SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 5, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

14670 Black Bull Contracting, LLC, Index 150120/13
Plaintiff-Appellant,

-against-

Indian Harbor Insurance Company,
Defendant-Respondent.

Law Office of James M. Haddad, New York (James M. Haddad of counsel), for appellant.

Kaufman, Dolowich & Voluck LLP, Woodbury (Michael L. Zigelman of counsel), for respondent.

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered January 7, 2013, which, in an action seeking a declaratory judgment that defendant insurer is obligated to defend and indemnify plaintiff insured in an underlying personal injury action, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), and denied plaintiff's cross motion for summary judgment, unanimously modified, on the law, to declare that defendant has no obligation to defend and indemnify plaintiff in the underlying action, and otherwise affirmed, with costs awarded to defendant against plaintiff. The Clerk is directed to enter judgment accordingly.

Plaintiff Black Bull Contracting, LLC (Black Bull) is the named insured under a commercial general liability (CGL) policy issued by defendant Indian Harbor Insurance Company (Indian Harbor) for the period from March 2011 to March 2012. The CGL coverage form used in the policy states that the insured is covered for liability for "'bodily injury' or 'property damage' to which this insurance applies." An endorsement to the CGL coverage form (denominated "Endorsement #003") provides: "This insurance applies only to operations that are classified or shown on the Declarations or specifically added by endorsement to this Policy." The declarations page sets forth four classifications, with associated code numbers: (1) "Carpentry — interior" (91341); (2) "Dry Wall or Wallboard Installation" (92338); (3) "Contractors — subcontracted work — in connection with construction, reconstruction, repair or erection of buildings — Not Otherwise Classified" (91585); and (4) "Contractors — subcontracted work — in connection with construction, reconstruction, repair or erection of buildings — Not Otherwise Classified — uninsured/underinsured" (91585c). It is evident from the declarations page that the specified classifications were the basis on which the premium was calculated.

Black Bull was engaged by nonparties United Airconditioning Corp. II and United Sheet Metal Corp. (collectively, United) to

perform certain work on a building in Long Island City owned by United. On August 26, 2011, an employee of Black Bull named Luis Mora, while using a jackhammer to demolish a chimney in the United building, was injured when he was struck by a piece of concrete from the chimney. Mora commenced an action against United in Supreme Court, Kings County (the *Mora* action), and United commenced a third-party action against Black Bull. Black Bull tendered to Indian Harbor its defense in the *Mora* action, as well as the defense of United, an additional insured under Black Bull's Indian Harbor policy. After a delay of more than two months from its receipt of the notice of claim, Indian Harbor disclaimed coverage on the ground that demolition work by Black Bull, the activity that gave rise to Mora's injury, was not within any of the four classifications of work covered by the policy.

This action by Black Bull seeks a declaration that Indian Harbor is obligated to defend and indemnify Black Bull and United (the latter as an additional insured under Black Bull's policy) in the *Mora* action. In lieu of answering, Indian Harbor moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Black Bull cross-moved for summary judgment. Supreme Court granted Indian Harbor's motion and denied Black Bull's cross motion. For the reasons discussed below, we modify only to issue a

declaration in favor of Indian Harbor, and otherwise affirm.

Initially, we note that Supreme Court correctly determined that Indian Harbor's disclaimers, had they been subject to the timeliness requirement of Insurance Law § 3420(d)(2), would have been untimely as a matter of law. The record shows that Indian Harbor issued separate disclaimers to Black Bull 79 days and 85 days after it received the notice of claim. Since the basis of the disclaimers was apparent from the face of the notice of claim and accompanying correspondence, Indian Harbor's extensive delays in issuing the disclaimers were unreasonable as a matter of law (*see National Cas. Co. v American Home Assur. Co.*, 102 AD3d 553, 553 [1st Dept 2013]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88-89 [1st Dept 2005]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [1st Dept 2002], *lv denied* 98 NY2d 605 [2002]).

Notwithstanding the untimeliness of Indian Harbor's disclaimers under Insurance Law § 3420(d)(2), Supreme Court correctly determined that Indian Harbor does not owe Black Bull or United coverage with respect to the *Mora* action. Whether the untimeliness of Indian Harbor's disclaimer under Insurance Law § 3420(d)(2) precludes it from denying coverage depends on whether there was "a lack of coverage in the first instance" or "a lack of coverage based on an exclusion" (*Matter of Worcester Ins. Co.*

v Bettenhauser, 95 NY2d 185, 189 [2000]). As the Court of Appeals elaborated in *Worcester*:

> "Disclaimer pursuant to section 3420(d) [now § 3420(d)(2)] is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed. By contrast, disclaimer pursuant to section 3420(d) is necessary when denial of coverage is based on a policy exclusion without which the claim would be covered" (95 NY2d at 188-189).

We agree with Supreme Court that the subject policy's classification limitations of coverage merely define the activities that were included within the scope of coverage "in the first instance" (*Worcester*, 95 NY2d at 188) and do not constitute exclusions from coverage that would otherwise exist.[1] Stated otherwise, the relevant policy language of Endorsement #003 and the declarations page states the activities that *are* covered. If the loss in question did not arise from activities within the classifications set forth on the declarations page, then coverage is lacking "by reason of lack of inclusion" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 137 [1982] [internal

[1]We point out that, as correctly noted by Supreme Court and agreed by both parties, it is not dispositive that the word "exclusion" is not used in the relevant portions of the subject policy (*see Planet Ins. Co. v Bright Bay Classic Vehicles*, 75 NY2d 394, 400 [1990]).

quotation marks omitted]), and "the policy as written could not have covered the liability in question under any circumstances" (*id.* at 134).

Our determination that the classification limitation in the subject policy does not constitute an exclusion finds support in *Max Specialty Ins. Co. v WSG Invs., LLC* (No. 09-CV-05237 [CBA][JMA], 2012 WL 3150577 [ED NY Aug. 2, 2012]). The CGL policy at issue in *Max Specialty* was based on a coverage form that, like the one at issue here, afforded coverage for losses "*to which this insurance applies*" (2012 WL 3150577, *3 [internal quotation marks omitted]) and contained an endorsement providing that the insurance "applies only to 'bodily injury' . . . arising out of only those operations designated, listed and described in the declarations page" (2012 WL 3150577, *1). The federal district court, applying New York law, held that the *Max Specialty* policy was "written to cover only those business operations in the areas of interior carpentry and drywall and wallboard installation," the classifications set forth in the declarations (2012 WL 3150577, *3). Therefore, the court concluded, the lack of coverage for liability arising from an activity outside of those classifications was not based on an exclusion and was not waived by an untimely disclaimer (*id.*).

Black Bull does not attempt to distinguish *Max Specialty*,

instead arguing that the case was "erroneous[ly]" decided. We disagree, and find *Max Specialty*'s reasoning persuasive in reaching our conclusion that the classification limitation endorsement to Black Bull's policy was not an exclusion but a definition of the scope of coverage. Contrary to Black Bull's contention, the policy's CGL coverage form did not define coverage in a broad manner that, but for Endorsement #003, would have included losses arising from activities outside the classifications set forth in the declarations. Rather, as in *Max Specialty*, the coverage form provides that Indian Harbor "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' *to which this insurance applies*" (emphasis added). The coverage form does not purport to fully define the losses "to which this insurance applies," and Endorsement #003 specifies that the insurance applies only to losses arising from the classifications of operations set forth on the declarations page.

Black Bull's reliance on *Planet Ins. Co. v Bright Bay Classic Vehs.* (75 NY2d 394 [1990]) is misplaced. The *Planet Insurance* policy covered cars in a rental fleet that were rented for less than 12 months (*id.* at 398). The Court of Appeals deemed this definition to be an exclusion as applied to a car leased for 24 months because a car that otherwise would have been

covered as part of the insured's fleet "became 'uncovered' upon the happening of a subsequent event: i.e., the rental of Bright Bay's car for a lease period other than that prescribed in the policy. Thus, it cannot be said that there was never a policy in effect covering the involved automobile" (*id.* at 401). In reaching this conclusion, the Court was influenced by the public policy consideration that the person renting the vehicle, which was represented as covered by insurance, would have had no way of knowing that the period of the lease negated the coverage (*id.*). No such considerations are present in this case, where Black Bull, the named insured, should have known from the outset that it would not be covered for liabilities arising from operations outside the classifications set forth in the policy declarations.[2]

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[2]*Greater N.Y. Mut. Ins. Co. v Clark* (205 AD2d 857 [3d Dept 1994], *lv denied* 84 NY2d 807 [1994]), which deemed the restriction of automobile liability coverage to losses arising from permissive use of the vehicle to constitute an exclusion, is distinguishable on grounds similar to *Planet Insurance.* Also unavailing is Black Bull's reliance on *Tower Ins. Co. of N.Y. v BCS Constr. Servs. Corp.* (118 AD3d 527 [1st Dept 2014]), which concerned whether the subject loss fell within the policy's coverage under its classification limitation endorsement. The timeliness of the carrier's disclaimer was not at issue in *Tower*, and the decision therefore did not consider whether the classification limitation endorsement functioned as an exclusion from coverage, as opposed to part of the definition of coverage in the first instance, for purposes of Insurance Law § 3420(d)(2). Similarly, the Second Department in *Burlington Ins. Co. v Guma Constr. Corp.* (66 AD3d 622 [2d Dept 2009]) did not

Finally, Supreme Court correctly determined that, because the demolition work in which Mora was engaged does not fall within any of the classifications set forth in the policy declarations, neither Black Bull nor United is covered for this loss under Black Bull's Indian Harbor policy. The complaint in the *Mora* action alleges that Mora was demolishing a chimney with a jackhammer when he was injured. On appeal, Black Bull does not argue that this activity could be deemed to fall under the "Carpentry — interior" or "Dry Wall or Wallboard Installation" classifications, but contends that it falls within the scope of the classification for "Contractors — subcontracted work — in connection with construction, reconstruction, repair or erection of buildings — Not Otherwise Classified," which bears the code number 91585 (classification code 91585). It is Black Bull's position that classification code 91585 could reasonably be interpreted to extend coverage to liability arising from any work subcontracted to Black Bull, as opposed to liability arising from work that Black Bull subcontracts to other contractors. Such an interpretation, however, is untenable as a matter of law, because

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rule on whether the classification limitation endorsement constituted an exclusion, but found that the allegations of the underlying complaint "suggest[ed] a reasonable possibility of coverage" (*id.* at 625). We find the remaining authorities cited by Black Bull on this issue either inapposite or unpersuasive.

it would render meaningless and without effect the two previous classification limitations by extending Black Bull's coverage to all of its contracting operations, whether or not they constitute carpentry or wall installation. "The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595, 599 [1961]; *Metropolitan Suburban Bus Auth. v County of Nassau*, 126 AD3d 434, 435 [1st Dept 2015], *lv denied* 25 NY3d 907 [2015]).

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

ENTERED: JANUARY 5, 2016

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16051 In re Paramjit Gakhal, Index 113428/11
Petitioner-Appellant,

-against-

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

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Law Office of Jeffrey L. Goldberg, P.C., Port Washington (Eileen J. Goggin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2014, which denied the petition in this CPLR article 78 proceeding to annul respondents' determination, dated August 11, 2011, denying petitioner accidental disability retirement (ADR) benefits, reversed, on the law, without costs, the petition granted, and the matter remanded to respondents for a new determination consistent herewith.

An accident is defined as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II*, 57 NY2d 1010, 1012 [1982] [internal quotation marks omitted]). Here, on the first day of training, petitioner lost control of a scooter, which accelerated to 40 miles per hour, and crashed into a metal barrier, causing

the barrier and scooter to fall on top of her. The commanding officer of the training unit characterized the incident as "unexpected." While injuries sustained during routine training exercises may not qualify for ADR benefits (*see Matter of Becker v Ward*, 169 AD2d 453 [1st Dept 1991]), here, the loss of control coupled with the scooter's acceleration, appears to have been sudden and out of the ordinary (*see Matter of Starnella v Bratton,* 92 NY2d 836, 839 [1998]; *Matter of Flannelly v Board of Trustees of N.Y. City Police Pension Fund* (278 AD2d 113 [1st Dept 2000] [officer's trip and fall over a tangle of television and VCR wires in police locker room, while performing routine security inspection, constituted a service-related accident as a matter of law]).

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

SWEENY, J. (dissenting)

I dissent.

We are faced with a simple question -- was there credible evidence that the incident at issue was not an accident? The answer is yes.

Petitioner was learning to ride a scooter as part of her normal police training in a scooter obstacle course. That the scooter accelerated quickly (petitioner cannot remember why) and hit a metal barrier is unfortunate but clearly within the commonsense expectations of what might occur in such a training exercise.

Where, as here, ADR benefits are denied as a consequence of a tie vote by the Board of Trustees, the denial may be set aside only if it can be determine "as a matter of law" that the officer's disability was "the natural and proximate result of a service-related accident" (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II*, 60 NY2d 347, 352 [1983]; *see also Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]). As long as there is any "credible evidence" that the incident was not an accident, the Board's determination must stand (*Meyer*, 90 NY2d at 145).

The Court of Appeals has determined that the term "accident"

in the applicable statute (*see* Administrative Code of City of NY § 13-252) means a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010 [1982]).

Here, although the commanding officer's subjective observation that the incident was "unexpected" is favorable for petitioner, there is credible objective evidence that the incident was not an "accident"[1] (*see Lichtenstein*, 57 NY2d at 1012; *see also Matter of Becker v Ward*, 169 AD2d 453, 453 [1st Dept 1992]). Accordingly, the Board's determination must stand.

The article 78 court's decision should be affirmed.

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

ENTERED: JANUARY 5, 2016

CLERK

[1]In fact, the majority can say no more than that the incident "appears" to have been sudden and out of the ordinary.

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

16464 Niurka Andino, Index 26798/04
Plaintiff-Respondent,

-against-

Ronald Mills, et al.,
Defendants-Appellants.
- - - - -
City of New York, and New York
State Trail Lawyers Association,
Amici Curiae.
- - - - -
[And A Third-Party Action]

Lawrence Heisler, New York City Transit Authority, Brooklyn (Timothy O'Shaugnessy of counsel), for appellants.

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

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for City of New York, amicus curiae.

Evan M. Goldberg, New York, for New York State Trail Lawyers Association, amicus curiae.

Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered June 20, 2014, upon a jury verdict, awarding plaintiff the principal sums of $600,000 for past pain and suffering, $23,000,000 for future pain and suffering over 37 years, $283,422 for past lost earnings, $2,392,512 for future lost earnings over 19.24 years, $2,100,000 for future medical expenses over 37 years, and $2,490,829 for future loss of pension over 17.7 years, and bringing up for review an order, same court

and Justice, entered April 8, 2014, which, after a hearing, denied defendants' motion for a collateral source offset pursuant to CPLR 4545, unanimously modified, on the law, to grant that portion of defendants' motion seeking to offset the jury's award of future pension benefits by the amount of plaintiff's accidental disability benefits, and, on the facts, to vacate the award for future pain and suffering and order a new trial as to such damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award for future pain and suffering in the amount of $2.7 million and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

As a result of a motor vehicle accident, plaintiff sustained a brain injury resulting in, inter alia, permanent cognitive impairment, and headaches accompanied by nausea and dizziness, and injuries to her knees resulting in three surgeries and the need for a future left knee replacement. The severity of the injuries notwithstanding, the award of $23,000,000 for future pain and suffering deviates materially from what is reasonable compensation to the extent indicated (*see e.g. Godfrey v G.E. Capital Auto Lease, Inc.,* 89 AD3d 471 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012], *lv denied* 19 NY3d 816 [2012]; *Coore v Franklin Hosp. Med. Ctr.*, 35 AD3d 195 [1st Dept 2006]; *see also*

Smith v Manhattan & Bronx Surface Tr. Operating Auth., 58 AD3d 552 [1st Dept 2009]; CPLR 5501[c]). The award for future medical costs, however, was not speculative, and was supported by the testimony of plaintiff's physicians and an economist (*see Coleman v City of New York*, 87 AD3d 401 [1st Dept 2011]).

The trial court correctly denied defendants' motion to reduce the jury's award for future lost earnings by her accidental disability pension and future medical expenses by the health insurance plan afforded to her as part of her disability retirement (*see Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]; *Johnson v New York City Tr. Auth.*, 88 AD3d 321, 328-330 [1st Dept 2011]; *Gonzalez v Iocovello*, 249 AD2d 143 [1st Dept 1998], *affd* 93 NY2d 539 [1999]). The jury's award for future loss of pension benefits, however, should have been offset by the total amount that plaintiff was projected to receive under that

disability pension, effectively reducing that category of damages to zero (*see Oden,* 87 NY2d at 89).

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

ENTERED: JANUARY 5, 2016

CLERK

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

16473N In re New York City Asbestos Litigation, Index 190377/10

- - - - -

Mary Andrucki, et al.,
Plaintiffs-Respondents,

-against-

Aluminum Company of America (ALCOA),
et al.,
Defendants,

The Port Authority of New York
and New Jersey,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Martin Shulman, J.), entered on or about June 15, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 11, 2015,

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

ENTERED: JANUARY 5, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, JJ.

16522-
16522A The People of the State of New York, Respondent,

Ind. 3351/09
3596/10

-against-

Oscar Punter,
Defendant-Appellant.

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

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

Judgments, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered September 20, 2012, convicting defendant, upon his pleas of guilty, of robbery in the first degree and assault in the second degree, adjudicating him a youthful offender on the robbery conviction and sentencing him to a term of one to three years, and sentencing him to a consecutive term of two years on the assault conviction, unanimously modified, on the law, to the extent of vacating the sentence on the assault conviction and remanding for a youthful offender determination on that conviction, and otherwise affirmed.

Defendant is entitled to a youthful offender determination pursuant to *People v Rudolph* (21 NY3d 497 [2013]) on his assault conviction. Although the court stated that defendant would receive

youthful offender treatment on the robbery charge, to which he pleaded guilty on the same day, it did not specify with regard to the assault count whether it had "actually consider[ed] youthful offender treatment or whether it had improperly ruled it out on the ground that it had been waived as part of defendant's negotiated plea" (*People v Eley*, 127 AD3d 583 [1st Dept 2015] [internal quotation marks omitted]).

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

ENTERED: JANUARY 5, 2016

CLERK

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

16523 Leroy Ford, Index 304128/09
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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

Asher & Associates, P.C., New York (Robert J. Poblete of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered July 28, 2014, which denied defendant's motion to dismiss the case as abandoned, and granted plaintiff's cross motion to restore the case to the calendar upon his payment to defendant of $600 in costs, unanimously affirmed, without costs.

The court providently exercised its discretion in granting plaintiff's cross motion to restore the case to the calendar more than one year after it had been marked off (*see Kaufman v Bauer*, 36 AD3d 481, 482 [1st Dept 2007]). Plaintiff showed a meritorious cause of action, a reasonable excuse for the delay in seeking to restore the matter to the calendar, an absence of intent to abandon prosecution, and a lack of prejudice to defendant (*see id.*).

We note that defendant does not contest that plaintiff showed a potentially meritorious cause of action based on evidence that he broke his ankle after tripping on a broken sidewalk curb of which the City had prior written notice.

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

ENTERED: JANUARY 5, 2016

CLERK

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

16524 In re Shazzi T.,
Petitioner-Appellant,

-against-

Ernest G.,
Respondent-Respondent.

Yisroel Schulman, New York Legal Assistance Group, New York (Christina Brandt-Young of counsel), for appellant.

Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about March 17, 2011, which denied petitioner's motion for an adjournment to amend a family offense petition and settled the matter over objection by entering a final six month order of protection, unanimously reversed, on the law and the facts, without costs, the motion granted, and the matter remanded for further proceedings.

The Family Court improvidently exercised its discretion by denying petitioner's request for a short adjournment so that she could amend the family offense petition and newly appointed counsel could familiarize herself with the case. Leave to amend should be freely granted so long as the amendment is not plainly lacking in merit and there is no significant prejudice to the nonmoving party (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]).

Here, at her third appearance before the court, petitioner appeared with counsel for the first time, having only been informed of her right to appointed counsel at the prior proceeding. Despite having earlier indicated its willingness to allow an amendment if petitioner obtained counsel, the court perfunctorily denied petitioner's request for a brief adjournment in order to amend the petition, and proceeded directly to assessing whether the matter could be disposed of without a fact finding hearing. In so doing, the court noted that respondent was paying his retained counsel's fee. Under the circumstances, where there is no indication of an attempt to unduly prolong the proceedings, a party's payment for counsel's representation is not the type of significant prejudice which will warrant the denial of an otherwise sufficient motion for leave to amend.

Also, the Family Court improperly exercised its discretion when, over petitioner's objection and without first conducting a fact-finding hearing, it abruptly settled the matter sua sponte by extending the existing permanent order of protection for only six months. Under the circumstances, "[t]he petitioner should have been given the opportunity to prove the alleged family offenses and

aggravating circumstances which, if established, would have entitled her to a three-year order of protection" (*Matter of Alfeo v Alfeo*, 306 AD2d 471 [2nd Dept 2003]; *see Matter of Eames v Eames*, 147 AD2d 696, 697 [2nd Dept 1989]).

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

ENTERED: JANUARY 5, 2016

CLERK

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

16525 Jasmin Irizarry, Index 301668/13
Plaintiff-Appellant,

-against-

1915 Realty LLC,
Defendant-Respondent.

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

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Tara C. Fappiano of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 12, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Triable issues of fact regarding whether defendant caused or created the wet stair condition on which plaintiff allegedly slipped and fell precludes the grant of summary judgment. Although defendant's superintendent denied mopping the stairs on the morning of plaintiff's accident, as it would have been inconsistent with his established cleaning routine and schedule, plaintiff's testimony that mopping was performed by different persons, at different times, on random days, conflicted with the superintendent's claim as to the existence of a mopping schedule. Furthermore, rather than rely on speculation as to causation, plaintiff's theory is based upon her

observation that the condition was soapy, dirty, and wet, resembling what one would see when using a dirty mop, and the presence of a mop, bucket, and "wet floor" sign in the nearby lobby. Defendant's creation of the alleged condition could be reasonably inferred from such testimony (*see Tucker v New York City Hous. Auth.,* 127 AD3d 619 [1st Dept 2015]; *Brown v Simone Dev. Co., L.L.C.,* 83 AD3d 544 [1st Dept 2011]).

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

ENTERED: JANUARY 5, 2016

CLERK

Mazzarelli, Sweeny, Saxe, Moskowitz, JJ.

16527 The People of the State of New York, Respondent, Ind. 2262/09

-against-

Brian Santiago, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered on or about November 10, 2011,

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

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

ENTERED: JANUARY 5, 2016

CLERK

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

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

16529 The People of the State of New York, Respondent, Ind. 4936/12

-against-

Herby Cabrera, 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 (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Mandelbaum, J. at suppression hearing; Laura A. Ward, J. at jury trial and sentencing), rendered December 4, 2013, convicting defendant of criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police saw defendant angrily yelling and cursing at a woman on the street, while aggressively waving bags at her with both hands. This conduct provided the police with a founded suspicion that defendant was engaged, or about to engage, in some type of criminality, consisting at least of disorderly conduct, with a potential for violence (*see generally People v De Bour*, 40 NY2d 210, 223 [1976]).

This justified the officer's common-law inquiry as to whether defendant had a weapon, or anything that would be of concern to the officer. Once defendant replied that he had a knife in his back pocket and tried to reach for it, the officer had a reasonable basis to fear for his safety, and his subsequent seizure of the knife from the location indicated by defendant was a reasonable protective measure (*see People v Terrance*, 101 AD3d 624, 625 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]). Defendant did not preserve his claim that the officer's initial direction to put down the bags was a seizure requiring reasonable suspicion, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see e.g. People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The People proved the operability, within the meaning of the statute, of defendant's gravity knife. The officer described how he opened the knife, and demonstrated its operability in court (*see People v Birth*, 49 AD3d 290 [1st Dept 2008], *lv denied* 10 NY3d 859 [2008]). The fact that the officer needed to make several attempts before the knife opened did not undermine a finding of operability (*see People v Smith*, 309 AD2d 608 [1st Dept 2003], *lv denied* 1 NY3d 580 [2003]).

The court properly exercised its discretion in denying defendant's mistrial motion, made when the prosecutor made a remark during jury selection regarding defendant's absence from the courtroom. The court's curative actions were sufficient (*see People v Santiago*, 52 NY2d 865 [1981]), and in any event the prosecutor's comment was not particularly prejudicial, because it was similar to an instruction that the court had already given on the subject of defendant's absence from the trial.

The court properly exercised its discretion in precluding defendant's accident reconstruction expert from testifying about the laws of motion and different kinds of forces that operate on objects, offered to assist the jury in determining whether the officer's flicking of the wrist constituted the application of either gravity or centrifugal force. The proposed testimony was unnecessary and potentially confusing (*see People v Herbin*, 86 AD3d 446, 447 [1st Dept 2011], *lv denied* 17 NY3d 859 [2011]). The excluded testimony was similar to the testimony properly excluded in *Herbin*, and defendant's argument to the contrary is unavailing.

Defendant's challenge to the court's instruction on the

knowledge element is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Parilla*, 112 AD3d 517 [1st Dept 2012], *lv granted* 26 NY3d 933 [2015]).

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

ENTERED: JANUARY 5, 2016

CLERK

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

16530-
16531 Index 603271/08

Northern Group Inc., et al.,
Plaintiffs-Appellants,

-against-

Merrill Lynch, Pierce, Fenner & Smith
Incorporated, et al.,
Defendants-Respondents.

_____

Paykin Krieg & Adams LLP, Purchase (Joseph N. Paykin of counsel), for appellants.

Morgan, Lewis & Bockius LLP, New York (Timothy J. Stephens of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 31, 2014, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 29, 2014, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record establishes that plaintiffs are unable to demonstrate the elements of a fraud cause of action in connection with their purchase from defendants of commercial mortgage-backed securities (CMBS) from May through July 2008, which allegedly resulted in a loss to plaintiffs of more than $24 million. Defendants' alleged misrepresentations are not actionable as fraud because they are "mere puffery, opinions of value or future

expectations, rather than false statements of value" (*Sidamonidze v Kay*, 304 AD2d 415, 415 [1st Dept 2003] [internal citations omitted]; *see also DH Cattle Holdings Co. v Smith*, 195 AD2d 202, 208 [1st Dept 1994]). Nor could these sophisticated plaintiffs have reasonably relied on the alleged misrepresentations in this arm's-length transaction, since they admit that they never read the relevant prospectuses, which were filed with the Securities and Exchange Commission (SEC) and were publicly available through SEC's website, and from which plaintiffs could have ascertained the specific risks that they claim were not disclosed to them (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012]). The record shows that other information that plaintiffs claim was withheld from them either was in fact known by their chief investment officer or was ascertainable through other publicly available sources. Defendants had no special duty to disclose pursuant to the special facts doctrine, since the information was not peculiarly within their knowledge and was not such that it could not have been discovered by plaintiffs through the exercise of ordinary diligence (*see Jana L. v*

West 129th St. Realty Corp., 22 AD3d 274, 278 [1st Dept 2005]).

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

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

ENTERED: JANUARY 5, 2016

CLERK

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

16532 In re Austrolyn O.,
Petitioner-Respondent,

-against-

Michelle R.,
Respondent-Appellant,

Juvayne O.,
Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Law Offices Of Randall S. Carmel, Syosset (Randall Carmel of counsel), attorney for the child

_____

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about February 23, 2015, which denied respondent mother's motion to vacate an order granting custody of the subject child to petitioner paternal grandmother on consent of the parties, unanimously affirmed, without costs.

The Family Court properly denied respondent mother's motion to vacate the custody order and to reopen the underlying custody proceeding. The record of the proceedings demonstrates that the mother's decision to waive her right to counsel and proceed pro se was knowing and voluntary, and made after appropriate

inquiries by the court (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 727 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

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

ENTERED: JANUARY 5, 2016

CLERK

Friedman, Sweeny, Saxe, Moskowitz, JJ.

16533 The People of the State of New York, Respondent, Ind. 2701/12

-against-

Emilio Fuentes, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Seth L. Marvin, J.), rendered on or about June 11, 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: JANUARY 5, 2016

CLERK

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

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

16534-		Ind. 2749/10
16534A-		1823/12
16534B-		1251/11
16534C	The People of the State of New York, Respondent,	23/13

-against-

Jaquel Flores,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered March 14, 2013, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed. Judgments (same court and Justice), rendered June 19, 2013, as amended December 4, 2013, convicting defendant, upon his pleas of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to an aggregate concurrent term of five years, unanimously modified, on the law, to replace the second felony offender adjudications on the drug convictions with adjudications as

a second felony drug offender, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. The record supports a reasonable conclusion that the alleged contradiction in a witness's testimony regarding the roles of the assailants was satisfactorily explained (*see People v Fratello*, 92 NY2d 565, 574-575 [1998], *cert denied* 526 US 1068 [1999]). The prosecutor's clarifying questions were permissible under the circumstances, and did not deprive defendant of a fair trial.

Defendant's challenge to the prosecutor's summation is unpreserved, and we decline to review it 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]). The challenged comments were fair responses to the defense summations, and the court's curative instruction was sufficient to alleviate any prejudice.

As the People concede, because of defendant's predicate drug

conviction, he should have been adjudicated a second felony drug offender, rather than a second felony offender, on the drug convictions.

We perceive no basis for reducing any of the sentences.

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

ENTERED: JANUARY 5, 2016

CLERK

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

16535 Five Towns Nissan, LLC, Index 651164/13
Plaintiff-Appellant,

-against-

Universal Underwriters Insurance Company,
Defendant-Respondent,

Tower National Insurance Company, et al.,
Defendants.

_____

McCarter & English, LLP, New York (Jeffrey M. Alfano of counsel), for appellant.

Robinson & Cole LLP, New York (Thomas J. Donlon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 6, 2014, which denied plaintiff's motion for partial summary judgment against defendant Universal Underwriters Insurance Company, and granted Universal's oral cross motion for summary judgment dismissing the breach of contract cause of action against it, unanimously affirmed, with costs.

The motion court correctly applied the unlimited aggregate deductible set forth in policy endorsement no. 001, rejecting plaintiff's contention that the limited deductible set forth in the certificate insurance governed. The certificate was not proof of insurance and contained a broad disclaimer that it was a contract or conferred any rights on the certificate holder (*see Buccini v 1568*

Broadway Assoc., 250 AD2d 466, 469 [1st Dept 1998]). Under the circumstances, assuming the argument is properly raised at this juncture, nor is the insurer estopped from denying the effectiveness of the deductible set forth in the certificate, as the disclaimer renders plaintiff's claimed reliance on the certificate unreasonable (*cf. Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co.*, 151 AD2d 207, 210 [3d Dept 1989]).

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

ENTERED: JANUARY 5, 2016

CLERK

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

16536- Ind. 5264/10
16536A The People of the State of New York, 175/11
Respondent,

-against-

Horace Nolan,
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 (Rebecca Hausner of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about June 14, 2012,

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

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

ENTERED: JANUARY 5, 2016

CLERK

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

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

16537 The People of the State of New York, Respondent, Ind. 4005/12

-against-

Juan Santana, Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about September 18, 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: JANUARY 5, 2016

CLERK

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

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

16538 In re D'Elyn Delilah W.,

A Child Under Eighteen Years of Age, etc.,

Liza Carmen T.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

_____

Appeal from order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about April 29, 2014, which, after a hearing, denied respondent mother's application to modify an order of disposition to provide increased visitation with the subject child, unanimously dismissed, without costs, as moot.

The mother's appeal has been rendered moot by the termination of her parental rights following a finding of permanent neglect. Family Court lacks authority to direct continuing contact between a parent and child where, as here, parental rights have been terminated in a contested proceeding (*see Matter of Hailey ZZ.* [*Ricky ZZ.*], 19 NY3d 422 [2012]; *Matter of April S.*, 307 AD2d 204, 204 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). In any event, the mother did not demonstrate changed circumstances or any other

factual basis that would provide "good cause" to modify the visitation provisions of the dispositional order in the article 10 proceeding (*see* Family Ct Act § 1061; *Matter of Shinice H.*, 194 AD2d 444, 444 [1st Dept 1993]).

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

ENTERED: JANUARY 5, 2016

CLERK

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

16539 In re Estate of Mauricio Leyton, Deceased. File 4842/13A/B

- - - - -

Ana Maria Leyton Latorre, et al., Petitioners-Appellants,

-against-

David Hunter, Respondent-Respondent.

_____

Stanley M. Ackert, III, Claverack, for appellants.

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

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered June 16, 2015, which denied the petition to revoke letters testamentary issued to David Hunter, the executor, and to disqualify Hunter as executor and beneficiary under decedent's will executed on January 11, 2001, unanimously affirmed, without costs.

The Supreme Court's recognition of same-sex couples' fundamental right to marry in *Obergefell v Hodges* (___ US ___, 135 S Ct 2584 [2015]) does not compel a retroactive declaration that the "Commitment Ceremony" entered into by decedent and Hunter in 2002, when same-sex marriage was not recognized under New York law, was a legally valid marriage for purposes of the "former spouse" provisions of EPTL § 5-1.4. Even assuming that decedent's and

Hunter's union should be retroactively recognized as having constituted a legal marriage, in order for Section 5-1.4's "former spouse" provisions to apply, the end of the marital relationship must have been effected by a formal judicial "decree or judgment" (EPTL § 5-1.4[f][2]). No such decree was ever issued here.

Indeed, according the union between decedent and Hunter retroactive legal effect would be inconsistent with their understanding that they had never been legally married. Their 2010 separation was informal, with no dissolution ceremony analogous to the commitment ceremony which marked their personal union. Even after 2011, when same-sex marriage was legalized in New York (*see* Marriage Equality Act, L 2011, Ch 95), decedent and Hunter took no steps to obtain any judicial decree declaring an end to their union.

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

ENTERED: JANUARY 5, 2016

CLERK

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

16540 The People of the State of New York, Respondent, Ind. 1319/12

-against-

Robert Colasuonno, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered June 17, 2014, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him to a prison term of four years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

The jury acquitted defendant of attempted murder in the second degree and assault in the first degree, but found him guilty of attempted first-degree assault, arising out of the stabbing of his cousin. Justification was a central issue at trial, and, because of the defect in the court's charge, it is impossible to discern whether acquittal of the top count was based on the jury's finding of justification in a manner that would mandate acquittal on the lesser count.

Considered as a whole, the court did not adequately convey the principle that, if the jury found defendant not guilty of the top count of attempted murder in the second degree on the basis of justification, it should not consider any lesser counts to the extent based on the same conduct (*see People v Velez*, 131 AD3d 129, 134 [1st Dept 2015]; *People v Feuer*, 11 AD3d 633 [2d Dept 2004]; *People v Roberts*, 280 AD2d 415, 416 [1st Dept], *lv denied* 96 NY2d 906 [2001]). As the People note, the court did instruct the jury to separately analyze the justification defense for each stab wound the complainant sustained, and if the jury found defendant justified in inflicting any particular injury, to acquit him of any charges based on infliction of that injury. Nevertheless, the verdict sheet directed the jury to consider each charge in the alternative, i.e., upon an acquittal of each greater offense, and neither the verdict sheet nor the court's explanation of its contents referred to justification. Furthermore, the court charged, "[I]t's an element of each of the counts. . . that the defendant was not justified," which "may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted the defendant on of the top count . . . based on justification" (*Velez*, 131 AD3d at 133). Thus, the charge as a whole never adequately conveyed that, if the jury found that defendant was not guilty of attempted murder on the basis of

justification, it was not to consider any lesser counts based on the same conduct.

Although there is evidence from which a jury could find a second unjustified confrontation, no different result is warranted on these facts. If the People's evidence is credited, there was an initial confrontation, in which the complainant was the aggressor, and defendant may have wielded the knife in self-defense, followed by a second confrontation in which defendant became the aggressor, and pursued and stabbed the by-then-injured complainant. Thus, the jury could have found the first confrontation to be justified, warranting acquittal of the top count, while finding the second confrontation to be unjustified, warranting conviction of the lesser count. Nevertheless, the defense presented a contradictory version of events that was largely consistent with the People's case as to the initial confrontation but omitted the second confrontation, and the court did not submit the lesser counts based solely on the second confrontation or later resulting injuries. Thus, there is no way of knowing whether acquittal of the top count was based on a finding of justification.

At the charge conference, defense counsel abandoned the

argument he raises on appeal, rendering the issue unpreserved. Nevertheless, reversal in the interest of justice is warranted. In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: JANUARY 5, 2016

CLERK

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

16541 The People of the State of New York, Respondent, Ind. 1752/13

-against-

Frederick Dillon, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jonathan D. Abramovitz of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about May 30, 2014,

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: JANUARY 5, 2016

CLERK

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

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

16542 The People of the State of New York, Respondent, Ind. 718/12

-against-

Anthony Berry, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered on or about March 19, 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: JANUARY 5, 2016

CLERK

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

16543N Naim Dedushaj, Index 300779/09
Plaintiff-Respondent,

-against-

3175-77 Villa Avenue Housing
Development Fund Corporation, et al.,
Defendants-Appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Laura Douglas, J.), entered June 16, 2014, which granted plaintiff's motion to preclude due to defendants' discovery violations, unanimously modified, on the facts, to vacate the preclusion part of the order and, instead, impose sanctions on defendants in the amount of $5000, and otherwise affirmed, without costs.

The record shows that defendants failed to comply with a conditional preclusion order directing them to produce an appropriate search affidavit. The affidavit defendants provided did not explain what efforts, if any, were made to preserve the requested documents, nor did it indicate whether the documents were routinely destroyed (*see Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). However, the sanction of precluding

defendants from denying notice of the allegedly dangerous condition on the steps in the cooperative building owned by the corporate defendant was not proportionate to defendants' misconduct (*see Young v City of New York*, 104 AD3d 452, 454 [1st Dept 2013]). The requested documents were not relevant to notice. Moreover, plaintiff has not been deprived of his ability to prove his case (*see Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 581 [2012]). The individual defendant (the president of the cooperative's board) was produced for deposition and plaintiff was able to obtain information from her concerning notice and maintenance procedures. Under the circumstances, a monetary sanction is appropriate (*see Young*, 104 AD3d at 454).

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

ENTERED: JANUARY 5, 2016

CLERK