SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 28, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Webber, Oing, Moulton, JJ.

4589 US Bank National Association, etc., Index 380053/14
Plaintiff-Respondent,

-against-

Glenwall Richards also known as
Glenwall H. Richards,
Defendant-Appellant,

Consolidated Edison Company, et al.,
Defendants.

____

Petroff Amshen LLP, Brooklyn (James Tierney of counsel), for appellant.

Gross Polowy, LLC, Westbury (Stephen J. Vargas of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 16, 2015, which denied defendant Glenwall Richards's motion to vacate an order granting summary judgment in plaintiff's favor, unanimously reversed, on the law, without costs, the motion granted, and the case remanded to Supreme Court for further proceedings.

In this mortgage foreclosure action, Supreme Court granted

summary judgment to plaintiff on default and subsequently denied Glenwall Richards's (borrower) motion to vacate the default. This was error as the borrower demonstrated both an excusable default and meritorious defenses under CPLR 5015(a)(1).

The borrower's prior counsel acknowledged that he failed to submit opposition to the summary judgment motion after stipulating to adjourn that motion. However, counsel moved to vacate the default less than one month after Supreme Court's decision was entered. Absent a pattern of dilatory behavior, the default was an excusable, one-time oversight, resulting in no prejudice (*see e.g. Price v Polisner*, 172 AD2d 422, 423 [1st Dept 1991]; *Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]; *Cheri Rest. Inc. v Eoche*, 144 AD3d 578, 580 [1st Dept 2016]).

This State also has a strong public policy for deciding cases on the merits (*see e.g. Bobet v Rockefeller Ctr., N., Inc.*, 78 AD3d 475, 475 [1st Dept 2010]). While Supreme Court stated that it reviewed all evidence submitted in denying the borrower's motion to vacate his default, it did not discuss any evidence or articulate its reasoning. Additionally, Supreme Court initially granted summary judgment in accordance with a boilerplate order.

The borrower raised a colorable notice defense regarding

plaintiff’s service of the mortgage’s 30-day default notice and the requisite 90-day notice under RPAPL 1304.[1] While copies of both notices were attached to the summary judgment motion, including a copy of the 90-day notice bearing a certified mailing number and bar code, the affidavit of plaintiff’s servicing agent failed to indicate that she had familiarity with standard office mailing procedures (*see e.g. U.S. Bank N.A. v Brjimohan*, 153 AD3d 1164, 1165-1166 [1st Dept 2017]).

The borrower also raised a meritorious standing defense. A plaintiff proves that it has standing to commence a mortgage foreclosure action by showing that it was both the holder or assignee of the mortgage and the note when the action was commenced (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523 [1st Dept 2016]). A written assignment of the note or physical delivery of the note is sufficient to establish standing (*see US Bank N.A. v Madero*, 80 AD3d 751, 753 [2d Dept 2011]). It is the

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[1]When the action was commenced, plaintiff’s process server was informed by a tenant at the premises that the borrower did not reside there and that the borrower is the landlord and collects rent on a monthly basis. This decision is without prejudice to plaintiff’s argument that the borrower was not entitled to any notice under RPAPL 1304 because he never occupied the premises as his principal dwelling and, therefore, the loan was not incurred by the borrower “primarily for personal, family, or household purposes” (RPAPL 1304[6][ii]).

note, and not the mortgage, that is the dispositive instrument that conveys standing to foreclose (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). Conclusory boilerplate statements, such as a bald assertion that the plaintiff is the holder of the note, will not suffice (*Wells Fargo Bank, N.A.*, 139 AD3d at 524).

Plaintiff seeks to foreclose the principal sum of $327,828.34, but there are gaps in its proof. According to the affidavit of plaintiff's servicing agent, plaintiff is the mortgagee of a consolidated and/or modified mortgage dated January 13, 2009, in the original principal amount of $327,828.34, made by the borrower in favor of Countrywide Home Loans Servicing LP. Plaintiff also asserts that the original note, dated March 26, 2004, made by the borrower in favor of Argent Mortgage Company, LLC in the amount of $289,000.00, was assigned to it, but was lost. There is no proof of such assignment. Nor does the mortgage assignment to plaintiff contain language stating that the note was endorsed to the assignee, which language was contained in the prior mortgage assignments from Argent to Ameriquest Mortgage Company and from Ameriquest to WM Specialty Mortgage LLC. There is also no evidence that the loan modification agreement, securing the

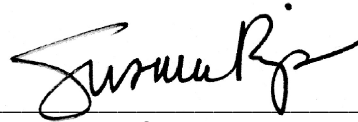
higher amount of $327,828.34, was assigned to plaintiff.

There is also a question as to the sufficiency of the content of the lost note affidavit submitted on summary judgment. The affidavit is made by a vice president of JPMorgan Chase Bank National Association, based on UCC 3-804, which provides that a suit may be brought by the owner of a lost instrument, "upon due proof of its ownership, the facts which prevent [the] production of the instrument and its terms." The affidavit states, in conclusory language, that based on a review of Chase's and JPMorgan Chase Custody Services, Inc.'s business records, a thorough and diligent search was made; the note was lost but not cancelled or transferred to another party; and Chase is the owner of the note. It does not state when the search was made or by whom, and does not indicate approximately when the note was lost. Therefore, the borrower has demonstrated a potentially meritorious standing defense (*see e.g. US Bank N.A.*, 80 AD3d 751

[summary judgment relating to certain borrowers should have been denied because the bank failed to demonstrate, prima facie, that it had standing as the lawful holder or assignee of the note when it commenced the action]).

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

ENTERED: NOVEMBER 28, 2017



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Richter, J.P., Manzanet-Daniels, Mazzarelli, Moskowitz, JJ.

16250 The People of the State of New York, Respondent, Ind. 944/09

-against-

Keith Fagan, Defendant-Appellant.

____

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

Keith Fagan, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Clara Salzberg of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered July 6, 2010, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 18 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 16 years to life, and otherwise affirmed.

At the sentencing hearing, defense counsel did not challenge the constitutionality of defendant's 2000 New York County conviction for attempted robbery, which had been used as a predicate in adjudicating defendant a persistent violent felony

offender. It was undisputed that at the 2000 plea proceeding, defendant had not been informed that his sentence would include a period of postrelease supervision (*see People v Catu*, 4 NY3d 242 [2005]).

By order dated April 3, 2014, we unanimously modified to the extent of vacating the sentence and remanding in accordance with our opinion, finding, inter alia, that *Catu* applied retroactively to invalidate the plea, and that defendant was entitled to have his persistent felony offender status litigated with proper assistance of counsel, at a new adjudication and sentencing (116 AD3d 451 [2014]). We found that defendant's purported waiver of his right to appeal was invalid. We found defendant's excessive sentence claim to be academic because we were ordering a plenary sentencing proceeding.

On remand, Supreme Court rejected the People's argument that defendant should remain a persistent violent felony offender in light of the 2000 conviction. Instead, the court adjudicated defendant based solely on a 1980 conviction for criminal sexual assault in the first degree, and sentenced him as a second violent felony offender to a term of 15 years, with 5 years PRS. The People made a motion for relief under 440.40, which was denied. We unanimously affirmed (134 AD3d 411 [2015]).

On appeal, the Court of Appeals reversed, holding that *Catu* does not apply retroactively in enhanced sentencing proceedings (*People v Smith*, 28 NY3d 191 [2016]). The Court noted that defendant was in essence seeking retroactive application of *Catu* to disqualify his predicate offense, which was not permissible. The Court accordingly ordered that the resentence be vacated and the original sentence (i.e., 18 years to life) reinstated.

We are now obliged, by virtue of the Court of Appeals' decision, to address defendant's request for a reduction in sentence.

Since we previously determined that defendant's purported waiver of the right to appeal was invalid, there is no impediment to our review.

Defendant accepted responsibility for his crime and apologized to the victims in open court. Defendant notes that

although he told the victims he had a gun, he was not armed and no one was injured in the brief encounter, during which only $4 and a pack of cigarettes were taken from the victims. Defendant will be over 65 years old when he is finally eligible for parole.

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

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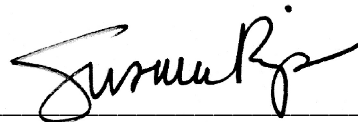

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Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4493 The People of the State of New York, Ind. 6401/09
Respondent,

-against-

Jaime Lopez-Mendoza,
Defendant-Appellant.

____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered February 15, 2011, as amended February 22, 2011, convicting defendant, after a jury trial, of rape in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

Assuming without deciding that the introduction of DNA reports and related expert testimony violated defendant's right of confrontation, the admission of the testimony and reports was harmless beyond a reasonable doubt (*see People v Douglas*, 4 NY3d 777, 779 [2005]; *People v Crimmins*, 36 NY2d 230, 240-241 [1975]). The DNA evidence established only that defendant had subjected the complainant to sexual contact — a fact defendant admitted when he told the arresting officer that he had sex with the

complainant.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998, 999-1000 [1982]). Defendant asserts that his trial counsel failed to adequately review video surveillance evidence that the People turned over before trial. As a result of this failure, defendant argues, trial counsel promised the jury in his opening statement that defendant would testify, but when it became apparent that the video surveillance would have refuted defendant's testimony, counsel reversed course and did not put his client on the stand.

Despite defendant's contentions to the contrary, we cannot conclude simply by reviewing the trial record that trial counsel was ineffective (*Love*, 57 NY2d at 1000). The brief exchange in which the video surveillance was discussed by trial counsel, the People, and the trial court is insufficient to establish that trial counsel promised defendant's testimony in his opening statement because he did not adequately review the video surveillance before trial. In addition, while defendant notes that he was offered a sentence of five years incarceration by the trial court before starting pretrial hearings, the record before

us is insufficient to determine whether trial counsel's alleged error caused defendant to reject that offer.

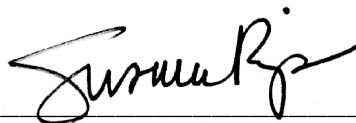
The trial court properly admitted carpet fiber evidence, because the circumstances provide "reasonable assurances" that the carpet sample that was used to compare to the fibers found on defendant's pants were from the same carpet that was in the room at the time of the incident (*see People v Julian*, 41 NY2d 340, 343 [1977]). Defendant's argument to the contrary is speculative, and at best goes to weight rather than admissibility.

Defendant's challenge to the prosecutor's summation is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the remarks at issue did not constitute comment on defendant's failure to testify.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 28, 2017



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Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4754-4755 The People of the State of New York, Respondent, Ind. 3886/10 976/13

-against-

Tamarkqua Garland,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered May 8, 2015, convicting defendant after a jury trial, of two counts of assault in the first degree and one count of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 14 years, affirmed. Judgment, same court (Peter J. Benitez, J. at suppression hearing; Lester Adler, J. at plea and sentencing), rendered March 2, 2016, convicting defendant upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree, and sentencing him to a concurrent term of 1½ years, unanimously affirmed.

With regard to the trial conviction, the court properly denied defendant's speedy trial motion. Defendant did not meet his burden of demonstrating that the People’s statement of readiness, which is “presumed truthful and accurate,” was illusory (*People v Brown*, 28 NY3d 392, 405 [2016]). The record supports the reasonable inference that the prosecutor had reestablished contact with the complainant at the time that he filed the off-calendar statement of readiness.

The court properly denied defendant’s suppression motion. As to the warrantless arrest of defendant, the People showed that the officers had obtained voluntary consent to enter the apartment from a person with the requisite authority (*see People v Cosme*, 48 NY2d 286, 290 [1979]). Neither the testimony of defendant nor the testimony of the detective gives rise to an inference that the person had submitted to coercion by the police (*see People v Gonzalez*, 39 NY2d 122, 128 [1976]).

Accepting the hearing court's credibility determinations (*see People v Prochilo*, 41 NY2d 759 [1977]), the People also met their burden of demonstrating that defendant waived his *Miranda* rights and made the written statement voluntarily. The court properly permitted the People to cross-examine defendant on the substance of the written statement, as defendant opened the door

to the inquiry by testifying on direct examination that the detective interrogating him had rejected his initial statement and coerced him into writing the subsequent inculpatory statement (*see People v Darrett*, 2 AD3d 16, 20-21 [1st Dept 2003]; *People v Huntley*, 46 Misc 2d 209, 211-212 [Sup Ct, NY County 1965], *affd* 27 AD2d 904 [1st Dept 1967], *affd* 21 NY2d 659 [1967]).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The element of serious physical injury (Penal Law § 10.00[10]) required for the assault convictions (Penal Law § 120.10[1], [3]) was established by evidence showing that four years after the complainant was struck by a bullet, he still felt pain and the bullet fragments in his leg and could not engage in sports at the same level as before the incident. This proof sufficiently shows a protracted impairment of health or protracted impairment of the function of a bodily organ to support a finding of serious physical injury (*see* Penal Law § 10.00[10]; *People v Rosa*, 112 AD3d 551 [1st Dept 2013], *lv denied* 22 NY3d 1202 [2014]; *People v Messam*, 101 AD3d 407 [1st Dept 2012], *lv denied* 20 NY3d 1102 [2013]; *People v Corbin*, 90 AD3d 478, 479 [1st Dept 2011], *lv denied* 19 NY3d 972 [2012]). Defendant's intent to cause such injury (Penal Law §

120.10[1]) is established by his written statement admitting that he fired the gun five times into a crowd of people (*see People v Hernandez*, 233 AD2d 273 [1st Dept 1996], *lv denied* 89 NY2d 986 [1997]). His written confession also establishes the element of possession of a loaded firearm required for the weapon possession conviction (*see* Penal Law § 265.03[3]).

By failing to object to any of the alleged prejudicial comments by the prosecutor, defendant failed to preserve his challenges to the People's summation (*see People v Flagg*, 149 AD3d 513, 514-515 [1st Dept 2017], *lv denied* 29 NY3d 1079 [2017]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The bulk of the challenged remarks were either fair response to defense counsel's arguments on summation or fair comment on the evidence, and any improprieties were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Regarding defendant's plea conviction, the record shows that defendant's waiver of his right to appeal was not knowing, intelligent and voluntary. Moreover, the waiver contains language that has been found by this Court to render a waiver

unenforceable (*see People v Powell*, 140 AD3d 401 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]). Nevertheless, defendant's challenge to the suppression ruling is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Since we do not find the officer's testimony to be manifestly untrue, contrary to common experience, self-contradictory, or tailored, we decline to disturb the court's conclusion that the testimony was credible (*see People v Sanchez*, 248 AD2d 306 [1st Dept 1998], *lv denied* 92 NY2d 928 [1998], 92 NY2d 930 [1998]; *People v Jordan*, 242 AD2d 254, 255 [1st Dept 1997], *lv denied* 91 NY2d 875 [1997]). The officer's testimony that, while apprehending another individual, he saw defendant sitting on the stairs with a scale and drugs supports the court's finding of probable cause to arrest defendant and seize the drugs.

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

In my view, the evidence at trial was legally insufficient to establish the element of "serious physical injury," defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law [PL] § 10.00[10]), and the convictions for assault in the first degree under PL §§ 120.10(1) and 120.10(3) should be reversed.

The charges stem from an incident on the evening of October 9, 2010, when, during a street brawl, defendant shot a gun multiple times toward a group of people, and struck 15-year-old bystander Lloyd B. in the leg.

Lloyd testified that after being shot, he returned to his apartment building. He initially thought he had been struck with a BB gun because "the bullet hole was so little." Later on that day, he went to the hospital, where police officers informed him that he had been shot with a gun. He reiterated that he hadn't realized, since the "[bullet] hole [wa]s so little," explaining that it "didn't even look like a bullet hole. I didn't know what it was." Lloyd received a tetanus shot and antibiotics at the hospital, but no pain medication. He initially rated his pain a

7 out of 10; two hours later, he rated his pain 0 out of 10. He did not undergo surgery. X rays showed no fractures or neurovascular damage. He denied any numbness, tingling or motor deficit, indicators that he had not suffered any acute damage.

Lloyd has retained bullet fragments within the left thigh; there was no evidence that the fragments caused any damage or endangered his life in any way. The People's expert testified that the fragments were "maybe" in the vicinity of the femoral artery. She explained that in trauma situations it was protocol to leave such fragments in an extremity so as not to cause possible further damage.

The People's expert was provided with no records beyond 2010, and thus was unable to opine as to whether Lloyd had a permanent disability.

Lloyd used crutches intermittently for a period of two months following the shooting. He has since resumed an active lifestyle. Although he once played on the football team, he now plays on a recreational basis. He testified that four years after the incident, he still had what he characterized as "little problems," such as soreness at night and "[w]hen it rains." He maintained at trial that he could feel the bullet fragments in his leg.

Lloyd was never in serious apprehension of death within the meaning of the statute, nor does the prosecution contend as much. Rather, the prosecution maintains that he suffered "serious and . . . protracted impairment of health" because he used crutches for two months, has intermittent pain, and has bullet fragments lodged near his femoral artery.

These are not bases for finding that Lloyd suffered "serious physical injury" as contemplated in the statute. The temporary use of crutches does not indicate "serious physical injury" (*see People v Ham*, 67 AD3d 1038, 1040 [3d Dept 2009 [conclusory assertion of use of crutches, pain medication, and physical therapy by gunshot victim did not support finding of "serious physical injury"]). Slight pain upon exertion or while running does not constitute "serious physical injury" (*see People v Daniels*, 97 AD3d 845, 847 [3d Dept 2012] [sore knee once in a while insufficient, where victim was able to resume playing soccer], *lv denied* 20 NY3d 931 [2012]), nor do complaints of intermittent pain associated with the weather (*see People v Castillo*, 199 AD2d 276 [2d Dept 1993]). Lloyd does not experience "persistent pain so severe as to cause protracted impairment of health" (*People v Romero*, 147 AD3d 1490, 1491-1492 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]).

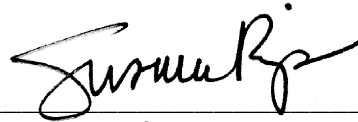
There is no proof of injury connected to the bullet fragments, nor is there proof that Lloyd's life was endangered by the presence of the fragments (*compare People v Horton*, 9 AD3d 503, 505 [3d Dept 2004], *lv denied* 3 NY3d 707 [2004] [no "serious physical injury" where surgeon declined to remove bullet fragments lodged near the spinal cord], *with People v Walker,* 279 AD2d 696, 697-698 [3d Dept 2001], *lv denied* 96 NY2d 869 [2001] [finding "serious physical injury" where a bullet fragment near the victim's spine had in fact caused paralysis and life-threatening injury and necessitated long-term rehabilitation]). Notably, the People's expert was unable to opine as to whether Lloyd had suffered permanent deficits associated with the injury.

The fact that Lloyd suffered a gunshot wound does not ipso facto establish that he suffered a "serious physical injury" (*see e.g. People v Ekwebalu*, 131 AD3d 982, 984 [2d Dept 2015], *lv denied* 26 NY3d 1108 [2016]).

Because I dissent on the above basis, I express no opinion concerning the proper remedy for the People’s failure to establish the “serious physical injury” element of assault,[2] or any of the other arguments advanced by defendant on appeal.

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

ENTERED: NOVEMBER 28, 2017



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[2]Proper remedies might include reducing the conviction to a lesser included offense (*see Romero*, 147 AD3d at 1491; *People v Snipes*, 112 AD2d 810 [1st Dept 1985]).

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4761-
4762N Ronald Prevost, et al.,
Plaintiffs-Respondents,

Index 107367/11

-against-

One City Block LLC,
Defendant-Appellant,

Island Fire Sprinkler, Inc.,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]
____

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellant.

Jaroslawicz & Jaros PLLC, New York (Norman E. Frowley of counsel), for Ronald Prevost and Melissa Prevost, respondents.

Fabiani Cohen & Hall, LLP, New York (Allison Snyder of counsel), for Island Fire Sprinkler, Inc., respondent.
____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 2, 2016, which, to the extent appealed from as limited by the briefs, denied defendant/third-party plaintiff One City Block LLC's (One City) motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241(6) claims and common-law negligence claim as against it, denied One City's motion for summary judgment on its claims against defendant/third-party defendant Island Fire Sprinkler, Inc.

(Island Fire) for contractual and common-law indemnification and breach of contract for failure to procure insurance, and granted Island Fire's motion for summary judgment dismissing One City's claims against it for contractual indemnification and breach of contract for failure to procure insurance, unanimously modified, on the law, to grant One City's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, to grant One City's motion for summary judgment on its claim for contractual indemnification by Island Fire, and to deny Island Fire's motion for summary judgment dismissing One City's claim against it for contractual indemnification and breach of contract for failure to procure insurance, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about May 1, 2017, which, to the extent appealed from as limited by the briefs, denied One City's motion for post-note-of-issue discovery, unanimously affirmed, without costs.

Plaintiff Ronald Prevost (plaintiff), a laborer employed by nonparty general contractor Benchmark Builders, Inc. (Benchmark), was injured while working on property owned by One City. He was working for Benchmark on a construction project for nonparty Google Inc. (Google), One City's parent company and tenant.

Plaintiff was responsible for cleaning and maintaining the work site to which he was assigned. Plaintiff alleges that he was injured when he slipped on a loose piece of sprinkler pipe lying on the floor. He fell onto his shoulder, allegedly causing damage to it requiring ongoing treatment and a possible shoulder replacement.

Plaintiff and his wife commenced an action against One City, asserting claims for common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). One City then commenced a third-party action against Island Fire, the subcontractor responsible for installing the sprinkler system at the project, asserting claims for contractual and common-law indemnification as well as breach of contract for failure to procure insurance. Island Fire was subsequently added as a direct defendant.

One City filed a motion for summary judgment dismissing plaintiff's complaint and on its claims against Island Fire for indemnification and breach of contract for failure to procure insurance. Island Fire also moved for summary judgment. The motion court granted partial summary judgment to One City dismissing plaintiff's Labor Law § 240(1) claim. The motion court also granted summary judgment to Island Fire dismissing One City's claims for contractual indemnification and breach of

contract for failure to procure insurance. The court found questions of fact on all other issues. As a separate matter, the motion court also denied One City post-note-of-issue discovery in the form of three additional independent medical examinations (IMEs) of plaintiff. With the exception of plaintiff's Labor Law § 240(1) claim, all of these issues now come to us on appeal.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*id.*).

The Court first turns to plaintiff's Labor Law § 200 and common-law negligence claims. We modify the order and grant summary judgment to One City on both claims. Section 200 of the Labor Law is a codification of the common-law duty imposed upon

an owner or general contractor to provide construction site workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 143-144 [1st Dept 2012]). "Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work" (*id.* at 144, citing *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). "Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca* at 144, citing *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

Here, the court finds that the appropriate standard to apply in this case is the dangerous condition standard and not the manner and means standard. The cause of the accident, the piece of loose pipe, was not a condition created by the manner in which

the work was performed by plaintiff or his employer but was rather a condition that already existed prior to plaintiff's arrival on the fifth floor that day.

In its motion for summary judgment, One City established prima facie that it did not create the condition and that it had no employees who could have had notice of the loose piece of sprinkler pipe. That One City was a subsidiary of Google did not alone put it on notice of anything Google employees knew or should have known (*see Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]; *Meshel v Resorts Intl. of N.Y.*, 160 AD2d 211, 213 [1st Dept 1990]).

Plaintiff failed to produce any evidentiary proof sufficient to rebut One City's prima facie showing that it did not create the hazardous condition and that it had no actual or constructive notice of it. There is no evidence in the record to suggest that any One City employee was aware or should have been aware of the loose pipe. In fact, there is no evidence that there were any One City employees present at the site on the day of the accident at all.

Even assuming, arguendo, that One City was an "alter ego" of Google, plaintiff's argument that Google had constructive notice of the hazard because its employees might have seen videos

recorded by cameras that were alleged to be in the area where plaintiff fell is mere speculation insufficient to raise an issue of fact (*see Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 [1st Dept 2006], *lv denied* 8 NY3d 803 [2007]). There were no Google employees on site on the day of the accident and no evidence to support the allegation that any Google employee viewed any videos on the day of the accident. Plaintiff's Labor Law § 200 and common-law negligence claims are therefore dismissed.

The court now turns to plaintiff's Labor Law § 241(6) claim predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.7(e)(1) and 23-2.1(a)(1). We affirm the motion court's denial of summary judgment to One City dismissing plaintiff's Labor Law § 241(6) claim predicated on violations of these Industrial Code provisions. Industrial Code § 23-1.7(e)(1) provides as follows:

> "(e) Tripping and other hazards.
>
> "(1) Passageways. All passageways should be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered."

Section 23-2.1(a)(1) similarly concerns the "safe and orderly" storage of materials to ensure that "they do not obstruct any passageway, walkway, stairway or other thoroughfare." While the term "passageway" is not defined in the Industrial Code, "courts

have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250 [4th Dept 2013]).

Here, there is a material question of fact as to whether plaintiff fell in a "passageway" or merely in an open area. Plaintiff, his supervisor, and the carpentry foreman all testified that stud walls had been erected at the time of the event. Plaintiff further testified at his deposition that the area in which he fell was an eight-foot-wide "corridor." A superintendent who arrived soon after the fall testified that plaintiff was in "an open space" but also confirmed that plaintiff was in a corridor or area where laborers were supposed to walk. As the Industrial Code does not provide a formal definition of "passageway," the practical function of the area where plaintiff fell is a question to be addressed by the trier of fact.

We reject One City's argument that plaintiff's § 241(6) claim should be dismissed on summary judgment because he was cleaning the floor at the time of his injury. It is well-settled that "[a]n employee cannot recover for injuries received while doing an act to eliminate the cause of the injury" (*Kowalsky v*

Conreco Co., 264 NY 125, 128 [1934]). However, the record contains conflicting testimony as to whether plaintiff was in the act of cleaning the floor at the time of the accident. On this question of material fact, the credibility and weight to be given to the testimony of each witness is to be determined by the jury (*Shea v United States Trucking Corp.*, 200 App Div 821, 824 [1st Dept 1922], *affd* 235 NY 529 [1923]).

We now turn to the question of contractual and common-law indemnification. We further modify the order to the extent it denied summary judgment to One City and find that One City is entitled to contractual indemnification by Island Fire. As One City is entitled to contractual indemnification, its claim for common-law indemnification has been rendered academic. Island Fire's contract with nonparty Benchmark obligated Island Fire to indemnify all those whom Benchmark was obligated to indemnify, and Benchmark's contract with Google obligated Benchmark to indemnify all subsidiaries of Google. While One City's certificate of incorporation was not issued until 10 days after the Google-Benchmark contract was executed, the contract included as indemnitees entities not yet in existence via the reference to "all such [indemnified] parties' . . . respective heirs, executors, administrators, successors and assigns." The contract

thus applied to subsidiaries in existence on the date on which the indemnity provision was triggered, not merely those in existence when the contract was executed.

We now turn to One City's claim against Island Fire alleging breach of contract for failure to procure insurance. We also modify the order to the extent it granted summary judgment to Island Fire dismissing One City's claim for breach of contract and find that Island Fire failed to establish, as a matter of law, that it procured the $5,000,000 in per-occurrence liability insurance it was contractually obligated to purchase. In addition to a $2,000,000 per-occurrence policy, Island Fire provided the motion court with a certificate of insurance referring to a $10,000,000 umbrella policy as evidence that it complied with its insurance procurement obligations. However, we have held that a certificate of insurance is merely evidence of a contract rather than conclusive proof that coverage was procured (*see Horn Maintenance Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1st Dept 1996]). Indeed, on summary judgment, a certificate may be sufficient to raise an issue of fact, but it is not sufficient, standing alone, as it does here, to prove coverage as a matter of law (*id.*). Additionally, Island Fire provided the motion court with evidence that it procured

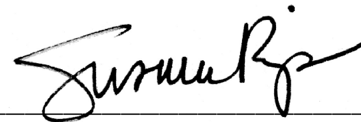
$40,000,000 in general aggregate coverage. However, such evidence also fails to demonstrate that Island Fire complied with its insurance procurement obligations, as it fails to establish that Island Fire met the contract's requirement of procuring $5,000,000 in per-occurrence liability coverage. Because Island Fire has not presented sufficient evidence to demonstrate that it procured the required coverage, it cannot be granted summary judgment dismissing One City's claim.

We finally turn to One City's request for post-note-of-issue discovery. We affirm the motion court's decision to deny One City's discovery request. One City seeks three additional IMEs of plaintiff in response to his claim that he will require shoulder replacement surgery. In seeking post-note-of-issue discovery, a defendant must demonstrate "unusual or unanticipated circumstances" as well as "substantial prejudice" (22 NYCRR 202.21[d]; *see* CPLR 3101[d][1][i]; *Hartnett v City of New York*, 139 AD3d 506 [1st Dept 2016]). Here, the need for future surgery was already pleaded in prior bills of particulars. Moreover, two of plaintiff's experts specifically noted the possibility of a shoulder replacement. One City had ample notice of plaintiff's

ongoing shoulder problems far in advance of the note of issue. Therefore, the motion court correctly denied One City’s late request for additional examinations.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5031 The People of the State of New York, Ind. 2684N/11
Respondent,

-against-

Miguel Adrian-Reyes,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 29, 2014, as amended February 21, 2014, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees and conspiracy in the second degree, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, the evidence of defendant's guilt was overwhelming. The only reasonable inference that can be drawn from the evidence, which included intercepted conversations, is that defendant was a participant in a large-scale drug trafficking operation, and that he knowingly

transported a very large quantity of cocaine in his car as part of his role in that operation.

The court providently exercised its discretion in declining to give an adverse inference charge. At the time of defendant's arrest, the police seized the car he was driving, which was used to transport drugs, and which contained a secret compartment commonly used by drug dealers. At the inception of the case, the People offered defendant the opportunity to inspect or photograph the car and the secret compartment, but defendant never availed himself of that opportunity. Defendant first raised the issue at trial, when it was revealed that the car had been transferred to the United States Marshals Service and sold, apparently under a federal forfeiture procedure not entirely explained in the record. Under these circumstances, defendant cannot complain about the People's failure to retain the car, and defendant's inaction was an appropriate ground for denying an adverse inference charge (*see People v Handy*, 20 NY3d 663, 669 [2013]; *People v D'Attore*, 151 AD3d 548, 549 [1st Dept 2017], *lv denied* __ NY3d __ [2017]).

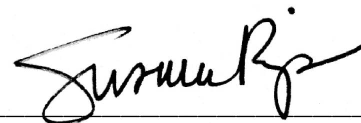
In any event, regardless of whether the court should have given an adverse inference charge for the disposal of defendant's car and the secret compartment it contained, we find that

defendant was not prejudiced, because photographs and other competent evidence adequately depicted the nature of the compartment. Furthermore, any error was harmless, because this compartment, which was not actually found to contain drugs, was only part of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We adhere to our prior decision in which we denied defendant's motion for disclosure of the unredacted affidavits supporting the warrant applications, the sealed *Darden* hearing minutes (*People v Darden*, 34 NY2d 177, 181-182 [1974]) and related relief. As previously directed by this Court, we conducted an in camera review of the unredacted affidavits supporting the warrant applications and of the *Darden* hearing. We find that there was probable cause for the issuance of the warrants for eavesdropping and for placing a GPS tracking device on defendant's car.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5032 Daniel Collazo, et al., Index 157486/16
Plaintiffs-Appellants,

-against-

Netherland Property Assets LLC,
et al.,
Defendants-Respondents.

____

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Jesse D. Gribben of counsel), for appellants.

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for respondents.

____

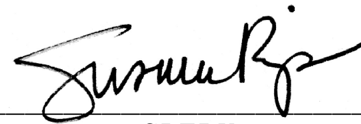
Order, Supreme Court, New York County (David B. Cohen, J.), entered March 7, 2017, which granted defendants' motion to dismiss plaintiffs' complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion in ruling that plaintiffs' rent overcharge claims should be determined by the New York State Division of Housing and Community Renewal in the first instance (*Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441-442 [1st Dept 2012], *lv dismissed* 20 NY3d 1000 [2013]). The court also correctly ruled that plaintiffs had

failed to state a cause of action for relief under General Business Law § 349 (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]).

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

ENTERED: NOVEMBER 28, 2017



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CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5033-
5034-
5035-
5036 In re Sine C.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

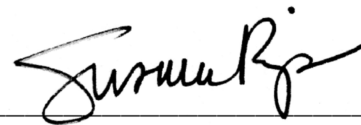
Orders of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 15, 2016, and November 17, 2016, which adjudicated appellant a juvenile delinquent upon his admissions that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the third degree and grand larceny in the fourth degree, and placed him with the Administration for Children’s Services Close to Home program for an aggregate period of 18 months; and orders (same court and Judge), entered on or about November 21, 2016, which, upon findings that appellant violated the conditions of his probation, revoked his probation

and placed him with the abovementioned program for a period of 12 months, unanimously affirmed, without costs.

The placement was a provident exercise of the court's discretion, and constituted the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The disposition was justified by appellant's repeated criminal conduct (including new offenses, on two separate occasions, while already on probation), his poor attendance in school, his substance abuse problems, and the recommendations contained in the probation and Mental Health Services reports.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5037 In re AAC Auto Service, et al., Index 260997/14
Petitioners-Respondents,

-against-

New York State Department of Motor Vehicles, et al.,
Respondents-Appellants.

____

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for appellants.

Vincent P. Nesci, P.C., Mount Kisco (Vincent P. Nesci of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 1, 2016, which, to the extent appealed from, granting the petition to the extent of vacating the determination of respondent Department of Motor Vehicles, dated September 18, 2014, upholding the imposition of monetary penalties against petitioner Aristo Arteaga, unanimously reversed, on the law, without costs, the determination reinstated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The imposition of a civil penalty upon both Arteaga, in his capacity as a certified motor vehicle inspector, and petitioner AAC Auto Service, in its distinct capacity as a licensed official

inspection station, for violations arising from the same conduct does not constitute a prohibited double fine (*see* Vehicle and Traffic Law § 303[h]; *Matter of GR Auto & Truck Repair v New York State Dept. of Motor Vehs.*, 150 AD3d 730 [2d Dept 2017], citing *Matter of Khan Auto Serv., Inc. v New York State Dept. of Motor Vehs.*, 123 AD3d 1258 [3d Dept 2014]).

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

ENTERED: NOVEMBER 28, 2017

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

5038 George Peters, Index 600482/07
Plaintiff-Appellant,

-against-

Stelios Coutsodontis,
Defendant-Respondent,

General Maritime Enterprises
Corporation, et al.,
Defendants.

____

Beys Liston & Mobargha LLP, New York (Nader Mobargha of counsel), for appellant.

Hartmann Doherty Rosa Berman & Bulbulia, LLC, New York (Kelly A. Zampino of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 18, 2016, which, to the extent appealed from as limited by the briefs, granted defendant Stelios Coutsodontis's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff George Peters and his uncle, Stelios Coutsodontis, have been involved in a lengthy dispute over stock ownership of a family shipping business, Sea Trade Maritime Corporation. In February 2005, Coutsodontis and others commenced an action against Peters and others, alleging that Peters had engaged in

self-dealing. In an affidavit submitted in opposition to a motion to dismiss the complaint in the 2005 action, Coutsodontis stated that the power of attorney naming Peters as attorney-in-fact bore what he believed was a forged signature of the appointing authority. In February 2007, based on these statements, Peters brought the instant defamation action.

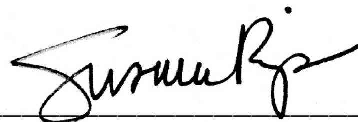
Supreme Court properly concluded that the alleged defamatory statements were pertinent to the 2005 action and therefore absolutely protected by the judicial proceedings privilege (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007], *abrogated on other grounds by Front, Inc. v Khalil*, 24 NY3d 713 [2015]). The statement in the complaint alleging that Peters fraudulently awarded himself an employment contract, was obviously related to the fraud allegations (*see Lacher v Engel*, 33 AD3d 10, 13 [1st Dept 2006]). The statement regarding the authenticity of the power of attorney related to Peters' ability to award himself the contract, and was thus pertinent to the allegation that Peters engaged in self-dealing (*see Hadar v Pierce*, 111 AD3d 439 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]). Public policy favors having litigants speak freely in judicial proceedings (*see Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007]).

There are no facts alleged supporting a conclusion that the instant litigation is "a sham action brought solely to defame," which would otherwise destroy the privilege (*see Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]; *Lacher*, 33 AD3d at 13-14). Coutsodontis prosecuted his claims in the 2005 action, opposed plaintiff's motion to dismiss the 2005 action, and appealed the order of dismissal (*see Coutsodontis v Peters*, 39 AD3d 274 [1st Dept 2007]). His failure to prevail on the 2005 action does not vitiate the privilege, since "[i]f the privilege existed only in cases that were ultimately sustained, none of the persons whose candor is protected by the rule – parties, counsel or witnesses – would feel free to express themselves" (*Lacher* at 14).

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: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5039 The People of the State of New York, Ind. 3891/14
Respondent,

-against-

Cahiem Harris,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered April 1, 2015, convicting defendant, after a jury trial, of burglary in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The chain of events readily supports the inference that at the time defendant unlawfully entered an apartment building, he did so with the intent to commit a crime therein.

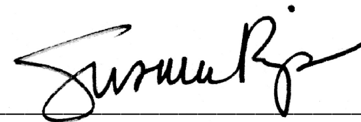
Defendant's ineffective assistance of counsel claim is

unreviewable on direct appeal because it involves significant matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of his ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). With regard to defendant's claim that his counsel's conduct deprived him of the opportunity for a more lenient disposition, defendant has not shown that counsel could have "salvaged" the aborted guilty plea after defendant made a plainly unsatisfactory factual allocution. With regard to trial strategy, the record

shows that, in addition to other defenses, counsel did in fact present a version of the defense that defendant now faults him for omitting.

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

ENTERED: NOVEMBER 28, 2017



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CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5040-
5041 The People of the State of New York, Ind. 4643/99
Respondent,

-against-

Paul Smith,
Defendant-Appellant

____

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

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

____

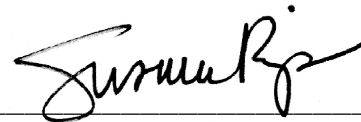
Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered May 31, 2011, resentencing defendant to an aggregate term of 12 years, with 4 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding was neither barred by double

jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We perceive no basis for reducing the term of postrelease supervision imposed.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5042 Island Intellectual Property LLC, et al., Index 651702/15
Plaintiffs-Respondents,

-against-

Reich & Tang Deposit Solutions, LLC, et al.,
Defendants-Appellants.

____

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale (David A. Loglisci of counsel), for appellants.

Kelley Drye & Warren LLP, New York (John Dellaportas and Kristina Allen of counsel), for respondents.

____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 14, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss plaintiffs' fraud claim, denied defendants' motion to stay the action pending related federal actions, and granted plaintiffs' cross motion for partial summary judgment on the issue of liability on their breach of contract and indemnification claims, unanimously modified, on the law, plaintiffs' cross motion denied, and otherwise affirmed, without costs.

The motion court should not have entertained plaintiffs' cross motion for summary judgment, as the parties did not chart a

course for summary judgment (*see Primedia Inc. v SBI USA LLC*, 43 AD3d 685, 686 [1st Dept 2007]). Defendants objected to the court entertaining the motion as one for summary judgment and the court did not provide adequate notice of its intention to convert the motions pursuant to CPLR 3211(c) (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

The court properly determined that plaintiffs' fraudulent inducement claim, alleging a misrepresentation of then-present facts that was collateral to the parties' licensing agreement, was not duplicative of the breach of contract claim (*see GoSmile, Inc v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]).

The court also providently exercised its discretion in denying defendants' motion for a stay in this action pending the subsequently commenced federal actions seeking to invalidate the

patents that are the subject of the licensing agreement (*see e.g.* *Allied Props. v 236 Cannon Realty*, 3 AD3d 318 [1st Dept 2004]; CPLR 2201).

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

ENTERED: NOVEMBER 28, 2017

CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5043 Fran Schiff, etc., Index 158161/12
Plaintiff-Respondent,

-against-

ABI One LLC, et al.,
Defendants-Appellants.

____

Perry, Van Etten, Rozanski & Primavera LLP, New York (Jeffrey K. Van Etten of counsel), for appellants.

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

____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered September 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion to amend the bill of particulars, unanimously affirmed, without costs.

The motion court correctly concluded that there were triable issues of fact as to whether defendants, the owner and manager of a building in which plaintiff's decedent lived, installed smoke and carbon monoxide detectors in decedent's apartment and whether such failure, if it occurred, was a proximate cause of his injuries. Although the building superintendent testified that he installed the device in decedent's apartment, conflicting

testimony from other witnesses was presented, the documentary evidence is unclear, no smoke detector was observed in the debris following the fire, and neither the neighbors nor the firefighters heard an alarm (*see Mero v Vuksanovic*, 140 AD3d 574, 575 [1st Dept 2016], *lv dismissed* 29 NY3d 999 [2017]). Further, evidence was presented that a smoke alarm could have alerted decedent in sufficient time to escape before being overcome by smoke inhalation.

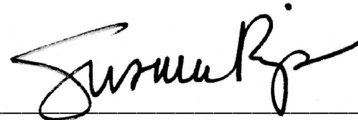
The motion court providently exercised its discretion in permitting plaintiff to amend the bill of particulars, after the filing of the note of issue, to add additional statutory violations; mere delay is not a sufficient basis to deny the relief and defendants failed to show prejudice or likely surprise

(*see Flowers v 73rd Townhouse LLC*, 149 AD3d 420, 421 [1st Dept 2017]).

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

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5044 Alvin Davidson, Plaintiff-Appellant, Index 301524/12

-against-

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

____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered June 8, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the state and federal law claims of malicious prosecution, assault, battery, and excessive force, and denied plaintiff's motion for partial summary judgment on the federal law claims of illegal search and seizure, false arrest, false imprisonment, assault, and battery, unanimously affirmed, without costs.

Plaintiff testified that he found a bag containing a gun and that when he saw defendant Lt. Maloney walking towards him, he so informed the officer. Since "a search authorized by consent is wholly valid," plaintiff's claims of illegal search and seizure

and false arrest must fail (*see Schneckloth v Bustamonte*, 412 US 218, 222 [1973]). The suppression of the gun following a *Dunaway*/*Mapp* hearing, at which plaintiff did not testify, is not dispositive since the doctrine of collateral estoppel is inapplicable here (*see Jenkins v City of New York*, 478 F3d 76, 85 [2d Cir 2007]).

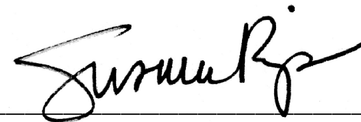
The malicious prosecution claims were correctly dismissed because plaintiff failed to show either lack of probable cause or malice (*see Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). Contrary to plaintiff's contention, the officers were not obligated to inform the grand jury of his claim that he had just found the gun (*see Gisondi v Town of Harrison*, 72 NY2d 280, 285 [1988]; *Abdul-Aziz v City of New York*, 56 AD3d 291, 293 [1st Dept 2008], *lv denied* 12 NY3d 712 [2009]).

The claim of excessive force was correctly dismissed since plaintiff testified that the handcuffs were too tight, but he did not testify, or submit other evidence, that he sustained physical injury as a result (*see Burgos-Lugo v City of New York*, 146 AD3d 660, 662 [1st Dept 2017]). For the same reason, coupled with the

finding of probable cause for the arrest, the claims of assault and battery were correctly dismissed (*see Mendez v City of New York*, 137 AD3d 468 [1st Dept 2016]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5045 In re Nyron P.,
Petitioner-Respondent.

-against-

Giselle A.,
Respondent-Appellant.

____

Steven N. Feinman, White Plains, for appellant.

D. Philip Schiff, New York, for respondent.

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

____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about July 15, 2016, which granted sole physical and legal custody of the subject child to petitioner father Nyron P., unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that a final award of sole legal and physical custody to the father is in the child's best interest (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The child resided with the mother until she was five years old, at which time a neglect petition was filed against the mother, resulting in the child being removed from the mother's care and paroled to the father's care. Evidence at the hearing on the father's custody petition

showed that the neglect petition was brought as a result of the mother's issues with anger, aggression and domestic violence in the child's presence, and that the child expressed fear and reported that the mother had hit her with a belt (*see Matter of Moreno v Cruz*, 24 AD3d 780 [2d Dept 2005], *lv denied* 6 NY3d 712 [206]; *see also Matter of Joshua C. v Tenequa A.*, 132 AD3d 497 [1st Dept 2015]). Although the mother attended services to address those issues and the neglect proceeding was eventually resolved, during the neglect proceedings the mother was involved in another violent incident in the child's presence during an overnight visit. There was also evidence that the mother failed to address an on-going alcohol abuse problem (*see Matter of Nunn v Bagley*, 63 AD3d 1068 [2d Dept 2009]), that she showed an insensitivity to the child's needs and exercised poor parental judgment. In particular, the mother threatened to keep the child from the father and the paternal grandparents.

On the other hand, the evidence showed that the father was a suitable caretaker who had provided a stable home for the child for at least the past eighteen months, and that the child was loved and well-cared for in his care. The father was living with the paternal grandparents in a three-bedroom home, and the grandparents were willing and able to provide financial support

to the father and child, and assist in the child's care. Since residing with the father, the child's school attendance and timeliness had improved, and all of her needs had been met. The child is loved and happy living with the father and his family, where she is no longer subjected to domestic and physical violence.

Accordingly, there was ample support for the court's decision that it was in the child's best interest for final custody to be awarded to the father under the circumstances (*see Matter of Dedon G. v Zenhia G.*, 125 AD3d 419, 420 [1st Dept 2015]).

The mother's alternative argument that joint custody would have been an appropriate award under the circumstances is unpreserved, and unavailing (*see Matter of Fedun v Fedun*, 227 AD2d 688 [3d Dept 1996]) as the record shows that the parties are incapable of any meaningful communication or cooperation so as to

effectively preclude joint decision-making.

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

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

ENTERED: NOVEMBER 28, 2017

CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5046 HSBC Bank USA, etc., Index 381068/13
Plaintiff-Respondent,

-against-

Anthony Ezugwu,
Defendant-Appellant,

Mortgage Electronic Registration Systems,
Inc., etc., et al.,
Defendants.

____

Petroff Amshen LLP, Brooklyn (James Tierney of counsel), for appellant.

Hogan Lovells US LLP, New York (Courtney Colligan of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 13, 2016, which, to the extent appealed from, granted plaintiff's motion for summary judgment against defendant Anthony Ezugwu, unanimously affirmed, without costs.

Plaintiff established prima facie that it complied with the notice terms of the subject mortgage by submitting an affidavit of plaintiff's officer, who personally reviewed the records related to defendant's loan, and averred that these records were made contemporaneously and in the regular course of business. They were thus properly relied upon as evidence (*see* CPLR 4518[a]; *People v Cratsley*, 86 NY2d 81, 89 [1995]). The officer

further averred that, as per the bank’s regular practice, default notices were sent via first class and certified mail to the property address encumbered by the mortgage, and a P.O. box provided by defendant, as demonstrated by the record copies of the default notices stamped with tracking numbers, electronic screenshots of custodial activity indicating that the default notices were sent, and certified mail return receipts establishing that the default notice sent to defendant’s P.O. box was signed for and delivered.

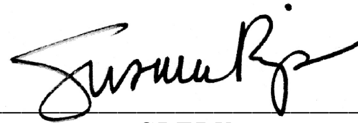
Defendant failed to raise a triable issue of fact in opposition with his claim that he advised plaintiff of a different notice address. Not only did defendant fail to provide any details regarding the notification, but plaintiff submitted defendant’s 2010 and 2011 tax returns, as well as defendant’s bank statement from after the date the default notices were sent, all of which recited the P.O. box as defendant’s address. Likewise, defendant’s bare denial of receipt was unavailing (*see Grogg v South Rd. Assoc., L.P.,* 74 AD3d 1021, 1022 [2d Dept 2010]).

The court properly determined that plaintiff had standing to

commence the foreclosure action. Among other proof, plaintiff established delivery and possession of the note by appending it to the complaint (*see Deutsche Bank Natl. Trust Co. v Umeh*, 145 AD3d 497 [1st Dept 2016]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5047 The People of the State of New York Ind. 1775/02
Respondent,

-against-

Nelson Figueroa,
Defendant-Appellant.

____

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

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

____

Order, Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about September 10, 2015, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of reducing the classification to that of a level two offender, and otherwise affirmed, without costs.

As the People apparently concede, the record does not support the court's point assessments for use of a dangerous instrument and for multiple victims. Accordingly, defendant's correct point score is 100, which supports a level two

adjudication. We reject the People's request for an upward departure, as the aggravating factors they cite have either been adequately taken into account by the guidelines or are insufficiently indicative of sexual recidivism.

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

ENTERED: NOVEMBER 28, 2017

CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5048 46 Warren, LLC, Index 570028/15
Petitioner-Landlord-Appellant,

-against-

Holly Lynch,
Respondent-Tenant-Respondent.

____

Goodfarb & Sandercock, LLP, New York (Adam D. Goodfarb of counsel), for appellant.

Brill & Meisel, New York (Kerry M. Fontana of counsel), for respondent.

____

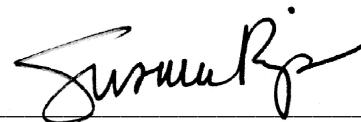
Order, Appellate Term of the Supreme Court, First Department, entered July 23, 2015, which reversed a judgment of the Civil Court, New York County (James E. d'Auguste, J.), entered September 17, 2014, awarding petitioner landlord unpaid rent, late charges and interest, upon an order that granted petitioner summary judgment on its claim for unpaid rent, and dismissing respondent tenant's affirmative defense and counterclaim for breach of the warranty of habitability, unanimously affirmed, without costs.

While a warranty of habitability will not be implied in a commercial lease (*Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361, 364 [1st Dept 2006]; *see* Real Property Law § 235-b), respondent does not rely on an implied warranty. She cites the express terms of

the subject lease, which was prepared by petitioner, which permitted only residential use, and included petitioner's warranty of habitability and agreement to provide certain services, such as heat and hot water, enforceable by the warranty of habitability. The parties acknowledge that they agreed that respondent could use the premises for commercial purposes, setting up the apartment as a home office. However, petitioner neither sought reformation of the lease nor demonstrated "unusual circumstances" that would relieve it of its duty to abide by the lease terms (*see George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 218 [1978]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5050 The People of the State of New York, Ind. 1307/12
Respondent,

-against-

Nabil Fawzi,
Defendant-Appellant.

____

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Bonnie G. Wittner, J. at trial and sentencing), rendered December 2, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

The court properly denied defendant’s motion to suppress a statement on the ground that it was the fruit of an allegedly unlawful entry into the apartment defendant shared with his mother. The record also supports the court’s alternative findings that the first police entry into the apartment was justified by both consent and exigent circumstances.

The overall circumstances established that defendant’s

mother voluntarily consented to the entry, and that it was not the product of a ruse (*see generally People v Gonzalez*, 39 NY2d 122 [1976]). The entry was also justified by exigent circumstances. Based upon information supplied by witnesses, the police had reason to fear that defendant was armed and would soon flee (*see People v McBride*, 14 NY3d 440, 446 [2010], *cert denied* 562 US 931 [2010]).

Defendant's contention that the court should have suppressed the fruits of a subsequent warrantless search of the apartment is unpreserved, and we decline to review it in the interest of justice (*see People v Martin*, 50 NY2d 1029, 1031 [1980]). As an alternative holding, we find that the record on this issue provides no basis for suppression.

Defendant's legal insufficiency claim is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury properly rejected defendant's theory that his intoxication negated the element of intent. Defendant exhibited purposeful behavior in walking home to obtain a knife after an altercation

with the victim, approaching the victim from behind, and repeatedly stabbing him (*see People v Sirico*, 17 NY3d 744, 746 [2011]). Additionally, a witness, who knew defendant, and had spoken with immediately before the stabbing did not observe the defendant to appear intoxicated.

Further, defendant failed to establish either the subjective or objective elements of the defense of extreme emotional disturbance by a preponderance of the evidence. While defendant claimed to have been under the influence of extreme emotional disturbance as a result of being punched by the victim during an altercation between the two some 20 minutes before the stabbing, his casual conversation with the food vendor, the purposeful manner in which he committed the crime, and his efforts at concealing his crime immediately after stabbing the victim negate his claims (*see People v Kenny*, 134 AD3d 420 [1st Dept 2015, *lv denied* 27 NY3d 1000 [2016]). The evidence also failed to support defendant’s assertion that a reasonable person in defendant’s position would have lost control and been extremely disturbed 20 minutes after the altercation with the victim.

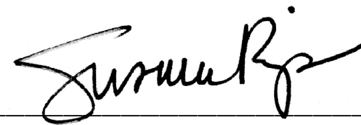
Finally, defendant’s arguments concerning the People’s summation are unpreserved (*see People v Romero*, 7 NY3d 911 [2006]), and we decline to review them in the interest of

justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Moreover, any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5052 The People of the State of New York, Ind. 1714/14
Respondent,

-against-

Luis Turner,
Defendant-Appellant.

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

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

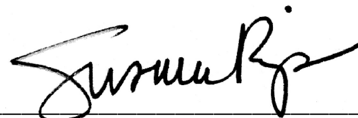
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered March 31, 2015,

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.

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

ENTERED: NOVEMBER 28, 2017



CLERK

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

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5053 Lisa Kurcias, et al., Index 158267/13
Plaintiffs-Respondents,

-against-

1043 Rest. Corp.,
Defendant-Appellant,

"John Doe",
Defendant.

____

Jeffrey Kim, P.C., Bayside (Stephen E. Kwan of counsel), for appellant.

Friedman, Levy, Goldfarb & Green, P.C., New York (Ira H. Goldfarb of counsel), for respondents.

____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about October 14, 2016, which denied the motion of defendant 1043 Restaurant Corp. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

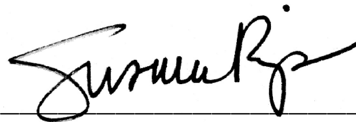
Defendant did not establish entitlement to judgment as a matter of law in this action for personal injuries sustained when an unidentified bicycle delivery person struck plaintiff as she crossed the street. Defendant failed to demonstrate that the bicycle delivery person was not its employee. Although several of its delivery personnel testified that they were not involved

in the accident, defendant did not submit affidavits from its undeposed employees who worked as bicycle delivery persons at the time of the accident averring that they had no involvement in the collision with plaintiff, or, alternatively, from someone else with that same knowledge (*see* CPLR 3212[b]; *compare Morales v Living Space Design*, 278 AD2d 48 [1st Dept 2000]).

Since defendant failed to meet its initial burden to show that none of its employees were involved in the accident, the burden to offer evidence on the issue never shifted to plaintiff (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5054 The People of the State of New York, Ind. 200/15
Respondent,

-against-

Kenya Burgess,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 13, 2015, unanimously affirmed.

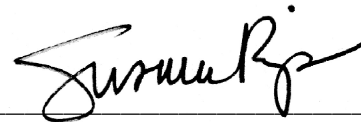
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5055N JPMorgan Chase Bank, National Association, Plaintiff-Respondent, Index 155630/13

-against-

Ching J. Lu also known as Ching Jung Lu, Defendant-Appellant,

Longjun Xie, Defendant,

408 West 57th Owners Corp., Defendant-Respondent.

Kevin Kerveng Tung, P.C., Flushing (Kevin K. Tung of counsel), for appellant.

Parker Ibrahim & Berg LLC, New York (Scott W. Parker of counsel), for JPMorgan Chase Bank, National Association, respondent.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for 408 West 57th Owners Corp., respondent.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about September 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Ching J. Lu’s motion, under CPLR 5015(a), to vacate a default judgment, unanimously affirmed, without costs.

The trial court’s determination that defendant failed to demonstrate a reasonable excuse for her default was within the

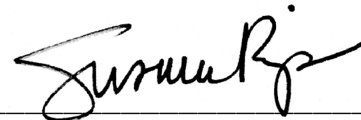
court’s sound discretion (*see Gecaj v Gjonaj Realty & Mgt. Corp*., 149 AD3d 600, 602 [1st Dept 2017]). To the extent defendant denies service of the summons and complaint, her general denials are insufficient to rebut the presumption of service created by the detailed, validly executed affidavits of service (*see Slimani v Citibank, N.A.*, 47 AD3d 489 [1st Dept 2008]). Defendant’s argument that she relied on assurance from defendant cooperative corporation (the co-op) that her property would be protected and that she need not answer the complaint, is unsupported by any proof and accordingly insufficient (*see Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602 [1st Dept 2013]). Moreover, defendant, who acknowledged she did not pay much attention to papers she received by mail, further fails to explain why the co-op would have so assured her. The record before us shows that defendant knew she had defaulted on a loan secured by the property, and that she had received multiple notices from plaintiff of her default, and of its intent to collect the debt, and to foreclose and sell the property at a public auction, if necessary. Under the circumstances, defendant fails to show how her reliance on any alleged assurances from the co-op could have been reasonable (*see Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551 [4th Dept 2017]; *Di Gangi v Schiffgens*, 90 AD2d 805 [2d Dept

1982]).

Given the lack of a reasonable excuse for her default, it is not necessary for us to consider whether defendant demonstrated the existence of a meritorious defense (*see Gecaj*, 149 AD3d at 607).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5056 In re James Pettus, O.P. 119/17
[M-4764] Petitioner,

-against-

Hon. Guzman, et al.,
Respondents.

____

James Pettus, petitioner pro se.

John W. McConnell, New York (Shawn Kerby of counsel), for respondents.

____

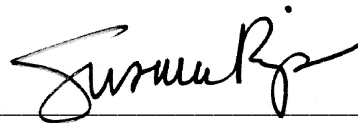
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5057 In re James Pettus, O.P. 122/17
[M-5257] Petitioner,

-against-

Hon. Fernando Tapia, et al.,
Respondents.

James Pettus, petitioner pro se.

John W. McConnell, New York (Shawn Kerby of counsel), for respondents.

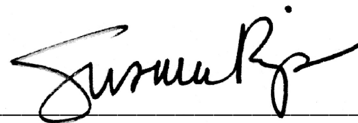
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Richter, J.P., Kapnick, Webber, Oing, Singh, JJ.

5058 In re James Pettus, O.P. 123/17
[M-5258] Petitioner,

-against-

Hon. James W. Hubert,
Respondent.

____

James Pettus, petitioner pro se.

John W. McConnell, New York (Shawn Kerby of counsel), for respondent.

____

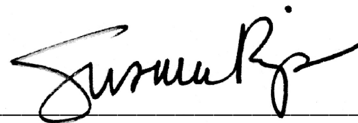
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5059 The People of the State of New York, Ind. 180/14
Respondent,

-against-

Hector Watson,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered January 8, 2016, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his claims that the sentence court misperceived its discretion, and that the sentence was excessive. The oral colloquy, in which the court separated the right to appeal from the rights automatically given up by pleading guilty, along with the written waiver, satisfied the requirements for a valid waiver (*see People v Bryant*, 28 NY3d 1094 [2016]).

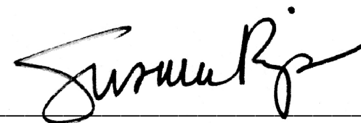
Regardless of whether defendant made a valid waiver of his

right to appeal, he failed to preserve his claim that the court failed to exercise its sentencing discretion (*see People v Fishman*, 14 AD3d 411 [1st Dept 2005], *lv denied* 4 NY3d 853 [2005]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Even if the court mistakenly believed that it had no discretion to impose a lower sentence than called for under the plea agreement, there would be no need to remand for resentencing because the court expressed no reservations about that sentence (*see id.*). On the contrary, the court stated that it was not "inclined" to impose a lower sentence in any event.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5060 Jose A. Marte Lopez, Index 306421/14
Plaintiff-Respondent,

-against-

Golan Achdary,
Defendant-Appellant,

"John Doe" (name fictitious
and unknown), et al.,
Defendants.

____

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for appellant.

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

____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about September 26, 2016, which denied defendant Golan Achdary's motion for summary judgment dismissing the complaint and cross claim as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff seeks to recover for injuries he sustained while a passenger on a motorcycle owned by defendant Achdary when the motorcycle collided with a vehicle owned and operated by defendant Afriyie Adu and defendant David O. Saprong, respectively. After the accident, the unidentified operator of

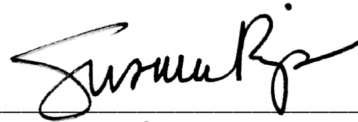
the motorcycle fled the scene.

Achdary rebutted the presumption that the unidentified individual was operating the motorcycle with his permission (*see* Vehicle and Traffic Law § 388[1]; *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003]; *Villamil v Budget Rental*, 281 AD2d 207 [1st Dept 2001]; *Pow v Black*, 182 AD2d 484 [1st Dept 1992]). His affidavit and documentary evidence establish that the motorcycle had been stolen from its parking spot on the street before the accident. His cellular phone record of calls made to 311, 911 and GEICO, his insurance company, confirm that he discovered and reported the theft of his motorcycle hours before the accident (*compare Hamilton v Hunt*, 288 AD2d 86 [1st Dept 2001]). Moreover, Achdary had in his possession both sets of keys to the ignition, which was tampered with, as well as the license plate, which he had removed from the motorcycle after parking it.

In opposition, plaintiff, whose memory of the accident is impaired, offered no evidence as to the identity of the operator of Achdary’s motorcycle and failed to raise a triable issue of fact as to permissive use of the motorcycle.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5061-
5061A In re Tyshawn M.,

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

____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

____

Orders, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about July 25, 2016, which adjudicated appellant a juvenile delinquent upon fact-finding determinations that he committed acts, that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, criminal possession of a weapon in the fourth degree, robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, attempted assault in the third degree and menacing in the third degree, and upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted robbery in the second degree, and placed him with the Administration for

Children’s Services’ Close to Home program, for a period of 12 months, with a 6-month minimum, unanimously affirmed, without costs.

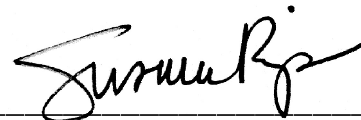
The court properly denied appellant’s suppression motion. During the course of a brief common-law inquiry that was clearly supported by a founded suspicion of criminality, a robbery victim was brought to the scene, where he identified appellant. In any event, even if the encounter could be viewed as a detention requiring reasonable suspicion, that requirement was also satisfied, because the totality of the information possessed by the police supported an inference that appellant and his companions were members of a group that had just committed a robbery nearby (*see e.g. People v Williams*, 146 AD3d 410, 411 [1st dept 2017] *lv denied* 29 NY3d 954 [2017]).

Appellant did not preserve his claim that the showup was unduly suggestive, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007] *lv denied* 9 NY3d 865 [2007]).

Appellant's challenge to the court's dispositional order is moot because he has already completed his placement (*see Matter of Yuan Tung C.*, 296 AD2d 323, 323 [1st Dept 2002]). In any event, the disposition was a provident exercise of discretion.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5062 Warnell Carroll, Index 23222/16
Plaintiff-Respondent,

-against-

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

____

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

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

____

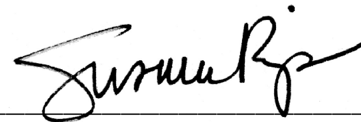
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about April 11, 2017, which denied defendants' motion to vacate and/or modify a prior compliance-conference order directing defendants to produce unredacted copies of documents contained in the Bronx County District Attorney's files, unanimously reversed, on the law, without costs, the motion granted, and the compliance-conference order vacated.

The compliance-conference order should be vacated in this action alleging, inter alia, false arrest and malicious prosecution. "[S]ince the Bronx District Attorney, who is not a party to this action, is not under the control of the City of New

York, defendants cannot be expected to produce documents prepared or maintained by any prosecutors” (*Espady v City of New York*, 40 AD3d 475, 476 [1st Dept 2007]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5063 The People of the State of New York, Ind. 4662/14
Respondent,

-against-

Mark Rouse,
Defendant-Appellant.

____

Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins 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 (Thomas Farber, J. at suppression hearing; Anthony J. Ferrara, J. at jury trial and sentencing), rendered June 11, 2015, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. It is undisputed that the hearing evidence established probable cause for defendant's arrest. Under the circumstances presented, the People did not receive sufficient notice that defendant would be arguing that, notwithstanding the presence of probable cause, the search might still have been conducted in a manner warranting suppression. In any event, there is no basis, other than

speculation, to support defendant's assertion that there may have been a strip search, a search of a closed container, or anything other than an ordinary search incident to arrest.

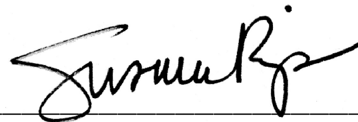
Defendant's contention that certain testimony violated his right of confrontation is moot because the jury acquitted defendant of the charge to which that evidence pertained (*see People v Spallone*, 150 AD3d 556 [1st Dept 2017], *lv denied* 29 NY3d 1134 [2017]). To the extent that the evidence could be viewed as supporting the remaining charge, we find that any violation of the Confrontation Clause was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]), which included the recovery of prerecorded buy money from defendant.

The challenged portions of the People's summation were fair responses to defense counsel's own summation, or fair comment on the evidence, and there was nothing so egregious as to warrant a

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

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5065 The People of the State of New York, Ind. 1628/16
Respondent,

-against-

Mike Oshinowo,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Ronald A. Zweibel, J. at plea; Mark Dwyer, J. at sentencing), rendered October 20, 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.

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

ENTERED: NOVEMBER 28, 2017

____
CLERK

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

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5066 National Union Fire Insurance Company of Pittsburgh, PA, Plaintiff-Respondent, Index 107838/09

-against-

Compaction Systems Corporation of New Jersey, et al., Defendants-Appellants.

Fox Rothschild LLP, New York (Jeffrey M. Pollack of counsel), for appellants.

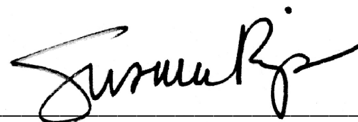
Law Offices of Michael F. Klag, Brooklyn (Michael F. Klag of counsel) and Jackson & Campbell, P.C., Washington, DC (Erin N. McGonagle of the bar of the District of Columbia, the State of Maryland and the State of California, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered September 27, 2016, which denied defendants' (collectively, Compaction) motion to dismiss or stay the fourth cause of action, seeking a declaration that the contribution claim asserted by Compaction against plaintiff's (National Union) insured, Combustion Equipment Associates, Inc. (CEA), in related pending federal environmental litigation, is not covered under the National Union policies, unanimously reversed, on the law, with costs, and the cause of action stayed pending resolution of the federal litigation.

The prior appeal in this case considered the first cause of action ripe for adjudication because the issue concerned National Union's relationship with Compaction pursuant to the 1998 settlement agreement between those parties (*see National Union Fire Ins. Co. of Pittsburgh, PA v Compaction Sys. Corp. of N.J.*, 136 AD3d 594, 594, [1st Dept 2016]). Issues remain as to whether complete relief can be afforded as to National Union's fourth cause of action, for declaratory relief as to Compaction's claim for contribution, because, to the extent the fourth cause of action implicates liability, the insurer may be exonerated in this declaratory action "on a different factual basis from that which will [] be established" in the pending federal action (*Prashker v United States Guar. Co.*, 1 NY2d 584, 590-591 [1956]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5067 The People of the State of New York, Ind. 4349/12
Respondent,

-against-

Robert Hill,
Defendant-Appellant.

____

Rosemary Herbert, Office of the Appellate Defender, New York (Katherine M. A. Pecore of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered July 15, 2014, convicting defendant, after a jury trial, of robbery in the first degree (five counts), criminal possession of a weapon in the second degree (two counts) and attempted robbery in the first and second degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion in all respects. Initially, we find no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1971]), and we note that our review is limited to the evidence adduced at the hearing (*see People v Abrew*, 95 NY2d 806, 808 [2000]).

A defendant's resemblance to a photograph of a crime suspect may furnish reasonable suspicion justifying a stop (*see People v Reed*, 106 AD3d 673, 675-676 [1st Dept 2013], *lv denied* 21 NY3d 1045 [2013]; *People v Joseph*, 10 AD3d 580, 580-581 [1st Dept 2004], *lv denied* 3 NY3d 740 [2004]), even where the photograph is not of optimal quality (*see People v Medina*, 66 AD3d 555, 555-556 [1st Dept 2009], *lv denied* 13 NY3d 908 [2009]). Here, the detectives had, at the very least, reasonable suspicion based on the surveillance videotape and a photograph from one of the suspected robberies. Although this videotape did not depict the actual robbery, it provided strong circumstantial evidence that the person depicted was the person who committed the crime. Furthermore, defendant generally matched the descriptions provided by victims of the pattern robberies, and he was stopped in the vicinity of the crime scene within a few days of the most recent crime, at an early morning hour that was consistent with the time at which the robberies were committed, thus reinforcing the detectives' suspicion (*see Medina*, 66 AD3d at 555-556).

At the hearing, by explicitly acknowledging that he was not moving to suppress a jacket recovered by the police and the stolen jewelry it contained, defendant affirmatively waived the issue (*see People v Bertolo*, 65 NY2d 111, 121 [1985]). In any

event, defendant expressly conceded that he had no possessory interest in these items.

The record, including a lineup photograph, supports the hearing court's finding that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The lineup participants all were reasonably similar in appearance, and there was no substantial likelihood that the defendant would be singled out for identification.

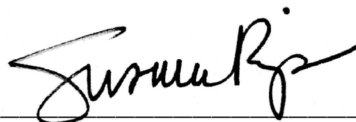
The court properly exercised its discretion in permitting the prosecutor to argue that similarities among the crimes, or some of them, warranted an inference that the similar crimes were committed by the same person. The pattern was sufficiently distinctive so as to be probative of defendant's identity (*see People v Beam*, 57 NY2d 241, 253 [1982]; *Medina*, 66 AD3d at 556). There were numerous similarities among the crimes as to time, location, and many particular details of the manner in which they were committed. While none of the individual characteristics was unusual, the pattern was sufficiently distinctive to support the inferences that the prosecutor asked the jury to draw.

The court also provided a suitable limiting instruction

relating to the prosecutor’s argument. Defendant’s challenge to the phrasing of the court’s instruction is unpreserved and we decline to review his claim in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5069 In re Frankie S.,

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

Katiria Y.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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

____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about October 13, 2016, which denied respondent mother's motion to modify the order of disposition entered on or about July 30, 2015, unanimously affirmed, without costs.

Modification of the dispositional order and vacatur of the neglect finding is not authorized under Family Court Act § 1051(c), since that statute only permits dismissal at the fact-finding stage (*see Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 8 [1st Dept 2017]). Nor are modification and vacatur warranted under Family Court Act § 1061, as the mother failed to demonstrate good cause that the relief sought promoted the best

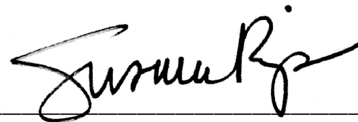
interests of the child (*see id.* at 9). Notably, the mother neither sought a hearing at which she might testify, nor submitted an affidavit in support of her motion. She had a significant child protective history, including two neglect proceedings involving the child. The first proceeding, which alleged medical and educational neglect of the child, ended with an adjournment in contemplation of dismissal. After the mother completed the mandated services, a second proceeding was commenced against her with the some of the same allegations, and including an additional claim of excessive corporal punishment of an older child in the home, resulting in the neglect finding. The mother's offenses were serious because she failed to address the child's special needs on a consistent basis.

Moreover, the record does not reflect evidence of remorse, acknowledgment by the mother of her parental deficiencies in the past, or amenability to correction. As the court noted, it is not unreasonable to believe that its aid would be required in the

future, given the mother's difficulties in the past coping with her children's needs and the absence of any sworn statement by her addressing the court's reasonable concerns.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5070 Deborah Hartt, Index 23892/14
Plaintiff-Appellant,

-against-

Barry Kramer, D.D.S.,
Defendant-Respondent.
____

Joel M. Kotick, New York, for appellant.

Rawle & Henderson LLP, New York (Sylvia Lee of counsel), for respondent.
____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 12, 2016, which, in this action alleging dental malpractice and lack of informed consent, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record shows that before meeting with defendant, plaintiff consulted another dental practice, which recommended that she address her issues through implant surgery, which would involve three separate procedures, including a sinus lift and bone graft, over the course of six months. Plaintiff then approached defendant for a second opinion, expressing to him, among other things, her fear of surgery. Defendant advised her of his opinion that implant surgery carries with it certain

risks, and offered her a conservative treatment involving replacement of bridges, as well as cosmetic treatment.

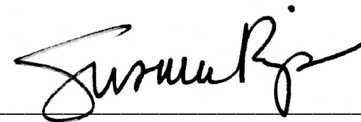
Defendant established his entitlement to judgment as a matter of law by submitting evidence showing that he did not depart from good and accepted dental practices, and that he fully informed plaintiff of the risks and benefits of his conservative treatment and the implant surgery (*see* Public Health Law § 2805-d [1], [3]).

In opposition, plaintiff failed to raise a triable issue of fact. Although her expert opined that defendant should have advised plaintiff to undergo implant surgery because that was the best treatment available at the time, defendant's decision to offer plaintiff conservative treatment for her dental problems, rather than to advise her to undergo a surgery that another physician had already recommended, did not constitute malpractice, as his choice was one of "several medically acceptable treatment alternatives" (*Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002] [internal quotation marks omitted]; *see also A.C. v Sylvestre*, 144 AD3d 417 [1st Dept 2016]). Concerning the informed consent cause of action, the opinion of plaintiff's expert that defendant misrepresented the risks of surgery lacked support and failed to demonstrate whether any alleged

misrepresentation proximately caused any alleged injury (*see Denis v Manhattanville Rehabilitation & Health Care Ctr., LLC*, 111 AD3d 406 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5071 Heritage Partners LLC, et al., Index 652381/16
Plaintiffs-Appellants,

-against-

Stroock & Stroock & Lavan LLP,
Defendant-Respondent.

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

Stroock & Stroock & Lavan LLP, New York (Bruce H. Schneider of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 16, 2017, which granted defendant's motion to dismiss the complaint with prejudice, unanimously affirmed, with costs.

Even if our decision in a prior action between the parties (*Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428 [1st Dept 2015], *lv denied* 27 NY3d 904 [2016]) does not constitute res judicata barring the instant action (a question we need not address), the new complaint fails to state a cause of action for malpractice because it does not sufficiently allege that defendant's negligence was the proximate cause of plaintiff's damages. While the current complaint addresses many of the problems we noted in the prior appeal, it does not

adequately address the difficulty of "obtain[ing] debtor-in-possession financing in a troubled economic climate" (*Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d at 429). Plaintiffs allege that "any funding required to facilitate a bankruptcy plan would have been secured through the bankruptcy court's issuance of a 'superpriority lien' . . . . Plaintiffs' over $71 million in equity cushion was more than sufficient to secure approval from a bankruptcy court for a superpriority lien for DIP Financing." However, as defendants contend, it is conjecture that there would have a been a DIP lender willing to finance plaintiffs' reorganization even if the bankruptcy court gave it superpriority. Unlike *In re Lake Michigan Beach Pottawattamie Resort LLC* (547 BR 899 [Bankr ND Ill 2016]), this is not a case where "the Debtor . . . offered to provide evidence . . . of lenders willing to refinance the Property and pay [the existing lender] in full" (*id.* at 908). Thus, like the allegations in the prior complaint, the allegations in the

current complaint are “couched in terms of gross speculations on future events and point to the speculative nature of plaintiffs’ claim” (*Heritage*, 133 AD3d at 429 [internal quotation marks omitted]).

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

ENTERED: NOVEMBER 28, 2017

CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5072 In re John Cooper, Index 101348/14
Petitioner-Respondent,

-against-

City of New York,
Respondent,

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

____

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

Glass Krakower LLP, New York (Jordan F. Harlow of counsel), for respondent.

____

Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered April 18, 2016, inter alia, annulling respondent Department of Education’s determination, dated November 24, 2014, which terminated petitioner’s probationary service and denied him a certificate of completion of probation, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

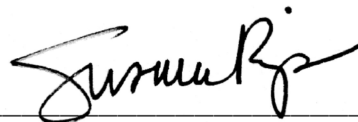
Petitioner failed to establish that his probationary service as a special services manager was terminated in bad faith or for an impermissible purpose (*see Matter of Brown v City of New York*,

280 AD2d 368 [1st Dept 2001]). To the contrary, the record demonstrates that respondent had a good faith reason for its determination, i.e., petitioner’s unsatisfactory performance. The record shows there were issues with petitioner’s leadership, communication and project management skills. Moreover, these issues persisted despite his supervisor’s repeated advice that he needed to improve and her efforts to assist him.

To the extent petitioner argues that the annulment of his termination should be affirmed because of procedural deficiencies in the internal review process, this argument is unpreserved and in any event unavailing. Any deviations from internal procedures did not deprive petitioner of a substantial right or undermine the fairness and integrity of the review process (*see Matter of Cho-Brellis v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 149 AD3d 411 [1st Dept 2017]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5073 The People of the State of New York, Respondent, Ind. 1636/15

-against-

Dajon Melendez,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 11, 2015, unanimously affirmed.

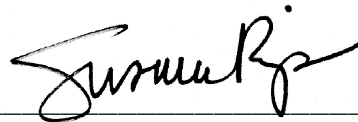
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5074 The People of the State of New York, Respondent, — Ind. 726/14

-against-

Timothus Dallas, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel) and Arnold & Porter Kaye Scholer, New York (Benjamin C. Wolverton of counsel), for appellant.

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

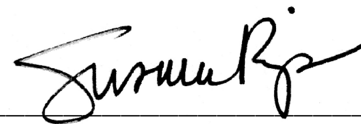
Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered July 15, 2015, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Regardless of whether the evidence established that defendant unlawfully entered an office building as a whole, or the portion of the building constituting a private school, the evidence clearly established that defendant was not licensed or privileged to enter a teachers' lounge, where he was

found rummaging through a teacher’s bag. A witness testified, with a sufficient degree of certainty, that the room was marked by a sign indicating that it was for faculty only, and the evidence supports the conclusion that the room was not open to the public (*see e.g. People v Midgette*, 115 AD3d 603, 604 [1st Dept 2014], *lv denied* 23 NY3d 965 [2014]; *People v Jenkins*, 213 AD2d 279 [1st Dept 1995], *lv denied* 85 NY2d 974 [1995]). This theory was encompassed in the charge set forth in the indictment. There is no merit to defendant’s interpretation of the sign as barring entry by the school’s students, but permitting entry by strangers.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5076 The People of the State of New York, Ind. 2239/03
Respondent,

-against-

Joseph Torres,
Defendant-Appellant.

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

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

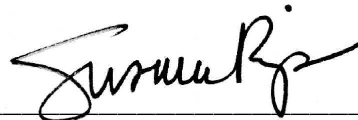
Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered November 8, 2010, resentencing defendant, as a second felony offender, to a term of 10 years, followed by 5 years of postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5077-
5078N Michael Rakosi, et al.,
Plaintiffs-Respondents,

-against-

Sidney Rubell Company, LLC, et al.,
Defendants-Appellants.

Index 654473/16

____

Wilk Auslander LLP, New York (Alan D. Zuckerbrod of counsel), for appellants.

Rosenfeld & Kaplan, LLP, New York (Tab K. Rosenfeld of counsel), for respondents.

____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered March 9 and 10, 2017, which granted plaintiffs' CPLR 6301 motion to preliminarily enjoin Sidney Rubell Company, LLC (SRC) from acting as managing agent of partnership properties, and directed SRC to turn over all keys, security codes, books, records and accounts for the properties, and to cease representing that it is the manager of the properties, unanimously affirmed, without costs.

In this action seeking damages and equitable relief with regard to SRC's management of properties of alleged real estate partnerships, plaintiffs, alleged partners of the partnerships, in seeking a preliminary injunction to enforce their termination

of SRC as managing agent, adequately demonstrated a likelihood of success on the merits, irreparable injury in the absence of the sought relief, and a balance of the equities in their favor (*see Doe v Axelrod*, 73 NY2d 748 [1988]), and Supreme Court's grant of the preliminary injunction was within its sound discretion (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

The terms of the May, 2009 settlement agreement were sufficiently clear to show that plaintiffs, expressly designated as partners with ownership interests in the real estate partnerships at issue here, acted within their authority by purporting to terminate SRC in July, 2016. We disagree with defendants that Supreme Court's previous determination in *Sperber et al. v Rubell et al.* (Sup Ct, NY County, Feb. 2, 2008, Tolub, J., Index No. 109933/05)) (Sperber litigation), that these individuals were not, by virtue of inheritance or assignment, partners of two of the real estate entities, disproves the settlement agreement's plain terms; the Sperber litigation pre-dated, and was definitively resolved by, the parties' execution of the settlement agreement. Moreover, Supreme Court here observed that, in the Sperber litigation, the sole surviving partner of the real estate partnerships was Sidney Rubell; as such, his agreement with plaintiffs here, and Stanley Rosenbloom,

sufficed to vest these individuals with membership interests (*see* Partnership Law § 40[7]).

Defendants present the entities' K-1s as dispositive proof that Rubell family LLC-transferees of Rubell's interests are entity partners; however, such documents, standing alone, do not prove an express partnership exists (*see Royal Communications Consultants, Inc. v IVIZ, LLC,* 40 Misc 3d 1217[A], ***11 [Sup Ct, Kings County 2013]). They may be relevant to the inquiry, but are not determinative (*see Rosenfeld v Kaplan*, 245 AD2d 176 [1st Dept 1997]). Moreover, defendants are judicially estopped from reliance on the K-1s as proof of their LLCs' partnership interests, having taken the precisely contrary position in the Sperber Litigation, and prevailed (*see Baje Realty Corp v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]). Their failure to submit any proof of Rubell's or other then-living partners' consent to their LLCs' acquisition of membership interests in the entities further undermines their position here (*see Rapoport v 55 Perry Co.*, 50 AD2d 54, 57 [1st Dept 1975]).

Plaintiffs have shown irreparable injury to the extent the properties continue to be managed by an agent they do not desire (*see Fieldstone Capital, Inc. v Loeb Partners Realty*, 105 AD3d 559 [1st Dept 2013]; *Bishop v Rubin* 228 AD2d 222,224-225 [1st

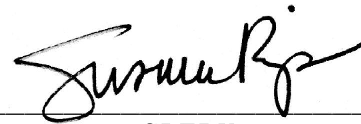
Dept 1996]). Further, given that defendants have been on notice, since 2009, that, by the settlement agreements' plain terms, their tenure as managing agent could expire as early as May, 2016, and given they do not show why, if their termination by plaintiffs is ultimately deemed valid, they cannot seek management work elsewhere, the balance of equities weighs in plaintiff's favor (*see Sirius Satellite Radio v Chinatown Apts.*, 303 AD2d 261 [1st Dept 2003]; *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 7 Misc 3d 1008[A] [Sup Ct, NY County 2004], *affd* 16 AD3d 292 [1st Dept 2005]). Defendants' unsupported, fact-intensive arguments concerning the alleged hardships that would be suffered by tenants of the partnerships' properties if SRC were replaced with a new managing agent were not raised below, and so we do not consider them now (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299, 303 [1st Dept

2000]).

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

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5079 In re Manuel P. Asensio, O.P. 124/17
[M-5298] Petitioner,

-against-

Hon. Nancy M. Bannon,
Respondent.

____

Manuel P. Asensio, petitioner pro se.

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

____

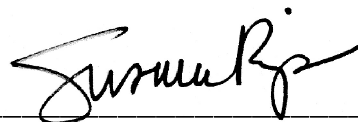
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Friedman, Andrias, Gesmer, JJ.

5080 In re Manuel P. Asensio, O.P. 125/17
[M-5381] Petitioner,

-against-

Hon. Nancy M. Bannon,
Respondent.

____

Manuel P. Asensio, petitioner pro se.

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

____

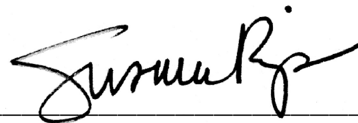
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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.

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

ENTERED: NOVEMBER 28, 2017



CLERK

Tom, J.P., Mazzarelli, Andrias, Oing, Singh, JJ.

4540-
4541 The People of the State of New York, Respondent,

Ind. 4123/11

-against-

Equan Southall,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 22, 2014, and order, same court and Justice, entered on or about June 28, 2016, reversed, on the law, the motion to vacate granted, and the matter remanded for a new trial.

Opinion by Tom, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Richard T. Andrias
Jeffrey K. Oing
Anil C. Singh, JJ.

4540-4541
Ind. 4123/11

____x

The People of the State of New York,
Respondent,

-against-

Equan Southall,
Defendant-Appellant.

____x

Defendant appeals from the judgment of the Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 22, 2014, convicting him, after a jury trial of murder in the second degree, and imposing sentence, and from the order of the same court and Justice, entered on or about June 28, 2016, which denied his CPL 440.10 motion to vacate the judgment.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer and Hilary Hassler of counsel), for respondent.

TOM, J.

In this appeal, we must consider whether a juror’s failure to disclose that she applied for the position of Assistant District Attorney with the New York County District Attorney's Office, the same office that prosecuted defendant, two days before being sworn as a trial juror, deprived defendant of his right to a fair trial, and whether Supreme Court abused its discretion in denying defendant’s posttrial motion to vacate the judgment of conviction. For the following reasons, we find that the juror’s failure to disclose her application did deprive defendant of a fair trial, and that Supreme Court abused its discretion as a matter of law when it denied defendant’s motion to vacate pursuant to CPL 440.10. Accordingly, we now grant the motion to vacate the judgment and remand the matter for a new trial.

In 2011, defendant was charged with murder in the second degree for killing his girlfriend. At trial, since defense counsel conceded that defendant truthfully confessed to killing the victim, the central issue was whether defendant suffered from an extreme emotional disturbance which would reduce the conviction to first degree manslaughter. The jury ultimately convicted defendant of murder in the second degree, and he was sentenced to a prison term of 23 years to life.

During the April 11, 2014 voir dire, the court gave general instructions to the juror at issue and other prospective jurors, stating that "the jury must be fair" and that "[a] fair juror is a person who starts out with no view in favor or against the People or defendant," and "who, without fear, favor, bias, prejudice, or sympathy for either the People or the defendant . . . renders a verdict of guilty or not guilty." The court told the jury panel that the court needed to decide "[w]hether there's anything about you that might impact your ability to be a fair and impartial juror in this case." The questions on the panelists' questionnaire included whether they had "been employed by a law enforcement agency or police," whether they had "any business pending" before a police or law enforcement agency, and whether there was "any reason why [they] could not be a fair and impartial juror in this case." The panelists were also asked a catch-all question about whether anything else relevant came to mind.

On April 14, 2014, the juror told the court that she was "employed as an attorney" at "a large law firm doing corporate litigation, white col[la]r defense and securities." In response to the court's questions about her work, the juror said that she had been an attorney for about 18 months, that "part of [her] practice involve[d] criminal law," that she had "some specialized

knowledge about criminal law," and that her practice was largely federal. She confirmed that she would follow the court's instructions and not apply any of her own specialized knowledge. When asked if she thought she would "be able to be a fair juror in this case," she said, "Yes." The juror also reported in an answer on the questionnaire, "I previously was employed by the U.S. Attorney's [O]ffice here in Manhattan. I was a paralegal specialist before I went to law school." The court asked if this work focused on criminal justice, and the juror said, "Yes, narcotics unit."

In response to another question on the questionnaire, the juror stated, "I don't have any business matters pending before an agency or court." She further stated, "There's no reason why I couldn't be fair and impartial." In response to the catch-all question, she said, "There's, also, nothing else."

Defense counsel noted that the juror "spent a lot of time with federal prosecutors at 500 Pearl Street," and asked her if anything "about [her] experience would make [her] impartial," and the juror said, "No.", presumably assuming that counsel meant "biased" instead of "impartial." When counsel asked if the juror's "prosecutor background" "would affect" her in this case, the juror responded:

"No, when I worked [at] the U.S. [A]ttorney's [O]ffice

> I worked with a variety of different federal agencies. And I worked with cooperating witnesses, many of whom came from different backgrounds and rap sheets, and had certain things in their past. So I sort of worked with people on both sides, and had positive . . . interactions with both. And there's nothing about that entire array of experiences that would make me be unfair or impartial in evaluating the witnesses."

Defense counsel asked the juror a follow-up question about whether the "cooperating witnesses" she had mentioned, who may have had "horrible backgrounds" and "committed the crimes they're being accused of and 10,000 other crimes," nevertheless "have the right to come in and get on the witness stand and be believed." The juror responded, "Yeah."

After notifying the juror and others that they had been selected for the jury, the court instructed them to "remember all of the rules" stated earlier. The jury was sworn on April 18, 2014.

After swearing in the prospective jurors, the court invited them to speak with the court privately if they had "some concern or problem" with serving, and asked whether there was "anything else about [their] possible jury service" to discuss, including "anything else that . . . [it] ha[d] not already asked about." The juror did not do so at any time.

Eight months after defendant was sentenced, one of the two Assistant District Attorneys (ADA) who tried this case, Craig J.

Ortner, sent a letter to the court and the defense, dated January 22, 2015, disclosing that one of the jurors who convicted defendant, the juror, had been hired by the DA’s Office as an ADA. He noted that the juror submitted an online application for that position on April 16, 2014 -- two days after she was questioned as a prospective juror, but two days before she was sworn as a juror. He added that the juror’s application did not mention her jury service, and that neither he nor his cocounsel was aware of the application anytime during trial. He further stated that after the trial concluded, on April 29, 2014, the juror completed four interviews with the DA’s Office beginning on May 20, received an employment offer on July 8, and started working there on September 2, 2014.

Following this disclosure, defendant moved to vacate the judgment of conviction pursuant to CPL 440.10(1)(f) and (h), based on the prejudicial conduct of the juror’s failure to inform the court of her pending job application to the New York District Attorney’s Office during the jury selection process. On February 19, 2016, a hearing was held on the motion at which the juror and defendant’s trial counsel, Patrick Brackley, testified.

At the 440 hearing, the juror testified that at the time of trial, she was a 28-year-old litigation associate at a large firm, who had been admitted to the bar in 2013, and graduated

from law school in 2012. The juror, who had worked at the US Attorney's Office as a paralegal, did not want to spend her whole career at a firm. Thus, in February 2014 she started applying for jobs, primarily federal judicial clerkships in New York. At the time of voir dire, she had an "interest in one day pursuing a career as a prosecutor" because of her "overwhelmingly positive experience" working at the US Attorney's Office before law school, but could not recall "at that moment" having a specific interest in any "particular office." At that time, she had not applied to any prosecutors' offices, although she had applied for a trial attorney position at the antitrust division of the US Department of Justice.

The juror had not received any responses to her clerkship applications, and she recalled that "being called for jury service for the first time . . . and coming down to the court and having the experience of going through [v]oir [d]ire . . . certainly inspired [her] at that time to consider other jobs," including the DA's Office. Accordingly, on April 16, she applied to the DA's Office online. She took "a few hours" tailoring her existing documents to suit this particular application before uploading them to the website. The main document she needed to "personalize" was the cover letter; she kept all of her other documents (a resume, transcripts, and list of references)

essentially the same as with her prior applications. She could not remember if she submitted a writing sample at that time or later in the hiring process.

The juror explained that she had interpreted the trial court's instruction not to communicate with attorneys in the case to refer to the individual prosecutors handling the case, not to the DA's Office as a whole. Therefore, she did not inform the court of her application to the DA's Office because "it didn't occur to [her] that . . . submitting an application was something that [she] was supposed to disclose to the court." She stated: "My understanding of the [v]oir [d]ire questions that I had been asked didn't include whether I had hoped, intended, or had any applications for any jobs in particular."

The juror asserted that she answered all voir dire questions truthfully, and did not make any statements she knew (at the time or during the CPL 440 hearing) to be false to the court or counsel during jury selection or trial. She testified that she followed all of the court's instructions to the best of her ability, and never "intentionally fail[ed] to disclose information that [she] believed to be relevant to [her] qualifications to serve as a juror" during jury selection. She was not concerned that disclosing the application might prevent her from serving on the jury.

The juror also denied that she thought about her job application to (or prospective employment with) the DA's Office at all during jury deliberation, and she maintained that her application did not influence her conduct as a juror in this case, including her verdict. In this regard, she stated that she "play[ed] an active role in discussing the case with other jurors." Similarly, she noted that she voted to convict because she "believed that the evidence proved [d]efendant's guilt beyond a reasonable doubt." If she had believed otherwise, she would have "explained" to the other jurors "why [she] came to that conclusion on the basis of the evidence," "insisted" that the jury deliberate about her reasons for believing that the People had not met their burden, and voted to acquit. The juror did her best "to be a fair juror in this case," and had no bias against either party during the trial.

After submitting the application, the juror did not communicate with anyone at the DA's Office until weeks after the trial. When she arrived for her initial interview, on May 20, 2014, a staff member told her that ADA Ortner would interview her, but the juror pointed out that she had recently served on a jury in a case prosecuted by ADA Ortner, who ultimately did not interview her. She never mentioned her jury duty during her four DA's Office interviews.

Defendant's trial counsel, Patrick Brackley, testified that he chose not to challenge the juror because after questioning her about her experience at the US Attorney's Office and her then-current position at a firm where she practiced white-collar criminal defense, counsel Brackley concluded that she would likely be "sympathetic to defense issues." However, if counsel had known that the juror had a pending job application with the DA's Office, counsel Brackley would have "inquired into it" and challenged her for cause; if that were denied, counsel would have used a peremptory challenge.

Supreme Court denied defendant's motion to vacate, finding that the juror's testimony established that her vote in this case "was not influenced by any bias or prejudice arising from her employment application," and that she did not falsely answer any voir dire questions or violate the court's instructions. In other words, the court found that it had not been shown that the juror exhibited actual bias.

Turning to defendant's claim of "implied bias," the court recognized that "[t]he juror's failure to inform the [c]ourt and the parties on her own about her application when she appeared to begin the trial on April 18, 2014 reflected poor judgment, particularly since [she] was an attorney, who should have realized the application might create an appearance of

impropriety." However, the court remarked that it was unaware of any case where implied bias was found to warrant vacating a conviction. In any event, the court found "no extreme circumstances warranting a finding of implied bias," since there was "no reason . . . to believe [] the juror thought her employment prospects in the DA's [O]ffice would be impacted by her jury verdict," and her "application did not come up during the jury's deliberations."

Article I, section 2 of the New York State Constitution guarantees a trial by jury in criminal cases. Article VI, section 18[a] of our State Constitution also provides that "crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived." But, it is not merely a right to trial by a jury of twelve of our citizens that are among our most valued rights, rather it is the right to a fair trial in front of a fair jury. Undoubtedly, "[f]undamental to our constitutional heritage is an accused's right to trial by an impartial jury" (*People v Johnson*, 94 NY2d 600, 610 [2000]; *see also* US Const 6th Amend).

Indeed, "[n]othing is more basic to the criminal process than the right of an accused to a trial by an impartial jury" (*People v Branch*, 46 NY2d 645, 652 [1979]). As the Court of Appeals has further explained, "The presumption of innocence, the

prosecutor's heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias" (*id.* at 652).

Because the right to an impartial jury is so critical, a defendant plays a significant role in the selection of the jurors. In fact, "[t]he constitutional right of a criminal defendant to a fair trial includes both the right to be tried by the jury in whose selection the defendant himself has participated, and the right to an impartial jury" (*People v Rodriguez*, 71 NY2d 214, 218 [1988]). Stated another way, a defendant has a "constitutional right to a trial by a 'particular jury chosen according to law, in whose selection [the defendant] has had a voice'" (*People v Buford*, 69 NY2d 290, 297-298 [1987], quoting *People v Ivery*, 96 AD2d 712 [4th Dept 1983]). In enacting certain provisions of the Criminal Procedure Law, our State Legislature has ensured the defendant's role in that selection and has provided procedural safeguards to ensure the selection of impartial jurors.

Initially, jurors must complete questionnaires about themselves that may reveal bias or other grounds that would prevent them from serving, and both the court and counsel are given opportunities to examine the prospective jurors (CPL

270.15). Individual jurors may be challenged for cause (*see* CPL 270.20) based on demonstrable actual bias, or even in cases of implied bias in which the juror "bears some other relationship to [certain persons] of such nature that it is likely to preclude him from rendering an impartial verdict" (CPL 270.20[c]).

Even absent cause, defendants are afforded the right to peremptory challenges to a prospective juror "for which no reason need be assigned" (CPL 270.25). Significant to the right to an impartial jury, "[t]he central function of the right of peremptory challenge is to enable a litigant to remove a certain number of potential jurors, who are not challengeable for cause, but in whom the litigant perceives bias or hostility" (2 Crim. Prac. Manual § 54:2). The function is "to eliminate the extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise" (*Swain v Alabama*, 380 US 202, 219 [1965]).

As a final failsafe, our procedures provide for the selection of alternate jurors (CPL 270.30), and for the discharge of sworn jurors and replacement by alternate jurors in the cases of incapacity, unavailability, a juror grossly disqualified to serve, or where a juror has engaged in substantial misconduct (CPL 270.35).

Here, due to the juror’s concealment of material information regarding her job application, which also demonstrated a predisposition in favor of the prosecution, defendant was deprived of an impartial jury comprised of 12 jurors whom he had selected and approved through voir dire. In fact, defendant was tried by only 11 jurors whom he truly selected and approved; this violated his constitutional right to a jury of 12 of his own choice in a criminal case (NY Const, art VI, § 18[a]). He was also deprived of exercising the various safeguards put into place by our legislature. As defense counsel testified, had the juror timely disclosed this information he would have moved to strike her for cause, and if unsuccessful would have exercised a peremptory challenge against her (*see People v Howard*, 66 AD2d 670 [1st Dept 1978] [prospective juror’s failure to disclose connection to law enforcement agency deprived defendant of right to fair trial; had juror disclosed such information, a for cause challenge would have been sustained or counsel could have used a peremptory challenge]; *see also United States v Colombo*, 869 F2d 149, 151-152 [2nd Cir 1989][court may presume bias where juror deliberately concealed information; defendant prevented from intelligently exercising his peremptory and causal challenges because of the juror’s intentional nondisclosure]). While we recognize that there is no rule requiring automatic reversal in

these situations (*see People v Rodriguez*, 100 NY2d 30, 34 [2003]), since the verdict was not returned by a fair and impartial jury and we find the juror would have been subject to removal for cause, we agree with defendant that he was denied a fair trial on the ground that he was not tried by a jury of his own choice. We thus remand for a new trial. Critically, the juror remaining on the jury was prejudicial to defendant because he was ultimately convicted by the jury.

Instructive here is the case of *People v Gajadhar* (9 NY3d 438 [2007]), in which the defendant executed a signed waiver consenting to a verdict rendered by 11 jurors. In that case, after deliberations began, one juror became ill and, to avoid a declaration of mistrial, defendant agreed to the waiver. While our State Constitution permits a waiver of the right to a jury of 12 citizens, it is crucial that the waiver be made knowingly, voluntarily and intelligently. In addition to requesting that the juror be replaced by an alternate juror, perhaps, if the disclosure was made after the jury was sworn but before the verdict, defendant would have consented to a similar waiver in this case. However, as the events unfolded defendant was not given such an opportunity and could not have validly waived his right to an impartial jury of 12 citizens which he selected.

Although the motion court decides whether to grant or deny a motion to vacate in its discretion (*see People v Friedgood*, 58 NY2d 467, 474 [1983]), and we defer to the court's credibility determinations, we conclude that the motion court abused its discretion as a matter of law in denying the motion. The motion court employed a too narrow approach to determining whether the juror exhibited actual bias. Notably, CPL 270.20(1)(b) requires merely proof of a "state of mind that is likely to preclude a juror from rendering an impartial verdict." Thus, actual bias "is not limited . . . to situations where a prospective juror has formed an opinion as to the defendant's guilt" (*People v Torpey*, 63 NY2d 361, 366 [1984]).

Actual bias may be demonstrated, inter alia, by failure "to answer honestly a material question on voir dire," (*McDonough Power Equip. v Greenwood*, 464 US 548, 556 [1984]), concealing material information from the court (*see United States v Colombo*, 869 F2d at 152, *supra*), or by manifesting a predisposition in favor of the prosecution (*see People v Brown*, 295 AD2d 184, 185 [1st Dept 2002]).

While the juror did not lie when she was questioned as a prospective juror, she later concealed material information - her application to work for the office prosecuting this case - which, as an attorney with some specialized knowledge of criminal law,

she should have known to disclose to the court. Similarly, while the juror may have subjectively believed she was not biased, that her application had no bearing on her ability to be an impartial juror, that she did not consider the affect a not-guilty verdict would have on her prospective employment, and that she followed the court's instructions as she understood them, an objective view of her failure to inform the court of a significant action on her part can not be perceived in the same manner. It is this objective view that matters here, and we find that the record demonstrates that the juror possessed a state of mind likely to prevent her from rendering a fair and impartial verdict.

Indeed, while the juror may have been applying for many legal jobs during that time period she must have known this job application was unique. Significantly, the juror's immediate disclosure of her jury service upon her discovery that one of the prosecuting attorneys on this case was to interview her for her job is telling in that it reveals the juror knew her jury service and job application were connected and, as the motion court stated, raised at the very least an appearance of impropriety. In other words, the failure to disclose the job application to the court demonstrated actual bias. Once again, defense counsel averred that if he knew of the juror's job application he would have sought her removal for cause or would have used a peremptory

challenge. In sum, the motion court's crediting the juror's testimony that she did not think her job application might compromise her impartiality is of no moment under these circumstances.

Further, as the juror herself testified, she was inspired to become a prosecutor by her experience during the voir dire of this matter, which is what compelled her to immediately apply to work at the office that prosecuted this case. It appears that there may have been a predisposition in favor of the prosecution which could have separately warranted a challenge for cause (*see People v Brown*, 295 AD2d at 185).

The motion court and the People rely on *Smith v Phillips* (455 US 209 [1982]) to argue that where a sitting juror applies for a job at the office prosecuting the case and fails to disclose that fact, a defendant is not denied his right to a fair trial. According to the United States Supreme Court, under federal law, the defendant in *Smith* was afforded due process because he had an opportunity to prove actual bias by the sworn juror at an evidentiary hearing. However, *Smith* is distinguishable in that it involved a habeas petition and is inapposite to the state law issues raised in this case. Even accepting that *Smith* established the federal standard, such standard sets the floor and not the ceiling on protections under

New York law. As discussed below, New York law offers far greater protections, including the disqualification of jurors for implied bias.

Contrary to the People's contention that a defendant in New York must show actual bias in a postjudgment hearing, and the motion court's related statement that there is no precedent in which the implied bias standard has been used to vacate a conviction through a postjudgment motion, in *People v Rentz* (67 NY2d 829 [1986]), the Court of Appeals granted a postjudgment motion to vacate a conviction on the ground of a juror's implied bias. Accordingly, it is well settled that a juror's implied bias is a sufficient ground to vacate a conviction.

Pursuant to CPL 270.20(1)(c), a juror may be removed for cause where he or she has a relationship with the defendant, a witness, or counsel for the People or defendant which "is likely to preclude him [or her] from rendering an impartial verdict." "This is referred to colloquially as an 'implied bias' that requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect her ability to be fair and impartial" (*People v Furey*, 18 NY3d 284, 287 [2011]).

Crucially, such implied bias cannot be cured with an expurgatory oath (*Furey*, 18 NY3d at 287). Indeed, "the risk of

prejudice arising out of the close relationship . . . [is] so great that recital of an oath of impartiality could not convincingly dispel the taint” (*Branch*, 46 NY2d at 651). Implied bias “creates the perception that the accused might not receive a fair trial before an impartial finder of fact” (*Furey*, 18 NY3d at 287). For this reason, the Court of Appeals has advised trial courts to exercise caution in these situations by leaning toward “disqualifying a prospective juror of dubious impartiality” (*Branch*, 46 NY2d at 651).

Here, defendant met his burden of establishing the juror’s implied bias. The nature of the parties’ relationship is to be considered in determining whether disqualification is necessary (*Furey*, 18 NY3d at 287). While the juror did not have any direct contact with the ADAs assigned to the case, and did not initially reveal her jury service in her job application, the fact remains that just two days after being questioned in voir dire, and two days before she was sworn as a juror, the juror spent hours on her application to the same office prosecuting defendant, in which she attempted to persuade that office to hire her as a prosecutor. The juror admitted at the CPL 440 hearing that she made the decision to apply for the job because she was inspired by her experience of the voir dire in this case -- and this inspiration was specifically directed at the prosecutorial side,

since she already aspired to be a prosecutor some day after finding her job in the narcotics unit of the US Attorney's Office to be "overwhelmingly positive." The juror was presumably motivated to think highly of the DA's Office in order to be well-prepared to establish a positive connection with the office in the event she was interviewed. And, a job applicant is by nature partial towards the prospective employer, here the prosecuting office in this case.

Even if the juror was sincerely convinced that she would be a fair juror, it was problematic for her to be one of the triers of fact in an action brought by her prospective employer. Her knowledge that she was seeking a job at the DA's Office, as well as her experience of crafting her argument in her cover letter to the DA's Office that she would be an excellent prosecutor there, created a relationship between her and the DA's office, which raised a high likelihood that she would be inclined to favor the People, and which was "likely to preclude [her] from rendering an impartial verdict" (CPL 270.20[1][c]). As noted, the juror's assertions of impartiality are irrelevant to our analysis, as her implied bias is incurable.

Separately, permitting a juror seeking employment with the prosecuting agency in a criminal matter to serve on the jury creates the appearance of impropriety, and erodes the public's

confidence in the criminal justice system. Indeed, a number of cases make clear that a juror's recent contact or association with the prosecuting agency's office warrant a dismissal for cause (*see e.g. People v Lynch*, 95 NY2d 243, 248 [2000] [student intern employed at prosecutor's office should have been dismissed for cause]; *People v Greenfield*, 112 AD3d 1226, 1229 [3d Dept 2013] [prospective juror's current cooperation with prosecuting agency required dismissal for cause]).

Further, it is understandable that defense counsel, not knowing of the job application, decided not to challenge the juror, who had made a convincing argument for her ability to be impartial, describing her professional interactions with cooperating witnesses in criminal cases as relevant to her ability to fairly consider witnesses with troubled backgrounds in this case, and who practiced white-collar criminal defense at around that time. Yet, counsel credibly testified that if he had known of the juror's pending job application to the DA's Office, he would have challenged her on that basis. A for-cause challenge should have been granted if the juror had disclosed the information, due to her conflict of interest as a juror who was in the process of vying for a job as an ADA at the same office prosecuting defendant in this case.

In sum, the court should have granted defendant's motion to vacate his conviction, since "[i]mproper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment," which "would have required a reversal of the judgment upon an appeal therefrom" if it had occurred on the record (CPL 440.10[1][f]).

Finally, the verdict was not against the weight of the evidence, and there is thus no basis for dismissal of the indictment or reduction of the conviction. Since we are reversing the order and judgment, and granting the motion to vacate, we do not reach defendant's remaining arguments.

Accordingly, the judgment of the Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 22, 2014, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him, to a term of 23 years to life, and the order of the same court and Justice, entered on or about June 28, 2016, which denied his CPL 440.10 motion to vacate the

judgment, should be reversed, on the law, the motion to vacate granted, and the matter remanded for a new trial.

All concur.

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

ENTERED: November 28, 2017

CLERK