Ms. Menkes asked if there was any news and if "we should say that if we do not settle by a certain date we will not accept settlement and will be prepared to let the jury decide the value of the case." Later that day, Mr. Golomb replied that he had gotten a text from

the mediator that morning, who said he would try to contact the excess carrier that day and would let Mr. Golomb know what happened. Three days later, on May 31, the mediator conveyed the $8 million offer to Mr. Golomb, which plaintiffs accepted.

Mr. Golomb also acknowledged at oral argument on the motions that at the close of the mediation there was an expression of hope by the mediator that the gap between the parties would be closed. Mr. Golomb explained:

> "He gave me the card for the Zurich excess – the RSUI excess representative. He gave her my card. He expressed the hope that we would remain in touch because the only way the case was going to settle was, (a), if I could get a greater than statutory one-third reduction of the comp lien which I hoped to and, (b) if one or both of the excess carriers would put a substantial amount, at least a million dollars, if not more, on the case."

Mr. Golomb further acknowledged that after the May 20 session, he had further conversations with the mediator and with the structured settlement brokers and defense counsel. Mr. Golomb admitted that he ultimately agreed to the $8 million dollar figure with the mediator, who was involved when all the parties locked in the number, after which he and defense counsel worked out the terms of the structured settlement and the release on their own. During this entire 10-day period, Mr. Golomb and Ms. Menkes took no steps to prepare the case for trial and were

merely awaiting news of the mediator's progress with the excess carrier in anticipation of settlement. That the parties came to an agreement on the details of the structured settlement and release, including the issues arising from plaintiffs' receipt of Workers' Compensation benefits, without needing the assistance of the mediator, does not alter the fact that the offer of $8,000,000 and the acceptance of that figure was accomplished through the mediator.

On this record, the fact that the mediator, whether to generate good will or otherwise, chose to bill for only 5 hours is inconsequential. The fact that it took 11 days to reach a settlement merely demonstrates the extent of the mediator's continued involvement and efforts to resolve the case. While the majority believes that Mr. Golomb should be rewarded because he took the lead at the mediation and in the follow-up negotiations,

that is what he agreed to do for 12% of the net attorneys' fees.

Accordingly, I would award Mr. Golomb 12% of the net attorneys fees.

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

ENTERED: MAY 19, 2015

CLERK

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

14689-
14690 In re Ann D.,
Petitioner-Appellant,

-against-

David S.,
Respondent-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

The Wallack Firm, P.C., New York (Robert M. Wallack of counsel), for respondent.

Richard L. Herzfeld, PC, New York (Richard Herzfeld of counsel), attorney for the children.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about June 12, 2013, which, after a hearing, inter alia, awarded respondent father sole decision-making authority with respect to the children's religious practice and modified the parties' residential access schedule by expanding respondent's Wednesday overnight visitation with the children to include a full week every six weeks, unanimously modified, on the law and the facts, to vacate that portion of the order altering the residential access schedule and to revise the schedule for religious holidays as stated herein, and otherwise affirmed, without costs. Appeal from order, same court and

J.H.O., entered on or about September 12, 2013, which denied petitioner mother's petition seeking, inter alia, a clarification of the June 12, 2013 custody order for failure to state a cause of action, unanimously dismissed, without costs, as abandoned.

The court improvidently exercised its discretion in determining that respondent should receive an additional week of parenting time with the children every six weeks (*see Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295, 296 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]; *Ronald S. v Lucille Diamond S.*, 45 AD3d 295, 296-207 [1st Dept 2007]). Petitioner and the children's attorney argue that the children will suffer as a result of this expansion of time with respondent, and this argument has support in the record.

Although the respondent father is to retain decision-making authority over the children's religious upbringing, we see no reason to impose an extra requirement of written consent before petitioner may take the children to religious services or to prohibit her from attending services with them. In addition, the parties should share the enumerated Jewish holidays despite respondent's crucial role in the children's religious development. Thus, in odd-numbered years respondent father shall have the children for the first day of Rosh Hashanah, the first

night of Chanukah, and the second night of Passover; petitioner mother shall have the children the second day of Rosh Hashanah, all of Yom Kippur, and the first night of Passover. In even-numbered years, this schedule will be reversed.

Petitioner's contention that the court was biased against her was not preserved for appellate review and we decline to review it in the interest of justice (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470, 471 [1st Dept 2013]; *K. v B.*, 13 AD3d 12, 20 [1st Dept 2004], *appeal dismissed* 4 NY3d 878 [2005]). As an alternative holding, we find that the record fails to support her allegation. We note that the court allowed petitioner to remain the children's primary caretaker despite finding that her testimony was less than candid and that she repeatedly tried to minimize respondent's access to the children (*see Victor L. v Darlene L.*, 251 AD2d 178 [1998], *lv denied* 92 NY2d 816 [1998]).

We have considered petitioner's remaining contentions and find them unavailing. We note that petitioner has not raised any argument on appeal relating to the order entered on or about September 12, 2013.

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

ENTERED: MAY 19, 2015

CLERK

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

14893 The People of the State of New York, Ind. 3427/11
Appellant,

-against-

Jomo Cole,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for appellant.

The Bronx Defenders, Bronx (Adnan Sultan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about February 6, 2014, which granted defendant's motion to suppress physical evidence, unanimously affirmed.

The police received a radio run providing an anonymous tip about a man with a gun in a building stairwell, accompanied by other men. Upon their arrival at the building, the police encountered a group of men, including defendant, in the lobby. Following a chase, defendant retreated to a nearby apartment and threw a backpack toward a closet. The officer who chased defendant removed defendant and two others from the apartment at gunpoint. While the men were detained outside the apartment, the officer went into the apartment and retrieved the backpack from the closet. The bag contained two weapons.

The record supports the motion court's decision to suppress the evidence. The court found there was no consent to enter the apartment and that no exigency existed (*see e.g. People v Jenkins*, 24 NY3d 62 [2014]), and the People do not challenge those findings on appeal. The only argument advanced by the People on this point is that defendant lacked standing to challenge the seizure because he had no expectation of privacy in the apartment. However, the People did not raise this specific claim in their post-hearing argument and submissions before the motion court, nor did the court reach this issue. Thus, the People's argument is unpreserved and we decline to reach it in the interest of justice (*see People v Dodt*, 61 NY2d 408 [1984]). There is no merit to the People's contention that the motion court's granting of a suppression hearing was tantamount to a ruling adverse to the People on the issue of standing. The court made no such finding and simply ordered a *Mapp* hearing to explore all issues raised by the motion to suppress. In light of our

conclusion, we do not address the People's alternative argument that the police had a sufficient basis to pursue defendant in the first instance.

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

ENTERED: MAY 19, 2015

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

15100 The People of the State of New York, Ind. 650/08
Respondent,

-against-

Vincent Luckerson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 10, 2009, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The court properly exercised its discretion in granting the People's application, based on substantial security concerns, that potential spectators other than defendant's family be required to show identification or provide their names and dates of birth. This procedure was considerably less restrictive than the screening procedure in *People v Jones* (96 NY2d 213 [2001]), where the Court of Appeals recognized the procedure as implicating the right to a public trial. In *Jones*, "the court

reserved the right to exclude based on its own evaluation of the explanation offered by any individual seeking admission" (*id.* at 218). Here, all potential spectators who identified themselves were to be automatically admitted, there was to be no "screening" process, and only those who insisted on remaining anonymous would have been excluded.

To the extent this minimal exclusion could be considered a partial closure of the courtroom (*see United States v Smith*, 426 F3d 567, 573–574 (2d Cir 2005), *cert denied* 546 US 1204 [2006]), we find that it satisfied all the elements set forth in *Waller v Georgia* (467 US 39, 48 [1984]). The People made a detailed and extensive *ex parte* showing of a serious threat to the safety of potential witnesses (*see People v Frost*, 100 NY2d 129 [2003]), including, among other things, a document bearing notations with ominous implications, recovered during the execution of a search warrant. Under the circumstances of the case, it was appropriate for the court to consider the People's ex parte affirmation, and its acceptance of the People's showing constituted adequate findings of fact (*compare People v Carr*, ___ NY3d ___, 2015 NY Slip Op 02798 [2015]). The main purposes of the identification requirement were to record the identities of persons who attended

the trial so as to provide leads to possible suspects in the event of harm to witnesses, and to deter such misconduct. The minimal restriction on entry was carefully tailored to achieve those purposes.

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

ENTERED: MAY 19, 2015

CLERK

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

15130 The People of the State of New York, Ind. 4723/11
Respondent,

-against-

Joseph Zanoni,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about March 14, 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: MAY 19, 2015

CLERK

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

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

15131 Yolanda Crosby, Index 300681/10
Plaintiff-Respondent,

-against-

Montefiore Medical Center, et al.,
Defendants-Appellants.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Montefiore Medical Center, appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for Beth Abraham Health Services, appellant.

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

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 22, 2014, which denied defendants' motions to vacate a prior order sua sponte setting aside a jury verdict as inconsistent and granting plaintiff a new trial, and to rescind the parties' high-low settlement agreement, unanimously modified, on the law, the motions granted to the extent they sought vacatur of the prior order, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in the amount of $250,000 pursuant to the high-low agreement.

During jury deliberations in this medical malpractice action, the parties entered into a "high-low" settlement

agreement in open court, setting the high end of the high-low range at $1,485,000 and the low end at $250,000. The parties agreed that the settlement would not survive a hung jury, and that they waived posttrial motions or appeal.

Shortly after jury deliberations began, defendants' attorneys noticed an error in the verdict sheet instructions, which directed the jury to proceed to determine apportionment of fault and damages, even upon a finding of no liability. In an off-the-record discussion, the court ruled that, if the jury found no liability but proceeded to award damages under the faulty instructions, the court would enter a defense verdict. Plaintiff did not object.

The jury returned a verdict finding that defendants had departed from the standard of care, but that such departure was not a substantial factor in causing plaintiff's injuries. The jury nonetheless, following the instructions on the verdict sheet, allocated fault 70% to Montefiore and 30% to Beth Abraham, and awarded plaintiff $650,000 for pain and suffering.

At a posttrial conference, the court granted plaintiff's oral application to set aside the verdict as inconsistent pursuant to CPLR 4111(c), and subsequently signed an order presented ex parte by plaintiff. The court then denied

defendants' motions to vacate that order.

Contrary to plaintiff's contention, the order appealed from is not in the nature of a denial of reargument, which would not be appealable as of right (CPLR 5701[a][2]). Defendants properly moved to vacate the order setting aside the verdict, which was not made pursuant to a motion made on notice, and the resulting order is appealable (*see Sholes v Meagher*, 100 NY2d 333, 335 [2003]).

Under the circumstances, the jury's allocation of fault and award of damages pursuant to the defective verdict sheet was superfluous, and did not render the verdict inconsistent (*see Alcantara v Knight*, 123 AD3d 622 [1st Dept 2014]). As the court had ruled prior to the jury's verdict, the jury's verdict was in favor of defendants, thus triggering the high-low agreement (*see Cunha v Shapiro*, 42 AD3d 95, 98-99 [2d Dept 2007], *lv dismissed* 9 NY3d 885 [2007]).

Contrary to defendants' argument, plaintiff's posttrial motions raising the issue of inconsistency in the verdict were not "so substantial and fundamental" a breach of the parties'

high-low settlement agreement that rescission would be warranted (*Bisk v Cooper Sq. Realty, Inc.*, 115 AD3d 419, 419 [1st Dept 2014]).

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

ENTERED: MAY 19, 2015

CLERK

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

15132 In re Osriel L.,

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

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

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

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 17, 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 robbery in the third degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, attempted assault in the third degree, menacing in the third degree (two counts) and assault in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations.

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

ENTERED: MAY 19, 2015

CLERK

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

15136 In re Yi Song He, Index 157242/13
Petitioner-Appellant,

-against-

The Motor Vehicle Accident
Indemnification Corporation,
Respondent-Respondent.

_____

Mallilo & Grossman, Flushing (Francesco Pomara Jr. of counsel), for appellant.

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for respondent.

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Order, Supreme Court, New York County (Carol Edmead, J.), entered March 12, 2014, which, in a proceeding, pursuant to Insurance Law § 5218, for leave to bring an action against the Motor Vehicle Accident Indemnification Corporation (MVAIC) to recover for personal injuries allegedly sustained in a hit-and-run accident, denied the petition, and dismissed the proceeding, unanimously affirmed, without costs.

Petitioner, who commenced this action to recover for injuries he allegedly sustained when, while riding a bicycle, he was hit by a motor vehicle that fled the scene, failed to establish that "all reasonable efforts" were made "to ascertain the identity of the motor vehicle and of the owner and operator

thereof" (Insurance Law 5218[b][5]; *see Matter of Simmons v Motor Veh. Acc. Indem. Corp.*, 44 AD2d 673 [1st Dept 1974]). The police accident report identifies two witnesses and reflects that two license plates were identified as belonging to the offending motor vehicle. Contrary to petitioner's assertion, the fact that one of the license plates was identified as a "possible plate," does not mean that there is no substantial evidence linking that vehicle to the accident. Rather, it means that an investigation was required. Yet, petitioner has not identified any effort made to investigate the possible involvement of the vehicle, whose owner MVAIC was able to identify, or to obtain information from the two witnesses (*see Matter of Acosta-Collado v Motor Veh. Acc. Indem. Corp.*, 103 AD3d 714 [2d Dept 2013]).

Petitioner also failed to establish that he was a "qualified person" via verifiable proof of his residency and household composition (*see* Insurance Law §§5202[b] and 5211[a][1]; *see also Matter of Willingham v Huston*, 36 AD3d 469 [1st Dept 2007]).

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

ENTERED: MAY 19, 2015

CLERK

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

15137 The People of the State of New York, Ind. 2398/03
Respondent,

-against-

Roderick Gunn,
Defendant-Appellant.

_____

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

Roderick Gunn, appellant pro se.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about April 6, 2010, 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.

We have considered the contentions raised in defendant's pro se supplemental brief and find them to be without merit.

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

ENTERED: MAY 19, 2015

CLERK

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

15138 Josefina Cruz, Index 100768/13
Plaintiff-Appellant,

-against-

United Federation of Teachers,
Defendant-Respondent.

_____

Josefina Cruz, appellant pro se.

Lichten & Bright, P.C., New York (Daniel R. Bright of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 30, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without cost.

The motion court properly found that the action is time-barred since it was filed more than four months after plaintiff learned, in an October 25, 2012 letter from defendant, that her grievance concerning a salary adjustment was denied, that defendant did not believe that her claim was meritorious, and that it would not pursue the matter at arbitration (*see* CPLR 217[2][a]).

Plaintiff's claim that the doctrine of equitable estoppel precludes defendant from invoking the statute of limitations is unavailing. Plaintiff alleges that her delay in filing this

action was caused by defendant's alleged failure to advise her that it had access to her personnel records. Plaintiff's claim is not dependent on knowledge of this fact, and, in any event, mere silence is insufficient to invoke the doctrine of equitable estoppel (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]; *Nichols v Curtis*, 104 AD3d 526, 528 [1st Dept 2013]).

Moreover, to the extent that plaintiff's claim is based on defendant's refusal to provide her with counsel to defend herself in an action brought by her former employer to recover an alleged salary overpayment, such conduct does not state a claim for breach of the duty of fair representation since plaintiff could have presented her own defense in the action, and any alleged misconduct by defendant in refusing to assist her would not prevent her from obtaining a remedy (*see Sinicropi v New York State Pub Empl Rels Bd*, 125 AD2d 386, 389 [2d Dept 1986]).

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

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

ENTERED: MAY 19, 2015

CLERK

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

15139 Lissette Arzeno, Index 300613/10
Plaintiff-Respondent-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Anvernic LLC, et al.,
Defendants-Appellants-Respondents.

_____

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani of counsel), for appellants-respondents.

Kafko Schnitzer, LLP, Bronx (Neil R. Kafko of counsel), for respondent-appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered March 20, 2014, which, to the extent appealed from, granted the motion of defendant City of New York for summary judgment dismissing the complaint as against it, and denied the motion of defendants Anvernic LLC and GDA LLC (owners) for summary judgment dismissing the complaint and cross claims as against them, unanimously modified, on the law, the owners' motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the entire complaint.

Plaintiff fell in a hole on part of a blacktopped sidewalk

adjacent to a fire hydrant. Since the City and its agencies were performing work on the fire hydrant, which work entailed placing blacktop on the surrounding sidewalk, it exercised control over that area during the pendency of its work, to the exclusion of the owners (*see Lewis v City of New York*, 89 AD3d 410 [1st Dept 2011]; *Hurley v Related Mgt. Co.*, 74 AD3d 648, 649 [1st Dept 2010]; *and see Kaufman v Silver*, 90 NY2d 204, 207 [1997]).

The court properly granted the City's motion for summary judgment, since the City did not receive any prior written notice of the defect at issue (*see* Administrative Code of the City of New York § 7-201[c][2]). Plaintiff failed to raise an issue of fact as to whether the City, by its repair, affirmatively created the defect through an act of negligence that "immediately results in the existence of a dangerous condition" (*see Oboler v City of New York*, 8 NY3d 888, 889 [2007], quoting *Bielecki v City of New York*, 14 AD3d 301, 301 [1st Dept 2005]). That the City may have made a temporary repair was not evidence of a negligent repair (*see Vega v City of New York*, 88 AD3d 497, 498 [1st Dept 2011]).

Nor is an ineffectual pothole repair job which does not make the condition any worse amount to an affirmative act of negligence (*see Kushner v City of Albany*, 27 AD3d 851, 852 [3d Dept 2006], *affd* 7 NY3d 726 [2006]).

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

ENTERED: MAY 19, 2015

CLERK

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

15141 The People of the State of New York, Ind. 3183/12
Respondent,

-against-

Lee Edens,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about December 19, 2012,

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

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

ENTERED: MAY 19, 2015

CLERK

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

Sweeny, J.P., Moskowitz, Manzanet-Daniels, Gische, JJ.

15142 In re Michael P. Thomas, Index 100145/14
Petitioner-Appellant,

-against-

Richard J. Condon, etc., et al.,
Respondents-Respondents.

_____

Michael P. Thomas, appellant pro se.

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

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Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered September 30, 2014, to the extent appealed from, denying the petition to compel the disclosure of documents pursuant to the Freedom of Information Law (Public Officers Law article 6) (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings consistent herewith.

Petitioner seeks materials pertaining to the investigation of two complaints filed by him and another person with the Office of the Special Commissioner of Investigation for the New York City School District (SCI) concerning whether a speech that was given by an employee of the New York State Department of

Education (DOE) at a public high school and later reproduced on DOE's website violated Chancellor's Regulations D-130(I)(B)(2), (I)(B)(8), and (I)(C)(1). These regulations govern the use of school buildings by political candidates, officials and organizations and the conduct of school employees and officers with respect to political campaigns and elections.

Supreme Court improperly suggested that petitioner had the burden to establish that respondents' denial of his FOIL request was "arbitrary and capricious," "an abuse of discretion," "irrational," or "unlawful." The appropriate standard of review is whether the determination "was affected by an error of law" (CPLR 7803[3]; (*Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Moreover, the burden is on respondents to establish "that the material requested falls squarely within the ambit of one of the[] statutory exemptions" from disclosure (*Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 657 [2012]; *see* Public Officers Law § 87[2]). Under the circumstances of this case, the application of an improper legal standard is reversible error since it resulted in substantial prejudice to petitioner (*cf. Mulgrew*, 87 AD3d at 507 [no remand necessary since determination that requested

materials should be released was proper]; *Matter of Miller v New York State Div. of Human Rights*, 122 AD3d 431 [1st Dept 2014] [no remand necessary since determination that requested materials need not be released was proper]).

Respondents failed to establish that disclosure of the materials at issue would "constitute an unwarranted invasion of personal privacy under the provisions of [§ 89(2)]" (Public Officers Law § 87[2][b]). They do not claim that any personal privacy category enumerated in § 89(2) is applicable. Therefore, we must determine whether any invasion of personal privacy would be unwarranted "by balancing the privacy interests at stake against the public interest in disclosure of the information" (*Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). The speech at issue excoriated unspecified candidates in the 2013 mayoral election who had taken certain positions on education policy. Notwithstanding that the speech did not name any individual candidate or political party, the complaints to SCI raised serious questions about the propriety of the speech and its publication on DOE's website. We find that there is a "significant public interest" in the requested materials, which may shed light on whether this matter was adequately investigated (*see Matter of Thomas v New York City*

Dept. of Educ., 103 AD3d 495, 497 [1st Dept 2013]). Respondents failed to establish that the claimed privacy interests outweigh this public interest (*see Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 532 [1st Dept 2015]). They assert that the materials contain personally identifying information such as home addresses, dates of birth, and Social Security numbers. However, that information can be redacted and does not provide a basis for withholding entire documents (*see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 463-464 [2007]; *see also* Public Officers Law § 89[2]).

Respondents also failed to demonstrate the applicability of the inter- or intra-agency exemption, since some or all of the materials may constitute "factual tabulations or data" or "final agency ... determinations," which do not fall within this exemption (Public Officers Law § 87[2][g]; *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 276-277 [1996]).

Accordingly, we direct that defendant produce the requested information to the extent it constitutes factual data or final agency determinations. Personal identifying information such as names, home addresses, dates of birth and social security numbers may be redacted. All other requested materials shall be provided to the court for an *in camera* inspection.

Petitioner's request for litigation costs pursuant to Public Officers Law § 89(4)(c) is premature. Any determination of whether such costs are warranted must await the court's in camera inspection.

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

ENTERED: MAY 19, 2015

CLERK

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

15145 Ind. 5258/08
15146 The People of the State of New York,
Respondent,

-against-

Raynell Burgess,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered September 22, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts), assault in the second degree and attempted coercion in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, unanimously modified, on the law, to the extent of vacating the assault conviction and remanding for further proceedings on that count, and otherwise affirmed.

Defendant has not demonstrated that he was prejudiced by the lack of pretrial notice and a hearing regarding uncharged crime evidence that the People revealed in their opening statement.

Since defendant only objected to the lack of timely notice of this evidence rather than challenging its admissibility, and raised no challenge to a jury instruction that the evidence was probative on the issue of intent, defendant has not preserved his claim that the evidence was inadmissible, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court properly admitted testimony that, almost immediately after the charged crime, defendant attempted to shoot the victim. Defendant was charged with attempted murder and other crimes under the theory that he was accessorially liable for the acts of the codefendant, who did the actual shooting in the charged incident. Accordingly, the People were obligated to prove that defendant acted with homicidal intent and with a community of purpose (*see generally* Penal Law § 20.00; *People v Allah*, 71 NY2d 830, 832 [1988]). In meeting this burden, the People "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). Evidence that defendant personally tried to shoot the victim almost immediately after the charged attempted murder was highly probative of defendant's state of mind at the time of the charged crime, rather than his general propensity, because the second attack "evince[d] defendant's intent to focus his

aggression" on the victim (*People v Bierenbaum*, 301 AD2d 119, 150 [1st Dept 2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]). The probative value of this evidence far exceeded any prejudicial effect, which was minimized by the court's instructions. In any event, any error was harmless in view of the overwhelming evidence of guilt.

To the extent the existing record permits review, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant asserts that his attorney rendered ineffective assistance by failing to object to a detective's testimony that allegedly suggested that defendant had been inculpated by nontestifying declarants, and to the court's participation in a lengthy readback of testimony by reading the answers while the court reporter read the questions. Defendant has not shown that, in either instance, the lack of objection fell below an objective standard of reasonableness, or that such lack of objection deprived defendant of a fair trial or affected the outcome of the case, particularly in light of the overwhelming evidence. The detective's testimony was admissible under the principles discussed in *People v Garcia/DeJesus* (__NY3d__, 2015 NY Slip Op

02675 [2015]), and the court's readback procedure, while inadvisable (*see People v Alcide*, 21 NY3d 687, 695 [2013]), did not deprive defendant of a fair trial, given the court's instructions. To the extent that, independently of his ineffective assistance claim, defendant is raising a Confrontation Clause claim, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant's arguments regarding undisclosed police reports are similar to arguments made on the jointly tried codefendant's appeal (*People v Lee*, 116 AD3d 493, 497-498 [1st Dept 2014], *lv denied* 23 NY3d 1064 [2014]), and we reach the same conclusions here. Defendant's claim that his situation is different from that of his codefendant is unpersuasive.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. This finding is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). We do not find any disparate treatment by the prosecutor of similarly situated

panelists, because there were significant differences in the situations of the challenged and unchallenged panelists at issue.

Defendant is entitled to reversal of his assault conviction for the reasons stated on the codefendant's appeal (*Lee*, 116 AD3d at 495).

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

ENTERED: MAY 19, 2015

CLERK

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

15147 Hawa Boureima, et al., Index 402014/09
Plaintiffs-Appellants,

-against-

The New York City Human Resources Administration, etc., et al.,
Defendants-Respondents.

- - - - -

New York City Public Advocate,
Amicus Curiae.

_____

Legal Services NYC, New York (Amy S. Taylor of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Leticia James, New York (Jennifer Levy of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Louis B. York, J.), entered January 30, 2014, which, inter alia, granted defendants' (HRA) motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for partial summary judgment, unanimously modified, on the law, to deny the motion as to plaintiffs' disparate treatment claim pursuant to the New York City Human Rights Law (HRL), and otherwise affirmed, without costs.

Supreme Court correctly found that there is no private right

of action under the Equal Access to Human Services Act (EAHSA) (Administrative Code of City of NY § 8-1001 *et seq.*). Indeed, EAHSA does not contain an express private right of action, and the Legislature specifically removed a proposed right of action originally included with the draft law. Thus, even accepting that plaintiffs are in the class to be protected by the statute, a private right of action cannot be fairly implied as it would not be consistent with the legislative scheme or intent (*see Carrier v Salvation Army*, 88 NY2d 298, 302 [1996]).

However, the City HRL prohibits discrimination based on national origin and, as is pertinent, provides that it is unlawful for any provider of public accommodation, such as HRA, to discriminate on the basis of national origin by withholding from or denying accommodations, advantages, facilities, or privileges (*see* Administrative Code § 8-107[4][a]). Further, discrimination against limited English proficiency (LEP) individuals such as plaintiffs constitutes discrimination based on national origin (*see Colwell v Department of Health & Human Servs.*, 558 F3d 1112, 1116-1117 [9th Cir 2009]; *Lau v Nichols*, 414 US 563 [1974]). Accordingly, plaintiffs stated a claim for disparate treatment based on national origin pursuant to the City HRL, and we deny the motion as to that claim.

We also find that plaintiffs failed to plead a disparate impact claim in their complaint, and thus cannot be granted summary judgment on such a claim. Specifically, plaintiffs did not allege that HRA's policies or practices had a significantly adverse or disproportionate impact on LEP individuals, but only that failure to provide language services discriminated against them individually based on their national origin (*see* Administrative Code § 8-107[17]; *Tsombanidis v West Haven Fire Dept.*, 352 F3d 565 [2nd Cir 2003]). In any event, there appear to be questions regarding whether any of the plaintiffs suffered an injury, as they either received benefits from HRA, were ineligible for benefits or make no claim for lost benefits.

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

ENTERED: MAY 19, 2015

CLERK

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

15148 The People of the State of New York, Ind. 727/86
Respondent,

-against-

William Simmons,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about June 24, 2011, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's challenges to his adjudication are unpreserved, and we decline to review them in the interest of justice. In any event, we find that the court properly applied the presumptive override for causing the death of a victim, "which results in a level three adjudication independent of any point assessments" (*People v Rivera*, 123 AD3d 639, 639 [1st Dept 2014]), that there is no basis for a downward departure, and that the court properly exercised its discretion in declining to rule on matters it

considered academic (*see People v Pedraja*, 49 AD3d 325 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]). Moreover, even if, as defendant contends, his correct point score is only 70, we would still find no basis for a modification of the adjudication.

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

ENTERED: MAY 19, 2015

CLERK

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

15150- Index 100889/10
15150A Cesar N. Ladignon, et al., 590379/10
Plaintiffs-Respondents,

-against-

Lower Manhattan Development Corporation,
Defendant,

Bovis Lend Lease LMB, Inc.,
Defendant-Appellant-Respondent,

R&J Construction Corp.,
Defendant-Respondent-Appellant,

Gramercy Wrecking & Environmental
Contractors, Inc.,
Defendant-Respondent.

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Bovis Lend Lease LMB, Inc.,
Third-party Plaintiff-Appellant-Respondent,

-against-

Paradise Electrical Energy
Contractors, Inc., et al.,
Third-party Defendants-Respondents,

R&J Construction Corp.,
Third Party Defendant-Respondent-Appellant.

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Newman, Myers, Kreines, Gross, Harris, P.C., New York (Patrick M. Caruana and Olivia M Gross of counsel), for appellant-respondent.

Law Office Of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent-appellant.

The Perecman Firm, PLLC, New York (Peter D. Rigelhaupt of counsel), for Ladignon respondents.

Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for Gramercy Wrecking & Environmental Contractors, Inc, respondent.

Milbert Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Paradise Electrical Energy Contractors, Inc., respondent.

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 17, 2013, which, insofar as appealed from, granted the motion of defendant Gramercy Wrecking & Environmental Contractors, Inc. (Gramercy) for summary judgment dismissing the complaint and all cross claims and third-party claims against it, denied the motion of defendant Bovis Lend Lease LMB (Bovis) for summary judgment dismissing the complaint as against it and for summary judgment on its third-party claims, and denied the motion of defendant R&J Construction (R&J) for summary judgment dismissing all cross claims and third-party claims as against it, unanimously affirmed, without costs.

Plaintiff Cesar Ladignon was working as an inspector for the demolition of a building when, while walking down a flight of stairs, he slipped and fell on a broken light bulb and nails that were left in the stairway. He commenced this action against Bovis, the construction manager, and three of the subcontractors, R&J, Gramercy and Paradise Electrical Energy Contractors,

alleging, among other things, violations of Labor Law § 200 and § 241(6). Bovis commenced a third-party action for indemnification and contribution from the subcontractors.

On the various motions for summary judgment, the court correctly found that there was no evidence that Gramercy, the subcontractor responsible for cleaning up debris, created or had notice of the defective condition of the staircase. Gramercy was responsible for cleaning up the debris on the site either at the end of a subcontractor's project, at the end of a shift, or as directed by Bovis. Plaintiff's accident occurred at approximately 8:45 a.m., and Gramercy had performed its cleaning functions at the end of the previous day and there is no evidence that it ignored a directive to clean. Accordingly, the action and third-party action were properly dismissed as against Gramercy.

There are, however, triable issues concerning whether Bovis may be liable for plaintiff's fall and thus, the court properly declined to dismiss the common-law negligence and Labor Law § 200 and § 241(6) claims as against it. There are triable issues as to constructive notice of the defective condition of the staircase since the record is unclear as to when the staircase was last inspected prior to plaintiff's fall. Moreover, Bovis's

argument that there is no viable Labor Law § 241(6) claim, is unavailing. Plaintiff slipped on debris in a work area (*see* 12 NYCRR 23-1.7[e]), and plaintiff, a demolition inspector, was "within the class of persons that Labor Law § 241(6) was intended to protect" (*McNeill v LaSalle Partners*, 52 AD3d 407, 409 [1st Dept 2008]).

Furthermore, the record presents triable issues of fact as to whether the electrical (Paradise) and carpentry (R&J) subcontractors may be required to indemnify Bovis or contribute to the payment of plaintiffs' claims. Neither subcontractor has sufficiently demonstrated that the debris upon which plaintiff slipped could not have come from their work (*see generally Raquet v Braun*, 90 NY2d 177 [1997]; *see Mitchell v Fiorini Landscape*, 284 AD3d 313, 314-315 [2d Dept 2001]).

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

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

ENTERED: MAY 19, 2015

CLERK

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

15151N Adam Brook, M.D., etc., et al., Index 650921/12
Plaintiffs-Respondents,

-against-

Peconic Bay Medical Center, et al.,
Defendants-Appellants,

John Does 1 to 5, et al.,
Defendants.

_____

Garfunkel Wild, P.C., Great Neck (Leonard M. Rosenberg of counsel), for appellants.

Schwartz & Thomashower LLP, New York (William Thomashower of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Kapnick, J.), entered January 27, 2014, which, to the extent appealed from, granted plaintiffs' motion for reargument and, upon reargument, denied defendants' motion for a change of venue to Suffolk County, unanimously affirmed, without costs.

Contrary to defendants' contention, plaintiffs' motion was a proper motion for leave to reargue (*see* CPLR 2221[d]). Defendants failed to establish that their two alleged nonparty witnesses were not employees or otherwise within their control

(*see Gissen v Boy Scouts of Am.*, 26 AD3d 289 [1st Dept 2006]).

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

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

ENTERED: MAY 19, 2015

CLERK

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

15152N Yu-Dan Wong, Index 400977/13
Plaintiff-Respondent,

-against-

Kenneth Ming Wei Wong,
Defendant.
- - - - -
Arthur Wong,
Nonparty-Appellant.

_____

Law Offices of Dean T. Cho, LLC, New York (Dean T. Cho of counsel), for appellant.

Freshfields Bruckhaus Deringer US LLP, New York (Scott A. Eisman of counsel), and Legal Aid Society, New York (Laura A. Russell), for counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about April 8, 2014, which, to the extent appealed from as limited by the briefs, denied nonparty-appellant's (hereinafter appellant) motion to vacate Supreme Court's stay of a Civil Court holdover proceeding, unanimously affirmed, without costs.

In this action for divorce, Supreme Court providently exercised its discretion in denying appellant's motion to vacate the stay of the holdover proceeding. Appellant, defendant's brother, brought the holdover proceeding against plaintiff, defendant's wife, to remove her from a cooperative apartment she

used to share with defendant and their child. The stay is proper and did not violate appellant's due process rights, even though he is not a party to the divorce action and was not served with plaintiff's motion for a stay. Appellant had knowledge of the stay and the court was presented with sufficient evidence that he and defendant were acting together to evict plaintiff from the apartment (*see Ricatto v Ricatto*, 4 AD3d 514, 516 [2d Dept 2004]). Moreover, appellant's counsel was able to argue against the stay before and after it was issued

A stay is warranted to avoid plaintiff's eviction pending resolution of the divorce proceeding (*see Ricatto*, 4 AD3d at 515; *see also Societe Anonyme Belge D'Exploitation De La Nav. Aerienne [Sabena] v Feller*, 112 AD2d 837, 839-840 [1st Dept 1985]). Domestic Relations Law § 236(B)(5)(f) permits a court to issue an order regarding the use and occupancy of the marital home, "without regard to the form of ownership of such property." As Supreme Court noted, it has yet to be determined in the divorce action whether the apartment is marital property and, if it is, how it might be equitably distributed. Appellant has not shown that the property is not marital property, as there is evidence in the record that defendant acquired the property during his

marriage with plaintiff (*see* Domestic Relations Law § 236[1][c]; *see also Massimi v Massimi*, 35 AD3d 400, 402 [2d Dept 2006], *lv denied* 9 NY3d 801 [2007]).

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

ENTERED: MAY 19, 2015

CLERK

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

15153 & M-1582 The People of the State of New York, Ind. 24684/10

-against-

Lovenia V.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered May 7, 2012, convicting defendant, after a nonjury trial, of assault in the third degree, resisting arrest, obstructing governmental administration in the second degree, menacing and harassment in the second degree, adjudicating her a youthful offender, and sentencing her to an aggregate term of three years' probation, with community service, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility, including its evaluation of any inconsistencies. The evidence supports the

conclusions that defendant punched a school safety officer in her face, causing swelling, that the injury caused "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]), and that defendant acted with the requisite intent to cause physical injury.

We perceive no basis for reducing the sentence.

M-1582 - *People v Lovenia V.*

Motion to strike reply brief granted.

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

ENTERED: MAY 19, 2015

CLERK

CORRECTED ORDER - JUNE 11, 2015

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

15155 In re Melvin R.,
Petitioner-Respondent,

-against-

Luisanny A.,
Respondent-Appellant.

- - - - -

In re Ana R.,
Petitioner-**Respondent**,

-against-

Luisanny A.,
Respondent-Appellant.

- - - - -

In re Nagely N., and Another,

Children Under Eighteen Years
of Age, etc.,

Luisanny A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office Of Kenneth M. Tuccillo, Hastings on Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Bruce A. Young, New York, for Melvin R., respondent.

George E. Reed, Jr., White Plains, for Ana R., respondent.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for Administration for Children Services, respondent.

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

_____

Order, Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about February 28, 2014, which, after a hearing, inter alia, granted the petition of Kaylin's father, Melvin R., for custody of Kaylin, and the petition of Nagely's maternal step-great-grandmother, Ana R., for guardianship of Nagely, unanimously affirmed, without costs.

Family Court's custody and guardianship determinations have a sound and substantial basis in the record (*see Matter of Kenneth H. v Fay F.*, 113 AD3d 542 [1st Dept 2014]). The combined dispositional, custody and guardianship hearing followed the entry of an order, upon consent, finding that respondent mother (respondent) abused Kaylin and derivatively abused Nagely. The record supports the court's finding that the subject children would be at risk of harm if returned to respondent's care (*see Matter of Brianna R. [Marisol G.]*, 78 AD3d 437 [1st Dept 2010], *lv denied* 16 NY3d 702 [2010]). The court's determinations that respondent's hearing testimony was incredible and that the testimony of the other witnesses was credible are entitled to deference (*Matter of Olmsted v Boronow*, 95 AD3d 891 [2d Dept 2012]), and are supported by the record. Respondent was not forthcoming about what happened to Kaylin, and changed her story several times.

However, even under respondent's version of events, including her argument that she did not harm Kaylin intentionally, respondent

exhibited poor judgment by leaving Kaylin, then nine months old, unattended on a bed and shaking her after picking her up from the floor. Moreover, although Kaylin sustained severe, life-threatening and persistent injuries at the hands of respondent, respondent's testimony reflects that she does not appreciate the severity of what she did to Kaylin or its long-lasting effect. Thus, contrary to respondent's contention, her abuse of Kaylin cannot be considered an isolated, non-serious incident.

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

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

ENTERED: MAY 19, 2015

CLERK

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

15156 Robin Anderson, Index 304651/12
Plaintiff-Respondent,

-against-

Daren W. Thomas, et al.,
Defendants-Appellants.

_____

Adams, Hanson, Rego, & Kaplan, Yonkers (Brian L. Miller of counsel), for appellants.

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about June 27, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant Thomas allegedly struck plaintiff's car while in a supermarket parking lot. Supreme Court correctly determined that issues of fact exist as to Thomas's liability for the accident. Plaintiff testified that prior to pulling out of a parking space in the parking lot, she looked to her right and then to her left, and did not see any moving vehicles. She claims that she had already exited the parking space and was driving straight when defendants' vehicle struck the front right bumper of her vehicle. Thomas testified that he was driving five miles per hour and did

not see plaintiff's vehicle until after the accident. His wife, a passenger in their vehicle, also testified that she did not see plaintiff's vehicle until after the collision. Given defendants' testimony that they did not see plaintiff's vehicle before the collision, they failed to establish Thomas's lack of negligence (*see Thoma v Ronai*, 82 NY2d 736, 737 [1993]), or the applicability of the emergency doctrine (*see Caristo v Sanzone*, 96 NY2d 172, 174 [2001][the doctrine only applies when the defendant is faced with a "sudden and unexpected circumstance" that "leaves little or no time for thought, deliberation or consideration"]).

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

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

ENTERED: MAY 19, 2015

CLERK

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

15158 Yvette Hawthorne-King, Index 153139/12
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellant.

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

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about February 20, 2014, which granted defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she slipped and fell on exterior steps of a building owned by defendant NYCHA, when she used her foot to swipe aside a potato chip bag on one step, and then slipped on an oily substance underneath the bag.

NYCHA failed to meet its prima facie burden to show that its employees did not have constructive notice of the alleged condition. NYCHA's witness, the supervisor of caretakers, testified only as to a general cleaning routine, which did not

indicate when the exterior stairs had last been cleaned or inspected prior to the accident. The caretaker who would have inspected and cleaned the building on the day of the accident did not testify or submit an affidavit (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651, 651-652 [1st Dept 2013]; *Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412, 412 [1st Dept 2013]; *Guerrero v Duane Reade, Inc.*, 112 AD3d 496 [1st Dept 2013]). The documentary evidence submitted by NYCHA also did not establish the agency's lack of constructive notice of the alleged defect, because those records only indicated that a caretaker went up the stairs and that caretakers were working "on steps - 'A' side" about an hour and a half after plaintiff's accident, and there is no evidence that the entries referred to the accident location itself (*see Matias v Rebecca's Bakery Corp.*, 44 AD3d 429 [1st Dept 2007]).

Assuming that NYCHA met its burden of demonstrating that its employees did not create the wet or greasy condition on the steps, plaintiff raised an issue of fact through her testimony and the affidavit of her daughter, who both stated that they had seen NYCHA employees pouring liquid from buckets down the subject stairs after cleaning the building's interior on previous occasions. Further, plaintiff's daughter averred that she was

with plaintiff when she fell, and saw that the stairs were wet and that the liquid on the stairs had the same consistency and smell as the liquid that the building's porters used to clean the interior stairs. This is sufficient to raise an issue of fact as to whether NYCHA's employees caused and created the greasy condition (*see Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Contrary to NYCHA's contention, plaintiff's testimony does not establish that her conduct is the sole proximate cause of the accident. To the extent that plaintiff may have contributed to the accident by swiping the potato chip bag with her foot, rather than walking around it, the issues of contributory negligence and proximate cause are questions of fact for the jury to decide (*see Permuy v City of New York*, 156 AD2d 174, 176-177 [1st Dept 1989]).

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

ENTERED: MAY 19, 2015

CLERK

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

15159 The People of the State of New York, Ind. 9378/98
Respondent,

-against-

William Green,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Anthony J. Ferrara, J.), entered September 27, 2013, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously reversed, on the law, without costs, and the matter remanded to Supreme Court for a hearing before a different Justice.

Under the circumstances presented, the court erred in refusing to permit defendant to appear at the hearing via video conferencing (*see* Correction Law § 168-o[4]; *People v Marquez*, 124 AD3d 741 [2d Dept 2015]). We remand the matter for the court

to conduct a hearing with defendant's participation, if he chooses, in person or, given the undisputed health limitations on his ability to travel, via video conferencing.

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

ENTERED: MAY 19, 2015

CLERK

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

15160 Ana Aycardi, Index 105341/11
Plaintiff-Respondent,

-against-

Norman Robinson,
Defendant,

Town Sports International, LLC,
doing business as New York Sports Clubs,
Defendant-Appellant.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Lorraine M. Girolamo of counsel), for appellant.

The Noll Law Firm, P.C., Syosset (Richard E. Noll of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about April 28, 2014, which denied the motion of defendant Town Sports International, LLC (TSI) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that she was hit by defendant Robinson's car as she was crossing a street intersection. At the time of the accident, Robinson, a trainer for TSI, was driving his own car between two sports club locations, where he was either training clients or meeting with a manager, at the time of the alleged accident.

The motion court properly determined that TSI had not established entitlement to summary judgment dismissing the claim seeking to hold it vicariously liable for Robinson's negligent driving. TSI did not submit evidence sufficient to establish that Robinson, who worked over 40 hours a week and received a W-2 form, was merely an independent contractor, rather than an employee (*see Bynog v Cipriani Group*, 1 NY3d 193, 198-199 [2003]). Furthermore, although Robinson was driving his own car and was not required to have a car for work, his conduct occurred during the work day, while driving between work locations, which TSI reasonably could have anticipated he would do. Thus, triable issues exist as to whether Robinson was acting in furtherance of his employment and subject to TSI's control at the time of the accident (*see generally Riviello v Waldron*, 47 NY2d 297, 303 [1979]; *Lundberg v State of New York*, 25 NY2d 467, 470 [1969];

see also Palumbo v Prenga, 295 AD2d 170 [1st Dept 2002]; *Makoske v Lombardy*, 47 AD2d 284, 288 [3d Dept 1975], *affd* 39 NY2d 773 [1976]).

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

ENTERED: MAY 19, 2015

CLERK

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

15161 Rhodium Special Opportunity Fund, LLC,
Plaintiff-Appellant,

-against-

Life Trading Holdco, LLC,
Defendant-Respondent,

AXA Equitable Life Insurance Company, et al.,
Defendants.

Index 653452/13

Law Offices Of Susan R. Nudelman, Dix Hills (Susan R. Nudelman of counsel), for appellant.

Joseph Hage Aaronson LLC, New York (Gregory P. Joseph and Roman Asudulayev of counsel), for respondent.

Order, Supreme Court, New York County (Melvin L. Schweizer, J.), entered April 2, 2014, which granted defendant Life Trading Holdco, LLC's (defendant) motion to dismiss pursuant to CPLR 3211(a)(1), unanimously affirmed, with costs.

Contrary to plaintiff's assertion, the parties' confidentiality agreement was unambiguous, and by its plain language barred any claim for failing to negotiate or enter into a transaction to purchase the assets at issue, unless and until the parties had signed a definitive written agreement (*see Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 13-

14 [1st Dept 2009]). Thus, defendant's submission of the confidentiality agreement, coupled with plaintiff's failure to plead the existence of the requisite agreement, was fatal to plaintiff's complaint (*see Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 172-173 [1st Dept 2007]). The requirement of an executed, definitive written agreement was also fatal to plaintiff's claims, first asserted on appeal, of breach of the covenant of good faith (*see id.*) and promissory estoppel (*Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [1st Dept 2005]).

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

ENTERED: MAY 19, 2015

CLERK

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

15162- Ind. 2041/10
15162A The People of the State of New York, SCI 3820/11
Respondent,

-against-

Anthony Powell,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about April 3, 2012,

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

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

ENTERED: MAY 19, 2015

CLERK

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

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

15163 In re Timothy Bergin, Index 101247/13
Petitioner,

-against-

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

_____

Strazzullo Law Firm PC, Brooklyn (Salvatore E. Strazzullo of counsel), for petitioner.

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

_____

Determination of respondent Police Commissioner, dated May 20, 2013, which dismissed petitioner from his position as a New York City police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered December 12, 2013), dismissed, without costs.

Substantial evidence supports the findings that petitioner committed larceny by withdrawing money from his girlfriend's bank account without consent; that he made false statements in an accident report; and that he had an unapproved absence and made false statements regarding a separate purported approval of an absence (*see generally 300 Gramatan Ave. Assoc. v State Div. of*

Human Rights, 45 NY2d 176, 180-181 [1978]). There exists no basis to disturb the credibility determinations of the Deputy Commissioner of Trials (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Given the seriousness of the sustained charges, and inasmuch as respondent Commissioner "is accountable to the public for the integrity of the Department," the penalty of termination does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001] [internal quotation marks omitted]).

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

ENTERED: MAY 19, 2015

CLERK

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

15164 The People of the State of New York Ind. 3378/07
Respondent,

-against-

Robert Denis,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at motion; Peter Benitez, J. at hearing, jury trial and sentencing), rendered March 2, 2011, convicting defendant of manslaughter in the first degree, attempted assault in the first degree, three counts of attempted assault in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 26⅓ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence disproved defendant's justification defense beyond a reasonable doubt.

The court correctly denied defendant's motion for a *Dunaway* hearing on the ground that it was not supported by sufficient factual allegations, given the information available to defendant (*see People v Lopez*, 5 NY3d 753 [2005]; *People v Mendoza*, 82 NY2d 415 [1993]). Defendant's motion only addressed his allegedly innocent behavior at the time of his arrest, although he was well aware that he had been arrested for an earlier homicide. Additionally, we conclude that at a hearing on defendant's other suppression claims, the hearing court properly exercised its discretion in declining defendant's request to expand the hearing to include the issue of probable cause.

We do not find the sentence excessive.

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

ENTERED: MAY 19, 2015

CLERK

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

15165 The Argo Corporation, Index 400166/11
Plaintiff-Appellant,

-against-

Admiral Indemnity Company, et al.,
Defendants-Respondents.

_____

The Abramson Law Group, PLLC, New York (Howard Wintner of counsel), for appellant.

Law Offices of Arnold Stream, New York (Arnold Stream of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia Kern, J.), entered April 10, 2014, which granted defendants' (Admiral) motion for summary judgment declaring that they have no duty to defend or indemnify plaintiff in the underlying action, unanimously affirmed, with costs.

In determining whether notice should be provided, the test is not whether the insured will ultimately prevail as to liability, or believes it will prevail. The test is whether from the information available relative to the accident, "'an insured could glean a reasonable possibility of the policy's involvement'" (*Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307 [1st Dept 2008]). Despite Argo's contention that its relations with the underlying plaintiff's attorney were

cordial, Argo's receipt of an October 14, 2008 letter wherein the attorney explicitly mentioned bringing suit put Argo on notice that the damage to the underlying plaintiff's apartment could result in a claim, and Argo's failure to notify Admiral until March 19, 2009 constituted untimely notice pursuant to the policy.

Argo's belief of nonliability was not reasonable under the circumstances. Equally unavailing is Argo's claim that "loss run" reports issued by the condominium's former insurer constituted notice to Admiral, as an insured's obligation to provide notice is not excused if an insurer has received notice from another insured or an independent source (*see American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373, 373 [1st Dept 1998]).

None of the cases cited by plaintiff actually holds that an insurer waives coverage defenses by merely seeking an extension of time to answer the complaint.

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

ENTERED: MAY 19, 2015

CLERK

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

15166 Ricardo Hausmann, Index 650038/12
Plaintiff-Appellant,

-against-

United States Life Insurance, et al.,
Defendants-Respondents.

_____

Moreira and Associates PLLC, Rahway (Sheila Moreira of counsel), for appellant.

Fishkin Lucks LLP, New York (Steven M. Lucks of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered January 29, 2014, which granted defendants' motion for entry of judgment in their favor, and directed the Clerk to enter judgment dismissing the complaint with prejudice, unanimously affirmed, without costs.

The court correctly directed entry of judgment in favor of defendants, because no claims remained in this action. Although, in a prior order entered May 3, 2012, the court severed and continued the breach of contract cause of action, in its underlying decision, which is controlling (*see Madison III Assoc. Ltd. Partnership v Brock*, 258 AD2d 355, 355 [1st Dept 1999]; *Curry v Curry*, 14 AD3d 646, 647 [2d Dept 2005]), it stated that it was dismissing the cause of action except with respect to

plaintiff's claim for post-termination compensation. That post-termination compensation claim was subsequently discontinued by stipulation entered August 21, 2013. Because plaintiff never appealed from the order entered May 3, 2012, he is bound by the underlying decision (*see Fusco v Kraumlap Realty Corp.*, 1 AD3d 189, 193 [1st Dept 2003] [the correctness of the Housing Court's decision and order was not before this Court, where the order was never appealed]).

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

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

ENTERED: MAY 19, 2015

CLERK

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

15167- Ind. 966/11
15167A The People of the State of New York, 4583/12
Respondent,

-against-

Noland Ramos,
Defendant-Appellant.

_____

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

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

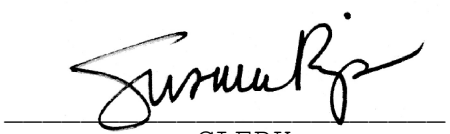
_____

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about March 5, 2013, and an order, same court and Justice, entered March 5, 2013,

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

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

ENTERED: MAY 19, 2015



CLERK

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

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

15170 Murray Schwartz, Index 150229/12
Plaintiff-Respondent, 157070/12

-against-

Hotel Carlyle Owners Corporation, et al.,
Defendants-Appellants,

New World Development Co.,
Defendant.

[And Another Action]

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants.

Davidoff Hutcher & Citron, LLP, New York (Malcolm S. Taub of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 11, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claim for breach of the covenant of quiet enjoyment against defendant Hotel Carlyle Owners Corporation (Hotel) and his claims for trespass, conversion and punitive damages against all defendants, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff, the owner of a residential suite in the Carlyle

Hotel, alleges that, following a water leak that occurred in July 2011, the Hotel's agents trespassed in his apartment and converted specified items of personal property, and that the Hotel breached the covenant of quiet enjoyment in the proprietary lease.

Defendants demonstrated entitlement to dismissal of the trespass claim because the proprietary lease for the apartment permits the Hotel to enter the apartment for purposes of assessing leak damage and making repairs. Defendants further demonstrated that their agents left the apartment as soon as plaintiff objected. Since the essence of a trespass is intentional entry onto the property of another without justification or permission (*see Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 855 [2d Dept 2012]), plaintiff's allegations that the Hotel's agents mishandled his drapery and otherwise exacerbated the conditions caused by the leak do not support a trespass claim.

With respect to the conversion claim, defendants demonstrated an absence of any evidence that any of them, as opposed to plaintiff's own agents, were responsible for taking plaintiff's personal property or that they were currently in possession of it (*see Republic of Haiti v Duvalier*, 211 AD2d 379,

384 [1st Dept 1995]). Defendants also demonstrated that plaintiff received full compensation from his insurer for the value of all items that he claimed were missing, and plaintiff provided no evidence in opposition to raise an issue of fact as to any additional uncompensated loss (*see Will of Rothko*, 56 AD2d 499, 503 [1st Dept 1977], *affd* 43 NY2d 305 [1977]).

As for plaintiff's remaining claim, in actions for damages for breach of the covenant of quiet enjoyment, a tenant must show an ouster, or if the eviction is constructive, an abandonment of the premises (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). Constructive or actual eviction requires that "there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). Significantly, plaintiff's negligence claim against the Hotel was previously dismissed, and he does not allege that the Hotel caused the water damage, but only that its agents caused some additional harm to personal property after the flood and that the Hotel delayed his ability to make repairs.

Defendants submitted an affidavit of the Hotel's director of finance with invoices demonstrating that plaintiff was credited with a rent abatement from August 2011 through April 2012, and

that plaintiff thereafter failed to make any payments of monthly maintenance pursuant to the proprietary lease. Defendants also demonstrated that plaintiff received compensation from his insurer for additional living expenses while the apartment was uninhabitable, even though his primary and secondary residences are elsewhere, and that any delays in completing repairs to the apartment after April 2012 were not due to any unreasonable conduct on the part of the Hotel. In opposition to defendants' prima facie showing, plaintiff provided no evidence that he had any uncompensated damages resulting from his inability to resume residence after the flood, and did not raise an issue of fact as to whether any wrongful act on the part of the Hotel prolonged his alleged inability to resume residence (*see Barash*, 26 NY2d at 82).

In any event, plaintiff's failure to pay rent "constitutes an election of remedies," so that he has no claim for damages (*Frame v Horizons Wine & Cheese*, 95 AD2d 514, 518 [2d Dept 1983]; *see Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]). This legal argument, raised by defendants on appeal, appears on the face of the record and can therefore be reviewed (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]).

Plaintiff's claim for punitive damages does not survive the dismissal of the substantive claims and, in any event, is insufficient since he has not alleged or provided any evidence that defendants acted in a morally reprehensible manner (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]).

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

ENTERED: MAY 19, 2015

CLERK

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

15171 138-140 West 32nd Street Associates LLC, Plaintiff-Appellant, Index 152064/13

-against-

138-140 West 32nd Street Associates, etc., et al., Defendants-Respondents.

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellant.

Schwartz & Blumenstein, New York (Clifford Schwartz of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 25, 2014, which, to the extent appealed from, granted defendant's motion to dismiss the causes of action for specific performance and a declaratory judgment and cancel the notice of pendency, unanimously reversed, on the law, without costs, and the motion denied.

Defendants moved to dismiss on the ground of a defense founded upon documentary evidence (CPLR 3211[a][1]). They submitted the 1981 deed indicating that defendants Joseph Simhon and David Simhon purchased, in their individual capacities, one of the properties (Parcel No. 1) that defendant partnership purported to sell under the purchase and sale agreement (the

contract) to show that the partnership did not own Parcel No. 1 and that therefore Joseph's signature alone, as a general partner of the partnership, on the contract was insufficient to convey the property and to bind David. However, the deed does not conclusively establish that the partnership did not own Parcel No. 1; there is circumstantial evidence that the partnership was intended to be the owner and that Parcel No. 1 was treated, along with Parcel No. 2, as property of the partnership (*see e.g. Wiener v Spahn*, 110 AD3d 443 [1st Dept 2013]).

Nor does plaintiff's failure to tender the down payment at the time of the execution of the contract warrant dismissal since an issue of fact exists whether defendants waived immediate tender of the down payment or acquiesced in the late tender. The complaint alleges that at the time of the execution of the contract, Joseph indicated that he would obtain David's signature and deliver it to plaintiff and that he would take the down payment from plaintiff at that time.

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

ENTERED: MAY 19, 2015

CLERK

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

15172N Howard Simson, Index 106136/10
Plaintiff-Appellant-Respondent,

-against-

Cushman & Wakefield, Inc., et al.
Defendants-Respondents-Appellants.

_____

Markewich and Rosenstock LLP, New York (Lawrence M. Rosenstock of counsel), for appellant-respondent.

Arthur R. Lehman, L.L.C., New York (Arthur R. Lehman of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 21, 2013, which, to the extent appealed and cross-appealed from, directed that a new arbitration proceeding be held before a different panel at which plaintiff would have the right to call and cross-examine witnesses, unanimously modified, on the law, to delete so much of the order as directed that plaintiff have the right to call and cross-examine witnesses, and as so modified, affirmed, without costs.

Plaintiff surrendered any right to call or cross-examine witnesses in the arbitration by entering into an arbitration agreement waiving such rights, and further, by participating in the arbitration proceeding without objection (CPLR 7506[f]; *Matter of American Ins. Co. [Messinger – Aetna Cas. & Sur. Co.]*,

43 NY2d 184, 191-192 [1977]). Consistent with defendant Cushman & Wakefield's arbitration procedures for resolving disputes between brokers, it is in the sole discretion of the arbitrators to determine whether the parties shall appear, or whether testimony or additional evidence is required.

Similarly, plaintiff has waived his assertion that any arbitration panel composed of Cushman & Wakefield employees is impermissible, by agreeing to the arbitration provisions, and by failing to appeal from a prior order of the court granting defendants' motion to arbitrate, and instead proceeding to arbitration, without further objection. Based on the foregoing, plaintiff was not deprived of due process by proceeding in arbitration, rather than in the courts.

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

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

ENTERED: MAY 19, 2015

CLERK

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

15173N Remy M. Foussard, Index 100154/10
Plaintiff-Appellant,

-against-

Emee Olarte-Foussard,
Defendant-Respondent.

_____

Hantman & Associates, New York (Robert J. Hantman of counsel), for appellant.

Law Offices of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 13, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgement dismissing the malicious prosecution cause of action, unanimously affirmed, without costs.

Dismissal of the malicious prosecution claim was warranted where the record, including plaintiff's threatening emails to defendant, demonstrates that the criminal proceeding against him did not lack probable cause (*see generally Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]). Furthermore,

defendant, a civilian, did not initiate the criminal proceeding, but merely conveyed information to the authorities (*see Moorhouse v Standard, N.Y.*, 124 AD3d 1, 7-8 [1st Dept 2014]).

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

ENTERED: MAY 19, 2015

CLERK