SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 27, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Richter, Gische, Gesmer, JJ.

725 Robert Obey, Index 106088/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

New York City Transit Authority,
Defendant-Respondent.

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Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Mark R. Bernstein of counsel), for appellant.

Lawrence Heisler, Brooklyn, for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 22, 2014, which granted defendant New York City Transit Authority's (NYCTA) posttrial motion to set aside the verdict on the issue of liability and dismiss the complaint, and denied plaintiff's motion to set aside the jury's award for past and future pain and suffering, affirmed, without costs.

Plaintiff was traveling from a methadone clinic in Manhattan, where he received treatment for his heroin addiction,

to his shelter on Staten Island, when he slipped on the platform of the 33rd Street subway station, hit his head, fell onto the tracks, and was injured by a train. Plaintiff has no memory of the incident from the moment he slipped until after he was assisted by medical personnel. A psychologist who treated plaintiff two days after the accident testified, based on her contemporaneous notes, that plaintiff informed her that on the morning of his accident he had been "high on Xanax and Klonopin," psychoactive prescription drugs that can cause dizziness and, if abused, fainting. However, at trial plaintiff denied taking illegal drugs on the day of the accident, and attributed his fall and memory loss to slipping and hitting his head.

Plaintiff testified that he entered the 33rd Street station around 11:15 a.m. He was discovered injured on the tracks at 11:58 a.m. Plaintiff does not recall when he fell onto the tracks, and the record contains no evidence casting light on the particular time the fall occurred during the window between plaintiff's entering the station and his subsequent discovery on the tracks. Over the course of the approximately 45 minutes that plaintiff may have been lying on the tracks, at least three trains passed through the 33rd Street station. The first train was operated by Daniel Correa, the second train — the train that

plaintiff claims to have injured him — was operated by Abraham Lopez, and the third train (which did not injure plaintiff) was operated by Jacqueline White. Although a large pool of blood was found on the tracks, and stains that appeared to be blood were discovered on four separate cars of Correa's train, Correa denied observing plaintiff lying on the tracks. While Lopez's train did not have any blood stains, Lopez reported observing white sneakers on the tracks, and called in an alert to a possible obstacle on the tracks.[1] Subsequently, White entered the station at a reduced speed due to Lopez's alert, and stopped her train when she saw passengers on the platform waving and pointing at plaintiff on the tracks.

As noted, plaintiff alleges that Lopez's train injured him and that Lopez negligently failed to stop the train after observing sneakers on the tracks. After a trial, the jury apportioned fault for plaintiff's injury 60% to plaintiff himself and 40% to NYCTA, and awarded damages. Upon NYCTA's posttrial motion, Supreme Court set aside the verdict and dismissed the

[1]According to a dispatcher's note, Lopez reported having seen a "body" on the tracks. Lopez denies having seen a body on the tracks. As more fully discussed below, even if the dispatcher's note is accurate, this does not constitute evidence that Lopez's train, rather than Correa's, injured plaintiff.

complaint, holding that plaintiff had failed to make a prima facie showing either that Lopez had caused plaintiff's injury or that Lopez had acted negligently. Plaintiff having appealed, we affirm on both grounds.

Initially, as to causation, plaintiff failed to satisfy his burden to produce credible evidence showing that Lopez's train, as opposed to Correa's train, caused his injury. In *Seong Sil Kim v New York City Tr. Auth.* (27 AD3d 332 [1st Dept 2006], *lv denied* 7 NY3d 714 [2006]), an alert was issued to all trains after a train passenger reported seeing a person on the tracks. Subsequently, the defendant's train operator spotted the plaintiff on the tracks and engaged the emergency brake, but was unable to stop the train before the first car of the train passed over the plaintiff (*id.*, 27 AD3d at 333). This Court set aside a jury verdict against the defendant as "pure speculation," explaining that there was insufficient evidence that the defendant's train had actually injured the plaintiff, as multiple trains passed over the tracks after the alert, no blood was found on the defendant's train, and the plaintiff's sole evidence showing causation was that the injured plaintiff was discovered lying between the tracks under the defendant's train (*id.*, 27 AD3d at 335).

Here, as in *Kim*, the record is devoid of evidence from which the jury could have made a nonspeculative finding as to which train — Correa's or Lopez's — injured plaintiff. The evidence shows that Correa's train passed through the 33rd Street station after plaintiff testified to entering the station, and it is mere speculation to assert that plaintiff fell to the tracks only after Correa's train had passed through the station.

In fact, the physical evidence points to Correa's train as the proximate cause of plaintiff's injuries. What appeared to be bloodstains were discovered on four cars of Correa's train, while no bloodstains were discovered on Lopez's train. Plaintiff's strained arguments that the apparent bloodstains on Correa's train may have actually been grape juice, and that Lopez's train may have had no bloodstains due to the weight and heat of the train instantly cauterizing them, are internally inconsistent, as plaintiff points to the large pool of blood found on the tracks to determine the location of the accident. Moreover, plaintiff offers no explanation of why any blood on Lopez's train would have been cauterized but the similar substance on Correa's train was not.

Plaintiff erroneously relies upon Lopez's report of observing sneakers on the tracks, while Correa denied observing

anything on the tracks, as evidence that Lopez's train, as opposed to Correa's train, injured plaintiff. It is undisputed that plaintiff entered the station before both Correa's train and Lopez's train passed through the station. Thus, either Correa's train or Lopez's train could have been the one that actually injured plaintiff. The disputed issue is whether Correa's train injured plaintiff before Lopez's train passed through the station, or whether Lopez's train injured plaintiff. Under either circumstance, Lopez could have observed the sneakers, or even plaintiff's body (as stated in the aforementioned dispatcher's note), near the tracks. Therefore Lopez's testimony that he observed sneakers, and even the dispatcher's note stating that he reported seeing a body, does not show whether Lopez's train injured plaintiff or whether Correa's train had previously injured plaintiff. Further, Correa's testimony that he did not see a person on the tracks does not establish that plaintiff had not already fallen when Correa's train passed through the station, especially given that blood was found on Correa's train but not on Lopez's train. In sum, as in *Kim*, plaintiff failed to make a prima facie showing that Lopez caused his injury, and the jury verdict was based upon pure speculation.

Turning to the issue of whether Lopez acted negligently,

assuming arguendo that Lopez's train caused plaintiff's injury, plaintiff failed to make a prima facie showing that Lopez could have avoided injuring plaintiff if he had activated the train's emergency brake upon observing plaintiff's sneakers (*see Dibble v New York City Tr. Auth.*, 76 AD3d 272 [1st Dept 2010], *appeal withdrawn* 17 NY3d 791 [2011]; *Mirjah v New York City Tr. Auth.*, 48 AD3d 764 [2d Dept 2008]).

The 33rd Street station platform is 512.5 feet long, enabling 10 50-foot cars of a train to stop at its platform. The evidence indicated that plaintiff was injured approximately 100 feet from the end of the station where a large pool of blood was discovered. The disputed issue is how far Lopez was into the station before observing the sneakers. Lopez's written report on the day of the accident and his trial testimony indicated he was almost fully stopped and towards the end of the station before observing the sneakers. Lopez's written report notes that he observed the sneakers "[a]s I made my station stop," and at trial Lopez testified that he was almost at the end of the station when he observed the sneakers a few feet in front of the train.

Nevertheless, plaintiff argues that an incident report noting that Lopez orally reported observing sneakers "as he was entering 33rd Street" constitues sufficient evidence to support a

finding that Lopez observed the sneakers immediately upon entering the station, from a 400 foot distance. Accordingly, plaintiff's expert testified that if Lopez had 400 feet to react and was traveling at a speed of 25 miles per hour (mph), as Lopez claimed he had been when entering the station, Lopez would have had approximately 6.5 seconds to react and engage the emergency brake to stop the train before reaching the sneakers.

However, plaintiff, implicitly acknowledging that the evidence does not show that Lopez had observed the sneakers immediately upon entering the station, introduced further expert testimony that the headlights on Lopez's train illuminated the otherwise dark train tunnel for a range of between 50 and 150 feet, and that if Lopez had observed the sneakers from a distance of 150 feet at a speed of 15 mph (which Lopez testified had been his speed when approaching the required stopping point), he would have had 3.5 seconds to react.

The Court of Appeals has explained that a train operator "may be found negligent if he or she sees a person on the tracks 'from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person'" (*Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 [2006], quoting *Coleman v New York City Tr. Auth.*,

37 NY2d 137, 140 [1975]). Contrary to the dissent's arguments that our holding here "eviscerate[s]" *Soto*, this Court and our colleagues in the Second Department have explained that *Soto* does not relieve a plaintiff of the burden to introduce competent evidence, nor does it allow a plaintiff to rely solely on conclusory assertions and mere speculation (*see Dibble*, 76 AD3d at 277*; Mirjah*, 48 AD3d at 765-766). Similar to the plaintiffs in *Dibble* and *Mirjah*, plaintiff has failed to make a prima facie showing that Lopez had sufficient time to stop the train after observing the sneakers. Plaintiff conclusorily asserts that Lopez had 3.5 seconds to react if he observed the sneakers at the 150 foot outer range of the train's headlights, as at 15 mph the train would require 75 feet to stop, leaving 3.5 seconds to react. However, there is no competent evidence in the record to support plaintiff's assertion that Lopez actually observed the sneakers from a distance of 150 feet. Perhaps Lopez observed the sneakers from a 100 foot distance and had a little over one second to react, the reaction time we found insufficient to impose liability in *Dibble* (76 AD3d at 279-280). Or perhaps Lopez observed the sneakers from a 50 foot distance and could not possibly have avoided passing them.

Evidence consisting of mere speculation as to when Lopez

actually observed the sneakers does not suffice to make a prima facie showing that Lopez could have avoided passing them. There is not a scintilla of competent evidence pointing to Lopez actually observing the sneakers while he had sufficient time to react. As the submitted evidence shows that it was equally as likely that Lopez did not have time to stop the train as it was likely that he did have time to stop the train, the jury's verdict was based upon pure speculation.

We have considered plaintiff's remaining arguments regarding liability and find them unavailing. Given the foregoing determination, we need not consider plaintiff's arguments regarding damages.

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

GISCHE J. (dissenting)

I respectfully dissent and would vote to reverse in favor of reinstating the jury's verdict both as to liability and damages. While the evidence of liability is not free from dispute, the jury resolved those disputed issues in favor of plaintiff and the verdict is supported by a legally sufficient view of the evidence. There is sufficient evidence to support a conclusion that it was the subway train operated by Abraham Lopez that struck plaintiff. There is also sufficient evidence that Lopez failed to operate the train in a reasonable manner when, after seeing evidence of a human presence on the tracks (white sneakers), he failed to take any action to avoid striking plaintiff, although able to do so (*Soto v New York City Tr. Auth.*, 6 NY3d 487 [2006]). I believe that the trial court and majority's reliance on our prior decision in *Dibble v NYCTA* (76 AD3d 272 [1st Dept 2010]) as the legal basis to set aside the jury's verdict is misplaced. By reading *Dibble*, a decision predicated on the limits of the expert testimony given in that case, in such an expansive manner, they eviscerate the Court of Appeals' decision in *Soto*, which held that a train operator may be found negligent if he or she fails to bring the train to a safe stop if the circumstances permit him or her to do so (*Soto*,

6 NY3d at 493).

It is undisputed that on May 9, 2006, plaintiff fell into the subway tracks at the 33rd Street downtown station of the number 6 train and was struck by a train shortly before noon. His left foot was severed in the accident. The plaintiff could not recall how he wound up on the subway tracks, testifying that shortly before the accident, he had been at a methadone clinic where he received medication; he denied using any other drugs. The jury rendered a verdict in plaintiff's favor. It apportioned, however, 60% of the liability to plaintiff and only a lesser percentage, 40%, to defendant New York City Transit Authority (NYCTA). Defendant moved to set aside the verdict and the trial court granted the motion, largely on the basis of *Dibble*, finding that because the train operator had no prior warning of a person on the tracks, defendant was not negligent as a matter of law and further that plaintiff's expert's testimony was speculative. The majority now affirms, holding that the evidence does not conclusively identify that it was the subway train operated by Lopez that struck plaintiff and that the expert's testimony was speculative.

It is black letter law that a jury verdict should not be set aside as based upon legally insufficient evidence unless "there

is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Soto*, 6 NY3d at 492). Under this highly deferential standard, a court should not interfere with the jury's fact-finding function simply because it would have evaluated credibility differently (*Gartech Elec. Contr. Corp. v Coastal Elec. Constr. Corp.*, 66 AD3d 463 [1st Dept 2009] *appeal dismissed* 14 NY3d 748 [2010]). Additionally, when the verdict is based upon expert testimony, the jury is free to accept or reject such testimony, either in whole or in part (*Sicignano v New York City Tr. Auth.*, 126 AD3d 595, 596 [1st Dept 2015]). An expert's testimony is not speculative if it is based upon facts in the record, or otherwise known to him or her personally (*Soto* at 494; *Espinosa v A & S Welding & Boiler Repair*, 120 AD2d 435, 437 [1st Dept 1986], *lv denied* 69 NY2d 604 [1987]). The trial record in this case presents sufficient facts to uphold the jury determination.

Although plaintiff has limited recollection of exactly what happened on March 9, 2006, the day of the accident, much of the trial evidence, including Lopez's own testimony, the testimony of two other train operators, and an incident report prepared by a

NYCTA employee, sets forth in reasonable detail the events of that morning. Lopez, the train operator involved in the incident, testified that at some point before bringing the train to a stop in the 33rd Street station and while the train was in braking mode, he saw something on the tracks that he thought looked like white sneakers. In his deposition testimony, read into evidence, Lopez testified that he had been approaching the 33rd Street station at approximately 25 miles per hour (MPH), which is his custom and practice, and was approximately two cars into the station when he began to apply the brakes slowing the train down to approximately 10 to 15 MPH in order to make his regular stop. He estimated he saw the sneakers approximately 35 feet away from the 10-car marker where he was required to bring the train to a complete halt. Lopez did not apply the emergency brakes upon seeing the objects he thought were sneakers or at anytime while coming into the station, nor did he testify that he was unable to do so. He stated that he does not stop the train every time he sees debris on the roadbed. Lopez testified that he proceeded to the next station, as usual, although he glanced out the window and no longer could see the sneakers.

NYCTA personnel prepared a train incident report dated March 9, 2006, which contains an entry that Lopez contacted NYCTA's

control center shortly before noon (1156 hours) to report that he thought he had seen "a body on the south end of Track #1" at the 33rd Street station. The incident report also reflects that Lopez placed a second call to NYCTA's control center at 1215 hours, approximately 19 minutes later, to report that "as he was entering 33rd Street, he thought he might have seen something between the running rail[s], since his train did not go into emergency, he did not investigate any further." That entry, made by a NYCTA supervisor, indicates that Lopez contacted him "[a]fter he thought about it . . . to caution the next train." At trial, Lopez denied the accuracy of both entries, testifying that he had never reported seeing a "body" on the tracks only that he had seen something he thought were sneakers, and he had never made a second call to NYCTA's control center. A third entry in the incident report states that at 1307 hours "a large pool of blood" was found near survey marker 138+00, and traces of blood were also found at markers 44 and 45.

Although no traces of blood or tissue were recovered from Lopez's train, plaintiff's expert, Dr. Carl Berkowitz, testified that the weight of the train and the 600 degree heat generated by its wheel, would have cauterized plaintiff's wound, to account for why no blood was found on Lopez's train. A substance of what

"appeared to be blood" was, however, cleaned from under the train operated by Daniel Correa, which had traveled through the 33rd Street station immediately before Lopez's train. That substance was never tested.

Daniel Correa testified at trial that while traveling through the 33rd Street station, he did not see anyone fall onto the tracks in front of him. He denied seeing anything unusual on the tracks or the roadbed that day and stated that if he had seen anyone, he would have been required to stop the train if he could. The operator of the train immediately after Lopez's train, Jacqueline White, discovered the wounded plaintiff on the tracks when passengers on the platform began frantically waving their arms to get her attention as her train entered the station.

I believe that these facts provided a sufficient basis for the jury to have rationally concluded that it was the train operated by Lopez that actually struck plaintiff. Although Lopez denied seeing a human presence on the train tracks that day or that the white sneakers on the tracks constituted anything other than debris, the jury was free to reject his testimony, especially in view of the fact that the entries in NYCTA's incident report were at odds with Lopez's account. The jury was also free to conclude that it was unreasonable for Lopez to have

thought that the pair of white sneakers he saw on the tracks were simply debris and not evidence of a human presence. Likewise, the jury was also free to accept Correa's testimony that he did not see any indication of a human presence on the track at the time that he was passing through the 33rd Street station. Nor was the jury required to accept that the untested material on Correa's train was human blood.

The majority's reliance on *Seong Sil Kim v New York City Tr. Auth.* (27 AD3d 332 [1st Dept 2006], *lv denied* 7 NY3d 714 [2006]), is misplaced and the unique facts of that case make it easily distinguishable. In *Kim*, a 911 operator relayed a called to the defendant, NYCTA, that a passenger on a southbound A train had seen a person on the tracks at 34th Street and 8th Avenue. The passenger, however, did not immediately place that 911 call, but waited until he had reached his destination in Brooklyn, an estimated 18 minutes later. In response to that 911 call, the defendant issued a "caution" warning to its train operators traveling through that area to slow down to no more than 10 to 15 MPH. During the approximately 18-minute period of time that elapsed between the passenger's observation of the person already on the tracks and his placement of the 911 call, a number of trains (at least three) had traveled through that station. After

the accident the trains were examined, but none were found to have any signs of having struck the plaintiff. Here, in contrast, Correa's testimony provided a basis from which a jury could rationally conclude that plaintiff was not on the tracks when the train operated by Correa passed though the station. There was, however, further evidence that plaintiff was on the tracks by the time the train operated by Lopez passed through the station. Contrary to the majority's conclusion, under this version of the facts, it is not equally plausible that either train could have hit plaintiff. Furthermore, the opinion of the plaintiff's expert in *Kim*, that defendant should have issued an "extreme caution" warning to its train operators, which would have required them to reduce their speed to no more than 10mph, was offered without any basis for that conclusion, scientific or otherwise, but was simply the expert's impression of how the situation should have been handled (27 AD3d at 334).

I also disagree with the majority's conclusion that plaintiff failed to submit nonspeculative evidence that the train operator had adequate time and distance to observe plaintiff, so as to avoid hitting him. Under established jurisprudence from the New York Court of Appeals, we have long recognized that a train operator may be found negligent if he or she sees a person

on the tracks from such a distance and under such other circumstances as to permit him or her in the exercise of reasonable care to stop before striking the person (*Soto*, 6 NY3d at 493; *Coleman v New York City Tr. Auth.*, 37 NY2d 137, 140 [1975]). A jury may rely upon an expert's mathematical calculations in concluding that a train could have been stopped before striking the plaintiff, provided the information serving as the basis for the calculations is in the record, or personally known to the expert. Thus in *Soto*, the expert was allowed to rely on mathematical calculations based, in part, on the plaintiff's testimony regarding an estimate of his running speed at the time of his accident derived from using a treadmill (*Soto* at 493).

In this case, plaintiff's expert witness, Dr. Berkowitz, a transportation safety expert, testified that he had visited the 33rd Street station, taken measurements, and examined documents, photographs, and records, among other things, including the train incident report and NYCTA's own July 12, 1995 Emergency Brake Stopping Distances for Customer Cars chart (braking chart). The braking chart depicts in graph form the distance in feet required to stop a train applying the emergency brakes, relative to its speed in miles per hour. The braking chart shows, consistent

with the laws of physics, that at slower speeds, less distance is needed to stop a train, whereas at faster speeds, the distance needed to stop is greater. Berkowitz testified that based upon the total length of the station (512.5 feet), and the evidence of where blood was found at the 138+00 marker, plaintiff was struck approximately 98 feet from the front of the platform, or 414.5 feet from the north portal of the station. Using a simple mathematical calculation, Berkowitz estimated that applying the braking distances set forth in NYCTA's own braking chart, and assuming Lopez was correct about his speed of entry (25 MPH), the train would have come to a complete stop at 180 feet. At 36 seconds per foot, Lopez had 6.52 seconds available to him in which to act and still avoid hitting plaintiff. At the lesser speed Lopez testified he was traveling at when approaching the 10-car marker (i.e., 15 MPH), the train would have traveled an even shorter distance before stopping, and Lopez would have had even more time (8.42 seconds) to activate the emergency brakes.

Dr. Berkowitz's calculations were all based on evidence otherwise before the jury. The jury had the right and obligation to decide from the conflicting evidence Lopez's physical location in the station when he first observed the sneakers. As the majority concedes, although Lopez testified that he was almost at

the end of the station before he observed the sneakers, the incident report indicates that Lopez orally reported to NYCTA that he had observed the sneakers as he was entering the 33rd Street station; this report by him was made shortly after the accident actually occurred. The jury, therefore, had a basis to rationally conclude that Lopez had between 6.52 and 8.42 seconds to bring the train to a stop without hitting plaintiff. They could have reasonably concluded that this time was sufficient.

In my view, *Dibble* should be limited to its facts and not read expansively to preclude any expert evidence about speed, distance and accident avoidance in cases where negligence by a train operator is alleged. *Dibble* is improperly being relied upon for a general proposition that calculations about emergency stopping times of trains is speculative. In *Dibble* the train operator applied the emergency brakes when he first noticed a human form on the tracks (76 AD3d at 274). The expert, however, opined that the train operator had not reacted fast enough and had he done so, he could and should have stopped the train in time to avoid hitting plaintiff (*id.* at 278-279). This was based upon a wholly speculative assumption that average human reaction time for train operators was faster than this train operator's actual reaction time (*id.* at 280). This Court, finding that the

estimates of human reaction time, which formed the basis of the expert's calculations had no basis in the record, reversed the jury verdict (*id*. at 280-281). This Court also declined to predicate liability on the fact that some train operators may react faster than others (*id*.) In the case before us, however, there is no dispute that Lopez made no effort to stop the train at all. Thus, the issue is not whether Lopez was negligent in not stopping sooner or faster, but rather whether he was negligent because he could have, but did not, make any effort to stop the train at all, given that he had time in which to do so and avoid hitting plaintiff. The expert in this case did not make any calculations based on estimated reaction times. Dr. Berkowitz made concrete mathematical calculations based upon evidence in the record and it was the jury that decided there was sufficient time to stop. I believe that if we read *Dibble* in such a way to set aside the jury verdict in this case, we are making it impossible for a plaintiff to ever prove liability based upon a train operator's failure to stop. Clearly, such a result would be in contravention of the Court of Appeals' authority recognizing a cause of action for a train operator's negligent failure to stop in time.

I would reinstate the verdict on liability. I would also,

however, find that plaintiff's cross appeal, claiming that the damages awarded were too low, has no merit. I would, therefore, affirm the denial of plaintiff's motion to set aside the damages award and reinstate the damages awarded by the jury.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

899 In re Terrell Williams, Index 653954/13
Petitioner-Appellant,

-against-

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

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Glass Krakower LLP, New York (Bryan Glass of counsel), for appellant.

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

Order and judgment (one paper), Supreme Court, New York County (Frank P. Nervo, J.), entered August 12, 2014, denying the petition to vacate the part of the arbitration award that terminated petitioner's employment as a tenured school teacher, and dismissing the proceeding, reversed, on the law, without costs, the petition granted, and the matter remanded to respondents for imposition of a lesser penalty.

The evidence presented at the arbitration hearing establishes that petitioner, while an eighth-grade physical education teacher, initiated conversations with at least two of his female students asking them if they had older sisters, and, if so, how old they were, whether they had boyfriends, and

whether they had photographs of them,[1] and accepted the phone number of one student's 23 year old sister. Petitioner also told a student that her mother had called him "handsome" while passing him on the street. One student testified that petitioner's conduct made her feel "uncomfortable," and another said that his conduct "aggravated" her. Of the 12 specifications with which he was charged, the Hearing Officer dismissed five, including charges that he had engaged in similar behaviors in the 2010-2011 school year, that he actually contacted the sister whose telephone number he received, and that he told the students, "[M]y wife said I can look but I can't touch."[2]

The Hearing Officer found petitioner to be insufficiently remorseful, that his actions revealed "moral failings," and that, although termination might be "too severe," it was the only penalty that could "jolt" petitioner into an understanding of the seriousness of his misconduct.

Based on all the circumstances of the case, including the

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[1]The dissent claims that petitioner "ogle[d]" photographs of his student's sisters. However, there is no support in the record for this claim, and the Hearing Officer did not so find.

[2]The dissent claims that petitioner sent a text to the student's sister. However, there was no proof that he did so, as the hearing officer specifically found, and that specification was dismissed.

lack of any prior allegations of misconduct against petitioner during 13 years of service and the fact that the misconduct does not violate any specific rule or regulation, we find the penalty of termination sufficiently disproportionate to the offenses to shock the conscience (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 [1st Dept 2008]).

Moreover, petitioner had never been warned or reprimanded regarding the conduct at issue, and, contrary to the conclusion of the Hearing Officer, there is no evidence that a warning or reprimand or other penalty short of termination would not have caused petitioner to cease the objectionable conduct immediately (*see Matter of Polayes v City of New York*, 118 AD3d 425 [1st Dept 2014]).

While we share some of our dissenting colleague's concern regarding petitioner's behavior and his failure to express any deeper understanding of the inappropriate nature of his actions, we do not agree that the law supports petitioner's termination at this time. This is in part because we do not agree that petitioner's communication with his students, while inappropriate, can be fairly characterized as "romantic/sexual in nature," or as being for the purpose of "solicit[ing] female companions for his sexual gratification," as the dissent puts it.

The Hearing Officer herself found only that petitioner made "inappropriate inquiries of his 8th grade female students regarding their female relatives, in furtherance of a personal agenda having nothing to do with school or his responsibilities as a teacher." She did not find that petitioner actually intended to, or did, have any "romantic/sexual" interactions with anyone. Rather, she concluded that petitioner's questions about the students' sisters "in sum and substance... amount[] to expressing an interest in meeting" their sisters, and she made clear that no one testified to his using "those precise words." There is no evidence that he made any sexual comments to his students.

In contrast, the teachers in each of the cases cited by the dissent engaged in conduct that constituted a violation of a specific law, rule or regulation, and that was far more outrageous than petitioner's in this case. In *Matter of Villada v City of New York* (126 AD3d 598 [1st Dept 2015]), Mr. Villada repeatedly sexually harassed a colleague, including by forcibly tongue kissing her. In *Matter of Ajeleye v New York City Dept. Of Educ.* (112 AD3d 425 [1st Dept 2013]), Mr. Ajeleye was found guilty of verbal abuse of students, insubordination, neglect of duty, and unbecoming conduct (*id.*). The teacher in *Matter of*

Binghamton City School Dist. (Peacock) was found to have committed insubordination, neglect of duty and conduct unbecoming a teacher because he had "engaged in an improper, intimate and clandestine relationship with a minor female student... [for which he] showed no remorse..., disobeyed administrative direction to cease his relationship with the student and not transport her in his car, and continued to contact her even after disciplinary charges were brought against him" (33 AD3d 1074, 1077 [3d Dept 2006], *appeal dismissed* 8 NY3d 840 [2007]). The teacher in *Lackow* (51 AD3d 563) discussed bestiality, necrophelia and his own ejaculations with students, and, while teaching class with a model of reproductive organs, told a student he should "enjoy" looking at a vagina (51 AD3d at 565). Moreover, Mr. Lackow had received at least three written warnings to stop such conduct. His termination was the result of his failure to do so (51 AD3d at 568-569). Similarly, the teacher in *Matter of Rogers v Sherburne-Earlville Cent. School Dist.* (17 AD3d 823, 824-825 [3d Dept 2005]) had received warnings before being terminated for falsifying time records, abusing leave time by, for example, using sick leave to go hunting, and taking excessive leave time. The dissent also cites *Matter of Chaplin v New York City Dept. Of Educ.* (48 AD3d 226 [1st Dept 2008]) for the proposition that even

employees with good work histories are appropriately terminated for "[a]cts of moral turpitude" (*id.* at 227). That case does not discuss the specific behavior which triggered the employee's termination. However, in both *Chaplin* and the Court of Appeals case to which it cites, *Matter of Kelly v Safir* (96 NY2d 32 at 37, 39 [2001]), the petitioners' acts constituted crimes, which is certainly not the case here.

Here, petitioner showed very poor judgment, but he has not been shown to have violated any law, or even any rule or regulation of the Department of Education. Our decision today does not excuse petitioner's behavior, but directs a less serious punishment. Should it continue, termination may well be in order in the future.

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

TOM, J.P. (dissenting)

In this article 75 proceeding, petitioner seeks to vacate the arbitration award of a Hearing Officer, dated October 29, 2013, which terminated his employment as a tenured physical education and health teacher. Due to the egregious nature of the misconduct at issue, and the Hearing Officer's conclusion that petitioner did not display any remorse or an appreciation for the seriousness of his actions or the effect his actions had on the young female students, I would find that the penalty of termination was appropriate (*see Matter of Villada v City of New York*, 126 AD3d 598 [1st Dept 2015]; *Lackow v Department of Educ. (or "Board") of City of N.Y*, 51 AD3d 563 [1st Dept 2008]).

The evidence presented at the arbitration hearing establishes that petitioner, while an eighth-grade physical education teacher, repeatedly engaged in inappropriate conversations with his female students. Specifically, these conversations were romantic/sexual in nature and involved petitioner asking multiple female students in 7th and 8th grade about their older sisters and female relatives, including what their sisters, mothers and aunts looked like, whether they had boyfriends, and soliciting contact information and photographs for his own personal gratification and use. Five former female

students testified at the hearing that during the downtime before physical education class started or during girls' volleyball practice in the mornings, petitioner asked on multiple occasions whether they had older sisters, how old they were, what they looked like, and whether he could have their phone number. Some of these conversations took place when the girls' volleyball team was formed for practice in the morning before school began. Although respondent was not one of the coaches for the volleyball team, he would arrive early to school to join the girls' practice. It was in these various settings that conversations which formed the basis of the charges against respondent took place. In one instance petitioner learned that the student had a 23-year-old sister, he asked more than once, and finally obtained the number. The students testified that petitioner's conduct made them feel "uncomfortable" and "aggravated." In addition, one of the student's mothers had come to the school upset and filed a complaint after learning petitioner had asked her daughter if she had any cute sisters and later was told by the student's older sister that petitioner had "texted" her phone. This was the testimony of one of the students.

These inappropriate conversations with different female students spanned the 2010-2011 and 2011-2012 school years, and,

by petitioners's own admission, he had at least 20 such conversations in the 2011-2012 school year.[1] Petitioner also testified that he had engaged in these types of conversations several times before, including at another school.

According to petitioner, all of the inappropriate conversations were initiated by the students who would frequently talk about their female relatives and try to interest him by showing him pictures or offering phone numbers. He similarly claimed that parents would approach him directly and ask him to go out for a drink or "hang out." He claimed that his questions about student's sisters were made "jokingly," and that he would brush off students' entreaties about their female relatives by smiling and sometimes saying, "I love my wife." Petitioner also explained that he did not tell his students to stop these conversations - even though he thought the students were serious when they made the comments - because at his prior school, where the same situation had occurred, he told a student to stop and got a bad reaction from the student, who became angry at the

[1]Although the Hearing Officer dismissed the charges relating to the 2010-11 school year, she did not find the testimony relating to those charges to be unreliable and, in fact, took into account that the record supported that petitioner made certain comments in that school year.

suggestion that petitioner thought he was too good for her mother.

The Hearing Officer sustained the majority of the charges against petitioner and made clear that the case turned on the credibility of the witnesses. In particular, the Hearing Officer found petitioner's claims incredible and rejected his version of events while crediting the testimony of the students. The Hearing Officer did not believe that five eighth-grade students would conspire to lie under oath about their former teacher, and found no evidence to support such a conspiracy. In this regard, the Hearing Officer could not accept petitioner's claims that the students instigated these conversations or actively solicited their own family members into a relationship with a married man. Nor did she credit petitioner's testimony that during different years and at different schools eighth-grade students could not contain themselves in trying to bring petitioner into their families in a romantic way or that parents were throwing themselves at petitioner. The Hearing Officer also rejected any contention that these conversations were made entirely in jest.

In sustaining the various charges, the Hearing Officer stressed that the behavior at issue was not isolated and included numerous conversations with multiple female students at this

school (and at a prior school) during which he discussed their relatives' phone numbers and viewed their photographs. She also remarked that petitioner had attempted to paint himself as a victim who could not "contain a constant onslaught of female attention, even when it involves his students."

The Hearing Officer ultimately found that termination was the appropriate penalty because petitioner did not understand the seriousness of his conduct, continued to deny wrongdoing and place blame on his young students, and "did not consider the possibility, even in his version of this story, that the appropriate response is to address his students with discipline and/or moral teaching." The Hearing Officer went on to note that "[c]ontrary to his own misguided understanding, [petitioner] *is* a role model for his students, and he is expected to model appropriate behavior." Further, she did not believe a fine or suspension would make him understand the seriousness of his behavior or "right the moral judgment which is so horribly askew." Nor did she think a lesser penalty would be appropriate because she did not "believe such a penalty would be effective, . . . nor adequately address[] the harm done here."

Petitioner continues to minimize his conduct in this proceeding, referring to it as "harmless banter" and claiming it

to be a "minor lapse in judgment" unlikely to recur despite his own admissions that he spoke to numerous students this way at two different schools over different years. In sum, he insists that his behavior had no "ill effects" on the students at issue.

Petitioner's continued failure to comprehend the nature and seriousness of his actions, blaming the young students for his misconduct and showing no remorse for his actions, supports the Hearing Officer's point and her conclusion that the penalty of termination was appropriate. Initially, petitioner's lack of prior disciplinary history was considered by the Hearing Officer and is no basis to reduce the penalty (*see Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425, 426 [1st Dept 2013]). In any event, the record shows petitioner received an unsatisfactory rating for the school year previous to those at issue, and the absence of prior charges does not necessarily prove his behavior was beyond reproach.

Nor is even worse behavior such as physical assault a prerequisite to termination (*see e.g. Lackow*, 51 AD3d at 569 [continuing in a pattern of conduct that was clearly irresponsible and inappropriate within the classroom setting]; *Ajeleye*, 112 AD3d at 425 [insubordination, neglect of duty, conduct unbecoming his position, and using language that

constituted verbal abuse of his students]). Termination for offenses has been found appropriate where, as here, a teacher has displayed no remorse or an appreciation for the seriousness of his actions (*see Villada*, 126 Ad3d at 599). Termination of a teacher who merely engaged in a pattern of excessive leave time usage has been upheld as not shocking to the conscience (Matter of *Rogers v Sherburne-Earlville Cent. School Dist.*, 17 AD3d 823 [3d Dept 2005]). Moreover, we have held that "[a]cts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work histories" (*Matter of Chaplin v New York City Dept. of Educ.*, 48 AD3d 226, 227 [1st Dept 2016 2008]).

The majority's efforts to distinguish the foregoing cases do not support a finding that the penalty in this case shocks the conscience. While the actions in those cases were egregious, they do not make petitioner's behavior appropriate or acceptable or somehow make him fit to remain a teacher. Further, the purpose of citing a case such as *Lackow* was not because the facts are identical but rather to demonstrate that neither physical abuse nor sexual assault are the standard required for a teacher to be terminated, and because the teacher in *Lackow* similarly "continued in a pattern of conduct that was clearly irresponsible

and inappropriate within the classroom setting" which "reflect[ed] an inability to understand the necessary separation between a teacher and his students" (51 AD3d at 569).

The majority also notes that petitioner's misconduct does not violate any specific rule or regulation. However, the Education Law has a general prohibition on "conduct unbecoming a teacher" (*see Denhoff v Mamaroneck Union Free School Dist,* 29 Misc 3d 1207[A], 2010 NY Slip Op 51742[u] [Sup Ct, Westchester County 2010], *affd* 101 AD3d 997 [2d Dept 2012]; *see also Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856 [1st Dept 2011] [upholding penalty of termination where the petitioner was charged with conduct unbecoming a teacher]; *Matter of Mazur [Genesee Val. BOCES]*, 34 AD3d 1240 [4th Dept 2006] [upholding penalty of termination where evidence, inter alia, supported the Hearing Officer's determination that the petitioner engaged in conduct that was unbecoming an administrator]). There is no question that the evidence in this case established that petitioner engaged in conduct that was unbecoming a teacher.

Matter of Polayes v City of New York (118 AD3d 425 [1st Dept 2014]) bears no relation to this case. In *Polayes*, the teacher engaged in one objectively innocuous conversation with a group of high school senior students during which he suggested one student

was “the type to party with” or “you want to go to school to party” after that student expressed interest in attending a college that was widely reported to be a “party school.” The students who testified were not offended by these comments. In contrast, petitioner, during the course of different school years and at different schools, engaged in numerous inappropriate romantic/sexual in nature conversations with multiple young female students during which he discussed his potential romantic interest and possibly to form an intimate relationship with his students’ female relatives who he objectified.

The evidence in this case clearly showed that petitioner fails to understand the seriousness of his actions, that he was a role model for his students, and that his conduct undoubtedly had ill effects on his students and made him unworthy of a position of trust and authority over impressionable students. Rather than providing his students moral guidance about boundaries and appropriate conversations to have with teachers or modeling correct behavior for them, petitioner illustrated for them repeatedly that he finds it acceptable to discuss his potential romantic or sexual interest in any and all of their female relatives, to ogle over photographs of those relatives, and to

view them as appropriate targets for conquest.[2] What, indeed, does this teach adolescent girls about their worth in the world? Petitioner's conduct is demeaning to women. It can only serve to reinforce a wrongheaded sense that their value is solely in their physical appearance and as objects of desire, that their older female relatives, and soon they, will be objects pursued even by those who are in positions of authority over them, who are tasked with molding them from children into adults. Moreover, the fact that petitioner, an authoritative figure and supposed role model, is openly a married man with children seeking out young female companions can give the wrong impression to the female students that spousal cheating is proper and acceptable.

Although he refuses to acknowledge his responsibility to his students, his duties included supplying a safe learning environment and fostering trust and respect in authority figures. Instead, by repeatedly engaging in inappropriate romantic/sexual

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[2]The majority notes that the Hearing Officer did not specifically determine whether petitioner "ogled" photographs of his students' female relatives. On the other hand, she did not determine he had not done so. In any event, one would be hard pressed to find a more appropriate word for petitioner repeatedly asking his students what their sisters, mothers and aunts looked like, and then soliciting and viewing their photographs for his own personal gratification. Indeed, when asked how many students had presented him with photographs, petitioner responded he would have to "sift through" the photographs he received.

conversations, petitioner horribly miseducated his young students about student-teacher boundaries, proper and decent behavior, good moral conduct and about how they should view themselves and their female relatives. Petitioner has irreversibly abused his position as a teacher by transforming the high school where he teaches into a dating forum using his young female students to search out candidates for his illicit romantic escapades. This behavior harmed his students, even if they did not fully realize it.

Accordingly, petitioner's conduct over years involving multiple students and schools, and his continued failure to show remorse or understanding of either his actions or responsibility as a teacher, demonstrates that he is not fit to be a teacher, and thus the penalty of termination does not shock the conscience.

Notably, in *City School Dist. of the City of N.Y. v McGraham* (17 NY3d 917 [2011]), the Court of Appeals cautioned that "[c]ourts will only intervene in the arbitration process in those cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator" (17 NY3d at 919 [internal quotation marks omitted]).

Thus, as the Court emphasized, "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty" (*id.* at 920). Here, too, that the majority might have issued a lesser penalty had they been in the position of the Hearing Officer, does not provide a basis for vacating the arbitral award.

Oddly, the majority does not agree with my characterization of petitioner's communications as "romantic/sexual in nature" or for being for the purpose of "soliciting female companions for his sexual gratification." Yet, the Hearing Officer specifically stated that the "conversations generally involved whether [petitioner] might have a romantic interest in some of the students' older female relatives." The testimony of multiple students included examples of petitioner asking them about what their relatives looked like, whether they were cute, whether those relatives were in a relationship, and whether he could see photographs of them and be given their phone numbers. Surely, petitioner was not seeking intellectual stimuli from these potentially young, "cute" companions. As succinctly stated by the Hearing Officer, a "test of common sense" can only lead to a conclusion that petitioner intended to form a romantic and

possibly an intimate relationship with his young students' older siblings. As further stated by the Hearing Officer, "I am urged not to throw common sense out the window."

Petitioner's testimony also made clear that these were romantic conversations. His own testimony was that his students solicited his romantic interest in their relatives to, as the Hearing Officer put it, bring him "into their families in a romantic way" and that parents "threw themselves at him."

The Hearing Officer, whose credibility and factual findings are entitled to deference (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]), ultimately determined that petitioner initiated conversations with students about their female relatives for "inappropriate, personal purposes." Given the foregoing testimony and findings it is astounding that the majority would conclude that petitioner's communications with his students were not found to be romantic/sexual in nature. What other purpose petitioner could have had in seeking photographs and phone numbers of students' young female relatives, while also querying if they were in a relationship, is truly a mystery.

The majority urges that "petitioner had never been warned or reprimanded regarding the conduct at issue" and that "a warning" could cause petitioner to cease the conduct. The majority's

position is irrational in that a high school teacher should not even have to be warned not to use his students to solicit female companions for his sexual gratification. It is also wishful thinking that petitioner can right his moral shortcomings with a warning. The majority should recognize that petitioner has solicited female companions at work on multiple occasions at different school years and at different schools, and this is not an isolated incident. In any event, the disciplinary process does not require waiting until worse harm befalls a student at the hands of a teacher.

Further, the fact that petitioner had not received prior warnings about his behavior is no basis for vacating the penalty. Indeed, "no reasonable person concerned about education — could plausibly believe that the conduct in which [petitioner] was found to have engaged was not unbecoming of a teacher and subversive of the educational process" (*Denhoff,* 29 Misc.3d 1207[A], * 10). Stated another way, "It is incredible that any adult — let alone a teacher — would not know that the conduct is and was improper" (*Nreu v New York City Dept. of Educ.*, 25 Misc 3d 1209[A] *5, 2009 NY Slip Op 2007[u] [Sup Ct, New York County 2009]).

Given New York's "explicit and compelling public policy to

protect children from the harmful conduct of adults" (*Matter of Binghamton City School Dist. (Peacock)*, 33 AD3d 1074, 1076 [3d Dept 2006], *appeal dismissed* 8 NY3d 840 [2007]), the Hearing Officer rationally concluded that petitioner, who was placed in a position of authority over children, betrayed that trust and his responsibility and posed a continued danger to those students because he failed to understand appropriate boundaries or his role in educating his students, that the evidence supported a finding that he would engage in similar behavior again and that termination was appropriate.

For these reasons, I would affirm Supreme Court's order denying the petition to vacate the arbitration award and dismissing the proceeding.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Tom, J.P., Renwick, Richter, Webber, JJ.

1020-
1021-
1022

Index 650447/14

GSO Coastline Credit Partners LP, et al.,
Plaintiffs-Appellants,

Centerbridge Credit Partners Master LP, et al.,
Plaintiffs,

-against-

Global A&T Electronics Ltd., et al.,
Defendants-Respondents.

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Commercial Finance Association,
Amicus Curiae.

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Lowenstein Sandler LLP, New York (Thomas E. Redburn, Jr. and Michael J. Hampson of counsel), for appellants.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Paul M. O'Connor, III of counsel), for Global A&T Electronics Ltd., Global A&T Finco Ltd., United Test and Assembly Center Ltd., UTAC Cayman Ltd., UTAC Hong Kong Limited, UTAC (Taiwan) corporation, UTAC Thai Limited, UTAC Thai Holdings Limited, respondents.

Susman Godfrey L.L.P., Houston, TX (Mary Kathryn Sammons of the bar of the State of Texas, admitted pro hac vice of counsel), for Newbridge Asia GenPar IV Advisors, Inc. and TPG Asia GenPar V Advisors, Inc., respondents.

Baker & McKenzie LLP, New York (David F. Heroy of counsel), for Affinity Fund III General Partner Limited and Costa Esmeralda Investments Limited on behalf of itself and all others similarly situated, respondents.

Otterbourg P.C., New York (Jonathan N. Helfat of counsel), for Commercial Finance Association, amicus curiae.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered on or about July 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the second, third, fourth, fifth, seventh, eighth, tenth, eleventh, twelfth and thirteenth causes of action, unanimously modified, on the law, to deny the motions as to the second, third, fourth, fifth, seventh, eighth, tenth and eleventh causes of action, and otherwise affirmed, without costs.

Plaintiffs are purchasers of senior secured notes (Senior Notes) issued in February 2013 by defendant Global A&T Electronics Ltd. (GATE). The Senior Notes are secured by first-priority liens on certain assets of GATE and its subsidiaries (the Collateral). The securitization and payment priority of the Senior Notes, relative to notes held by GATE's junior debt holders, is set forth in an Intercreditor Agreement (ICA) and an Indenture. Under sections 1.1 ("Second Priority Agreement") and 2.1 of the ICA, there is a clear prohibition against the replacement, refinancing or repayment of second-priority secured obligations with first-priority secured obligations. Any such replacement debt is, by definition, a second-priority obligation relative to the Senior Notes held by plaintiffs.

In September 2013, without notice to, or consent of, the

senior note holders, GATE consummated a debt exchange that allegedly allowed GATE's junior debt holders, including one of its two controlling shareholders, to "leapfrog" up GATE's debt priority structure by swapping their second-priority secured interests for first-priority secured notes (the Additional Notes) that purportedly rank pari passu with plaintiffs' Senior Notes.

The complaint states a cause of action for breach of sections 2.2 and 3.2 of the ICA, which, respectively, prohibit the alteration of the priority scheme set forth in section 2.1 of the ICA and any actions the purpose or effect of which is to make any lien securing second-priority obligations pari passu with, or senior to, the liens securing the first-priority obligations, including the Senior Notes.

The complaint states a cause of action for breach of section 4.12 of the Indenture, since GATE placed a new lien on the Collateral securing the Senior Notes, and the new lien is not a "Permitted Lien" under subsection 17 of the definition of that term in the Indenture, because any new liens are subject to the priority scheme set forth in the ICA. Indeed, section 9.1 of the ICA provides that, in the event of a conflict between the terms of the ICA and the Indenture, the ICA controls. Nor is the new lien a "Permitted Lien" under subsection 11 of the definition of

that term in the Indenture, which expressly provides that any such lien remains subject to the priority scheme under the ICA. Because the lien placed on the Collateral was not a Permitted Lien, plaintiffs have also alleged a breach of section 4.18(b) of the Indenture.

The complaint states a cause of action for breach of section 4.16 of the Indenture. Based on the express terms of section 9.3(b) of the ICA, GATE's second amendment to the ICA, effectuating the issuance of the Additional Notes that purport to rank pari passu with the Senior Notes, was subject to the provisions of the ICA, including the provisions governing the priority scheme. Because the second amendment to the ICA did not conform with, and sought to circumvent, the terms of the ICA concerning the priority scheme, GATE lacked the authority to enter into it.

Moreover, the second amendment to the ICA was not permitted under section 4.16(b)(i), (ii) or (v) of the Indenture since there is no inconsistency or ambiguity in the ICA, section 4.16(b)(ii) expressly provides that any increased indebtedness is subject to the terms of the ICA, which includes the priority scheme, and any additional notes secured by the Collateral are still subject to the priority scheme.

The complaint states a cause of action for breach of section 4.11 of the Indenture by alleging that GATE could have executed the debt exchange under more favorable terms in an arm's-length transaction.

As the complaint states a cause of action for breach of the Indenture, the cause of action for declaratory relief should be reinstated.

The complaint states a cause of action for tortious interference with contract, by alleging that the controlling shareholder defendants knew of the ICA and Indenture, and intentionally caused the GATE defendants to breach those agreements without justification, by causing them to effect the debt exchange.

The complaint fails to state causes of action for fraudulent inducement and fraud since the representations on which

plaintiffs rely are nonactionable statements of either intent or belief (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [1st Dept 2008]).

The Decision and Order of this Court entered herein on May 3, 2016 is hereby recalled and vacated (*see* M-2895/M-2915/M-2946 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1272 DLJ Mortgage Capital, Inc, Index 104675/10
Plaintiff/Petitioner-Respondent,

Thomas Hoey, et al.,
Third-Party Intervenors-Plaintiffs,

-against-

Thomas Kontogiannis, et al.,
Defendants/Respondents,

Hahn & Hessen LLP,
Respondent-Respondent,

Jeffrey Siegel, et al.,
Respondents-Appellants,

June Siegel, etc., et al.,
Respondents.

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An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about January 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 August 22, 2016,

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1696 The People of the State of New York, Ind. 4784/00
Respondent,

-against-

Tyrone Fleetwood,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.) entered on or about June 24, 2015, 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 properly exercised its discretion in granting an upward departure based on defendant's egregious criminal history, which was not adequately accounted for in the risk assessment instrument, and which evinced a threat to public safety that outweighed the mitigating factors cited by defendant (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1697 James Mitchell, et al., Index 306510/12
Plaintiffs,

-against-

Barrington A. Smith,
Defendant-Appellant,

Excel Demolition Recycling, et al.,
Defendants-Respondents.

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DeSena & Sweeny, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for appellant.

Burke Conway Loccisano & Dillion, White Plains (Martin Galvin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered December 9, 2015, which, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of defendant Barrington A. Smith for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Smith's vehicle was proceeding northbound in the right light lane of Interstate 95 when it was struck on the driver's side by a tractor-trailer owned by defendant Excel Demolition Recycling and operated by defendant Campusano, which was trying to enter the right lane from the middle lane. Plaintiffs were passengers

in Smith's vehicle.

Smith established his prima facie entitlement to summary judgment by evidence that the tractor-trailer improperly attempted to change lanes without first ascertaining whether it was safe to do so, in violation of Vehicle and Traffic Law § 1128(a) (*see Cascante v Kakay*, 88 AD3d 588 [1st Dept 2011]; *Zummo v Holmes*, 57 AD3d 366 [1st Dept 2008]). The testimony of plaintiffs and Smith established that Smith remained in the right lane of travel at all times before the collision, that he was traveling at approximately 40-45 miles per hour, that he periodically checked his rearview mirror, and that he was not engaged in any distracting behavior. Campusano testified that as soon as he tried to move from the middle lane to the right lane, he collided with the rear driver's side of Smith's vehicle, which he did not see.

The submissions in opposition to Smith's motion failed to raise a triable issue of fact as to comparative negligence on the part of Smith (*see Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]). There is no evidence that Smith, who had the right of way, had time to react to Campusano's vehicle coming into his lane or that he was at fault in the happening of the accident. It is of no moment that plaintiff passengers, one of whom was in

the rear seat, may have observed the offending truck in the middle lane at some point prior to the accident.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1698 In re Essleiny A., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Rafael A.,
Respondent-Appellant,

Griselda P.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

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Larry S. Bachner, Jamaica, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Order of fact-finding, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about May 14, 2015, which determined, after a hearing, that respondent father had neglected the subject children, unanimously affirmed, without costs.

The Family Court's finding that the father neglected the children was supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b][i]). The father was arrested upon exiting the family's building while possessing a half kilo of heroin. The arresting officer proceeded to search the apartment

and discovered a kilo press, which is commonly used to compact heroin, in the children's bedroom. Further, one of the children testified that she had seen the father counting money with another man in the apartment. Finally, the Family Court was entitled to draw a negative inference against the father for failing to testify at the fact-finding hearing (*see Matter of Jamie V.*, 110 AD3d 481 [1st Dept 2013]).

Taken as a whole, the evidence in the record suffices to create an inference that the father engaged in narcotics trafficking in the immediate proximity of the children and thereby created an imminent danger to the subject children's physical, mental, and emotional condition (*see* Family Ct Act § 1012 [f][i]; *Matter of Jamie V.*, 110 AD3d 481 [1st Dept 2013]; *Matter of Paul J.*, 6 AD3d 709 [2d Dept 2004]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1699 Irving Ruderman, Index 651466/13
Plaintiff-Appellant,

-against-

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

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Kraus & Zuchlewski LLP, New York (Geoffrey A. Mort of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), and Kelley Drye & Warren LLP, New York (Anne-Marie Mitchell of counsel), for respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about September 22, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Although the order did not expressly address plaintiff's retaliation claim, it unambiguously granted defendants' motion to dismiss in its entirety. CPLR 2219(a) provides the court with "broad leeway" as to the form of the order, and the parties addressed this claim in their motion papers (*Corteguera v City of New York*, 179 AD2d 362, 363 [1st Dept 1992]).

Plaintiff's retaliation claim under federal and state civil rights law and under the New York City Human Rights Law was

properly dismissed because the amended complaint failed to provide a basis for a reasonable jury to conclude that the job offer that was extended to plaintiff was rescinded because of his inquiry to the Equal Employment Opportunity Commission (EEOC). There is no dispute that the job offer was re-confirmed, even after defendant City of New York's employees were aware of the inquiry *(see Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 313 [2004]).

There is also no dispute that plaintiff failed to complete the routine paperwork, which stated that this might result in not being appointed to the position that was offered. Plaintiff failed to allege facts sufficient to demonstrate a causal connection between the adverse employment action and his EEOC inquiry or that the stated reason for rescinding the job offer was a pretext for impermissible retaliation *(see Treglia v Town of Manlius,* 313 F3d 713, 721 [2d Cir 2002]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1700 The People of the State of New York, Ind. 4607/10
Respondent,

-against-

Henry Darden,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 14, 2011, convicting defendant, after a jury trial, of criminal trespass in the second degree, petit larceny, and two counts of assault in the third degree, and sentencing him to four consecutive terms of one year, unanimously affirmed.

Defendant's right of confrontation was not violated by the admission of a logbook entry, created by a nontestifying security guard at the homeless shelter where the events took place. Properly admitted as a business record, the logbook entry was not testimonial because it was not "procured with a primary purpose of creating an out-of-court substitute for trial testimony" (*Michigan v Bryant*, 562 US 344, 358 [2011]). The evidence

established that such logbook entries were routinely made for the private security firm's business purposes, regardless of whether an arrest or other unusual activity occurred.

The court properly denied defense counsel's request for a missing witness instruction with regard to the guard, who was no longer employed by the security company, since he was neither available to the People nor within their control for purposes of a missing witness instruction (*see People v Gonzalez*, 68 NY2d 424 [1986]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1701 In re Anna Y.,
Petitioner-Appellant,

-against-

Alexander S.,
Respondent-Respondent.

_____

Bikel & Mandarano, New York (Linda A. Rosenthal of counsel), for appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Joseph F. De Simone of counsel), for respondent.

_____

Order, Family Court, New York County (Lewis A. Borofsky, Support Magistrate), entered on or about March 12, 2015, which, to the extent appealed from, denied petitioner's motion for 90% of her interim child care expenses and for counsel fees, unanimously reversed, on the law, to grant the motion for child care expenses in the amount of 78% thereof and to award interim counsel fees in the amount of $25,000, without costs.

Petitioner is incurring child care expenses as a result of working, and therefore is entitled to an order directing respondent to pay his proportionate share of those expenses (*see* Family Court Act § 413[1][c][4]; *Steel v Steel*, 152 Misc 2d 880, 881, 884 [Sup Ct, NY County 1990])). Respondent argues that his proportionate share, if any, would be 78%, not the 90% petitioner

seeks. Thus, respondent is responsible for 78% of the child care expenses, subject to adjustment at trial.

Family Court Act § 438(a) authorizes an award of counsel fees in proceedings for the support of children, reflecting the strong policy concern of "leveling the playing field" to ensure that "marital litigation is shaped not by the power of the bankroll but by the power of the evidence" (*Charpie v Charpie*, 271 AD2d 169, 170 [1st Dept 2000]). Upon consideration of the financial circumstances of the parties, including that respondent's income and assets are significantly greater than petitioner's, together with the other circumstances of this case, an award of interim counsel fees to petitioner in the amount of $25,000 is warranted to preserve parity between the parties and to avoid having petitioner deplete her assets in order to have legal representation.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1702 The People of the State of New York, Ind. 3505/12
Respondent,

-against-

Kelvin Otunyo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 23, 2013, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Since defendant had an opportunity to withdraw his plea, and since he was aware that his plea had immigration consequences, his present challenges to his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-383 [2015]; *People v Peque*, 22 NY3d 168, 183 [2013], *cert denied sub nom Thomas v New York*, 574 US —, 135 S Ct 90 [2014]), and we decline to review these unpreserved claims in the interest of justice. As an alternate

holding, we find that the plea was knowing, intelligent and voluntary in all respects.

Defendant made a valid waiver of his right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1703-
1704-
1705

Index 652371/13

Safka Holdings, LLC,
Plaintiff-Appellant,

-against-

220 West 57th Street Limited Partnership,
Defendant-Respondent.

- - - - -

220 West 57th Street Limited Partnership,
Plaintiff-Respondent,

-against-

Safka Holdings, LLC,
Defendant-Appellant.

_____

Lebensfeld Sharon & Schwartz P.C., New York (Alan M. Lebensfeld of counsel), for appellant.

Norton Rose Fulbright US LLP, New York (Felice B. Galant of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered June 29, 2015, dismissing the complaint and awarding defendant the total amount of $128,047.65, and bringing up for review an order, same court and Justice, entered May 8, 2014, which, among other things, granted defendant's motion for summary judgment dismissing the complaint and granted it partial summary judgment as to liability on its counterclaim for attorneys' fees, and an order, same court and Justice, entered February 9, 2015,

which denied plaintiff's motion to reject a special referee's report, and granted defendant's cross motion to confirm the report, unanimously affirmed, without costs. Appeals from orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this breach of contract action stemming from a failed real estate transaction between plaintiff, the prospective buyer, and defendant, the prospective seller, the motion court correctly granted defendant's motion for summary judgment dismissing the complaint. Defendant demonstrated that it fulfilled its contractual obligations by timely providing all requested due diligence information. Plaintiff's claims that defendant's responses were either incomplete or provided too late are inconsistent and unsupported by the record, and thus insufficient to defeat defendant's motion.

Even if an issue of fact did exist as to whether defendant met its obligations, dismissal of the complaint would still be appropriate because plaintiff failed to give defendant notice of and an opportunity to cure any deficiencies prior to bringing suit, as required by the parties' agreement. Plaintiff's argument regarding the validity of defendant's own termination notice raises an issue not asserted in the complaint or in any

motions before the motion court, and is not properly before us in the context of this appeal.

The motion court providently exercised its discretion in adopting the Special Referee's recommendation and awarding attorneys' fees and costs in the recommended amounts. The Referee's findings were supported by the record, and the Referee clearly defined the issues and resolved matters of credibility (*see Steingart v Hoffman*, 80 AD3d 444, 445 [1st Dept 2011]). Defendant presented evidence supporting the fee application, including the amount of time spent and the lawyers' experience, ability and reputation (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]), and plaintiff failed to appear or offer any evidence to contest the evidence presented by defendant.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Andrias, J.P., Richter, Gische, Kahn, JJ.

1706 Aristalia Benitez, Index 309302/08
Plaintiff, 83847/09

-against-

United Homes of New York, LLC, et al.,
Defendants.

- - - - -

U.S. Bank, National Association,
Third-Party Plaintiff-Respondent,

-against-

ANM Funding, LLC, et al.,
Third-Party Defendants,

Lowenthal & Kofman, et al.,
Third-Party Defendants-Appellants.

_____

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman and Brandon H. Weinstein of counsel), for appellants.

Moran· Karamouzis LLP, Rockville Centre (Siobhan E. Moran and Andrew P. Karamouzis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about April 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendant/third-party plaintiff U.S. Bank, National Association's (the bank) motion for partial summary judgment on the issue of liability on its legal malpractice claim against third-party defendants Lowenthal & Kofman and Jerald Weinberger (together the law firm), and denied

the law firm's motion for summary judgment dismissing that claim, unanimously affirmed, without costs.

The bank made a prima facie showing that the law firm departed from the standard of care in connection with the closing of a residential real estate mortgage loan to plaintiff by, among other things, failing to advise that the subject property lacked a certificate of occupancy, failing to advise of the risk of funding the loan under these circumstances, and failing to confirm that plaintiff contributed 3% of her own funds toward closing, a condition of the loan (*see generally AmBase Corp. v Davis, Polk & Wardwell*, 8 NY3d 428, 434 [2007]). The motion court properly considered the affidavit of the bank's legal expert concerning the duty of care an attorney owes to a mortgage-lender client (*see Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010], *appeal withdrawn* 16 NY3d 796 [2011]; *Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243 [1st Dept 2005]). The bank's closer, who was responsible for ensuring that the closing documents were in order, clearly had "knowledge of the facts" and therefore was qualified to submit an affidavit in support of the bank's summary judgment motion (CPLR 3212[b]). The closer's lack of knowledge concerning the underwriting process is irrelevant to the legal

malpractice claim.

In opposition, the law firm, which did not rebut the expert's opinion with an expert opinion of its own, failed to raise a triable issue of fact (*see Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 141 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

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

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1707 The People of the State of New York Ind. 5769/10
Respondent,

-against-

Manahan Reyes,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at suppression hearing; Bruce Allen, J. at jury trial and sentencing), rendered March 23, 2012, convicting defendant of robbery in the first degree (12 counts), attempted robbery in the first degree (3 counts), robbery in the second degree (4 counts) and of attempted robbery in the second degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The motion court properly denied defendant's motion to suppress showup identifications. The showup was conducted in close geographic and temporal proximity to the crime "as part of an unbroken chain of fast-paced events" (*People v Vincenty*, 138 AD3d 428, 429 [1st Dept 2016]), including the convergence of numerous witnesses upon the location where the police were

holding defendant, and the circumstances, viewed collectively, were not unduly suggestive (*see e.g. People v McNeil*, 39 AD3d 206, 209 [1st Dept 2007], *lv denied* 13 NY3d 861 [2009]; *People v Gatling*, 38 AD3d 239 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). The fact that the prompt showup involved multiple witnesses does not require suppression, and nothing indicates that the witnesses influenced each other in making their simultaneous identifications (*see People v Love*, 57 NY2d 1023, 1024 [1982]; *People v Vincenty*, 138 AD3d at 429).

Defendant did not preserve his arguments that the officer conducting the showup made suggestive preidentification comments about recovered property, or that the People failed to establish the absence of suggestive comments by the officers who transported witnesses to the showup, and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1708 In re Ronda E. F.,
Petitioner-Respondent,

-against-

Leroy M. C.,
Respondent-Appellant.

_____

Daniel R. Katz, New York, for appellant.

Ronda E. F., respondent pro se.

_____

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about September 18, 2014, which, upon confirmation of the Support Magistrate's finding of willfulness, sentenced respondent Leroy M. C. to incarceration for a period of four months with a purge amount set at $20,000, unanimously affirmed, without costs.

Respondent failed to present credible evidence of his inability to make the required payments to provide support for the subject child (*see Matter of Powers v Powers*, 86 NY2d 63, 68-70 [1995]; *Matter of John T. v Olethea P.*, 64 AD3d 484, 485 [1st Dept 2009]).

Contrary to respondent's argument, improperly raised for the first time on appeal, the Support Magistrate did not assume the appearance of an advocate for the petitioner during the

proceedings. Rather, the Magistrate fulfilled a "vital role in clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial" (*Matter of Carlos S.*, 5 AD3d 1051, 1052 [2004], *lv denied* 2 NY3d 707 [2004]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1712 The People of the State of New York, Ind. 3111N/12
Respondent,

-against-

Romulo Antunez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno 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 (Bruce Allen, J.), rendered December 19, 2012, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree, and sentencing him to a term of 45 days, unanimously affirmed.

Where, despite his prior expression of dissatisfaction with counsel, defendant expressly stated that he did not wish to withdraw his guilty plea and that he wanted his attorney to continue to represent him at sentencing, defendant abandoned any claims to the contrary (*see People v Ragin*, 136 AD3d 426 [1st Dept 2016] *lv denied* 27 NY3d 1074 [2016]), and the court had no reason to assign new counsel sua sponte. In any event, the

record establishes the voluntariness of the plea and the absence of good cause for reassignment of counsel.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1713 The People of the State of New York, Ind. 44560C/05
Respondent,

-against-

Lawrence Perez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 5, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant did not preserve his claim that the court should have discharged a sequestered deliberating juror or made a further inquiry into whether she could be fair and impartial after her request to attend a family event during deliberations had been denied, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record, including the court's inquiry of the juror, supports the conclusion that the juror did not possess a state of mind that would have prevented her from rendering an impartial

verdict (*see generally People v Mejias*, 21 NY3d 73, 79 [2013]).

Defendant did not preserve his claim that certain testimony violated his right of confrontation, and we decline to review it in the interest of justice. As an alternative holding, we conclude that the testimony did not violate defendant's constitutional rights. Furthermore, this testimony was generally helpful to defendant, and defense counsel pursued a reasonable, nonprejudicial strategy by consenting to its admission, with agreed-upon redactions, and exploiting it in summation. Accordingly, 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]), and we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

Finally, defendant did not preserve his claim that a mistrial was required after a cooperating witness who also participated in the crime testified on redirect that he believed there was a contract on his life, but that he was willing to testify because he would be serving his sentence in federal prison were he would not be around the defendants. As an alternative holding, no mistrial was warranted because the offending testimony was stricken, clarifying testimony was

elicited that the threats on the witness's life were not directly or indirectly related to defendant and curative instructions were offered.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1714 The People of the State of New York, Ind. 1104/12
Respondent,

-against-

Nuradeen Vanterpool,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 January 8, 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: SEPTEMBER 27, 2016

CLERK

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

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

1715 The People of the State of New York, Ind. 1960/10
Respondent,

-against-

Frank Furino,
Defendant-Appellant.

_____

Law Offices of Randall D. Unger, Bayside (Randall D. Unger of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered August 17, 2012, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of seven 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]). The evidence supports reasonable conclusions that defendant took merchandise from a store without paying for it, that he did so with larcenous intent, and that he used force for the purpose of retaining control of the property and not merely to defend himself (*see e.g. People v Jorge*, 71 AD3d 604 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]). Among

other things, a videotape depicted defendant's movements, and his express challenge to a store employee to fight him for the merchandise demonstrated his intent to retain it by force. Although there was evidence that defendant was intoxicated, it did not show that his intoxication reached the level of negating any element of the crime (*see* Penal Law § 15.25).

Defendant did not preserve claims regarding the court's charge, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The charge, "read as a whole. . .fairly instructed the jury on the correct principles of law to be applied (*People v Ladd*, 89 NY2d 893, 896 [1996]).

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.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1716 Jeanne Atkinson, Index 104274/11
Plaintiff-Respondent,

-against-

Key Real Estate Associates, LLC, et al.,
Defendants-Appellants.

_____

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

Philip J. Dinhofer, LLC, Rockville Centre (Philip J. Dinhofer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 20, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss so much of the complaint as is based on the height differential between a marble step and the bull-nosing on the front of that step, and otherwise affirmed, without costs.

The parties agree that the height differential between the marble step and the bull-nosing on which plaintiff caught her heel, causing her to fall, was one-eighth to one-quarter of an inch. This defect, as a matter of law, did not constitute a trap or nuisance, nor were the intrinsic characteristics or the surrounding circumstances such that they magnified the danger

posed by this otherwise insignificant defect (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77-78 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997]). Thus, this defect was trivial as a matter of law, and therefore nonactionable.

As defendants concede in their reply brief, issues of fact exist as to whether defendants' failure to install handrails, pursuant to Administrative Code of the City of New York § 27-375(f)(1), was a proximate cause of plaintiff's injuries.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1717 The People of the State of New York, Ind. 2188/11
Respondent,

-against-

Jean Laroche,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse 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 (A. Kirke Bartley, Jr., J.), rendered February 6, 2014, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of 2½ years, unanimously affirmed.

Defendant's challenges to the voluntariness of his plea are unpreserved, since he failed to make an appropriate postallocution motion or otherwise raise these challenges in the plea court, despite ample opportunity to do so within the many months between his guilty plea and sentencing (*see People v Williams*, 27 NY3d 212, 219 [2016]). Under the circumstances here, the narrow exception to the preservation requirement set forth in *People v Louree* (8 NY3d 541, 545-546 [200]) is

inapplicable. We decline to review this unpreserved claim in the interest of justice.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1718 The People of the State of New York, Ind. 1557/06
Respondent,

-against-

Patrick Smith,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered March 2, 2012, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 7½ to 15 years, unanimously modified, on the law, to the extent of reducing the amounts of the mandatory surcharge and crime victim assistance fee to $150 and $5, respectively, and otherwise affirmed.

Since the crime was committed before the effective date of

the legislation increasing the mandatory surcharge and crime victim assistance fee, defendant's sentence is unlawful to the extent indicated.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Friedman, J.P., Andrias, Gische, Kahn, JJ.

1719-
1719A In re Joseph Cepeda,
Petitioner-Appellant,

-against-

Glendalys Salgado, et al.,
Respondents-Respondents.

- - - - -

In re Glendalys Salgado,
Petitioner-Respondent,

-against-

Joseph Cepeda, etc.,
Respondent-Appellant,

Maria R. Guastella, et al.,
Respondents.

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260406/16

_____

Joseph Cepeda, appellant pro se.

Stanley Kalmon Schlein, Bronx, for respondents.

_____

Judgments, Supreme Court, Bronx County (John W. Carter, J.), entered August 12, 2016, unanimously dismissed, without costs or disbursements.

In light of appellant's delay in filing these appeals, at the time they were heard it was too late to grant relief under

the Election Law. Accordingly, we dismiss the appeals as moot.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

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

1720 The People of the State of New York, Ind. 1033/13
Respondent,

-against-

Orlando Rodriguez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered January 8, 2015, 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: SEPTEMBER 27, 2016

CLERK

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

1721N Cityfront Hotel Associates Limited Partnership, et al., Plaintiffs-Appellants, Index 652521/16

-against-

Starwood Hotels & Resorts Worldwide, Inc., et al., Defendants-Respondents.

_____

Pryor Cashman, LLP, New York (Todd E. Soloway of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Charles A. Gilman of counsel), for Starwood Hotels & Resorts Worldwide, Inc., Sheraton Operating Corporation, The Sheraton LLC and Western Hotel Management, L.P., respondents.

Jenner & Block LLP, New York (Michael W. Ross of counsel), for Marriott International, Inc., respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 1, 2016, which denied plaintiffs' motion for a preliminary injunction, unanimously affirmed, with costs.

The court providently exercised its discretion in denying the application to enjoin the announced hotel chain merger for failure to demonstrate that the harm would be irreparable. Plaintiffs' claimed projected losses all amounted to loss of revenue, which defendants' expert showed, without contradiction,

was calculable (*see SportsChannel Am. Assoc. v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]).

In view of the foregoing, it is unnecessary to address the parties' contentions regarding the other requisites of preliminary injunctive relief.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1722- Ind. 557/10
1723- 1562/12
1724 The People of the State of New York, 1563/12
Respondent,

-against-

Fernando Arias,
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 (Frank Glaser of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 11, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and seventh degrees, and sentencing him, as a second felony drug offender, to a term of nine years, and judgments, same court and Justice, rendered June 15, 2012, convicting defendant, upon his pleas of guilty, of criminal possession of a controlled substance in the third degree and bail jumping in the first degree, and sentencing him, as a second felony drug offender, to a concurrent aggregate term of six 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 jury could reasonably have found that there was a satisfactory explanation for the fact that only one of several officers noticed the drugs at issue.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record, concerning counsel's choice of suppression issues (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim 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 counsel's decision not to challenge the predicate for the car stop that led to defendant's arrest was objectively unreasonable, or that it caused defendant any prejudice (*see People v Carver*, 27 NY3d 418, 420-421 [2016]). Such a challenge had little chance of success, because the hearing evidence demonstrated that there was reasonable suspicion justifying the car stop. A cell phone tip that was anonymous (although

potentially traceable) was accompanied by several indicia of reliability, including that it was in the form of a present sense impression (*see People v Vasquez*, 88 NY2d 561, 574-575 [recognizing reliability of present sense impressions]), and that it accurately predicted the movement of defendant's car.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1725 Liberty Mutual Insurance Company, et al.,
Plaintiffs-Respondents,

-against-

K.O. Medical, P.C.,
Defendant-Appellant.

Index 21708/13E

Law Office of Melissa Betancourt, P.C., Brooklyn (Frank D'Esposito of counsel), for appellant.

Burke, Conway, Loccisano & Dillon, White Plains (Philip J. Dillon of counsel), for respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about March 6, 2015, which, upon renewal, granted plaintiffs' motion to amend the complaint, for summary judgment, and for a permanent injunction against any arbitration or court hearing on no-fault benefits between the parties, to the extent of declaring that defendant is not entitled to no-fault insurance benefits, unanimously modified, on the law, to deny the parts of the motion seeking summary judgment and leave to amend, to vacate the declaration, and to order that the denial of the parts of the motion seeking to amend the complaint and for a permanent injunction is without prejudice to renewal, and otherwise affirmed, without costs.

Plaintiffs seek, inter alia, a declaration that defendant is not entitled to no-fault insurance benefits because it failed to appear for examinations under oath (EUOs). However, plaintiffs failed to demonstrate that the EUOs were properly noticed (*see e.g. Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]). Counsel's affirmation may be sufficient proof that the requests for EUO were mailed (*see Liberty Mut. Ins. Co. v Five Boro Med. Equip., Inc.*, 130 AD3d 465 [1st Dept 2015]), but neither the affirmation nor anything else in the record establishes that the requests were mailed in accordance with the time frames set forth in the no-fault implementing regulations. Under the circumstances, the timeliness of plaintiffs' claim denials is immaterial (*see Interboro Ins. Co.*, 112 AD3d 483).

Plaintiffs also failed to establish prima facie defendant's failure to appear for the EUOs. The transcripts submitted to show defendant's failure to appear on certain dates were uncertified and unsworn (*see Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]), and no evidence was submitted with respect to the other dates.

In support of their motion to amend, plaintiffs failed to include the proposed amended complaint or the proposed additional billings (*see McBride v KPMG Intl.*, 135 AD3d 576, 581 [1st Dept

2016]). Thus, the motion is denied without prejudice to renewal before the trial court. The motion for an injunction against arbitration or further court proceedings also is denied without prejudice to renewal, and that motion should be addressed to Supreme Court in the first instance.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1726 The People of the State of New York, Ind. 4050N/12
Respondent,

-against-

Abelardo Alejandro,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at suppression hearing; Marcy L. Kahn, J. at plea and sentencing), rendered September 4, 2013, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him to a term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record.

The police observed a car driven by defendant remaining stationary in a no-parking zone, and defendant was neither loading or unloading passengers or property. Accordingly, even though its motor was running, defendant’s car was parked

illegally, and the police had, at least, an objective credible reason for approaching the car (*see People v Ruiz*, 100 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]).

As the police approached the car, defendant and a passenger began moving their hands rapidly, leaning forward and dipping their shoulders, and they reasonably appeared to be hiding something. Based on the men's movements, as well as the officers' experience relating to weapons hidden in cars and the fact that the car was illegally parked in a high crime neighborhood, the police were justified in ordering the men out of the car, making a limited visual inspection of areas of the car where a weapon could be located, and conducting a protective frisk (*see People v Garcia*, 20 NY3d 317, 321 [2012]; *People v Feldman*, 114 AD3d 603 [1st Dept 2014], *lv denied* 23 NY3d 962 [2014]; *People v Washington*, 91 AD3d 534, 534 [1st Dept 2012] *lv denied* 18 NY3d 999 [2012]). In any event, the frisk itself did not yield any contraband. Instead, the police saw cocaine in plain view on the driver's seat as defendant got out of the car.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Webber, JJ.

1727-
1728 Index 650183/13

Mark Sarfati,
Plaintiff-Respondent,

-against-

Frank Palazzolo,
Defendant-Appellant.

_____

Hass & Gottlieb, Scarsdale (Lawrence M. Gottlieb of counsel), for appellant.

Ruskin Moscou Faltischek, P.C., Uniondale (E. Christopher Murray of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 11, 2015, in favor of plaintiff and against defendant, unanimously affirmed. Order, same court and Justice, entered November 4, 2015, which, inter alia, denied defendant's motion for renewal, unanimously affirmed, with costs.

Plaintiff established prima facie the existence of the guaranty executed by defendant, the underlying debt, and defendant's failure to perform under the guaranty (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]), by submitting the "Guaranty and Assignment of Loan Transactions Agreement," the stock purchase agreement setting forth the terms

of the purchase money debt obligation, and a demand letter from himself to defendant.

The guaranty and assignment agreement included an unambiguous and valid assignment of plaintiff's rights under the stock purchase agreement that demonstrates the intent of the parties to assign plaintiff's rights (*see Van Damme v Gelber*, 104 AD3d 534, 534-35 [1st Dept 2013], *lv dismissed* 22 NY3d 952 [2013]). Therefore, contrary to defendant's argument, no additional documentation is needed to effectuate the agreement. Moreover, the guaranty and assignment agreement does not support defendant's contention that he is entitled to a payment equal to a percentage of the purchase money debt obligation.

Defendant also failed to raise an issue of fact as to his counterclaim for repayment of what he conclusorily asserts were monthly loan payments to plaintiff (*see Schwartz v JPMorgan Chase Bank, N.A.*, 84 AD3d 575, 577 [1st Dept 2011]). The record shows that those payments were principal and interest payments on the guaranty.

The "new evidence" that defendant submitted in support of his motion to renew, i.e., that the parties orally agreed to cancel the guaranty and assignment agreement, would not change the prior determination, since the agreement includes a written

modification clause, and there is no writing canceling it (*see Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 [1st Dept 2003]; CPLR 2221[e]). Moreover, defendant failed to provide reasonable justification for his delay in presenting this evidence, which is based on information that was in his possession at the time the summary judgment motion was made and therefore could have been included in his own affidavit in opposition (CPLR 2221[e][3]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1729-
1729A In re Fendi B.,

A Child Under Eighteen Years of Age,
etc.,

Jason B.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about March 19, 2015, to the extent it brings up for review a fact-finding order (same court and Judge), entered on or about March 19, 2015, which found that respondent sexually abused the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding that respondent sexually abused the subject

child was supported by a preponderance of the evidence (Family Ct Act § 1012 [e][iii]; § 1046 [b][i]). The child's sworn testimony at the fact-finding hearing is competent evidence that respondent sexually abused her (*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Matter of Danielle M.*, 151 AD2d 240, 243 [1st Dept 1989]). Contrary to respondent's contention, the Family Court properly credited the child's testimony and any inconsistencies with her prior statements were minor and peripheral to the dispositive issues (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556 [1st Dept 2012]). Furthermore, the child's testimony was corroborated by her medical records, which included her similar account of the abuse, as well as by the caseworker's testimony (*see Matter of Imani G. [Pedro G.]*, 130 AD3d 456 [1st Dept 2015]; *Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411 [1st Dept 2012]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1730 The People of the State of New York, Ind. 1658/87
Respondent,

-against-

Mark Wellman,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about February 26, 2014, 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 correctly assessed points under the risk factor for failure to accept responsibility (*see e.g. People v Fortin*, 29 AD3d 765, 766 [2d Dept 2006], *lv denied* 7 NY3d 712 [2006]). Given defendant's prison disciplinary record, the court also correctly assessed points under the risk factor for unsatisfactory conduct while confined. However, since the People failed to prove by clear and convincing evidence that defendant engaged in sexual misconduct while in prison, the assessment

under the risk factor for conduct while confined should only have been 10 points rather than 20. Even with a reduction of 10 points, defendant remains a level three offender, and, given the heinousness of the underlying crime against a young child, we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1733 In re Lisa W.,
Petitioner-Respondent,

-against-

John M.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Lisa C. W., New York, respondent pro se.

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

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Order, Family Court, New York County (Fiordaliza A. Rodriguez, J.), entered on or about June 26, 2015, which, after a hearing, granted Lisa W.'s petition for a final order of sole legal and physical custody of the subject child, with weekly supervised visitation by the father, and denied the father's cross petition for custody, unanimously affirmed, without costs.

A sound and substantial basis in the record supports the determination that the child's best interests are met by the award of sole legal and physical custody to petitioner mother (*see Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]). The court's findings and determination are accorded great deference on appeal, since that court had the opportunity to assess the

witnesses' demeanor and credibility (*see id.* at 173; *Matter of Mildred S.G. v Mark G.*, 62 AD3d 460 [1st Dept 2009]). There is no basis to disturb the court's findings that the mother and her aunt were highly credible witnesses, while the father lacked credibility and was incredible on certain issues.

The court considered the appropriate factors and determined, among other things, that the child has always lived in the mother's home, and that the mother has been the child's primary caretaker, although she worked full time. Further, the mother has provided for the child financially and was observed by the court, the forensic expert, and the aunt to be a nurturing and stable parent, who was able to continue to care for the child and meet all of her needs.

On the other hand, the father had failed to regularly visit the child, and had no realistic plan for her future, including financially and educationally. The father had a history of being emotionally withdrawn and isolated, and had a rigid and inflexible parenting style, which the expert psychologist found raised concerns about his ability to care for the child.

Contrary to the father's arguments, the court gave appropriate weight to the forensic report, which was admitted without objection, and expressly did not rely on inadmissible

hearsay incorporated in the report in reaching its determination. The admissible evidence in the record, including portions of the expert's report that did not include hearsay and the testimony of the parties and the aunt, was sufficient to support the court's conclusion (*see Strauss v Strauss*, 136 AD3d 419 [1st Dept 2016]; *Matter of Prete v Prete*, 193 AD2d 804 [2d Dept 1993]). Further, the court properly considered the order of protection against the father and in favor of the mother and the child's half-brother (*see Lisa W. v John M.*, 132 AD3d 495 [1st Dept 2015]).

With respect to visitation, the record shows that the father failed to regularly avail himself of supervised visitation provided by the temporary visitation order, which jeopardized his bond with the child and knowingly disappointed her (*see State of N.Y. ex rel. Barbara D. v Francis D.*, 58 AD3d 436 [1st Dept 2009], *appeal dismissed* 12 NY3d 872 [2009]). Further, in light of the evidence of the father's history of emotional isolation and concerns regarding his aggressive behavior and impulse

control, supervised visitation was warranted (*see Matter of Aaron P. v Tamara F.*, 137 AD3d 485 [1st Dept 2016]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1735 The People of the State of New York, Ind. 2650/10
Respondent,

-against-

Sinke Zewge,
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 (Christine DiDomenico of counsel), for respondent.

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Order, Supreme Court, New York County (Bruce Allen, J.), rendered September 5, 2014, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly considered defendant's prior youthful offender adjudication in assessing points under the risk factor for prior crimes (*see People v Wilkins*, 77 AD3d 588 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]). The court also properly assessed points under the risk factor for alcohol abuse, because defendant's admissions to correction officials (*see e.g. People v Kelly*, 69 AD3d 498 [1st Dept 2010]) provided clear and convincing evidence of such abuse, satisfying the standard set forth in

People v Palmer (20 NY3d 373, 378-379 [2013]).

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument,and the record does not establish any basis for a downward departure.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1736 Board of Managers of Loft Space Condominium,
Plaintiff-Appellant,

-against-

SDS Leonard, LLC,
Defendant-Respondent,

G46, LLC, et al.,
Defendants.

Index 652731/12

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Stephen H. Orel of counsel), for appellant.

Cohen & Marderosian, New York (Mark D. Marderosian of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 15, 2015, which granted defendant SDS Leonard, LLC's motion to dismiss the complaint as against it, unanimously modified, on the law, to deny the motion as to (1) so much of the breach of contract claim as is based on (a) items that are hazardous, dangerous, and/or in violation of law and (b) SDS's failure to obtain a permanent certificate of occupancy and (2) so much of the eighth and ninth causes of action as are based on SDS's conveyance of the commercial units at the Loft Space Condominium (the condominium) to LW Retail Associates LLC, and otherwise affirmed, without costs.

Each purchaser of a residential unit at the condominium entered into a contract with SDS, the sponsor of the condominium. The contract incorporated the condominium offering plan by reference. The offering plan states that the "[t]he Common Elements are offered in 'as is' condition as of the date of the First Unit Closing, subject to . . . the Sponsor's [i.e., SDS's] obligation to maintain the Property in accordance with the requirements of law and to cause any hazardous or dangerous conditions to be cured."

To the extent the first cause of action, alleging breach of contract against SDS, is based on items that are hazardous, dangerous, and/or violate the law (that is, exceptions to the "as is" clause), the "as is" clause does not bar the claim (*see TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85-86 [1st Dept 2015]). The temporary certificates of occupancy (TCOs) for the buildings comprising the condominium do not refute plaintiff's claim that hazardous and dangerous conditions existed when SDS sold the residential units. A TCO merely creates a rebuttable presumption that a building complies with New York City law (*see Board of Mgrs. of Olive Park Condominium v Maspeth Props. LLC*, 2014 NY Slip Op 33012[U], *9-10 [Sup Ct, Kings County 2014]; *see also Solomons v Greens at Half Hollow, LLC*, 26 Misc 3d

83, 86 [App Term, 2d Dept 2010]). Therefore, it is not the kind of documentary evidence that warrants granting a CPLR 3211(a)(1) motion (*see e.g. Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The motion court should not have dismissed the breach of contract claim to the extent it alleges that SDS failed to obtain a permanent certificate of occupancy. The offering plan states that the "Sponsor expects to obtain a permanent Certificate of Occupancy . . . within 180 days of the First Unit Closing of a Residential Unit," and the "as is" clause in the plan does not negate this obligation.

The motion court correctly dismissed the fraudulent inducement claim (i.e., the second cause of action) as duplicative of the breach of contract claim (*see e.g. Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 581 [1st Dept 2010]).

The seventh cause of action, alleging that certain equity distributions made by SDS violated Debtor and Creditor Law § 273, was correctly dismissed. Plaintiff merely alleged the "legal conclusion[]" – not "specific factual allegations" (*NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 412 [1st Dept 2010]) – that the equity distributions were made without fair

consideration. For the same reason, the motion court correctly dismissed the eighth cause of action to the extent it alleges that the equity distributions violated Debtor and Creditor Law § 274.

The motion court should not have dismissed the eighth cause of action to the extent it alleges that SDS's conveyance of four commercial units at the condominium to LW for $0 violated Debtor and Creditor Law § 274. On its face, $0 for four commercial condominium units does not appear to be "fair consideration" (Debtor and Creditor Law § 274). Moreover, even if SDS established a reserve fund of $623,000, this does not "utterly refute[]" (*Goshen*, 98 NY2d at 326) plaintiff's allegation that SDS was left with "unreasonably small capital" (Debtor and Creditor Law § 274). The condominium offering plan, which SDS relied on before the motion court, states that Local Law 70 of 1982 "requires that . . . the Sponsor shall establish *and transfer to the Board of Managers of the Condominium* [i.e., plaintiff], a Reserve Fund" (emphasis added). Thus, this evidence does not show that SDS retained the reserve fund; rather, it shows that the fund was transferred to plaintiff.

The motion court correctly dismissed the ninth cause of action to the extent it alleges that SDS's equity distributions

violated Debtor and Creditor Law § 276. However, the court should not have dismissed the cause of action to the extent it alleges that SDS's conveyance of the commercial units violated Debtor and Creditor Law § 276. Plaintiff alleged sufficient "badges of fraud" to support the latter claim, including "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; [and] the transferor's knowledge of the creditor's claim and the inability to pay it" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [internal quotation marks omitted]). In particular, plaintiff alleges that LW is owned and controlled by a defendant related to SDS. Further, as previously noted, $0 for four commercial condominium units appears to be inadequate consideration. As for SDS's knowledge of plaintiff's claim, it is notable that SDS

conveyed the units to LW in July 2013, after plaintiff filed its August 2012 summons with notice in the instant case.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

1737-
1738-
1739 In re Malachi P., and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Georgette P.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

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Bruce A. Young, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

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Orders of fact finding and disposition, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about July 22, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed the custody and guardianship of the children to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that the agency made diligent efforts to strengthen the parental relationship by scheduling visitation, providing referrals for services, and encouraging respondent to undergo mental health evaluations and engage in therapy to address the reason for the children's placement into foster care, and that, notwithstanding completion of those services, during the statutorily relevant period, respondent failed to address meaningfully the problems leading to the children's placement, and thus failed to plan for their future (*see Matter of Autumn P. [Alisa R.]*, 129 AD3d 519 [1st Dept 2015]; *Matter of Leroy Simpson M. [Joanne M.]*, 122 AD3d 480 [1st Dept 2014]; Social Services Law § 384-b[7][a], [f])).

The determination that it is in the children's best interests to terminate respondent's parental rights and free the children for adoption is supported by the record (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have been living with the foster mother since October 2011 and are thriving in her care, and there is no evidence that respondent has a realistic plan to provide an adequate and stable home for them.

A suspended judgment is not appropriate; respondent failed to address the problems that caused the children to be removed

from her care, and those problems remained unresolved at the time of disposition. The children are entitled to a stable family home without further delay (*see Matter of Jesus Michael P. [Sonia R.]*, 122 AD3d 520 [1st Dept 2014]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1740 The People of the State of New York, Ind. 2783/10
Respondent,

-against-

Derek J. Simmons,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Joseph C. Teresi, J.), rendered April 22, 2013, convicting defendant, after a jury trial, of grand larceny in the third degree and criminal possession of stolen property in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years, unanimously reversed, on the law, and the matter remanded for a new trial.

In response to a jury note asking whether defendant could be convicted on one of the submitted counts and not the other, the court first responded that the "answer is yes." However, after the jury informed the court that it had reached a verdict, the court "corrected" its answer, telling the jury that one of the possible verdicts it could render – guilty of grand larceny in

the third degree but not guilty of criminal possession of stolen property in the third degree – was "not a legally permissible verdict." Defense counsel objected "to the jury having been instructed on what they could find," and, when asked by the court whether he agreed that the contemplated mixed verdict would be a repugnant verdict, answered that he did not. The court overruled counsel's objection and, after further deliberation, the jury returned a verdict of guilty on both counts.

We agree with defendant that the court erred. "[A] verdict as to a particular count shall be set aside as repugnant only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury. . .without regard to the accuracy of those instructions" (*People v Muhammad*, 17 NY3d 532, 539 [2011][internal quotation marks and citation omitted]). The repugnancy test is "essentially a variant of the 'theoretical impossibility' test that is applied in the realm of lesser included offenses" (*id*. at 539). Notwithstanding the overwhelming evidence as to both submitted counts in this case, and notwithstanding the practical remoteness of the possibility that a person who commits grand larceny will not also be guilty of criminal possession of the property he or she steals, our examination of the elements of the two crimes persuades us that

it is theoretically possible for a person to possess the mental state required for guilt of grand larceny in the third degree, and at the same time lack the mental state necessary for guilt of criminal possession of stolen property in the third degree. Accordingly, the mixed verdict contemplated in the challenged instruction would not have been a repugnant verdict, and the court therefore erred in instructing the jury that it was "not a legally permissible verdict."

We are not persuaded by the People's argument, based on dicta in *Muhammad*, that there was no error even if the trial court was incorrect in believing that the contemplated verdict would be repugnant. *Muhammad* indicated that a trial judge faced with a mixed verdict that is not legally repugnant, but "appears to be inconsistent with the evidence presented," "may not be required to accept the verdict[]," but rather "can point out the apparent inconsistency to the jurors, issue further instructions and ask them to continue to deliberate" (17 NY3d at 545). The People argue, in essence, that the trial court permissibly did, in anticipation of a possible mixed verdict, what it could have done if it had actually received one.

We do not agree. Even if it is permissible for a court to "point out" what it sees as factual inconsistency in a mixed

verdict and urge further deliberation, it may not, as the court did here, effectively mandate a factually consistent verdict in advance. We believe that *Muhammad* and other cases on inconsistent verdicts reflect that "factual repugnancy – which can be attributed to mistake, confusion, compromise or mercy" (*id.* at 545) – is ultimately the prerogative of the jury. The court's instruction here impermissibly intruded on the deliberation process.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Since a new trial is required, we find it unnecessary to reach any other issues (*see People v Evans*, 94 NY2d 499, 504-505 [2000]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1741 The People of the State of New York, Ind. 10641/90
Appellant,

-against-

Johnny Hincapie,
Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (Benjamin E. Rosenberg of counsel), appellant.

Law Offices of Ronald L. Kuby, New York (Ronald L. Kuby of counsel), for respondent.

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Order, Supreme Court, New York County (Eduardo Padró, J.), entered on or about October 6, 2015, which granted defendant's CPL 440.10 motion to vacate a judgment conviction of conviction rendered January 3, 1992, and ordered a new trial, unanimously affirmed.

The court properly exercised its discretion in granting defendant's motion to vacate his conviction based on newly discovered evidence. Even if, as the People argue, defendant failed to satisfy the requirement of due diligence as to two of the three witnesses he called to testify on his behalf at his CPL 440.10 hearing (*see People v Feliciano*, 240 AD2d 256 [1st Dept 2007], *lv denied* 90 NY2d 1011 [1997]), due diligence as to the remaining witness is undisputed, and the court properly granted

defendant's motion based on its finding that her testimony was "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10[1][g]). There is no basis for disturbing the credibility determinations, made by the court after having "the unique opportunity to see and hear the witnesses" (*People v Macon*, 129 AD3d 484, 485 [1st Dept 2015], *lv denied* 26 NY3d 1041 [2015]). Contrary to the People's argument, the court appears to have understood that defendant's hearing testimony did not constitute newly discovered evidence; alternatively, insofar as the court improperly considered that testimony to have militated in favor of vacating the judgment pursuant to CPL 440.10(1)(g), we find that any such error was harmless.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1742 James Rohan, et al., Index 154522/12
Plaintiffs-Respondents,

-against-

Turner Construction Company, et al.,
Defendants-Appellants,

W.R. Grace & Co., et al.,
Defendants.

_____

Camacho Mauro Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for appellants.

Silberstein, Awad & Miklos, PC, Garden City (Chan Hee Park of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 5, 2015, which, to the extent appealed from, denied the motion of defendants Turner Construction Company and Gladden Properties LLC (together defendants) for summary judgment dismissing the Labor Law § 241(6) claim as against them and the common-law negligence and Labor Law § 200 claims as against Turner, unanimously affirmed, without costs.

Summary judgment dismissing the Labor Law § 241(6) claim is not warranted, since an issue of fact exists as to whether Industrial Code (12 NYCRR) § 23-1.22(b)(1), pertaining to runways and ramps, is applicable. Defendants maintain that the plank

that allegedly struck plaintiff James Rohan did not constitute part of a ramp. However, the affidavit of plaintiffs' expert, who opined that the unsecured wooden planks served as a "temporary construction ramp" and that the ramp violated 12 NYCRR 23-1.22(b)(1), is entitled to consideration (*see Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 624 [1st Dept 2013]).

Turner, the general contractor, is not entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims. Plaintiff's testimony that one of Turner's employees told him to use a pile of wood planks to address the one-foot height differential he had observed between the temporary loading dock and the trailer of delivery trucks raises a triable issue of fact as to whether Turner exercised supervisory control over the injury-producing work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

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

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1743 The People of the State of New York, Ind. 2031/11
Respondent,

-against-

Dwight Ashe,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at speedy trial motion; Jill Konviser, J. at jury trial and sentencing), rendered January 8, 2013, convicting defendant of grand larceny in the second degree and 20 counts of identity theft in the first degree, and sentencing him to an aggregate term of four to twelve years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. The only period at issue is the 40 days between this Court's order reversing defendant's original conviction (74 AD3d 503 [1st Dept 2010], *affd* 15 NY3d 909 [2010]) and the order of a Justice of this Court granting leave to the Court of Appeals. The motion court properly concluded that, because of the operation of CPL 30.30(5)(a), this 40-day period, during which the People's leave

application was pending, was not part of the time in which the People were required to be ready.

CPL 30.30(5)(a) provides that when a defendant is to be retried following, among other things, an appellate reversal, the criminal action is deemed to have commenced for speedy trial purposes on "the date the order occasioning a retrial becomes final." Had there been no leave application, this Court's retrial order would have been final for 30.30(5)(a) purposes (*see People v Wilson*, 86 NY2d 753 [1995]). However, since the People pursued an appeal to the Court of Appeals, the retrial order only became final when that Court affirmed our order (*see People v Wells*, 24 NY3d 971, 973 [2014]; *People v Blancero*, 289 AD2d 501 [2d Dept 2001]).

In any event, even if the speedy trial clock had been running, the period in which the People applied for leave to appeal was excludable as a reasonable delay resulting from an

appeal (*see* CPL 30.30[4][a]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1744 The People of the State of New York, Ind. 4328N/13
Respondent,

-against-

Harry Behlin,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered September 30, 2014, 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: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1745-
1746 The People of the State of New York, Ind.1770/11
Respondent, 388/11

-against-

Teuri Corona,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Margaret L. Clancy, J. at hearing; James M. Kindler, J. at pleas and sentencing), rendered November 7, 2013, convicting defendant of criminal possession of a weapon in the third degree and assault in the third degree, and sentencing him an aggregate term of one to three years, unanimously affirmed.

Defendant's suppression motion was properly denied. The officer's common-law inquiry was justified by the totality of his observations, including the particular position of defendant's hand and his manner of walking, and his belief that defendant was holding what appeared to be the handle of a firearm (and not some innocuous object) at his waistband (*see e.g. People v Feliz*, 45

AD3d 437 [1st Dept 2007], *lv denied* 9 NY3d 1033 [2008]; *Matter of Jamaal C.*, 19 AD3d 144 [1st Dept 2005]). Defendant's immediate flight upon being approached by the officer, coupled with the officer's observations, justified the police pursuit, during which time defendant deliberately discarded the pistol he was carrying (*see e.g. People v Bush*, 129 AD3d 537 [1st Dept 2015]; *People v Pitman*, 102 AD3d 595 [1st Dept 2013], *lv denied* 21 NY3d 1018 [2013]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1747 The People of the State of New York, Sci. 1404/14
Respondent,

-against-

Brandon Curley,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J. at plea, Joseph J. Dawson, J. at sentencing), rendered June 13, 2014 convicting defendant, upon his plea of guilty, of one count of attempted robbery in the second degree (Penal Law §§ 110/160.10[2]), and sentencing him to a term of two years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1748N Carnegie Associates Ltd., et al., Index 156680/12
Plaintiffs-Appellants,

-against-

Lerner, Arnold & Winston., etc., et al.,
Defendants-Respondents.

- - - - -

[And a Third-Party Action]

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Ohrenstein & Brown, LLP, Garden City (Rosario DeVito of counsel), for appellants.

L'Abbate Balkan Colavita & Contini LLP, Garden City (Candice B. Ratner of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about March 17, 2016, which granted defendants' motion to disqualify plaintiffs' law firm, unanimously reversed, on the facts and in the exercise of discretion, with costs and the motion denied.

This is a legal malpractice action to recover as damages the attorneys' fees incurred in prosecuting the appeal in a prior lawsuit alleging damages caused by defendants' discovery violations. While we agree with the motion court that the testimony of plaintiffs' attorneys, who had represented plaintiffs on the prior appeal, was necessary and that defendants did not engage in undue tactical delay in seeking

disqualification on that ground, we find that defendants failed to carry their heavy burden of demonstrating that the attorneys' testimony would be prejudicial to plaintiffs (*see Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]). The deposed attorney's failure to recall certain details during his deposition testimony, the alleged overlaps in his firm's billings, and defendants' speculation concerning the attorney's supervision of an associate not admitted to the bar do not constitute evidence that the attorney's testimony would be adverse to the interests of his clients (*see id.*).

We decline to consider the other ground on which defendants urge disqualification, which they raise for the first time on appeal. If we were to consider it, we would reject it, because there is no justification for the delay of nearly two years in raising the argument (*see St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 94-95 [1st Dept 2004]).

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

ENTERED: SEPTEMBER 27, 2016

CLERK

CORRECTED SQUIB - SEPTEMBER 28, 2016

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1284 Sandra Delgado, etc., et al Index 14684/95
Plaintiffs-Appellants,

-against-

The City Of New York, et al,
Defendants-Respondents,

New York City Police Department, et al,
Defendants.

_____

Law Offices of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for The City of New York, respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Patrick J. Lawless of counsel), for New York City Housing Authority, New York City Housing Police Department and Nicholas Witkowich, respondents.

Ronald P. Berman, New York, for Brian Washington, respondent.

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Judgment, Supreme Court, Bronx County (Faviola Soto, J.), entered December 9, 2014, **reversed**, on the law, without costs, and the matter remanded for a new trial.

Opinion by Acosta J. All concur except Friedman, J.P. and Saxe J. who dissent in an Opinion by Saxe, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
David B. Saxe
Judith J. Gische
Troy K. Webber JJ.

1284
Index 14684/95

_____x

Sandra Delgado, etc., et al.,
Plaintiffs-Appellants,

-against-

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

New York City Police Department,
et al.,
Defendants.
_____x

Plaintiffs appeal from the judgment of the Supreme Court, Bronx County (Faviola Soto, J.), entered December 9, 2014, dismissing the complaint against defendants the City of New York, New York City Housing Authority, Nicholas Witkowich, and Brian Washington, upon grant of a directed verdict at the close of the evidence.

Law Offices of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph and Mitchel Ashley of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo and Deborah A. Brenner

of counsel), for the City of New York, respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Patrick J. Lawless of counsel), for New York City Housing Authority, New York City Housing Police Department and Nicholas Witkowich, respondents.

Ronald P. Berman, New York, for Brian Washington, respondent.

ACOSTA, J.

This case gives us the opportunity to emphasize that when an issue is specifically decided on a motion for summary judgment, that determination is the law of the case. As such, the trial court, as well as the parties, are bound by it "absent a showing of subsequent evidence or change of law" (*Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]). Applying this rule to the case at hand, we specifically found in *Delgado v City of New York* (86 AD3d 502, 508 [1st Dept 2011] [*Delgado I*]), that the no-knock search warrant at issue was not valid. Thus, the trial court was bound by that determination absent the introduction of subsequent evidence to show otherwise. The evidence that was introduced at trial on the validity of the warrant, however, was not significantly different from what was previously before the court on the motion for summary judgment. Accordingly, the trial court erred in deeming the warrant valid and granting defendants' motion for a directed verdict in their favor.

This action arises from the execution of a "no knock" search warrant at the Delgado plaintiffs' NYC Housing Authority (NYCHA) apartment in the Bronx sometime after midnight. Plaintiff mother and her six children were sleeping in their two-bedroom apartment when a team of about 12 officers knocked down the door and entered the apartment. The warrant was issued on May 19, 1994,

based on an affidavit prepared by police officer Robert Masiello. Massiello based his assertions upon information provided by a confidential informant, alleged to be known to him, who stated that s/he had been inside the apartment for purposes of obtaining vials of crack to sell on the street. The informant gave Massiello instructions on how to get to the apartment. S/he told Masiello that s/he last visited the apartment the night before and that while in the apartment, "Green Eyes," a light skinned Hispanic man about five feet eight inches tall, took a brown bag from the bedroom, went to the kitchen and removed a "row of vials." The informant also saw additional vials of crack and saw Green Eyes remove a "9 millimeter automatic tech" and a "9 semi-automatic machine pistol" from the bedroom and place them on the kitchen table.

The same date the warrant was issued, defendant police officer Brian Washington completed a follow up report on his debriefing of the informant, and noted that the informant stated that a Hispanic woman, known as "Shorty," and a small female infant also resided in the apartment, which had two bedrooms facing the back of the building. When the search warrant was executed, neither Green Eyes nor Shorty was found in the apartment. This action for personal injury and property damage ensued.

This is the second time this case has come up for our review. In *Delgado I*, this Court was "disquieted by the manner in which the search was executed. Upon entering the apartment, the police encountered not 'Green Eyes' and 'Shorty' with an infant, as described by the informant, but plaintiff mother and her six sleeping children. At that point, a reasonable police officer should have realized that an error had been made" (*id.* at 510). Instead, the officers pushed some of the plaintiffs down to the ground and placed guns to their heads, handcuffed all of the occupants except for the two youngest, and held them "in the hallway . . . for three hours while the officers searched the apartment, overturning furniture, slashing sofas and mattresses, and destroying property in the bedrooms including the children's posters and baseball cards" (*id.* at 505-506).

The Court also modified the order (Patricia Williams, J.), entered June 13, 2008, which, among other things, had granted so much of defendants' summary judgment motions as sought dismissal of the complaint against the individual officers who merely executed the warrant, on the ground of qualified immunity, but held that such protection did not apply to defendants Nicholas Witkowich and Brian Washington, the officers who initiated the issuance of the search warrant (*id.* at 510). This Court modified the order to the extent of dismissing the action against

defendant "James" Masiello, who had been improperly named, since "Robert" Masiello was the officer involved in obtaining the search warrant, and dismissing the 42 USC § 1983 claim against NYCHA (*id.* at 511).

In affirming so much of the order as denied the defendants' motions to dismiss the complaint, this Court found that the police had not satisfied either of the two prongs of the *Aguilar-Spinelli* test (*Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]), for evaluating hearsay information provided by an undisclosed informant (*Delgado I*, 86 AD3d at 507-509). "The police had no basis to believe that the [informant] was reliable . . . [H]e had never before provided information leading to an arrest" (*id.* at 508).

The Court found that "[o]n this record, . . . we cannot state that the informant's statements were sufficiently contrary to his or her penal interest so as to establish reliability under the first prong of *Aguilar-Spinelli*" (*id.* [citation omitted]). This Court further found that "no corroborative verification whatsoever was performed by the police prior to issuance of the warrant" (*id.* at 509). This Court also noted that the record did not indicate whether "the officers conducted an investigation to corroborate the information . . . prior to seeking a search warrant" (*id.* at 504).

This Court also found that the second prong of *Aguilar-Spinelli,* "the informant's basis of knowledge, was never established by corroborative details of such quantity and quality as to be indicative of criminality" (*id.* at 509 [citation omitted]).

In finding that Witcowich and Washington, who initiated the issuance of the search warrant, were not entitled to qualified immunity, this Court found that they "did little, if anything, to establish the reliability of the [informant] or the information supplied by him or her (*id.* at 510).

Prior to trial, plaintiffs moved, in limine, to preclude defendants from arguing or presenting evidence indicating that they had a sufficient basis for obtaining or executing the search warrant, on the ground that this Court had already found that the warrant was not properly issued, which determination was the "law of the case." That motion was denied.

The case proceeded to trial, where evidence regarding the issuance of the warrant was introduced. Specifically, the trial evidence included testimony that an assistant district attorney had interviewed the confidential informant and prepared Officer Masiello's affidavit, which was used to obtain the warrant, testimony that the informant appeared before, and was likely questioned by, the court, prior to the issuance of the warrant,

and testimony that surveillance and a controlled buy were not feasible and testimony that the informant's statement as to purchasing drugs with intent to sell them implicated him in a more serious crime than that for which he had been arrested.

At the close of evidence, the court granted the City, NYCHA, Witkowwich and Washington's motions for a directed verdict, stating that it could not "apply a law [or decision] that [it thought was] incorrect" [referring to *Delgado I*], and that *Delgado I* was decided "in a vacuum." We now reverse.

In *Delgado I*, we specifically concluded that the no-knock search warrant was not valid. Our conclusion was not "obiter dictum," as the dissent contends.

We did not find that defendants failed to establish a prima facie case as to the validity of the warrant or that there were issues of fact regarding the issue.[1] As such, our conclusion in *Delgado I* is the law of the case (*Carmona*, 92 AD3d at 492-493; *cf.* CPLR 3212[g]; *E.B. Metal & Rubber Indus. v County of Washington*, 102 AD2d 599, 603 [3d Dept 1984] citing Siegel, New

[1]Although generally, "a denial of a motion for summary judgment is res judicata of nothing except that summary judgment was not warranted" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21; *see also Sackman-Gilliland Corp. v Senator Holding Corp.*, 43 AD2d 948 [2d Dept 1974], *lv denied* 34 NY2d 515 [1974]), as noted above, we specifically decided the issue in *Delgado I*.

York Practice § 285, p. 341]; *Garcia v Tri-County Ambulete Serv.*, 282 AD2d 206, 207 [1st Dept 2001]; *Deutsche Bank Natl. Trust Co. v Donohue*, 50 Misc 3d 1221[A], ** 5 [Supreme Ct, Suffolk County 2016]).

As we noted in *Carmona* (92 AD3d at 492-493):

> "'"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law"' (*Kenney v City of New York*, 74 AD3d 630, 630-631 [2010], quoting *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 [2007]). Under the doctrine, parties or their privies are 'preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue' (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [2007]; *see also Matter of Atlantic Mut. Ins. Co. v Lauria*, 291 AD2d 492, 493 [2002])."'

In many ways, this case is very similar to *Brownrigg v New York City Hous. Auth.* (29 AD3d 722 [2d Dept 2006]). There, plaintiff's motion for summary judgment on liability was denied. However, prior to the start of trial, the court granted plaintiff summary judgment on that very issue. In reversing, the Second Department noted that

> "[t]he grant of summary judgment to the plaintiff on the issue of liability at the beginning of trial was based on the same

> facts and law as the prior order of June 24, 2003, which denied summary judgment to the plaintiff on the issue of liability. As the June 24, 2003 order was the law of the case, and there were no extraordinary circumstances permitting the Supreme Court to ignore the order . . ., the Supreme Court erred in granting the plaintiff summary judgment on the issue of liability at that juncture in the proceeding, when no evidence had been proffered, introduced, or admitted at trial" (*Brownrigg*, 45 AD3d at 722 [citations omitted).

Similarly, here, defendants were denied summary judgment based on our conclusion that the information provided by the informant and the subsequent police investigation was insufficient to issue a search warrant. Although evidence was introduced at trial on this issue, it was not significantly different than what was presented in the motion for summary judgment. That is, the fact that an assistant district attorney helped prepare Masiello's affidavit did not imbue the informant with additional reliability or add to his basis of knowledge. Moreover, the affidavit was before this Court in *Delgado I* when we decided that it was insufficient to justify the warrant. It was also known, before trial, that a justice of the Supreme Court granted the application for the warrant. In addition, it is not clear that the informant was examined by the court, only that he was likely questioned by the court (*see People v Kaplan*, 174 AD2d 489 [1st Dept 1991] [*Aguilar-Spinelli* test not applicable since

the confidential informant was examined in person by the magistrate]).[2]

Last, there was evidence in *Delgado I* that the informant had purchased vials of crack from the alleged location to sell on the street, and yet we found that these facts did not establish the informant's reliability:

> "Defendants assert that the informant's statements were against penal interest, and therefore, reliable. On this record, however, we cannot state that the informant's statements were sufficiently contrary to his or her penal interest so as to establish reliability under the first prong of *Aguilar-Spinelli* (*see People v Burks*, 134 AD2d 604, 605 [2d Dept 1987] [the informant's statement that she had, on unspecified past occasions, purchased cocaine from the defendant, was not sufficiently against penal interest to establish reliability]). According to the affidavit in support of the search warrant, Doe informed that "on other occasions" he or

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[2]Captain Witkowich, who was in charge of the operation, testified that a judge has the option to speak to the informant, but he did not state whether in this case the court actually spoke to the informant before issuing the warrant. Likewise, Officer Washington testified that the ADA interviewed the informant and that the court "might have interviewed him also." On cross-examination, however, he claimed, contrary to Witkowich's assertion that a judge has the option to speak to the informant, that a judge would always interview a confidential informant in connection with a search warrant application. He was then asked:

"Q: But this time the affidavit was submitted, the interview was done and the judge signed the warrant, correct?"

"A: Correct."

> she had been inside the premises for the purpose of obtaining red top vials from Green Eyes to sell on the street, and that on one occasion, May 18th, he or she had purchased one row of vials to sell on the street. It is not clear, on this record, that this statement, admitting possession of small quantities with intent to sell them on the street, was likely to be used against Doe" (*Delgado I*, 86 AD3d at 508-509).

Given that the additional trial evidence did not add any significant new facts, this Court's prior ruling was still the law of the case (*Brownrigg*, 45 AD3d at 722).

Whether this Court's conclusion regarding the validity of the search warrant in *Delgado I* was erroneously reached is irrelevant. The law of the case precluded the trial court from re-examining the issue (*see Carmona,* 92 AD3d at 492-493), and it was therefore bound by our conclusion regardless of its views on our analysis (*see Matter of LaDelfa*, 107 AD3d 1562, 1563 [4th Dept 2013] ["It is well settled that, until a decision of this Court is modified or reversed by a higher court, . . . the trial court is bound by our decision . . . regardless of whether our decision was correctly decided" [internal quotation marks and citations omitted]).

At the very least, the issue as to the validity of the search warrant should have gone before the jury since the additional evidence adduced at trial did not significantly alter

our analysis. Instead, acting essentially as an appellate court, the trial court effectively reversed this Court's finding on the validity of the warrant. Significantly, the court had previously stated its belief that the decision in *Delgado I* "was totally contradictory [because it dismissed the action against the officers who executed the warrant and not as to the investigating officer and captain]. A warrant is valid until it is found invalid." There was, however, no contradiction inasmuch as there is a distinction between granting qualified immunity to officers executing what appears to be a facially valid search warrant, and not granting immunity to officers who improperly obtained the warrant. Indeed, we were very clear on that issue in *Delgado I*,

> "The lower court properly determined that only those police officers or other government agents who executed the no-knock warrant are entitled to qualified immunity. The officers who executed the warrant did so with the understanding that a valid search warrant had been issued. However, the same cannot be said for defendants Witkowich and Washington, who initiated the issuance of the search warrant and did little, if anything, to establish the reliability of the confidential informant or the information supplied by him or her" (86 AD3d at 510).

Accordingly, the trial court erred in granting a directed verdict in defendants' favor at the close of the evidence.

The trial court, however, properly denied plaintiffs' in

limine motion to preclude defendants from introducing evidence regarding the validity of the warrant (*Carmona*, 92 AD3d at 492-493 ["the law of the case . . . is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question *absent a showing of subsequent evidence*"] [emphasis added]; *Brownrigg v New York City Hous. Auth.*, 29 AD3d at 722). Defendants were therefore permitted to introduce evidence at trial on the validity of the search warrant.

Plaintiffs have abandoned all claims against the City, which is not the same entity as NYCHA (*see Torres v New York City Hous. Auth.*, 261 AD2d 273, 275 [1st Dept 1999], *lv denied* 93 NY2d 816 [1999]), since they have not addressed those claims on appeal (*see Edelman v Emigrant Bank Fine Art Fin., LLC*, 89 AD3d 632, 632 [1st 2011]).

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

Accordingly, the judgment of the Supreme Court, Bronx County (Faviola Soto, J.), entered December 9, 2014, dismissing the complaint against defendants the City of New York, New York City Housing Authority, Nicholas Witkowich, and Brian Washington, upon

grant of a directed verdict at the close of the evidence, should be reversed, on the law, without costs, and the matter remanded for a new trial.

All concur except Friedman, J.P. and Saxe, J. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

The trial court properly (1) denied plaintiffs' in limine motion, and (2) granted a directed verdict in favor of the remaining defendants at the close of evidence, finding that plaintiffs had failed to establish that the warrant was not properly obtained. The law of the case doctrine does not preclude a trial court from making a necessary finding of fact based upon the evidence before it *after a denial of summary judgment* by a prior bench of this Court, where that bench in its denial of summary judgment exceeded the scope of its assignment by finding facts beyond those necessary to reach its determination.

In the prior appeal in this case, this Court affirmed the denial of defendants' motion for summary judgment (*Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011] [*Delgado I*]). In doing so, it necessarily determined one of two things: either that, based on the record before it, defendants had failed to conclusively establish, as a matter of law, that the "no-knock" search warrant was validly issued and executed, or, that plaintiffs had offered proof in opposition that created a question of fact (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). As the Practice Commentary cited by the majority clearly and categorically states, "A denial of a

motion for summary judgment is res judicata of nothing except that summary judgment was not warranted" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3212:21 at 30). In view of the axiom that the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), the purported "finding" included in this Court's decision in *Delgado I*, that "the police did not have sufficient independent verification to satisfy the veracity component of *Aguilar-Spinelli*, nor did they possess the requisite knowledge ... component of the test" (86 AD3d at 508), constituted obiter dictum, in that it was unnecessary for the denial of summary judgment, and therefore is not binding as precedent (*see* Black's Law Dictionary 1240 [10th ed 2014]).[1] As such, it did not constitute the law of the case (*see Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 350 [1st Dept 2006], *mod* 9 NY3d 105 [2007]). The trial court was not precluded from considering and resolving, after the presentation of evidence at trial, the issues regarding the issuance and execution of the warrant, since those issues had not yet been finally determined (*see Holmes v Bronx-Lebanon Hosp. Ctr.*, 128 AD3d 596 [1st Dept 2015]; *Rodriguez*

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Nothing in the cases cited by the majority requires or justifies holding that this Court's purported finding when denying summary judgment should be treated as the law of the case. In *Brownrigg v New York City Hous. Auth.* (29 AD3d 721, 722 [2d Dept 2006]), a previous denial of summary judgment precluded a subsequent *pretrial grant* of summary judgment; it did *not* preclude a decision on the issue at trial.

Nor does the case of *Carmona v Mathisson* (92 AD3d 492 [1st Dept 2012]) support precluding the trial court here from making its own findings here regarding the evidence before it. In *Carmona*, this Court had previously granted summary judgment in favor of one of the defendants, the manufacturer of the Alcon machine that had been used in the cataract surgery performed on the plaintiff, finding no evidence of defective design or manufacture (*see Carmona v Mathisson*, 54 AD3d 633 [1st Dept 2008]). Yet, "the trial court permitted defendants to elicit testimony that the Alcon machine malfunctioned or contained a design defect, [and] ... the court included Alcon on the verdict sheet for the purpose of apportioning liability" (92 AD3d at 492). This Court in *Carmona II* held that giving those issues to the jury constituted reversible error, since they had already been determined on the earlier grant of summary judgment;

accordingly, this Court set aside the verdict and remanded for a new trial (*id.*). In the case now before us, because this Court affirmed the *denial* of defendant's motion for summary judgment, there is no viable finding of fact to which the law of the case doctrine can apply.

Moreover, the trial court, hearing live testimony rather than merely reading transcribed depositions, affidavits, or other documents, is in the unique position of being able to assess and interpret testimony (*cf. Cioffi-Petrakis v Petrakis*, 103 AD3d 766 [2d Dept 2013], *lv denied* 21 NY3d 860 [2013]). Therefore, although the live testimony before the trial court largely paralleled the content of the submissions on the summary judgment motion, the trial judge as factfinder had greater leeway than the motion court in assessing credibility and drawing inferences from the testimony. So, for example, with regard to whether the warrant court interviewed the informant before signing the warrant, although the submissions on defendants' motion failed to establish as a fact that the warrant judge had interviewed the informant, the trial testimony of Police Officer Brian Washington[2] could properly have formed the basis for a finding by

[2] After testifying that in his experience the judge would have interviewed the confidential informant as well, and only then would the judge sign off on the warrant or decline to sign it, Washington was asked, "But this time the affidavit was

the trial court that the warrant judge did, in fact, interview the confidential informant before signing the warrant. That finding would render the *Aquilar-Spinelli* test inapplicable (*see People v Kaplan*, 174 AD2d 489 [1st Dept 1991]).

In any event, even if the *Aguilar-Spinelli* test was applicable, it was satisfied. The reliability of the information was established by the informant's admission, against penal interest, that he had purchased drugs from the apartment, and by his implication in the more serious crime of selling drugs (*see Kaplan*, 174 AD2d at 490). The basis of the informant's knowledge was established by the informant's detailed description of the apartment, and the drugs and weapons alleged to be contained in the apartment, based upon his personal knowledge (*see id.*). At trial, not only did plaintiffs fail to rebut the presumption of validity that attaches to a warrant (*see People v Ortiz*, 234 AD2d 74, 75 [1st Dept 1996], *lv denied* 89 NY2d 941 [1997]), but the trial court had the authority to make findings as to the warrant's validity based on the evidence placed before it.

While no drugs or weapons were recovered from the apartment, which was alleged to be a drug distribution center, it is undisputed that the apartment was the one identified in the

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submitted, the interview was done and the judge signed the warrant, correct?" and he answered, "Correct."

warrant, that police found several hidden trap compartments there, and that the drug sniffing dogs reacted positively to two areas in the apartment. Plaintiffs' expert conceded that, even if the officer in charge of the execution of the warrant believed that the apartment was the wrong one, he or she could have reasonably decided to perform a controlled search. Further, defendant Nicholas Witkowich, a retired police captain who was in charge of the NYCHA Police Department narcotics unit at the time of the search, testified that the search for drugs and firearms needed to be performed methodically and that, for the safety of all concerned, the occupants of the premises needed to be secured during the search. Under these circumstances, plaintiffs failed to meet their burden of showing that the execution of the search was objectively unreasonable (*see Liu v New York City Police Dept.*, 216 AD2d 67, 68 [1st Dept 1995], *lv denied* 87 NY2d 802 [1995], *cert denied* 517 US 1167 [1996]; *Simpkin v City of Troy*, 224 AD2d 897, 898 [3d Dept 1996]). Further, since there was no showing at trial that the officers who presented the information to the court for a warrant knowingly misled or provided false information to the judge, individual defendants Nicholas Witkowich and Brian Washington were entitled to the protection of qualified immunity (*id.*).

While the preferred procedure would have been for the trial

court to leave the issues of fact for determination by the jury, there was no material issue that required the submission of the case to a jury. Accordingly, the court had the authority to direct a verdict at the close of evidence under CPLR 4401, and its decision should stand.

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

ENTERED: SEPTEMBER 27, 2016

CLERK

Corrected Opinion - October 24, 2016

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
David B. Saxe
Judith J. Gische
Troy K. Webber JJ.

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Index 14684/95

_____x

Sandra Delgado, etc., et al.,
Plaintiffs-Appellants,

-against-

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

New York City Police Department,
et al.,
Defendants.
_____x

Plaintiffs appeal from the judgment of the Supreme Court, Bronx County (Faviola Soto, J.), entered December 9, 2014, dismissing the complaint against defendants the City of New York, New York City Housing Authority, Nicholas Witkowich, and Brian Washington, upon grant of a directed verdict at the close of the evidence.

Law Offices of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph and Mitchel Ashley of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo and Deborah A. Brenner

of counsel), for the City of New York, respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Patrick J. Lawless of counsel), for New York City Housing Authority, New York City Housing Police Department and Nicholas Witkowich, respondents.

Ronald P. Berman, New York, for Brian Washington, respondent.

ACOSTA, J.

This case gives us the opportunity to emphasize that when an issue is specifically decided on a motion for summary judgment, that determination is the law of the case. As such, the trial court, as well as the parties, are bound by it "absent a showing of subsequent evidence or change of law" (*Carmona v Mathisson*, 92 AD3d 492, 492-493 [1st Dept 2012]). Applying this rule to the case at hand, we specifically found in *Delgado v City of New York* (86 AD3d 502, 508 [1st Dept 2011] [*Delgado I*]), that the no-knock search warrant at issue was not valid. Thus, the trial court was bound by that determination absent the introduction of subsequent evidence to show otherwise. The evidence that was introduced at trial on the validity of the warrant, however, was not significantly different from what was previously before the court on the motion for summary judgment. Accordingly, the trial court erred in deeming the warrant valid and granting defendants' motion for a directed verdict in their favor.

This action arises from the execution of a "no knock" search warrant at the Delgado plaintiffs' NYC Housing Authority (NYCHA) apartment in the Bronx sometime after midnight. Plaintiff mother and her six children were sleeping in their two-bedroom apartment when a team of about 12 officers knocked down the door and entered the apartment. The warrant was issued on May 19, 1994,

based on an affidavit prepared by police officer Robert Masiello. Massiello based his assertions upon information provided by a confidential informant, alleged to be known to him, who stated that s/he had been inside the apartment for purposes of obtaining vials of crack to sell on the street. The informant gave Massiello instructions on how to get to the apartment. S/he told Masiello that s/he last visited the apartment the night before and that while in the apartment, "Green Eyes," a light skinned Hispanic man about five feet eight inches tall, took a brown bag from the bedroom, went to the kitchen and removed a "row of vials." The informant also saw additional vials of crack and saw Green Eyes remove a "9 millimeter automatic tech" and a "9 semi-automatic machine pistol" from the bedroom and place them on the kitchen table.

The same date the warrant was issued, defendant police officer Brian Washington completed a follow up report on his debriefing of the informant, and noted that the informant stated that a Hispanic woman, known as "Shorty," and a small female infant also resided in the apartment, which had two bedrooms facing the back of the building. When the search warrant was executed, neither Green Eyes nor Shorty was found in the apartment. This action for personal injury and property damage ensued.

This is the second time this case has come up for our review. In *Delgado I*, this Court was "disquieted by the manner in which the search was executed. Upon entering the apartment, the police encountered not 'Green Eyes' and 'Shorty' with an infant, as described by the informant, but plaintiff mother and her six sleeping children. At that point, a reasonable police officer should have realized that an error had been made" (*id.* at 510). Instead, the officers pushed some of the plaintiffs down to the ground and placed guns to their heads, handcuffed all of the occupants except for the two youngest, and held them "in the hallway . . . for three hours while the officers searched the apartment, overturning furniture, slashing sofas and mattresses, and destroying property in the bedrooms including the children's posters and baseball cards" (*id.* at 505-506).

The Court also modified the order (Patricia Williams, J.), entered June 13, 2008, which, among other things, had granted so much of defendants' summary judgment motions as sought dismissal of the complaint against the individual officers who merely executed the warrant, on the ground of qualified immunity, but held that such protection did not apply to defendants Nicholas Witkowich and Brian Washington, the officers who initiated the issuance of the search warrant (*id.* at 510). This Court modified the order to the extent of dismissing the action against

defendant "James" Masiello, who had been improperly named, since "Robert" Masiello was the officer involved in obtaining the search warrant, and dismissing the 42 USC § 1983 claim against NYCHA (*id.* at 511).

In affirming so much of the order as denied the defendants' motions to dismiss the complaint, this Court found that the police had not satisfied either of the two prongs of the *Aguilar-Spinelli* test (*Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]), for evaluating hearsay information provided by an undisclosed informant (*Delgado I*, 86 AD3d at 507-509). "The police had no basis to believe that the [informant] was reliable . . . [H]e had never before provided information leading to an arrest" (*id.* at 508).

The Court found that "[o]n this record, . . . we cannot state that the informant's statements were sufficiently contrary to his or her penal interest so as to establish reliability under the first prong of *Aguilar-Spinelli*" (*id.* [citation omitted]). This Court further found that "no corroborative verification whatsoever was performed by the police prior to issuance of the warrant" (*id.* at 509). This Court also noted that the record did not indicate whether "the officers conducted an investigation to corroborate the information . . . prior to seeking a search warrant" (*id.* at 504).

This Court also found that the second prong of *Aguilar-Spinelli,* "the informant's basis of knowledge, was never established by corroborative details of such quantity and quality as to be indicative of criminality" (*id.* at 509 [citation omitted]).

In finding that Witcowich and Washington, who initiated the issuance of the search warrant, were not entitled to qualified immunity, this Court found that they "did little, if anything, to establish the reliability of the [informant] or the information supplied by him or her (*id.* at 510).

Prior to trial, plaintiffs moved, in limine, to preclude defendants from arguing or presenting evidence indicating that they had a sufficient basis for obtaining or executing the search warrant, on the ground that this Court had already found that the warrant was not properly issued, which determination was the "law of the case." That motion was denied.

The case proceeded to trial, where evidence regarding the issuance of the warrant was introduced. Specifically, the trial evidence included testimony that an assistant district attorney had interviewed the confidential informant and prepared Officer Masiello's affidavit, which was used to obtain the warrant, testimony that the informant appeared before, and was likely questioned by, the court, prior to the issuance of the warrant,

and testimony that surveillance and a controlled buy were not feasible and testimony that the informant's statement as to purchasing drugs with intent to sell them implicated him in a more serious crime than that for which he had been arrested.

At the close of evidence, the court granted the City, NYCHA, Witkowwich and Washington's motions for a directed verdict, stating that it could not "apply a law [or decision] that [it thought was] incorrect" [referring to *Delgado I*], and that *Delgado I* was decided "in a vacuum." We now reverse.

In *Delgado I*, we specifically concluded that the no-knock search warrant was not valid. Our conclusion was not "obiter dictum," as the dissent contends.

We did not find that defendants failed to establish a prima facie case as to the validity of the warrant or that there were issues of fact regarding the issue.[1] As such, our conclusion in *Delgado I* is the law of the case (*Carmona*, 92 AD3d at 492-493; *cf.* CPLR 3212[g]; *E.B. Metal & Rubber Indus. v County of Washington*, 102 AD2d 599, 603 [3d Dept 1984] citing Siegel, New

[1]Although generally, "a denial of a motion for summary judgment is res judicata of nothing except that summary judgment was not warranted" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:21; *see also Sackman-Gilliland Corp. v Senator Holding Corp.*, 43 AD2d 948 [2d Dept 1974], *lv denied* 34 NY2d 515 [1974]), as noted above, we specifically decided the issue in *Delgado I*.

York Practice § 285, p. 341]; *Garcia v Tri-County Ambulete Serv.*, 282 AD2d 206, 207 [1st Dept 2001]; *Deutsche Bank Natl. Trust Co. v Donohue*, 50 Misc 3d 1221[A], ** 5 [Supreme Ct, Suffolk County 2016]).

As we noted in *Carmona* (92 AD3d at 492-493):

> "'"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law"' (*Kenney v City of New York*, 74 AD3d 630, 630-631 [2010], quoting *J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 [2007]). Under the doctrine, parties or their privies are 'preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue' (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [2007]; *see also Matter of Atlantic Mut. Ins. Co. v Lauria*, 291 AD2d 492, 493 [2002])."'

In many ways, this case is very similar to *Brownrigg v New York City Hous. Auth.* (29 AD3d 722 [2d Dept 2006]). There, plaintiff's motion for summary judgment on liability was denied. However, prior to the start of trial, the court granted plaintiff summary judgment on that very issue. In reversing, the Second Department noted that

> "[t]he grant of summary judgment to the plaintiff on the issue of liability at the beginning of trial was based on the same

> facts and law as the prior order of June 24, 2003, which denied summary judgment to the plaintiff on the issue of liability. As the June 24, 2003 order was the law of the case, and there were no extraordinary circumstances permitting the Supreme Court to ignore the order . . ., the Supreme Court erred in granting the plaintiff summary judgment on the issue of liability at that juncture in the proceeding, when no evidence had been proffered, introduced, or admitted at trial" (*Brownrigg*, 45 AD3d at 722 [citations omitted).

Similarly, here, defendants were denied summary judgment based on our conclusion that the information provided by the informant and the subsequent police investigation was insufficient to issue a search warrant. Although evidence was introduced at trial on this issue, it was not significantly different than what was presented in the motion for summary judgment. That is, the fact that an assistant district attorney helped prepare Masiello's affidavit did not imbue the informant with additional reliability or add to his basis of knowledge. Moreover, the affidavit was before this Court in *Delgado I* when we decided that it was insufficient to justify the warrant. It was also known, before trial, that a justice of the Supreme Court granted the application for the warrant. In addition, it is not clear that the informant was examined by the court, only that he was likely questioned by the court (*see People v Kaplan*, 174 AD2d 489 [1st Dept 1991] [*Aguilar-Spinelli* test not applicable since

the confidential informant was examined in person by the magistrate]).[2]

Last, there was evidence in *Delgado I* that the informant had purchased vials of crack from the alleged location to sell on the street, and yet we found that these facts did not establish the informant's reliability:

> "Defendants assert that the informant's statements were against penal interest, and therefore, reliable. On this record, however, we cannot state that the informant's statements were sufficiently contrary to his or her penal interest so as to establish reliability under the first prong of *Aguilar-Spinelli* (*see People v Burks*, 134 AD2d 604, 605 [2d Dept 1987] [the informant's statement that she had, on unspecified past occasions, purchased cocaine from the defendant, was not sufficiently against penal interest to establish reliability]). According to the affidavit in support of the search warrant, Doe informed that "on other occasions" he or

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[2]Captain Witkowich, who was in charge of the operation, testified that a judge has the option to speak to the informant, but he did not state whether in this case the court actually spoke to the informant before issuing the warrant. Likewise, Officer Washington testified that the ADA interviewed the informant and that the court "might have interviewed him also." On cross-examination, however, he claimed, contrary to Witkowich's assertion that a judge has the option to speak to the informant, that a judge would always interview a confidential informant in connection with a search warrant application. He was then asked:

"Q: But this time the affidavit was submitted, the interview was done and the judge signed the warrant, correct?"

"A: Correct."

> she had been inside the premises for the purpose of obtaining red top vials from Green Eyes to sell on the street, and that on one occasion, May 18th, he or she had purchased one row of vials to sell on the street. It is not clear, on this record, that this statement, admitting possession of small quantities with intent to sell them on the street, was likely to be used against Doe" (*Delgado I*, 86 AD3d at 508-509).

Given that the additional trial evidence did not add any significant new facts, this Court's prior ruling was still the law of the case (*Brownrigg*, 45 AD3d at 722).

Whether this Court's conclusion regarding the validity of the search warrant in *Delgado I* was erroneously reached is irrelevant. The law of the case precluded the trial court from re-examining the issue (*see Carmona,* 92 AD3d at 492-493), and it was therefore bound by our conclusion regardless of its views on our analysis (*see Matter of LaDelfa*, 107 AD3d 1562, 1563 [4th Dept 2013] ["It is well settled that, until a decision of this Court is modified or reversed by a higher court, . . . the trial court is bound by our decision . . . regardless of whether our decision was correctly decided" [internal quotation marks and citations omitted]).

At the very least, the issue as to the validity of the search warrant should have gone before the jury since the additional evidence adduced at trial did not significantly alter

our analysis. Instead, acting essentially as an appellate court, the trial court effectively reversed this Court's finding on the validity of the warrant. Significantly, the court had previously stated its belief that the decision in *Delgado I* "was totally contradictory [because it dismissed the action against the officers who executed the warrant and not as to the investigating officer and captain]. A warrant is valid until it is found invalid." There was, however, no contradiction inasmuch as there is a distinction between granting qualified immunity to officers executing what appears to be a facially valid search warrant, and not granting immunity to officers who improperly obtained the warrant. Indeed, we were very clear on that issue in *Delgado I*,

> "The lower court properly determined that only those police officers or other government agents who executed the no-knock warrant are entitled to qualified immunity. The officers who executed the warrant did so with the understanding that a valid search warrant had been issued. However, the same cannot be said for defendants Witkowich and Washington, who initiated the issuance of the search warrant and did little, if anything, to establish the reliability of the confidential informant or the information supplied by him or her" (86 AD3d at 510).

Accordingly, the trial court erred in granting a directed verdict in defendants' favor at the close of the evidence.

The trial court, however, properly denied plaintiffs' in

limine motion to preclude defendants from introducing evidence regarding the validity of the warrant (*Carmona*, 92 AD3d at 492-493 ["the law of the case . . . is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question *absent a showing of subsequent evidence*"] [emphasis added]; *Brownrigg v New York City Hous. Auth.*, 29 AD3d at 722). Defendants were therefore permitted to introduce evidence at trial on the validity of the search warrant.

Plaintiffs have abandoned all claims against the City, which is not the same entity as NYCHA (*see Torres v New York City Hous. Auth.*, 261 AD2d 273, 275 [1st Dept 1999], *lv denied* 93 NY2d 816 [1999]), since they have not addressed those claims on appeal (*see Edelman v Emigrant Bank Fine Art Fin., LLC*, 89 AD3d 632, 632 [1st 2011]).

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

Accordingly, the judgment of the Supreme Court, Bronx County (Faviola Soto, J.), entered December 9, 2014, **to the extent appealed from**, dismissing the complaint against defendants New York City Housing Authority, Nicholas Witkowich, and Brian Washington, upon grant of a directed verdict at the close of the

evidence, should be reversed, on the law, without costs, and the matter remanded for a new trial.

All concur except Friedman, J.P. and Saxe, J. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

The trial court properly (1) denied plaintiffs' in limine motion, and (2) granted a directed verdict in favor of the remaining defendants at the close of evidence, finding that plaintiffs had failed to establish that the warrant was not properly obtained. The law of the case doctrine does not preclude a trial court from making a necessary finding of fact based upon the evidence before it *after a denial of summary judgment* by a prior bench of this Court, where that bench in its denial of summary judgment exceeded the scope of its assignment by finding facts beyond those necessary to reach its determination.

In the prior appeal in this case, this Court affirmed the denial of defendants' motion for summary judgment (*Delgado v City of New York*, 86 AD3d 502 [1st Dept 2011] [*Delgado I*]). In doing so, it necessarily determined one of two things: either that, based on the record before it, defendants had failed to conclusively establish, as a matter of law, that the "no-knock" search warrant was validly issued and executed, or, that plaintiffs had offered proof in opposition that created a question of fact (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). As the Practice Commentary cited by the majority clearly and categorically states, "A denial of a

motion for summary judgment is res judicata of nothing except that summary judgment was not warranted" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3212:21 at 30). In view of the axiom that the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), the purported "finding" included in this Court's decision in *Delgado I*, that "the police did not have sufficient independent verification to satisfy the veracity component of *Aguilar-Spinelli*, nor did they possess the requisite knowledge ... component of the test" (86 AD3d at 508), constituted obiter dictum, in that it was unnecessary for the denial of summary judgment, and therefore is not binding as precedent (*see* Black's Law Dictionary 1240 [10th ed 2014]).[1] As such, it did not constitute the law of the case (*see Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 350 [1st Dept 2006], *mod* 9 NY3d 105 [2007]). The trial court was not precluded from considering and resolving, after the presentation of evidence at trial, the issues regarding the issuance and execution of the warrant, since those issues had not yet been finally determined (*see Holmes v Bronx-Lebanon Hosp. Ctr.*, 128 AD3d 596 [1st Dept 2015]; *Rodriguez*

[1]Notably, this Court did not search the record to grant plaintiff summary judgment on the issue of liability.

v Ford Motor Co., 106 AD3d 525, 525-526 [1st Dept 2013]).

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Nor does the case of *Carmona v Mathisson* (92 AD3d 492 [1st Dept 2012]) support precluding the trial court here from making its own findings here regarding the evidence before it. In *Carmona*, this Court had previously granted summary judgment in favor of one of the defendants, the manufacturer of the Alcon machine that had been used in the cataract surgery performed on the plaintiff, finding no evidence of defective design or manufacture (*see Carmona v Mathisson*, 54 AD3d 633 [1st Dept 2008]). Yet, "the trial court permitted defendants to elicit testimony that the Alcon machine malfunctioned or contained a design defect, [and] ... the court included Alcon on the verdict sheet for the purpose of apportioning liability" (92 AD3d at 492). This Court in *Carmona II* held that giving those issues to the jury constituted reversible error, since they had already been determined on the earlier grant of summary judgment;

accordingly, this Court set aside the verdict and remanded for a new trial (*id.*). In the case now before us, because this Court affirmed the *denial* of defendant's motion for summary judgment, there is no viable finding of fact to which the law of the case doctrine can apply.

Moreover, the trial court, hearing live testimony rather than merely reading transcribed depositions, affidavits, or other documents, is in the unique position of being able to assess and interpret testimony (*cf. Cioffi-Petrakis v Petrakis*, 103 AD3d 766 [2d Dept 2013], *lv denied* 21 NY3d 860 [2013]). Therefore, although the live testimony before the trial court largely paralleled the content of the submissions on the summary judgment motion, the trial judge as factfinder had greater leeway than the motion court in assessing credibility and drawing inferences from the testimony. So, for example, with regard to whether the warrant court interviewed the informant before signing the warrant, although the submissions on defendants' motion failed to establish as a fact that the warrant judge had interviewed the informant, the trial testimony of Police Officer Brian Washington[2] could properly have formed the basis for a finding by

[2] After testifying that in his experience the judge would have interviewed the confidential informant as well, and only then would the judge sign off on the warrant or decline to sign it, Washington was asked, "But this time the affidavit was

the trial court that the warrant judge did, in fact, interview the confidential informant before signing the warrant. That finding would render the *Aquilar-Spinelli* test inapplicable (*see People v Kaplan*, 174 AD2d 489 [1st Dept 1991]).

In any event, even if the *Aguilar-Spinelli* test was applicable, it was satisfied. The reliability of the information was established by the informant's admission, against penal interest, that he had purchased drugs from the apartment, and by his implication in the more serious crime of selling drugs (*see Kaplan*, 174 AD2d at 490). The basis of the informant's knowledge was established by the informant's detailed description of the apartment, and the drugs and weapons alleged to be contained in the apartment, based upon his personal knowledge (*see id.*). At trial, not only did plaintiffs fail to rebut the presumption of validity that attaches to a warrant (*see People v Ortiz*, 234 AD2d 74, 75 [1st Dept 1996], *lv denied* 89 NY2d 941 [1997]), but the trial court had the authority to make findings as to the warrant's validity based on the evidence placed before it.

While no drugs or weapons were recovered from the apartment, which was alleged to be a drug distribution center, it is undisputed that the apartment was the one identified in the

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While the preferred procedure would have been for the trial

court to leave the issues of fact for determination by the jury, there was no material issue that required the submission of the case to a jury. Accordingly, the court had the authority to direct a verdict at the close of evidence under CPLR 4401, and its decision should stand.

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

ENTERED: SEPTEMBER 27, 2016

CLERK