SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 15, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Mazzarelli, Andrias, Gesmer, Oing, JJ.

5326 Anaima Lebron, etc., Index 303775/10
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant,

The City of New York,
Defendant.

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Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 24, 2016, which, to the extent appealed from, denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On October 25, 2008, the decedent, Yovanna Angomas, told her mother, plaintiff Anaima Lebron, that she was having an asthma

attack. Plaintiff asked her other daughter to call 911 and began CPR. At approximately 8:27 p.m., EMTs arrived at the seventh floor apartment and found the decedent on the bedroom floor in respiratory arrest. Within minutes of this initial assessment, the decedent had no pulse, no vital signs, no blood pressure and appeared to be in cardiac arrest. Consequently, the EMTs requested the assistance of paramedics from an Advanced Life Services unit.

At approximately 8:44 p.m., the paramedics arrived and attempted to put the decedent on a Lifepak 12 monitor, which malfunctioned. The paramedics then used an Automated External Defibrillator until a working Transcare monitor arrived at approximately 8:52 p.m., and continued to administer CPR and follow treatment protocols, including the administration of medications, in an effort to restart the decedent's heart. However, the decedent remained in asystole, a complete flatline indicating no heart rhythm. Nevertheless, the paramedics decided to transport her to the nearest hospital.

Due to decedent's weight (approximately 300-400 pounds), the paramedics requested that the FDNY bring a Stokes basket, which arrived at approximately 9:02 p.m. After placing the decedent in the Stokes basket, which took approximately five minutes, the paramedics maneuvered the decedent into the elevator, which

experienced stoppages on the way down. At 9:38 p.m., the decedent was placed in an ambulance and transported to the hospital, where she was pronounced dead shortly after her arrival.

Plaintiff testified at her 50-h hearing that she left the apartment "like four minutes later" than the emergency personnel. It took her two minutes to get to the lobby and the decedent arrived 10 or 15 minutes later (amounting to a delay of between 16 and 21 minutes). At her deposition, plaintiff testified that she was waiting in the lobby for 30 minutes before the decedent arrived there.

Paramedic Fieldcamp testified that she and two firefighters went into the elevator with the decedent. The elevator stopped one time and stuck between floors. It started to move and then got stuck a second time. While it felt like an eternity, it probably was not. EMT Roman testified that it took him three minutes to get from the decedent's apartment to the lobby. He waited 5 to 10 minutes for the elevator to arrive in the lobby and left for the hospital at 9:38 p.m., approximately an hour and 10 minutes from the first call.

Plaintiff seeks to recover damages allegedly sustained due to NYCHA's negligence in maintaining the elevator on the grounds that it delayed paramedics from transporting the decedent to a

nearby hospital for more intensive treatment.

NYCHA failed to demonstrate that it lacked prior notice of elevator stoppages in the building, as its employee's testimony, and its maintenance records, submitted with its moving papers show that the elevators experienced numerous malfunctions and stoppages in less than two months before the incident (*see Villalba v New York El. & Elec. Corp., Inc.*, 127 AD3d 650 [1st Dept 2015]; *Scafe v Schindler El. Corp.*, 111 AD3d 556 [1st Dept 2013]). Although NYCHA's elevator repair person testified that a dispatcher would inform him when the elevator was broken, no logbook documenting complaints or an affidavit from someone who would actually receive complaints was produced.

However, allegations of negligence, even if provable, are insufficient to establish liability absent proof that the negligence was a proximate cause of the injury (*see Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept 2000], *appeal dismissed* 95 NY2d 885 [2000], *lv denied* 95 NY2d 769 [2000]). Although "issues of proximate cause are generally fact matters to be resolved by a jury" (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 659 [1989]), "[t]here are certain instances . . . where only one conclusion may be drawn from the established facts and . . . the question of legal cause may be decided as a matter of law" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *see*

also D' Avilar v Folks Elec. Inc., 67 AD3d 472 [1st Dept 2009]).

Here, NYCHA presented unrefuted evidence demonstrating that the decedent's cardiac rhythm was asystole, a dire form of cardiac arrest in which the heart stops beating and there is no electrical activity in the heart, and that she showed no signs of life in the hour between the arrival of emergency personnel and her transfer into the elevator, despite the emergency responders' continuous resuscitative efforts. Furthermore, NYCHA's medical expert stated that "[t]he prolonged and unsuccessful resuscitative course in an asystolic patient is associated with an extremely poor outcome" and that "the decedent's obesity made resuscitative efforts more difficult and further reduced [her] likelihood of survival." Thus, he opined, "within a reasonable degree of medical certainty[,]. .. the outcome for the decedent would [not] have changed had the transport time within the elevator been shorter."

By these facts and its expert's opinion, NYCHA demonstrated its prima facie entitlement to judgment as a matter of law by showing that the stoppage of its elevator, and resulting delay of the decedent's arrival at the hospital, were not a proximate cause of the decedent's death. In opposition, plaintiff, who did not submit an expert's affirmation, failed to refute the averment of NYCHA's expert that the elevator stoppage did not change the

outcome for the decedent or raise a triable issue of fact as to whether NYCHA's purported negligence "was a substantial cause of the events which produced the injury" (*Derdiarian*, 51 NY2d at 315).

Plaintiff argues that NYCHA did not satisfy its prima facie burden because the testimony of paramedic Pinkhasov shows that the decision to transport decedent to the hospital was based, in part, on the possibility that her heart was beating, despite some indications that she was in a state of asystole. However, this testimony did not suffice to raise a material issue of fact as to proximate cause.

When asked if there was a time when he decided to transport the decedent, rather than continue care at the scene, Pinkhasov responded:

> "this was a 30 year-old female who [was] young, so just by age alone and that per BLS crew, ... she was fresh, that means that she just arrested ... and she also was on the heavier side, that to get a termination time through a telemetry on a person who is on the heavy side it's a little harder because they believe that we sometimes - you know, because they have too much body mass, you can't get a really could [sic] reading, they need an ultrasound to get an actual good picture of a heart, so I decided to transport her because she was young and there was a possibility."

However, this testimony was speculative, not based on any degree of medical certainty and insufficient to refute the opinion of NYCHA's medical expert. Indeed, Pinkhasov further

testified that: (i) when he arrived at the scene the decedent was in cardiac arrest, which "means they have no blood flowing through their system, their heart is not operating and they are not breathing"; (ii) when they placed the decedent on the Transcare Monitor it showed a "[l]ack of heart rhythm," and no electrical or mechanical activity; (iii) decedent continuously "remained in asystole, which is a complete flatline," and, despite his efforts, he never got any response out of the decedent's heart and she never regained consciousness or breathed on her own; (iv) decedent's vital signs were checked six times and there was no blood pressure, pulse or respiration; (v) the fact that the decedent was obese did not make a difference with respect to the equipment used and he never had a problem with respect to readings because of obesity; and (vi) when the decedent was put in the elevator "she didn't have any blood pressure, she was dead."

Pinkhasov's partner, paramedic Fieldcamp, testified that when she arrived at the apartment at 8:50 p.m., the decedent was not breathing, had no pulse, was in cardiac pulmonary arrest and was asystole. At 9:20 p.m, things had not changed. When asked why she did not do a field termination, Fieldcamp responded:

> "There's various circumstances. Sometimes the patient's age. Which the patient could have been pronounced dead at her home. After 20 minutes of CPR,

> you get on the phone with the doctor and pronounce the patient dead. You also have to look at the psychological circumstances in the house removal of the patient and someone that age you're going to do everything possible you can, but then again she could have been pronounced dead as well."

Fieldcamp explained that there were other variables that affected her decision to transfer the decedent to the hospital, primarily that her entire family was witnessing her die:

> "[Y]ou have other people around you. I believe that there are some paramedics, EMS providers that may have pronounced her in the house. I myself probably [would have] pronounced her in the house in [a] different set of circumstances, but when you get into that whole thing [referring to the decedent's family watching her die], and, you know, you're flipping a mattress, you're in a tight apartment, its disheveled in the house, you're working and you're doing your best effort."

Furthermore, EMT Mendez testified that the decedent never regained any vital signs and was clinically dead.

Thus, NYCHA established prima facie that the amount of time the decedent spent in the elevator did not have a substantial effect on her prospects for survival. The decedent remained in asystole, which is clinically dead, from the moment paramedics arrived through the time she was transported to the hospital. Plaintiff failed to present any admissible evidence contesting defendant's evidence or which would establish that she would have

had a better chance of survival had the elevator not stopped. Accordingly, NYCHA's motion for summary judgment should have been granted.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5494 The People of the State of New York, Respondent, Ind. 447/09

-against-

Geraldo Garay, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at speedy trial motion; Laura A. Ward, J. at jury trial and sentencing), rendered March 31, 2011, convicting defendant of gang assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of 7 years, unanimously modified, on the law, to the extent of reducing the gang assault conviction to attempted gang assault in the first degree, and remanding the matter for resentencing on both convictions.

The evidence was legally insufficient to establish that the injuries sustained by the victim constituted serious physical injury (*see* Penal Law § 10.00[10]), an element of gang assault in the first degree (*see People v Rosado*, 88 AD3d 454 [1st Dept 2011], *lv denied* 18 NY3d 928 [2012]). Although there was

testimony that the victim still had some physical effects of the assault at the time of trial, the evidence on this was limited and, in any event, the record before the jury did not show that the injury was such that a reasonable observer would find the victim's appearance distressing or objectionable (*see People v McKinnon*, 15 NY3d 311, 316 [2010]). It is also undisputed that the victim's injuries did not impair his general health (*see Rosado*, 88 AD3d at 454). We find that the most appropriate remedy is a reduction to the lesser included offense of attempted gang assault in the first degree pursuant to CPL 470.15(2)(a), with a remand for resentencing on both convictions (*see People v Tucker*, 91 AD3d 1030, 1032 [3d Dept 2012], *lv denied* 19 NY3d 1002 [2012]; *People v Delgado*, 167 AD2d 181, 182 [1st Dept 1990], *lv denied* 77 NY2d 905 [1991]).

Defendant's only preserved argument concerning the denial of his speedy trial motion is that the court improperly applied the rule of *People v Green* (90 AD2d 705 [1st Dept 1982], *lv denied* 58 NY2d 784 [1982]) to an adjournment granted after the court had denied a prior CPL 30.30 motion by one of the two codefendants. However, we find that the reasonable 20-day adjournment following the decision on that motion was excludable under the circumstances (*see People v Ali*, 195 AD2d 368, 369 [1st Dept 1993], *lv denied* 82 NY2d 804 [1993]). Defendant failed to

preserve his remaining speedy trial arguments. In particular, a statement in his motion that he "reserves" an argument never actually made had no preservation effect (*see People v Bierenbaum*, 301 AD2d 119, 152 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]), and the argument in question was, in any event, materially different from those raised on appeal. We decline to review defendant's unpreserved claims in the interest of justice. As an alternative holding, we reject them on the merits (*see People v Brown*, 28 NY3d 392, 405 [2016]; *People v Davis*, 80 AD3d 494, 494-495 [1st Dept 2011]).

To the extent the record permits review, we find that defense counsel was not ineffective under the state or federal standards for failing to challenge, as repugnant, the verdict convicting defendant as noted but acquitting him of first-degree assault under Penal Law § 120.10(1). Such a challenge would have had "little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]). We decline to review defendant's unpreserved repugnancy claim in the interest of justice. As an alternative holding, we reject it on the merits. Under the court's charge, the jury could theoretically have made consistent findings supporting the combination of verdicts it reached, regardless of whether there was any evidentiary basis for those findings (*see People v Muhammad*, 17

NY3d 532, 539 [2011]; *People v Tucker*, 55 NY2d 1, 6-7 [1981]).

Since we are remanding for a plenary resentencing, we do not reach defendant's excessive sentence claim.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5639 In re Grace E.-J.,
Petitioner-Respondent,

-against-

Robert J.-R.,
Respondent-Appellant.

_____

Law Office of Bruce A. Young, New York (Bruce A. Young of counsel), for appellant.

Larry S. Bachner, New York, for respondent.

Karen Freedman, Lawyer's for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about December 20, 2016, which, to the extent appealed from as limited by the briefs, denied respondent father's motion to hold petitioner mother in civil contempt for violating a temporary visitation order, unanimously dismissed, without costs, as moot.

This appeal by respondent father is moot because the temporary visitation order expired on its own terms. The mother's custody petition from which the temporary visitation order and contempt motion flowed was dismissed by the same order appealed. The exception to the mootness doctrine does not apply here because the denial of the motion, seeking to hold the mother in contempt for a violation of a temporary order of visitation,

does not "stand[] as a permanent stigma that may impact [the father's] standing in any future proceedings" (*Matter of Joshua Hezekiah B [Edgar B.]*, 77 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 716 [2010]; *see also Matter of Daqwuan G.*, 29 AD3d 694, 695 [1st Dept 2006]). On the contrary, there is nothing to prevent the father from testifying at a hearing, on his pending custody petition, about the mother's failure to abide by the court's temporary order of visitation and the impact it had upon his relationship with the child, or from moving for contempt if she is violating the final order of visitation. As such, there may still be serious consequences to the mother for her repeated and blatant disregard of the court's order.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5701 The People of the State of New York, Respondent, Ind. 2272/13

-against-

Melinda Evans, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about September 3, 2014, convicting defendant, after a nonjury trial, of robbery in the third degree, and sentencing her, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility, including its evaluation of minor discrepancies regarding the victim's description of her

assailant. The victim made a prompt and reliable showup identification. We have considered and rejected defendant's remaining arguments.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5702 Krzysztof Sawczyszyn, Index 158910/14
Plaintiff-Respondent,

Beata Sawczyszyn,
Plaintiff,

-against-

New York University, et al.,
Defendants-Appellants.

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Cozen O'Connor, New York (Eric J. Berger of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (Norman E. Frowley of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 12, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim and so much of the Labor Law § 241(6) claim as based on an alleged violation of Industrial Code (12 NYCRR) § 23-1.22(b)(3), denied defendants' motion for summary judgment dismissing those claims, and granted plaintiff's cross motion for leave to amend his bill of particulars to allege a violation of Industrial Code § 23-1.7(f) in support of the Labor Law § 241(6) claim, unanimously modified, on the law, to deny plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, grant defendants'

motion for summary judgment dismissing the Labor Law § 240(1) claim, and deny plaintiff's cross motion for leave to amend his bills of particulars, and otherwise affirmed, without costs.

The court should have dismissed the Labor Law § 240(1) claim. Plaintiff was allegedly injured in the course of rolling a four-wheeled cart filled with about 100 to 200 pounds of materials over an unsecured, makeshift plywood ramp which bridged an approximately five- or six-inch gap between a truck bed to a loading dock, when the ramp slipped out of place and landed on the truck bed, and the cart descended, pulling on plaintiff's arms and causing injuries. Plaintiff admitted that the vertical distance from the surface of the truck bed to the surface of the dock was about 8 to 12 inches, which under the circumstances, does not constitute a physically significant elevation differential covered by Labor Law § 240(1) (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514-515 [1991] ["While the extent of the elevation differential may not necessarily determine the existence of an elevation-related risk, it is difficult to imagine how plaintiff's proximity to the 12-inch trough could have entailed an elevation-related risk which called for any of the protective devices of the types listed in section 240(1)"]; *compare Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009], *with Arrasti v HRH Constr. LLC*, 60 AD3d 582 [1st Dept

2009]). Plaintiff's injury was not proximately caused by a failure to protect him from any elevation-related risks posed by the distance of almost four feet from the floor to the surface of the dock, since plaintiff remained on the dock while the cart became wedged in the gap between the truck bed and the dock, and there is no evidence that the gap was large enough to pose a significant risk of any hazardous descent to the floor.

The court improperly exercised its discretion in granting leave to amend the bills of particulars to allege a violation of Industrial Code § 23-1.7(f) in support of the Labor Law § 241(6) claim. In this case, the ramp from the truck bed to the dock, covering a vertical distance of about one foot or less, "did not provide access to an above- or below-ground working area within the meaning of the regulation" (*Torkel*, 63 AD3d at 590; *see Francescon v Gucci Am., Inc.*, 105 AD3d 503 [1st Dept 2013]).

However, the court properly granted plaintiff's motion for partial summary judgment on the Labor Law § 241(6) claim insofar as based on an alleged violation of Industrial Code § 23-1.22(b)(3). Defendants' assertion that the four-wheeled plastic cart containing construction materials, which plaintiff was pulling over the ramp at the time of the accident, was not intended to be used by any types of equipment enumerated in the regulation, including a "hand cart[]" (Industrial Code § 23-

1.22[b][3]), is conclusory (*cf. Torkel*, 63 AD3d at 590-591). Defendants' arguments that the work did not require a ramp, and that this regulation is inapplicable to a temporary ramp, are also without merit (*see e.g. Arrasti*, *supra*). Moreover, plaintiff's work of preparing materials to be brought to upper floors of the building to be used in an asbestos abatement project was within the scope of Labor Law § 241(6) (*see* Industrial Code § 23-1.4[b][13]).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5703 In re Natalie Schleifer, etc., et al.,
Petitioners-Respondents,

-against-

Richard L. Yellen, et al.,
Respondents,

34-10 Development LLC, et al.,
Respondents-Appellants.

File No. 3599/10

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Loeb & Loeb LLP, New York (Jon Hollis of counsel), for respondents.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about July 20, 2017, which, insofar appealed from as limited by the briefs, denied the motion of respondents 34-10 Development LLC, 37-11 Development LLC, 338-342 East 110 LLC, 333-339 East 109 LLC, Louisiana Nursing Realty, LLC, 91-DMR of Queens, LLC, Douglaston Realty Associates, LLC, Atria Builders, LLC, DSM Design Group, LLC, David Marx, and Robert Marx (the Marx respondents) to dismiss the thirteenth and fourteenth causes of action (conspiracy and breach of contract) and part of the second cause of action (fraud) of the amended petition, unanimously modified, on the law, to grant the motion as to the second and thirteenth causes of action, and otherwise affirmed, without

costs.

Having failed to cross-appeal, petitioners may not ask us to reverse so much of the order as found that they ratified the settlement agreement (*see e.g. Hecht v City of New York*, 60 NY2d 57 [1983]).

The fact that petitioners ratified the agreement does not bar them from seeking damages for having been fraudulently induced into it (*see e.g. Sager v Friedman*, 270 NY 472, 479-481 [1936]; *see also Danaan Realty Corp. v Harris*, 5 NY2d 317, 319, 323 [1959]). However, the release contained in the agreement bars their fraud claim (as opposed to their contract claim), since petitioners fail to "identify a separate fraud from the subject of the release" (*Centro Empresarial Cempresa S.A. de América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]).

The court should have dismissed the conspiracy claim because "New York does not recognize an independent cause of action for conspiracy to commit a civil tort" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). Moreover, since we are dismissing the fraud claim, there is no longer any underlying primary tort (*see id.* [elements of conspiracy include primary tort]).

The court properly declined to dismiss the contract claim. Plaintiff significantly alleged that the Marx Group (as defined

in the settlement agreement) breached the contract by failing to provide a detailed statement of financial condition for respondent David Marx within ten days. As for the Marx respondents' argument that petitioners were not injured by the delay in providing the financial statement, "[n]ominal damages are always available in breach of contract action" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]; *see also Rebecca Broadway L.P. v Hotton*, 143 AD3d 71, 78 n 3 [1st Dept 2016]; *C.K.S. Ice Cream Co. v Frusen Gladje Franchise*, 172 AD2d 206, 208 [1st Dept 1991]).

The contract claim is also based on the Marx Group's failure to make payments pursuant to the schedule set forth in the agreement. A letter from the Marx Group's own lawyer shows that it failed to pay $85,000 of the first payment and $500,000 of the second payment. Even though the Marx Group tendered $585,000 on July 14, 2014, it still breached the agreement by failing to pay on time (*cf. San-Dor Assoc. v Toro*, 213 AD2d 233, 234 [1st Dept 1995] ["As defendant was ready and willing to tender the monthly rental payments *as they came due*, but as plaintiff refused to accept such payments, there was no default under the lease"] [emphasis added]). At a minimum, petitioners would be entitled to interest on (1) $85,000 from the fall of 2011 through July 13, 2014 and (2) $500,000 from June 1, 2012 through July 13, 2014.

Moreover, the Marx Group's tender did not address the Schleifer Group's July 7, 2014 declaration that the Marx Group was in default, its acceleration of all unpaid amounts under the settlement agreement, and its demand for $4,585,000 plus interest.

The amended petition is dated January 7, 2015. There is no indication in the record that petitioners sought to supplement it to take account of events after that date, such as the Marx Group's attempt to make the fourth payment. In addition, issues as to the fourth payment (including the quitclaim deed) may be moot because, in November 2017, the Marx respondents apparently made the fourth payment and petitioners apparently gave the Marx respondents a quitclaim deed. Therefore, we do not reach the Marx respondents' argument that petitioners' contract claim should be dismissed because petitioners themselves failed to perform by failing to give the Marx respondents a quitclaim deed.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5706 The People of the State of New York, Ind. 2404/16
Respondent,

-against-

Jose Solis,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen 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 (Shari Michels, J.), rendered September 12, 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: FEBRUARY 15, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5708 In re Jian Min Lei, Index 157409/15
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

_____

Steven T. Gee, P.C., New York (Steven T. Gee of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for New York City Department of Housing Preservation and Development, respondent.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for Gouverneur Gardens Housing Corp., respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered August 23, 2016, denying the petition to annul the determination of respondent New York City Department of Housing Preservation and Development (HPD), which denied petitioner's claim for succession rights to the subject apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's inclusion on his father's income affidavits does not, by itself, establish his entitlement to succession rights as a matter of law (*see Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [1st Dept

2007]). HPD was "entitled to consider the lack of objective documentary evidence supporting petitioner's claim. . .and the fact that petitioner provided an address other than the subject apartment as his place of residence on a tax return filed during the relevant time period" (*Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288, 289 [1st Dept 2008]).

The fact that the housing company changed its records and billings, accepted petitioner's rent checks for several years, and entered into a transfer agreement is unavailing, as "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (*Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008] [internal quotation marks omitted]). HPD never issued a lease, and the payment of rent by petitioner did not legitimatize his occupation of the apartment (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]).

Contrary to petitioner's contention, the transfer agreement did not constitute an approval of his succession rights, and the agreement specifically stated that it was subject to HPD regulations. Equally unavailing is petitioner's argument that HPD should have challenged the housing company's transfer of his

tenancy under 28 RCNY 3-18, and not pursuant to 28 RCNY 3-02(p), since no written lease was involved (*compare Matter of Waldman v New York City Dept. of Hous. Preserv. & Dev.*, 36 AD3d 501 [1st Dept 2007]).

Petitioner also claims that he was never provided with a translation of the documents. However, there is no evidence that an interpreter was requested (*see Yunayeva v Kings Bay Hous. Co., Inc.*, 94 AD3d 452 [1st Dept 2012]). Furthermore, "the regulation under which [petitioner] claimed succession rights (28 RCNY § 3-02(p)) did not provide for a hearing" (*Pietropolo* at 407); nor was one warranted under the circumstances.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5709 The People of the State of New York, Respondent, Ind. 450/10

-against-

Ilius Ballenilla, Defendant-Appellant.

_____

Andrew Freifeld, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about October 30, 2013, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

A risk level two adjudication was supported by clear and convincing evidence. The court correctly made point assessments based on facts contained in the victim's grand jury testimony (*see People v Mingo*, 12 NY3d 563, 573 [2009]), defendant's guilty plea (*see* Correction Law § 168-n[3]), or both, and defendant's challenges to these assessments are unavailing. We have considered and rejected defendant's remaining arguments concerning his point score.

Regardless of whether the court should have considered the

transcript of a New York County trial where defendant was acquitted of charges involving the same victim at an earlier age, there was no prejudice. Nothing in the testimony at that trial, as described by defendant, rendered unreliable the victim's grand jury testimony regarding the events at issue here.

The court also providently exercised its discretion when it declined to grant a downward departure (*see generally 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 defendant's lengthy course of sexual misconduct against a child.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5712 The People of the State of New York, Ind. 3144/15
Respondent,

-against-

Edgardo Monroy true name
Edgardo Monroig,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Hornstein, J. at plea; Marc Whiten, J. at sentencing), rendered January 8, 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 ORDEROF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 15, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5713 The People of the State of New York, Ind. 410/14
Respondent,

-against-

Rene Lopez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Katherine J. Hwang of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert Torres, J.), rendered July 1, 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: FEBRUARY 15, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5716-
5717 Index 22805/15E

Siri Medical Associates, PLLC
also known as Catskill Physical
Medicine and Pain Management PLLC,
Plaintiff-Respondent,

-against-

Paradise Court Management Corporation,
Defendant-Appellant,

Sentinel Insurance Company,
Limited/The Hartford,
Defendant.

_____

Kelly & Curtis, PLLC, New York (Elio M. DiBerardino of counsel), for appellant.

Joseph A. Maria, P.C., White Plains (Frances Dapice Marinelli of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered August 10, 2016, which, insofar as appealed from as limited by the briefs, denied the branch of defendant Paradise's motion seeking to dismiss the complaint for lack of legal capacity to sue, and order, same court and Justice, entered May 16, 2017, which, after a traverse hearing, denied the branch of Paradise's motion seeking to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

Plaintiff satisfied its burden of establishing, by a preponderance of the evidence, that service of process was

effected on Paradise and that personal jurisdiction was thereby obtained (*see* CPLR 311[a][1]; *Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 271-273 [1980]; *Elm Mgt. Corp. v Sprung*, 33 AD3d 753, 754-755 [2d Dept 2006]; *see also* CPLR 3211[a][8]). There exists no basis to disturb the hearing court's determination, which turned largely on the credibility of the witnesses and was substantiated by the record, including the affidavit of service (*see Arrufat v Bhikhi*, 101 AD3d 441, 442 [1st Dept 2012]).

Nor did Paradise demonstrate that plaintiff lacks capacity to bring this suit. Plaintiff, as the corporate tenant claiming to have sustained property damage, had the "power to appear and bring its grievance before the court" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]; *see* CPLR 3211[a][3]).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5718 The People of the State of New York, Respondent, Ind. 3231N/15

-against-

Jahni Fannis, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard 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: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5720 Rufina Moreira, Index 301455/12
Plaintiff-Appellant,

-against-

Prakash Mahabir, et al.,
Defendants-Respondents.

_____

Sacco & Fillas, LLP, Astoria (Chad B. Russell of counsel), for appellant.

Lawrence Heisler, Brooklyn (Harriet Wong of counsel), for Prakash Mahabir and New York City Transit Authority, respondents.

Saretsky Katz & Dranoff, L.L.P., New York (Daniel Rifkin of counsel), for Mohammad Hossain and Relax Auto Services, Inc., respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered October 21, 2016, which granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury pursuant to Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to plaintiff's claims regarding her cervical spine and lumbar spine under the permanent consequential limitation and significant limitation categories, and otherwise affirmed, without costs.

Plaintiff alleges that she sustained serious injuries to her cervical and lumbar spine following a motor vehicle accident that occurred in July 2011 when she was a passenger on a City bus. Defendants made a prima facie showing that plaintiff did not

sustain serious injuries involving significant or permanent consequential limitation in use of those body parts through the affirmed reports of an orthopedic surgeon and neurologist who found normal ranges of motion, negative objective test results, and resolved sprains and strains (*see Rickert v Diaz*, 112 AD3d 451, 451-452 [1st Dept 2013]). Defendant's neurologist explained that the limitations he measured in the lumbar spine were due to plaintiff's limited effort on examination, not any injury related to the accident (*see Mercado-Arif v Garcia*, 74 AD3d 446 [1st Dept 2010]). However, defendants' experts did not raise any issue as to causation, since the orthopedic surgeon acknowledged that the accident caused cervical and lumbar sprain that had resolved. While their neurologist stated that the MRIs "appeared to show pre-existing herniations," he did not review the MRI films himself, and his equivocal statement was inconsistent with the referenced MRI reports, which identified specific herniations and noted no significant degenerative disc disease in the spine.

In opposition, plaintiff raised an issue of fact through the affirmed reports of a physician who examined her soon after the accident, and another who examined her recently and observed significant limitations in range of motion of the affected body parts, as well as positive results on objective tests for cervical and lumbar injury (*see Encarnacion v Castillo*, 146 AD3d

600, 601 [1st Dept 2017]; *DaCosta v Gibbs*, 139 AD3d 487, 487 [1st Dept 2016]). Although the contents of some of the medical records submitted by plaintiff were inadmissible because they were unaffirmed (*see Barry v Arias*, 94 AD3d 499, 499 [1st Dept 2012]), they could "be considered for the purpose of demonstrating that plaintiff sought medical treatment for h[er] claimed injuries contemporaneously" (*Vishevnik v Bouna*, 147 AD3d 657, 659 [1st Dept 2017]).

To the extent that defendants raised an issue as to degeneration, plaintiff's physicians adequately addressed the issue by ascribing her injuries to a different, yet equally plausible, explanation — the accident (*see Pommells v Perez*, 4 NY3d 566 [2005]; *Camacho v Espinoza*, 94 AD3d 674 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). Defendants' contention that plaintiff failed to adequately explain a cessation of treatment is unpreserved, since it was first raised in reply and may not be raised on appeal (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept 2017]; *Tadesse v Degnich*, 81 AD3d 570 [1st Dept 2011]). In any event, plaintiff's physician noted that therapy and other treatment ceased because it failed to improve her condition (*see Pommells v Perez*, 4 NY3d at 577).

Defendants met their prima facie burden as to the 90/180-day

claim by submitting plaintiff's bill of particulars and deposition testimony, where she admitted that she had not been confined to her bed and home for the requisite period of time after the accident (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]). In opposition, plaintiff did not raise an issue of fact.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Kahn, Oing, JJ.

5721N Dale Weingarten, etc., Index 401034/13
Plaintiff-Appellant,

-against-

Jeff Braun,
Defendant-Respondent,

Jonathan Jossen, et al.,
Defendants.

_____

LeClairRyan, New York (Joseph M. Cerra of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Robert B. Hille of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 29, 2017, which denied plaintiff's motion seeking, inter alia, discovery of the personal tax returns of defendant Jeff Braun, and a deposition of nonparty attorney, unanimously affirmed, without costs.

While New York has a broad policy of discovery, favoring disclosure, disclosure of tax returns is disfavored because of their confidential and private nature, requiring the party seeking to compel production to make "a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources" (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005] [internal

quotation marks omitted]). Here, plaintiff failed to identify the particular information the tax returns of Braun will contain and its relevance to the claims made here. How Braun put the allegedly improperly obtained property to use, e.g., by allegedly claiming a loss on his personal taxes, is extraneous to whether the property was, in fact, improperly obtained. Similarly, plaintiff has failed to detail what information the nonparty attorney could offer in the proposed deposition that would be relevant to this claim (*see Ortiz v Rivera*, 193 AD2d 440 [1st Dept 1993]).

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: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5722 The People of the State of New York, Respondent, Ind. 6061/10

-against-

Anthony Kelly, Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered July 17, 2014, as amended September 11, 2014, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly declined to charge the jury on the affirmative defense of extreme emotional disturbance (EED). The evidence was insufficient, viewed in the light most favorable to defendant, to support a finding that at the time he killed the victim, defendant was actually under the influence of EED (*see People v Roche*, 98 NY2d 70, 75-78 [2002]). Among other things, his actions after the crime indicated that he was not affected by an emotional disturbance, but was capable of exercising self-control by attempting to come up with several stories explaining

why he stabbed the victim (*see People v Moronta*, 96 AD3d 418, 420 [1st Dept 2012], *lv denied* 20 NY3d 987 [2012]; *People v Acevedo*, 56 AD3d 341, 341-342 [1st Dept 2008], *lv denied* 12 NY3d 813 [2009]). In this case, defendant's claim of having been under the influence of PCP went to the defense of intoxication, which the court charged. It did not charge EED. However, it did charge first and second-degree manslaughter, which was advantageous to defendant.

By acquiescing in the court's ruling, and failing to make any offer of proof, defendant failed to preserve his contention that the court improperly precluded the defense psychologist from opining on whether defendant was under the influence of EED at the time of the crime (*see e.g. People v George*, 67 NY2d 817, 819 [1986]; *People v Anderson*, 116 AD3d 499, 501 [1st Dept 2014], *lv denied* 24 NY3d 958 [2014]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court's ruling was a provident exercise of discretion (*see People v Diaz*, 51 NY2d 841 [1980]). In any event, any error in this regard was harmless. In the first place, the psychologist was permitted to testify in detail about defendant's mental condition. Furthermore, as discussed above, there was overwhelming evidence negating EED. Given the objective circumstances of the crime and its aftermath, the proffered

opinion would not have met defendant's burden of establishing the EED defense, or have even created a jury issue warranting submission of that defense. Finally, this particular psychologist's opinion on EED would have had little probative value, given the limits of his actual expertise.

Defendant's general objections failed to preserve his challenges to the People's impeachment of the defense psychologist, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The court providently exercised its discretion in allowing impeachment of the psychologist about acts of misconduct in other cases where he testified as an expert witness (*see generally People v Smith*, 27 NY3d 652, 660 [2016]). The People established a good faith basis for the questioning, it was relevant to credibility, and it was not unduly prejudicial.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5723 Strategic Trading LLC, et al., Index 150076/16
Plaintiffs-Appellants,

-against-

Deutsche Bank Securities, Inc., etc.,
Defendant-Respondent.

_____

TJ Morrow, New York, for appellants.

Moses & Singer, LLP, New York (Jason Canales of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 28, 2017, which denied plaintiffs' motion for summary judgment in lieu of complaint, and granted defendant's cross motion to dismiss, unanimously affirmed, without costs.

Supreme Court properly determined that this action to obtain payment on two 20-year old checks is untimely under Maryland Code Commercial Law § 3-118(c). We reject plaintiffs' argument that the UCC does not apply to this matter, which seeks enforcement of negotiable instruments (*see* Maryland Code Commercial Law § 3-102[a]). Plaintiffs' arguments center on the inapplicability of UCC article 2, Sales, but neither defendant nor Supreme Court relied on UCC article 2.

The court properly relied on the margin account agreement, identified and proffered by an officer in defendant's

institutional and private client group, which was admissible for purposes of the summary judgment motion before the court (*see DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146 [1st Dept 2003]).

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

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5724 In re Thomas M.-S.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 19, 2016, 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 criminal sexual act in the first and third degrees, sexual abuse in the first and third degrees, attempted criminal sexual act in the third degree and attempted sexual misconduct, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The victim's brief delay in reporting the incident, and the absence of

corroborating medical evidence, were satisfactorily explained. We also note that, in its findings of fact, the court carefully explained that its dismissal of some counts of the petition was based on considerations that did not affect its conclusion that the victim's testimony was credible.

We have considered and rejected appellant's remaining argument.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5725 The People of the State of New York, Respondent, Ind. 5314/12

-against-

Sara Banach,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 1, 2013, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her to five years' probation, unanimously affirmed.

Defendant's challenges to her plea are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). We decline to review these claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made, notwithstanding any deficiencies in the plea

colloquy (*id.* at 382-384; *People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5726 The People of the State of New York, Respondent, Ind. 861/11

-against-

Dwayne Buchanan, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about May 12, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The Court properly assessed 20 and 10 points, respectively, under the risk factors for the victim's helplessness and for forcible compulsion, because the victim's reliable account demonstrated both physical helplessness and forcible compulsion at different times during the incident (*see People v Alvarez-Perez*, 155 AD3d 430 [1st Dept 2017]).

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the seriousness of the underlying offense.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5727-
5728-
5728A Index 154323/13

Robert Vargas, et al.,
Plaintiffs,

-against-

City of New York, et al.,
Defendants.

- - - - -

City of New York, et al.,
Third-Party Plaintiffs-Respondents,

-against-

L&L Painting Co., Inc., et al.,
Third-Party Defendants,

The Evanston Insurance Company,
Third-Party Defendant-Respondent,

Liberty Insurance Underwriters,
Third-Party Defendant-Appellant,

_____

Hardin, Kundla, McKeon & Poletto, New York (George R. Hardin of counsel), for appellant.

McMahon, Martine & Gallagher, LLP, Brooklyn (Kristina Scotto of counsel), for the City of New York, New York City Transit Authority and the Metropolitan Transportation Authority, respondents.

Clausen Miller, P.C., New York (Don R. Sampen of the State of Illinois, admitted pro hac vice, of counsel), for the Evanston Insurance Company, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered May 20, 2016, declaring that third-party defendant Liberty Insurance Underwriters Inc. is

obligated to defend and indemnify defendants/third-party plaintiffs City of New York, New York City Transit Authority, and Metropolitan Transit Authority (the City defendants) in the underlying personal injury action, unanimously modified, on the law, to delete, without prejudice, the declaration that Liberty is obligated to indemnify the City defendants, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 15, 2016, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered on or about May 26, 2016, which, insofar as appealed from, upon renewal, adhered to the original determination, unanimously modified, on the law, to delete, without prejudice, the declaration that Liberty is obligated to indemnify the City defendants, and otherwise affirmed, without costs.

The City defendants contracted with defendant E.E. Cruz & Tully Construction Co., a Joint Venture, LLC (Joint Venture). In turn, the Joint Venture entered into a subcontract with defendant/third-party defendant L&L Painting Co., Inc. The subcontract required L&L to procure insurance naming the Joint Venture and the City defendants as additional insureds.

Liberty issued a commercial general liability insurance policy to L&L. Endorsements 1-3 provide, in pertinent part, that

an additional insured is someone "required by written contract signed by both parties prior to any 'occurrence' in which coverage is sought." By contrast, endorsement 4 says that an additional insured is "any person or organization with whom you [L&L] have agreed to add as an additional insured by written contract."

Liberty argues that the City defendants are not additional insureds because it had no contract with them. If endorsement 4 were the only additional insured endorsement, Liberty would be correct (*see Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 147-148, 151 [1st Dept 2016]). However, a contract between Liberty and the City defendants is not required under endorsements 1-3 (*see Netherlands Ins. Co. v Endurance Am. Speciality Ins. Co.*, ___ AD3d __, 2018 NY Slip Op 00105 [1st Dept, Jan. 9, 2018]).

Liberty also argues that the City defendants are not additional insureds because plaintiff Robert Vargas's injury was not caused by L&L or those acting on its behalf, as required by endorsements 1-3. The limitations in endorsements 1-3 do not vitiate Liberty's duty to defend, because the second amended complaint brings the insurance claim at least "potentially within the protection purchased" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks omitted]). The

second amended complaint alleges that *all* defendants – which includes L&L – operated, maintained, managed, and controlled the job site. It also alleges that all defendants were negligent and failed to provide a safe job site. Thus, it is possible that plaintiff's injury was caused by L&L.

However, it was premature to declare that Liberty is obliged to *indemnify* the City defendants. The duty to defend is broader than the duty to indemnify (*see e.g. id.*). It has not yet been determined if L&L was the proximate cause of plaintiff's injury (*see Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313 [2017]).

Since the City defendants did not ask the motion court to declare that Liberty was required to defend and indemnify them, it is not entirely clear why it did so. If the court based its decision on its finding that Liberty's disclaimer was untimely, this was error: A late disclaimer would not preclude Liberty from arguing that the City defendants were not covered under the policy because they were not additional insureds (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 112 and n 5 [1st Dept 2012]; *see also Agoado Realty Corp. v United Intl. Ins. Co.*, 260 AD2d 112, 115 [1st Dept 1999]), *mod on other grounds* 95 NY2d 141 [2000]; *National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 416 [1st Dept 1993]).

The timeliness of Liberty's disclaimer is relevant to whether it can assert the lead exclusion (*see Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 146 n * [2000]) and the defense that the City defendants' notice was late (*see Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [1st Dept 2002] [notice requirement applies equally to both primary and additional insureds]). The motion court correctly found as a matter of law that Liberty's 45-day delay in disclaiming was untimely (*see Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88-89 [1st Dept 2005]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [1st Dept 2002], *lv denied* 98 NY2d 605 [2002]). Plaintiff commenced this action on May 9, 2013. The City defendants did not notify Liberty until they commenced their third-party action; their complaint is dated February 4, 2014, and Liberty received it on February 21, 2014. Liberty did not need to investigate to conclude that a delay in giving notice was untimely (*see West 16th St. Tenants Corp.*, 290 AD2d at 279; *see also American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373 [1st Dept 1998]). Similarly, it did not need to investigate to conclude that the lead exclusion formed a basis for disclaiming; the third-party complaint says that the plaintiff in the underlying personal injury action alleged that he was exposed to lead dust.

Moreover, Liberty had sent a letter on October 24, 2013 to the Joint Venture, L&L, and plaintiff, disclaiming on the basis of the lead exclusion.

Liberty is correct that, when a putative insured first makes a claim for coverage in a complaint, the insurer may disclaim via its answer (*see American Mfrs. Mut. Ins. Co.*, 246 AD2d at 373). However, the City defendants/third-party plaintiffs did not waive their argument that Liberty's disclaimer was untimely by agreeing to extend Liberty's time to answer (*see City of New York v Welsbach Elec. Corp.*, 49 AD3d 322, 322-323 [1st Dept 2008]).

Even if, arguendo, Liberty's disclaimer were timely, the lead exclusion would not relieve Liberty of its duty to defend. Since the second amended complaint alleges that plaintiff "was poisoned by exposure to dangerously high levels of lead dust *and other hazardous substances"* (emphasis added), the allegations do not "cast the pleadings wholly within that exclusion" (*Bovis Lend Lease*, 27 AD3d at 93 [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5729 Marion Burnett-Joseph, etc., Index 304761/11
Plaintiff-Respondent,

-against-

Brian McGrath, M.D., et al.,
Defendants-Appellants,

Narasinga Parsinam Rao,
et al.,
Defendants.

_____

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellants.

Duffy & Duffy, PLLC, Uniondale (James N. LiCalzi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered July 20, 2015, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Brian McGrath, M.D. and St. Barnabas Hospital (together, appellants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The motion court correctly found issues of fact precluding summary judgment. Plaintiff's decedent was brought into St. Barnabas Hospital by the police in an intoxicated and agitated condition. He was then chemically sedated with Valium. Two and one-half hours later, he "flatlined," and, while resuscitative

efforts were made, he did not awaken and was declared "brain dead" four days later.

Appellants contend that Dr. McGrath cannot be held liable for medical malpractice because, as a resident, he did not exercise independent medical judgment when he chose the type and dosage of sedative to use on decedent. However, the deposition testimony of the attending physician, defendant Dr. Rao, raised an issue of fact as to whether Dr. McGrath was permitted to, and in fact did, exercise independent medical judgment in deciding on the amount and type of sedation to administer, so that he may be held liable, and St. Barnabas Hospital may be held vicariously liable (*see e.g. Soto v Andaz*, 8 AD3d 470, 471 [2d Dept 2004]; *Lopez v Master*, 58 AD3d 425, 425 [1st Dept 2009]).

Appellants made a prima facie showing that they did not depart from the standard of care in choosing the type and amount of sedative to use, and that their treatment and monitoring of decedent were appropriate and did not cause or contribute to his death since, among other things, Valium would not affect the part of the brain that controls respiration. However, to the extent appellants' expert in pharmacology opined that decedent's death resulted from other substances he ingested, the expert's opinion that the substances "may contain innumerable unidentifiable chemicals and toxins," without stating what these chemicals or

toxins were, or what their effects might be, amounts to speculation and does not establish appellants' entitlement to summary judgment on that ground (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 357 [1st Dept 2006]).

In opposition, plaintiff, through her experts, raised issues of fact as to whether appellants' use of Valium, and the amount administered, coupled with the alcohol in decedent's bloodstream, departed from the standard of care and led to his death. Plaintiff's experts also raised an issue as to whether appellants failed to adequately monitor decedent and disputed the theory that other substances could have contributed to his death.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5730 Serlene Martin, Index 156115/13
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Law Office of Ryan S. Goldstein, P.L.L.C., Bronx (Ryan Goldstein of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered July 19, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff alleges that she was injured when she tripped and fell on a hole at a curb. The record shows that defendant City lacked prior written notice of the alleged defect (Administrative Code of City of NY § 7-201[c][2]), and plaintiff failed to raise a triable issue of fact as to whether the City caused or created the hole in the curb (*see Brown v City of New York*, 150 AD3d 615 [1st Dept 2017]). Her expert's assertions that the City negligently installed the pedestrian ramp and curb, or had negligently repaired the area sometime before the accident, were

speculative and unsupported by the record (*see Epperson v City of New York*, 133 AD3d 522, 523 [1st Dept 2015]). Furthermore, plaintiff's expert failed to establish how the installation of the pedestrian ramp and curb, or a subsequent repair to the area, immediately resulted in the hole that caused the accident so as to bring the alleged defect out of the ambit of ordinary wear and tear (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5731 The People of the State of New York, Respondent, Ind. 3160/14

-against-

Michael Mims, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Carruthers, J. at plea; Neil Ross, J. at sentencing), rendered November 10, 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: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5732-
5732A The People of the State of New York,
Respondent,

Ind. 133/13
2110/13

-against-

Sterling Stevens,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Robert E. Torres, J. at plea; Denis J. Boyle, J. at sentencing), rendered June 13, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: FEBRUARY 15, 2018

CLERK

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

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5735 The People of the State of New York, Ind. 1473/15
Respondent,

-against-

Damien Powell,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered August 12, 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: FEBRUARY 15, 2018

CLERK

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

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5736-
5737 The People of the State of New York,
Respondent,

Ind.3177/10
3584/13

-against-

Amar Hussain,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena Uviller, J.), rendered November 21, 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: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5738 In re Empire Center for Public Policy, Inc., Petitioner-Respondent, Index 100079/16

-against-

N.Y.C. Office of Payroll Administration, Respondent-Appellant.

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

Lawrence P. Justice, Albany, for respondent.

Judgment, Supreme Court, New York County (Kathryn Freed, J.), entered March 10, 2017, granting the petition brought pursuant to CPLR article 78 seeking to compel respondent to disclose certain information requested by petitioner pursuant to the Freedom of Information Law (FOIL), granting attorney's fees and costs, and referring the matter to a special referee to hear and report on the appropriate amount of attorney's fees to be awarded, unanimously reversed, on the law, without costs, and the petition dismissed.

Between July 1, 2015 when petitioner first made the FOIL request and November 5, 2015, petitioner and respondent corresponded regarding respondent's attempt to comply with the request. Respondent anticipated needing until October 2015 to

compile the data. On November 5, 2015, upon petitioner's inquiry, respondent requested an additional 20 days to provide the requested data. On November 6, 2015 petitioner filed an administrative appeal. However, petitioner's appeal was premature because respondent did not constructively deny petitioner's FOIL request. Respondent provided most of the information on November 18, 2015 (*cf. Matter of South Shore Press, Inc. v Havemeyer*, 136 AD3d 929 [2d Dept 2016] [failure to provide approximate date when FOIL request would have been granted was constructive denial]).

Petitioner did not file an administrative appeal from respondent's November 18, 2015 response and failed to exhaust its administrative remedies before commencing this article 78 proceeding (*see Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 [1st Dept 2006] [despite untimely response to FOIL request, petitioner did not properly institute Article 78

without first taking an administrative appeal], *lv denied* 7 NY3d 714 [2006]; *Matter of Carty v New York City Police Dept.*, 41 AD3d 150 [1st Dept 2007] [same]).

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

ENTERED: FEBRUARY 15, 2018

CLERK

CORRECTED ORDER - FEBRUARY 26, 2018

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5739 In re Nicholas M.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about February 22, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination, **Family Court, Westchester County (Hal B. Greenwald, J.), entered on or about June 11, 2015,** that **appellant** committed an act that, if committed by an adult, would constitute the crime of criminal sexual act in the first degree, and placed him on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed.

The presentment agency concedes that the petition should be dismissed because the four-year-old complainant lacked the capacity to give truthful and accurate testimony and was thus

incapable of testifying under oath, and because his testimony was not corroborated by any evidence (*see* Family Ct Act § 343.1).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5740 Anthony Thomas, Index 302228/14
Plaintiff-Respondent,

-against-

Elvy Gonzalez,
Defendant-Appellant.

_____

Brand, Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for appellant.

Michael B. Palillo, P.C., New York (Michael B. Palillo of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about May 5, 2017, which, to the extent appealed from, in this action for personal injuries sustained when plaintiff bicyclist was struck by a motor vehicle driven by defendant, denied defendant's motion to renew his motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion for renewal granted and, upon renewal, defendant's motion for summary judgment granted. The Clerk is directed to enter judgment accordingly.

Defendant taxi driver demonstrated that the alleged new facts uncovered in a deposition conducted after the decision on the original motion would change the prior determination of the motion court to deny his summary judgment motion (*see* CPLR 2221[e][2]; *212 Inv. Corp. v Kaplan*, 44 AD3d 332, 333 [1st Dept

2007]; *Montero v Elrac, Inc.*, 16 AD3d 284 [1st Dept 2005]). Following the determination of the original motion, plaintiff's main fact witness was deposed and gave testimony materially inconsistent with his sworn statements in the affidavit plaintiff had submitted in opposition to the original motion. The conclusion of plaintiff's expert that defendant had been at fault in the subject accident was based on the factual account given in the witness's affidavit. Accordingly, defendant was entitled to renewal based on the witness's deposition testimony discrediting his earlier affidavit and, upon renewal, to summary judgment dismissing the complaint.

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5743 Kalman Kaspiev, Index 652274/16
Plaintiff-Appellant,

-against-

Corbis Corporation,
Defendant-Respondent.

_____

Kalman Kaspiev, appellant pro se.

Gottlieb, Rackman & Reisman P.C., New York (Robert Feinland of counsel), and Lane Powell PC, Seattle, WA (Aaron P. Brecher II of the bar of the State of Washington, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered November 15, 2016, which, inter alia, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff seeks to recover royalties allegedly due under a license agreement between defendant Corbis and the late Evgeny Khaldei, a World War II photographer, based on allegations that, as the agent of Khaldei and his estate, he was a third-party beneficiary of the license agreement. In a prior action in federal court between Khaldei's heir and plaintiff, the court rejected plaintiff's claim to recover royalties as an agent, including any royalties to be paid by Corbis, because he had been a faithless servant (*Khaldei v Kaspiev*, 135 F Supp 3d 70, 84-86

[SD NY 2015]). Since defendant established that the identical issue of plaintiff's entitlement to receive royalties was "necessarily decided in the prior action and is decisive in the present action," and plaintiff had a full and fair opportunity to litigate the issue in the prior action (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]), his current claims are barred by the doctrine of collateral estoppel. Application of the doctrine in this case furthers the policies "of avoiding relitigation on a decided issue and the possibility of an incongruous result" (*id.* at 668).

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

ENTERED: FEBRUARY 15, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5747N Ramon Domiguez, Index 161738/14
Plaintiff-Appellant,

-against-

Barsalin, LLC, et al.,
Defendants-Respondents.
- - - -
[And a Third-Party Action]

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

Kaufman, Dolowich & Voluck, LLP, Woodbury (Megan E. Yllanes of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered December 3, 2015, which, insofar as appealed from as limited by the briefs,, granted the motion of defendants Alfred Shtainer and Victoria Shtainer (the Shtainers) for summary judgment dismissing the action as against them, unanimously affirmed, without costs.

The Shtainers established entitlement to judgment as a matter of law pursuant to the homeowner exception to Labor Law §§ 240(1) and 241(6). Defendants showed that they were never at the residence while it was under demolition/construction, had no role in the work, and intended to use the premises as a family vacation home (*see Del Carmen Diaz v Bocheciamp*, 140 AD3d 408 [1st Dept 2016]; *Patino v Drexler*, 116 AD3d 534 [1st Dept 2014]).

Nothing in the house plans indicates that any portion would be for commercial use, and plaintiff's speculation that it might be rented during those time periods when the Shtainers were not in residence there, without any evidentiary support for that statement, is insufficient to defeat summary judgment (*see Del Carmen Diaz* at 409).

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: FEBRUARY 15, 2018

CLERK