SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 4, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7760 The People of the State of New York, Respondent, Ind. 5814/10

-against-

George Ventura,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered August 9, 2014, as amended August 12, 2016, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years to life and 15 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's requests for new counsel, made during the suppression hearing and jury selection (*People v Sides*, 75 NY2d 822, 824 [1990]; *People v Medina*, 44 NY2d 199, 207 [1978]). Regardless of

the sufficiency of the first inquiry, the court conducted a thorough inquiry into defendant's second request (*see People v Nelson*, 7 NY3d 883, 884 [2006]), and it gave defendant numerous opportunities to elaborate on his conclusory statements that defense counsel was unprepared (*see People v Linares*, 2 NY3d 507, 511 [2004]). Defendant's only specific complaints were unfounded (*see People v Felder*, 17 AD3d 126, 126-27 [1st Dept], *lv denied* 5 NY3d 852 [2005]). When defense counsel joined in defendant's application, he cited only defendant's recent request and defendant's belligerence in court the preceding day as the basis for his request, which did not amount to an irreconcilable conflict that required counsel to be relieved. "No conflict existed other than that created by defendant through his unjustified hostility toward his competent attorney" (*id*. at 127).

Arrest photos of defendant should have been excluded as irrelevant, and a witness's testimony about, and speculative explanation for, "bad blood" between defendant and the victim should have been excluded as being beyond the witness's personal knowledge. However, we find both errors harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence of defendant's guilt, from a variety of sources, including compelling evidence of defendant's consciousness of guilt.

At a *Sirois* hearing (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]), the People proved, by clear and convincing evidence, that, by causing a witness's unavailability, defendant forfeited his right to confront the witness and rendered his witness's out-of-court statement admissible. Defendant did not preserve his claim that the witness's statement was insufficiently reliable to be admitted, and we decline to review it in the interest of justice. As an alternative holding, we find there was sufficient indicia of reliability (*see People v Cotto*, 92 NY2d 68, 77-78 [1998]), including, among other things, corroboration by two other eyewitnesses.

The court lawfully imposed consecutive sentences for murder and simple weapon possession (Penal Law § 265.03 [3]), because the evidence supports the inference that defendant's unlawful possession of the weapon on the street was complete before he

drew the weapon and shot the victim (*see People v Brown*, 21 NY3d 739, 750-751 [2013]). We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7761 Milton Goya,
Plaintiff-Appellant-Respondent,

-against-

Longwood Housing Development Fund Company, Inc., et al.,
Defendants-Respondents,

A.A.D. Construction Corp.,
Defendant-Respondent-Appellant.

- - - - -

Longwood Housing Development Fund Company, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Triboro Maintenance Corporation, et al.,
Third-Party Defendants-Respondents.

- - - - -

Triboro Maintenance Corporation,
Second Third-Party Plaintiff-Respondent,

-against-

Clark & Wilkins Industries, Inc.,
Second Third-Party-Defendant-Respondent.

- - - - -

Longwood Housing Development Fund Company, Inc.,
Third-Third-Party Plaintiff-Respondent,

-against-

Clark & Wilkins Industries, Inc.,
Third-Third-Party Defendant-Respondent.

- - - - -

Clark & Wilkins Industries, Inc.,
Fourth Third-Party Plaintiff-Respondent,

-against-

Index 23359/14E
43017/16E
43120/16E
43142/16E
43252/16E
43282/16E

Cross Contracting, Inc., et al.,
Fourth Third-Party Defendants-Respondents.
- - - - -
Longwood Housing Development Fund Company, Inc.,
Fifth Third-Party Plaintiff-Respondent,

-against-

Cross Contracting, Inc., et al.
Fifth Third-Party Defendants-Respondents.

____

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

O'Connor Reed Orlando LLP, Port Chester (Steven M. O'Connor of counsel), for respondent-appellant.

Litchfield Cavo LLP, New York (Dennis J. Dozis of counsel), for Longwood Housing Development Fund Company, Inc., respondent.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for Melcara Corp., respondent.

Sullivan & Klein, LLP, New York (Frederick M. Klein of counsel), for Triboro Maintenance Corporation, respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for AIM Construction of NY Inc., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for Clark & Wilkins Industries, Inc., respondent.

Gallo Vitucci Klar LLP, New York (Sara R. David of counsel), for Cross Contracting Inc. and Cross Contracting Corp., respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 28, 2017, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on his Labor Law

§ 240(1) claim, and denied the cross motion of defendant A.A.D. Construction Corp. (AAD) for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, unanimously affirmed, without costs.

The court properly denied AAD's cross motion for summary judgment because the fire escape ladder that plaintiff was climbing at the time of the accident was a "safety device" within the meaning of Labor Law § 240(1). The ladder was specifically used "to provide access to different elevation levels for the worker and his materials" (*Acosta v Kent Bentley Apts.*, 298 AD2d 124, 125 [1st Dept 2002]; *see Sahota v Celaj*, 11 AD3d 308, 310 [1st Dept 2004]), and, as such, the record does not permit a conclusive determination that AAD was not liable for plaintiff's injuries. Moreover, the record does not permit the conclusion that this plaintiff was the sole proximate cause of his injuries, or, that there was another, readily available ladder or safety device, that plaintiff unreasonably chose not to use (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

The court correctly denied plaintiff's motion for partial summary judgment because there were issues of fact as to whether he was "permitted or suffered to work on [the] building" at the time of the accident (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]). There was conflicting evidence as to

whether plaintiff had permission to perform work at the accident site on the day in question (*see Aslam v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 135 AD3d 790, 791-792 [2d Dept 2016]; *Lazri v Kingston City Consol. School Dist.*, 95 AD3d 1642, 1644 [3d Dept 2012]).

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7764 The People of the State of New York, Ind. 2358/16
Respondent,

-against-

Theodore Barnes,
Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler 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 August 22, 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: DECEMBER 4, 2018

CLERK

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

Acosta, P.J., Mazzarelli, Gesmer, Singh, JJ.

7766 The People of the State of New York, Ind. 819/13
Respondent,

-against-

Leondriss Jeffreys,
Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Amanda K. Regan of counsel), for respondent.

____

Order, Supreme Court, New York County, (Robert M. Stolz, J.), entered on or about October 9, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant was properly assessed 20 points under the risk factor for the victim’s physical helplessness. The record establishes that the victim was asleep when defendant sexually assaulted her and only woke up as the result of the assault (*see People v Winbush*, 123 AD3d 490 [1st Dept 2014], *lv denied* 24 NY3d 916 [2015]). Defendant was also properly assessed 15 points under the risk factor for substance abuse. Defendant admitted that he was under the influence of alcohol during the crime, and this is sufficient to support the point assessment (*see People v*

Watson, 112 AD3d 501, 502 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or were outweighed by the egregious circumstances of the underlying offense.

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7767 The People of the State of New York, Ind. 2061/16
Respondent,

-against-

Juan Molina,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter 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 (Robert M. Stolz, J.), rendered November 30, 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: DECEMBER 4, 2018

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CLERK

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

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

7768 In re Country-Wide Insurance Company, Index 651296/15
Petitioner-Appellant,

-against-

Bay Needle Acupuncture, P.C.,
as assignee of Jasmine Walker,
Respondent-Respondent.

____

Thomas Torto, New York (Jason Levine of counsel), for appellant.

Gary Tsirelman, P.C., Brooklyn (Gary Tsirelman of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 5, 2017, in favor of respondent, unanimously affirmed, with costs, and the matter is remanded to Supreme Court for a determination of respondent's reasonable attorneys' fees for this appeal.

Petitioner failed to demonstrate that the arbitration award underlying the judgment was irrational and incorrect as a matter of law and that therefore the master arbitrator exceeded his power in affirming it (*see* CPLR 7511[b][1][iii]). Petitioner's primary argument is that the no-fault arbitrator's refusal to accept its untimely opposition papers asserting a *Mallela* defense (*State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313 [2005]) was irrational and incorrect because such a defense may not be waived or precluded on the ground of untimeliness (*see Matter of*

Acuhealth Acupuncture, P.C. v Country-Wide Ins. Co., 149 AD3d 828 [2d Dept 2017]). We reject this argument.

We find that petitioner's defense is not a *Mallela* defense. It is based on the guilty plea of Andrey Anikeyev, who, according to petitioner, is respondent's "*de facto* owner," to conspiracy to commit health care fraud and mail fraud. Anikeyev pleaded guilty to billing insurance companies "for health care services for time periods in excess of the actual time period the patient spent with [the] acupuncturist." This plea supports nothing more than "a defense that the billed-for services were never rendered," which is "more like a 'normal' exception from coverage (e.g., a policy exclusion) [than] a lack of coverage in the first instance" (*Fair Price Med. Supply Corp. v Travelers Indem. Co.*, 10 NY3d 556, 565 [2008]), and therefore does not fall into the "settled law recognizing a narrow exception to the 30-day deadline for defenses based on lack of coverage" (*Matter of MVAIC v Interboro Med. Care & Diagnostic PC*, 73 AD3d 667 [1st Dept 2010] [citation omitted]).

Petitioner failed to present any evidence that respondent was improperly or fraudulently incorporated. In fact, there is no evidence in this record that Andrey Anikeyev was the owner of respondent so that his actions could be imputed to respondent. In any event, Anikeyev's guilty plea does not amount to an

admission of improper incorporation.

Respondent is entitled to reasonable attorneys' fees for this appeal, to be determined by Supreme Court (11 NYCRR 65-4.10[j][4]; *see Matter of Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018]).

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

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7769 47-53 Chrystie Holdings LLC, et al., Index 651896/15
Plaintiffs-Appellants,

-against-

Thuan Tam Realty Corp., et al.,
Defendants-Respondents,

Wing Yui Choi, et al.,
Defendants.

____

Frydman, LLC, New York (David S. Frydman of counsel), for appellants.

Paul D. Wexler, New York, for respondents.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 29, 2017, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss the cause of action for fraud as against defendants Diane Choi, Cam Thi Tai, Lisa Quach, Chung Tem Choi and Jonathan Choi, the cause of action for rescission of plaintiffs' termination of a purchase agreement and specific performance of that agreement, and the cause of action, alternatively, for breach of the agreement, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff Theodore Welz, through plaintiff 47-53 Chrystie Holdings LLC (Chrystie), entered into a stock purchase agreement

with the individual defendants, majority shareholders of defendant Thuan Tam Realty Corp (Realty). Under the purchase agreement, plaintiffs were afforded a 20-day due diligence period, during which they could terminate the agreement, and defendants were required to give plaintiffs reasonable access to Realty's books and records and to furnish information that plaintiffs reasonably requested. The complaint alleges that plaintiffs requested Realty's corporate documents and that the individual defendants represented, on a number of occasions, that no corporate documents existed. The record contains an email from Realty's manager to plaintiffs' counsel stating that he had confirmed with the "different shareholders" that Realty did not have the requested corporate documents. The complaint alleges that plaintiffs relied on this representation and, based on the uncertainty concerning the existence of corporate documents, terminated the purchase agreement.

The parties continued to negotiate, and they agreed to revive the agreement on the condition that a court of competent jurisdiction issue a declaratory judgment as to the holdout shareholder's rights, which would address the uncertainty created by the absence of corporate documents. The individual defendants then secured a higher purchase price from plaintiffs. After the second purchase agreement was signed, defendants disclosed that

corporate documents did exist.

The complaint states a cause of action for fraud against the individual defendants. Contrary to defendants' contention, the fact that it refers to the seller shareholders as the "Individual Defendants" does not render the claim insufficiently particularized as to any of the individual defendants (*see Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532 [1st Dept 2011]; CPLR 3016[b]). The term "Individual Defendants" does not refer to a diverse group of defendants to whom entirely different acts giving rise to the action may be attributed; it refers to the eight shareholders of the single corporate defendant, each of whom is alleged to have made the same false representation, to wit, that no corporate documents existed. At this stage of the proceedings, it is reasonable to infer that the individual shareholders knew whether this closely held corporation maintained corporate documents and thus that they participated in the alleged wrongful conduct by representing that no documents existed (*see id.*, citing *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]).

The complaint alleges that plaintiffs terminated the first purchase agreement as a result of defendants' fraudulent conduct. Thus, it states a cause of action for rescission of that agreement based on a "fraudulently induced unilateral mistake"

(*Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 1000 [1998]; *see e.g. Pomranz v Tauber*, 279 AD2d 411 [1st Dept 2001]).

In view of the existing issue of whether plaintiffs were induced by bad faith conduct on defendants' part to terminate the first purchase agreement, as alleged in the complaint, it would be premature to dismiss the alternative breach of contract cause of action (*see Mokar Props. Corp. v Hall*, 6 AD2d 536, 540 [1st Dept 1958]).

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7770-
7771 In re Black United Fund of New York, Inc., Index 110537/05 451498/15

BUFNY Houses Associates, et al.,
Plaintiffs-Appellants,

-against-

Black United Fund of New York, Inc., et al.,
Defendants-Respondents.

____

Howard I. Horn, Garden City, for appellants.

Dentons US LLP, New York (Charles E. Dorkey III of counsel), for Black United Fund of New York, Inc. and Robert Williams, respondents.

Herrick Feinstein, LLP, New York (Michelle M. Sekowski of counsel), for 2261-2273 ACP Residences, LLC, BUF Plaza, LLC and First American Title Insurance Company, respondent.

Fidelity National Group, New York (Michael C. Sferlazza of counsel), for Chicago Title Insurance Company, respondents.

____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered January 20, 2015, which denied plaintiffs' motion to modify a prior order approving a sale of real property by BUFNY Houses Associates (Houses) to defendant 2273 Realty, LLC, to declare that Houses had a 15% ownership interest in 2273 Realty and retained certain rights in the premises, or, in the alternative, to vacate the order and declare Houses the owner of the premises, unanimously affirmed, without costs. Order, same

court and Justice, entered on or about October 31, 2016, to the extent it denied plaintiffs' motions for leave to renew the prior motion, granted defendants' motions to dismiss and for sanctions, and referred certain issues to a special referee for hearing and determination, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Plaintiffs argue that a subsequent purchaser of the real property at issue did not have a protected interest in that property because the purchaser had constructive knowledge of a prior, fraudulent transfer of the property arising from a discrepancy in the deed (*see generally M.L.C. Constr., Inc. v Hui Ru Zhang*, 162 AD3d 410, 410 [1st Dept 2018]; *ABN AMRO Mort. Group, Inc. v Pantoja*, 91 AD3d 440, 441 [1st Dept 2012]; Real Property Law § 266). The alleged discrepancy in the prior deed did not give the purchaser constructive notice of plaintiffs' interest in the property.

On their motions to renew, plaintiffs failed to present the motion court with any new material facts as to the purchaser's protected status in the property (CPLR 2221[e]). Similarly, plaintiffs do not dispute the basis for the motion court's sanctions - that the 2014 action was brought to delay the resolution of 2005 litigation or to harass the purchaser - or the

type of sanctions - no more than $5,000 in attorneys' fees for defending that action and a bar to bringing further actions or proceedings regarding the premises without prior leave of the court (22 NYCRR 130-1.1[a], [c][2]).

Plaintiffs' argument regarding aiding and abetting a breach of fiduciary duty is improperly raised for the first time on appeal.

Plaintiffs have not articulated any basis for us to interfere in the motion court's referral of certain issues.

No appeal lies from the denial of leave to reargue (*Espinal v City of New York*, 107 AD3d 411 [1st Dept 2013]).

We have considered plaintiffs' remaining arguments and find them without merit.

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7772 In re Anthony S., Index 6820F/14
Petitioner-Respondent,

-against-

Monique T.B.,
Respondent-Appellant.

____

Orrick, Herrington & Sutcliffe LLP, New York (René Kathawala of counsel), for appellant.

Goetz L. Vilsaint, Bronx, for respondent.

____

Order, Family Court, Bronx County (Lisa S. Headley, J.), entered on or about April 30, 2018, which, upon granting respondent's objection to a Support Magistrate's order awarding retroactive child support to petitioner, remanded the matter to the Support Magistrate for further proceedings "necessary for discovery and to prove facts," unanimously affirmed, without costs.

Respondent objected to the award of child support to petitioner on the ground that petitioner failed to establish that he was the custodial parent. She argues that, upon granting her objection, Family Court should have dismissed the petition, not remanded to give petitioner a second chance to prove his status. However, respondent does not dispute that she was the non-custodial parent of the subject child after March 2014 and that

she had an obligation to support the child until the child reached the age of 21, in September 2017 (*see* Family Court Act § 413), and she did not object to the amount of retroactive child support awarded by the Support Magistrate for that period. Thus, accepting her argument that dismissal is required would release respondent from her undisputed support obligation, to the child's detriment, on the ground that petitioner lacked standing to file a support petition for the child's benefit (*but see* Family Court Act § 422[a] ["a parent or guardian, of a child, or other person in loco parentis, . . . may file a petition in behalf of a dependent relative"]).

Contrary to respondent's argument, Family Court has the authority to remand an issue of fact to the Support Magistrate (Family Court Act § 439[e][i]). We find that the court providently exercised its discretion in the interests of justice in remanding the matter for further proceedings to determine whether petitioner was a custodial parent or otherwise a proper party to file a support petition on behalf of the child (*see* Family Court Act § 422; *Matter of Renee XX. v John ZZ.*, 51 AD3d 1090, 1092 [3d Dept 2008]; *see generally Matter of Mateer v Field*, 14 AD3d 564 [2d Dept 2005]; *Weckstein v Breitbart*, 111 AD2d 6, 8 [1st Dept 1985]).

The court providently exercised its discretion in upholding

the Support Magistrate's denial of respondent's motion to dismiss the petition as a sanction for petitioner's failure to comply with discovery under CPLR 3126. The court properly rejected respondent's objection that the Support Magistrate erred in failing to draw a negative inference against petitioner based on his decision not to testify (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983]). The court also properly declined to draw a negative inference based on the failure of the paternal grandmother to testify or the failure of the elder child to return from her upstate college to complete her testimony, since, as we observed in a prior appeal, neither the grandmother nor the daughter is a party to this proceeding, and there is no evidence that either is under petitioner's control (*Matter of Anthony S. v Monique T.B.*, 148 AD3d 596 [1st Dept 2017]).

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7773 The People of the State of New York, Respondent, — Ind. 2357/10, 6518/10

-against-

Johansel Marte, Defendant-Appellant.

Holland & Knight, LLP, New York (Philip George of counsel), for appellant.

Johansel Marte, appellant pro se.

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at speedy trial motions and jury trial; Jill Konviser, J. at sentencing), rendered October 15, 2013, as amended October 21, 2013, convicting defendant of assault in the first degree (two counts) and attempted assault in the second degree, and sentencing him to an aggregate term of 14 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's repeated motions for a mistrial, made on the ground that counsel for a jointly tried codefendant was allegedly acting as a "second prosecutor" against defendant. The defenses were not irreconcilable and did not warrant a severance (*see People v Mahboubian*, 74 NY2d 174 [1989]). The complained-of conduct by

the codefendant's counsel essentially constituted an attempt to show that this codefendant did not act in concert with the others. This was not incompatible with defendant's defense, and the codefendant's counsel neither elicited inadmissible evidence against defendant nor caused any other prejudice.

Defendant did not preserve his specific challenges to the court's rulings, in deciding defendant's speedy trial motions, regarding the excludability of periods of delay, or his challenge to the court's discharge of a sworn juror for medical reasons, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. These unpreserved arguments, as well as defendant's preserved argument that the court should have granted his request for a justification charge, are all generally similar to arguments this Court has already rejected on the codefendants' appeals (*People v Marte-Tejada*, 153 AD3d 1210 [1st Dept 2017], *lv denied* 30 NY3d

1107 [2018]; *People v Meran*, 143 AD3d 423 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]), and we find no reason to reach any different conclusions here.

We have considered and rejected defendant's pro se claims.

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7774 Jerome Rabinowitz, Index 650929/17
Plaintiff-Respondent,

-against-

Robert C. Gottlieb, P.C.,
Defendant-Appellant.

Winget, Spadafora & Schwartzberg, LLP, New York (Dianna D. McCarthy of counsel), for appellant.

Aaron M. Goldsmith, New York, for respondent.

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered on or about August 22, 2017, which denied defendant's motion to dismiss the complaint and to impose sanctions on plaintiff and/or his counsel, unanimously modified, on the law, to dismiss the complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

In a prior action brought by plaintiff, based upon identical facts and asserting the same claims, plaintiff willfully failed to comply with multiple disclosure orders and was precluded from testifying. His complaint was dismissed for failure to prosecute, and for "multiple failures to appear for video deposition without explanation." Plaintiff's motion to restore the case was also denied based on the preclusion order,

the dismissal of the case, and the absence of an affidavit of merits. Under these circumstances, the prior dismissal order, which was not appealed, while not designated "on the merits," is entitled to res judicata effect, to prevent plaintiff from circumventing the effect of the preclusion decree (*see Strange v Montefiore Hosp. & Med. Ctr.*, 59 NY2d 737, 738 [1983]; *Yates v Roco Co.*, 48 AD3d 800 [2d Dept 2008]).

However, the denial of defendant's application for sanctions was not an abuse of discretion (22 NYCRR 130-1.1[c]).

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7777 Rosa Altagracia Martinez Robles, Index 159637/15
Plaintiff-Appellant,

-against-

Time Warner Cable Inc., et al.,
Defendants-Respondents.

____

Wingate, Russotti, Shapiro & Halerin, LLP, New York (David M. Hoffman of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Charles W. Kreines of counsel), for respondents.

____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered October 10, 2017, which, inter alia, granted the motion of defendant Time Warner Cable New York City LLC (Time Warner) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Time Warner failed to establish entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she tripped and fell over a defect in a public sidewalk that was near Time Warner's metal box cover installed in the sidewalk. Although the defect in the sidewalk was more than 12 inches from the subject metal box, and 34 RCNY 2-07(b) only requires Time Warner to maintain and repair the box cover and the 12-inch perimeter around it, Time Warner also has a common-law duty not to create a hazardous condition on the sidewalk (*see*

Shehata v City of New York, 128 AD3d 944, 946-947 [2d Dept 2015]), and, further, as a special user of the public sidewalk, has a "duty to maintain the area of the special use in a reasonably safe condition" (*Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004]). Additionally, constructive notice may be imputed where, as here, there is a duty under the administrative code to conduct inspections of the box covers (*see* 34 RCNY 2-07(b); *Singh v United Cerebral Palsy of NY City, Inc.*, 72 AD3d 272, 276 [1st Dept 2010]).

Here, the evidence, including the testimony of Time Warner's construction manager, shows that Time Warner did not regularly inspect its box covers, as required by the regulation it relied upon (*see* 34 RCNY 2-07[b]), and that, if the area had been inspected, Time Warner would have repaired the cracked sidewalk condition around the box cover and replaced the sidewalk flag, which extends to the spot where plaintiff tripped. Time Warner also submitted the affidavit of an engineer who measured the distance between plaintiff's fall and the box cover as more than 12 inches, but did not address whether or not the metal box installed in the sidewalk created the cracked condition around

the box cover that extended to the spot where plaintiff fell. Furthermore, the fact that Time Warner did not install the box cover itself has no bearing since the duty to maintain the area of the special use "runs with the land as long as it is maintained for the benefit of a special user" (*Weiskopf* at 203).

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7778 The People of the State of New York, Ind. 5251/12
Respondent,

-against-

Angel Ocasio,
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 (Michael J. Yetter of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered November 13, 2014, convicting defendant, after a jury trial, of attempted burglary in the third degree and possession of burglar’s tools, and sentencing him, as a second felony offender, to an aggregate term of two to four 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, there was no reasonable view of the evidence, viewed in a light most favorable to defendant, that he unlawfully attempted to enter a store without larcenous intent. Accordingly, the court properly declined, on that ground, to submit to the jury the lesser included offenses of criminal trespass in the second and third degrees and their

attempts.

"[T]he intent necessary for burglary can be inferred from the circumstances of the entry itself" (*People v Mackey*, 49 NY2d 274, 280 [1980). Shortly after midnight, defendant attempted to pick the lock on the door of a store selling discounted merchandise, and tried to flee when the police arrived. When arrested, he was found to be in possession of a screwdriver, channel lock pliers, and two flashlights. He was also wearing gloves and a ski mask with only his eyes showing, in an obvious attempt to hide his identity.

Larcenous intent is the only plausible explanation for all of these preparations to break into a store. On appeal, defendant posits various theories of what he might have intended to do in the store, such as to "seek refuge," or even to "do nothing." None of defendant's theories has any support in the record or qualifies as a reasonable view of the evidence.

We note also that third-degree trespass does not qualify as a lesser included offense of burglary (*see People v Santiago*, 143 AD3d 545, 546 [1st Dept 2016], *lv denied* 28 NY3d 1127 [2016]), and the same would apply to the respective attempts.

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7779 The People of the State of New York, Ind. 928/16
Respondent,

-against-

Aime Diendere,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered November 29, 2016, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. The victim's testimony was corroborated by a chain of evidence, provided by an eyewitness and the police, that linked defendant to the crime. The jury's mixed verdict does not warrant a different conclusion, because although in performing our weight of the evidence review, we may consider an alleged

factual inconsistency in a verdict (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we nevertheless find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

By effectively conceding the issue at the suppression hearing, and failing to subsequently raise it in any way, defendant failed to preserve his challenge to the victim's showup identification, and we find that the court's suppression ruling was not "in response to protest" (*see People v Miranda*, 27 NY3d 931, 932 [2016]). We decline to review this claim in the interest of justice. As an alternative holding, we reject it on the merits. The victim's showup identification of defendant was justified by spatial and temporal proximity, and it was not conducted under unduly suggestive circumstances (*see e.g. People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]).

The court providently exercised its discretion in receiving photographs depicting the eyewitness's view of the assault. While, as the jury was well aware, the photos were taken under

different lighting conditions from those existing at the time of the assault, those differences went to weight rather than admissibility (*see People v Nevado*, 22 AD3d 383 [1st Dept 2005], *lv denied* 6 NY3d 757 [2005]).

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7780 Cornell Wilkins, Index 109107/11
Plaintiff-Appellant,

-against-

West Harlem Group Assistance,
Incorporated,
Defendant-Respondent.

The Orlow Firm, Flushing (Thomas P. Murphy of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondent.

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 2, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant managed a building located at 127 West 127th Street in Manhattan. Defendant leased the premises to the Administration of Children's Services, which employed plaintiff as a peace officer starting on October 1, 2008. The premises contained a locker room with two identical windows on its west wall, which all peace officers used. Verizon technicians had access to the locker room as it housed its communications equipment.

On October 2, 2008, plaintiff used the locker room to change

and opened one of the windows half a foot to cool down. When he attempted to close the window, he used a "little bit more force than [he] did when [he] lifted it." As the window closed, it reverberated a bit and then the whole window structure came out and crashed over plaintiff's head.

Plaintiff sued, claiming, among other things, that defendant was on actual or constructive notice of the dangerous condition and the doctrine of res ipsa loquitur was applicable. Defendant moved for summary judgment, on the grounds that it had no notice of the dangerous condition, and res ipsa was inapplicable. Supreme Court granted summary judgment on both grounds. Plaintiff appeals.

The defendant met its prima facie burden on lack of constructive notice of a dangerous condition. While it is disputed that defendant never inspected the windows since installation in 2004, it did not have an affirmative duty to conduct reasonable inspections (*Ayers v Dormitory Auth. Of the State of NY*, __ AD3d __, 2018 WL 4778917 [1st Dept 2018]; *Singh v United Cerebral Palsy of NY City, Inc.*, 72 AD3d 272, 276 [1st Dept 2010]; *Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500 [1st Dept 2007]) *lv denied* 9 NY3d 809 [2007]).

We find that an issue of fact exists as to the applicability of the doctrine of res ipsa loquitur, which allows for an

inference of negligence to be drawn on the occurrence of an accident. The doctrine requires that a plaintiff must demonstrate that the "event is the kind which ordinarily does not occur in the absence of negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and [that] it was not due to any voluntary action or contribution on the part of the plaintiff" (*Dawson v National Amusements*, 259 AD2d 329 [1st Dept 1999]).

Here, "common experience" dictates that a window being shut does not simply fall out absent negligence. In order to establish exclusive control, plaintiff is not required to show that defendant "had sole physical access" to the window (*Dawson*, 259 AD2d at 330; *Hutchings v Yuter*, 108 AD3d 416 [1st Dept 2013] [plaintiff demonstrated exclusive control notwithstanding others had access to the door that fell and struck plaintiff] [citing *Singh*, 72 AD3d 272]). Further, there remains a question of fact

whether plaintiff did something to contribute to the window falling on him.

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

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7781- Index 100346/13
7781A Barklee 94 LLC,
Plaintiff-Appellant,

-against-

Augustus Oliver, et al.,
Defendants-Respondents.

____

Barbara Kraebel, New York, for appellant.

Frydman LLC, New York (David S. Frydman of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered June 29, 2017, dismissing the complaint with prejudice, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 27, 2017, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion to reopen discovery, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

So much of the first cause of action as alleged that defendants' workers failed to comply with building code requirements for inspection, to give timely notice of excavation work, and to report a party wall easement in filed building plans was correctly dismissed as time-barred, in accordance with a prior order of this Court (124 AD3d 459 [1st Dept 2015]).

Plaintiff's argument that the statute of limitations ran from 2011, when the certificate of occupancy was issued, is without merit (*see West Chelsea Building LLC v Guttman*, 139 AD3d 39, 43 [1st Dept 2016]).

The roof wire/trespass claim alleged in the third cause of action was correctly dismissed because the evidence establishes that the wire was installed by independent contractors, and there is no evidence that raises an issue of fact as to the existence of any exception to the rule that an owner will not be liable for an independent contractor's negligent installation (*see Rothstein v State*, 284 AD2d 130 [1st Dept 2001]; *Kojic v City of New York*, 76 AD2d 828 [2d Dept 1980]).

So much of the sixth cause of action as seeks to direct defendants to complete the decorative panel on their side of the party wall is barred by the doctrine of law of the case, this Court having found that the underlying allegations failed to state a cause of action (124 AD3d 459). Moreover, the motion court correctly found that the claim was barred by the applicable statute of limitations (*see* RPAPL 2001; CPLR 214[4]).

Plaintiff failed to meet its burden under CPLR 3212(f) to

show that facts may exist that would establish its belated claim that elevator anchor bolts encroached upon its portion of the party wall.

Plaintiff’s remaining arguments are without merit.

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

ENTERED: DECEMBER 4, 2018

CLERK

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

7782N In re Tri-State Consumer Insurance Company, Index 261052/14
Petitioner-Appellant,

-against-

Hereford Insurance Company,
Respondent-Respondent.

Thomas Torto, New York, for appellant.

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about June 29, 2017, which denied petitioner Tri-State's motion to vacate the order and judgment (one paper), same court and Justice, entered December 28, 2015, denying upon default Tri-State's petition to vacate two inter-company arbitration awards in favor of respondent Hereford Insurance Company (Hereford) and granting Hereford's cross motion to confirm the arbitration awards, and denied Tri-State's motion to stay enforcement of the judgment, entered February 16, 2016, in Hereford's favor and against Tri-State in the total sum of $111,145.34, unanimously affirmed, without costs.

Although "there exists a strong public policy in favor of disposing of cases on their merits, . . . this policy does not relieve a party moving to vacate a default from satisfying the

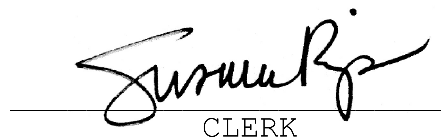
two-pronged test of showing both (1) a reasonable excuse for the default; and (2) a meritorious defense to the action" (*Johnson-Roberts v Ira Judelson Bail Bonds*, 140 AD3d 509, 509 [1st Dept 2016]). Despite Tri-State's contention that this Court has excused defaults caused by an attorney's inadvertent failure to make a court appearance due to lack of notice (*see Toos v Leggiadro Intl., Inc.*, 114 AD3d 559 [1st Dept 2014]), "claims of law office failure which are 'conclusory and unsubstantiated' cannot excuse default" (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]).

At least two of Tri-State's multiple defaults lack a substantiated excuse - its failure to submit opposition, and its failure to appear at the November 16, 2015 hearing despite counsel's assignment two months prior - and those incidents, in addition to a pattern of dilatory conduct, warrant affirmance of the order on appeal. Since the default was not excusable, Tri-

State's motion to vacate the judgment was properly denied, regardless of whether it presented a potentially meritorious defense (*Amir M.C.W. v 2343, Inc.*, 126 AD3d 453, 454 [1st Dept 2015]).

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

ENTERED: DECEMBER 4, 2018



CLERK

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

7783N Tracy Spitzer, Index 314761/15
Plaintiff-Appellant,

-against-

Mark Spitzer,
Defendant-Respondent.

____

Raoul Felder & Partners, P.C., New York (Michael N. Klar of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Valentina Shaknes of counsel), for respondent.

____

Order, Supreme Court, New York County (Michael L. Katz, J.), entered June 27, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff wife's pendente lite motion for at least $10,000 per month to pay for the actual costs of a certain rental apartment, and for $14,634.66 in basic monthly child support, unanimously affirmed, without costs.

The court properly declined to direct respondent husband to pay for the actual costs associated with the wife's rental of a three-bedroom, three-bathroom apartment on Manhattan's Upper East Side. The court awarded the wife interim maintenance intended to cover all of her basic living expenses, including housing costs, from which the wife does not appeal (*see Khaira v Khaira*, 93 AD3d 194, 200 [1st Dept 2012]; *see also Francis v Francis*, 111 AD3d 454 [1st Dept 2013]).

The wife also failed to establish that modification of the pendente lite child support award before trial is warranted (*see e.g. Wittich v Wittich*, 210 AD2d 138 [1st Dept 1994]). Although she argues that the award of $6,500 is inadequate in light of the husband's wealth, the wife fails to demonstrate that it is insufficient based on the children's actual needs or less than the amount required for a lifestyle appropriate for the children (*see e.g. Matter of Vulpone v Rose*, 103 AD3d 416, 417 [1st Dept 2013]). In the absence of exigent circumstances, it is well established the remedy for a dispute over pendente lite awards is a prompt trial (*see e.g. Wittich* at 140).

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

ENTERED: DECEMBER 4, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

1822 The People of the State of New York, Ind. 519/13
Respondent,

-against-

Raymond Crespo,
Defendant-Appellant.

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

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

Upon remittitur from the Court of Appeals (__ NY3d __, 2018 NY Slip Op 06849 [2018]), judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered December 19, 2014, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life and 3 1/2 to 7 years, respectively, unanimously affirmed.

The Court of Appeals remitted this case for consideration of the facts and issues raised but not determined on the appeal (CPL

470.25[2][d]; 470.40[2][b]). Upon remittal, we find, and the parties agree, that there are no such remaining facts or issues. Accordingly, the judgment should be affirmed.

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

ENTERED: DECEMBER 4, 2018

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

7538 The People of the State of New York Ind. 2107/13
Respondent,

-against-

Jules Desselle,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered October 15, 2015, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, affirmed.

After considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion. While the 28-month delay was substantial, it was attributable to both the prosecution and the defense. While most adjournments were either on consent or were otherwise satisfactorily explained, the People failed to provide an adequate reason for their delay in responding to defendant's motion to compel

production of certain medical records and in producing the records. Nevertheless, the charges were very serious and, although defendant was incarcerated the entire time, he has not demonstrated how his defense was impaired by the delay. This is not a case where the delay, and in particular the portion attributable to the People, was so egregious as to warrant dismissal regardless of prejudice (*see People v Wiggins*, 31 NY3d 1, 13-16 [2018]).

All concur except Renwick, J.P. and Manzanet-Daniels, J. who concur in a separate memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (concurring)

Although the factors enumerated in *Taranovich* do not, on balance, warrant a finding that defendant's constitutional right to a speedy trial was violated (*People v Taranovich*, 37 NY2d 442, 445 [1975]), it cannot escape mention that the prosecutor's actions in this case led to the substantial and unnecessary delay.[1]

On June 17, 2013, defendant demanded all *Brady* material in the prosecution's possession. On September 16, 2014, defense counsel informed the court that it had specifically requested the victim's medical records, citing the fact that the victim had an "epileptic seizure" immediately preceding the alleged shooting. In the alternative, he requested the name of her treating physician so he could subpoena the records himself. The victim had given conflicting stories in the aftermath of defendant's arrest.

The prosecutor conceded that defendant was alleging "a possible *Brady* issue," and that there "may be something in the medical record that would indicate that she suffered from this condition," and asked that the parties be permitted to submit

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[1]Were this an appeal from the denial of a statutory speedy trial claim, the result may well have been different. Here, defendant waived the right to appeal as part of his plea bargain, and his statutory speedy trial claim did not survive the waiver.

memoranda.

The court agreed that the issue “should be explored,” and set a briefing schedule, with defendant to make a motion on October 1, 2014; the People to reply on October 14, 2014; and the court to issue a decision on November 6, 2014.

On October 1, 2014, defendant made a motion to compel production of the medical records of the eyewitness relating to her diagnosis and treatment for epilepsy or her seizure disorder. The People did not file on October 14, and requested additional time to respond to the motion. Although promising to file by December 15, 2014, the People ultimately did not file until January 29, 2015, nearly four months later. The People opposed defendant’s “overbroad” demand for the witness’s medical records, as well as his alternative request for the issuance of subpoenas for such records.

On March 5, 2015, the court granted defendant’s motion and ordered the People to turn over the victim’s medical records for in camera review. Yet the People did not even submit a HIPPA authorization release form to the victim for signature until April 17, 2015, and continued to delay until mid-August, nearly 5 months later and 10 months after defendant’s original request.

It cannot escape notice that the admittedly substantial 28-month delay was largely the fault of the prosecution. It was

the prosecution that insisted on motion practice; it was the prosecution that missed its own filing deadlines; and it was the prosecution that ultimately lost the motion. Therefore, I concur in the result, but disagree with the majority's finding that essentially excuses the prosecutor's behavior.

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

ENTERED: DECEMBER 4, 2018

CLERK

Renwick, J.P., Richter, Tom, Kern, Oing, JJ.

7657-
7658 Aspen Specialty Insurance Company, Plaintiff-Respondent, Index 160353/14

-against-

Ironshore Indemnity Incorporated,
Defendant-Appellant,

Transel Elevator, Inc.,
Defendant.

____

Vogrin & Frimet, LLP, New York (George J. Vogrin of counsel), for appellant.

Connell Foley, LLP, New York (William D. Deveau of counsel), for respondent.

____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 29, 2018, which denied defendant Ironshore Indemnity Incorporated (Ironshore's) motion for leave to renew a prior motion to dismiss the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about March 27, 2018, which, inter alia, denied Ironshore's motion to reargue the court's January 29, 2018 decision, unanimously dismissed, without costs, as taken from a non-appealable order.

The court properly denied Ironshore's renewal motion on the ground that the parties' rights and responsibilities under the respective insurance contracts, or specifically, Alphonse Hotel's

entitlement to additional insured status under the Ironshore policy, was conclusively adjudicated by our decision in *Aspen Specialty Ins. Co. v Ironshore Indem. Inc.* (144 AD3d 606, 606 [1st Dept 2016]), an order from which Ironshore did not appeal. At this juncture, the time to appeal has expired, and the court properly determined that renewal based upon the Court of Appeals decision in *Burlington Insurance Company v NYC Tr. Auth.* (29 NY3d 313 [2017]), is no longer available (*see Matter of Huie (Furman)*, 20 NY2d 568, 572 [1967]).

We have considered and rejected Ironshore’s remaining arguments.

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

ENTERED: DECEMBER 4, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7715-
7716-
7717 Index 850097/13

U.S. Bank National Association, etc.,
Plaintiff-Appellant,

-against-

Darryl Jones, etc.,
Defendant-Respondent,

Criminal Court of the City of New York, et al.,
Defendants.

____

Shapiro, DiCaro & Barak, LLC, Rochester (Austin T. Shufelt of counsel), for appellant.

Law Office of Daniel R. Miller, Brooklyn (Daniel R. Miller of counsel), for respondent.

____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about November 18, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its foreclosure action, unanimously reversed, on the law, without costs and the motion granted. The Clerk is directed to enter judgment accordingly. Appeals from orders (same court and Justice), entered on or about October 22, 2015 and March 6, 2017, unanimously dismissed, without costs, as academic.

Contrary to the IAS court's finding, plaintiff eliminated all fact issues as to its standing to foreclose by annexing the

indorsed note to the complaint (*see Bank of N.Y. Mellon v Knowles*, 151 AD3d 596, 597 [1st Dept 2017]).

We decline to consider defendant's new factual argument, raised for the first time on appeal, that the allonge was not firmly affixed to the note. This argument is fact based, not a question of law, and plaintiff could have responded by affidavit or otherwise below – so that it could have been avoided (*cf. Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). Moreover, there is simply nothing in the record to support counsel's new factual assertion. As such, plaintiff was entitled to summary judgment.

In light of our decision on the first order appealed from, the appeals from the other orders are moot.

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7784 The People of the State of New York, Ind. 3414/16
Respondent,

-against-

Marcos Martinez,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Megan DeMarco 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 (Larry Stephen, J.), rendered November 15, 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: DECEMBER 4, 2018

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CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7785 Santos Uvidia, Index 306692/12
Plaintiff-Respondent,

-against-

The Cardinal Spellman High School,
et al.,
Defendants-Appellants.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellants.

Siegel & Coonerty, LLP, New York (Steven Aripotch of counsel), for respondent.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about November 21, 2017, which, upon renewal of plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, granted plaintiff's motion, unanimously affirmed, without costs.

Plaintiff was injured by the collapse of a plywood structure, which he and a coworker were in the middle of erecting on top of a building's roof in preparation for asbestos abatement to be performed inside the structure. Plaintiff made a prima facie showing that the collapse was proximately caused by a violation of Labor Law § 240(1), since the bracing of the structure was inadequate to prevent its collapse (*see Greaves v Obayashi Corp.*, 55 AD3d 409 [1st Dept 2008], *lv dismissed* 12 NY3d

794 [2009]).

There is no issue of fact about whether a gust of wind was the sole proximate cause of the accident. Labor Law § 240(1) required the provision of devices to protect against the foreseeable risk that windy weather on the roof of the building could cause the structure to shift or collapse while it was under construction (*see Williams v 520 Madison Partnership*, 38 AD3d 464, 466 [1st Dept 2007]).

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7786 In re Dominique R.,

A Child Under Eighteen Years of Age, etc.,

Denise S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

____

Carol L. Kahn, New York, for appellant.

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

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

____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on May 19, 2017, which, inter alia, upon a finding of neglect, placed the child in the custody of the Commissioner of Social Services until the completion of the next permanency hearing, then scheduled for October 2, 2017, unanimously affirmed, with respect to the finding of neglect, and the appeal therefrom otherwise dismissed, without costs, as moot.

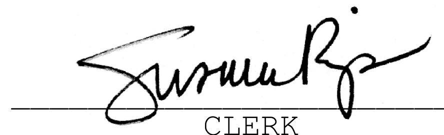
Petitioner demonstrated by a preponderance of the evidence that respondent mother suffered from mental illness and lacked insight into her illness and need for treatment, thereby placing the child at imminent risk of physical or emotional harm (*see*

Matter of Mylah C. [Chantal C.], 159 AD3d 553 [1st Dept 2018], *lv denied* 31 NY3d 908 [2018]; *Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 39 [1st Dept 2017], *affd* 30 NY3d 985 [2017]). Evidence of actual injury to the child was not required to enter a finding of neglect, since the mother's then untreated mental illness posed a sufficiently imminent risk of harm to the child (*Ruth Joanna O.O.,* 149 AD3d at 41).

The challenge to the disposition is moot since the order expired by its own terms and the child has been returned to her parents' care.

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

ENTERED: DECEMBER 4, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7788 Joshua R., an Infant, by His Mother and Natural Guardian Carmen N., Plaintiff,

Index 150629/15

-against-

101 Delancey Realty, LLC, Defendant-Respondent,

Jumuna Contracting, Inc. Defendant-Appellant.

- - - - -

[And a Third-Party Action]

Hardin Kundla McKeon & Poletto P.A., New York (Ross V. Carpenter of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (Jason A. Stewart of counsel), for respondent.

Order, Supreme Court, New York County (James d'Auguste, J.), entered September 12, 2017, which granted the motion of defendant/third-party plaintiff 101 Delancey Realty, LLC (101 Delancey) for summary judgment dismissing the complaint and cross claims as against it, and denied the cross motion of defendant Jumuna Contracting, Inc. (Jumuna) for summary judgment dismissing the complaint and cross claims as against it, unanimously affirmed, without costs.

The infant plaintiff was a pedestrian on the sidewalk adjacent to a building owned by 101 Delancey that was undergoing

construction, when he was struck in the eye by an unknown particle, which appeared to be debris. Plaintiff testified at his deposition that, before the incident, he saw a man on a ladder in front of the building holding a scraper, and debris, like small rocks and pebbles, on the ground. 101 Delancey had retained Jumuna to perform repairs, including removing stucco from the facade.

Although Jumuna was an independent contractor, it can be held liable to non-contracting third parties if it "launched a force or instrument of harm" (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-140 [2002]). Jumuna contends it was not working at the building on the date of plaintiff's accident, but the record presents issues of fact concerning whether or not its employee was present at the time of the accident.

With respect to 101 Delancey's motion for summary judgment, 101 Delancey made a showing that it could not be held liable for injuries resulting from the work performed by Jumuna, an independent contractor, since the work was not inherently dangerous and 101 Delancey did not assume control over the work (*see Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]; *Fernandez v 707, Inc.*, 85 AD3d 539, 540 [1st Dept 2011]). While Jumuna asserts that 101 Delancey owed a nondelegable duty to protect pedestrians on the public sidewalk from hazards caused by work

performed for its benefit, Jumuna failed to raise any factual issue that would put 101 Delancey on notice of a dangerous condition (*see Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 151-152 [1943]; *Emmons v City of New York*, 283 AD2d 244, 245 [1st Dept 2001]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7789 The People of the State of New York, Respondent, Dkt. 59443/13N

-against-

David Bookard, Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered October 30, 2013, convicting defendant, after a nonjury trial, of sexual abuse in the third degree, and sentencing him to a term of 70 days, unanimously affirmed.

The prosecutor's information was not jurisdictionally defective (*see People v Kalin*, 12 NY3d 225, 228 [2007]). The described conduct, as observed by an officer on a subway train, supported reasonable inferences that defendant acted for the purpose of sexual gratification and without the victim's consent.

The court's verdict was based on legally sufficient evidence

and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Although the victim did not testify, the officer's observations likewise established the elements of third-degree sexual abuse.

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7790 Pastora L., et al., Index 350027/13
Plaintiffs,

K.O., an Infant by Her Mother and
Natural Guardian Pastora L.,
Plaintiff-Appellant,

-against-

Thierno O B Diallo, et al.,
Defendants,

Walter Romero, et al.,
Defendants-Respondents.

____

Mitchell Dranow, Sea Cliff, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about November 15, 2017, which granted defendants Walter Romero and Umbrella Cab Corp.'s motion for summary judgment dismissing the infant plaintiff's claims on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie that the infant plaintiff's claimed injuries were not serious within the meaning of Insurance Law § 5102(d) through the affirmed reports of an orthopedic surgeon who found normal range of motion and no objective evidence of injury and a radiologist who found no

evidence of injury in the MRIs taken of plaintiff's claimed injured body parts after the accident (*see Hernandez v Marcano*, 161 AD3d 676 [1st Dept 2018]). Defendants also submitted the report of an expert in emergency medicine, who opined that plaintiff's emergency room records, which showed she "[got] checked" after the accident and had no complaints of pain or signs of injury, were inconsistent with her serious injury claims (*see Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]). Relying on plaintiff's deposition testimony, defendants also identified a complete cessation of treatment after several months of physical therapy (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious, rather than a minor, injury. Her medical records confirm defendants' position, namely, that there was no objective evidence of injury (*see Thomas v City of New York*, 99 AD3d 580 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]). Her records also include findings of normal range of motion and resolving complaints. Plaintiff offered no justification for her cessation of treatment only several months following the collision (*see Pommells*, 4 NY3d at 574; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]). Moreover, the fact that four years followed in which plaintiff did not seek treatment renders the opinion of her medical expert, submitted in

opposition, "speculative as to the permanency, significance, and causation of the claimed injuries" (*Vila v Foxglove Taxi Corp.*, 159 AD3d 431, 431-32 [1st Dept 2018]).

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7791-
7792-
7793

Index 652290/12
654931/16

1414 Holdings, LLC,
Plaintiff-Appellant,

-against-

BMS-PSO, LLC,
Defendant-Respondent.

- - - - -

In re 1414 Holdings LLC,
Petitioner-Appellant,

-against-

BMS-PSO, LLC,
Respondent-Respondent.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

David Rozenholc & Associates, New York (Gary N. Horowitz of counsel), for respondent.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about August 10, 2017, which granted defendant's motion for summary judgment dismissing the supplemental complaint, unanimously affirmed, with costs. Order, same court and Justice, entered on or about November 30, 2017, which, insofar appealed from as limited by the briefs, denied plaintiff's motion to increase defendant's undertaking, unanimously affirmed, with costs. Order, same court (Eileen Bransten, J.), entered December 5, 2017, which dismissed the

petition to vacate an arbitration award, unanimously affirmed, with costs.

Regarding the August 2017 order, plaintiff contends that the fourth cause of action in its supplemental complaint, which sought only declaratory and injunctive relief to build an ADA compliant elevator, should not have been dismissed as moot because if a plaintiff "succeeds in proving that he is entitled to equitable relief, equity may grant damages in addition to or as an incident of some other . . . equitable relief" (*Doyle v Allstate Ins. Co.,* 1 NY2d 439, 443 [1956] [emphasis omitted]). Here, on the prior appeal, we granted plaintiff all of the equitable relief plaintiff requested (*see* 116 AD3d 641, 643 [1st Dept 2014]). Plaintiff thereafter obtained the desired access and built an ADA compliant elevator, according to its own design. It would not be "a failure of justice" to deny plaintiff damages (*Doyle* at 443 [internal quotation marks omitted]). Plaintiff's damages in having to convert the elevators in two steps are not related to any access denial by defendants. They stem from plaintiff trying to cancel defendant's lease without complying with the lease requirements (demolishing all or substantially all of the building where defendant's premises are located). Had plaintiff postponed its conversion of the building to a hotel until 2021 (when defendant's lease expires), or if it had

obtained a permit to demolish all or substantially all of the building, it would not be facing the issue of a two-stage elevator conversion.

Plaintiff did not cross-move to conform the pleadings to the proof or for leave to file a second supplemental complaint (*see e.g. O'Reilly-Hyland v Liberty Mgt. & Constr., Ltd.*, 32 AD3d 765, 766 [1st Dept 2006]). Even if we were to overlook this defect, we would find that the motion court providently exercised its discretion by denying the relief plaintiff requested, in view of the prejudice to defendant and the effect of such relief on the orderly prosecution of this case (*see e.g. Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992]). Moreover, plaintiff may not recover damages caused by the motion court's refusal to modify the temporary restraining order (preventing plaintiff from closing the building and shutting off utility services to defendant's premises) to permit plaintiff to install an elevator that complied with the Americans with Disabilities Act (*see Building Serv. Local 32B-J Pension Fund v 101 L.P.*, 115 AD3d 469, 472 [1st Dept 2014], *appeal dismissed* 23 NY3d 954 [2014]).

In its November order, the court properly denied plaintiff's motion to increase defendant's undertaking. The purpose of an undertaking is to indemnify the party who is the target of a

preliminary injunction (here, plaintiff) against "all damages and costs which may be sustained by reason of the injunction" (CPLR 6312[b]). Thus, "[i]f the injunction was warranted, then the landlord will not be entitled to any damages arising from its issuance" (*Building Serv. Local*, 115 AD3d at 473).

After plaintiff commenced the instant action to force defendant out of the building by July 31, 2012, defendant obtained a TRO, and then a preliminary injunction, preventing plaintiff from closing the building and shutting off utility services to defendant's premises. By withdrawing its notice of cancellation of lease with prejudice and discontinuing its cause of action for a warrant of eviction/ejectment with prejudice, plaintiff conceded that it improperly attempted to force defendant from the building. Thus, since the TRO and preliminary injunction were justified, plaintiff is not entitled to damages.

As for the modification of the TRO to permit elevator work, CPLR 6314 says the court may require the party moving to modify the TRO – here, plaintiff – "to give an undertaking." It does not require the nonmovant (defendant) to give an undertaking (*see e.g.* 116 AD3d at 644). Furthermore, by the time plaintiff moved to increase defendant's undertaking, the motion court had already dismissed plaintiff's supplemental complaint and sub silentio denied its request to file a second supplemental

complaint. The case was over and there was no longer a preliminary injunction or a basis for an undertaking.

As for the December order, the court properly denied the petition to vacate the arbitration award (i.e., the neutral arbitrator's selection of Tenant's Fair Market Terms). Petitioner's claim that the arbitrator exceeded her power by refusing to hold a hearing, is unavailing. Article 75(B) of the parties' lease does not require the arbitrator to hold a hearing. Instead, it provides that "the Arbitrator shall select either Landlord's Fair Market Terms or Tenant's Fair Market Terms." Article 75(B) of the lease, and the retainer agreement that both sides signed with the arbitrator, show that petitioner waived any right it may have had under CPLR 7506 to a hearing (*see Matter of American Ins. Co. [Messinger - Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 191 [1977]; *Simson v Cushman & Wakefield, Inc.*, 128 AD3d 549 [1st Dept 2015]).

Nor was petitioner deprived of counsel at the arbitration. There is a distinction between a waiver or deprivation of the right to counsel and the failure to avail oneself of that right, and here, the record establishes that petitioner failed to exercise its right to counsel (*see Matter of Rosengart [Armstrong Daily]*, 6 AD2d 1052 [2d Dept 1958]). Moreover, petitioner fails to demonstrate how its rights were prejudiced by the fact that

the neutral arbitrator met with the party arbitrators without either party's lawyer being present (*see Matter of Sims v Siegelson,* 246 AD2d 374, 377 [1st Dept 1998]; *compare Matter of Mikel v Scharf,* 85 AD2d 604 [2d Dept 1981]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7794 In re Jaquiya F.,

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

Dawne A. Mitchell, The Legal Aid Society, New York (Marianne Allegro of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 4, 2017, which adjudicated appellant a juvenile delinquent upon appellant's admission that she committed an act that, if committed by an adult, would constitute attempted assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a one-year period of probation, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The underlying offense was a serious, violent attack that resulted in injuries to the victim, and

appellant has demonstrated a multitude of behavioral problems at school and at home. In light of these factors, the court properly concluded that an adjournment in contemplation of dismissal would not have provided sufficient supervision.

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7795 The People of the State of New York, Ind. 3356/16
Respondent,

-against-

Francisco Olivares,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered February 22, 2017,

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: DECEMBER 4, 2018

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CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7796 The People of the State of New York, Ind. 2923/10
Respondent,

-against-

Maurice Eaddy,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered September 15, 2010, as amended October 15, 2010, convicting defendant, after a nonjury trial, of course of sexual conduct against a child in the first degree, criminal sexual act in the second degree and sexual abuse in the second degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of any inconsistencies in the victim's testimony.

Defendant's objections, made on different grounds from those on which the court actually received the evidence, or those

defendant raises on appeal, failed to preserve his present challenges to the testimony of the victim's teacher and friend concerning her disclosure of the alleged sexual abuse, and we decline to review them in the interest of justice. As an alternative holding, we conclude that the testimony of the victim's friend was admissible under the state of mind exception to the hearsay rule (Prince, Richardson on Evidence § 8-106 at 502 [Farrell 11th ed]), and as a proper description of the victim's demeanor (*People v Spicola*, 16 NY3d 441, 452 n 2 [2011]). The victim's teacher's testimony about the victim's disclosure was admissible for the "relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to defendant's arrest" (*People v Ludwig*, 24 NY3d 221, 231 [2014]). In any event, any error in admitting either or both forms of testimony was harmless, particularly because the victim's credibility was tested through cross-examination (*see id.* at 230), and because the court, as fact-finder, is "presumed to have considered only the legally

competent evidence adduced at trial and to have excluded inadmissible evidence from [its] deliberations and verdict" (*People v Dones*, 250 AD2d 381, 382 [1st Dept 1998]).

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7797 The People of the State of New York, Ind. 2237/14
Respondent,

-against-

Stephens Bush,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Diane R. Kiesel, J.), rendered December 7, 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: DECEMBER 4, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7803 The People of the State of New York, Respondent, — Ind. 947/10, 3256/12

-against-

Devon C. McDonald, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Patricia DiMango, J., at plea and sentencing), rendered September 11, 2013, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the second degree, and sentencing him to a term of three to nine years, unanimously affirmed.

To the extent the record reflects the extent of counsel's immigration advice to defendant on the immigration consequences of his plea, it shows that counsel rendered deficient advice (*see Padilla v Kentucky*, 559 US 356 [2010]) when he stated on the record that defendant "could" be deported, whereas he was actually pleading guilty to an aggravated felony for which deportation was presumptively mandatory. However, the plea court immediately corrected counsel's error and advised defendant that he "will" be deported as the result of his plea. Defendant

confirmed that he understood the court’s warning.

Although appropriate immigration advice is the responsibility of counsel, accurate warnings from a plea court may establish that counsel’s inaccurate warnings caused no prejudice, so long as counsel does not undermine the court’s warning (*see Lee v United States*, __ US __, 137 S Ct 1958, 1968 n 4 [2017], and cases cited therein). In light of the plea court’s plain warning — which was the last word on the subject, and not in any way undermined by defense counsel — we find that the existing record establishes that defendant cannot show a reasonable probability that he would have gone to trial if he had been properly warned by counsel about deportation. Accordingly, there is no need for a remand for a hearing.

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7804 The People of the State of New York, Ind. 1782/12
Respondent,

-against-

Gilliam Cordero,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered June 12, 2013, as amended June 18, 2013, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of eight years, unanimously affirmed.

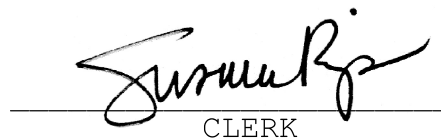
By failing to make specific objections on the grounds asserted on appeal, failing to join in a codefendant's objections, or by failing to request further relief after objections were sustained, defendant failed to preserve any of his challenges to the direct examination of the victim and to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

The record amply establishes the prosecutor's good faith

basis for attempting to elicit that the victim's reluctance to testify was the result of witness-tampering attributable to defendant (*see People v Bahamonte*, 89 AD3d 512 [1st Dept 2011], *lv denied* 18 NY3d 881 [2012]). The challenged summation remarks were responsive to defense counsel's attack on the victim's credibility and constituted fair comment on the evidence (*see id.*).

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

ENTERED: DECEMBER 4, 2018



CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7805N In re Peter G. Terian File 3871I,J/02
Deceased.
- - - - -
Juliana C. Terian,
Petitioner-Respondent,

Thomas J. Killeen,
Petitioner,

-against-

Robert Wurmbrand,
Respondent-Appellant.

Sullivan & Worcester, LLP, New York (Jonathan G. Kortmansky of counsel), for appellant.

Law Office of Theodore P. Kaplan, New York (Theodore P. Kaplan of counsel), for respondent.

Order, Surrogate’s Court, New York County (Nora S. Anderson, S.), entered July 26, 2017, which, inter alia, granted the joint application of petitioners Juliana C. Terian and Thomas J. Killeen for the appointment of Jacques L. Debrot as successor co-trustee upon the resignation of Killeen, unanimously affirmed, with costs.

The Surrogate properly granted the petition since the express terms of the subject will permitted a majority of the trustees to act collectively in selecting successor trustees (*see Matter of Luckenbach*, 303 NY 491, 496 [1952]; *see also Georgius v*

Village of Morrisville, 90 AD3d 1256 [3d Dept 2011]).

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

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

ENTERED: DECEMBER 4, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7806N Khristina Hamilton, Index 306467/13
Plaintiff-Respondent,

-against-

National Amusements, Inc., doing business as Jamaica Multiplex Cinemas,
Defendant-Appellant,

Mattone Group Jamaica Company, LLC.,
Defendant.

____

Miranda Sambursky Slone Sklarin & Verveniotis LLP, Elmsford (John W. Manning of counsel), for appellant.

Sacco & Fillas LLP, Astoria (Adam Nichols of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 10, 2017, which, in this action for personal injuries, granted plaintiff's motion pursuant to CPLR 5015 to vacate her default on defendant National Amusements, Inc.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion by accepting the law office failure of plaintiff's attorney as a reasonable excuse because that failure was isolated and unintentional and did not result in any prejudice to defendant (*see Chevalier v 368 E. 148th St. Assoc., LLC,* 80 AD3d 411, 413-414 [1st Dept 2011]; *SS Constantine & Helen's Romanian Orthodox*

Church of Am. v Z. Zindel, Inc., 44 AD3d 744 [2d Dept 2007]). Furthermore, plaintiff's deposition testimony and the allegations contained in her bill of particulars sufficiently set forth a meritorious cause of action (*see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]; *Hunter v Annexstein*, 141 AD2d 449, 451 [1st Dept 1988]).

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

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

ENTERED: DECEMBER 4, 2018

CLERK