SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 1, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13502 The People of the State of New York, Ind. 821/08
Respondent,

-against-

Anthony Lewis,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 4, 2011, convicting defendant, after a jury trial, of enterprise corruption, scheme to defraud in the first degree, grand larceny in the fourth degree (three counts), and attempted grand larceny in the fourth degree, and sentencing him to an aggregate term of 7 to 21 years, unanimously affirmed.

Defendant did not preserve his claim that the evidence was legally insufficient to prove the criminal enterprise element of enterprise corruption, and we decline to review it in the

interest of justice. As an alternative holding, we reject it on the merits. Defendant's claim that he served the dominant role in perpetrating the crimes, thus preventing the enterprise from continuing in his absence, is no defense to enterprise corruption (*see People v Keschner*, 110 AD3d 216, 221-225 [1st Dept 2013], *affd* 25 NY3d 704 [2015]). We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

In this case involving extortion directed at construction contractors, the court providently exercised its discretion in admitting evidence of more than 100 calls to New York City's 311 system complaining of purported safety violations and fire hazards at construction sites. The evidence that defendant or his accomplices had made voluminous complaints of that type, not pertaining to any specifically charged victims, was directly relevant to establishing defendant's ongoing course of conduct beyond the specific pattern acts for purposes of the enterprise corruption and scheme to defraud counts. The evidence was also properly admitted to show defendant's motive and intent with respect to the counts alleging grand larceny by extortion against specific victims (*see People v Alvino*, 71 NY2d 233 [1987]; *People v Peckens*, 153 NY 576, 592-593 [1897]). The probative value of

this evidence exceeded any prejudicial effect (*see People v Mateo*, 2 NY3d 383, 424-425 [2004], *cert denied* 542 US 946 [2004]). In any event, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant failed to preserve his purported due process challenge to the admission of the 311 complaints (which amounts to a state evidentiary claim that is not of constitutional dimension), or his contention that the prejudicial effect was compounded by the prosecutor's references to the 311 complaints in summation. We decline to review these unpreserved arguments in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 1, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Gische, JJ.

15532 Cantor Fitzgerald & Co., Index 156559/14
Plaintiff-Respondent,

-against-

8an Capital Partners Master Fund, L.P., et al.,
Defendants,

Philip Eytan,
Defendant-Appellant.

_____

David Bolton, P.C., Garden City (David Bolton of counsel), for appellant.

Cantor Fitzgerald & Co., New York (Michael S. Popok of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered January 16, 2015, which denied defendant Philip Eytan's motion to dismiss the complaint as against him, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The motion court should have granted defendant's motion. The complaint alleges that defendant knew of and participated in the alleged fraudulent transfer of assets but fails to allege that he is the transferee, and further fails to allege, in anything other than conclusory fashion, that he benefited from

the transfer, as required to state a cause of action for fraudulent conveyance (Debtor and Creditor Law §§ 273, 276; *Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]; *Symbax, Inc. v Bingaman*, 219 AD2d 552, 553-554 [1st Dept 1995]). Moreover, while defendant is an officer of both defendant transferor and transferee corporations, "receipt of a salary from the transferee corporation as an officer of the corporation is not sufficient to render the officer a transferee or beneficiary of the transfer" (*D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452-453 [1st Dept 2013] [internal quotation marks and citation omitted]). As there are no other nonconclusory allegations sufficient to hold defendant individually liable for the fraudulent transfer, the complaint should be dismissed as against him (see *Riback v Margulis*, 43 AD3d 1023, 1023 [2d Dept 2007]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15743 The People of the State of New York, Ind. 3863/12
Respondent,

-against-

Lamont Thompson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about May 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: OCTOBER 1, 2015

CLERK

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

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15744 Terri Kornicki, Index 304097/10
Plaintiff-Appellant,

Marshall Kaminer, et al.,
Plaintiffs,

-against-

Rubin Shur, etc.,
Defendant-Respondent.

_____

Law Office of Samuel E. Bartos, New York (Samuel E. Bartos of counsel), for appellant.

Terri Kornicki, appellant pro se.

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about October 5, 2012, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

The allegations set forth in the complaint, as supplemented by the allegations in plaintiff Kornicki's affidavit submitted in opposition to the motion, fail to adequately state a claim for negligent infliction of emotional distress or breach of duty. Plaintiffs allege that defendant, among other things, called plaintiff Kornicki a "criminal" in front of her children while

they were visiting Kornicki's mother, and attempted to coerce her into paying money to settle a family dispute. These allegations do not set forth conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993][internal quotation marks omitted]; *Goldstein v Massachusetts Mut. Life Ins. Co.*, 60 AD3d 506, 508 [1st Dept 2009], *lv denied* 12 NY3d 714 [2009][internal quotation marks omitted]). Further, the allegations that defendant was a court-appointed guardian for Kornicki's mother do not provide a basis for finding that he owed a "heightened" duty toward Kornicki and her children. Even if defendant had a duty toward Kornicki, there is no allegation that his breach of that duty endangered Kornicki's physical safety or caused Kornicki to fear for her safety (*see Ferreyr v Soros*, 116 AD3d 407, 407 [1st Dept 2014]). Any physical harm that Kornicki suffered was due to her own actions.

The plaintiff children's claims for negligent infliction of emotional distress are inadequately pleaded, as there are no allegations that they observed a family member's death or serious injury while in the zone of danger (*see Coleson v City of New*

York, 24 NY3d 476, 483 [2014]).

Because all of the substantive claims were properly dismissed, the derivative loss of consortium claim asserted by plaintiff Kaminer also fails to state a claim (*see Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15745 In re Mary P.,
Petitioner-Respondent,

-against-

Joseph T.P.,
Respondent-Appellant.

_____

Law Office of John M. Zenir, Westbury (John M. Zenir of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about March 10, 2014, which denied respondent's objections to the order entered on or about January 7, 2014 (Support Magistrate Paul Ryneski), denying his motion to vacate a modified support order, entered on or about June 1, 2004, as to arrears, and a January 2002 money judgment for arrears, and dismissed his petition, unanimously affirmed, without costs.

Family Court properly denied respondent's objections to the support magistrate's determination that there was no basis for vacatur of his child support arrears.

A child born during marriage is presumed to be the legitimate child of the marriage (*see* Domestic Relations Law §

24; Family Court Act § 417; *Matter of Findlay*, 253 NY 1, 7 [1930]). Respondent acknowledged that he knew in December 1985, immediately after the child's birth, that he was not the child's biological father. However, he took no affirmative steps to rebut the presumption of legitimacy at any time prior to April 2006, when, relying on the divorce court's finding that there were no children of the marriage, he sought to vacate the support order as to arrears and the money judgment for arrears. The law is well settled that child support arrears cannot be modified retroactively (*see Matter of Dox v Tynon*, 90 NY2d 166, 173-174 [1997]). "Under Family Court Act § 451, the court has no discretion to cancel, reduce or otherwise modify child support arrears accrued prior to the making of an application for such relief" (*Matter of Zaid S. v Yolanda N.A.A.*, 24 AD3d 118 [1st Dept 2005]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15747 The People of the State of New York, Ind. 5447/09
Respondent,

-against-

Luis Garcia,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at hearing; Renee A. White, J. at plea and sentencing), rendered May 22, 2012, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 2½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

The police recovered drugs from defendant pursuant to a search incident to an arrest supported by probable cause. The court's finding of probable cause was supported by an officer's

testimony regarding her observation, in a drug-prone location, of a suspicious exchange between defendant and another man of a small object for money, which included defendant weighing the object. Based on the officer's training and experience, she recognized the overall pattern of behavior as characteristic of a drug transaction, regardless of whether the object was specifically recognizable as drug packaging (*see People v Jones*, 90 NY2d 835, 837 [1997]; *People v James*, 83 AD3d 504, 504 [1st Dept 2011], *lv denied* 17 NY3d 817 [2011]; *People v Schlaich*, 218 AD2d 398 [1st Dept 1996], *lv denied* 88 NY2d 994 [1996]). The officers who performed the actual arrest and search received the information from the officer in the observation post, and were entitled to rely on that information pursuant to the fellow officer rule (*see People v Ketcham*, 93 NY2d 416, 419 [1999]).

The evidence also supports the conclusion that the search was "incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not" {*People v Reid*, 24 NY3d 615, 619 [2014]), and the clear import of the hearing court's decision is that it made such a finding. There was no evidence that the police formed the intent to arrest defendant only after they conducted their search. Instead, it is evident that at the time the officers approached defendant, they intended

to arrest him based on probable cause to believe he had acquired contraband during the apparent drug transaction observed by their fellow officer.

Defendant claims that the drugs should have been suppressed as the fruit of a statement that was suppressed by the hearing court for lack of *Miranda* warnings and that included defendant's consent to a search of his person. Defendant failed to preserve this specific claim (*see People v Wright*, 68 AD3d 573, 574 [1st Dept 2009], *lv denied* 14 NY3d 774 [2010]), and we decline to review it in the interest of justice. As an alternative holding, we find that it is unsupported by the hearing evidence, which clearly establishes that the search was not based on defendant's consent, or any other statement by defendant, but on probable cause that preexisted any statements. We find it unnecessary to reach the issue of whether, given United States Supreme Court

authority to the contrary (*see United States v Patane*, 542 US 630 [2004]), physical evidence may be suppressed as fruit of a *Miranda* violation.

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15749 In re Marilyn C.,
Petitioner-Appellant,

-against-

Olsen C.,
Respondent-Respondent.

_____

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

Law Offices of Gary Schultz, New York (Gary Schultz of counsel), for respondent.

_____

Order, Family Court, New York County (Monica Shulman, Referee), entered on or about October 15, 2014, which, after a fact-finding hearing in a proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition for an order of protection, unanimously affirmed, without costs.

In a family offense proceeding, "a petitioner must prove the allegations by a fair preponderance of the evidence" (*Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]; Family Ct Act § 832). "A hearing court's determination is entitled to great deference because the hearing court has the best vantage point for evaluating the credibility of the witnesses. Its determination should therefore not be set aside unless it lacks a sound and substantial evidentiary basis" (*Matter of Melind M.* at

555; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

Here, the Family Court properly dismissed the petition. Petitioner failed to establish by a preponderance of the evidence that respondent committed acts constituting harassment in the second degree or warranting issuance of an order of protection. The evidence demonstrated no more than disputes between an estranged couple concerning household expenses, use of electricity, and similar matters. There is no basis to disturb the Family Court's credibility determinations.

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15750 The People of the State of New York, Ind. 3256/09
Respondent,

-against-

Anthony Hatcher,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about December 16, 2011, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act, unanimously affirmed, without costs.

The court properly assessed 10 points under the risk factor for acceptance of responsibility, because defendant's contradictory statements, admitting and denying his guilt, demonstrated a lack of genuine acceptance (*see People v Williams*, 96 AD3d 421, 422 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; *see also People v Mosley*, 106 AD3d 1067 [2d Dept 2013], *lv denied* 22 NY3d 854 [2013]).

Regardless of whether the court properly assessed points

under the acceptance of responsibility factor, the record supports the court' s alternative finding that a discretionary upward departure was warranted. Even without the points disputed on appeal, defendant's point score is nearly enough for a level three adjudication. The risk assessment instrument did not adequately account for the significant risk of recidivism indicated by defendant's serious criminal history (*see e.g. People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15751 The People of the State of New York, Ind. 4727/11
Respondent,

-against-

Gregory Winters,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered August 13, 2013, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly exercised its discretion in declining to grant what defense counsel characterized as a "long" adjournment, during trial, for the purpose of making efforts to obtain video footage allegedly depicting events that transpired immediately before the events depicted on a hotel surveillance videotape introduced by the People. None of the factors discussed in *People v Foy* (32 NY2d 473 [1973]) weighed in favor of the adjournment; in particular, there was no reason to believe that

the additional footage would have corroborated defendant's defense or that it was otherwise material to the case.

The court properly concluded that it lacked authority to grant defendant's request for an order permitting defense access to private premises for investigatory purposes (*see Kaplan v Tomei*, 224 AD2d 530 [2d Dept 1996]). In any event, defendant has not demonstrated that such access would have aided his defense.

The court properly received evidence of a statement made to a hotel employee. This evidence was relevant to provide background information to explain the employee's actions and his pursuit of defendant (*see People v Tosca*, 98 NY2d 660 [2002]).

Defendant failed to preserve his constitutional arguments regarding the denial of his requests for an adjournment and an access order, his claim that the court should have issued a limiting instruction regarding the statement received as background information, or any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. We also find, with regard to both the preserved and unpreserved issues, that any errors were harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15752- Index 650891/13
15753-
15754 In re Kim Rand, also known as
Kim Rand Chaves.,
Petitioner-Respondent,

-against-

610 Smith Street Corporation, et al.,
Respondents-Appellants.

_____

Jones Day, New York (Meir Feder of counsel), for appellants.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 15, 2014, inter alia, awarding petitioner a sum of money for the fair value of her shares in respondent 610 Smith Street Corporation, and awarding her fees and expenses, unanimously affirmed, with costs.

The trial court's valuation of petitioner's shares in respondent 610 Smith Street Corporation is amply supported by the record (*see Matter of Cohen v Four Way Features*, 240 AD2d 225 [1st Dept 1997]). The court was not bound to accept respondents' expert's estimate of $6.1 million for the environmental remediation of the corporation's sole asset, a commercial warehouse in Brooklyn, for which there is no other basis in the

record; the court's finding that $1 million is the correct estimate is supported by the trial evidence. The trial court properly awarded fees and costs to petitioner pursuant to Business Corporation Law § 623(h)(7).

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

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15755 In re James S.,
Petitioner-Appellant,

-against-

Rosemide D.,
Respondent-Respondent.

_____

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

_____

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about April 29, 2014, which, after a fact-finding hearing, dismissed the petition for an order of protection, unanimously affirmed, without costs.

The petition was properly dismissed because the allegations that respondent committed acts that would constitute family offenses were not supported by a preponderance of the evidence

(*see* Family Ct Act § 832). There is no basis for disturbing the court's credibility determinations (*see Matter of Nicole R.S. v Troy Kenneth Brian L.*, 128 AD3d 597 [1st Dept 2015]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15757 Michael Offit, et al., Index 157768/14
Plaintiffs-Appellants,

-against-

Julian Maurice Herman,
Defendant-Respondent.

_____

Akin Gump Strauss Hauer & Feld LLP, New York (Sean O'Donnell of counsel), for appellants.

Akerman LLP, New York (M. Darren Traub of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 15, 2014, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

Plaintiffs contend that a memorandum of understanding (MOU) that they and defendant signed was a "Type II" agreement under federal case law, requiring defendant to negotiate in good faith to finalize a settlement of various lawsuits among the parties. The New York Court of Appeals has rejected "the rigid classification into 'Types'" in favor of asking "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d

209, 213 n 2 [2009]). The MOU says that the parties have reached an "agreement in principle, subject to documentation acceptable to the parties and court approval." Moreover, in prior motion practice, counsel for plaintiff Rosemarie Herman admitted that the MOU was merely "an agreement to agree." Thus, the MOU is not an enforceable contract, and the motion court correctly dismissed the complaint (*see e.g. Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423 [1st Dept 2010]), *lv denied* 15 NY3d 704 [2010]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288 [1st Dept 2003]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15758 The People of the State of New York, Ind. 525/05
Respondent,

-against-

Geral Jiminez,
Defendant-Appellant.

_____

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

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

_____

Appeal from judgment, Supreme Court, New York County (Michael Obus, J.), rendered November 2, 2007, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 17 years to life, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

As the court did not warn defendant of the deportation consequences of his guilty plea, he should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*People v Peque*, 22 NY3d 168, 198 [2013], *cert denied*

__ US __, 135 S Ct 90 [2014]). Accordingly, we remit for the remedy set forth in *Pegue* (22 NY3d at 200-201), and hold the appeal in abeyance for that purpose (*see People v Fermin*, 123 AD3d 465 [1st Dept 2014]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15759 In re Khalil S.,

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

_____

Larry S. Bachner, Jamaica, for appellant.

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

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about December 16, 2014, which, upon appellant's admission that he violated the conditions of his probation, vacated an order of disposition entered on or about January 8, 2014 that had placed him on probation for 18 months, and instead placed him with the Administration for Children's Services Close to Home program for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in placing appellant in nonsecure detention rather than restoring him to probation (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The court properly based this disposition on, among other things, appellant's poor school disciplinary and attendance record, his

numerous missed curfews, his parents' inability to enforce his curfew or other probation conditions, his termination from a therapeutic program, and the Mental Health Study's recommendation for a nonsecure placement.

Appellant's claim that the Family Court failed to conduct a proper dispositional hearing is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15760-
15760A Zetlin & De Chiara LLP,
Plaintiff-Respondent,

-against-

Gene Kaufman Architect, P.C., et al.,
Defendants-Appellants,

Robert Siegel,
Defendant.

Index 153859/12

_____

Dwayne Shivnarain, New York, for appellants.

Zetlin & De Chiara LLP, New York (Jaimee L. Nardiello of counsel), for respondent.

_____

Amended order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 14, 2014, which, to the extent appealed from, granted plaintiff's motion for summary judgment on its account stated cause of action, and amended order, same court and Justice, entered December 11, 2014, which denied defendants-appellants' motion for renewal and, upon reargument, adhered to its original determination, unanimously affirmed, with costs.

Plaintiff law firm made a prima facie showing of an account stated through, among other things, its submission of an affirmation of its special counsel stating that plaintiff sent each of its 21 invoices for the period of April 2011 to February

2012 to defendants using regular mailing procedures, and that defendants never objected to or returned the invoices (*see Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 294-295 [1st Dept 1996]). Even if no payments were applied to these invoices, defendants' mere reference to a subsequent settlement agreement noted in the complaint, without more, is conclusory and insufficient to raise a triable issue of fact as to whether they objected to the payments within a reasonable time (*see M&R Constr. Corp. v IDI Constr. Co., Inc.*, 4 AD3d 130, 130 [1st Dept 2004]).

The court correctly denied defendants' motion to renew, since the purportedly new material was available on plaintiff's prior motion and defendants did not offer a reasonable justification for failing to present the material at the time of that motion (*see C.R. v Pleasantville Cottage School*, 302 AD2d 259, 260 [1st Dept 2003]). Although the denial of a motion to reargue is generally not appealable as of right, because the court addressed the merits, it effectively granted the motion and correctly adhered to its original determination (*see Lipsky v Manhattan Plaza, Inc.*, 103 AD3d 418, 419 [1st Dept 2013]). Even if the court misconstrued the applicability of a 2005 retainer agreement, defendants offered nothing but conclusory allegations

that were insufficient to raise a triable issue of fact.

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: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15761 The People of the State of New York, Ind. 2288/12
Respondent,

-against-

Gadriele Brown,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at plea; A. Kirke Bartley, J. at sentencing), rendered April 3, 2013, convicting defendant of attempted robbery in the second degree, and sentencing him to a term of two years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing for an express youthful offender determination

(*see People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15763 The People of the State of New York, Ind. 1534/12
Respondent,

-against-

Jose Rojand,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered December 7, 2012, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of six months, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing for an express youthful offender determination

(*see People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15764 The People of the State of New York, Ind. 2426/13
Respondent,

-against-

Michael A. Betances,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about October 3, 2013, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 1, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15765 In re Kelly Blount, Index 2726/12
[M-2529] Petitioner, 3948/13

-against-

Hon. Robert E. Torres,
Respondent.

_____

Kelly Blount, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for District Attorney.

_____

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

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

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

ENTERED: OCTOBER 1, 2015

CLERK