SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 15, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Acosta, Kapnick, JJ.

15335 American Casualty Company of Reading, P.A., et al., Plaintiffs-Appellants, Index 653280/11

-against-

Morris Gelb, et al., Defendants-Respondents.

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DLA Piper LLP (US), New York (Joseph G. Finnerty III of counsel), for American Casualty Company of Reading, P.A., appellant.

White and Williams LLP, New York (Jay Shapiro of counsel), for Twin City Fire Insurance Company, appellant.

Troutman Sanders LLP, New York (Stephen G. Rinehart of counsel), for U.S. Specialty Insurance Company, appellant.

Ropers Majeski Kohn Bentley PC, New York (Geoffrey W. Heineman of counsel), for Navigators Insurance Company, appellant.

Dickstein Shapiro LLP, New York (James R. Murray of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 23, 2014, which denied plaintiffs' motion for partial summary judgment on counts one through three of their amended complaint, which seek a declaration that the claims

against defendants in an adversary proceeding in a bankruptcy action are not covered by the insurance policies issued by plaintiffs, and granted defendants' cross motion for the contrary declaration, to the extent of declaring that the Select Form's Insured Versus Insured exclusion is controlling and does not bar coverage for the adversary proceeding, unanimously affirmed, without costs.

Defendants are former directors and officers of Lyondell Chemical Company who seek insurance coverage for their defense of an adversary proceeding commenced by the creditors committee in Lyondell's bankruptcy proceeding. The bankruptcy proceeding was commenced in 2009 by Lyondell, a company with which it had merged in 2007, and about 90 of their subsidiaries. Before the merger was consummated, a shareholder brought a putative class action challenging the merger price and alleging that Lyondell's directors and officers had failed to get the best price possible for the company. Plaintiffs provided a defense for the directors and officers in that action, which eventually was dismissed (*Lyondell Chem. Co. v Ryan*, 970 A2d 235 [Del 2009]). For the purpose of prosecuting the adversary proceeding, the creditors committee's claims were assigned to a litigation trust, which alleged in its complaint that the merger price set by the

directors resulted in a windfall to them, that the price was derived from misleading financial data, and that the financing arranged to consummate the merger was over-leveraged, leading to the bankruptcy.

Defendants seek coverage for the adversary proceeding under excess directors and officers liability policies issued by plaintiffs to Lyondell in various layers over the course of two separate policy periods running from 2006 to 2007 and from 2007 to 2013. This excess coverage was to follow form to Lyondell's primary coverage. The primary insurer provided a defense for the directors and officers in the adversary proceeding. However, after the primary policies were exhausted and the defense was tendered to plaintiffs, plaintiffs commenced this action for a declaration that they have no obligation to defend defendants in that proceeding.

Plaintiffs argue that both the merger litigation commenced in 2007 and the adversary proceeding commenced in July 2009 arose out of the merger transaction and therefore must be treated as a single, unified claim that came into existence when the merger litigation was commenced, and that since that claim came into existence during the 2006-2007 policy period, it is subject to the exclusion in the 2006-2007 policies for claims brought by or

on behalf of Lyondell against any of its own directors or officers (the "insured versus insured" [IVI] exclusion). In April 2009, the IVI exclusion was narrowed, as announced by the primary insurer as part of its "Select Form," so that it no longer excluded claims brought or maintained by, inter alia, a bankruptcy creditors committee.

We reject plaintiffs' argument that the merger litigation and the adversary proceeding constitute one continuous claim. The two proceedings, while arising from the merger, are wholly different, with different parties, different allegations, and different causes of action. In essence, the merger litigation was premised on the allegation that the price per share set by Lyondell's directors and officers was too low, while the adversary proceeding is premised on the allegation that the price was in a sense too high, supported by unsustainable revenue projections and requiring excessive leverage by Lyondell to finance and consummate the transaction. Thus, the adversary proceeding claim came into existence in July 2009, after the Select Form had been announced, and is not subject to the IVI exclusion.

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

The Decision and Order of this Court entered herein on June 4, 2015 is hereby recalled and vacated (*see* M-3130 decided simultaneously herewith).

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

ENTERED: OCTOBER 15, 2015

CLERK

Tom, J.P., Andrias, Feinman, Gische, Kapnick, JJ.

15641 Mark Walker, Index 310641/11
Plaintiff-Appellant,

-against-

Robert C. Whitney, III, et al.,
Defendants-Respondents.

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Riegler & Berkowitz, Melville (David H. Berkowitz of counsel), for appellant.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 31, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims alleging that he sustained serious injuries to his cervical spine, lumbar spine and left shoulder, unanimously affirmed, without costs.

Defendants established that plaintiff did not sustain serious injuries as a result of the motor vehicle accident (*see* Insurance Law § 5102[d]). Defendants submitted the affirmed reports of an orthopedist and neurologist who found full range of motion in all parts, and of a radiologist who found that the MRI

films showed degenerative disc disease in the spine, mild acromioclavicular (AC) joint osteoarthritis in the shoulder, and no evidence of causally related injury (*see Figueroa v Ortiz*, 125 AD3d 491 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. He submitted no admissible medical evidence in support of his claim of serious injury to his cervical and lumbar spine, and the records did not become admissible merely because defendants' experts reviewed them (*see Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660 [1st Dept 2010]). The only admissible evidence is an affirmation from plaintiff's orthopedic surgeon, who last examined plaintiff shortly after the arthroscopic procedure. He indicated that following surgery, plaintiff had a "decreased range of motion in his left shoulder," but did not provide measurements of the actual ranges of motion or a normal value for comparison. He also did not provide evidentiary support for his conclusory statement that plaintiff's shoulder condition is related to the accident, nor did he address the opinions of defendants' experts that any shoulder injury was due to ongoing pathology and degenerative changes (*see Paduani v Rodriguez*, 101 AD3d 470, 471 [1st Dept 2012]). Although the unaffirmed MRI report of

plaintiff's radiologist, like that of defendant's expert radiologist, found "mild" hypertrophic changes of the AC joint, plaintiff's expert failed to address those findings and explain why they were not the cause of the injury (*see Batista v Porro*, 110 AD3d 609 [1st Dept 2013]). We note too that the surgeon's statement did not address the conclusions by defendants' doctors that as of 2012, plaintiff had regained a full range of motion in his left shoulder, which is relevant to the claim of permanent injury. Here, plaintiff fails to meet the serious injury threshold (*cf. Fedorova v Kirkland*, 126 AD3d 624 [1st Dept 2015] [plaintiff sufficiently established that at least some of her injuries met the serious injury "no-fault" threshold, warranting denial of defendants' motion to dismiss]). In sum, the surgeon's affirmation does not raise any questions of fact as to whether plaintiff suffered a "permanent consequential limitation" in the use of a body function or system (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]), a "significant limitation" in the use of a body

part (*see Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]) or a non-permanent medically determined injury (the "90/180" category of serious injury) (*see Gleissner v Lo Presti*, 135 AD2d 494 [2d Dept 1987]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15686-
15687 Granite State Insurance Company, et al., Plaintiffs-Appellants,

-against-

Transatlantic Reinsurance Company, Defendant-Respondent.

Index 652506/12

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of counsel), for appellants.

Crowell & Moring LLP, New York (Cliff Elgarten of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.) entered December 24, 2013, which, to the extent appealed from, denied plaintiffs' motion to dismiss certain of defendant's affirmative defenses, and denied the motion of plaintiff Granite State Insurance Company (Granite State) for partial summary judgment, unanimously affirmed, without costs. Order, same court and Justice, entered June 18, 2014, which effectively granted reargument of plaintiffs' motion to dismiss, and, upon reargument, adhered to its prior order, and which denied plaintiffs' renewal motion, unanimously affirmed, without costs.

In the early 1980s, plaintiffs insurance companies (collectively the AIG Insurers) issued excess liability insurance

policies to a number of corporate insureds. To reduce their risk, the AIG Insurers purchased reinsurance coverage for the policies from defendant, Transatlantic Reinsurance Company (TRC). The AIG Insurers allege that pursuant to the reinsurance certificates, for each underlying excess liability policy, the relevant AIG Insurer shared with TRC a portion of the premium that insurer had received from its corporate insured in exchange for TRC's assuming a percentage of the losses incurred under that policy.

The certificates provide that TRC's liability would follow the AIG Insurer's liability in accordance with the terms and conditions of the underlying excess liability policy. The certificates further provide that upon receipt by TRC of satisfactory evidence of payment of a loss for which the reinsurance was provided, TRC would reimburse the relevant AIG Insurer for TRC's share of the loss (the loss requirement). In addition, the AIG Insurers warranted that they would "retain for [their] own account, subject to treaty reinsurance only, if any, the amount specified on the face of this Certificate" (the retention warranty). The certificates also provide that they could not be assigned without TRC's written consent (the assignment clause).

In or about mid-2011, the AIG Insurers entered into a financial reinsurance transaction known as a "loss portfolio transfer" (LPT), whereby the AIG Insurers transferred certain asbestos liabilities arising under their insurance policies to nonparty National Indemnity Company (NICO). The LPT, which was governed by eight separate but integrated agreements, was structured in two parts. In the first part, nonparty Eaglestone Reinsurance Company agreed to reinsure the relevant asbestos liabilities of the AIG Insurers. In the second part, Eaglestone agreed to retrocede to NICO a portion of the risks assumed by Eaglestone. Each part of the LPT was subject to an aggregate limit of liability. The AIG Insurers also transferred to NICO the authority to handle the underlying insurance claims, pay losses, control litigation, and collect reinsurance payments from TRC.

In July 2012, the AIG Insurers commenced this action against TRC alleging breach of contract and seeking monetary damages and declaratory relief. According to the complaint, the AIG Insurers have made payments on losses on the underlying excess liability policies, and have billed TRC for its share in accord with the terms of the reinsurance certificates. The AIG Insurers allege that TRC initially paid the amounts due, but stopped making

payments in March 2012, which was after the LPT was entered into. TRC answered the complaint and raised various counterclaims and affirmative defenses. As relevant here, TRC alleged that the AIG Insurers had breached the certificates' retention warranty and assignment clause by entering into the LPT, and that the AIG Insurers had failed to satisfy the certificates' loss requirement.

The AIG Insurers moved, pursuant to CPLR 3211(b), to dismiss these affirmative defenses. By separate motion, Granite State moved, pursuant to CPLR 3212, for partial summary judgment with respect to three of the reinsurance certificates. In an order entered December 24, 2013, the motion court denied both motions. The AIG Insurers subsequently filed an unsuccessful motion for leave to reargue and renew the dismissal motion, and this appeal ensued.

In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (*182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]), and

"the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St.*, 90 AD3d at 542). Further, the court should not dismiss a defense where there remain questions of fact requiring a trial (*id.*).

Judged by these standards, the motion court properly found that the AIG Insurers failed to meet their burden. In support of their motion, the AIG Insurers submitted, through an attorney professing no personal knowledge, an unsigned, undated copy of only one of the eight agreements comprising the LPT. We agree with the motion court that the failure to submit executed copies of all of the transaction documents warranted denial of the AIG Insurers' prediscovery motion (*see e.g. Cendant Car Rental Group v Liberty Mut. Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008] [the plaintiffs' failure to submit signed copy of agreement warranted denial of motion]).

Even if we were to consider the unsigned document, it does not establish, as a matter of law, that TRC's affirmative defenses lack merit. Some of the defenses allege that, by entering into the LPT, the AIG Insurers violated the reinsurance certificates' retention warranty, which requires them to retain a specified amount of liability, "subject to treaty reinsurance

only." The AIG Insurers maintain that the LPT constitutes treaty reinsurance within that exception to the retention warranty. According to the AIG Insurers, treaty reinsurance can, like the LPT, be retroactive, i.e., reinsuring already-existing insurance policies. TRC, on the other hand, contends that treaty reinsurance is exclusively prospective in nature, i.e., reinsuring only against future losses under yet-to-be-issued policies. Because the LPT reinsures already-existing policies, TRC maintains that it cannot be treaty reinsurance.

In declining to dismiss the retention warranty defenses, the motion court concluded that, because the LPT is retroactive, it is not treaty reinsurance. Although we agree that these defenses should not be dismissed, the motion court's finding that the LPT does not constitute treaty reinsurance was premature. The question of whether the LPT is or is not treaty reinsurance cannot be resolved as a matter of law at this stage of the proceedings. The term "treaty reinsurance" is not defined in the reinsurance certificates, and it is not clear from the four corners of those documents whether treaty reinsurance is exclusively prospective. Nor does the record establish a universally-accepted definition of this term in the specialized reinsurance industry. Indeed, both parties point to reinsurance

treatises providing support for their respective positions. Because the limited record on the original motion shows that the term may be reasonably susceptible to differing meanings, it cannot be construed as a matter of law on this CPLR 3211 motion (*see Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010]).

In concluding that treaty reinsurance is only prospective in nature, the motion court placed undue emphasis on dicta contained in *Unigard Sec. Ins. Co. v North Riv. Ins.* Co. (79 NY2d 576 [1992]) and *Matter of Midland Ins. Co.* (79 NY2d 253 [1992]). In these decisions, the Court, in generally describing treaty reinsurance, stated that it is "obtained in advance of actual coverage" (*Unigard*, 79 NY2d at 579 n1; *Midland*, 79 NY2d at 258). These cases did not address the precise question presented here, and did not explicitly hold that treaty reinsurance can never be retroactive.[1]

The motion court correctly declined to dismiss TRC's

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[1] We note that in another case, the Court of Appeals suggested, also in dicta, that treaty reinsurance can be retroactive (*see Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 587 [2001] ["carrier seeking to reduce potential financial losses from policies *issued* to a class of customers or an industry may purchase treaty reinsurance"] [emphasis added]).

affirmative defense asserting that the AIG Insurers failed to satisfy the reinsurance certificates' loss requirement. As noted earlier, TRC was responsible for reimbursing the AIG Insurers upon receipt of satisfactory evidence of payment of a "loss," which is defined as only those amounts "actually paid by [the AIG Insurers]" under the reinsured polices. We agree with the motion court that the AIG Insurers failed to submit sufficient evidence of payment of the losses. The conclusory affidavit and scant documentary proof presented do not establish, at this prediscovery stage of the proceedings, that this affirmative defense fails as a matter of law. Likewise, no basis exists to dismiss TRC's affirmative defenses asserting that the LPT is an impermissible assignment under the reinsurance certificates. It cannot be determined, on this limited prediscovery record, whether the AIG Insurers transferred all of their interests in the certificates.

Because TRC's affirmative defenses remain to be litigated, and in the absence of discovery, Granite State's motion for partial summary judgment was properly denied. Granite State unpersuasively argues that TRC waived its defenses to the LPT by making payments between 2008 and 2011 without a reservation of rights. Since the defenses are based on the LPT, TRC could not

have waived them by making payments before the LPT was entered into (*see Russo v Rozenholc*, 130 AD3d 492, 496 [1st Dept 2015] ["A party asserting a waiver of rights has the burden of establishing that the purported waiver constituted an intentional, voluntary relinquishment of a *known* right" [emphasis added]). With respect to payments made after the LPT, issues of fact exist as to when TRC obtained full knowledge of the LPT's terms.[2]

The motion court properly denied summary judgment on Granite State's unpleaded account stated claim. The affidavit of TRC's Chief Claims Officer raises triable issues of fact as to whether TRC made timely objections to the invoices (*see Rachel Bridge Corp. v Dishi*, 277 AD2d 176, 176 [1st Dept 2000]).

Although the motion court's June 18, 2014 order purported to deny the AIG Insurers' reargument motion, it addressed the merits, thus effectively granting reargument and making the order appealable (*see 21st Century Diamond, LLC v Allfield Trading*, LLC, 88 AD3d 558, 559 * [1st Dept 2011]). On reargument, the

[2] Because we are affirming the motion court's denial of Granite State's motion, we need not reach TRC's alternative arguments that its payment of one invoice cannot constitute a waiver of objections to future invoices, and that enforcement of the purported waiver would be tantamount to creating coverage where none exists.

motion court properly adhered to its original determination. The motion court providently exercised its discretion in denying the motion for leave to renew. The AIG Insurers did not provide a reasonable justification for failing to submit the additional affidavit and documents in support of their original motion (*see Leighton v Lowenberg*, 125 AD3d 427, 427-428 [1st Dept 2015])

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15786 The People of the State of New York, Ind. 4849/12
Respondent,

-against-

Travis Best,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Renee A. White, J.), rendered on or about April 30, 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 15, 2015

CLERK

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

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15788 In re Chanize L. B.,
Petitioner-Appellant,

-against-

Lamont K. B.,
Respondent-Respondent.

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Larry S. Bachner, Jamaica, for appellant.

James M. Branden, New York, for respondent.

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Appeal from order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about November 20, 2012, which, to the extent appealed from as limited by the briefs, granted petitioner's objection to a support magistrate's July 2, 2012 order to the extent of remanding the issue of the parties' responsibility for unreimbursed medical expenses, unanimously dismissed, without costs.

Because the issue regarding unreimbursed medical expenses was remanded to the Support Magistrate for reconsideration,

petitioner is not an aggrieved party within the meaning of CPLR 5511 and the order appealed is not a final one (*see* Family Ct Act § 439[e]).

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

ENTERED: OCTOBER 15, 2015

CLERK

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

15789 Eduardo Velasquez, Index 156533/12
Plaintiff-Respondent,

-against-

MTA Bus Company, et al.,
Defendants-Appellants.

_____

Elizabeth A. Cooney, New York (Valerie K. Ferrier of counsel), for appellants.

Subin Associates, LLP, New York (Carly M. Jannetty of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about May 27, 2014, which granted plaintiff's motion for partial summary judgment on the issue of liability and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of negligence on the part of defendant bus driver by relying on the parties' deposition testimony, which showed that the accident occurred when plaintiff was riding his bicycle in the middle lane of traffic, and defendant bus driver came up behind him and, without honking or signaling, moved the bus toward the left lane in an attempt to pass the bicycle. According to defendant driver, the contact between the front side of the bus and the bicycle

occurred while the bus was straddling the middle and left lanes. The evidence that defendant driver made an unsafe lane change, without signaling or leaving a safe distance between the vehicles in violation of traffic laws, establishes defendants' negligence (*see* Vehicle and Traffic Law § 1122[a], 1128; *Cascante v Kakay*, 88 AD3d 588 [1st Dept 2011]).

Furthermore, the parties both testified that plaintiff was in the middle lane at all times, and defendant driver admitted that he had taken his eyes off plaintiff in the seconds before the accident in order to check his mirror. Thus, defendant driver's testimony that he believed the accident occurred because plaintiff merged toward the left into the bus is speculative and insufficient to raise an issue of fact (*see Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340 [1st Dept 2004]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15791 The People of the State of New York, Ind. 12011/92
Respondent,

-against-

Ramon Padro,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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Order, Supreme Court, New York County (Abraham Clott, J.), entered September 11, 2013, 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.

The court's assessment of 10 points under the acceptance of responsibility risk factor was supported by clear and convincing evidence. Any acceptance of responsibility for defendant's sex offense was extremely belated.

Defendant's challenge to the assessment of 5 points under the prior crimes risk factor is unpreserved, and is unavailing in any event. The record establishes that the prior conviction was

for driving a special vehicle while impaired by alcohol, which constituted a misdemeanor (*see* Vehicle and Traffic Law 1193[1][d]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15792 The People of the State of New York, Ind. 4687/10
Respondent,

-against-

Frank Rivas also known
as Frank Rosario,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered April 5, 2011, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him to concurrent terms of five years' probation, unanimously affirmed.

The court properly admitted $525 recovered from defendant at the time of his arrest since this evidence, along with the reasonable inferences that could be drawn therefrom, was

probative of defendant's intent to sell, an essential element of the charges (*see e.g. People v Bligen*, 35 AD3d 171 [1st Dept 2006], *lv denied* 8 NY3d 919 [2007]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15793 In re Nicholas J.,

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

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Law Office Of Israel Premier Inyama, New York (Israel P. Inyama of counsel), for appellant.

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

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 8, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree and menacing in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

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

disturbing the court's credibility determinations. Appellant's missing witness argument is unpreserved, and in any event it does not warrant a different conclusion regarding the sufficiency and weight of the evidence.

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

ENTERED: OCTOBER 15, 2015

CLERK

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

15794 Andrew Bittens, Index 653026/12
Plaintiff-Appellant,

-against-

The Board of Managers of the
Octavia Condominium, et al.,
Defendants-Respondents.

_____

Andrew Bittens, New York, appellant pro se.

Abrams Garfinkel Margolis Bergson, LLP, New York (Barry G. Margolis of counsel), for the Board of Managers of the Octavia Condominium, Michael Lam, Walter Epstein, Michael Bouffard, Leslie Wackerman, Allen Foster Tenant, Maxwell-Kates, Inc., Michael R. Bogart and David Degidio, respondents.

Joel Braziller, New York, for 320 57th Street, LLC and Joseph T. Wong, respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about December 19, 2013, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Joseph T. Wong for summary judgment dismissing the complaint as against him, and, upon a search of the record pursuant to CPLR 3212(b), granted summary judgment dismissing the complaint as against the remaining defendants, unanimously affirmed, without costs.

Plaintiff, who had entered into a contract to purchase a

condominium unit from the nonparty seller, commenced this action against defendant Board of Managers of the Octavia Condominium and its members, managing agent and attorneys, alleging, inter alia, that the board intentionally interfered with said contract by improperly purporting to exercise a right of first refusal. The motion court properly dismissed plaintiff's claim, because without an actual breach of the underlying contract, a cause of action for tortious interference with a contract fails (*see e.g. 397 W. 12th St. Corp. v Zupa*, 34 AD3d 236 [1st Dept 2006], *lv denied* 8 NY3d 815 [2007]; *compare Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455 [1st Dept 2010]).

Furthermore, even without the requirement of a breach by the seller, plaintiff's tortious interference claim fails. The board properly exercised the right of first refusal, financed the purchase at the original contract price through its designee and ultimately purchased and resold the property for profit, all in accordance with the condominium's bylaws. Although a board member was also a member of the board's designee, the record shows that the board's action was "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990] [internal

quotation marks omitted]; *see South Tower Residential Bd. of Mgrs. of Time Warner Ctr. Condominium v Ann Holdings, LLC*, 127 AD3d 485 [1st Dept 2015], *lv dismissed* _ NY3d _ , 2015 NY Slip Op 77893 [2015]).

Dismissal of plaintiff's fraud claim was also proper, since plaintiff failed to show any knowing or material false representation by defendants (*see Nicosia*, 77 AD3d at 456).

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: OCTOBER 15, 2015

CLERK

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

15795 Bond & Broadway, LLC, Index 158917/13
Plaintiff-Respondent-Appellant,

-against-

Funding Exchange, Inc.
Defendant-Appellant-Respondent,

Froggy Associates, LLC,
Defendant-Respondent-Appellant.

_____

Slarskey LLC, New York (David Slarskey of counsel), for appellant-respondent.

Greenberg Traurig LLP, New York (Carmen Beauchamp Ciparick of counsel), for Bond & Broadway, LLC, respondent-appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun of counsel), for Froggy Associates, LLC, respondent-appellant.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 22, 2014, which denied the parties' motions for summary judgment, unanimously modified, on the law, to grant defendant Funding Exchange, Inc.'s motion for summary judgment dismissing the complaint and all cross claims as against it, and to grant defendant Froggy Associates, LLC's motion insofar as it sought a declaration that Froggy validly exercised its right of first refusal to purchase Unit 5 of the 666 Broadway Condominium, and it is so declared, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant Froggy gave notice that it elected to purchase the subject unit in full compliance with the condominium's by-laws governing the manner in which the right of first refusal was to be exercised (*see Kaplan v Lippman*, 75 NY2d 320 [1990]). It was not required simultaneously to make a 10% down payment, a term of the contract of sale between defendant Funding Exchange and plaintiff. Froggy would be bound by the requirement to make a 10% down payment only after entering into a contract of sale with Funding Exchange on the same terms and conditions (pursuant to the by-laws) as the contract between Funding Exchange and plaintiff, and plaintiff would have no standing to sue for breach of that contract.

Nor did Froggy's post-notice request for the lease between Funding Exchange and its tenant render its notice an impermissible counter-offer (*compare Lamanna v Wing Yuen Realty*, 283 AD2d 165 [1st Dept 2001] [plaintiff failed to exercise option to purchase building by placing on the option a condition not in

compliance with the terms of the contract of sale], *lv denied* 96 NY2d 719 [2001]).

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: OCTOBER 15, 2015

CLERK

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

15796 The People of the State of New York, Ind. 5592/12
Respondent,

-against-

Barry Norman,
Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered October 4, 2013, convicting defendant of attempted criminal possession of a weapon in the second degree, tampering with physical evidence, attempted grand larceny in the fourth degree and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of three years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's course of conduct during a violent struggle with a police officer, including

gripping and repeatedly tugging at the officer's pistol and holster, warranted an inference that defendant intended to seize the pistol (*see People v Adair*, 84 AD3d 1752, 1753 [4th Dept 2011], *lv denied* 17 NY3d 812 [2011]).

The court properly denied defendant's suppression motion. At the time defendant swallowed what appeared to be bags of drugs, the police had, at least, a founded suspicion of criminality warranting a common-law inquiry, and they did not subject defendant to any intrusion beyond a direction to stop, which did not constitute a seizure (*see People v Bora*, 83 NY2d 531, 532-535 [1994]). In any event, the totality of the information available to the police also amounted to reasonable suspicion.

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15797 The People of the State of New York, Ind. 3022/11
Respondent,

-against-

Sergio Quito,
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. at plea; Jill Konviser, J. at sentencing and SORA hearing), rendered on or about July 18, 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 15, 2015

CLERK

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

15798-
15799-
15800 In re Rickelme Alfredo B.,

A Child under Eighteen
Years of Age, etc.,

Ricardo Alfred B.,
Respondent-Appellant,

-against-

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 7, 2014, which denied respondent father's motion to vacate orders entered upon the father's default; and order of disposition, same court and Judge, entered on or about April 24, 2014, which reiterated the court's earlier findings that the father's consent is not required for the adoption of the subject child, unanimously affirmed, without costs.

The father's due process arguments regarding the right to assigned counsel are not preserved for our review (*see Matter of Aribelys N. [Rafael N.]*, 106 AD3d 621, 622 [1st Dept 2013]). In any event, no substantive proceedings occurred between the time the father first appeared in court and the time he was assigned counsel.

The court properly found that the father failed to demonstrate both a reasonable excuse for his default and a meritorious defense (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]). Based on the father's account, he should have arrived in court on time despite the alleged traffic delay. In addition, he failed to substantiate the delay and failed to call his counsel or the court to advise that he would be late (*Matter of Ilyas Zaire A.-R. [Habiba A.-R.]*, 104 AD3d 512, 512 [1st Dept 2013], *lv denied* 21 NY3d 859 [2013]). Moreover, any confusion regarding the time or date of the proceedings is not a reasonable excuse for failing to appear (*see Matter of Mariah A. [Hugo A.]*, 109 AD3d 751, 752 [1st Dept 2013], *lv dismissed* 22 NY3d 994 [2013]).

As to his defense, the father failed to show that he consistently provided the child with fair and reasonable

financial support, and therefore he did not demonstrate that his consent is required for the adoption of the child (*see* Domestic Relations Law § 111[1][d]; *see also Aribelys*, 106 AD3d at 621). Further, the court properly found that the child's best interests would be served by freeing him for adoption, since he was living in a loving foster home, where he was thriving and where the foster parent wanted to adopt him (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). We have considered the father's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 15, 2015

CLERK

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

15801-
15802 Robert McCullough, Index 113802/09
Plaintiff-Respondent-Appellant,

-against-

One Bryant Park, et al.,
Defendants-Respondents,

Component Assembly Systems, Inc.,
Defendant-Appellant-Respondent.

_____

Brody & Branch LLP, New York (MaryEllen O'Brien of counsel), for appellant-respondent.

Sacks & Sacks LLP, New York (Scott Singer of counsel), for respondent-appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Michael Neri of counsel), respondents.

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Amended order, Supreme Court, New York County (Carol Edmead, J.), entered March 25, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendants One Bryant Park (Bryant), Durst Development, LLC (Durst), and Tishman Construction Corp. (Tishman)(collectively the Bryant defendants) a for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them and the Labor Law § 241(6) claim as against them to the extent it is based on an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(e)(1), denied

defendant Component Assembly Systems, Inc.'s (Component) motion for summary judgment dismissing the common-law negligence claim as against it, denied Component's motion for summary judgment dismissing the contractual indemnification cross claim of Bryant, Durst, and Tishman, and granted the Bryant defendants' motion for summary judgment dismissing Component's common-law indemnification and contribution cross claims against them, unanimously modified, on the law, to deny the Bryant defendants' motion for summary judgment dismissing the common- law negligence and Labor Law § 200 claims as against them, deny the Bryant defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim as against them insofar as it is based on an alleged violation of 12 NYCRR 23-1.7(e)(1), deny the Bryant defendants' motion for summary judgment dismissing Component's common-law indemnification and contribution cross claims against them, and otherwise affirmed, without costs. Order, same court and Justice, entered July 24, 2014, which, upon renewal of (1) Component's motion for summary judgment dismissing plaintiff's common-law negligence claim and the contractual indemnification cross claim against it, and (2) the Bryant defendants' motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them, adhered to

its original determination, unanimously affirmed, without costs.

Plaintiff's accident allegedly occurred while he was passing from an exterior roof on a construction site to an interior room, moved his left foot across an approximately one- or two-foot-high threshold in a doorway, and stepped into an uncovered "drain hole" in the floor directly behind the threshold, causing him to fall to the floor.

The motion court erred in granting the Bryant defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as against them insofar as it is based on an alleged violation of 12 NYCRR 23-1.7(e)(1), which applies to tripping hazards in "passageways." Contrary to the court's finding, the doorway constitutes a passageway within the meaning of the regulation, and plaintiff raised an issue of fact as to whether the proximate cause of his injury was a tripping hazard within the passageway (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 421-422 [1st Dept 2013]).

Nor are the Bryant defendants entitled to summary judgment dismissing the Labor Law § 200 and common-negligence claims as against them. It is immaterial that these defendants lacked supervisory control over plaintiff's work, since his injuries arose "from the condition of the workplace . . . , rather than

the method used in performing the work" (*Griffin v New York City Tr. Auth.*, 16 AD3d 202, 202 [1st Dept 2005]). Further, these defendants failed to make a prima facie showing that they lacked constructive notice of the uncovered drain hole (*see DePaul v NY Brush LLC*, 120 AD3d 1046, 1047 [1st Dept 2014]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555 [1st Dept 2009]). Defendants cannot meet this burden merely by pointing to gaps in plaintiff's proof (*see Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012]).

The court correctly denied Component's motion for summary judgment dismissing plaintiff's common-law negligence claim as against it. We reject Component's argument that it owed no duty of care to plaintiff because they lacked contractual privity. There is at least an issue of fact as to whether Component owed a duty of care to plaintiff based on Component's contractual obligation to provide temporary protection for drain holes, and based on plaintiff's alleged detrimental reliance on that obligation when he walked across the threshold of a door and stepped into the drain hole on the other side (*see Hopper v Regional Scaffolding & Hoisting Co., Inc.*, 21 AD3d 262, 263 [1st Dept 2005], *lv dismissed* 6 NY3d 806 [2006]; *see also Kelly v Glass House Dev., LLC*, 114 AD3d 623, 623-624 [1st Dept 2014]).

There is conflicting evidence as to whether Component had ceased to be responsible for temporary protection on the site.

The court correctly denied Component's motion for summary judgment dismissing the contractual indemnification cross claim against it. Component's contract required it to indemnify the other defendants if, among other things, the accident occurred, or allegedly occurred, near where Component was performing its work either "(1) while [Component] [wa]s performing the work . . . , or (2) while any of [Component]'s . . . work in progress . . . [was] in or about such place or the vicinity thereof." There are issues of fact as to whether the accident arose from Component's failure to perform its work of covering the hole on the seventh floor, thereby causing the accident and triggering the indemnification clause (*see Robbins v Goldman Sachs Headquarters, LLC*, 102 AD3d 414, 415 [1st Dept 2013]). Component's argument that it never received a work ticket concerning the uncovered hole is misplaced, since Component's foreman explained that Component itself was responsible for issuing work tickets to Tishman.

Given the issues of fact regarding Component's and the Bryant defendants' negligence, the court erred in granting the Bryant defendants' motion for summary judgment dismissing

Component's common-law indemnification and contribution cross claims against them (*see Miano v Battery Place Green LLC*, 117 AD3d 489, 490 [1st Dept 2014]; *see generally Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

We have considered the appealing parties' remaining contentions for affirmative relief, including Component's argument, raised for the first time on appeal, that it is entitled to summary judgment on its common-law indemnification and contribution cross claims, and find them unavailing.

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

ENTERED: OCTOBER 15, 2015

CLERK

Mazzarelli, J.P., Acosta, Renwick, Moskowitz, JJ.

15803 Renee Teran, née Banks, Index 102716/08
Plaintiff-Appellant,

-against-

JetBlue Airways Corporation,
Defendant-Respondent.

_____

Schwartz & Perry, LLP, New York (Brian Heller of counsel), for appellant.

Cerasia & Del Rey-Cone LLP, New York (Edward Cerasia II of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 19, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's claims for constructive discharge and retaliation under the New York City Human Rights Law, unanimously reversed, on the law, without costs, those branches of defendant's motion denied, and plaintiff's cause of action for retaliation reinstated, with leave to litigate both that cause of action and her claim for sexual harassment under a theory of constructive discharge.

Viewed in the light most favorable to plaintiff, the record shows that plaintiff, an acting supervisor, was sexually assaulted by a higher-ranking shift supervisor, who locked the

door to the supervisors' office late at night and repeatedly groped and kissed her while she asked him to stop and repeatedly pushed his hands away. The assault stopped only when another supervisor called to ask the assailant for help. As the assailant left the office, he looked at plaintiff and, in vulgar terms, told her that she was "hot" and that she sexually excited him.

Defendant suspended the offending supervisor, conducted an investigation, found that the offending supervisor had engaged in "inappropriate conduct," and disciplined the supervisor by giving him what was, in effect, a final warning. Defendant then informed plaintiff that the supervisor would be returning to work with plaintiff. When plaintiff asked that she be separated from the supervisor, defendant offered only to transfer her from the evening shift to an early morning shift, which would entail a pay cut and a functional demotion, because there would be no acting supervisor positions available.

Given the foregoing factual assertions, plaintiff raised issues of fact as to whether defendant constructively discharged her by deliberately creating working conditions that were so intolerable "that a reasonable person would have felt compelled to resign" (*Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 504

[1st Dept 2010] [internal quotation marks omitted]). Plaintiff also raised triable issues of fact as to her retaliation cause of action, since the record shows that she formally complained about the sexual harassment and was constructively discharged within a short time thereafter, permitting an inference of a causal connection between her complaint and the constructive discharge (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

Plaintiff may assert her constructive discharge theory with respect to her retaliation cause of action, which we reinstate, and with respect to her sexual harassment claim, which the motion court sustained (*see Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 115-116, 116 n 13 [2d Cir 2013]; *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 71, 78 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15804 The People of the State of New York, Respondent, Ind. 5139/11 4538/11

-against-

Abdul Cornelius, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Danielle Von Lehman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at reassignment of counsel; Bruce Allen, J., at jury trial and sentencing), rendered September 18, 2012, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, and judgment, same court (Edward McLaughlin, J.), rendered April 29, 2013, convicting defendant, upon his guilty plea, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a concurrent term of 9½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. Although the victim could not identify defendant at trial, he was certain of his identification of defendant shortly after the robbery. Additional corroboration for the identification was provided by one of the officers, who observed defendant carrying the victim's backpack, which defendant immediately discarded when he saw the officer. The evidence also supports the inference of accessorial liability (*see* Penal Law § 20.00).

Viewing the record as a whole, we conclude that defendant did not make a clear and unequivocal request to proceed pro se, sufficient to express the "definitive commitment to self-representation" that would trigger the need for a full inquiry by the court (*see People v LaValle*, 3 NY3d 88, 106 [2004]). Defendant's expression of a desire to represent himself came within the context of his complaints about his counsel and other statements and applications (*see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v Payton*, 45 NY2d 300, 314 [1978], *revd on other grounds* 445 US 573 [1980]). When the court assigned new counsel, defendant never made it clear that he still wanted to proceed pro se, nor did he raise the issue again or express further dissatisfaction with his counsel.

The court properly admitted evidence that defendant and a person whose wallet was found along defendant's escape route, and who was alleged to be one of defendant's unapprehended accomplices, had received disorderly conduct summonses together six weeks earlier. The probative value of that evidence exceeded any minimal prejudicial impact, as it provided background information showing that the other man was known to defendant and that the two lived in the same building (*see e.g. People v Bradley*, 250 AD2d 502 [1st Dept 1998], *lv denied* 92 NY2d 893 [1998]).

Turning to the drug case in which defendant pleaded guilty, we find that the totality of circumstances establish that his plea was voluntary (*People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). The voluntariness of the plea was not undermined by the fact that it covered a potential perjury prosecution (*see People v France*, 241 AD2d 525 [2d Dept 1997], *lv denied* 91 NY2d 873 [1997]), or by any statements made by the court in that connection. We have considered and rejected defendant's arguments concerning his motion to withdraw his plea.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256–257 [2006]), foreclosing review

of his excessive sentence claim regarding his drug conviction. Regardless of whether defendant made a valid waiver of his right to appeal his drug conviction, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15805-
15806 The People of the State of New York,
Respondent,

-against-

Earl Moore,
Defendant-Appellant.

Ind. 5047/08

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered July 16, 2010, as amended November 30, 2010, convicting defendant, upon his plea of guilty, of assault in the first degree and robbery in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress his statements to detectives and to an assistant district attorney. There is no basis for disturbing the court's credibility determinations. The facts stated by the police to defendant during the interrogation were generally close to the actual facts, and, under the totality of circumstances, any limited

deception could not have overborne defendant's will or undermined his right to remain silent (*see People v Thomas*, 22 NY3d 629, 642 [2014]).

The court properly exercised its discretion in denying defendant's motion to withdraw his plea. The conclusory claims made in defendant's pro se motion were "patently insufficient" *(People v Mitchell*, 21 NY3d 964, 967 [2013]), and when the court, in an effort to avoid a conflict of interest, assigned new counsel, the new attorney conceded that there was no ground upon which to make a plea withdrawal motion.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15807 In re Joshua C.,
Petitioner-Respondent,

-against-

Tenequa A.,
Respondent-Appellant,

Administration for Children's Services,
Respondent.

_____

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

Andrew J. Baer, New York, for Joshua C., respondent.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), Administration for Children's Services, respondent.

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

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 17, 2014, which granted sole physical and legal custody of the subject child, Karma C. to petitioner father, unanimously affirmed, without costs.

The evidence shows that the father is a suitable caretaker and able to provide a stable home for the child, has done so for at least the past four months, and the child is doing well in his care.

In particular, the father is living with the paternal grandfather in a four bedroom home with room for the child. The paternal grandfather is willing and able to provide financial support to the father and the child. In addition, the paternal grandmother and paternal aunt live nearby and are willing and able to assist the father in caring for the child as they have done in the past.

By contrast, the mother suffers from mental illness characterized by, among other things, bipolar disorder, anxiety and depression. Prior to relocating from Boston, the mother alternated between several shelters and the home of the paternal grandmother, who often provided primary care for the child. Since her unplanned moved to New York, with no arrangements for her own mental health treatment, the mother has lived in various shelters where she has gotten into physical altercations with shelter staff and residents in the presence of the child. This resulted in the child being removed from her care and a neglect finding being entered against her.

Accordingly, we find there was ample support for the court's decision that it was in the child's best interest for final custody to be awarded to the father under the circumstances (*see e.g. Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 937 [1st Dept

2011], *lv denied* 18 NY2d 804 [2012]). Such finding is consistent with this Court's prior decision granting temporary custody to the father, and there is no additional evidence to support a finding to the contrary (*Matter of Karma C. [Tenequa A.]*, 122 AD3d 415 [1st Dept 2014]).

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

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15808 The People of the State of New York, Ind. 4377/11
Respondent,

-against-

Frederick McKinley,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 10, 2012, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]), foreclosing review of his suppression claims. Regardless of whether defendant made a valid waiver of his right to appeal, his arguments for suppression of his statement are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that any error was harmless because, given the

People's disclaimer of any intention to introduce the statement, there is no "reasonable possibility that the error contributed to the plea" (*People v Wells*, 21 NY3d 716, 719 [2013]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, JJ.

15809 The People of the State of New York, Ind. 1055/13
Respondent,

-against-

Edgardo Nieves,
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 (Ronald A. Zweibel, J.), rendered on or about July 18, 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 15, 2015

CLERK

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

15810N Herrick Feinstein LLP, Index 651477/14
Petitioner-Respondent,

-against-

Noam Baram, et al.,
Respondents-Appellants.

_____

Law Office of Carl E. Person, New York (Carl E. Person of counsel), for appellants.

Herrick, Feinstein LLP, New York (Anna M. Hershenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin Schweitzer, J.), entered September 10, 2014, which granted petitioner Herrick Feinstein's motion to permanently stay arbitration, unanimously affirmed, without costs.

The IAS court correctly determined that the legal malpractice arbitration commenced by respondents was barred by the statute of limitations, having been commenced more than three years after the representation ended (CPLR 214[6]). The arbitration agreement did not implicate interstate commerce and the FAA does not apply, therefore respondents' reliance on *Cusimano v Schnurr* (40 Misc 3d 1208[A] [Sup Ct, NY County 2013],

revd 120 AD3d 142 [2014], *lv granted* 24 NY3d 909 [2014]) is unavailing.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15878 The People of the State of New York, Ind. 5262/10
Respondent,

-against-

Jose Valentin,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura Ward, J. at hearings; Arlene D. Goldberg, J. at jury trial and sentencing), rendered February 28, 2013, as amended March 4, 2013, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four 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 supports the conclusion that defendant sold drugs to an apprehended buyer.

Those portions of the prosecutor's summation to which defendant objected constituted reasonable inferences drawn from

the evidence, and were responsive to defendant's summation. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). We have considered and rejected defendant's claim that his counsel rendered ineffective assistance by failing to make additional objections to the summation (*see People v Cass*, 18 NY3d 553, 564 [2012]).

Upon granting the defense request for an agency defense based upon aspects of the People's evidence, the court properly allowed the People to introduce evidence of defendant's prior drug sale conviction (*see People v Small*, 12 NY3d 732, 733 [2009]). Defendant clearly asserted an agency defense. Contrary to defendant's argument, we see no reason to draw a distinction between the situation where a defendant testifies or otherwise elicits evidence to support an agency defense, and the situation where, as here, the defendant essentially adopts those portions of the evidence elicited by the People that support such a defense; in each instance, the People have the right of rebuttal.

The hearing court properly exercised its discretion in

reopening the suppression hearing to allow the People to present an additional witness (*see e.g. People v Cestalano*, 40 AD3d 238 [1st Dept 2007], *lv denied* 9 NY3d 921 [2007]). Defendant did not preserve his claim that the court had already rendered a decision on the merits and therefore lacked any discretion to reopen the hearing, and we decline to review it in the interest of justice. As an alternative holding, we reject this claim because the court expressly stated that it had not yet rendered a decision.

Defendant's remaining suppression argument 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 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15879 Bridge Street Contracting Inc., Index 602447/09
Plaintiff-Appellant,

EMFT, LLC, et al.,
Plaintiffs,

-against-

Everest National Insurance Company,
Defendant-Respondent,

Scottsdale Insurance Company,
Defendant,

CastlePoint Insurance Company,
Proposed Intervenor-Appellant.

_____

Wade Clark Mulcahy, New York (Menachem Simon of counsel), for Bridge Street Contracting Inc., appellant.

Law Office of Max W. Gershweir, New York (Joshua L. Seltzer of counsel), for Castlepoint Insurance Company, appellant.

Carroll McNulty Kull LLC, New York (Ann Odelson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered January 22, 2014, which granted defendant Everest National Insurance Company's motion for summary judgment dismissing the complaint, denied plaintiff Bridge Street Contracting, Inc.'s cross motion for summary judgment, and denied Castlepoint's motion to intervene, unanimously modified, on the law, solely to declare that Everest has no duty to defend or

indemnify Bridge Street in the underlying action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Everest properly disclaimed coverage based on Bridge Street's late notice of the underlying cross claims and third-party claims, and Everest was not required to show prejudice (*see T&S Masonry v State Ins. Fund*, 290 AD2d 308, 310 [1st Dept 2002]). Everest was not participating in the defense of any party to the underlying action when Bridge Street was served with the cross claims and third-party claims against it, and the record shows that Everest first learned of the claims more than a year after they were asserted (*compare City of New York v Continental Cas. Co.*, 27 AD3d 28, 32-33 [1st Dept 2005] [insurer improperly disclaimed coverage based upon additional insured's failure to immediately forward suit papers, where, among other things, insurer was actively participating in the underlying litigation before the additional insured was impleaded, and where insurer was served with a copy of the complaint against the additional insured when it was originally served]).

Everest's prior disclaimers were only partial disclaimers based solely on the workers' compensation and employer's

liability exclusions in its policy, and they were issued before Everest received notice of the underlying cross claims and third-party claims against Bridge Street. Accordingly, Everest did not waive its late notice defense, and immediate notice of the cross claims and third-party claims would not have been "useless."

Bridge Street's antisubrogation argument is improperly raised for the first time on appeal, and the issue cannot be determined on this record (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525, 525 [1st Dept 2014]).

Given the foregoing determination, the motion court properly dismissed as academic Castlepoint's motion to intervene.

We modify the order solely to issue a declaration in favor of Everest (*see Maurizzio v Lumbermans Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15880 The People of the State of New York, SCI 3727/13
Respondent,

-against-

Jamel Bryant,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (William McGuire, J.), rendered April 17, 2014, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him to a term of one to three years, unanimously affirmed.

The court, which included the duration of its order of protection in the written order signed by defendant, was not required to make an oral pronouncement of the order's duration at sentencing, because an order of protection is not part of the sentence imposed (*see People v Nieves*, 2 NY3d 310, 316 [2014]). The court properly set the order of protection to expire eight years from the date of the sentencing (*see* CPL 530.13[4][A][I]), and since the duration of the order was not based on the expiration date of defendant's sentence, jail time credit was

irrelevant. Defendant did not preserve his contention that the full order of protection is invalid because the court failed to articulate on the record its reasons for issuing the order pursuant to CPL 530.13(4), and we decline to review it in the interest of justice (*see People v Reynolds*, 85 AD3d 825 [2d Dept 2011], *lv denied* 18 NY3d 927 [2012]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15881 Jerry B. Bias, Index 350016/10
Plaintiff-Appellant,

-against-

Lauren Maillian Bias,
Defendant-Respondent.

_____

Butterman & Kahn, LLP, New York (Jay R. Butterman of counsel), for appellant.

Gary Greenwald & Partners, P.C., Chester (Erno Poll of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered January 7, 2014, which, to the extent appealed from, denied plaintiff's motion for a declaration that defendant breached the parties' stipulation of settlement of their divorce proceedings, and damages in the form of the imposition of a constructive trust on the benefits to be paid to defendant thereunder or, alternatively, for a declaration that defendant repudiated the stipulation, unanimously affirmed, without costs.

The court correctly determined that, assuming that defendant's conduct breached the non-disparagement clause of the parties' stipulation, under all the circumstances, including plaintiff's own failure to fulfill his obligations under the stipulation and to respond to defendant's notices of default,

neither the imposition of a constructive trust on defendant's benefits under the stipulation nor a declaration that defendant repudiated the stipulation was an appropriate remedy. While non-disparagement clauses in marital agreements are generally enforceable (*see e.g. Anonymous v Anonymous*, 233 AD2d 162 [1st Dept 1996]; *Trump v Trump*, 179 AD2d 201 [1st Dept 1992], *lv denied* 80 NY2d 760 [1992]), the stipulation did not provide for liquidated damages, and plaintiff provided no evidence of actual damages.

Plaintiff failed to demonstrate that defendant's conduct amounted to a complete and unequivocal repudiation of the agreement (*see Breiterman v Breiterman*, 239 App Div 709 [1st Dept 1934]; *compare Jones v Jones*, 232 AD2d 313 [1st Dept 1996], where the wife repudiated the stipulation of settlement when she cashed in the parties' bonds and disposed of 100% of the proceeds; her attempt at self-help after the husband purportedly failed to pay maintenance pursuant to the stipulation resulted in a material breach of the stipulation, entitling the husband to its rescission). Nor did the evidence of defendant's conduct warrant the equitable relief of imposition of a constructive trust on her share of the parties' assets (*see generally Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]).

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: OCTOBER 15, 2015

CLERK

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

15882 Magen David of Union Square, et al.,
Plaintiffs,

The Sixteenth Street Synagogue,
Plaintiff-Appellant,

-against-

3 West 16th Street, LLC,
Defendant-Respondent.

[And A Third-Party Action]

Index 600573/08

Lambert & Shackman, PLLC, New York (Thomas C. Lambert and Steven Shackman of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Paul H. Levinson of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered February 3, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff the Sixteenth Street Synagogue's (Synagogue) motion for summary judgment declaring, upon defendant 3 West 16th Street, LLC's (3 West) third counterclaim, that it is a one-third equitable owner of certain real property (the Building), unanimously affirmed, with costs.

In a prior appeal in this action (89 AD3d 24 [1st Dept 2011]), this Court, among other things, affirmed the motion court's grant of summary judgment to 3 West on its fourth

counterclaim, which sought to "recover sole possession of the Building" and plaintiff's ejection therefrom, and affirmed the motion court's declaration that "[3 West] has a fee simple interest in the [Building]" and that "plaintiffs possess no equitable ownership interest [in the Building]."

3 West's third counterclaim sought a declaration that "[3 West] is the proper fee simple owner of the Building with the exclusive right of possession." Although the prior appeal did not specifically address this counterclaim, the underlying issues were necessarily resolved in that appeal, and that resolution constitutes "the law of the case" (*Kenney v City of New York*, 74 AD3d 630, 630-631 [1st Dept 2010]).

The doctrine of res judicata also bars the Synagogue's claim of an equitable ownership interest in the Building (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). In a prior action, the Synagogue's predecessor in interest sought declaratory relief concerning its claimed equitable co-ownership of the Building. By stipulating to a discontinuance of that action, with prejudice, the Synagogue's predecessor gave up its claim of equitable ownership, and thus the Synagogue is barred from

asserting that claim in this action (*see Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 [1st Dept 2008], *lv dismissed* 14 NY3d 880 [2010]).

We decline 3 West's request to impose sanctions on the Synagogue.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15883 The People of the State of New York, Ind. 1413/12
Respondent,

-against-

Jordan B. Amos,
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 (Richard D. Carruthers, J.), rendered March 27, 2013, convicting defendant, upon his plea of guilty, of criminal mischief in the second degree, and sentencing him to a term of one year, with restitution in the amount of $40,000, and directing defendant to execute a confession of judgment in that amount, unanimously modified, on the law, to the extent of reducing the amount of restitution and the confession of judgment from $40,000 to $30,000, and otherwise affirmed.

As the People concede, the amount of restitution and the confession of judgment should be modified to conform to the unambiguous terms of the plea agreement. However, we see no reason to remand for further proceedings.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15884 In re James B.,
Petitioner-Appellant,

-against-

Regina D. S.,
Respondent-Respondent.

_____

James B., appellant pro se.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about June 23, 2014, which denied petitioner's objection to an order dismissing his petition for downward modification of an order of child support, unanimously affirmed, without costs.

Petitioner failed to meet his burden of establishing the existence of a substantial change of circumstances sufficient to warrant a downward modification of child support (*O'Brien v McCann*, 249 AD2d 92, 92 [1st Dept 1998]). Petitioner failed to show that he lost his job through no fault of his own (*see id.*at93).

We have considered petitioner's remaining contentions, including those regarding his paternity and respondent's default, and find them unavailing.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15885 In re Laysa Almonte, Index 103008/12
Petitioner-Appellant,

-against-

The Department of Education of the
City of New York, et al.,
Respondents-Respondents.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Daniel Dugan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered on or about May 2, 2014, which, to the extent appealed from as limited by the briefs, granted respondent New York City Department of Education's (DOE) cross motion to deny the petition and dismiss the proceeding, brought pursuant to CPLR article 78, seeking to annul respondent's determination to terminate petitioner's probationary employment, unanimously affirmed, without costs.

The IAS court correctly determined that DOE did not violate the law or act in bad faith in terminating petitioner, a probationary teacher (*see Matter of Johnson v Katz*, 68 NY2d 649 [1986]; *see also Medina v Sielaff*, 182 AD2d 424, 427 [1st Dept

1992]). Petitioner provided insufficient evidence to support her contention that her dismissal was due to bad fath or racial animus (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]). The evidence shows that petitioner's employment was terminated based on two classroom observations. Under these circumstances, the IAS court's annulment of petitioner's "U-rating," and DOE's failure to provide a mentor, are insufficient to show bad faith (*see Matter of Brown v Board of Educ. of the City School Dist. of the City of N.Y.*, 89 AD3d 486, 487-488 [1st Dept 2011]).

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

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15886 Ciaphas M. Wellington, et al., Index 304113/12
Plaintiffs-Appellants,

-against-

Financial Freedom Acquisition LLC,
on behalf of Structured Asset Securities
Corporation Reverse Mortgage Loan Trust
1999-RMI,
Defendant-Respondent.

_____

Daniel S. Ronan, Scarsdale, for appellants.

Parker Ibrahim & Berg LLC, New York (John M. Falzone of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 20, 2014, which granted defendants' motion to dismiss the complaint for lack of standing, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiffs allege that they own property that was previously owned by Louise Harper, who died in 2009 at the age of 96. According to plaintiffs, Harper first conveyed the property to them in early 1994; they reconveyed it to her in 1996 to correct an error in the deed; and in 1999, Harper executed a deed transferring the property back to them, subject to a life estate in her favor, in exchange for their promise to care for her during the remainder of her life.

Following Harper's death, plaintiffs learned that defendant claimed to be the assignee of a reverse mortgage executed by Harper in late 1994 (while plaintiffs owned the property) and recorded against the property. Although the mortgage was ineffective when executed, plaintiffs do not dispute that it attached to the property upon the subsequent reconveyance to Harper. They allege, however, that the mortgage is invalid because, inter alia, no funds were ever advanced to Harper and no annuity was ever acquired for her benefit pursuant to the loan documents, so that there was a failure of a condition precedent and lack of consideration.

The motion court erred in finding that plaintiffs lacked standing to bring this action pursuant to RPAPL article 15. RPAPL 1501(1) provides that any person who "claims an estate or interest in real property" may "maintain an action against any other person. . .to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, . . . the defendant might make" (*see generally ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801 [2d Dept 2012]). Plaintiffs, as owners of the subject property, clearly have standing to challenge the validity of defendant's mortgage and seek to have it removed as a cloud on their title

(*see Tornatore v Bruno*, 12 AD3d 1115, 1117 [4th Dept 2004]; *see also* RPAPL 1311[1]). Defendant's reliance on the principle of contract law that a person who was not a party to the contract or a third-party beneficiary thereof cannot assert a claim for breach of that contract (*see Griffin v DaVinci Dev., LLC*, 44 AD3d 1001 [2d Dept 1997]) is misplaced since plaintiffs' claim seeking to determine adverse claims to real property is expressly authorized by statute (RPAPL 1501).

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15887 The People of the State of New York, Ind. 3742/08
Respondent,

-against-

James Harrell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered August 15, 2012, as amended September 7, 2012, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree (two counts), attempted assault in the first degree, and assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 41 years to life, unanimously affirmed.

The court properly denied defendant's request for a justification charge regarding his use of force against the first of the two persons he assaulted during this incident. Defendant cut this victim using a screwdriver in a manner that effectively made it a knife capable of causing death or other serious

physical injury (*compare People v Almodovar*, 62 NY2d 126 [1974]). There was no reasonable view of the evidence, when viewed most favorably to defendant, that defendant used less than deadly physical force. Similarly, there was no reasonable view that, at the time of this assault, defendant believed, or had any reason to believe, that this victim was using or about to use deadly physical force, either alone or aided by others (*see People v Goetz*, 68 NY2d 96, 105-106 [1986]; *People v Watts*, 57 NY2d 299, 301 [1982]). Defendant did not preserve his claim that the court should have charged justification regarding his attack on the second victim, later in this incident, and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including counsel's strategy regarding his waiver of a possible CPL 710.30(3) preclusion argument (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits

review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Defendant's principal claim is that his trial counsel should have sought preclusion of defendant's videotaped statement for lack of timely notice, rather than making a suppression motion that effectively waived any preclusion argument. However, counsel could have reasonably concluded that the statement was, on balance, helpful to his client's defense, and that the best strategy was to proceed with a suppression hearing for discovery purposes only.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15888 In re Serenity H.,

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

Tasha S.,
Respondent-Appellant,

-against-

Administration for Children's Services
of the City of New York,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

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

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 27, 2013, which, to the extent appealed from, after a fact-finding hearing, found that respondent mother neglected the subject child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *see also Matter of Syed I.*, 61 AD3d 580, 580 [1st Dept 2009]). The record shows that the child was subject to actual or imminent danger of injury

or impairment of her emotional and mental condition from exposure to repeated incidents of domestic violence occurring in respondent's home (*see Matter of Angelique L.*, 42 AD3d 569, 572 [2d Dept 2007]). The record also shows that the impairment to the child's emotional health was clearly attributable to respondent's unwillingness or inability to exercise a minimum degree of care to protect her daughter from the harmful effects resulting from domestic violence, including respondent's denial that the father was committing domestic violence against her, her multiple refusals to receive domestic violence services and her failure to enforce the order of protection, issued after the police responded to the family apartment on November 18, 2012, which required the father to stay away from the family's home (*see Matter of Jasmine A. [Albert G.]*, 120 AD3d 1125 [1st Dept 2014]; *Matter of David M. [Sonia M.-C.]*, 119 AD3d 800, 801-802 [2d Dept 2014], *lv denied* 24 NY3d 989 [2014]; *Matter of Aaron C. [Grace C.]*, 105 AD3d 548 [1st Dept 2013]).

Contrary to respondent's contention, there exists no basis to disturb the court's credibility determinations (*see e.g. Matter of Niyah E. [Edwin E.]*, 71 AD3d 532 [1st Dept 2010]). The child's out-of-court statements that she saw the November 18, 2012 altercation between respondent and the father was

corroborated by the caseworker, respondent and the police officer who responded to the family's apartment after receiving a 911 emergency call and observed respondent's injuries (*see Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 616 [1st Dept 2014]; *Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]).

The child's out-of-court statement that she was frightened and saddened by the November 18, 2012 altercation between her parents demonstrates that she was in imminent risk of emotional and physical impairment (*see Matter of Krystopher D'A. [Amakoe D'A.]*, 121 AD3d 484, 485 [1st Dept 2014]; *Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421 [1st Dept 2012]). Moreover, the police officer's testimony that after he entered respondent's apartment, he saw that the child "looked like she had been crying" and was "breathing very, very quickly, rapidly" is sufficient to demonstrate by a preponderance of the evidence that the child's emotional well-being had been impaired by the altercation she had just witnessed between respondent and the father (*see Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]).

In addition, the child's out-of-court statements to the caseworker regarding the incidents of violence between respondent

and the father that occurred before the November 18, 2012 incident were corroborated by respondent's testimony that she had complained to the police that the father had hit her before and that the child was present when she and the father argued.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15889 In re Tapsiru Kamara, Index 154329/13
Petitioner-Respondent,

-against-

East River Landing,
Respondent,

Department of Housing Preservation,
and Development of the City of
New York, et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for Department of Housing Preservation and Development of the City of New York, appellant.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for 1199 Housing Corp., appellant.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 21, 2014, which granted petitioner's motion to vacate her default in a prior article 78 proceeding and consolidated that article 78 proceeding with the instant article 78 proceeding seeking the same relief, and denied respondents-appellants' cross motions to dismiss the petition, unanimously reversed, on the law, without costs, the cross motions granted, the petition denied, and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

The court improperly determined a motion to vacate an order

of a justice of coordinate jurisdiction rendered in an earlier article 78 proceeding brought by the then pro se petitioner. That motion should have been addressed to the justice in the prior proceeding because he was the assigned judge (*see* CPLR 2221[a][1], [b]; 22 NYCRR § 202.3[b]*; Clearwater Realty Co. v Hernandez,* 256 AD2d 100, 102 [1st Dept 1998]), and no exception was cited pursuant to 22 NYCRR § 202.3(c). Since the court lacked the authority to determine petitioner's motion to vacate her default in the prior article 78 proceeding, consolidation of the two proceedings was improper.

Moreover, it was undisputed that the second article 78 proceeding was untimely since it was filed more than four months after petitioner admitted she became aware of HPD's determination denying her succession rights to the apartment, and therefore, HPD's and the landlord's cross motions to dismiss the petition as barred by the statute of limitations should have been granted. In any event, HPD's determination was rational since the documents presented to the hearing officer did not demonstrate

when the tenant vacated the apartment and how long petitioner cohabited with him (*see Howard v Wyman*, 28 NY2d 434, 438 [1971]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15890- Ind. 5609/10
15891-
15892 The People of the State of New York,
Respondent,

-against-

Roni Smith,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Appellant,

-against-

Roni Smith,
Defendant-Respondent.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for respondent/appellant.

_____

Judgment of resentence, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 14, 2015, resentencing defendant, as a first felony offender, to a term of seven years, with five years' postrelease supervision, and bringing up for review an order (same court and Justice), entered on or about December 17, 2014, which granted defendant's CPL 440.20 motion to set aside his sentence, unanimously modified, as an exercise of discretion in the interest of justice, to the extent of reducing

the sentence to a term of 6 years, with 5 years' postrelease supervision, and otherwise affirmed.

The People's appeal presents the issue of whether a conviction by guilty plea is unconstitutional for predicate felony purposes if the defendant was not advised at the time of the plea that the sentence would include postrelease supervision, particularly if the plea was accepted before the Court of Appeals decided *People v Catu* (4 NY3d 242 [2005]). This Court has declined to reach this issue on prior appeals (*see e.g. People v Lara*, 130 AD3d 463 [1st Dept 2015]), given procedural considerations. Initially, we reject defendant's assertion that the People failed to preserve their present arguments on this issue.

CPL 400.15(7)(b) provides: "A previous conviction . . . which was obtained in violation of the rights of the defendant under the applicable provisions of *the constitution of the United States* must not be counted in determining whether the defendant has been subjected to a predicate felony conviction" (emphasis added). Because a conviction obtained in violation of *Catu* implicates rights under the federal Constitution as well as the state constitution (*see Catu*, 4 NY3d at 245 [citing *People v Ford*, 86 NY2d 397 [1995], which cited, among other things, *Boykin*

v Alabama, 395 US 238 [1969]; *see also People v Pignataro*, 22 NY3d 381, 386 n 3 [2013]; *People v Peque*, 22 NY3d 168, 176 [2013]), the court properly granted defendant's CPL 440.20 motion and vacated his sentence as a second violent felony offender on the ground that his 2002 conviction could not be counted as a predicate felony under CPL 400.15(7)(b).

The underlying conviction preceded the *Catu* decision. However, contrary to the People's contention, we find that the rule of law announced in *Catu* applies retroactively to pre-*Catu* convictions (*see Pignataro*, 22 NY3d 38; *People v Province*, 47 Misc 3d 286, 299-303 [Sup Ct, New York County 2015]).

Turning to defendant's cross-appeal, on the ground of excessiveness, from the judgment of resentence, we find the resentence excessive to the extent indicated, given that defendant has been resentenced as a first felony offender, and in light of the compelling mitigating factors cited.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15894 In re Raymond C. M.,

A Child Under Seventeen
Years of Age, etc.,

Marilyn M.,
Respondent-Appellant,

-against-

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent,

_____

Carol L. Kahn, New York, for appellant.

Joseph T. Gatti, New York, for respondent.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 6, 2014, which denied respondent mother's motion to vacate an order, same court and Judge, entered on or about March 18, 2013, upon her default, which, upon a finding that she had permanently neglected the subject child, terminated her parental rights and committed the custody and guardianship of the child jointly to petitioner agency and the Commissioner of the Administration for Children Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to meet her burden on moving to vacate to demonstrate both a reasonable excuse for her default in appearing for the fact-finding and dispositional hearings and a meritorious defense to the petition to terminate her parental rights (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538 [1st Dept 2012]). Her excuse that she was ill on the dates of the hearings is unsubstantiated (*see Matter of Julian Michael G. [Jeannette G.]*, 94 AD3d 573 [1st Dept 2012]). Moreover, respondent did not show that she made any effort to apprise her attorney, petitioner agency, the court, or any other party of her inability to attend (*see Matter of Octavia Loretta R. [Randy McN.-Keisha W.]*, 93 AD3d 537, 537 [1st Dept 2012]).

In view of the foregoing, we need not consider whether respondent demonstrated a meritorious defense. Were we to consider it, we would find that her argument that petitioner failed to show the required diligence under Social Services Law § 384-b(7)(f) is unpreserved and in any event belied by the record. Petitioner provided respondent with multiple counseling services and scheduled visitation with the subject child, thereby satisfying its statutory duty. It was relieved of its obligation to make diligent efforts after respondent failed for a period of

six months to keep it aware of her location (Social Services Law § 394-b[7][e][1]) and failed to complete the programs in her service plan (*Matter of Tyieyanna L. [Twanya McK.]*, 94 AD3d 494, 495 [1st Dept 2012]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15895 The People of the State of New York, Ind. 5738/12
Respondent,

-against-

Yusuf Sparks,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 14, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court properly exercised its discretion in modifying its *Sandoval* ruling based on defendant's trial testimony (*see People v Fardan*, 82 NY2d 638, 645-647 [1993]). The court had originally precluded the prosecutor from identifying a particular conviction as anything beyond an unspecified felony. However, when defendant testified, it became clear that there was a suspicious similarity, probative under the circumstances of the case, between the facts of defendant's own prior crime, and the conduct

he was now attributing to the victim. Furthermore, the court had warned defendant, prior to opening statements, that his testimony might open the door to a modified *Sandoval* ruling.

The court properly denied defendant's request for a justification charge, since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support that charge (*see People v Watts*, 57 NY2d 299, 301-302 [1982]). Even under the version of the events contained in defendant's testimony, any conduct by the victim that might have been a basis for a justification defense had abated by the time defendant committed the assault.

The court also properly admitted defendant's spontaneous statements made to police (*see People v Rivers*, 56 NY2d 476, 479-480 [1982]). The record supports the court's finding that these statements were not the product of interrogation or its functional equivalent.

In any event, in light of the overwhelming evidence against defendant, any errors regarding the *Sandoval* modification, the denial of a justification charge, and the suppression ruling were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The record

fails to support defendant's assertion that, in determining defendant's sentence, the court improperly considered conduct for which defendant had been acquitted. We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15896 The People of the State of New York, Ind. 5102/11
Respondent,

-against-

Reginald Wiggins,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered on June 12, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a prison term of 4½ years, unanimously affirmed.

Defendant's claim that the court should have inquired into a juror's fitness to continue serving is unpreserved because defendant, who requested other remedies, failed to join in his codefendant's request for an inquiry (*see People v Buckley*, 75 NY2d 843 [1990]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly determined, based on its own observations, that no inquiry was necessary (*see People v Maldonado*, 279 AD2d 406 [1st

Dept 2001], *lv denied* 96 NY2d 802 [2001]; *see also People v Buford*, 69 NY2d 290, 299 [1987]). The juror's brief outburst telling the codefendant's counsel not to use a racial epithet "again" during cross-examination demonstrated that she was bothered by the repeated use, at least four times, of the phrase, rather than by counsel's initial line of questioning, in which he was eliciting the relevant language used in a conversation. In any event, a juror's mere annoyance with a question or with counsel would not be a basis for discharge (*Buford*, 69 NY2d at 298-299). Accordingly, the court's instructions to all of the jurors to refrain from speaking from the jury box, to refrain from holding any questions they did not like against any of the parties, and to alert the court if they believed they could not be fair and impartial, sufficed under these circumstances (*see People v Mejias*, 21 NY3d 73, 80 [2013]; *People v Marshall*, 106 AD3d 1, 10 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]).

Defendant's similarly unpreserved contention that the juror's outburst warranted an inquiry because she might have been

inclined to usurp the court's role and disregard any later instructions is speculative, and further belied by the record, as the juror refrained from making any further comments from the jury box after the court told her not to do so.

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

ENTERED: OCTOBER 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15897 The People of the State of New York, Ind. 2075/03
Respondent,

-against-

Gerald Polanco, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Daniel P. Fitzgerald, J.), rendered on or about February 15, 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 15, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15898N Dennis Lee, also known as
Lee Man for Dennis, etc., Index 603111/05
Plaintiff-Respondent,

-against-

Chun Ka Luk, etc.,
Defendant-Appellant.

_____

Heller, Horowitz & Feit, P.C., New York (Eli Feit and Stuart A. Blander of counsel), for appellant.

The Law Office of Aimee P. Levine, New York (Aimee P. Levine of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 15, 2015, which, to the extent appealed from, granted plaintiff's motion to compel, unanimously modified, on the law and in the exercise of discretion, to limit the production of Nancy Lee Luk's estate's tax returns to the portion showing the operating results of ABN Realty, LLC and La Vie Zen Spa, LLC, and to delete the direction that defendant produce his tax returns, and otherwise affirmed, without costs.

Contrary to defendant's contention, plaintiff does not base his claim to the profits earned by Nancy Lee Luk and her companies (*e.g.* ABN and La Vie Zen) on her theft of a corporate opportunity; rather, he brings this action pursuant to Business

Corporation Law § 720 and alleges that she diverted funds from Lee-Tai Enterprises (USA) Ltd., 238-240 7th Avenue Corp., and Broadway Chinatown Realty, Inc. In *Glenn v Hoteltron Sys.* (74 NY2d 386 [1989]), a case brought pursuant to Business Corporation Law §§ 626 and 720 (*id.* at 390), defendant Jacob Schachter diverted the assets and opportunities of Ketek Electric Corporation to Hoteltron Systems, Inc., which he wholly owned (*id.*). The damages included profits that Hoteltron had earned "from Schachter's usurpation of Ketek assets and opportunities" (id.). Thus, the motion court providently exercised its discretion by ordering the production of ABN's and La Vie Zen's general ledgers so that plaintiff could ascertain their profits.

Defendant's argument about law of the case with respect to ABN's general ledger is unavailing; document request 37, which was at issue in *Lee v Luk* (68 AD3d 554 [1st Dept 2009]), did not involve ABN's *ledger*.

"Because of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources" (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005] [internal quotation marks

omitted]). In addition, "the party seeking to compel production ... must identify the particular information the return will contain and its relevance ... and limit examination of the return to relevant material through redaction of extraneous information" (*Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209 [1st Dept 1997]). Plaintiff satisfied these requirements with respect to Nancy Lee Luk's returns, but not defendant's. Furthermore, with respect to Nancy Lee Luk's estate's income tax returns, production of only the portion showing the operating results of ABN and La Vie Zen is warranted.

Below, defendant failed to establish that he filed joint tax returns with Nancy Lee Luk; therefore, we decline to consider this factually-based argument for the first time on appeal (*see e.g. Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [1st Dept 2000]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]).

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

ENTERED: OCTOBER 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Saxe, Richter, JJ.

15431 Pedro Quinones, Index 100115/12
Plaintiff-Respondent,

-against-

Olmstead Properties, Inc., et al.,
Defendants,

Fuel Outdoor, LLC,
Defendant-Appellant.

_____

Bartlett McDonough & Monaghan, LLP, White Plains (David C. Zegarelli of counsel), for appellant.

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 26, 2013, reversed, on the law, without costs, and the motion denied.

Opinion by Andrias, J. All concur except Mazzarelli J.P. and Richter J. who dissent in an Opinion by Mazzarelli, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela Mazzarelli, J.P.
John W. Sweeny, Jr.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter, JJ.

15431
Index 100115/12

_____x

Pedro Quinones,
Plaintiff-Respondent,

-against-

Olmstead Properties, Inc., et al.,
Defendants,

Fuel Outdoor, LLC,
Defendant-Appellant.

_____x

Defendant Fuel Outdoor, LLC appeals from the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered November 26, 2013, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against defendant Fuel Outdoor, LLC.

Bartlett McDonough & Monaghan, LLP, White Plains (David C. Zegarelli of counsel), for appellant.

Arye, Lustig & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for respondent.

ANDRIAS, J.

Plaintiff should not have been granted partial summary judgment on his Labor Law § 240(1) claim.

Plaintiff, an employee of North Shore Neon Sign (Neon), was injured while painting over graffiti on a billboard leased by defendant Fuel Outdoor, LLC (Fuel). The billboard was located inside a fenced-in lot and had a row of blocks in front of it that served as counterweights to prevent it from tipping over.

According to plaintiff, while standing on a stack of three of the concrete blocks, he lost his balance as he reached up to loosen one of the straps that held the image to the billboard frame so he could paint underneath it. Although plaintiff had been given a truck equipped with a cherry picker arm that extended 80 feet, with controls inside a basket at the end of the arm that manipulated the arm's movement, a safety harness and lanyard, and two ladders (8-feet and 24-feet), he did not attempt to use any of these devices, choosing instead to use the blocks as a platform. Plaintiff maintains that he could not paint from inside the cherry picker basket because the concrete blocks and light fixtures in front of the billboard were in the way, that he took off his harness because there was no way for him to "tie off" by attaching it to the structure, and that the ladders could not be used due to the configuration of the site and because no

one was with him to "foot" the 24-foot ladder.

To prevail on a Labor Law § 240(1) claim, a plaintiff must establish that a violation of the statute, i.e., a failure to provide adequate protection against a risk arising from a physically significant elevation differential, was a proximate cause of his or her injuries (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). Furthermore,

> "[t]o raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]).

Here, the record includes conflicting evidence regarding whether plaintiff was provided with adequate safety devices but failed to use them, which raises a triable issue of fact whether his conduct was the sole proximate cause of his injuries (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555 [2006]). Unlike cases where a plaintiff was injured when he used his discretion to choose one of several safety devices provided and

that device proved inadequate, in this case plaintiff was supplied with four safety devices and chose not to use any of them, electing instead to go straight to the concrete blocks, whose intended purpose was to act as a counterweight, not as a platform.

The dissent finds that defendant Fuel's submissions did not controvert plaintiff's evidence that the cherry picker and ladders were inadequate due to the configuration of the work site. The dissent also finds that defendant failed to submit any admissible evidence that the billboard itself, or any of its components, were safe or provided appropriate anchorage sites for plaintiff's harness lanyard. However, as to plaintiff's testimony that he could not paint from the bucket, James Taggart, vice president at Fuel, testified that in the past he had seen a Neon worker changing the sign's copy using a boom truck with a cherry picker that had been parked on the street outside the fence. As to plaintiff's claim that the lanyard could not be tied off, Fuel's expert stated that

> "there were numerous locations on the billboard and its frame where the plaintiff could have tied off, including but not limited to the tubing and piping out of which the billboard frame was constructed, the pieces of kindorf from which the billboard lights were supported and the straps on the face of the billboard."

Thus, an issue exists as to whether safe alternative means

of painting the billboard were available to plaintiff and whether his failure to use those means was the sole proximate cause of his accident (*see Harris v Hueber-Breuer Constr. Co., Inc.*, 67 AD3d 1351 [4th Dept 2009]).

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered November 26, 2013, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against defendant Fuel Outdoor, LLC, should be reversed, on the law, without costs, and the motion denied.

All concur except Mazzarelli, J.P. and Richter, J. who dissent in an Opinion by Mazzarelli, J.P.

MAZZARELLI, J.P. (dissenting)

Plaintiff, an electrician by trade, was injured while painting over graffiti on a billboard that was located inside a fenced-in, vacant lot. The billboard was leased from the property owner by defendant Fuel Outdoor, LLC. Plaintiff was employed by nonparty North Shore Neon Sign Co., Inc. (Neon). The area of the billboard's apron where the graffiti was located was approximately 12 or 13 feet from the ground. The billboard had no catwalks or guardrails that would permit a worker to safely work on it. Plaintiff testified that he had the following devices available to him when he arrived at the site: a cherry picker attached to the truck he used to gain access to the lot, a 24-foot extension ladder, an 8-foot A-frame ladder, and a safety harness. However, he further testified that none of those devices would permit him to safely perform the work. The cherry picker could reach a height of 85 feet, but plaintiff stated that the area of the billboard he needed to reach, which was fronted by concrete blocks and flood lights, was too far from the place where he could position the basket. He explained that he could not position either ladder close enough to the billboard because of the concrete blocks, and that the only way he could have positioned the extension ladder would have left him above the spot that needed to be painted. Further, there was no other

worker with him who could have "footed" the ladder. Finally, plaintiff testified that the safety harness he had was useless because there was no place on the billboard or the structure supporting the billboard to which he could have tied off a safety rope.

Plaintiff determined that the only way to perform the job was to climb on top of the concrete blocks to paint the billboard. The blocks had apparently been placed there as a counterweight for the structure holding the billboard. The blocks were approximately 2 1/2 feet deep, and were stacked so that they reached very close to the base of the billboard apron. Plaintiff began painting the billboard using a roller attached to a five-foot-long stick. After about 10 to 15 minutes, he had made his way from the far right to the center of the billboard, and was then standing on a stack of three concrete blocks. While reaching up to loosen one of the straps holding the image to the billboard frame, so that he could paint underneath it, plaintiff lost his balance and fell backwards to the ground.

Plaintiff testified that he had been trained in fall protection through his union, which sent him to a 10-hour OSHA course, and that he knew to tie off when at risk of a fall. The harness he had that day had a lanyard, and was in good condition. The A-frame and extension ladders in the truck were also in good

working order, as was the truck itself.

James Taggart, vice president at Fuel, testified at a deposition that the billboard had been physically constructed by Neon. Neon was also the contractor that changed the copy displayed on the billboard's sign. Taggart had seen a Neon worker changing the sign's copy using a boom truck with a cherry picker. The truck had been parked outside the chain link fence, and the worker had performed his work from inside the basket. Taggart received a complaint that the Fuel billboard had been tagged with graffiti, so he contacted Neon to have the sign painted. He stated that he did not have any understanding as to how Neon would paint over the graffiti, he gave Neon no instructions, and he made no evaluation as to whether there was a safe place from which a painter could work.

Plaintiff moved for summary judgment on his claim pursuant to Labor Law § 240(1). In support he provided an expert affidavit by a certified safety executive. The expert averred that plaintiff was "not provided with Fall Protection which was 'so constructed, placed and operated as to give proper protection,'" such as a proper walkway/catwalk with safety rails, or other passive fall protection system. The expert further averred that, while plaintiff was provided with an active fall protection system, i.e., the harness and lanyard, that device was

not appropriate for the situation because there were no designated anchorage or tie-off points, and the fall distance was such that plaintiff would have hit the ground before the system engaged. The expert also stated that the cherry picker was not proper protection, because it did not allow plaintiff to properly access the work area, the A-frame ladder could not be used due to the presence of the concrete blocks, and the extension ladder required a second worker to secure the ladder at the bottom.

In opposition, Fuel argued that plaintiff was the sole proximate cause of the accident, since he decided not to use any of the multiple safety devices provided to him. It too provided an affidavit by an expert, a professional engineer, who opined that any of the safety devices available to plaintiff would have prevented his fall. With respect to the safety harness, he stated that

> "there were numerous locations on the billboard and its frame where the plaintiff could have tied off, including but not limited to the tubing and piping out of which the billboard frame was constructed, the pieces of kindorf from which the billboard lights were supported and the straps on the face of the billboard."

Plaintiff submitted a reply affidavit by his expert, who observed that Fuel's expert did not state precisely what plaintiff should have tied onto, whether the suggested general locations were appropriate, given the free fall distances

implicated, and whether, in any event, the proposed tie-off locations were capable of safely supporting plaintiff's weight.

The motion court granted plaintiff's motion for partial summary judgment pursuant to Labor Law § 240(1), on the grounds that plaintiff was engaged in an elevation-related risk and was injured because of the failure of a safety device. The court found Fuel's argument that plaintiff was the sole proximate cause of his accident unpersuasive since there was "no evidence in this case to demonstrate that plaintiff was provided with the kinds of safety devices which could be utilized under the particular circumstances facing plaintiff." Regarding Fuel's expert's statement that plaintiff could have tied off on the billboard components, the court observed that there was no proof in the record that the suggested locations were strong enough to support plaintiff.

A plaintiff demonstrates his entitlement to summary judgment on a claim under Labor Law § 240(1) when he establishes that the statute was violated and that the violation was a proximate cause of his injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). However, if adequate safety devices are provided and the worker either chooses, without justification, not to use them, or misuses them, then the defendant is not liable under § 240(1) (*see Gallagher v New York*

Post, 14 NY3d 83 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]).

A safety device need not be inherently defective to be deemed inadequate. So long as the device is not suited to the task at hand, it is not adequate for purposes of Labor Law § 240(1) (*see Felker v Corning Inc.*, 90 NY2d 219 [1997]). In *Felker*, the plaintiff, a painter, was provided with a functioning ladder. However, he needed to reach out over a height in order to complete the task of painting an alcove wall. Since the ladder was insufficient to protect the plaintiff from the risk of having to reach out over the alcove, the Court of Appeals found that no device had been provided to protect against that risk (*see also Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449-450 [1st Dept 2013] [plywood cover over hole was inadequate to protect workers from falling through]; *Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012] [scaffold that required workers to travel across an unguarded gap of three feet was inadequate]).

Here, plaintiff made a prima facie showing that none of the devices furnished to him were adequate to the task at hand. He testified that neither the A-frame ladder nor the extension ladder could have been used due to the presence of the concrete

blocks at the base of the sign, and Fuel offered no evidence to the contrary. Fuel's expert stated in only a bare, conclusory fashion that the ladders were adequate for plaintiff to perform his work. Further, even if, as Fuel argues he should have, plaintiff had called the office to ask for someone to be sent to foot the ladder, the helper would not have constituted an adequate safety device (*see McCarthy v Turner Constr. Inc.*, 52 AD3d 333 [1st Dept 2008]).

Fuel also failed to raise an issue of fact as to whether plaintiff's failure to use the cherry picker made him the sole proximate cause of the accident. Plaintiff's testimony that the basket could not have reached the appropriate angle to make the painting feasible was unrebutted by Fuel. To be sure, as the majority points out, Taggart, Fuel's witness, testified that he had seen, on more than one occasion, a worker changing the advertising copy on the billboard from a cherry picker. However, the majority fails to account for the absence of evidence that the cherry picker that was available to plaintiff was the same or similar to the lifts that Taggart saw being used. Moreover, the majority ignores that Fuel did nothing to obviate the likely fact that changing copy is a substantially different task from, and requires different positioning than, painting over a small section of graffiti at the bottom of the billboard apron.

Indeed, Taggart testified that he had never seen a worker painting on the billboard face. Further, Fuel's expert did not explain how plaintiff could have safely employed the cherry picker to reach the section of the billboard where the graffiti was located.

Plaintiff also established prima facie that the safety harness was inadequate because there was nothing that he felt would safely hold the weight of his body if he tied off to it. I disagree with the majority that Fuel's expert's barebones statement that "there were numerous locations on the billboard and its frame where the plaintiff could have tied off" created an issue of fact. It was insufficient for the expert to merely itemize the things to which plaintiff could have attached his safety harness. Rather, the expert was required to state, for each of those things, that it had the physical properties necessary to support plaintiff's weight if he fell, and to set forth the steps that he took on his site visit to reach that conclusion (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904 [1st Dept 2011]). Further, the expert failed to address at all plaintiff's expert's opinion that, in any event, the fall distance was such that plaintiff would have hit the ground before the safety harness and rope system engaged.

Because Fuel was required to offer more than the barebones and conclusory statements it submitted as to how the four devices available to plaintiff could have prevented the accident, it failed to raise an issue of fact as to whether plaintiff was the sole proximate cause. Accordingly, I would affirm the grant of partial summary judgment to plaintiff on his claim pursuant to Labor Law § 240(1).

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

ENTERED: OCTOBER 15, 2015

CLERK