SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 8, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3939 Martin Gjeka, et al., Index 304692/12
Plaintiffs-Respondents, 83940/13

-against-

Iron Horse Transport, Inc., et al.,
Defendants-Respondents,

Re-Steel Supply Company, Inc.,
Defendant-Respondent-Appellant,

108-110 East 116th Street LLC,
Defendant-Appellant.

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Iron Horse Transport, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

108-110 East 116th Street LLC,
Third-Party Defendant-Respondent,

Ricky & Sons Construction Corp., et al.,
Third-Party Defendants.

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Milber Makris Plousadis & Seiden, LLP, White Plains (Otto Cheng of counsel), for appellant/respondent.

Simonson Hess Leibowitz & Goodman, PC, New York (Steven Hess of counsel), for Martin Gjeka and Drite Gjeka, respondents.

Thomas Torto, New York (Jason Levine of counsel), for Iron Horse Transport, Inc. and Michael Busch, respondents.

Jaffe & Kourmourdas, LLP, New York (Jean H. Kang of counsel), for Re-Steel Supply Company, Inc., respondent-appellant.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 21, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiffs' cross motion for partial summary judgment on the issue of liability on the Labor Law §§ 240(1) and 241(6) claims as against defendant 108-110 East 116th Street LLC (LLC) and for leave to amend the bill of particulars to allege violations of Industrial Code (12 NYCRR) §§ 23-1.7(b)(1) and 23-4.2(h), denied LLC's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims, and granted LLC's motion for summary judgment dismissing the Labor Law § 200, common-law negligence, and common-law indemnification claims as against it, unanimously affirmed, without costs.

Plaintiff Martin Gjeka made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim, by submitting his and other witnesses' testimony that he was directing traffic around an unguarded trench in the road measuring approximately five to eight feet deep, which was

being excavated to allow new sewer lines to be installed for a building owned by LLC, when a truck owned by defendant Iron Horse Transport, Inc. and driven by defendant Michael Busch, traveling about 25 or 30 miles per hour, struck plaintiff, causing him to fall into the trench. Such testimony, as well as plaintiff's two expert affidavits, established that his work exposed him to an extraordinary gravity-related risk, and that the absence of any safety device such as a barrier or safety railing around the trench was a violation of Labor Law § 240(1) (*see Dias v City of New York*, 110 AD3d 577 [1st Dept 2013]). The testimony and plaintiff's expert affidavits further showed that a barrier on the west side of the pit, where plaintiff was working, would not have impeded the work of excavating dirt from the pit (*compare Dias* at 578, *with Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]), notwithstanding the conclusory assertion to the contrary by LLC's expert. LLC's argument that the collision was unforeseeable is also unavailing (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315-316 [1980]).

The court properly exercised its discretion in granting plaintiffs' motion for leave to amend their bill of particulars, to allege violations of Industrial Code §§ 23-1.7(b)(1) and 23-4.2(h) in support of the Labor Law § 241(6) claim, since an

amendment to allege a specific section of the Industrial Code is appropriately permitted "in the absence of unfair surprise or prejudice . . . even where a note of issue has been filed" (*Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004]; *see also Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011] [reversing denial of leave to amend]). Plaintiffs' failure to present any reasonable justification for the timing of their amendment does not warrant reversing the court's exercise of discretion, in light of "the rule that leave to amend 'shall be freely given'" (*Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012], quoting CPLR 3025[b]), and defendants' failure to show any prejudice.

Labor Law § 241(6) imposes on owners a nondelegable duty to comply with specific safety regulations (*see Morton v State of New York*, 15 NY3d 50, 55 [2010]; *Misicki v Caradonna*, 12 NY3d 511, 517 [2009]). Industrial Code § 23-1.7(b)(1) requires that "hazardous opening[s] into which a person may step or fall" must "be guarded by a substantial cover . . . or by a safety railing." Industrial Code § 23-4.2(h) requires that "[a]ny open excavation adjacent to a . . . street, . . . or other area lawfully frequented by any person shall be effectively guarded." Both are plainly applicable to this case. LLC has failed to meet its

burden to show that there was no violation of these two Industrial Code provisions, or that any such violation did not proximately cause plaintiff's injuries (*see Addonisio v City of New York*, 112 AD3d 554, 556 [1st Dept 2013]; *Smith v Broadway 110 Dev., LLC*, 80 AD3d 490, 491 [1st Dept 2011]).

The court properly dismissed the Labor Law § 200 and common-law negligence claims as against LLC, since the evidence showed that LLC's representative merely oversaw the progress and safety of the work performed in the nearby building involved with this construction project, and did not supervise the safety of the work being performed in the road. Moreover, the general oversight LLC exercised inside the building, even if applicable to the roadway work, did not rise to the level of supervisory control (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). For the same reasons, the court properly dismissed the common-law indemnification claim asserted by Iron Horse and Busch against

LLC (*see McCarthy v Turner Constr. Inc.*, 17 NY3d 369, 378 [2011]; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 542 [1st Dept 2014]).

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

ENTERED: JUNE 8, 2017

CLERK

Richter, J.P., Mazzarelli, Kahn, Gesmer, JJ.

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Index 652332/12

Warberg Opportunistic Trading Fund L.P., et al.,
Plaintiffs-Appellants-Respondents,

Waterstone Capital Management, L.P.,
Plaintiff-Respondent,

-against-

GeoResources, Inc.,
Defendant-Respondent-Appellant.

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Warberg Opportunistic Trading Fund L.P., et al.,
Plaintiffs-Respondents-Appellants,

Waterstone Capital Management, L.P.,
Plaintiff-Respondent,

-against-

GeoResources, Inc.,
Defendant-Appellant-Respondent.

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O'Melveny & Myers LLP, New York (Gary Svirsky of counsel), for appellants-respondents/respondents-appellants and respondent.

Simpson Thacher & Bartlett LLP, New York (George S. Wang of counsel), for respondent-appellant/appellant-respondent.

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Judgment, Supreme Court, New York County (Saliann Scarpula, J.), entered March 24, 2016, awarding plaintiff Waterstone Capital Management, L.P. (Waterstone) the sum of $1,845,428.51, plus interest from July 2, 2012 in the sum of $619,305,58, for

the total sum of $2,464,734.09, unanimously reversed, on the law, with costs and the judgment vacated. Order, same court and Justice, entered December 1, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on their cause of action for reformation as to plaintiffs Warberg Opportunistic Trading Fund L.P. (Warberg) and Option Opportunities Co. (OOC) and granted the motion as to plaintiff Waterstone Capital Management, L.P. (Waterstone), and granted defendant GeoResources, Inc.'s motion for summary judgment dismissing the reformation cause of action with respect to Warberg and OOC and denied the motion as to Waterstone, unanimously modified, on the law, to deny summary judgment to all parties, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered February 29, 2016, which determined the damages awarded Waterstone, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This appeal concerns a pool of warrants to purchase shares in defendant GeoResources. The warrants, which were issued in June 2008, gave their holders the right to purchase a specified number of shares at any time from six months after the purchase date until June 9, 2013, at an exercise price of $32.43 per share. Each warrant included "anti-dilution" provisions, which

were intended to protect the holder's investment in the event that defendant issued or sold stock, or took any of the several specified actions deemed to be an issuance or sale of stock. Section 8(f) of the warrants contained a formula that provided for the adjustment of the exercise price in such a circumstance. However, section 8(h) established a floor below which the exercise price could not drop, by providing as follows:

> "Notwithstanding any other provisions of Section 8(f) to the contrary, no adjustment provided for in Section 8(f) shall result in a reduction of the Exercise Price to an amount less than $32.43 per Warrant Share (as appropriately adjusted for the occurrence of any events listed in [other anti-dilution clauses of Section 8])."

That the floor price was the same as the exercise price, a result which would appear to defeat the very purpose of the anti-dilution provision, is the subject of this appeal.

Plaintiff Waterstone purchased its warrants directly from defendant at the time of issuance. Plaintiffs Warberg and OOC, on the other hand, did not acquire their warrants directly from defendant, but on the secondary market, in seven separate transactions. Four of the transactions entered into by Warberg and OOC were pursuant to agreements with other secondary purchasers of the warrants, which provided that the sellers

"shall sell, convey, assign and deliver to the Buyer, and the Buyer shall purchase from the Seller, the Securities and any and all rights and benefits incident to the ownership thereof." The three remaining transactions were with initial investors such as Waterstone (but not Waterstone itself). The agreements governing those transactions employed the above language, and further provided that, with respect to title to the securities, the seller "is the lawful owner" of the securities with "good and marketable title, and "has the absolute right to sell, assign, convey, transfer and deliver the Securities and any and all rights and benefits incident to the ownership thereof . . . all of which rights and benefits are transferable by the Seller to the Buyer pursuant to this Agreement, free and clear of all [claims]," including "security interests, liens, pledges, claims (pending or threatened), charges, escrows, encumbrances."

As provided for in the purchase agreements governing the Warberg and OOC warrant purchases, the sellers of those warrants first delivered them to defendant, which cancelled them and issued new warrants, transferring them to Warberg and OOC pursuant to "Assignment Forms." Two of those forms provide that "for value received, the foregoing Warrant and all rights evidenced thereby are hereby assigned to [Warberg and OOC]." The

remaining Assignment Forms state that plaintiffs were transferred "all of the rights of [the assignor] under this Warrant."

In December 2009 and January 2011, defendant sold shares for less than the exercise price of $32.43. After the January 2011 sale of stock, Waterstone raised with defendant the possibility that the purchase price in its warrants would need to be reduced pursuant to the anti-dilution provision, and discussions among the parties about a possible adjustment continued over the following year. However, no accommodation was reached. Plaintiffs, in communications among themselves, focused on an unsigned, draft warrant that had been circulated to the initial investors in June 2008, right before defendant issued the warrants. The draft was attached to an email from Nicholas Wunderlich, an executive at Wachovia Securities, which defendant had hired as its placement agent in connection with the issuance of the warrants. Wunderlich wrote to the investors that

> "[i]t has been brought to my attention that when final docs for the . . . transaction were distributed last week, certain information (such as date, share count, and exercise price of warrant) was left blank. These amounts do not differ from what was communicated to you last week. However, attached for your records are the documents in their final form with this information inserted."

Section 8(h) of the draft warrant that was attached to the email

stated $28.07 as the floor price, in contrast to the $32.43 figure contained in the final, issued warrant.

Plaintiffs initiated this action asserting that defendant had breached the contract by failing to adjust the exercise price, and seeking damages and specific performance. The complaint alleged causes of action for breach of contract, specific performance, declaratory relief, fraudulent inducement, promissory estoppel, and unjust enrichment. Defendant moved to dismiss the complaint, on the basis that the warrants were unambiguous and set a floor price of $32.43. Supreme Court granted the motion to the extent of dismissing plaintiffs' claims for declaratory relief, promissory estoppel, fraudulent inducement, and unjust enrichment only. This Court unanimously affirmed (112 AD3d 78 [1st Dept 2013]). We found that "the 'notwithstanding' provision in section 8(h) clearly overrides any conflicting provisions in section 8(f)," even though "it renders the adjustment formula in section 8(f) impotent" (id. at 83). The breach of contract claim was allowed to proceed based on the draft warrant attached to the Wunderlich email. We noted that "the email appears to have been sent only to employees of Waterstone and not to Warberg or OOC. Unless there is evidence to prove that the floor price error applies to all plaintiffs'

warrants, then the claims by Warberg and OOC should be dismissed because the floor price in their warrants would remain $32.43. However, that is an issue to be determined by the trial court after some discovery" (112 AD3d at 85 n4).

Following this Court's decision, plaintiffs filed amended complaints, the second of which whose cause of action for reformation is the sole issue on this appeal. Plaintiffs claim that the floor price was intended to be $28.07, but that through a scrivener's error, the warrants were issued with an erroneous floor price of $32.43. In support of their claim of scrivener's error, plaintiffs cited the Wunderlich email and the attachment thereto. Defendant moved for summary judgment dismissing the amended complaint, arguing, as relevant here, that the evidence of the parties' intent with respect to the floor price term was not sufficient to support a claim of reformation. Plaintiffs opposed the motion for summary judgment, and, as relevant here, moved for summary judgment on their reformation claims, arguing that the evidence conclusively established that the parties intended the floor price to be $28.07.

The court granted Waterstone summary judgment on its reformation cause of action, and granted defendant's motion to the extent of dismissing the complaint with respect to Warberg

and OOC. The court cited the Wunderlich email, as well as other emails between Waterstone and its representatives. The court emphasized that Wachovia was defendant's agent with respect to the transactions at issue, regardless of the fact that its engagement letter with defendant included a limitation-of-engagement clause stating that Wachovia was to serve as an independent contractor and disclaiming the creation of a fiduciary duty or agency relationship. The court concluded that this only limited the scope of the agency, and that the documentary evidence "plainly shows that [defendant] had an agency relationship with Wachovia such that it made binding offers with respect to the warrants at issue here." Given that agency relationship, the court found it clear that the parties had agreed to the $28.07 floor price, and that the $32.43 price was a scrivener's error made by defendant's counsel. The court rejected as "nonsensical" the argument that the parties intentionally nullified the anti-dilution provision. The court further found that the deposition testimony of defendant's top executives and outside counsel did not raise an issue of fact as to this issue because they either did not remember anything about the floor price or had no actual knowledge of how the floor price was set.

While the court found that Waterstone believed the floor price to be $28.07, it also found that, since Warberg and OOC purchased their warrants on the secondary market, and Wachovia never directly communicated to them the lower floor price, they had presented no evidence that they had reason to believe that the floor price was lower than the one listed in the warrants they had received. The court rejected their claim that they stood in the shoes of the initial purchasers who did receive the Wunderlich email, interpreting the warrant assignment documents as indicating that the parties intended to limit the conveyance to the documents themselves and to sever any rights arising from the negotiations between defendant and the initial purchasers.

The court further found that the cancellation of the warrants and the reissuing of them before they were transferred to Warberg and OOC effected a novation, wiping out any right to reformation that might have otherwise flowed from the original warrants.

We first consider defendant's argument that the court erred in awarding summary judgment to Waterstone. It claims that Waterstone was not entitled to reformation because it did not establish that the $32.43 floor price in the issued warrants reflected a mistake on the part of both parties, and that the

parties actually intended that the floor price would be $28.07. This, defendant contends, is because, despite receipt of the Wunderlich email, Waterstone took no steps to seek reformation of the warrants, not even seeking that relief in its initial complaint. Defendant argues that mutual mistake must exist at the time the contract is entered into, and that Waterstone did not form a belief until years after the warrants were issued that there was a mistake in them. Defendant also asserts that there is no evidence that it believed the floor price to be $28.07. To the contrary, it points to deposition testimony from its employees and counsel asserting that the $32.43 floor price in the issued warrants did not reflect a mistake. Defendant seeks to negate the impact of the Wunderlich email by arguing that Wachovia was not its agent, and so it was not bound by the draft warrant attached to the email.

Waterstone, on the other hand, cites evidence showing that defendant's CEO was told by Wachovia that the floor price would be set at the June 5, 2008 closing stock price, which was $28.07, and that Wachovia's counsel, defendant's counsel, and defendant's CEO discussed using $28.07 as the floor price. Waterstone also cites deposition testimony from Wachovia and its counsel stating that defendant agreed to issue warrants with a $28.07 floor

price. Waterstone further argues that its conduct after the warrants were issued is explained by the fact that, while it became aware in 2011 that the anti-dilution protections in the warrants it had bargained for were not effective because they listed $32.43 as the floor price in Section 8(h), it did not learn the details of how the floor price was set at that level until there was discovery in this case.

"'A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake,'" and to succeed, the party seeking relief "must establish by 'clear, positive and convincing evidence' that the agreement does not accurately express the parties' intentions" (*see 313-315 W. 125th St. L.L.C. v Arch Specialty Ins. Co.*, 138 AD3d 601, 602 [1st Dept 2016]). "Reformation based upon a scrivener's error requires proof of a prior agreement between [the] parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement" (*US Bank N.A. v Lieberman*, 98 AD3d 422, 424 [1st Dept 2012]). The parties' course of performance under the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties (*Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 85

[1st Dept 2009]).

Given the need for "clear, positive and convincing evidence" of mutual mistake (*313-315 W. 125th St. L.L.C.*, *supra*), we find that issues of fact are present that should have prevented summary judgment from being awarded to Waterstone. The evidence does not unequivocally show that either Waterstone or defendant believed the agreed upon floor price was $28.07. To be sure, defendant relied heavily on Wachovia to handle the warrant transaction, including the setting of the floor price, and Wachovia employees testified that they believed the floor price was intended to be $28.07. However, the evidence shows that defendant had a hand in the drafting process. Thus, we may not entirely disregard the deposition testimony of defendant's employees and counsel that they did not consider the $32.43 floor price in the final warrants to be the result of a mistake.

In any event, mutual mistake requires that both parties to an agreement have the same belief, and the evidence with respect to Waterstone's belief is too tenuous to justify summary judgment. For example, that Wachovia circulated a draft warrant with $28.07 as the floor price is surely supportive of Waterstone's theory. However, without any documentary evidence reflecting any prior communications concerning the price, or any

testimony from Waterstone indicating what it believed the floor price was to be, it is impossible to find as a matter of law that Waterstone expected the true floor price to be $28.07. In addition to the absence of clear evidence of Waterstone's belief, its failure over the course of several years to affirmatively articulate a belief that the final floor price was a mistake, also militates against a grant of summary judgment. Although, as it argues, Waterstone might not have been able to allege all the circumstances of the purported floor price mistake until it obtained discovery in this action, it knew, or should have known from the outset, that the floor price in the final warrant was set at $32.43, which rendered the anti-dilution provision meaningless. Its failure to claim mutual mistake until 2013, even after it sought an adjustment in the exercise price in 2011 and initiated this lawsuit in 2012 based on the separate theory that the anti-dilution provision was merely being misinterpreted, undermines its claim that it believed that it had agreed to the $28.07 floor price and that there had been a drafting error.

We next consider the argument by Warberg and OOC that they are similarly situated to Waterstone and so should not have had their claims dismissed. Those plaintiffs contend that, while they were not parties to the warrants, any rights that the

original investors had under the warrants flowed down to them and were properly pressed against defendant. This argument is based on the fact that the agreements effecting the transfers represented that the seller was assigning "any and all rights and benefits incident to the ownership" of the warrants. Plaintiffs further claim that the court erred in finding a novation, since the cancellation by defendant of the original warrants was merely ministerial.

Where an assignment grants the same rights and interests with regard to the claim to which the assignor had been entitled, "'with all of its infirmities, equities, and defenses,'" the assignee stands in the shoes of the assignor (*Madison Liquidity Invs. 119, LLC v Griffith*, 57 AD3d 438, 440 [1st Dept 2008]). This has been held to include a claim for reformation (*see Beck-Brown Realty Co. v Liberty Bell Ins. Co.*, 137 Misc 263 [Sup Ct, Kings County 1930]; *Stark v Masonic Life Assn.*, 180 NYS 235, 238 [Sup Ct, NY County 1920], *affd* 194 App Div 900 [1st Dept 1920]).

Based on the plain language of the purchase agreements to which Warberg and OOC were parties, any reformation claim that the original purchasers held was assigned to them, since it qualifies as one of the "rights and benefits incident to the ownership" of the warrants. We reject defendant's position that,

at least for three of the seven Warberg/OOC transactions, the assignment was limited by language stating that the warrants were being conveyed "free and clear of all claims." That language does not limit the rights and benefits the buyers bargained for by stripping them of claims to protect those rights, but, in fact, protects the buyers by making clear that they were purchasing the warrants unencumbered by any claims with respect to title, such as competing "security interests, liens, pledges, claims (pending or threatened), charges, escrows."

The elements of a novation are a previously valid obligation, agreement of the parties to the new obligation, extinguishment of the old contract, and a valid new contract (*see Citigifts, Inc. v Pechnik*, 112 AD2d 832 [1st Dept 1985], *affd* 67 NY2d 774 [1986]; *Old Oak Realty v Polimeni*, 232 AD2d 536, 537 [2d Dept 1996]). "A novation will not discharge obligations created under a prior agreement unless it was so intended, and this question may be determined from the writings and conduct of the parties or, in certain cases, from the documents exclusively" (*Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 290 [1st Dept 1995] [internal citations omitted], *lv denied* 88 NY2d 809 [1996]; *Blair & Co. v Otto*, 5 AD2d 276, 280 [1st Dept 1958]). The party claiming a novation has the burden of proof of

establishing that it was the intent of the parties to effect a novation (*see Ventricelli v DeGennaro*, 221 AD2d 231, 232 [1st Dept 1995], *lv denied* 87 NY2d 808 [1996]).

We find that defendant presented no evidence that it and its counterparties intended to effectuate a novation before issuing warrants to Warberg and OOC. Defendant's argument that there was a novation is seriously undermined by the repeated references in the documents transferring the warrants to Warberg and OOC to an "assignment," and defendant's insistence that Warberg and OOC tender to it an "assignment form." By definition, a novation cannot exist where there is evidence that the rights existing under the purportedly cancelled agreement have been transferred or assigned to the other party. Further, we hesitate to find a novation upon the mere issuance of a new security, without any affirmative indication that the parties were changing the terms underlying the warrant being transferred. To do so would

potentially have an outsize effect on the myriad assignments of securities that are effectuated on any given business day, extinguishing all the rights, obligations and defenses not apparent from the face of the certificates themselves.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Webber, JJ.

3834 Mirton E. Baez-Pena, Index 310198/09
Plaintiff-Appellant,

-against-

MM Truck and Body Repair, Inc., et al.,
Defendants-Respondents,

Kiewit Constructors Inc., et al.,
Defendants.

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Seligson, Rothman & Rothman, New York (Martin S. Rothman of counsel), for appellant.

Thomas Torto, New York, for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered January 19, 2016, which granted defendants MM Truck and Body Repair, Inc., M&M Truck and Body Repair, Inc., Sajo Transportation and Johnny Pena's motion for summary judgment dismissing the complaint and all cross claims against them, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, while driving on the Major Deegan Expressway, rear-ended a box truck operated by defendant Johnny Pena, an employee of defendants MM Truck and Body Repair, Inc. and M&M Truck and Body Repair, Inc., and owned by defendant Sajo Transportation (collectively, the Pena defendants). According to

plaintiff's deposition testimony, when the accident happened, he was traveling southbound in the right-hand lane of the expressway at a speed no greater than 35 miles per hour. The accident occurred at 3:45 p.m., in traffic that plaintiff described as "medium." The road was dry. Plaintiff stated that the box truck, which had a container attached to it, was moving in front of him at approximately 35 miles per hour and that he had been traveling behind it for approximately three minutes when the accident happened. He testified that he was two car lengths behind the box truck when he saw the container make contact with the Willis Avenue Bridge overpass and come to a complete and sudden stop. At no time did he see the box truck's brake lights activate. After he saw the box truck make contact with the overpass, plaintiff applied his brakes, using strong pressure, but his vehicle skidded forward approximately one car length and struck the rear of the box truck. He did not swerve to either side, because there was no time.

Defendant Pena testified that he had been told that the truck he was driving was 13 feet tall. He traveled regularly on the route he was traveling on the day of the accident and drove beneath the subject overpass approximately 15 times per week before the accident, although not in the right lane, since it had

been closed for a project involving the replacement of the bridge. He also recalled that the traffic conditions were "medium" at the time the accident occurred. Pena testified that when the accident happened, he was in the right lane and traveling approximately 40 miles per hour. He noticed nothing unusual about the overpass and did not see anything hanging down before the accident. As soon as he reached the overpass, the truck hit the top of it, and came to a "[d]ead stop." "Within seconds" he felt an impact caused by the vehicle behind him striking the truck.

Plaintiff commenced this action for personal injuries sustained in the accident against, inter alia, the Pena defendants and the entities responsible for the Willis Avenue Bridge Project (referred to herein collectively as Kiewit). The Pena defendants moved for summary judgment dismissing the complaint and cross claims against them, arguing that the deposition testimony established that plaintiff rear-ended the box truck after it became stuck under the overpass and that plaintiff failed to provide a non-negligent explanation for failing to stop his vehicle in time. In opposition, plaintiff argued that the manner in which Pena operated the box truck created the chain of events that caused the accident, as the

truck came to a sudden stop while his vehicle was two car lengths behind it. He asserted that the Pena defendants failed to meet their initial burden to show that they were not negligent, because Pena testified that he knew that the bridge was in the process of being removed and that certain southbound lanes had been closed due to diminished clearance of the overpass during construction. Plaintiff maintained that this was not a routine rear-end collision, because the record showed that he was faced with a sudden emergency situation that was caused by the way Pena operated the truck, and there were triable issues as to whether he acted prudently in response to the situation, which was out of his control and not of his own making. He additionally argued that it was illogical to require him to have a non-negligent explanation for an accident that was triggered by defendants' own actions. Lastly, he asserted that the court should search the record and award him summary judgment on the issue of liability.

Kiewit also opposed the motion, arguing, inter alia, that the record showed that the Pena defendants caused the accident by failing to comply with Vehicle and Traffic Law (VTL) § 385(2) and Rules of the City of New York Department of Transportation (34 RCNY) § 4-15(b), which establish a maximum vehicle height of 13 feet, 6 inches. Kiewit submitted an affidavit by Corey Hopper,

who was employed as Kiewit's superintendent of operations and was working at the subject location when the accident happened. Hopper asserted that several days before the accident a similar truck failed to clear the overpass, which gave Kiewit occasion to measure the overpass as being 13 feet, 9 inches high at its lowest point. Kiewit also stated that, at some point before the accident, two signs had been installed, on a different overpass a short distance north of the bridge (such that they would have been visible to drivers proceeding in the same direction as Pena), warning drivers not to operate vehicles that were higher than 12 feet, 9 inches.

In their reply papers, the Pena defendants annexed an affidavit by Michael Szymanski, Pena's supervisor, who stated that the highest point of the truck Pena was operating was 13 feet, 5 inches. He also stated that defendants' box truck and container had gone through the same route for three years preceding the accident, without incident.

The court granted the Pena defendants' motion for summary judgment. It found that the testimony established that plaintiff failed to maintain an adequate distance between his vehicle and defendants' truck at the time the accident happened, and that the emergency doctrine was not applicable, because plaintiff conceded

that he was traveling 35 miles per hour and was two car lengths behind defendants' box truck for about three minutes before the accident, but could not stop his vehicle in time after he saw the truck strike the overpass.

A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident (*Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]; *Beloff v Gerges*, 80 AD3d 460 [1st Dept 2011]. The Pena defendants argue that plaintiff's contention that a sudden, unforeseeable stop by a lead vehicle can provide such a non-negligent explanation "is contrary to this Court's consistent holding that an allegation that the lead vehicle suddenly stopped is insufficient to rebut the presumption of negligence on the part of the rear-ending vehicle." However, this is simply not accurate (*see Berger v New York City Hous. Auth.*, 82 AD3d 531, 531 [1st Dept 2011] [presumption of negligence "may be rebutted by evidence that the vehicle in front stopped suddenly"]).

This is not to say that there are not many cases in which this Court has held that a sudden stop is insufficient; there are. However, the Pena defendants do not cite any cases from

this Court, nor are we aware of any, where a sudden stop by a vehicle on a highway, with normal traffic conditions, resulted in summary judgment in favor of that vehicle. Indeed, Court of Appeals precedent suggests that summary judgment is unwarranted in such a case. In *Tutrani v County of Suffolk* (10 NY3d 906 [2008]), a police officer was driving his vehicle in the middle lane of a three-lane highway when he "abruptly decelerated from approximately 40 miles per hour to 1 or 2 miles per hour while changing lanes" (10 NY3d at 907). The plaintiff was traveling immediately behind the police vehicle and had to slam on her brakes to avoid colliding with it; however, the vehicle behind her then struck her car. The Court reversed the Appellate Division's vacatur of a judgment finding the officer 50% liable for the accident, stating that there was sufficient evidence for the jury to have found him to be a substantial cause of the accident, since he "abruptly slowed his vehicle to a near stop in a travel lane of a busy highway where vehicles could reasonably expect that traffic would continue unimpeded" (*id.*). The Court further held that the negligence of the driver whose car struck the plaintiff's car

> "[did] not absolve [the officer] of liability as a matter of law. Clearly, [the officer's] actions created a foreseeable danger that vehicles would have

> to brake aggressively in an effort to avoid the lane obstruction created by his vehicle, thereby increasing the risk of rear-end collisions. That a negligent driver may be unable to stop his or her vehicle in time to avoid a collision with a stopped vehicle is a normal or foreseeable consequence of the situation created by [the officer's] actions" (*id.* at 908 [citation and internal quotation marks omitted]).

In light of *Tutrani*, we simply cannot conclude that Pena's actions were not a proximate cause of the rear-end collision.

In the cases cited by the Pena defendants in support of the proposition that a sudden stop can never provide a non-negligent explanation for an accident, the facts were markedly different from those encountered in *Tutrani* and in this case. For example, in *Morgan v Browner* (138 AD3d 560 [1st Dept 2016]), the lead vehicle signaled left at an intersection but continued straight, and then suddenly stopped. In *Diako v Yunga* (126 AD3d 567 [1st Dept 2015]), which also involved an accident on an expressway, the lead vehicle pumped its brakes and gradually slowed down before it was struck from behind. In *Matos v Sanchez*, 147 AD3d 585 [1st Dept 2017]), there were icy road conditions. In each situation encountered in these cases the vehicle behind the one that suddenly stopped had reason to exercise more than the usual vigilance in order to avoid a collision. Here, in contrast, the evidence suggests that plaintiff could have "reasonably

expect[ed] that traffic would continue unimpeded" (*Tutrani*, 10 NY3d at 907), since traffic was flowing smoothly and he had no reason to foresee that Pena's truck would not clear the overpass.

Finally, there is certainly an issue of fact whether Pena's negligence caused his truck to suddenly stop in the first place. If Hopper is correct that the height Pena needed to clear was 13 feet, 9 inches, Pena would have been in violation of the 13 foot, 6-inch height maximums imposed by Vehicle Traffic Law § 385 and 34 RCNY 4-15(b). In addition, Pena testified that he traveled the same route regularly in the days leading up to the accident, and so he had an opportunity to see the warning signs referred to by Hopper in his affidavit, which cautioned drivers whose vehicles were higher than 12 feet, 9 inches. Even though it is true that Pena had cleared the overpass on his previous trips, he had not traveled under the overpass in the right lane before the day of the accident. Under the circumstances, there is a

question whether Pena's decision to drive the truck on the expressway was negligent, such that a jury could find the Pena defendants at least partially culpable for plaintiff's injuries.

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

ENTERED: JUNE 8, 2017

CLERK

Richter, J.P., Andrias, Moskowitz, Feinman, Kapnick, JJ.

3919-
3920 The People of the State of New York,
Respondent,

-against-

Thein Stewart,
Defendant-Appellant.

Ind. 6138/11

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Robert S. Dean, Center for Appellate Litigation, New York (Sara N. Maeder of counsel), for appellant.

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

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Appeal from order, Supreme Court, New York County (Gregory Carro, J.), entered on or about May 18, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, held in abeyance, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel and a decision de novo on the motion. Appeal from judgment, same court and Justice, rendered March 27, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 8 years, held in abeyance pending the aforesaid hearing and decision.

Defendant moved below to vacate his conviction pursuant to

CPL 440.10, arguing that he had received ineffective assistance of counsel (*see People v Baldi*, 54 NY2d 137, 146 [1981]; *see also People v Turner*, 5 NY3d 476, 480-481 [2005]). Defendant asserted that his counsel was ineffective in prematurely filing "an otherwise-meritorious speedy trial motion" and submitted an affirmation from initial appellate counsel, but did not submit an affidavit from trial counsel.[1] Specifically, defendant argued that counsel provided ineffective assistance by failing to argue that the People's January certificate of readiness was illusory, and that counsel filed the speedy trial motion prematurely by failing to include three time periods in calculating chargeable time in support of the motion.[2] The People asserted that counsel was effective and "zealously and ably advocated defendant's cause." The People stated that generally, DNA testing delays are excluded from the calculation of chargeable time, and therefore

[1] Both trial counsel and defendant's initial appellate counsel were from the Legal Aid Society. New appellate counsel was subsequently appointed.

[2] The first speedy trial issue involves counsel failing to account for the prosecution's January certificate of readiness when asserting the prosecution had not declared readiness before February 9, 2012; the second is failing to account for his own consent to an adjournment from May 24, 2012 to June 7, 2012; and the third is failing to account for his colleague's consent to a subsequent adjournment from June 7, 2012 to June 28, 2012.

the calculation of chargeable time was not clear cut. As to the certificate of readiness, the People state that they were ready to proceed without the DNA evidence, that the certificate was not illusory, and therefore that there was no error in failing to contest the certificate of readiness.

The motion court mistakenly found that defendant's CPL 440.10 motion was procedurally barred. In reaching its decision, the motion court concluded that because the record of pretrial proceedings was sufficient to determine defendant's ineffective assistance of counsel claim without reference to any nonrecord facts, and because defendant failed to perfect the direct appeal, it was foreclosed from considering the motion on the merits and denied the motion. We disagree with this procedural analysis, because as described below, the current record is insufficient to determine defendant's ineffective assistance of counsel claim.

Defendant's ineffective assistance claim, as it relates to the speedy trial motion, presents factual issues requiring a hearing. We reject defendant's argument that the record before this Court is sufficient to decide whether counsel was ineffective by failing to account for the three challenged periods when filing the speedy trial motion. Although the affirmation by defendant's initial appellate counsel submitted in

support of defendant's 440.10 motion stated trial counsel was ineffective for failing to properly research the speedy trial motion before filing it, the affirmation fails to state whether appellate counsel had any personal knowledge of the case, or that he spoke to trial counsel about this issue. We do not know and cannot speculate as to why trial counsel submitted the motion when he did, and whether the decision to file was the result of a calculation error. Nor do we know what research or court records were reviewed before the motion was filed. A hearing will address whether trial counsel had strategic or other reasons for filing the speedy trial motion when he did, and address defendant's reasons that counsel was ineffective (*cf. People v Santos*, 145 AD3d 461 [1st Dept 2016]; *People v Rosario*, 132 AD3d 454 [1st Dept 2015]).

In light of this determination and because we are holding defendant's direct appeal in abeyance, we do not reach defendant's claims on the direct appeal.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4188-
4188A The People of the State of New York,
Respondent,

-against-

Sean Hill also known as Mike Anthony Floyd,
Defendant-Appellant.

Ind. 5502/11
1453/13

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 19, 2013, as amended February 25, 2013, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 10 years, unanimously affirmed. Judgments, same court (Edward J. McLaughlin, J.), rendered September 27, 2013, convicting defendant, upon his pleas of guilty, of attempted murder in the second degree, robbery in the first degree and conspiracy in the second degree and sentencing him to an aggregate term of 13 years, concurrent with the aforementioned sentences, unanimously affirmed.

At defendant's trial, the court accepted a partial verdict

of guilty of two weapon possession counts and declared a mistrial as to the remaining counts. Defendant then pleaded guilty to a first-degree robbery count upon which the jury had failed to reach a verdict. Defendant also pleaded guilty to attempted murder and conspiracy under a second indictment. Defendant does not seek vacatur of the pleas under the second indictment, but only claims that the aggregate 13-year sentences on those convictions were excessive.

In connection with his guilty pleas, defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]). Both the written waiver form and the plea colloquy clarified that the waiver of the right to appeal was separate from the forfeitures automatically resulting from a guilty plea. This waiver forecloses defendant's suppression claim to the extent it relates to his robbery conviction, his double jeopardy claim relating to his continued prosecution for robbery after the mistrial, and his excessive sentence claims as to all convictions by guilty pleas. Defendant's argument that the waiver does not apply to his double jeopardy claim is without merit, because there was no express exception to that effect in the written waiver (*see People v Muniz*, 91 NY2d 570 [1998]).

Regardless of whether defendant made a valid waiver of his

right to appeal with regard to his plea convictions, we find no basis for reversal or modification of those convictions. Continued prosecution of the robbery charge upon which the jury had failed to agree did not violate defendant's protection against double jeopardy, because the court providently exercised its discretion in granting a mistrial on that count based on its record-based finding that the jury was hopelessly deadlocked (*see e.g. Matter of Rivera v Firetog*, 11 NY3d 501 [2008]; *Matter of Plummer v Rothwax*, 63 NY2d 243 [1984]).

The court properly denied defendant's motion to suppress a pistol that he discarded. Initially, we note that, contrary to the People's assertion, the appeal waiver is inapplicable to defendant's challenge to the denial of his suppression motion insofar as it pertains to the trial conviction. In any event, defendant's contention that the deployment of a police dog constituted an arrest without probable cause is unpreserved (*see People v Martin*, 50 NY2d 1029 [1980]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find defendant's other arguments concerning suppression unavailing. The use of force does not necessarily elevate a seizure based on reasonable suspicion to an arrest requiring probable cause (*People v Foster*,

85 NY2d 1012, 1014 [1995]; *People v Allen*, 73 NY2d 378, 379-380 [1989]). The deployment of the dog did not constitute an arrest, and required only reasonable suspicion (*see People v Durham*, 146 AD3d 1070, 1072 [3d Dept 2017]; *see also People v Reyes*, 272 AD2d 244, 244 [1st Dept 2000], *lv denied* 95 NY2d 907 [2000]), which was provided by the police officers' observations that defendant, who matched the description of a man suspected of having just committed an armed robbery, in the vicinity of where gunshots were heard, was running away from the scene, changed course when he saw the police, and fidgeted with his waistband while running (*see e.g. Matter of Livan F.*, 140 AD3d 409, 410 [1st Dept 2016]). The police did not use excessive force in releasing the dog, where defendant continued running after an officer identified himself, repeatedly ordered defendant to stop, and warned defendant that he would release the dog unless defendant complied (*see United States v Lawshea*, 461 F3d 857, 859-60 [7th Cir 2006]). Accordingly, defendant's abandonment of the pistol in the street was not precipitated by any police illegality.

The trial court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant's procedural arguments concerning his *Batson* claim are unpreserved (*see People v James*, 99 NY2d 264, 272 [2002]; *People v Bruzzley*,

105 AD3d 576 [1st Dept 2013], *lv denied* 21 NY3d 1002 [2013]), and we decline to review them in the interest of justice. We further find that the court's *Batson* determinations are supported by the record (*see People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied sub nom. Black v New York*, 563 US 947 [2011]; *People v Smith*, 81 NY2d 875, 876 [1993]).

Upon our in camera inspection of a sealed document, we find that defendant was not entitled to disclosure of this material under *Brady v Maryland* (373 US 83 [1963]).

We perceive no basis for reducing any of the sentences.

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

ENTERED: JUNE 8, 2017

CLERK

1

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4189 Juan A. Ramirez, Index 311198/11
Plaintiff-Respondent,

-against-

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

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Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for appellants.

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

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Judgment, Supreme Court, Bronx County (Faviola Soto, J.), entered December 18, 2015, after a jury trial, in plaintiff's favor, unanimously reversed, on the law, without costs, and the complaint dismissed.

There is no evidence that defendants had prior written notice that the curb in Crotona Park North on which plaintiff

tripped was "obstructed" by overgrown vegetation (*see* Administrative Code of City of NY § 7-201[c][2], [c][1]; *Monteleone v Incorporated Vil. of Floral Park*, 74 NY2d 917 [1989]; *Carlo v Town of Babylon*, 55 AD3d 769 [2d Dept 2008]).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4190 In re Charlene R.,
Petitioner-Respondent,

-against-

Malachi R.,
Respondent-Appellant.

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Larry S. Bachner, Jamaica, for appellant.

Andrew J. Baer, New York, for respondent.

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Order of protection, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about October 25, 2016, which, upon a fact-finding determination that respondent committed a family offense, directed, among other things, that respondent stay away from the apartment the parties shared, until April 25, 2017, unanimously affirmed, without costs.

Even though the order of protection has expired, we address the merits of the appeal, given the enduring consequences which may potentially flow from an adjudication that respondent committed a family offense (*see Matter of Sasha R. v Alberto A.*, 127 AD3d 567, 567 [1st Dept 2015]). Although the Family Court did not specify which family offense respondent committed, remand is not required, because "the record is sufficiently complete to allow this Court to make an independent factual review and draw

its own conclusions" (*Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]; *Matter of Allen v Black*, 275 AD2d 207, 209 [1st Dept 2000]).

Based upon our review of the record, we find that a preponderance of the evidence adduced at the fact-finding hearing established that respondent's actions of taking petitioner's belongings, grabbing her by the neck, choking her, and scratching her face with enough force to cause her to bleed constituted the family offenses of harassment in the second degree (*see Matter of Chigusa Hosono D. v Jason George D.*, 137 AD3d 631, 632 [1st Dept 2016]), assault in the third degree, and criminal obstruction of breathing or blood circulation (*see Matter of Kenrick C.*, 143 AD3d 600, 601 [1st Dept 2016]). Given the foregoing acts of violence, the court properly excluded respondent from the home for six months (*see Barbara E. v John E.*, 44 AD3d 426, 427 [1st Dept 2007]).

The Family Court properly drew a negative inference against respondent from his failure to testify at the fact-finding hearing, even though there were two unrelated criminal cases pending against him during the family offense proceeding (*see Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

Respondent failed to preserve his argument regarding an adverse inference against petitioner, and his remaining contentions are unavailing.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4191 In re Embassy House Eat LLC, Index 500099/15
Petitioner-Appellant,

-against-

Dyan P by Her Article 81 Guardian JASA,
Respondent-Respondent.

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Cullen & Associates, P.C., New York (Wayne L. DeSimone of counsel), for appellant.

Morris K. Mitrani, PC, New York (Morris K. Mitrani of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered August 12, 2016, which granted respondent tenant's motion to vacate a so-ordered stipulation, dated May 16, 2014, and the resulting judgment of possession and warrant of eviction, unanimously affirmed, without costs.

The record supports the motion court's finding that respondent lacked the capacity to enter into the stipulation and thus showed good cause to vacate it (*see Matter of Frutiger*, 29 NY2d 143, 150 [1971]; *Matter of New York City Hous. Auth. v Jackson*, 48 AD3d 818, 819 [2d Dept 2008]; *Genesis Holding, LLC v Watson*, 5 Misc 3d 127[A], 2004 NY Slip Op 51218[U] [App Term, 1st Dept 2004]). The evidence shows, among other things, that the City Marshal referred the elderly respondent to Adult Protective

Services 10 months after she entered into the stipulation, that she had a history of depression and anxiety, that her apartment had mold violations since 2010, that she had a sensitivity to mold, and that the mold and other ailments affected her physical and mental condition during the course of the various proceedings. Unlike the tenant in *Ng v Chalasani* (51 Misc 3d 134[A], 2016 NY Slip Op 50544[U] [App Term, 2d Dept 2016]), relied upon by petitioner, respondent offered more than "[m]ere conclusory assertions of stress and depression" (*id.* at *2).

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

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4192 Clare Amiano, Index 150361/13
Plaintiff-Respondent,

-against-

Greenwich Village Fish Company, Inc., et al.,
Defendants-Appellants,

Joseph Gurrera, et al.,
Defendants.

_____

Law Office of James J. Toomey, New York (Frederick D. Schmidt, Jr. of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 12, 2016, which, insofar as appealed from, denied defendants' motion for summary judgment insofar as it sought dismissal of the negligence cause of action against defendants-appellants, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff seeks damages for injuries sustained when she choked on a fish bone while eating a fillet of flounder at defendants-appellants' restaurant. Plaintiff's negligence claim should have been dismissed pursuant to the "reasonable

expectation" doctrine, as the nearly one-inch bone on which plaintiff choked was not a "harmful substance[]" that a consumer "would not ordinarily anticipate" (*Vitiello v Captain Bill's Rest.*, 191 AD2d 429, 429 [2d Dept 1993]; *see also Mathews v Maysville Seafoods, Inc.*, 76 Ohio App 3d 624, 627 [Ct App 1991]; *Ex parte Morrison's Cafeteria of Montgomery, Inc.*, 431 So 2d 975, 979 [Ala Sup Ct 1983]).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4193 The People of the State of New York, Ind. 3858/13
Respondent,

-against-

Kelvin Silverio,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered February 19, 2016,

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: JUNE 8, 2017

CLERK

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

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4194 Willie R. Jenkins, Index 24318/14E
Plaintiff-Appellant,

-against-

Maggies Paratransit Corp., et al.,
Defendants-Respondents.

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Kravet, Hoefer & Maher, P.C., Bronx (John A. Maher of counsel), for appellant.

Daniel A. Fried, Yonkers, for respondents.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered April 8, 2016, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff failed to establish prima facie that a vehicle operated by defendant Chatham made an unsafe lane change. Although eyewitnesses testified that an Access-A-Ride vehicle struck plaintiff's motorcycle, they did not identify the driver. The amended police accident report is inadmissible hearsay, since

it was made by a police officer who did not witness the accident (*Kajoshaj v Greenspan*, 88 AD2d 538 [1st Dept 1982]). Nor does the traffic summons issued to Chatham constitute evidence.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4195 The People of the State of New York, Ind. 1767/15
Respondent,

-against-

Kerry Capellan,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered December 21, 2015,

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: JUNE 8, 2017

CLERK

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

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

4196 In re Oliver A.,
Petitioner-Respondent,

-against-

Diana Pina B.,
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

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

Larry S. Bachner, Jamaica, attorney for the children.

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Order, Family Court, Bronx County (Llinet M. Rosado, J.), entered on or about June 15, 2016, as amended July 8, 2016, which, after a hearing, granted petitioner father's petition to direct respondent mother to return the parties' two minor children to Norway, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding dismissed.

Petitioner, a citizen of Norway, and respondent, a United States citizen, were married in New York in 2009, and their two children were born in Norway in 2010 and 2012. The family lived in Norway and also spent months at a time living in the maternal grandmother's apartment in New York. In 2013, after the mother

was directed to leave Norway, the parties sold much of their personal property and their car, and went to the Dominican Republic, where they stayed for several months, from September 2013 until January 2014. They then went to New York and stayed with the maternal grandmother. At some time in or about March 2014, the father returned to Norway to look for an apartment and job, with the expectation that the mother would follow with the children. In court, the parties both confirmed their understanding that the mother would return to Norway with the children when he was settled. However, the mother testified that, following a long history of domestic violence, including a choking incident in February 2014 where the police were called and issued an NYPD Domestic Incident Report, she determined not to return to Norway and told the father she would not return. In April 2015, the father filed a petition for the return of the children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (1343 UNTS 89, TIAS No. 11670 [1980]) and its domestic implementing legislation, the International Child Abduction Remedies Act (22 USC §§ 9001-9011).

A parent bringing such a petition must demonstrate by a "preponderance of the evidence" that the child has been "wrongfully removed or retained" from her country of "habitual

residence" (22 USC § 9003[e][1][A]; *Mota v Castillo*, 692 F3d 108, 112 [2d Cir 2012]). Nevertheless, a petition will be denied if the parent opposing return of a child establishes "by clear and convincing evidence" the exception set forth in article 13b of the Convention (22 USC § 9003[e][2][A]) — namely, that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Hague Convention art 13[b]).

The determination of a child's "habitual residence" requires inquiry into the "shared intent" of the parents "at the latest time that their intent was shared," taking into account the parents' "actions [and] declarations," as well as "whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent" (*Mota*, 692 F3d at 112, quoting *Gitter v Gitter*, 396 F3d 124, 134 [2d Cir 2005]).

Although the record supports Family Court's determination that the parties' last shared intent was to return to Norway, the court did not consider the mother's evidence that the children had been acclimatized to New York, and whether that evidence trumped the parents' shared intent (*see id.*; *see also Hofmann v*

Sender, 716 F3d 282 [2d Cir 2013]).

We need not remand for this purpose, however, because we conclude that the mother met her burden to show, by clear and convincing evidence, that the children's return to Norway would result in a grave risk of harm to them (*see* Hague Convention art 13[b]; 22 USC § 9003[e][2][A]; *Blondin v Dubois*, 189 F3d 240, 245 [2d Cir 1999]). The mother presented detailed testimony of multiple acts of domestic abuse towards her by the father, at times in the presence of the parties' children. She also presented corroborating evidence, including the testimony of the maternal grandmother, who witnessed two of the violent incidents, including the February 2014 incident, and testified to visible signs of injury to her daughter, which was also noted in the Domestic Incident Report. The mother also submitted copies of text messages sent by the father threatening the mother's life. She further showed that the father had a propensity for violent abuse, as demonstrated by his violent acts, jealous rages, and, on at least two instances, forceful treatment toward the older daughter (*see Ermini v Vittori*, 758 F3d 153, 164-165 [2d Cir 2014]; *Souratgar v Lee*, 720 F3d 96, 104 [2d Cir 2013]; *Blondin*, 189 F3d at 247). The mother presented evidence that the nature of the abuse was such that it would inevitably resume if the

parties were reunited. The father acknowledged that the parties fought over the mother's infidelity, but broadly denied the mother's claims, other than admitting to pushing or grabbing the mother to restrain her. His testimony, however, was entirely uncorroborated.

The mother further presented evidence that, as a noncitizen of Norway, there would be minimal, if any, domestic violence resources available to her if she were to move there with the children, and that, due to her immigration status, she would not be allowed to live there for more than 90 days.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4198-
4199 Index 76236/13

Angela Murray-Caines,
Plaintiff-Appellant,

-against-

William L. Caines,
Defendant-Respondent.

_____

Wilson Sonsini Goodrich & Rosati, P.C., New York (Craig E. Bolton of counsel), for appellant.

Steven N. Feinman, White Plains, for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about February 24, 2016, which, after a hearing, among other things, dismissed plaintiff wife's petition seeking an order of protection; and order, same court and Justice, entered on or about September 26, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's CPLR 4404(b) motion to set aside the prior order, unanimously affirmed, without costs.

The Family Court properly determined that the allegations in the petition are not supported by a fair preponderance of the evidence (*see* Family Ct Act § 832; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). The court stated that it had reached its determination following completion of the hearing and

upon consideration of both parties' testimony (*cf. Matter of Janice M. v Terrance J.*, 96 AD3d 482 [1st Dept 2012] [consideration of the petitioner's credibility was improper on a motion to dismiss the petition for failure to prove a prima facie case]). There is no basis for disturbing the court's determination that plaintiff's testimony was not credible (*see Matter of Everett C.*, 61 AD3d 489), particularly given the evidence of plaintiff's motive to have defendant barred from the marital residence.

The Family Court properly granted defendant's prehearing application to limit plaintiff's proof to the allegations in the petition (*see Matter of Czop v Czop*, 21 AD3d 958, 959 [2d Dept 2005]; *see also Matter of Salazar v Melendez*, 97 AD3d 754 [2d Dept 2012], *lv denied* 20 NY3d 852 [2012]).

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

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4200 Tao Niu, Index 159128/13
Plaintiff-Respondent,

-against-

Sasha Realty LLC, et al.,
Defendants-Appellants.

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Matthew J. Zizzamia of counsel), for appellants.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 23, 2016, which denied defendants Sasha Realty LLC and Beach Lane Management, Inc.'s motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss plaintiff's claims based on violations of Multiple Dwelling Law § 52 and the 1938 Building Code of City of New York (Administrative Code of City of NY) § C26-292.0(g)(3), and otherwise affirmed, without costs.

Plaintiff seeks to recover for injuries he sustained when, as he was descending the staircase from the rooftop of defendants' building, the landing he stepped on collapsed, causing him to fall.

Initially, we note that the 1938 Building Code of City of

New York (Administrative Code of City of NY) § C26-292.0(g)(3) and Multiple Dwelling Law § 52 are inapplicable to this case. Although the subject staircase led to a rooftop, that rooftop was not an "exit" as defined in Administrative Code § 27-232, since it did not lead to a street or public space, and was not dedicated to public use (*see DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]).

However, defendants failed to meet their prima facie burden of showing that they lacked constructive notice of the alleged defective condition. The building manager testified that he would inspect the building about two to three times a day, looking for property damage such as broken windows or handrails. However, he did not testify that he would inspect the building's stairs or its landings, or when he last did so. This testimony was insufficient to show that defendants lacked constructive notice of the defective condition (*see Joachim v AMC Multi-Cinema, Inc.*, 129 AD3d 433, 434 [1st Dept 2015]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Defendant's contention that the condition of the landing was latent since the reinforcement underneath would not have been discoverable upon a reasonable inspection, was refuted by plaintiff's expert who averred that the type of landing through

which plaintiff fell was required to be regularly inspected and maintained, and that an inspection of the landing would have shown that it was susceptible to collapse. This was sufficient to raise an issue of fact (*see Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462, 463 [1st Dept 2010]).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4201 253 East 62nd Street, LLC, Index 651477/10
Plaintiff,

-against-

Moluka Enterprises, LLC
Defendant-Appellant,

Demo Plus Inc., et al.,
Defendants

Yolanda Queen, et al.,
Defendants-Respondents.

- - - - -

[And Other Actions]

_____

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen J. Steinlight of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 24, 2015, which, inter alia, granted the motion of defendants Douglas Elliman Property Management (Elliman) and Bellmarc Property Management Services (Bellmarc) for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Defendant Bellmarc entered into a contract with codefendant, Moluka Enterprises, to manage certain of Moluka's properties. By order of the New York City Department of Buildings, one of

Moluka's properties was demolished. Plaintiff owned the building adjacent to the demolished premises and claims that its building was damaged during the demolition process. Following the demolition, Bellmarc was acquired by Elliman.

Bellmarc and Elliman established their entitlement to judgment as a matter of law by demonstrating that they were not liable for any damage to plaintiff's building because Bellmarc's contract to manage the properties was with Moluka and thus, no duty was owed to plaintiff. It is well established that contractual obligations impose a duty only in favor of the promisee and intended third-party beneficiaries. Exceptions to this rule are where (1) the contracting party fails to exercise reasonable care in the performance of its duties, thereby launching a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting parties' duties; and (3) where the contracting party

has entirely displaced the other party's duty to maintain the premises safely (*see generally Espinal v Melville Snow Contrs.* 98 NY2d 136, 140 [2002]). There is no evidence that any of the above exceptions apply to the circumstances presented.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4202 The People of the State of New York Dkt. 77741/10
Respondent,

-against-

Louis Harris,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered November 12, 2010, convicting defendant, after a nonjury trial, of attempted assault in the third degree, and sentencing him to a term of 90 days, 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 court's credibility determinations. Evidence that defendant punched the victim in the head with such

force that it caused a laceration and significant bleeding supports a finding that defendant intended to cause physical injury (*see e.g. People v Lovenia V.*, 128 AD3d 537 [1st Dept 2015], *lv denied* 26 NY3d 931 [2015]).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4203-
4203A Index 650688/16

Amir Meiri,
Plaintiff-Appellant,

-against-

Sheila McNichols, et al.,
Defendants-Respondents.

Amampuri Realty LLC,
Intervenor-Respondent.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

The Law Office of Peter G. Gray, P.C., Brooklyn (Peter G. Gray of counsel), for Sheila McNichols and James Michael Cornwell, respondents.

Withers Bergman LLP, New York (Chaya F. Weinberg-Brodt of counsel), for Amampuri Realty LLC, respondent.

_____

Orders, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 14, 2016, which granted the motion of defendants Sheila McNichols and James Michael Cornwell to dismiss the complaint and the motion of Amampuri Realty LLC to intervene and dismiss the complaint, unanimously affirmed, with costs.

Since the right of first refusal in the lease between plaintiff and decedent William Cornwell did not refer to their heirs, successors, or assigns, it expired upon decedent's death (*see e.g. Gilmore v Jordan,* 132 AD3d 1379, 1380 [4th Dept 2015];

Herrmann v AMD Realty, Inc., 8 AD3d 619, 621 [2d Dept 2004]; *Adler v Simpson*, 203 AD2d 691, 692-693 [3d Dept 1994]).

The court properly permitted Amampuri to intervene pursuant to CPLR 1012(a)(3) (*see George v Grand Bay Assoc. Enter. Inc.*, 45 AD3d 451, 452 [1st Dept 2007]).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4204 The People of the State of New York, Ind. 3122/13
Respondent,

-against-

Wayne Middleton,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Bryan McArdle of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J. at suppression hearing; James M. Burke, J. at jury trial and sentencing), rendered October 1, 2014, convicting defendant of criminal possession of stolen property in the fourth and fifth degrees and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police had probable cause to believe that defendant was acting in concert with the codefendant in stealing money from a purse set up by the police as a decoy in a large toy store (*see e.g. People v Arriaga*, 204 AD2d 96 [1st Dept 1994]). Viewed in

totality, the only reasonable explanation of the two defendants' course of conduct was that they were a team of thieves. They did not look at merchandise or otherwise appear to be in the store for any legitimate reason. The two men approached the purse together, and as the codefendant tried to steal a wallet from the purse, defendant stood close by, engaging in behavior indicative of being a lookout while also positioning himself so as to conceal the codefendant's actions. Notably, defendant and the codefendant repeated the same behavior pattern twice, with the codefendant succeeding on his second attempt to steal from the purse. Rather than being conclusory, the police testimony about defendant's actions was sufficiently specific. Moreover, the officers were entitled to rely on their expertise regarding the manner in which this particular kind of larceny is commonly committed by a team (*see generally People v Valentine*, 17 NY2d 128, 132 [1966]). Defendant's implausible theory of having been merely present while his companion committed a larceny is contrary to both the evidence and common sense.

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

was supported by the same evidence that supported the hearing court's finding; this evidence established defendant's accessorial liability (*see* Penal Law § 20.00) for the larceny beyond a reasonable doubt. The criminal possession of stolen property convictions, which were based on the recovery of a civilian victim's bank and identification cards from defendant at the time of his arrest in the decoy operation, were supported by evidence warranting the conclusion that the cards were stolen and not "lost," and that defendant was either involved in the theft or otherwise possessed them with the requisite guilty knowledge (*see People v Charles*, 196 AD2d 750 [1st Dept 1993], *lv denied* 82 NY2d 892 [1993]). Among other things, the evidence showed that defendant was in possession of the victim's cards, but without her missing wallet. The evidence also supported a reasonable inference that the bank card functioned as a "credit card" as defined in General Business Law § 511(1), and any inconsistency in the victim's testimony on this subject was satisfactorily explained.

Defendant's challenge to the court's instructions is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4205 Franklin Gonzalez, Index 301423/14
Plaintiff-Respondent,

-against-

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

H.E.L.P.-Bronx, L.P., etc., et al.,
Defendants-Appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Ephrem J. Wertenteil, New York, for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 28, 2016, which, to the extent appealed from, denied defendants-appellants' motion for summary judgment dismissing the Labor Law § 240(1) claim as against them, and granted plaintiff's motion for summary judgment on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Whether or not the scaffold provided workers at the site with adequate protection for working at an elevation, the unsecured plank falling from the scaffold and striking plaintiff as the scaffold was being moved constituted a distinct elevation-related hazard requiring the securing of the plank for the purpose of moving the scaffold (*see Castillo v 62-25 30th Ave.*

Realty, LLC, 47 AD3d 865 [2d Dept 2008], citing *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [2001]; *cf. Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90 [2015] [slipping on ice and falling while using stilts not within ambit of Labor Law § 240(1)]). Plaintiff's employer's assertion that all his workers, including plaintiff, knew that a scaffold must be dismantled before being moved was unsupported by any evidence that plaintiff had ever been so instructed, and was therefore insufficient to raise a triable issue of fact whether he was the sole proximate cause of the accident (*Gallagher v New York Post*, 14 NY3d 83 [2010]).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4206 The People of the State of New York, Ind. 356N/15
Respondent,

-against-

Michael Macias,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered April 16, 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: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4207N Alan Blattberg, Index 160383/15
Plaintiff-Appellant,

-against-

52 & 58-27th Street, Jackson Heights, Incorporated,
Defendant-Respondent.

_____

Alan Blattberg, New York, appellant pro se.

Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 27, 2016, which, inter alia, granted defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

The affidavit of defendant cooperative apartment's president demonstrated a sufficient basis for personal knowledge, and

otherwise made out a prima facie case on each prong for vacatur of the default judgment (*cf. John v Arin Bainbridge Realty Corp.*, 147 AD3d 454 [1st Dept 2017]; CPLR 317).

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

ENTERED: JUNE 8, 2017

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Manzanet-Daniels, JJ.

4208 In re Chafik Hassane, Dkt. 99/17
[M-1498] Petitioner,

-against-

Chief Clerk of the New York
County Supreme Court,
Respondent.

_____

Chafik Hassane, petitioner pro se.

John W. McConnell, Office of Court Administration, New York (Pedro Morales of counsel), for respondent.

_____

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

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

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4209 The People of the State of New York, Ind. 1448/09
Respondent,

-against-

Osman Osman,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered November 30, 2010, as amended December 14, 2010, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him to a term of 3½ years, unanimously affirmed.

Since, to the extent defendant's comments at sentencing could be construed as a plea withdrawal motion, that motion did not raise any of the issues raised on appeal, defendant's challenges to the voluntariness of his plea do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]; *People v Peque*, 22 NY3d 168, 183 [2013], *cert denied* 574 US –, 135 S Ct 90 [2014]), and we decline to review these unpreserved claims in the interest of

justice. As an alternative holding, we reject them on the merits.

Nothing in the plea allocution record casts doubt on defendant's understanding of the rights he was giving up by pleading guilty. Although defendant had a history of mental illness, his competency had been established through proceedings under CPL article 730, and he coherently answered all the court's questions about the rights he was waiving.

The court was not required to inquire into the existence of a possible psychiatric or renunciation defense, because "[d]efendant said nothing during the plea colloquy or the sentencing proceeding that negated an element of the crime or raised the possibility of a [psychiatric or renunciation] defense" (*People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]). Unlike the situation in *People v Mox* (20 NY3d 936 [2012]), there was nothing in the actual plea allocution that triggered a duty to inquire into an potential psychiatric defense. Defendant's cryptic, nonresponsive use of the phrase "state of mind," immediately followed by an unequivocal declaration that he was "guilty," did not raise a psychiatric defense, and defendant's current assertion that he had a viable renunciation defense is based entirely on information extrinsic to the plea and sentence

proceedings.

Defendant's unpreserved *Peque* claim does not warrant any remedy in the interest of justice (*see e.g. People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]).

Finally, neither defendant's vague expression of dissatisfaction with his attorney during the plea colloquy, which was not accompanied by an explicit request for new counsel, nor his complaint about counsel at sentencing, which was plainly the product of a misunderstanding about credit for time served, was the type of serious complaint that would trigger the court's obligation to make a minimal inquiry (*see People v Porto*, 16 NY3d 93, 100-101 [2010]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4210 Marie Jose Clermont, Index 805240/15
Plaintiff-Respondent,

-against-

Sahar Abdelrehim, et al.,
Defendants,

Chuong Le, M.D.,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Michael J. O'Malley of counsel), for appellant.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 29, 2016, which, insofar as appealed from, granted plaintiff's motion to strike defendant Chuong Le, M.D.'s affirmative defense based on lack of personal jurisdiction and denied Le's cross motion to dismiss the claims against him, unanimously affirmed, without costs.

Plaintiff seeks damages for alleged medical malpractice in connection with spinal surgery that rendered her paralyzed from the waist down.

Le waived his lack of service defense by failing to timely move to dismiss, as required by CPLR 3211(e). If Le had never

filed an answer, CPLR 3211(e) would not have been implicated and the failure to serve him would have rendered all subsequent proceedings null and void (*see Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2d Dept 2013], *lv dismissed* 22 NY3d 947 [2013]). Because he did, thereby appearing in the action, at least on a limited basis (*see* CPLR 320[b]-[c]), he was bound to move to dismiss on the ground of lack of service within sixty days of asserting that defense in his answer (*see Clermont v Abdelrehim*, 144 AD3d 572 [1st Dept 2016]; *cf. Moustafa v Jamaica Hosp. Med. Ctr.*, 304 AD2d 539, 540 [2d Dept 2003]).

Although we reject Le's proposed interpretation of CPLR 3211(e), we nonetheless decline to award sanctions against him.

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4211-
4212 In re Brianna C.,

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

Raidri C.,
Respondent-Appellant,

Commissioner of the Administration
for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Jane Pearl, J.), entered on or about June 21, 2016, which determined, after a hearing, that respondent mother had neglected the subject child, unanimously affirmed, without costs.

The Family Court's finding that the mother neglected the child was supported by a preponderance of the evidence, as the mother misused drugs and alcohol and refused to participate in any rehabilitation program during the relevant period (*see* Family Ct Act § 1012[f][i][B]). The mother's admissions to hospital

staff that she smoked marijuana on the weekends, would drink five to six alcohol beverages a day on a regular basis, would "black out" from drinking, would become violent and aggressive when intoxicated to the point of physically attacking other people, and attempted suicide while intoxicated, constituted prima facie evidence of neglect pursuant to Family Court Act § 1046(a)(iii). The mother failed to rebut the statutory presumption of neglect by presenting proof that she was voluntarily and regularly participating in a recognized rehabilitation program (*see* Family Ct Act § 1046[a][iii]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012]). Given the statutory presumption, the agency was not required to establish the child's impairment or risk of impairment (Family Ct Act § 1012[f][i][B]; *Keoni Daquan A.*, 91 AD3d at 415).

Even in the absence of the application of the presumption, the evidence established that the child was at imminent risk of

harm as a result of the mother's untreated mental illness (Family Ct Act § 1012[f][i][B]; *Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37 [1st Dept 2010]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4213 Hity Barriga, Index 302067/12
Plaintiff-Appellant,

-against-

Stephen Ditmore,
Defendant-Respondent.

_____

Hallock & Malerba, P.C., Deer Park (Allen Goldberg of counsel), for appellant.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about May 31, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates as a matter of law that, when plaintiff lost control of her car on the snowy parkway and slid into defendant's lane a mere half a car length ahead of him, defendant was presented with an emergency not of his making that afforded him little or no time for reasoned consideration, and that he cannot be held liable for failing to avoid a collision with plaintiff's car (*see Caban v Vega*, 226 AD2d 109 [1st Dept 1996]). The unrefuted evidence shows that, although it was snowing heavily, visibility was not a problem. Defendant was

cognizant of the road conditions and maintained a vehicle speed of less than 45 miles per hour even as traffic to his left was passing him. Plaintiff presented no evidence to support her contention that defendant was unable to stop in time to avoid the collision because he was not driving reasonably for the weather conditions.

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

ENTERED: JUNE 8, 2017

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4214 James Frederickson, Index 150859/13
Plaintiff-Respondent,

-against-

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

Verizon New York, Inc., et al.,
Defendants-Appellants.

_____

Conway, Farrell, Curtin & Kelly, P.C., New York (Darrell John of counsel), for appellants.

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel),for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered December 23, 2015, which denied defendants Verizon New York, Inc. and Empire City Subway Company Ltd.'s motion for summary judgment dismissing the complaint and any and all cross claims against them, unanimously modified, on the law, to grant the motion as to Verizon, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of Verizon dismissing the complaint as against it.

The IAS court properly determined in this trip and fall action that issues of fact exist concerning whether an unevenness in the roadway surface caused by the defendants' work in the area

caused plaintiff's accident (*see e.g. Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Glickman v City of New York*, 297 AD2d 220 [1st Dept 2002]). However, Verizon made an unrebutted prima facie showing that it has no potential liability in this matter inasmuch as the plate in question was put in place by its subsidiary, Empire, without the direction or supervision of the parent company. While plaintiff argued in opposition that further discovery was required to determine whether grounds for Verizon's liability might exist, the order should be modified to dismiss the complaint as against Verizon in view of plaintiff's having filed a note of issue before taking Verizon's deposition.

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4215 The People of the State of New York, Respondent, Ind. 356N/15

-against-

Daniel Cedeno, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered December 9, 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: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4216 Sheldon Palmer, et al., Index 155469/14
Plaintiffs-Appellants,

-against-

Murray Hill Mews Owners Corp., et al.,
Defendants-Respondents.

Piken & Piken, New York (Robert W. Piken of counsel), for appellants.

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

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about August 25, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that there was no causal connection between any actions or omissions on their part and the theft of plaintiffs' jewelry from their apartment (*see Sakhai v 411 E. 57th St. Corp.*, 272 AD2d 231 [1st Dept 2000]). Their evidence shows that the employee who plaintiffs allege is the thief did not have access to the key to plaintiffs' apartment and that the computer system that tracks access to keys to residents' apartments did not reveal that anyone obtained access to the key

to plaintiffs' apartment during the relevant period. It also showed that there were no previous incidents of theft that would have put defendants on notice of the likelihood of criminal activity in the building. In opposition, plaintiffs relied on speculation, based on the absence of signs of forced entry and the fact that the subject employee had been disciplined for unrelated conduct, and hearsay, none of which raises a triable issue of fact (*see id.; see also Segev v Trump Parc Condominium*, 215 AD2d 322 [1st Dept 1995]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4217-
4218

Case 4100/11
4100A/11

In re Michael J. Hartofilis
as Preliminary Executor of the
Last Will and Testament of
Niki Sideris, etc.

- - - - -

Agatha Louis, et al.,
Petitioners-Respondents,

-against-

George Kakridas, et al.,
Objectants-Appellants.

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellants.

Coritsidis, Sotirakis & Saketos, PLLC, Great Neck (Antonia T. Constantinou of counsel), for respondents.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered May 13, 2016, granting probate to the Last Will and Testament of decedent Niki Sideris, dated October 19, 2000, and decree, same court and Surrogate, entered October 20, 2016, inter alia, directing appellants George Kakridas, James Kakridas, Konstantinos Kakridas, and Panagiota Kakridas, to transfer ownership and surrender possession of a certain condominium in Athens, Greece and its contents, and certain real property located in Laconia, Greece, to petitioners, executors of the estate, unanimously affirmed, without costs.

The determination whether to dismiss objections and admit a will to probate is within the discretion of the Surrogate's Court and will not be disturbed absent a showing of an abuse of such discretion (*McInerney v McInerney*, 79 AD3d 549 [1st Dept 2010], *lv denied* 16 NY3d 711 [2011]).

The court did not improvidently exercise its discretion in admitting the will to probate, despite the numerous minor errors in the document. Due execution was established by the will's attestation clause, the self-proving affidavit of the attesting witnesses, and the testimony of those witnesses, and of the attorney drafter and notary (*see Matter of West*, 147 AD3d 592 [1st Dept 2017]). As the court noted, the errors were not substantive, did not affect the dispositive portions of the will, and were adequately explained by the attorney drafter, who had no motive to lie (*see Matter of Snide*, 52 NY2d 193, 196 [1981]).

The court properly directed the turnover of decedent's

property in Greece based on objectants' admission that the property belonged to decedent, her primary domicile was New York, and objectants' failure to challenge the court's jurisdiction (*see* SCPA § 2103 [1][a]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4220 In re Anyi M.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

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

_____

Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about April 8, 2016, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal trespass in the second degree, and imposed a conditional discharge until December 31, 2016, unanimously affirmed, without costs.

The court providently exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the seriousness of the offense, which involved a residential burglary and the theft of valuable

property, as well as negative factors in appellant's background. Furthermore, the court offered to reconsider this disposition if appellant complied with the terms of his conditional discharge (*see Matter of Adabel D.*, 127 AD3d 604 [1st Dept 2015]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4221 The People of the State of New York, Ind. 1725/02
Respondent,

-against-

Nicholas P.,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Steven L. Barrett, J.), entered August 11, 2016, 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.

Initially, we reject the People's argument that the appeal should be dismissed on the ground that defendant has been deported (*see People v Edwards*, 117 AD3d 418 [1st Dept 2014]).

The court's upward departure to level three was supported by clear and convincing evidence of an aggravating factor not adequately taken into account by the risk assessment instrument, and which outweighed the mitigating factors cited by defendant (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). While

defendant was incarcerated for the underlying offense, he conspired to murder the victim, her mother, and her brother, in order to prevent them from testifying about his sexual abuse. This supported an inference of defendant's increased risk of sexual recidivism (*see People v Bonum*, 140 AD3d 501 [1st Dept 2016]; *People v Winfield*, 122 AD3d 488 [1st Dept 2014], *lv denied* 24 NY3d 917 [2015]; *People v O'Flaherty*, 23 AD3d 237 [1st Dept 2005], *lv denied* 6 NY3d 705 [2006]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4223 The People of the State of New York, Ind. 2431/01
Respondent,

-against-

Anthony Beaker,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Steven L. Barrett, J.), entered February 13, 2014, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 15 points under the risk factor for drug or alcohol abuse, based on the presentence report regarding an earlier conviction and information in the case summary (*see e.g. People v Johnson*, 77 AD3d 548 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). In any event, regardless of whether defendant's correct point score is 130 or 115 points, he remains a level three offender, and we find no basis for a

downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The fact that defendant has been deported is not an appropriate basis for such a departure (*see e.g. People v Zepeda*, 124 AD3d 417 [1st Dept 2015], *lv denied* 25 NY3d 902 [2015]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, JJ.

4224 The People of the State of New York, Ind. 2530/12
Respondent,

-against-

Lino Rios,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Christine DiDomenico 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 (Marcy L. Kahn, J. at trial and original sentencing; Bonnie G. Wittner, J. at resentencing), rendered September 19, 2016,

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: JUNE 8, 2017

CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4225 The People of the State of New York ex rel. Michelle Fox, on behalf of Samy Martinez-Jacquez, Petitioner-Appellant, Index 451658/16

-against-

Joseph Ponte, etc., Respondent-Respondent.

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

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

Appeal from judgment (denominated an order), Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about September 8, 2016, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This challenge to a bail court's refusal, on the ground of insufficient collateral, to approve a bail bond is moot because the bail court has entered a subsequent order that increased the amount of bail, and rendered the prior bond inapplicable. We do not find that an exception to the mootness doctrine should apply (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715

[1980]). Furthermore, because the existence of the superseding order would make it impossible to grant petitioner immediate release, habeas corpus relief would not be available (*see People ex rel. Douglas v Vincent*, 50 NY2d 901 [1980]).

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

ENTERED: JUNE 8, 2017

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Gesmer, JJ.

4226 The People of the State of New York, Ind. 3971/09
Respondent,

-against-

Joseph Diaz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered December 10, 2014, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 25 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 determinations concerning credibility and identification. The evidence establishing that defendant fatally shot a bystander during a gunfight included reliable identifications by two eyewitnesses, evidence of motive, and a surveillance videotape that, while not depicting the shooting, tended to corroborate the People's theory of the case.

Although a third witness testified that the assailant was actually another man involved in the incident, the jury could have reasonably rejected her testimony.

The crime scene evidence that defendant claims was admitted in violation of his right of confrontation was not testimonial, since it "[did] not link the commission of the crime to a particular person" (*People v John*, 27 NY3d 294, 315 [2016]; *see also People v Freycinet*, 11 NY3d 38, 42 [2008]; *People v Acevedo*, 112 AD3d 454, 455 [1st Dept 2013], *lv denied* 23 NY3d 1017 [2014]). In any event, any error in admitting the crime scene report and diagrams prepared by a nontestifying officer was harmless under the standard for constitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]), because evidence showing the locations where the officer found cartridge cases and other ballistic evidence shed little or no light on any of the disputed issues at trial, and there is no reasonable possibility that this evidence affected the verdict.

The court providently exercised its discretion in permitting a detective to give brief, limited testimony that he interviewed an alternative suspect in the shooting, and another witness, and that, based on the investigation, the alternative suspect was not arrested. This testimony completed the narrative and provided

the jury with relevant background information regarding the police investigation (*see People v Tosca*, 98 NY2d 660 [2002]). The detective did not reveal the content of these interviews, or convey any express or implied opinion that defendant was guilty. Furthermore, both the alternative suspect and the other witness testified at trial.

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 single error, in accidentally permitting some inadmissible evidence to enter the case, deprived him of a fair trial or affected the outcome of the case.

By completely waiving all cross-examination of a witness who had asserted his Fifth Amendment privilege regarding some of the prosecutor's questions on direct examination, defendant waived, or failed to preserve, his claim that his right to cross-examine this witness was unconstitutionally limited by the witness's assertion of the privilege or by the court's prospective ruling on the permissible scope of cross-examination. We decline to review defendant's claim in the interest of justice. As an alternative holding, we also reject it on the merits. Since

there was not even an attempt at cross-examination, it is impossible to determine whether the witness's anticipated assertion of his right against self-incrimination would have undermined the process to such a degree that meaningful cross-examination within the intent of the Confrontation Clause no longer existed (*see United States v Owens*, 484 US 554, 562 [1988]), and, if so, what remedy was necessary (*see People v Vargas*, 88 NY2d 363, 380 [1996]). Defendant has also not established that he was prejudiced by the witness's invocation of the privilege on direct examination. In any event, the testimony of this witness was nonincriminating and cumulative, and there was no reasonable possibility that it contributed to the conviction.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 8, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

4398 In re Richard Dietl, Index 100082/17
Petitioner-Appellant,

-against-

The Board of Elections in the City of New York,
Respondent-Respondent.

_____

Law Office of Martin E. Connor, Brooklyn (Martin E. Connor of counsel), for appellant.

Raphael Savino and Steven H. Richman, New York, for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered May 12, 2017, which denied the petition to correct a voter registration, and dismissed this proceeding brought pursuant to Election Law § 16-108, unanimously affirmed, without costs.

The court correctly found that, by checking two different political party affiliations on his application to register as a new voter in the City of New York, petitioner failed to enroll in any party (Election Law § 5-302[3]). We reject petitioner's argument that respondent should have enrolled him in the party in

which he had previously been enrolled, in Nassau County (*see* Election Law §§ 5-208[4]; 5-304[4]; *Matter of Coopersmith v Ortutay*, 76 AD3d 651 [2d Dept 2010]).

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

ENTERED: JUNE 8, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3648-
3649 In re Nonhuman Rights Project, Inc., on behalf of Tommy,
Petitioner-Appellant,

-against-

Patrick C. Lavery, etc., et al.,
Respondents-Respondents.

- - - - -

Justin Marceau, Samuel R. Wiseman, Laurence H. Tribe and Richard L. Cupp Jr.,
Amici Curiae.

- - - - - -

In re Nonhuman Rights Project, Inc., on behalf of Kiko,
Petitioner-Appellant,

-against-

Carmen Presti, etc., et al.,
Respondents.

- - - - -

Justin Marceau, Samuel R. Wiseman and Laurence H. Tribe,
Amici Curiae.

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150149/16

_____

Law Office of Elizabeth Stein, New Hyde Park (Elizabeth Stein of counsel), for appellant.

Justin Marceau, Denver, CO, amicus curiae pro se.

Samuel R. Wiseman, Tallahasse, FL, amicus curiae pro se.

Laurence H. Tribe, Cambridge, MA, amicus curiae pro se.

Richard L. Cupp, Jr., Malibu, CA, amicus curiae pro se.

_____

Judgment (denominated an order), Supreme Court, New York

County (Barbara Jaffe, J.), entered January 29, 2016, and judgment, same court and Justice, entered July 8, 2016, affirmed, without costs.

Opinion by Webber, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Angela M. Mazzarelli
Sallie Manzanet-Daniels
Paul G. Feinman
Troy K. Webber, JJ.

3648-3649
Index 162358/15
150149/16

_____x

In re the Nonhuman Rights Project, Inc.,
on behalf of Tommy,
Petitioner-Appellant,

-against-

Patrick C. Lavery, etc., et al.,
Respondents-Respondents.

- - - - -

Laurence H. Tribe, Richard L. Cupp Jr.
and Samuel R. Wiseman,
Amici Curiae.

- - - - -

In re the Nonhuman Rights Project, Inc.,
on behalf of Kiko,
Petitioner-Appellant,

-against-

Carmen Presti, etc., et al.,
Respondents.

- - - - -

Justin Marceau, Samuel R. Wiseman
and Laurence H. Tribe,
Amici Curiae.

_____x

Petitioner appeals from the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko, a chimpanzee, to a primate sanctuary, and the judgment (denominated an order) of the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy, a chimpanzee.

Law Office of Elizabeth Stein, New Hyde Park (Elizabeth Stein of counsel), and Steven M. Wise, Coral Springs, FL, of the bar of the State of Massachusetts, admitted pro hac vice, of counsel, for appellant.

Justin Marceau, Denver, CO, amicus curiae pro se.

Samuel R. Wiseman, Tallahasse, FL, amicus curiae pro se.

Laurence H. Tribe, Cambridge, MA, amicus curiae pro se.

Richard L. Cupp, Jr., Malibu, CA, amicus curiae pro se.

WEBBER, J.

Petitioner seeks reversal of the motion court's judgment declining to extend habeas corpus relief to two adult male chimpanzees, Tommy and Kiko.

Petitioner is a Massachusetts nonprofit corporation whose stated mission is "to change the common-law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them" to certain fundamental rights which include entitlement to habeas relief.[1]

The petition as to Tommy was brought in December 2015. It is alleged that Tommy, who is owned by respondents Circle L Trailer Sales, Inc. and its officers, is in a cage in a warehouse in Gloversville, New York. The petition as to Kiko was brought in January 2016. Kiko, who is owned by respondents the Primate Sanctuary, Inc. and its officers and directors, is allegedly in a cage in a cement storefront in a crowded residential area in

[1]Assuming habeas relief may be sought on behalf of a chimpanzee, petitioner undisputedly has standing pursuant to CPLR 7002(a), which authorizes anyone to seek habeas relief on behalf of a detainee.

Niagara Falls, New York.

These are not the first petitions for habeas relief filed by petitioner on behalf of Tommy and Kiko. In December 2013, petitioner filed a petition on behalf of Kiko, in Supreme Court, Niagara County. There, the trial court declined to sign an order to show cause seeking habeas relief and the Fourth Department affirmed (*Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]).

Also in December 2013, petitioner brought a habeas proceeding on behalf of Tommy, in Supreme Court, Fulton County. There, the trial court declined to sign an order to show cause and the Third Department affirmed the decision (*People ex rel. Nonhuman Rights Project, Inc. v Lavery*, 124 AD3d 148 [3d Dept 2014], *lv denied* 26 NY3d 902 [2015]).

Petitioner has also brought a habeas petition seeking the release of two chimpanzees not at issue here, Hercules and Leo, who, according to petitioner are confined for research purposes, at the State University of New York at Stony Brook. In that proceeding, Supreme Court, Suffolk County, declined to sign an order to show cause and in 2014, the Second Department dismissed petitioner's appeal (*Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434(U) [2d Dept 2014]).

Without even addressing the merits of petitioner's

arguments, we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances (*see People ex rel. Glendening v Glendening*, 259 App Div 384, 387 [1st Dept 1940], *affd* 284 NY 598 [1940]; *People ex rel. Woodard v Berry*, 163 AD2d 759 [3d Dept 1990], *lv denied* 76 NY2d 712, 715 [1990]; *see also People ex rel. Lawrence v Brady*, 56 NY 182, 192 [1874]).

CPLR 7003(b) permits a court to decline to issue a writ of habeas corpus if

> "the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it."

Petitioner has filed four identical petitions in four separate state courts in four different counties in New York. Each petition was accompanied by virtually the same affidavits, all attesting to the fact that chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities. Petitioner has failed to present any new information or new ground not previously considered. The "new" expert testimony presented by petitioner continues to support its basic position

that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans.

Any new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in *People ex rel. Nonhuman Rights Project, Inc. v Lavery* (124 AD3d at 148). In declining to extend habeas relief to chimpanzees, the Court in *Lavery* did not dispute the cognitive or social capabilities of chimpanzees. Nor, did it, as argued by petitioner, take judicial notice that chimpanzees cannot bear duties and responsibilities. Rather, it concluded:

> "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights -- such as the fundamental right to liberty protected by the writ of habeas corpus -- that have been afforded to human beings" (*id.* at 152).

The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them "persons" for purposes of CPLR article 70. This position is without legal support or legal precedent.

In support of its argument, petitioner submits several expert affidavits, including one by Dr. Jane Goodall, the well-known primatologist, purportedly showing, based on academic

research and hands-on experience, that chimpanzees have many human-like capabilities. These include recognizing themselves in reflections; setting and acting toward goals such as obtaining food; undergoing cognitive development with brains having similar structures to those of humans; communicating about events in the past and their intentions for the future, such as by pointing or using sign language; exhibiting an awareness of others' different visual perspectives, such as by taking food only when it is out of their competitors' line of sight; protecting others in risky situations, such as when relatively strong chimpanzees will examine a road before guarding more vulnerable chimpanzees as they cross the road; deceiving others (implying that they are able to anticipate others' thoughts); making and using complex tools for hygiene, socializing, communicating, hunting, gathering, and fighting; counting and ordering items using numbers; engaging in moral behavior, such as choosing to make fair offers and ostracizing chimpanzees who violate social norms; engaging in collective behavior such as hunting in groups of chimpanzees adopting different roles; showing concern for the welfare of others, particularly their offspring, siblings, and even orphans they adopt; protecting territory and group security; resolving conflicts; and apologizing.

"The common law writ of habeas corpus, as codified by CPLR

article 70, provides a summary procedure by which a 'person' who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention" (*id.* at 150, quoting CPLR 7002 [a]). While the word "person" is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees. While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal (*see e.g. United States v Mett*, 65 F3d 1531 [9th Cir 1995], *cert denied* 519 US 870 [1996]; *Waste Mgt. of Wisconsin, Inc. v Fokakis*, 614 F2d 138 [7th Cir 1980], *cert denied* 449 US 1060 [1980]; *Sisquoc Ranch Co. v Roth*, 153 F2d 437, 441 [9th Cir 1946]).

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally

accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense" (CPL 730.10[1]). While in an amicus brief filed by Professor Laurence H. Tribe of Harvard Law School, it is suggested that it is possible to impose legal duties on nonhuman animals, noting the "long history, mainly from the medieval and early modern periods, of animals being tried for offenses such as attacking human beings and eating crops," none of the cases cited took place in modern times or in New York. Moreover, as noted in an amicus brief submitted by Professor Richard Cupp, nonhumans lack sufficient responsibility to have any legal standing, which, according to Cupp is why even chimpanzees who have caused death or serious injury to human beings have not been prosecuted.

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community.

Similarly, petitioner's argument that the word "person" is

simply a legal term of art is without merit. As evidence, petitioner points to the doctrine of corporate personhood. In support of this argument, petitioner cites *Santa Clara County v South Pac. RR. Co.* (118 US 394 [1886]), where the United States Supreme Court reaffirmed that a corporation is a person for purposes of the Fourteenth Amendment and, thus, its property cannot be taxed differently from the property of individuals. The underlying reasoning was that the corporation's property was really just the property of the individual shareholders who owned the corporation, and therefore should be protected in the same manner. Again, an acknowledgment that such laws are referenced to humans or individuals in a human community.

Petitioner's additional argument that "person" need not mean "human," as evidenced by a river in New Zealand designated as a legal person owning its own riverbed pursuant to a public agreement with indigenous peoples of New Zealand and pre-independence Indian court decisions recognizing various sacred entities as legal persons is not relevant to the definition of "person" here in the United States and certainly is of no guidance to the entitlement of habeas relief by nonhumans in New York.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus

does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no adequate facilities to house [them] in proximity to the [c]ourt." Instead, petitioner requests that respondents be ordered to show "why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary." Petitioner submits an affidavit from the Executive Director of Save the Chimps stating that this organization agrees to provide a permanent sanctuary to any and all chimpanzees released by court order. Save the Chimps maintains that the warm, humid climate in southern Florida is "ideal for chimpanzees," as it is similar to the species' native Africa.

Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court (*see Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d at 1334; *compare People ex rel. Dawson v Smith*, 69 NY2d 689 [1986], *with People ex rel. Brown v Johnston*, 9 NY2d 482 [1961]).

Seeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim. Petitioner's reliance upon *Brown v Johnston* (9 NY2d at 482) as standing for an opposite result is misplaced. In *Brown*, the Court of Appeals found that the writ was properly sought by an inmate who had been transferred from prison to "an institution for custody of prisoners who are declared insane," based on his contention that he was "sane" and should accordingly be returned to prison (*Dawson v Smith*, 69 NY2d at 691). "The confinement in *People ex rel. Brown v Johnston* . . . was in an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court, and was not within the specific authorization conferred on the Department of Correctional Services by that sentence" (*id.*). By contrast, in *Dawson*, the Court found that habeas relief was properly denied as petitioner did "not seek his release from custody in the facility, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services [was] expressly authorized to impose on lawfully sentenced prisoners committed to its custody" (*id.*). This is analogous to the situation here.

While petitioner's avowed mission is certainly laudable, the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process (*see Lewis v Burger King,* 344 Fed Appx 470, 472 [10th Cir 2009], *cert denied* 558 US 1125 [2010]).

Accordingly, the judgment (denominated an order) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 29, 2016, declining to sign an order to show cause seeking the transfer of Kiko to a primate sanctuary, and the judgment (denominated an order) of the same court and Justice, entered July 8, 2016, effective nunc pro tunc as of December 23, 2015, declining to sign an order to show cause seeking such relief on behalf of Tommy, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 8, 2017

CLERK