SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 27, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7953-
7954-
7955N Anonymous, Index 350090/13
Plaintiff-Appellant,

-against-

Anonymous,
Defendant-Respondent.

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Law Office of William S. Beslow, New York (William S. Beslow of counsel), for appellant.

Cohen Rabin Stine Schumann LLP, New York (Evridiki Poumpouridis of counsel), for respondent.

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Orders, Supreme Court, New York County (Michael L. Katz, J.), entered February 9, 2017, which, inter alia, denied plaintiff husband's motions for pendente lite child support, for nonparty discovery and for leave to amend the complaint, unanimously affirmed, without costs.

The husband's motion for pendente lite child support was properly denied. In February 2015, Supreme Court granted the husband's motion for pendente lite maintenance to the extent of

awarding him $12,000 in taxable maintenance per month. In deviating upward from the presumptive amount of maintenance of $10,613.20, the court reasoned that the husband would have been entitled to child support if he had requested it. Thus, contrary to the husband's contention that he is making an initial application for relief, he is actually seeking to modify the prior pendente lite order. Since the husband fails to offer proof of exigent circumstances, it is well established that the remedy for any perceived inequities in a pendente lite award is a speedy trial (*see e.g. Anonymous v Anonymous*, 63 AD3d 493, 496-497 [1st Dept 2009], *appeal dismissed* 14 NY3d 921 [2010]).

The court providently exercised its discretion in denying the husband's motion for nonparty discovery, namely, deposing certain nonparty witnesses. The parties have spent five years in contentious pretrial litigation, mostly surrounding discovery issues, since this divorce action was commenced. The husband previously sought to depose these same witnesses in 2015, and after several months of negotiations, the parties agreed that the husband would depose the wife's brother, who would appear voluntarily subject to certain conditions, and with the understanding that the court would then determine whether further nonparty discovery was necessary. The husband's subsequent

failure to depose the wife's brother, without sufficient reason, resulted in a September 2016 order granting the wife's cross motion to quash all nonparty discovery, which had been held in abeyance pending her brother's deposition. Under the circumstances presented, there is no reason to disturb the court's denial of the subject motion (*see Duracell Intl. v American Employers' Ins. Co.*, 187 AD2d 278 [1st Dept 1992]; *see generally 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]).

The husband's request for leave to amend the complaint so as to add the wife's brother, father, and the estate of her late mother, was properly denied. The husband failed to submit a copy of the proposed pleading with the motion (*see* CPLR 3025[b]; *Dragon Head LLC v Elkman*, 102 AD3d 552, 553 [1st Dept 2013]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7956 In re Abel A.,
Petitioner-Respondent,

-against-

Imanda M.,
Respondent-Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Andrew J. Baer, New York, for respondent.

_____

Order, Family Court, Bronx County (Lisa S. Headley, J.), entered on or about February 1, 2018, which denied the mother's motion to vacate the order of custody dated January 9, 2018, that, after an inquest and upon her default, awarded the father custody of the children, unanimously reversed, on the law, without costs, the motion to vacate granted, and the matter remanded for further proceedings in Family Court in accordance with this decision.

The parties, Abel A. (father) and Imanda M. (mother), are the parents of the two subject children. In July 2017, after 17 months of the parties' separation, the father consented that the mother have sole custody of the children and the parties entered into a visitation agreement before the same court. Three months

later, in October 2017, the father filed a petition for custody, alleging that the mother was interfering with his parenting time.

Upon the mother's failure to appear at an inquest on the father's petition for custody of the children, Family Court issued a custody determination. The mother moved to vacate that order, and the court denied it. We now reverse.

While the decision to grant or deny a motion to vacate a default rests in the sound discretion of the court, "default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously" (*Matter of Dayon G. v Tina T.*, 163 AD3d 461, 462 [1st Dept 2018]; *see Matter of Sims v Boykin*, 130 AD3d 835, 835-836 [2d Dept 2015]; *see also Matter of Melinda M. v Anthony J.H.*, 143 AD3d 617, 618 [1st Dept 2016]; *compare Matter of Rodney W. v Josephine F.*, 126 AD3d 605 [1st Dept 2015], *lv dismissed* 25 NY3d 1187 [2015]).

Although the mother did not demonstrate a reasonable excuse for her default in the change of custody case, she had a meritorious defense. The children have resided primarily with her, and insufficient evidence was submitted to make an informed change of circumstances determination (*see* Family Ct Act § 467[b][ii]) that serves the best interests of the children (*see*

Eschbach v Eschbach, 56 NY2d 167, 172-173 [1982]; *Matter of Dayon G.*, 163 AD3d at 462-463).

Also, the court failed to sua sponte appoint an attorney for the children, which, based upon the insufficient evidence it had to make an informed best interests determination, would have been advisable (*see Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]; *compare A.C. v D.R.*, 36 AD3d 465, 466 [1st Dept 2007]).

Under these circumstances, Family Court improvidently exercised its discretion in denying the mother's request to vacate the final custody order. Accordingly, we remit the matter to Family Court, Bronx County, for further proceedings on the father's petition for custody of the children (*see Matter of Dayon G.* at 463), and direct that an attorney for the children be appointed (*see Richard D.*, 47 NY2d at 944-945)

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 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7958 The People of the State of New York, Ind. 4587/15
Respondent,

-against-

William Ravosa,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered February 5, 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 27, 2018

CLERK

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

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7959 The People of the State of New York, Ind. 664/15
Respondent,

-against-

Rafael Rivera,
Defendant-Appellant.

_____

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

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

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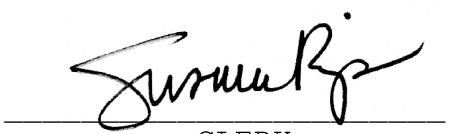
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered March 10, 2016,

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 27, 2018



CLERK

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

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7960-
7961 In re David W.,

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

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 23, 2018, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, menacing in the third degree, attempted robbery in the second degree, and attempted assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly declined to draw a missing witness inference as to the victim. The presentment agency sufficiently

established that the victim was unavailable (*see People v Savinon*, 100 NY2d 192 [2003]), and that the agency did not "merely go through the motions of asking [the] witness to testify," with the "ulterior goal of keeping the witness off the stand" (*id.* at 200). The victim's whereabouts were unknown by the time of the fact-finding hearing, and he could not be located despite diligent efforts conducted at that time (*see People v Henriquez*, 147 AD3d 706 [1st Dept 2017], *lv denied* 29 NY3d 1080 [2017]). In any event, any error was harmless given the police officer's eyewitness testimony of the assault (*see People v Daisley*, 115 AD2d 535 [1st Dept 2014]).

The fact-finding determination 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]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7962-
7963N NYCTL 1998-2 TRUST, et al.,
Plaintiffs-Appellants,

-against-

70 Orchard LLC,
Defendant-Respondent,

United States of America Internal
Revenue Service, et al.,
Defendants.

Index 652883/12

_____

Bronster, LLP, New York (Adam P. Briskin of counsel), for appellants.

Goldberg Weprin Finkel Goldstein LLP, New York (Howard S. Bonfield of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about January 12, 2017, and on or about July 6, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as against defendant 70 Orchard LLC, and granted defendant's cross motion for summary judgment dismissing the complaint, respectively, unanimously reversed, on the law, without costs, plaintiffs' motion granted, and defendant's cross motion denied.

Plaintiffs are the lawful assignees of certain City of New York water and sewer tax liens against property owned by

defendant. The City complied fully with the provisions of Administrative Code of City of NY § 11-320, which requires, inter alia, that four notices of the sale of the liens be sent to the property owner at specified intervals before the sale and that another notice be sent 30 days after the sale (*id.* § 11-320[b][1]). The City's four pre-sale notices informed defendant of the debt, of the impending sale, and of defendant's obligation to pay the City, if at all, by August 1, 2011. The notices also informed defendant that, after the sale, it should make payment arrangements with the new lienholder's representative.

Defendant did not pay the amounts owed by August 1, 2011. On the day after the tax liens were assigned to plaintiffs, defendant made payments to the City. The payments were not credited against defendant's debt, because, once the assignment had taken place, payments had to be made to plaintiffs (*see NYCTL-2008-A Trust v IG Greenpoint Corp.* [Sup Ct, NY County, Feb. 28, 2014, Scarpulla, J., Index No. 108725/2009]).

Contrary to defendant's argument, there is no tension between the Administrative Code's provisions for tax liens and tax sales and the law generally governing payments of an assigned

debt. Once a debtor has notice that the debt has been assigned, or has been put "on inquiry" as to an assignment of the debt, payments to the assignor (the original creditor) are not applied to the debt (*TPZ Corp. v Dabbs*, 25 AD3d 787, 790 [2d Dept 2006]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7964 The People of the State of New York, Ind. 3089/15
Respondent,

-against-

Charles Martin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 21, 2016, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 4½ years, unanimously affirmed.

Based on our in camera review of the minutes of a hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), we find no basis for suppression. Probable cause for the issuance

of a search warrant was established through police-supervised drug purchases made by a reliable confidential informant.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7965 The People of the State of New York, Ind. 4339/16
Respondent,

-against-

Alfonso Rizzuto,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J. at pretrial proceedings; Juan M. Merchan, J. at plea and sentencing), rendered April 19, 2017, convicting defendant of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Defendant's absence from a brief colloquy does not warrant reversal. While awaiting the arrival of defendant, who was appearing pro se, the plea court had a conversation with the prosecutor and standby counsel concerning essentially administrative matters. There were no applications by either side, or determinations of any legal or factual issues. Accordingly, nothing occurred that required defendant's presence,

including in his capacity as his own attorney (*see People v Hameed*, 88 NY2d 232, 240-241 [1996], *cert denied* 519 US 1065 [1997]).

Defendant's attorney, who became standby counsel after defendant knowingly and voluntary waived his right to counsel, was neither conflicted nor otherwise ineffective at any stage of the proceeding. No conflict was created when the attorney exercised his professional judgment in declining to adopt his client's pro se motions (*see e.g. People v Mangum*, 12 AD3d 207, 208 [1st Dept 2004], *lv denied* 4 NY3d 765 [2005]), or when he candidly acknowledged that defendant was in danger of being sentenced as a discretionary persistent felon. Accordingly, there was no reason for the courts presiding at either the pretrial or plea proceedings to appoint a new attorney for any purpose.

Defendant, who expressly declined to make a motion to withdraw his plea, failed to preserve his challenges to its validity (*see People v Conceicao*, 26 NY3d 375 [2015]), and we decline to review them in the interest of justice. As an alternative holding, we find that the record establishes the voluntariness of the plea. Statements by the pretrial and plea courts about the severity of defendant's potential sentence if

convicted after trial were not coercive (*see e.g. People v Pagan*, 297 AD2d 582 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]). Likewise, there was nothing coercive about the plea court's insistence that, in order to plead guilty to second-degree burglary, defendant was required to acknowledge that the burglarized location was a dwelling. In any event, nothing in the record casts doubt on defendant's guilt of second-degree burglary. To the extent the record reveals the status of the premises, it shows that defendant burglarized a hotel gym, open only to licensees, constituting a dwelling under the burglary statutes (*see People v McCray*, 23 NY3d 621, 629-30 [2014]).

The plea court providently exercised its discretion in declining to order a CPL article 730 examination (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 879-880 [1995]). There was no reason to doubt defendant's mental competency.

Defendant's argument that he was entitled to a hearing on the constitutionality of his predicate felony conviction is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the plea court

properly adjudicated defendant a second violent felony offender (*see People v Diggins*, 45 AD3d 266, 268 [1st Dept 2007], *affd* 11 NY3d 518 [2008]). Defendant did not allege any cognizable constitutional defect in his predicate conviction.

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7966 The People of the State of New York, Ind. 4863/13
Respondent, 2636/13

-against-

Jason Cummings,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Richard D. Carruthers, J. and Edward J. McLaughlin, J. at pleas; Edward J. McLaughlin at sentencing), rendered March 26, 2015,

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

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

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

ENTERED: DECEMBER 27, 2018

CLERK

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

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7967-
7968N Yesenia S., Individually
and as Mother and Natural Guardian
of Kira R., etc.,
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Index 350059/10

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Kenneth J. Ready & Associates, Mineola (Gregory S. Gennarelli of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered November 5, 2015, which granted defendant New York City Housing Authority's (NYCHA) motion to vacate a conditional order of preclusion dated October 7, 2013 to the extent of relieving it from the preclusion penalty, and directed that it produce a witness for deposition by a certain deadline or have its answer stricken, unanimously dismissed, without costs, as moot. Order, same court and Justice, entered on or about April 10, 2018, which denied NYCHA's motion to renew its motion to vacate the order dated October 7, 2013, reinstated the October 7, 2013 conditional order of preclusion, and precluded NYCHA from

offering evidence at trial on the issue of liability, unanimously affirmed, without costs.

The appeal from the order dated October 30, 2015, and entered November 5, 2015, is dismissed as moot, as the April 2018 order effectively vacated the order appealed from (*see Fidata Trust Co. Mass. v Leahy Bus. Archives*, 187 AD2d 270 [1st Dept 1992]).

The court properly denied NYCHA's motion for leave to renew its motion to vacate the October 7, 2013 order which conditionally granted preclusion if NYCHA failed to produce a particular employee to be deposed. By order dated October 30, 2015, the court gave NYCHA another opportunity to produce the employee. On the motion to renew, NYCHA sought to modify the October 30, 2015 order to reflect that the employee it had been directed to produce for deposition was no longer in NYCHA's employ as of October 24, 2014, and to direct, instead, that NYCHA provide plaintiff with the witness's last known address. NYCHA, however, has not provided a reasonable justification for its failure to inform the court, on its original motion to vacate, that the witness had ceased employment as of October 24, 2014 (*see* CPLR 2221[e][2],[3]). NYCHA claims that the employee was still in its employ when it filed the motion to vacate in July

2014, and that its Law Department and outside counsel were unaware that the witness had left NYCHA, until after their receipt of the October 30, 2015 order. The original motion, however, was not marked submitted until May 6, 2015, over six months after the employee had left NYCHA's employ. Given that NYCHA failed to produce its employee since early 2012, the motion court acted will within its discretion to find that NYCHA had willfully failed to comply with discovery, warranting the remedy of preclusion. Even if the explanation were true, it still does not amount to a reasonable excuse, as the information was readily available and could have been obtained had NYCHA exercised due diligence (*see Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]).

The court also properly imposed preclusion sanctions. The court essentially vacated the October 30, 2015 order, which it issued relying on NYCHA's misrepresentations, and reinstated the October 7, 2013 order. The October 7, 2013 conditional order was self-executing, and NYCHA has not complied with the deadline to produce the witness as set forth therein. To the extent, NYCHA claims that plaintiff's counsel had reneged on his promise to depose the witness after the court ordered deadline set forth in the October 7, 2013 order, plaintiff's counsel denied it.

Further, the papers submitted by NYCHA in support suggests engagement in some sort of tactic to again avoid producing the witness for deposition.

NYCHA also argues that the court may not sanction it for failure to comply with the October 30, 2015 order, because its appeal from that order automatically stayed it. The court, however, had vacated the October 30, 2015 order, and was enforcing the October 7, 2013 order.

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7969 The People of the State of New York, Ind. 3879/12
Respondent,

-against-

Maurice S. Lingard,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered January 9, 2013, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7970 The People of the State of New York, Ind. 3493/14
Respondent,

-against-

Charlie Blount,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Jeffrey Dellheim of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered July 27, 2015, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7972 The People of the State of New York, SCI 3247N/15
Respondent,

-against-

Eugene Espinal,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered November 19, 2015, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7973N Neville Gibson, Index 20849/16E
Plaintiff-Appellant,

-against-

U'SAgain Holdings, LLC, et al.,
Defendants-Respondents.

_____

Guerrero & Rosengarten, New York (Susan R. Nudelman of counsel), for appellant.

Law Offices of Tobias & Kuhn, New York (Carol M. Wickham of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 18, 2017, which, in this action for personal injuries, granted defendants' motion to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

The court providently exercised its discretion in granting defendants' motion to change venue to Westchester County. The motor vehicle accident occurred in Westchester, which is where plaintiff resided on the day of the accident and when the action was commenced. The affidavit of the Chief Financial Officer of defendant U'SAgain Holdings, LLC sufficiently satisfied defendants' burden of showing that plaintiff had improperly designated venue due to the fact that they did not maintain a principal office in Bronx County. He averred that he had

reviewed the records maintained by U'SAgain Holdings, LLC, which is the parent company of U'SAgain LLC, and that U'SAgain (2000) LLC had merged into U'SAgain LLC before the accident. Defendants also submitted an affidavit of a claims examiner of Penske Truck Leasing Corporation (Penske), who reviewed the relevant records, and set forth that Penske did not have a principal office in the Bronx (*see Perez v Worby, Borowick, Groner*, 290 AD2d 233 [1st Dept 2002]). The copies of the electronic records from the Secretary of State's official government website were admissible despite being uncertified, and the motion court properly considered them (*see Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012]; *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-21 [2d Dept 2009]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7974N- Index 153449/14
7975N- 650163/14
7976N

Ital Associates, et al.,
Plaintiffs-Appellants,

-against-

Thomas Axon, et al.,
Defendants-Respondents,

Salvatore Sommella, et al.,
Additional Defendants-Respondents.

- - - - -

Ital Associates, et al.,
Plaintiffs,

-against-

Thomas Axon, et al.,
Defendants,

Stephen J. Lovell, et al.,
Additional Defendants-Respondents/
Appellants-Respondents,

Loraine Buetti,
Additional Defendant-Respondent,

Samuel Goldman & Associates,
Nonparty Appellant/Respondent-Appellant.

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Samuel Goldman & Associates, New York (Samuel Goldman of counsel), for appellants and appellant/respondent-appellant.

Tashlik Goldwyn Levy LLP, Great Neck (Jeffrey N. Levy of counsel), for Stephen J. Lovell and Jayne Spielman, respondents/appellants-respondents.

DarrowEverett LLP, New York (Kevin P. Gildea of counsel), for Thomas Axon, 185 Franklin Street Corp., Axon Associates, Inc., Harrison Realty Corp., and RMTS, LLC, respondents.

O'Hare Parnagian LLP, New York (Robert A. O'Hare, Jr. of counsel), for Salvatore Sommella and Eugene Karol, respondents.

Feinstein & Naishtut, LLP, Rye Brook (Steven D. Feinstein of counsel), for Loraine Buetti, respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 22, 2017, which denied plaintiffs' motion for attorney's fees and expenses against defendants and additional defendants (index no. 153449/14), unanimously modified, on the law, to grant the motion to the extent of awarding fees and expenses against additional defendants, and otherwise affirmed, without costs. Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 9, 2016 (index no. 650163/14), which, to the extent appealed from as limited by the briefs, denied nonparty appellant Samuel Goldman & Associates' (SGA) motion for attorneys' fees and expenses based on a recovery of $3.5 million and awarded fees based on $1 million of that recovery, unanimously reversed, on the law, with costs, and the motion for fees and expenses based on the total $3.5 million recovery granted. Order, same court and Justice, entered January 19, 2018 (index no. 650163/14), which, insofar as appealed from

as limited by the briefs, granted additional defendants' motion to confirm the referee's report and recommendation, dated July 25, 2017, which determined reasonable attorneys' fees and expenses, unanimously reversed, on the law, with costs, the motion denied, and the matter remanded for a determination of the amount of fees in accordance herewith.

The motions by both plaintiffs and their counsel (SGA) for awards of attorneys' fees and expenses against additional defendants should have been granted pursuant to the common fund doctrine, and SGA's award against additional defendants in index no. 650163/14 should be based on the total $3.5 million recovery allocable to the independent limited partners, not solely on the portion of this recovery ($1 million) that purportedly is attributable to SGA's efforts alone.

In a prior appeal in index no. 153449/14, this Court recognized that an award of attorneys' fees and expenses against additional defendants pursuant to the common fund doctrine was appropriate, because, although they did not sign the retainer agreement with plaintiffs' counsel (SGA), additional defendants "signed a settlement agreement obtained by SGA entitling [them] to receive a pro-rata payout from the proceeds of the sale of a building in which [they] had invested" (*Ital Assoc. v Axon*, 150

AD3d 474, 474 [1st Dept 2017]). Additional defendants received a "substantial benefit" as a result of SGA's efforts, i.e., funds from the liquidation of an asset (the subject property) as to which defendants had successfully excluded them for 30 years (*see Seinfeld v Robinson*, 246 AD2d 291, 294 [1st Dept 1998]).

The fact that SGA has already been partially compensated by plaintiffs does not preclude a fee award, as that would be inconsistent with the purpose of the common fund doctrine to prevent unjust enrichment by "allow[ing] the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses" (*Mills v Electric Auto-Lite Co.*, 396 US 375, 392 [1970]; *see also Central R.R. & Banking Co. of Georgia v Pettus*, 113 US 116, 125 [1885]; *cf. Matter of Kantrowitz Goldhamer & Graifman, P.C. v New York State Elec. & Gas Corp.*, 27 AD3d 872, 875 [3d Dept 2006], *lv denied* 7 NY3d 704 [2006] [assuming without deciding that "counsel is permitted to apply for independent fees over and above that which they receive from their clients" but finding recovery inappropriate in the circumstances]).

We acknowledge that there are important distinctions between index no. 650163/14 and index no. 153449/14, in which the prior appeal arose, including the fact that, in index no. 650163/14,

additional defendants retained and paid their own, separate counsel. However, we find that the distinctions do not mandate a different result. With respect to the issue of separate counsel, for example, while the parties dispute the extent of additional defendants' counsels' involvement, the motion court found that SGA was chiefly responsible for the recovery and that additional defendants' counsel did not contribute in any meaningful way (*see Nolte v Hudson Nav. Co.*, 47 F2d 166, 168 [2d Cir 1931]; *accord United States v Tobias*, 935 F2d 666, 668-669 [4th Cir 1991]). The court based this finding on the record and on its own involvement in the litigation; we defer to the court, because it was in a better position to evaluate the parties' claims.

Additional defendants' argument that a fee award is improper because SGA had a conflict of interest in representing both them and plaintiffs is unavailing. Plaintiffs designated them as additional defendants for technical reasons; they did not assert any claims against them, and their interests were essentially aligned (*see Stilwell Value Partners IV, L.P. v Cavanaugh*, 123 AD3d 641 [1st Dept 2014]).

The court properly declined to award plaintiffs attorneys' fees and expenses against defendants in index no 153449/14, because defendants have consistently controlled and derived

benefits from the subject property, and SGA's efforts to force a sale thereof did not confer a substantial benefit upon them, even if they did receive a share of the proceeds. Moreover, defendants' relationship with plaintiffs was adversarial (*see Builders Affiliates v North Riv. Ins. Co.*, 91 AD2d 360, 367 [1st Dept 1983]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Webber, Oing, Moulton, JJ.

6510 The People of the State of New York, Ind. 512/15
Respondent,

-against-

Thomas Vinson,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline A. Meese-Martinez of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 22, 2016, convicting defendant, after a jury trial, of tampering with physical evidence and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously reversed, on the law, and the indictment dismissed.

This Court previously held this appeal in abeyance pending a suppression hearing (161 AD3d 493 [1st Dept 2018]). Supreme Court (Robert Mandelbaum, J. at hearing) granted defendant's motion to suppress the contraband at issue, and the People do not

seek to challenge that determination. Accordingly, we vacate the conviction and dismiss the indictment.

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7231 Jason Walker, Index 652554/16
Plaintiff-Appellant,

-against-

Urban Compass, Inc., etc.,
Defendant-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about February 15, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 5, 2018,

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

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

ENTERED: DECEMBER 27, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7585 In re Prospect Union Associates, Index 570838/16
Petitioner-Respondent, 46932/15

-against-

Bienvenida DeJesus, et al.,
Respondents-Appellants.

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Bronx Legal Services, Bronx (Sara E. Smith of counsel), for appellants.

Heiberger & Associates, P.C., New York (Lawrence C. McCourt of counsel), for respondent.

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Order, Appellate Term, First Department, entered June 6, 2017, which affirmed an order of the Civil Court, Bronx County (Arlene H. Hahn, J.), dated April 18, 2016, which denied respondents tenants' motion to vacate three stipulations of settlement in the summary holdover proceeding, and an order of the same court and Judge, dated October 31, 2016, which denied respondents' motion to vacate the final judgment of possession and for a permanent stay of the warrant of eviction, unanimously modified, in the exercise of discretion, to grant respondents' motion to vacate the final judgment of possession and for a permanent stay of the warrant of eviction to the extent of granting a temporary stay of the warrant of eviction and remanding the matter to the Civil Court for a hearing on whether

to permanently stay the eviction.

Tenants, a married couple, have resided in this HUD regulated, Section 8 subsidized, multifamily housing project since 1998. The wife, Mrs. DeJesus, age 54, claimed before the motion court that she suffers from a cognitive impairment and that her husband, Mr. DeJesus, age 73, has mobility limitations. He uses a cane, crutches, or a wheelchair. As discussed further below, in April 2016, a temporary Mental Hygiene Law article 81 guardian was appointed for both tenants upon a prima facie showing that they both were incapacitated and unable to provide for their personal needs and manage their property and financial affairs.

In June 2015, petitioner landlord served tenants with a notice of termination alleging that they had failed to maintain their apartment in a safe and sanitary condition. The conditions included bedbugs, keeping the apartment in a Collyer-like, cluttered condition posing a fire hazard, and failing to prepare the apartment for extermination. In September 2015, a guardian ad litem (GAL) was appointed for them by Housing Court (CPLR 1201), after this summary holdover proceeding was commenced. The GAL signed three stipulations on tenants' behalf.

In the first stipulation, dated October 22, 2015, the GAL

acknowledged that extermination could not take place without proper preparation of the apartment, and agreed to effectuate the completion and return of certain forms so the landlord could inspect and have the apartment exterminated. When that did not occur, the GAL entered into a second stipulation, dated December 9, 2015, which afforded tenants more time to comply with the terms of the first stipulation. In the second stipulation, the GAL consented to entry of a final judgment of possession, but with execution of the warrant of eviction stayed until December 31, 2015 so that tenants would have another opportunity to prepare their apartment for extermination. When, once again, that did not occur, the GAL negotiated a third stipulation (dated January 6, 2016), with a further stay of eviction so that the apartment could be inspected and exterminated on January 11, 2016. Tenants failed to comply with that stipulation as well. With eviction imminent, tenants obtained legal counsel, who moved to vacate the stipulations on the basis that the GAL had exceeded her authority and tenants had not consented to the stipulations. Housing Court denied the motion and, in its April 18, 2016 order of denial, directed that the New York City Human Resources Administration's (HRA) Adult Protective Services (APS), be notified.

APS commenced an article 81 proceeding on tenants' behalf in Supreme Court, Bronx County. By order dated April 26, 2016, the court appointed Self Help Community Services, Inc. as tenants' temporary guardian[1] under article 81 of the Mental Hygiene Law and ordered that the guardian immediately arrange for a "heavy duty cleaning [and] extermination" of tenants' apartment. The court also ordered a stay of eviction so that the cleaning could be effectuated. HRA exterminated the apartment on June 9 and, in a follow-up inspection report dated June 17, the HRA exterminator reported that he had found no evidence of live bedbugs or roaches. Satisfied with this progress, Supreme Court extended the temporary article 81 guardianship, and granted tenants a further stay of eviction until August 12, 2016.

In Housing Court, before the stay expired, tenants moved to dismiss the judgment of possession and warrant of eviction on the basis that the article 81 guardian had cured the conditions and was in the process of applying for certain benefits and services that would permanently resolve the problem of access and the condition alleged. Landlord opposed the motion, claiming that

[1] Although this appointment was intended to be temporary, tenants' attorney informed this Court at oral argument that it is now a permanent appointment.

its agent had inspected the apartment and found that it was still cluttered, but could not inspect for live vermin because the tenant asked him to leave. Housing Court denied tenants' motion in its entirety (Order October 31, 2016), stating that even if tenants had finally cured most of the conditions alleged in the termination notice, the cure was untimely. The court stated that tenants were not entitled to any postjudgment relief because their non-cooperation throughout the proceedings had "severely prejudiced" the landlord. Appellate Term affirmed both the April 8 and October 31, 2016 orders.

We affirm Appellate Term's decision with respect to Housing Court's April 18, 2016 order, denying tenants' motion to vacate the stipulations that the GAL signed on their behalf. A GAL "is not a decision-making position; it is an appointment of assistance. The GAL provides invaluable service to the ward, such as applying for public assistance or arranging clean-ups" (*1234 Broadway LLC v Feng Chai Lin*, 25 Misc 3d 476, 495 [Civ Ct, NY County 2009]). As opposed to a guardian under article 81 of the Mental Hygiene Law, the GAL is required to appear and "adequately assert and protect the rights" of his or her ward (*New York Life Ins. Co. v V.K.*, 184 Misc 2d 727, 729 [Civ Ct, NY County 1999]). The record, viewed as a whole, shows that the GAL

attempted to help her wards protect their rights during the proceeding by obtaining extensions of time for them to comply with landlord's demand for access to their apartment. There is no evidence that she forced a settlement or that tenants would have fared any better by going to trial. Tenants failed to meet their burden of showing that the GAL either inadvisedly entered into those stipulations or failed to look out for their best interests.

We modify, however, because we disagree with Housing Court's determination that tenants are not entitled a permanent stay of eviction because the conditions in the apartment were not timely cured or they are ongoing. Aside from blanket statements by the landlord and the court about the likelihood of an ongoing "exodus" of bedbugs into neighboring apartments, there are no affidavits by neighbors or statements by any other individuals with personal knowledge of those facts. The determination that tenants are incapable of keeping the apartment in a safe and clean condition going forward is a serious determination that was made without the benefit of a hearing and without a proper evaluation of whether the article 81 guardian's management of their personal (and property) affairs will now make a difference in their ability to stay in their home without harming others.

Under the Fair Housing Act (FHA), as amended, it is unlawful to discriminate in housing practices on the basis of a "handicap" (42 USC § 3604[f][2][A]). Handicap is very broadly defined, and a person is considered handicapped and thereby protected under the FHA if he or she:

1. Has a physical or mental impairment that substantially limits one or more major life activities, or

2. Has a record of such impairment, or

3. Is regarded as having such an impairment.

No specific diagnosis is necessary for a person to be "handicapped" and protected under the statute. In fact, the determination may even be based upon the observations of a lay person (*Douglas v Kriegsfeld Corp.*, 884 A2d 1109, 1131 [DC 2005]). The appointment of an article 81 guardian for tenants sufficiently establishes that these tenants are "handicapped" within the meaning of the FHA, leading us to consider whether they are entitled to a reasonable accommodation. What is "reasonable" varies from case to case, because it is necessarily fact-specific (*see Shapiro v Cadman Towers Inc.*, 844 FSupp 116 [EDNY 1994] [bladder disorder necessitated moving tenant to the top of the waiting list for an indoor parking spot], *affd* 51 F3d 828 [2d Cir 1995]). The overarching guiding factor, however, is

that a landlord is obligated to provide a tenant with a reasonable accommodation if necessary for the tenant to keep his or her apartment. The "'refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the handicapped individual] equal opportunity to use and enjoy a dwelling'" is a discriminatory practice (*see e.g. Shapiro* 51 F3d at 333, quoting 42 USC § 3604[f][3][B]). A landlord does not have to provide a reasonable accommodation if it puts other tenants at risk, but should consider whether such risks can be minimized (*see Sinisgallo v Town of Islip Hous. Auth.*, 865 F Supp 2d 307 [ED NY 2012] [a reasonable accommodation might be imposition of a probationary period after tenant with bipolar disorder attacked a neighbor]).

The circumstances before us warrant a hearing on whether tenants are entitled to a permanent stay of eviction as an accommodation. More narrowly, the issue is whether, with the involvement of the article 81 guardian and its management of their affairs, tenants can fulfill their lease obligations and avoid eviction. Housing Court failed to consider whether with ongoing supportive services and suitable monitoring tenants can continue to live an orderly existence in the apartment without

harming or affecting their neighbors (*RCG-UA Glenwood, LLC v Young*, 9 Misc 3d 25 [App Term, 2d Dept 2005] [tenant offered evidence of his improved behavior after enrollment in a treatment program]). We remand for a hearing to determine whether the accommodations proposed by the guardian are reasonable, whether they will curtail the risk of the nuisance recurring, and whether there should be a permanent stay of eviction (*see Strata Realty Corp. v Pena*, __ AD3d __, 2018 NY Slip Op 07350 [1st Dept 2018]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7925 The People of the State of New York, SCI 30154/16
Respondent,

-against-

Tracy E.,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about February 2, 2017, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People presented clear and convincing evidence supporting the assessment of 20 points under the risk factor for number of victims (*see People v Mingo*, 12 NY3d 563 [2009]). The additional conduct against the second victim was uncharged, but was reflected in a reliable police report that noted that defendant admitted to sexually abusing the second victim (*see People v Sanford*, 130 AD3d 486, 486 [1st Dept 2015] *lv denied* 26 NY3d 908 [2015).

The court providently exercised its discretion in denying defendant's request for 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 seriousness of the underlying sexual conduct. The court also cited circumstances that would render a downward departure premature, and suggested that the issue be revisited (presumably by way of a modification petition under Correction Law § 168-o) at a later time.

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7926 In re Lorna Martin, Index 652851/15
Petitioner-Appellant,

-against-

The Department of Education of the City of New York, etc.,
Respondent-Respondent,

The State of New York,
Respondent.

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Stewart Lee Karlin Law Group, PC, New York (Stewart Lee Karlin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Nwamaka Ejebe of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered January 27, 2017, which granted the cross motion of respondent Department of Education (DOE) to dismiss the petition to vacate an arbitration award terminating petitioner's employment, unanimously affirmed, without costs.

The petition is untimely, since plaintiff failed to commence this CPLR article 75 proceeding within 10 days of her receipt of the Hearing Officer's decision (Education Law § 3020-a[5][a]).

Although the hearing was not completed within 125 days (Education Law § 3020-a[3][c][vii]) and the arbitration award was not issued within 30 days of the last day of the hearing

(Education Law § 3020-a[4][a]), petitioner has not shown that she suffered prejudice as a result (*see Matter of Leon v Department of Educ. of the City of N.Y.*, 115 AD3d 435, 436 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]; *Scollar v Cece*, 28 AD3d 317 [1st Dept 2006]).

The Hearing Officer did not abuse his discretion in granting a one-day adjournment at the outset of the hearing (*see Matter of Chawki v New York City Dept. of Educ., Manhattan High Schools, Dist. 71*, 39 AD3d 321, 324 [1st Dept 2007], *lv denied* 9 NY3d 810 [2007]). Nor did petitioner establish, by clear and convincing evidence, that the Hearing Officer was biased (*see Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792 [1st Dept 2012]).

Because the petition was not dismissed under CPLR 3211, we need not address petitioner's substantive arguments. In any event, the award is supported by adequate evidence, was rational, and was not arbitrary and capricious (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]), and there exists no basis to disturb the Hearing Officer's credibility findings (*id.* at 568).

Under the circumstances presented, the termination of

petitioner's employment does not shock our sense of fairness (*see e.g. Matter of Brizel v City of New York*, 161 AD3d 634 [1st Dept 2018]; *Lackow* at 569). Despite an almost 30-year career with DOE, the record shows that petitioner committed many instances of misconduct, including threatening behavior and insubordination, and she continued to deny any wrongdoing.

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

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7927 In re Destin B.,

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

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

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 14, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the second degree and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's fact-finding determination 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 determinations concerning credibility. Although the victim did not testify, the off-duty detective had a sufficient opportunity to observe the incident so as to establish all the elements of the offenses.

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7928 The People of the State of New York, Ind. 2163/15
Respondent,

-against-

Hector Lugo,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Caitlin Glass of counsel), for appellant.

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

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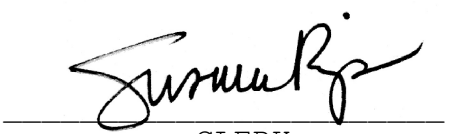
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Albert Lorenzo, J.), rendered July 21, 2016,

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 27, 2018



CLERK

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

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7929 Panagiotis Savlas, Index 309332/12
Plaintiff-Respondent-Appellant,

-against-

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

CSM Engineering, P.C.,
Defendant-Respondent.

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Malcolm Pirnie, Inc., et al.
Third-Party Plaintiffs-Appellants,

-against-

Schiavone Construction Co., et al.,
Third-Party Defendants,

CSM Engineering, P.C.,
Third-Party Defendant-Respondent.

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Goldberg Segalla LLP, New York (Stewart G. Milch of counsel), for The City of New York, appellant-respondent.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Gail J. McNally of counsel), for Malcolm Pirnie, Inc., appellant-respondent/appellant.

Lewis John Avallone Aviles, LLP, New York (Kevin G. Mescall of counsel), for URS Corporation-New York and URS Corporation, appellants-respondents/appellants.

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

Goldstein Law, PC, Garden City (Jeffrey R. Beitler of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 2, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim as against them, denied defendant City of New York's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against it, denied defendants Malcolm Pirnie, Inc., URS Corporation-New York and URS Corporation's (collectively, URS-MP) motion for summary judgment dismissing the common-law negligence claim as against them and on their contractual indemnification claim against defendant CSM Engineering, P.C., and granted CSM's motion for summary judgment dismissing the City's and URS-MP's cross claims for contractual indemnification as against it, unanimously modified, on the law, to grant URS-MP's motion as to the common-law negligence claim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

While working for a contractor at a construction project owned by the City, plaintiff tripped and fell over one of several steel plates covering openings into a lower level of a project building. The motion court correctly dismissed the Labor Law § 241(6) claim premised on a violation of Industrial Code (22

NYCRR) § 23-1.7(e)(2), because the plates were not scattered materials or debris, but an integral part of the construction (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805 [2006]; *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013]; *Zieris v City of New York*, 93 AD3d 479, 480 [1st Dept 2012]).

The court correctly found that neither URS-MP, the construction manager, nor CSM, its subcontractor, was a general contractor or an agent of the City, and correctly dismissed the complaint as against CSM (*see Hutchinson v City of New York*, 18 AD3d 370 [1st Dept 2005]). The court also correctly dismissed all claims against CSM for contractual indemnification, because there is no evidence that CSM was negligent in the performance of its contract with URS-MP so as to trigger the indemnification clause. However, the court erred in declining to dismiss the common-law negligence claim as against URS-MP (*see DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480 [1st Dept 2015]). URS-MP's contract did not establish authority on its part to control the work site. Moreover, plaintiff was not a third-party beneficiary of the contract, and there is no evidence that URS-MP caused or created the alleged dangerous condition of the work site.

The City failed to demonstrate that its employees neither created nor had actual or constructive notice of the alleged dangerous condition of the steel plates and that therefore the Labor Law § 200 and common-law negligence claims should be dismissed as against it (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 6 [1st Dept 2011]). The City's alternative arguments, that the alleged height differential between the floor and the plate was de minimis (*see Munasca v Morrison Mgt. LLC*, 111 AD3d 564 [1st Dept 2013]) and that the alleged defect was open and obvious and not actionable as a matter of law, are unavailing (*see Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 454-455 [1st Dept 2018]).

We have considered plaintiff's and the City's remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 27, 2018

CLERK

CORRECTED ORDER - JANUARY 14, 2019

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7936 Thomas Canty, Index 156588/15
Plaintiff-Appellant-Respondent,

-against-

133 East 79th Street, LLC,
Defendant-Respondent-Appellant,

Spieler & Ricca Electrical Co., Inc.,
Defendant-Respondent.

- - - - -

[And Third-Party Actions]

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David Horowitz, PC, New York (David Fischman of counsel), for appellant-respondent.

Malapero Prisco & Klauber LLP, New York (Francis B. Mann, Jr. of counsel), for respondent-appellant.

Vigorito Barker Patterson Nichols & Porter, Valhalla (Leilani Rodriguez of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn Kotler, J.), entered August 18, 2017, which, insofar as appealed, (1) granted defendant Spieler & Ricca Electrical Co., Inc's (Spieler) motion for summary judgment dismissing the complaint against it, (2) granted in part and denied in part defendant 133 East 79th Street, LLC's (133 East) motion for summary judgment dismissing the complaint against it, (3) denied 133 East's motion for summary judgment dismissing Spieler's cross claims for contribution and common-law and contractual indemnification

against it, and (4) granted the portion of Spieler's motion for summary judgment dismissing 133 East's cross claim for contractual indemnification against it, and denied as moot the portion seeking dismissal of 133 East's cross claims for contribution and common-law indemnification against Spieler, unanimously modified, on the law, to reinstate plaintiff's negligence claim against Spieler, to grant in full 133 East's motion for summary judgment dismissing the complaint against it, and to dismiss Spieler's cross claim for contribution and common-law and contractual indemnification against 133 East, and otherwise affirmed, without costs.

Plaintiff was searching for a tool in his employer's gang box when the lid of the gang box fell and closed on his left hand. He claims that a Spieler employee had carelessly knocked the lid over when the employee lifted open the lid of a Spieler gang box, which was "back to back" with his employer's gang box, due to overcrowding in the work area. At the time, plaintiff was performing construction work on property owned by defendant 133 East. Lend Lease (US) Construction LMB, Inc., the general contractor, had subcontracted defendant Spieler for electrical work, and plaintiff's employer, Cross Country Construction (Cross Country), for concrete work.

The complaint should not have been dismissed as against Spieler. Plaintiff's deposition testimony set forth circumstantial evidence sufficient to raise an issue of fact as to whether a Spieler employee had carelessly knocked over the lid (*see Weicht v City of New York*, 148 AD3d 551, 551 [1st Dept 2017]; *Angamarca v New York City Partnership Hous. Dev. Fund Co., Inc.*, 56 AD3d 264, 264-265 [1st Dept 2008]).

The court should have dismissed the common-law negligence and Labor Law § 200 claims against 133 East. The fact that 133 East had submitted only an attorney's affirmation is not fatal to its motion, as the affirmation incorporated by reference deposition testimony of plaintiff and Spieler's foreman, Laurence Bisso, which had been submitted by Spieler (*see Carey v Five Brothers, Inc.*, 106 AD3d 938, 940 [2d Dept 2013]; *Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]).

The facts implicate only the means and methods of work liability standards of Labor Law § 200 (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). The testimony established that 133 East did not have supervisory control over the placement or utilization of the gang boxes.

The court properly dismissed the Labor Law § 241(6) claim against 133 East. Even if plaintiff may properly rely on 12

NYCRR 23-1.5(c)(3) as a predicate, that provision is inapplicable, as the subject gang box is not unguarded or defective power equipment (*see Tuapante v LG-39, LLC*, 151 AD3d 999 [2nd Dept 2017]; *Williams v River Place II, LLC*, 145 AD3d 589, 589 [1st Dept 2016]; *Becerra v Promenade Apts. Inc.*, 126 AD3d 557, 558 [1st Dept 2015]). Even if the gang box constituted the type of equipment contemplated by the regulation, nothing indicates that it was defective.

As plaintiff failed to raise an issue of fact as to 133 East's liability on his own negligence and Labor Law § 200 claims, 133 East is entitled to dismissal of Spieler's cross claims for contribution and common-law indemnification against it. Moreover, 133 East is entitled to dismissal of Spieler's cross claim for contractual indemnification, as Spieler has not identified any contract in support of such claim. To the extent

133 East seeks reinstatement of its cross claims for contribution and common-law indemnification, they are denied as moot in light of the foregoing.

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7937 Aaron Tzamarot, Index 150451/14
Plaintiff-Appellant,

-against-

JP Morgan Chase & Co., et al.,
Defendants-Respondents.

- - - - -

JP Morgan Chase & Co.,
Third-Party Plaintiff,

-against-

McGuire Service Corp.,
Third-Party Defendant-Respondent.

_____

David Grossman & Associates, PLLC, Huntington (David C. Grossman of counsel), for appellant.

Ehrlich Gayner, LLP, New York (Charles J. Gayner of counsel), for JP Morgan Chase & Co. and Wilgrin Realty Corp., respondents.

Gallo Vitucci Klar LLP, New York (Andrew C. Kaye of counsel), for McGuire Service Corp., respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about October 10, 2017, which, inter alia, granted the motions of defendants and third-party defendant for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper since plaintiff's attempt to walk on top of a curbside mound of snow as a shortcut

to his parked car, instead of using a nearby path that had been cleared of snow and ice, was the sole proximate cause of his accident (*see Tchouke v City of New York*, 158 AD3d 412 [1st Dept 2018]; *McKenzie v City of New York*, 116 AD3d 526, 527 [1st Dept 2014]; *Polomski v Deluca*, 161 AD3d 1116 [2d Dept 2018]).

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

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7938- Ind. 1918/13
7939-
7940-
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7942-
7943-
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7945-
7946 The People of the State of New York,
Respondent,

-against-

Alfred Rivera,
Defendant-Appellant.

- - - - - -

The People of the State of New York,
Respondent,

-against-

David Rodriguez,
Defendant-Appellant.

- - - - - -

The People of the State of New York,
Respondent,

-against-

Tobias Parker,
Defendant-Appellant.

- - - - - -

The People of the State of New York,
Respondent,

-against-

Jose Parra,
Defendant-Appellant.

- - - - - -

The People of the State of New York,
Respondent,

-against-

Harmon Frierson,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Dwayne Maynard,
Defendant-Appellant.

_____

Larry Sheehan, Bronx, for Alfred Rivera, appellant.

Glenn A. Garber, P.C., New York (Glenn A. Garber of counsel), for David Rodriguez, appellant.

David K. Bertran, Bronx, for Tobias Parker, appellant.

London & Worth, LLP, New York (Howard B. Sterinbach of counsel), for Jose Parra, appellant.

Donald Yannella, PC, New York (Donald Yannella of counsel), for Harmon Frierson, appellant.

Feldman Golinski Reedy + Ben-Zvi PLLC, New York (Leslie H. Ben-Zvi of counsel), for Dwayne Maynard, appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered September 16, 16, 16, and 15, 2016, respectively, convicting defendants Jose Parra, David Rodriguez, Tobias Parker

and Alfred Rivera, after a jury trial, of attempted gang assault in the first degree, attempted assault in the first degree, assault in the second degree, falsifying business records in the first degree, offering a false instrument for filing in the first degree and official misconduct, and sentencing each to an aggregate term of 4½ years, unanimously affirmed. Judgments, same court and Justice, rendered September 16, 2016, convicting defendants Harmon Frierson and Dwayne Maynard, after a nonjury trial, of official misconduct, and sentencing each to a conditional discharge with 500 hours of community service, unanimously affirmed.

The verdicts were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Moreover, we find that the evidence was overwhelming. There is no basis for disturbing the credibility determinations made by the respective factfinders in this joint jury/nonjury trial. The triers of fact properly resolved any inconsistencies involving the testimony and prior statements by the victim, who was a prison inmate when he was assaulted by correction officers, including four of the defendant-appellants, in a search pen, which was covered for privacy, and another inmate who testified about his observations

outside the pen. The triers of fact properly rejected defendants' justification defenses predicated on written reports by correction officers to the effect that the victim was an initial aggressor and was swinging a knife at the officers. This defense was refuted by, among other things, medical evidence and the fact that the victim had gone through a metal detector and strip search immediately before the incident. Frierson and Maynard remained outside the search pen during the incident, but the evidence showed that they filed false official reports, with the intent to benefit other officers, about commands addressed to the victim that they purportedly heard during the incident (*see People v Flanagan*, 28 NY3d 644, 659 [2017]).

The court properly declined to charge justification pursuant to Penal Law §§ 35.10(2) and 35.30(1) as to defendants Rodriguez, Parker, Parra, and Rivera. This case presented a straightforward credibility contest, in which defendants and other correction officers alleged in their written reports that the officers used force to defend themselves against the victim who was wielding a knife, but the victim testified that he was merely complying with a search when the officers suddenly initiated an attack against him without provocation. The court issued a proper justification charge based on the officers' accounts (Penal Law § 35.15), but

properly declined to charge justification under the other statutes, which are limited to special situations. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]), because the absence of the initial aggressor exclusion in the additional justification statutes at issue would not have benefited defendants, who would not have been considered initial aggressors in the first place if the jury had credited their accounts.

The court providently exercised its discretion in precluding evidence as to the meaning of a "red ID card," which had been issued to the victim by the correctional facility and was visible on his clothing in a surveillance video. Defendants' argument that the card was relevant to their justification defenses is unavailing, since there was no evidence that they used force because of any beliefs about the victim's conduct based on his card (*see People v Pizzaro*, 184 AD2d 448 [1st Dept 1992], *lv denied* 80 NY2d 908 [1992]). Defendants' reports attributed their decisions to use force solely to the victim's conduct at the time of the incident, and did not mention the card.

The court properly denied the severance motions made by defendants Frierson and Maynard, who waived a jury trial. The People's case against them and their codefendants was generally

provided by the same evidence, their defenses did not pose any "irreconcilable conflict with" a codefendant's defenses, and there was no "significant danger" that the joint trial would cause the court in the nonjury trial to infer guilt (*People v Mahboubian*, 74 NY2d 174, 185 [1989]). Moreover, the court, in its capacity as a separate factfinder regarding these defendants, is presumed capable of avoiding prejudice.

The court providently exercised its discretion in declining to hold a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) to determine whether the use of the forensic statistic tool to conduct DNA analysis using the low count number or high-sensitivity method was generally accepted in the scientific field (*see People v Gonzalez*, 155 AD3d 507 [1st Dept 2017], *lv denied* 30 NY3d 1115 [2018]).

Defendants were also not entitled to a *Frye* hearing as to the metal detector through which the victim passed shortly before the incident. The court properly allowed the People's expert to testify, based on his experience conducting thousands of tests of the same model of metal detector, that the machine, when set to a certain sensitivity level, would have a 99.999% chance of detecting the piece of metal in question, or a 1 in 100,000 of failing to do so. In overruling objections to this testimony,

the court made clear that defendants could cross-examine the expert about his basis for this estimate.

In any event, we find that any error in the foregoing rulings regarding the jury charge, evidentiary matters, or severance was harmless in light of the overwhelming evidence of guilt (*see Crimmins*, *supra*).

We perceive no basis for reducing any of the sentences.

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7947 In re Noel R.,

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

LaQueenia S.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Emily Olshansky, J.), entered on or about December 5, 2017, which, inter alia, upon a finding that respondent mother is intellectually disabled, terminated her parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that the mother, by reason of intellectual disability, is unable, at present and for the foreseeable future, to provide proper and

adequate care for the child (*see* Social Services Law § 384-b[4][c], [6][b]; *Matter of Erica D. [Maria D.]*, 80 AD3d 423 [1st Dept 2011], *lv denied* 16 NY3d 708 [2011]). Although the mother possesses adequate adaptive skills in certain areas and there is a parental bond between the mother and the child, an expert psychologist opined that the mother's intellectual disability significantly impacted upon her ability to provide proper care for the child, who is on the autism spectrum and has special needs, and that therapy or services the mother had received and available interventions would not significantly impact upon or improve her parenting abilities (*see Matter of Leomia Louise C.*, 41 AD3d 249 [1st Dept 2007]). The record further shows that the child has bonded with his foster mother, who is dedicated to his care and provides for his special needs (*see Matter of Joyce T.*, 65 NY2d 39, 49-50 [1985]).

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7948 The People of the State of New York, Ind. 2710/15
Respondent,

-against-

Luis Pena,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 1, 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 27, 2018

CLERK

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

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7949 Raymond Marino, Index 153321/14
Plaintiff-Appellant,

-against-

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

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Cronin & Byczek, L.L.P., White Plains, (Linda M. Cronin of counsel), for appellant.

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

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered March 11, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's allegations of employment discrimination based on events that occurred before April 8, 2011 are time-barred under the applicable three-year statute of limitations (CPLR 214[2]; Administrative Code of City of NY § 8-502[d]; *see Jae Hee Chung v Mary Manning Walsh Nursing Home Co., Inc.*, 147 AD3d 452, 453 [1st Dept 2017]). The continuous violation doctrine does not apply (*see Ferraro v New York City Dept. of Educ.*, 115 AD3d 497 [1st Dept 2014]; *National R.R. Passenger Corp. v Morgan*, 536 US 101, 113-114 [2002]).

Plaintiff's timely allegations fail to state claims for

employment discrimination (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621 [1st Dept 2013] [termination of employment]; *Gaffney v City of New York*, 101 AD3d 410, 410-411 [1st Dept 2012] [hostile work environment], *lv denied* 21 NY3d 858 [2013]). Among other things, the allegations relating to disability retirement recommendations of the Police Pension Fund's Medical Board are misdirected. The Police Pension Fund is a corporate entity independent and distinct from the police department or the City (*see* Administrative Code § 13-220), and is not plaintiff's employer. Defendants cannot be held liable for the Police Pension Fund's alleged adverse employment actions (*see Freda v Board of Educ. of City of N.Y.*, 224 AD2d 360 [1st Dept 1996]; *Matter of New York State Teachers' Retirement Sys. v New York State Div. of Human Rights*, 83 Misc 2d 993 [Sup Ct, Albany County 1975]).

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

ENTERED: DECEMBER 27, 2018

CLERK

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

7950N In re Marco Pasanella, et al., Index 650198/12
Petitioners-Appellants,

-against-

James Quinn,
Respondent-Respondent,

Q Wines, LLC,
Respondent.

_____

Law Office of Ernest H. Gelman, New York (Ernest H. Gelman of counsel), for appellants.

Sher Tremonte LLP, New York (Mark Cuccaro of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 1, 2017, which denied petitioners' motion to reargue respondent Quinn's cross motion to dismiss the petition for lack of jurisdiction (denominated a motion to vacate the dismissal order) or, in the alternative, for an extension of time to serve, unanimously affirmed, without costs, as to the denial of the part of the motion seeking an extension of time to serve, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Although denominated a motion to vacate, petitioners' motion is in fact a motion to reargue respondent's cross motion

to dismiss the petition (*see Johnson v Banner Intl. Corp.*, 125 AD3d 498 [1st Dept 2015]). No appeal lies from the denial of a motion for reargument.

Given petitioners' failure to explain why they waited more than three years after the validity of service on Quinn was placed in issue to seek an extension of time to serve him, we find that the interests of justice do not require that they be afforded additional time for service (*see Jakobleff v Jakobleff*, 108 AD2d 725 [2d Dept 1985]; *Umana v Sofola*, 149 AD3d 1138, 1139-1140 [2d Dept 2017]).

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

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

ENTERED: DECEMBER 27, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Singh, JJ.

7951N Mark Shapiro, Index 157718/16
Plaintiff-Appellant,

-against-

Anthony Tardalo, et al.,
Defendants-Respondents,

State Farm Fire and Casualty
Insurance Company, et al.,
Defendants.

_____

The Zuppa Firm, Garden City (Raymond J. Zuppa of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Barry Jacobs of counsel), for Anthony Tardalo and The National Insurance Crime Bureau, respondents.

Weil Gotschal & Manges LLP, New York (Gregory Silbert of counsel), for Dallas Ragan and Farmers Insurance Company, respondents.

Eversheds Sutherland (US) LLP, New York (Kymberly Kochis of counsel), for Government Employees Insurance Company, GEICO General Insurance Company and GEICO Indemnity Insurance Company, respondents.

Manning & Kass, Ellrod, Ramirez, Trester, LLP, New York (Jeanette L. Dixon of counsel), for Travelers Indemnity Company and Travelers Home and Marine Insurance Company, respondents.

Dechert LLP, New York (Douglas W. Dunham of counsel), for State Farm Mutual Automobile Insurance Company, respondent.

Bruno, Gerbino & Soriano, LLP, Melville (Richard C. Aitken of counsel), for Metropolitan Property and Casualty Insurance Company and MetLife Auto and Home Insurance Agency, Inc., respondents. _____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 13, 2017, which denied plaintiff's motion for leave to file a second amended complaint, unanimously affirmed, without costs.

The court did not abuse its discretion in denying plaintiff leave to file a second amended complaint, where the proposed causes of action were precluded by the *Noerr-Pennington* doctrine (*see Eastern R.R. Presidents Conference v Noerr Motor Frgt.*, 365 US 127 [1961]; *United Mine Workers v Pennington*, 381 US 657 [1965]). That doctrine provides immunity to defendants for their cooperation with the government in the criminal investigation against multiple defendants, including plaintiff, for alleged no-fault fraud, notwithstanding plaintiff's allegations that defendants turned over false evidence against him, or that he was ultimately acquitted.

Further, plaintiff does not allege facts from which it might reasonably be inferred that this case falls within the "sham" exception to the *Noerr-Pennington* doctrine (*Alfred Weissman Real Estate v Big V Supermarkets*, 268 AD2d 101, 109 [2d Dept 2000]). By contrast, the record supports the inference that defendants had a genuine pecuniary interest in supporting governmental

investigation of insurance fraud (*see generally Weissman*, 268 AD2d at 109).

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

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

ENTERED: DECEMBER 27, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Sallie Manzanet-Daniels
Judith J. Gische
Anil C. Singh, JJ.

7581-7581A
Index 158738/16

_____x

Jodi Knox, also known as Jodi McGinnis,
Plaintiff-Appellant-Respondent,

-against-

Aronson, Mayefsky & Sloan, LLP, et al.,
Defendants-Respondents-Appellants,

Fredman Baken & Kosan, LLP,
Defendant-Respondent.

_____x

Cross appeals by plaintiff and defendants Aronson, Mayefsky & Sloan, LLP and Karen Robarge from the order of the Supreme Court, New York County (Carmen Victoria St. George, J.), entered October 16, 2017, which granted said defendants' motion to dismiss the breach of fiduciary duty claim, and denied their motion to dismiss the legal malpractice, fraud, and Judiciary Law § 487 claims and the request for punitive damages. Plaintiff appeals from the order of the same court and Justice and same entry date, which granted defendant Fredman Baken & Kosan, LLP's motion to dismiss the amended complaint as against it.

Richard Pu, New York, for appellant-respondent.

Rivkin Radler LLP, New York (Deborah Isaacson and Jonathan B. Bruno of counsel), for respondents-appellants.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jonathan Harwood and Hillary J. Raimondi of counsel), for respondent.

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SINGH, J.

Plaintiff Jodi Knox brings this action against her former counsel, Aronson, Mayefsky & Sloan, LLP and Karen Robarge (collectively, AMS) for legal malpractice, breach of fiduciary duty, fraud, and violation of Judiciary Law § 487 in connection with a divorce action brought by her former husband, nonparty James McGinnis (the husband), in New York County Supreme Court (*McGinnis v McGinnis*). She alleges that her successor legal counsel, defendant Fredman Baken & Kosan, LLP (FBK), also committed legal malpractice.

Defendant AMS represented plaintiff from approximately February through October 2013. Defendant Robarge is the partner at AMS who was primarily responsible for plaintiff's case. Defendant FBK represented plaintiff from January 2014 through June 2015.[1]

While represented by AMS, plaintiff repeatedly expressed her desire to move for a protective order against the husband. AMS ultimately made the application for a protective order as a cross motion to the husband's motion to set a visitation schedule on May 3, 2013. The motion and cross motion were resolved by a

[1] Plaintiff was also represented by four other firms during the pendency of the matrimonial action.

temporary stipulation, dated May 7, 2013 (the temporary stipulation), which gave plaintiff and the couple's infant daughter, born on November 6, 2012 exclusive occupancy of the couple's apartment in Manhattan and set a schedule for visitation with the husband.

In July 2013, plaintiff sought to temporarily move from the Manhattan apartment to Connecticut for foot surgery. Despite defendant Robarge's advice to the contrary, plaintiff, after apparently obtaining her husband's consent, moved with the child to Greenwich, Connecticut.

On October 21, 2013, AMS filed an order to show cause to be relieved as counsel due to plaintiff's lack of confidence in their advice. Before the order to show cause was heard, plaintiff voluntarily secured new counsel.

On May 2, 2014, while plaintiff was represented by FBK, the parties entered into a stipulation of settlement. On May 2, 2014, in open court, the parties were allocuted on the record. They stated that they understood and were satisfied with the settlement and with their attorneys' representation.

The settlement provided for joint legal custody of the child, who would primarily reside with plaintiff. Plaintiff was required to move back to Manhattan "no later than September 1, 2014." This obligation was deemed a "material term" of the

settlement, and plaintiff agreed to pay any fees incurred in enforcing this term. The husband was required to pay FBK's legal fees in the sum of $20,000 on plaintiff's behalf. Plaintiff was otherwise "solely responsible for all legal and professional fees" incurred in connection with the matrimonial action.

The settlement also provided that plaintiff "withdraws her application for an Order of Protection with prejudice which she agree[d] shall be deemed dismissed on the merits after a full and fair hearing by the Court." Since the first motion for an order of protection was resolved by the temporary stipulation, this was a second motion for a protective order, which plaintiff voluntarily withdrew as part of the settlement.

Plaintiff failed to return to Manhattan by the stated deadline under the settlement. As a result, the husband moved to compel her return, to transfer sole custody of the child to him, and for attorneys' fees.

On September 5, 2014, Supreme Court ordered plaintiff to return "forthwith," scheduled a custody hearing, and granted the husband's application for attorneys' fees subject to a showing of the amount owed. On July 15, 2015, Supreme Court directed that plaintiff pay the husband's attorneys' fees in the amount of $132,030.60. The court also found that a modification of the settlement was warranted and awarded the husband sole legal and

primary residential custody of the child. The court cited plaintiff's failure to timely return to Manhattan, which breached a material term of the settlement, and plaintiff's continued exhibition of "gatekeeping" behavior toward the husband, including by making false accusations to the police. The court rejected plaintiff's attempt to blame her failure to return to Manhattan on the husband's failure to comply with his obligation to guarantee her lease, noting that plaintiff "made no serious effort to find a Qualified Residence" and her "obligation to move was not contingent on [the husband's] guaranteeing a lease."

Plaintiff appealed, and this Court affirmed (*McGinnis v McGinnis*, 159 AD3d 475 [1st Dept 2018]). We held, citing plaintiff's "lack of insight, poor judgment, efforts to minimize the father's relationship with the child and multiple, unsubstantiated claims of abuse – as well as her refusal to return to New York in violation of the parties' settlement agreement" (*id.* at 476), that the husband had established that a modification of the custody arrangement was in the child's best interests.

In September 2015, FBK sued plaintiff in Westchester County Supreme Court to recover legal fees allegedly owed. Plaintiff, representing herself, answered the complaint and asserted a vague counterclaim for "professional misconduct." FBK moved to dismiss

this counterclaim and plaintiff, now represented by counsel, cross-moved to amend her answer to expand on her counterclaim. Plaintiff added details regarding FBK's alleged abandonment of its motion for attorneys' fees. In addition to a negligence claim, plaintiff sought to interpose counterclaims for breach of contract and breach of fiduciary duty.

By order dated January 11, 2017, Supreme Court denied plaintiff's motion to amend her answer with respect to the negligence and breach of fiduciary duty counterclaims. In addition, the court granted FBK's motion to dismiss the negligence counterclaim.

Meanwhile, in October 2016, plaintiff brought this action against AMS and subsequently added a claim against FBK. Supreme Court granted AMS's motion to dismiss the breach of fiduciary duty claim, but denied dismissal of the legal malpractice, fraud, and Judiciary Law § 487 claims, and the request for punitive damages. Supreme Court granted FBK's motion to dismiss the complaint. This appeal ensued.

Plaintiff's complaint should be dismissed in its entirety against AMS. We agree that Supreme Court properly dismissed the claim against FBK.

Turning first to plaintiff's legal malpractice cause of action against AMS, she alleges that AMS was negligent in failing

to move for attorneys' fees, resulting in her failure to receive an undetermined award to pay her attorneys. This claim fails because plaintiff's various successor counsel had ample time and opportunity to make such a motion, and in fact one did (although it was purportedly abandoned) (*see Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 487 [1st Dept 2018]).

Even assuming AMS was negligent in failing to move for attorneys' fees, by agreeing as part of the settlement[2] to forgo any award of attorneys' fees except for $20,000, plaintiff cannot show that but for AMS's negligence she would not have sustained the loss (*see generally Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007], *affd* 11 NY3d 195 [2008] [to establish proximate cause, the plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would have prevailed in the matter in question; failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent]); *180 Ludlow Dev. LLC v Olshan Frome Wolosky LLP*, 165 AD3d 594, 595 [1st Dept 2018] ["While proximate cause is generally a question

[2] Contrary to plaintiff's contention, the settlement is properly considered on this motion based on documentary evidence (CPLR 3211[a][1]) (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]), and it "conclusively establishes a defense to the asserted claims as a matter of law" (*see id.*).

for the factfinder . . . it can, in appropriate circumstances, be determined as a matter of law"]).

Next, plaintiff claims that AMS was negligent in allegedly advising her that she was permitted to move to Connecticut, resulting in the loss of custody of the child. The damages plaintiff seeks are the attorneys' fees incurred in connection with the husband's motion to compel her return to New York and future legal fees she will have to expend to recover custody. Again, this claim fails because plaintiff's alleged damages were not proximately caused by any advice given by AMS, but rather by her own subsequent failure to comply with the terms of the settlement.

Turning to the breach of fiduciary duty claim, plaintiff seeks damages for pain and mental suffering, the $132,000 plaintiff was required to pay the husband for his attorneys' fees, the attorneys' fees needed to recover custody of the child, and punitive damages. This claim and ensuing damages sought for the breach are duplicative of the malpractice cause of action (*see Alphas v Smith*, 147 AD3d 557, 558-559 [1st Dept 2017] [where the court found that the relief sought in the fiduciary duty claim was identical to the legal malpractice claim as it sought similar damages]).

Even if the two causes of action are not duplicative,

Supreme Court properly dismissed the breach of fiduciary cause of action. In the attorney liability context, the breach of fiduciary duty claim is governed by the same standard as a legal malpractice claim (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]). Accordingly, to recover damages against an attorney arising out of the breach of the attorney's fiduciary duty, plaintiff must establish the "but for" element of malpractice (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11 [1st Dept 2008]).

Citing to Domestic Relations Law § 240, plaintiff contends that had the motion court considered her application for a protective order, the husband would not have gained custody of the child. However, this statute gives the court discretion and does not mandate a particular decision. Moreover, under the temporary stipulation plaintiff and the child received exclusive occupancy of the Manhattan apartment. The husband was given visitation. Thereafter, under the settlement, plaintiff agreed to joint custody and was given primary residential custody of the child. As a matter of law, her damages, including loss of primary residential custody of the child, flow from her breach of the settlement, and not from AMS's acts or omissions.

Plaintiff's causes of action sounding in breach of fraud and

her Judiciary Law § 487 claims are identical and duplicative of the legal malpractice and breach of fiduciary claims. Therefore, these claims and the request for punitive damages should also be dismissed.

Finally, Supreme Court properly dismissed plaintiff's complaint as against FBK, since the only claim asserted, a legal malpractice claim, is barred by the doctrine of res judicata (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). Plaintiff's legal malpractice claim is based on the same conduct that was the basis of the counterclaim previously dismissed by Supreme Court Westchester County. Res judicata bars all claims "arising out of the same transaction or series of transactions . . . even if based upon different theories or if seeking a different remedy" (*Jumax Assoc. v 350 Cabrini Owners Corp.*, 110 AD3d 622, 623 [1st Dept 2013] [internal quotation marks omitted], *lv denied* 23 NY3d 907 [2014]). Contrary to plaintiff's contention, the dismissal in the Westchester action was on the merits. The order addressed the merits of the counterclaim, dismissing it on the basis of the settlement and the custody decision in the matrimonial action (*see Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 98 [1st Dept 2012]).

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

Accordingly, the order of the Supreme Court, New York County (Carmen Victoria St. George, J.), entered October 16, 2017, which granted defendants Aronson, Mayefsky & Sloan, LLP and Karen Robarge's motion to dismiss the breach of fiduciary duty claim, and denied their motion to dismiss as to the legal malpractice, fraud, and Judiciary Law § 487 claims and the request for punitive damages, should be modified, on the law, to grant said defendants' motion to dismiss the complaint in its entirety, and as so modified, affirmed, without costs. The order of the same court and Justice, and same entry date, which granted defendant Fredman Baken & Kosan, LLP's motion to dismiss the amended complaint as against it, should be affirmed, without costs. The Clerk is directed to enter judgment accordingly.

All concur.

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered October 16, 2017, modified, on the law, to grant defendants Aronson, Mayefsky & Sloan, LLP and Karen Robarge's motion to dismiss the complaint in its entirety, and as so modified, affirmed, without costs. Order, same court and Justice and entry date, affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Opinion by Singh, J. All concur.

Richter, J.P., Manzanet-Daniels, Gische, Singh, JJ.

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

ENTERED: DECEMBER 27, 2018

CLERK