SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 22, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

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

-against-

City of New York,
Respondent,

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

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

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

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered April 18, 2016, which, to the extent appealed from as limited by the briefs, annulled respondent Department of Education's determination, dated November 24, 2014, terminating petitioner's probationary service and denying him a certificate of completion of probation, unanimously reversed, on the law, without costs, the petition, to the extent it challenges the aforementioned actions, denied, and

the proceeding brought pursuant to CPLR article 78, to the same extent, dismissed.

Petitioner failed to establish that his probationary service as a special services manager was terminated in bad faith or for an impermissible purpose (*see Matter of Brown v City of New York*, 280 AD2d 368 [1st Dept 2001]). To the contrary, the record demonstrates that respondent had a good faith reason for its determination, i.e., petitioner's unsatisfactory performance. The record shows there were issues with petitioner's leadership, communication and project management skills. Moreover, these issues persisted despite his supervisor's repeated advice that he needed to improve and her efforts to assist him.

To the extent petitioner argues that the annulment of his termination should be affirmed because of procedural deficiencies in the internal review process, this argument is unpreserved and in any event unavailing. Any deviations from internal procedures did not deprive petitioner of a substantial right or undermine

the fairness and integrity of the review process (*see Matter of Cho-Brellis v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 149 AD3d 411 [1st Dept 2017]).

The Decision and Order of this Court entered herein on November 28, 2017 is hereby recalled and vacated (*see* M-160 decided simultaneously herewith).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Friedman, J.P., Gische, Mazzarelli, Kern, Singh, JJ.

5564 In re Houston Street Management Co., Index 570987/14
Petitioner-Respondent,

-against-

Suzanne La Croix,
Respondent-Appellant.

_____

Law Office of Harriette N. Boxer, Brooklyn (Harriette M. Boxer of counsel), for appellant.

Kossoff PLLC, New York (Steven Y. Steinhart of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered January 12, 2017, which affirmed a judgment of the Civil Court, New York County (Laurie L. Lau, J.), entered November 17, 2014, after a nonjury trial, granting the petition for a final judgment of possession in this nonprimary residence holdover proceeding, unanimously affirmed, without costs.

"In primary residence cases, where the Appellate Division acts as the second appellate court, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*409-411 Sixth St., LLC v Mogi*, 22 NY3d 875, 876-877 [2013] [internal quotation marks omitted]).

Civil Court's determination, affirmed by Appellate Term, that respondent no longer uses the subject apartment as her primary residence, and that her testimony that she had been in Florida during the nine-month period through December 2010 for medical reasons was "not credible," plainly constitutes a fair interpretation of the evidence. Contrary to the view of the dissenting Appellate Term justice, petitioner established a prima facie case by proving that respondent was not residing in the apartment during the periods at issue, and it then became respondent's burden to establish excuses for these absences, which Civil Court and Appellate Term fairly concluded she failed to do. While we are mindful that respondent has been the tenant of this apartment for many years, this history does not permit her to continue to enjoy the benefits of a rent-stabilized leasehold that she no longer uses as her primary residence.

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

ENTERED: FEBRUARY 22, 2018

CLERK

Renwick, J.P., Andrias, Kapnick, Gesmer, Moulton, JJ.

5680-
5680A In re Kevin B.,
Petitioner-Appellant,

-against-

Zovania B.,
Respondent-Respondent,

Ronald B.,
Respondent.

_____

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

Leslie S. Lowenstein, Woodmere, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the child.

_____

Orders, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about January 4, 2017, which dismissed petitioner's petition for visitation with the subject child with prejudice, granted respondent mother's motion to dismiss and sua sponte granted summary judgment in favor of the mother, unanimously modified, on the law, to vacate the grant of summary judgment, and to grant the motion to dismiss without prejudice, and otherwise affirmed, without costs.

Family Court correctly determined that petitioner lacks standing to pursue his claim for visitation with the child, as he failed to plead that he is the child's biological grandfather or

legal grandparent through adoption (*see e.g. Matter of B.S. v B.T.*, 148 AD3d 1029, 1030 [2d Dept 2017]).

The Court of Appeals' decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1 [2016]) does not compel a different result, as the Court expressly stated that its decision "addresses only the ability of a person to establish standing as a *parent*" (*id.* at 28 [emphasis added]).

However, under the circumstances, the court did not adequately give notice to the parties that it was treating the motion to dismiss as one for summary judgment (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]).

We have considered petitioner's remaining arguments, including those regarding equitable estoppel and waiver, and find them unavailing.

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5773 The People of the State of New York, Respondent, Ind. 1052/12

-against-

Devin Scott, Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Jill Konviser, J. at plea and sentencing), rendered January 14, 2014, convicting defendant of criminal possession of a forged instrument in the second degree, and sentencing him to a term of nine months, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The police account of the incident, which established probable cause for defendant's arrest, was not so implausible as to require a different conclusion (*see e.g. People v Lewis*, 136 AD3d 468 [1st Dept 2016], *lv denied* 27 NY3d 1001 [2016]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5774-
5775 In re Isaac C. (Anonymous),

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

The Commissioner of Social Services of
the City of New York,
Petitioner-Appellant,

Cristina C., et al.,
Respondents-Respondents,

Anthony C., et al.,
Respondents.

_____

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for appellant.

Dechert LLP, New York (Katherine M. Wyman of counsel), for respondents.

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

_____

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about November 30, 2016, which, to the extent appealed from as limited by the briefs, after a hearing, dismissed the abuse petition as against the respondent parents, unanimously affirmed, without costs.

Respondents rebutted petitioner agency's prima facie showing of abuse (*see* Family Ct Act § 1046[a][ii]); they demonstrated that the five-month-old nonambulatory child's symptoms were

consistent with an underlying medical condition — namely, bone fragility due to rickets and severe Vitamin D deficiency (*see Matter of Philip M.*, 82 NY2d 238, 244-245 [1993]). There is no basis for disturbing the court's credibility findings (*see e.g. Matter of Toshea C.J.*, 62 AD3d 587, 587 [1st Dept 2009]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5776 Novita LLC, et al., Index 603329/09
Plaintiffs,

-against-

M&R Hotel Times Square LLC, et al.,
Defendants,

LG-39 LLC,
Defendant-Respondent,

Tritel Construction Company, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (James E. d'Auguste, J.), entered September 14, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 30, 2018,

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5777 In re Nostrand & Halsey LLC, Petitioner,

-against-

New York State Liquor Authority, Respondent.

Index 101069/17

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

Christopher R. Riano, New York (Alexandra S. Obremski of counsel), for respondent.

Determination of respondent, dated July 26, 2017, which, after a hearing, sustained five violations against petitioner and cancelled its liquor license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered on or about August 10, 2017), dismissed, without costs.

The determination is supported by substantial evidence, including testimony from respondent's investigator and the exhibits adduced at the hearing (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]).

Petitioner's arguments regarding the unconstitutionality of the statutes and rules relied upon by respondent in sustaining

the violations are unavailing. First, petitioner argues that Rules of the State Liquor Authority (9 NYCRR) § 48.8 is unconstitutional because it goes beyond what is required by section 110 of the Alcohol Beverage Control Law (ABC Law). However, ABC Law § 110(4) and (7) do not in any way preempt or conflict with 9 NYCRR § 48.8. Rather, 9 NYCRR § 48.8(a) establishes a continuous obligation to conform to all representations set forth in the application for a license, and is a reasonable extension of the licensing power granted by the legislature in ABC Law § 110(4) and (7) (*see Matter of 7th Ave. Rest. v New York State Liquor Auth.*, 101 AD3d 633 [1st Dept 2012]).

Nor is ABC Law § 106(6) unconstitutional. The statutory language, requiring the licensee not to allow the premises to become "disorderly," was sufficient to provide petitioner with an adequate warning of what the law requires and a reasonable opportunity to appreciate the prohibited conduct (*People v Stuart*, 100 NY2d 412, 420 [2003]; *People v Byron*, 17 NY2d 64, 67 [1966]). Furthermore, the record establishes that the premises received many complaints, visits from the police, and a summons on account of the excessive noise emanating from the premises, but that petitioner did nothing to alter its conduct even though it was fully aware that the continuance of this conduct was

prohibited.

The penalty imposed does not shock our sense of fairness. The evidence shows a continuing pattern of disorder and misconduct occurring over an extended period of time that adversely affected the community (*see Matter of MGN, LLC v New York State Liq. Auth.*, 81 AD3d 492 [1st Dept 2011]). Further, where, as here, there is a history of similar violations, it lends support to a finding that revocation of the license is warranted (*Matter of Le Cave LLC v New York State Liq. Auth.*, 107 AD3d 447 [1st Dept 2013].

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: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5778 The People of the State of New York, Respondent,

-against-

Jose Rivera,
Defendant-Appellant.

Ind. 2277/14

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

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

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered April 8, 2015, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). Moreover, the combination of credible eyewitness testimony and surveillance videotape provided overwhelming evidence of defendant's guilt.

Defendant did not preserve his challenge to the court's response to a jury note, and we find defendant's preservation argument unavailing. We decline to review this claim in the interest of justice. As an alternative holding, we find that the court meaningfully responded to the note by reviewing previously

discussed principles (*see People v Almodovar*, 62 NY2d 126, 131 [1984]).

Defendant's challenges to the prosecutor's summation are also unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

In any event, in light of the overwhelming evidence against defendant, any errors regarding the summation and charge were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5779 The People of the State of New York, SCI 1219/16
Respondent,

-against-

Josse Polanco,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss 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 (Linda Poust-Lopez, J. at plea; Eugene Oliver, J. at sentencing), rendered September 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 ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 22, 2018

CLERK

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

Tom, J.P., Kapnick, Webber, Oing, JJ.

5780-
5781-
5782 Ind. 1129/14

The People of the State of New York
Respondent,

-against-

Stacey Roundtree,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered October 27, 2015, as amended December 8, 2015 and January 21, 2016, convicting defendant, upon his plea of guilty, of attempted sexual abuse in the first degree, and sentencing him, as a second felony offender, to a term of 2½ years, unanimously affirmed. Order, same court and Justice, entered on or about May 13, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's claims that the five-year-old victim was improperly allowed to testify as a sworn witness before the grand jury, and that there was no corroborating evidence, are

essentially a challenge to the sufficiency or admissibility of the evidence before the grand jury. Those claims are forfeited by defendant's guilty plea (*see People v Guerrero*, 28 NY3d 110, 116 [2016]; *People v Tammaro*, 155 AD3d 473, 475 [1st Dept 2017]). There is no basis for applying the narrow exception for grand jury improprieties that are so egregious as to undermine the integrity of the proceeding (*see People v Pelchat*, 62 NY2d 97 [1984]).

Defendant's guilty plea was knowingly, intelligently, and voluntarily made. The court correctly informed defendant of the prison and postrelease supervision components of his sentence. It appears, from the limited record, that defendant was ultimately confined by the correctional authorities for a period extending beyond the expiration of his prison term, apparently for reasons relating to his sex offender status and unsettled postrelease housing situation. However, defendant's complaint about that circumstance does not require a finding that he was misled about the length of his sentence or that his plea was otherwise involuntary (*see People v Harrett*, 16 NY3d 200 [2011]).

We perceive no basis for reducing defendant's 10-year period of postrelease supervision.

With regard to defendant's appeal from his sex offender adjudication, we find that the court providently exercised its

discretion in denying a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account in the risk assessment instrument, and the seriousness of the underlying offense outweighed any such factors.

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5783 Reyes Rodriguez, Claim 126967
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

_____

Kohan Law Group, P.C., Manhasset (Joshua M. Lockamy of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne of counsel), for respondent.

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Order, Court of Claims of the State of New York, (Thomas H. Scuccimarra, J.), entered October 19, 2016, which dismissed the claim alleging unjust conviction (Court of Claims Act § 8-b) as untimely, and denied claimant Reyes Rodriguez's cross motion for partial summary judgment as to liability, unanimously affirmed, without costs.

The claim for unjust conviction was untimely because it was filed more than two years after the Court of Appeals dismissed the indictment (*see* Court of Claims Act § 8-b[7]), and, as such was properly dismissed. Upon reversing this Court's affirmance of claimant's conviction due to insufficient corroboration of accomplice testimony (*People v Rodriguez*, 22 NY3d 917 [2013]; *see* CPL 60.22[1]), the Court of Appeals was required to take whatever corrective action this Court would have been statutorily

permitted to take, had it reversed on the same grounds (CPL 470.40 [1]). As this Court's reversal would have compelled it to dismiss the indictment (CPL 470.20[2]), the Court of Appeals was also compelled to dismiss the indictment. Contrary to claimant's argument, upon a finding of insufficient evidence to prove guilt beyond a reasonable doubt, the CPL does not require the Court of Appeals to remit a matter to criminal court before dismissal of the indictment occurs; the Court can effect dismissal on its own, and such dismissal is self-executing. *Long v State of New York*, (7 NY3d 269 [2006]), does not compel a different result, as there no action was taken on the criminal indictment by the Court of Appeals under CPL 470.40.

Our affirmance of the claim's dismissal as untimely makes it unnecessary to consider claimant's arguments concerning his cross motion for partial summary judgment. Were we to consider those arguments, we would find that claimant failed to make the

requisite showing of actual innocence (*see Warney v State of New York*, 16 NY3d 428, 434 [2011]) and that the cross motion was properly denied.

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5784 The People of the State of New York, Respondent,

Ind. 1955/09

-against-

Edward Parker,
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 (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J. at suppression motion; Eduardo Padró, J. at plea and sentencing), rendered July 8, 2015, convicting defendant of burglary in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence, without granting a hearing, because his motion papers did not raise an issue of fact as to probable cause for his arrest (*see People v Mendoza*, 82 NY2d 415 [1993]). First, defendant's reference to "state action," by an unspecified person or persons, was too vague and conclusory to raise a factual question regarding whether the security guard who apprehended defendant was functioning as an agent of law enforcement. To the extent that such an assertion was supported by any factual

allegations, those allegations did not establish the guard's status as a state actor. Furthermore, defendant's assertion that he was "not engaged in any criminal activity at the time of, or immediately prior to his arrest" did not controvert the specific information that was provided by the People concerning the basis for the arrest. Defendant did not address these allegations or raise a factual dispute requiring a hearing (*see e.g. People v Cartwright*, 65 AD3d 973 [1st Dept 2009], *lv denied* 13 NY3d 937 [2010]). In context, it was not even clear what, if any, portion of the events leading up to defendant's arrest was intended to be addressed by the phrase "immediately prior to his arrest."

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5785 Alex Morgan Bell, Index 151001/16
Plaintiff-Appellant,

-against-

United Parcel Service, Inc.,
Defendant-Respondent.

_____

Law Office of Elisa Barnes, New York (Elisa Barnes of counsel), for appellant.

Ansa Assuncao, LLP, White Plains (Stephen P. McLaughlin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about April 4, 2017, which granted defendant's motion to dismiss the complaint for lack of standing, unanimously affirmed, without costs.

Supreme Court properly dismissed the complaint for lack of standing since plaintiff failed to sufficiently articulate how he suffered special injury, beyond that suffered by the community at large, as a result of defendant's alleged conduct of obstructing

designated bicycle lanes with its delivery trucks (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001]; *cf. Graceland Corp. v Consolidated Laundries Corp.*, 7 AD2d 89, 93 [1st Dept 1958], *affd* 6 NY2d 900 [1959]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5786 In re Darren Gittens, Index 100890/13
Petitioner-Appellant,

-against-

State University of New York,
et al.,
Respondents-Respondents.

_____

Daren J. Rylewicz, Albany (Constance R. Brown of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 23, 2017, granting petitioner's motion for reargument of an order and judgment, same court and Justice, entered June 20, 2016, which, inter alia, granted the petition to the extent of remanding the proceeding to respondents for a hearing of petitioner's wrongful termination claim pursuant to the parties' collective bargaining agreement, and upon reargument, revised and clarified the order and judgment to direct that the hearing, permitting petitioner and his union representative to explain why he should not be terminated, be conducted before the management of respondent SUNY Downstate Medical Center (DMC), instead of an arbitrator, pursuant to the parties' "last chance" probationary agreement (LCA), unanimously

dismissed, without costs.

An appeal as of right does not lie from an order in an article 78 proceeding remanding a matter to an agency for further nonministerial proceedings (*see Matter of Leung v Department of Motor Vehs. of State of N.Y.*, 65 AD2d 736 [1978]; CPLR 5701[b],[c]), and we decline to grant leave to appeal nostra sponte in the interest of justice.

Were we to entertain the appeal, we would find that Supreme Court providently exercised its discretion in remanding the matter to DMC for further consideration (*see Matter of Wiener v Joy*, 100 AD2d 800, 801 [1984]) pursuant to the LCA. Remand is appropriate to afford petitioner administrative review and enable ultimate judicial review in the light of a complete record (*see Matter of Porter v New York State Div. of Hous. & Community Renewal*, 51 AD3d 417, 418 [2008], *lv denied* 11 NY3d 703 [2008]; *see Matter of 47 Clinton St. Co. v New York State Div. of Hous. & Community Renewal*, 161 AD2d 402, 403 [1990]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5787-
5788-
5788A-
5788B In re Cristalyn G., and Another,

Dependent Children Under the Age of
Eighteen Years, etc.,

Elvis S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Dawne Mitchell, Jr., The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children.

_____

Order of disposition, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about January 19, 2017, to the extent it brings up for review a fact-finding order, same court (Susan K. Knipps, J.), entered on or about July 7, 2016, which determined, after a hearing, that respondent was a person legally responsible for the two subject children, that he neglected the children, and that he sexually abused the older child and derivatively abused the younger child, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal

from the order of disposition. Appeal from two orders of protection, same court (Ta-Tanisha D. James, J.), entered on or about January 19, 2017, unanimously dismissed, without costs.

The finding that respondent neglected the children by punching and choking the mother while the children were present is supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784, 784 [1st Dept 2012]). The older child's out-of-court statements to petitioner agency's caseworker were corroborated by the mother's testimony and by the younger child's out-of-court statements to the caseworker (*see Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 616 [1st Dept 2014]).

That the finding was based on a single incident did not preclude the Family Court from entering a finding of neglect against respondent, because his actions exposed the children to a risk of substantial harm (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]).

The older child's sworn testimony at the fact-finding hearing was competent evidence that respondent sexually abused her, and the fact that she did not have a physical injury does not require a different result (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 659-660 [1st Dept 2013]). Furthermore, the older child's testimony about the sexual abuse was corroborated

by the criminologist's testimony that respondent's semen was "soaked" or "imbedded into the material" of the child's shorts and could not have been the result of a DNA transfer that occurred incidentally or accidentally.

The testimony of respondent's expert about an exam he did not conduct failed to rebut petitioner's showing that respondent sexually abused the child (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]).

The fact that there was a criminal case pending against respondent at the time of the hearing did not deprive the Family Court of the right to draw an adverse inference from his failure to testify (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424-425 [1st Dept 2017]).

The Family Court properly entered a derivative abuse finding against respondent as to the younger child, because it is undisputed that the younger child was living in the home when the sexual abuse against the older child occurred (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]).

As conceded by respondent, no appeal lies from the two orders of protection entered upon respondent's default (*see Matter of Jenny F. v Felix C.*, 121 AD3d 413 [1st Dept 2014]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5791 Juan Pena, Index 301044/15
Plaintiff-Respondent,

-against-

The Jane H. Goldman Residuary Trust Number 1, et al.,
Defendants-Appellants,

Century Management Services Inc., et al.,
Defendants.

_____

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for appellants.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 9, 2016, which, inter alia, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action as against defendant Sol Goldman Investments, LLC (SGI), unanimously affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) cause of action as against SGI. Plaintiff submitted his deposition testimony, which showed that he was injured when the unsecured and damaged ladder upon which he was working wobbled, causing him

to fall (*see Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465 [1st Dept 2013]).

SGI's opposition failed to raise a triable issue of fact. Its submission of an ambiguous affidavit from plaintiff's supervisor was insufficient to rebut plaintiff's prima facie showing. Notably, the supervisor did not address the fact that he was at the scene of the accident shortly after plaintiff fell, and provided only vague references to other available ladders, without addressing plaintiff's testimony that other workers were using those ladders (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]; *see also Rivera v Dafna Constr. Co., Ltd.*, 27 AD3d 545, 545-546 [2d Dept 2006]). Furthermore, SGI's argument that questions of fact exist as to whether plaintiff was the sole proximate cause of his accident is unavailing given that SGI failed to make a showing that adequate safety devices were provided to plaintiff (*see Rice v West 37th Group., LLC*, 78 AD3d

492 [1st Dept 2010]).

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

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5792 The People of the State of New York, Respondent, Ind. 4075/14

-against-

Haniel Saldana, 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 (Larry Stephen, J.), rendered October 2, 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 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5793 The People of the State of New York, Respondent, Ind. 5435/13

-against-

Edison Nunez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 22, 2014, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree and bail jumping in the second degree, and sentencing him to an aggregate term of two years, unanimously affirmed.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal. Defendant claims he was deprived of effective assistance because his attorney misadvised him of the immigration consequences of his plea (*see Padilla v Kentucky*, 559 US 356 [2010]). The record is insufficient to permit adequate review of defendant's claim. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal (*see People v Peque*, 22 NY3d 168, 202-203 [2013]).

Defendant's constitutional challenge to his sentence is unpreserved (*see People v Pena*, 28 NY3d 727, 730 [2017]), and we decline to review it in the interest of justice. Defendant's valid waiver of the right to appeal forecloses his claim that the sentence was harsh and excessive. In any event, we perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5794 Lawrence A. Omansky, Index 603738/08
Plaintiff-Appellant,

-against-

160 Chambers Street Owners, Inc., et. al.,
Defendants-Respondents.

_____

Lawrence A. Omansky, New York, appellant pro se.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about January 25, 2016, to the extent it awarded defendant 160 Chambers Street Owners, Inc. (Cooperative) legal fees in connection with the commercial holdover proceeding in an amount to be determined by a special referee, unanimously affirmed, and appeal therefrom otherwise dismissed, with costs.

Plaintiff appeals from the order to the extent it purportedly dismissed the third cause of action wherein he seeks damages for defendant Cooperative's failure to repair the skylights in his residential unit. However, defendants contend, and Supreme Court, in a subsequent order, agrees, that plaintiff's third cause of action was never dismissed (*see Omansky v 160 Chambers Street Owners, Inc.*, 2017 NY Slip Op 31798[U], *5 [Sup Ct, NY County 2017]). Thus, plaintiff is not

aggrieved (CPLR 5511).

Plaintiff also appeals from the order to the extent it awarded the Cooperative attorneys' fees from him in connection with the holdover proceeding granting judgment of possession to the Cooperative. However, the award of attorneys' fees was proper since the plain terms of the lease on the commercial space grants attorneys' fees to the prevailing party (*see e.g. Continental Ins. Co. v 115-123 W. 29th St. Owners Corp.*, 275 AD2d 604 [1st Dept 2000]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5795 L.I. City Ventures LLC doing business as Modern Spaces, Plaintiff-Respondent, Index 155156/16

-against-

John Sismanoglou, et al., Defendants,

Hercules Argyriou, et al., Defendants-Appellants.

_____

McManus, Ateshoglou Adams, Aiello & Apostolakos, PLLC, New York (Steven D. Ateshoglou of counsel), for appellants.

Warshaw Burstein LLP, New York (Andrew Coyle of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered November 30, 2016, which, insofar as appealed from, denied Hercules Argyriou, Paul Apostolakis, Mega Contracting Group LLC, and M25 Properties LLC's motion to dismiss the causes of action for unjust enrichment and tortious interference as against them, unanimously affirmed, with costs.

Plaintiff seeks to recover, inter alia, a commission allegedly due on the sale of certain real property, based upon an exclusive brokerage agreement entered into with defendant 25th Avenue Realty NY LLC. The complaint alleges that defendants Argyriou, Apostolakis, and Mega created defendant M25 (together, the buyers) to purchase the property, that Mega is the true

purchaser, and that the buyers transferred the property via a two-step transaction for the purpose of evading the discovery of the purchase and the payment to plaintiff of its commission.

The complaint states a cause of action for unjust enrichment against the buyers by alleging facts sufficient to establish a relationship that caused reliance or inducement between them and plaintiff (*see generally Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). It alleges that Apostolakis had direct dealings with plaintiff concerning Mega's potential purchase of the property, that Apostolakis knew that plaintiff was the exclusive broker for the property, and that these dealings led to M25's purchase of the property, through Argyriou. Apostolakis's knowledge is imputable to the remaining buyers because of the nature of their relationships in this alleged scheme to deprive plaintiff of a commission (*see Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1, 7 [1st Dept 2014]). The associated savings constitutes the buyers' enrichment (*see Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 118 [1st Dept 1990], *lv denied* 77 NY2d 803 [1991]).

The complaint states a cause of action for tortious interference with contract by alleging that Apostolakis had substantive dealings with plaintiff, from which it can be inferred that he knew of the exclusive brokerage agreement, that

defendants used a two-step transaction to sell the property, and that the ultimate purchaser was an entity created only weeks earlier (*see e.g. Butler v Delaware Otsego Corp.*, 218 AD2d 357, 360–361 [1st Dept 1996]).

Contrary to the buyers' contention, "a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012] [internal quotation marks omitted]; *see also Ramos v 24 Cincinatus Corp.*, 104 AD3d 619, 620 [1st Dept 2013]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5796N In re New York City Transit Authority, Index 453014/15
Petitioner-Appellant,

-against-

Physical Medicine & Rehab of NY PC,
as Assignee of Valerie Mathis,
Respondent-Respondent.

_____

Foley, Smit, O'Boyle & Weisman, Hauppauge (Aaron E. Meyer of counsel), for appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about December 18, 2015, denying the petition to, among other things, vacate a master arbitration award, dated August 15, 2015, which affirmed an arbitrator's award granting respondent no-fault insurance benefits, unanimously affirmed, without costs.

Petitioner's application to vacate the award pursuant to CPLR 7511, or for de novo review (*see* 11 NYCRR 65-4.10[h]), was properly denied because the award "had evidentiary support, a rational basis, and was not arbitrary and capricious" (*Matter of Global Liberty Ins. Co. v Coastal Anesthesia Servs., LLC*, 145 AD3d 644, 645 [1st Dept 2016]).

Contrary to petitioner's arguments, the facts of this case are distinguishable from those in *Cividanes v City of New York* (20 NY3d 925 [2012]), in which the Court of Appeals found that

benefits were not available under the no-fault Insurance Law because the plaintiff's injury did not arise out of the "use or operation of a motor vehicle" (Insurance Law § 5104[a]). In that case, the plaintiff exited a stopped bus and fell when she stepped into a hole in the street. The Court determined that the bus was neither a "proximate cause" nor an "instrumentality" that produced her injury (*id.* at 926 [internal quotation marks omitted]; *see also Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211 [1996]).

Here, the bus driver activated the lift device of the bus to assist Valerie Mathis when she boarded the bus. Subsequently, when she was exiting the bus, the bus driver refused to activate the lift device or to lower the bus. As a result, she was forced to place her walker out in the street, and then fell over while attempting to exit the bus.

Thus, the arbitrator and master arbitrator rationally found that the bus was a "proximate cause" of the injury and that the accident involved the "use or operation" of a motor vehicle within the meaning of Insurance Law § 5104(a).

To the extent petitioner seeks de novo review, it does not dispute the arbitrators' fact-findings and we find no basis for departing from the arbitrators' rational rulings.

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5797-
5797A The People of the State of New York, Ind. 5380/12
Respondent, 337/13

-against-

Novashawn Banister,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered May 8, 2013, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed. Judgment, same court, Justice and date, rendered May 8, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a concurrent term of 10 months, unanimously affirmed.

The record establishes that, as to defendant's possession conviction, the court made an explicit determination that it

would not grant youthful offender treatment. Although the court had initially promised defendant probation and youthful offender treatment in exchange for his plea on the possession case, he was arrested less than two weeks later on the case resulting in the sale conviction also on appeal. The court properly reviewed the presentence report and expressly denied YO treatment on the possession conviction. Defendant did not preserve his claim that the failure to impose the promised sentence was error because the plea did not include a no-arrest condition, and we decline to review this claim in the interest of justice. In any event, that claim would not entitle defendant to YO treatment.

However, while, as the People maintain, the court clearly meant to deny YO treatment on the sale conviction as well, its failure to make that determination explicitly on the record requires a remand (*see People v Rudolph*, 21 NY3d 497 [2013]; *People v Eley*, 127 AD3d 583 [1st Dept 2015]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5798 Bradford Rom, Index 300960/15
Plaintiff-Respondent,

-against-

Eurostruct, Inc., et al.,
Defendants-Appellants.

_____

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

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

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 16, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was caused to fall to the ground when the unsecured ladder on which he was standing suddenly shifted and kicked out from underneath him (*see Faver v Midtown Trackage Venture, LLC*, 150 AD3d 580 [1st Dept 2017]; *Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453 [1st Dept 2017]).

Defendants' opposition failed to raise a triable issue of fact. None of coworkers who provided affidavits actually

witnessed plaintiff fall from the ladder, and they did not contradict his testimony that the ladder suddenly moved. Although defendants also submitted an unsworn accident report containing a statement from a coworker that plaintiff lost his balance and fell, this did not contradict plaintiff's consistent testimony that he fell because the ladder suddenly moved (*see Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016]). Furthermore, defendants' reliance on *O'Brien v Port Auth. of N.Y. & N.J.* (29 NY3d 27 [2017]) is misplaced because that case, which found an issue of fact about whether a slippery exterior staircase provided adequate protection to the plaintiff, left intact the presumption that Labor Law § 240(1) is violated where, as here, a ladder collapses or malfunctions for no apparent reason (*see id.* at 33; *Kebe*, 150 AD3d at 454).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5799 Agripino Polanco Rosa, Index 308543/12
Plaintiff-Appellant,

Kathy Acevedo,
Plaintiff,

-against-

Rafael Delacruz, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for Rafael Delacruz, respondent.

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

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Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered October 25, 2016, which, inter alia, granted defendants' motions for summary judgment dismissing plaintiff Agripino Polanco Rosa's complaint based on his failure to demonstrate that he suffered a serious injury to his left shoulder within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established that plaintiff's alleged left shoulder injuries were not causally related to the subject accident by submitting the MRI report of plaintiff's radiologist, who found multiple degenerative cysts, and no torn tendons, in

the MRI of plaintiff's left shoulder performed shortly after the accident (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Defendants also submitted the affirmed reports of two orthopedists who found normal range of motion in the left shoulder, both shortly after the accident and two years later, after plaintiff underwent left shoulder arthroscopic surgery.

In opposition, plaintiff failed to raise an issue of fact as to whether his alleged shoulder injuries were causally related to the accident. Plaintiff submitted a report of his radiologist, who affirmed that his MRI findings were true, and of his orthopedic surgeon, who opined that tears found during surgery were causally related to the accident. However, neither the radiologist nor the orthopedic surgeon addressed the findings of degeneration in the radiologist's MRI report, or explained why the tears and physical deficits found by the orthopedic surgeon

were not caused by the preexisting degenerative conditions (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Marcellus v Forvarp*, 101 AD3d 482 [1st Dept 2012]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5800-
5801-
5802-
5803-
5804-
5805 In re Rita F.H.,
Petitioner-Appellant,

-against-

Jesse M.H.,
Respondent-Respondent.

- - - - -

In re Jesse M.H.,
Petitioner-Appellant

-against-

Rita F.H.,
Respondent-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for Rita F.H., appellant/respondent.

Carol L. Kahn, New York, for Jesse M.H., respondent/appellant.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about January 4, 2016, which, to the extent appealed from, denied respondent Jesse M.H.'s (respondent) objections to the portions of an order of a Support Magistrate, dated October 27, 2015, that found, after a hearing, that he willfully violated a support order, and dismissed without prejudice his petition for downward modification of his support obligation, and denied petitioner Rita F.H.'s (petitioner)

objection to the part of the Support Magistrate's order that denied her request that respondent be incarcerated or directed to post an undertaking, unanimously affirmed, without costs.

Petitioner presented prima facie evidence of respondent's willful violation of a support order. In opposition, respondent failed to show by competent, credible evidence that his retirement was mandated by his medical condition so that he was incapable of making the required payments (*see generally Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). As the record reveals, the testimony of respondent's physician was inconsistent and, at times, contradictory regarding his treatment of respondent. In fact, the physician admitted that respondent's cardiac condition was stable at the time he recommended that respondent cease work. Moreover, the evidence established that respondent suffered from "mild to moderate aortic insufficiency," and such condition did not require a restriction of his activities. Accordingly, we see no reason to disturb the Support Magistrate's credibility findings, which are afforded deference (*see e.g. Matter of Childress v Samuel*, 27 AD3d 295, 296 [1st Dept 2006]).

Based on the record, and in light of the willfulness finding against respondent, the court acted within its discretion in denying his cross petition seeking a downward modification of his

support obligation since he failed to establish that the reduction was unavoidable and not volitional (*see Matter of Commissioner of Social Servs. v Merchant*, 298 AD2d 334 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]). We take notice of respondent's prolonged history of evading his support obligations and defrauding petitioner (*see U.S. v Hilsen*, 2005 WL 3434778 [SD NY 2005]; *In re Hilsen*, 404 BR 58, 67–69 [Bankr ED NY 2009]; *In re Hilsen*, 119 BR 435 [SD NY 1990]; *Hilsen v Hilsen*, 161 AD2d 459 [1st Dept 1990], *lv denied* 76 NY2d 714 [1990]).

Respondent's further claim that he was provided ineffective assistance of counsel is not properly before this Court, and, in any event, is without merit (*see e.g. Matter of Matthew C.*, 227 AD2d 679, 682-683 [3d Dept 1996]).

Contrary to respondent's contention, the court did not direct him to comply with the life and health insurance provisions of the parties' judgment of divorce, but to provide proof that he was not insurable, as he argued in his defense. Since the record is silent as to whether he was subsequently ordered to obtain insurance, the issue is not properly before us.

As for petitioner's cross appeal, we find that the court providently exercised its discretion in declining to incarcerate respondent (*see generally Matter of Delaware County Dept. of Social Servs. v Brooker*, 272 AD2d 835 [3d Dept 2000], citing

Family Court Act § 454[3][a]) or to direct him to post an undertaking. The parties are in their mid-70s, and, under the circumstances of this case, the Support Magistrate's decision to garnish respondent's income was an appropriate remedy.

We have considered the parties' remaining contentions, including the husband's argument that the Support Magistrate's evidentiary rulings deprived him of a full and fair hearing, and find them unavailing.

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5806 Digital Gadgets, LLC, Index 654057/15
Plaintiff-Appellant,

-against-

White Oak Global Advisors, LLC,
Defendant-Respondent.

_____

Judd Burstein P.C., New York (Ali R. Jaffery of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Niall D. Ó Murchadha of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 5, 2016, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The documentary evidence utterly refutes plaintiff's allegations that defendant breached its agreement to lend plaintiff money (*see Lezama v Cedano*, 119 AD3d 479, 480 [1st Dept 2014]). The provisions of the commitment letter and term sheet, taken together, required no less than a second-priority lien on the New Jersey property as a condition precedent to defendant's commitment to lend the money. Plaintiff was unable to meet this condition. It was not unreasonable for defendant, exercising the discretion given to it in the commitment letter, to conclude that

plaintiff's inability to meet this condition, coupled with the fact that actual revenue was 30% less than projected revenue, was material and adverse to its business interests (*see generally UBS Sec. LLC v Finish Line, Inc.*, 2008 WL 536616, *5 [SD NY 2008]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5807 The People of the State of New York, Ind. 2741/15
Respondent,

-against-

David Acosta,
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 (Thomas Farber, J.), rendered January 19, 2016, 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 22, 2018

CLERK

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

5809 The People of the State of New York, Ind. 4845/14
Respondent,

-against-

Andre Durham,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered September 8, 2105, as amended September 29, 2015, convicting defendant, after a nonjury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's choice of cross-examination strategy at the suppression hearing (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the

alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). It was a reasonable strategy for counsel, rather than simply relying on the alleged deficiencies in the arresting officer's direct testimony, to cross-examine the officer about his ability to recognize the knife he saw defendant holding as a gravity knife. Moreover, defendant was not prejudiced by that strategy. The direct testimony established several lawful justifications for the police action, and the record does not support defendant's assertion that the allegedly improvident cross-examination enabled the People to avoid suppression of the knife.

Defendant did not preserve his claim that the court failed to follow the procedure set forth in CPL 200.60 with regard to the use of a prior conviction to elevate the level of the crime charged (*see People v Mienko*, 282 AD2d 283, 283-284 [1st Dept 2001], *lv denied* 96 NY2d 904 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we find that the use of a stipulation to establish the prior conviction was appropriate under the circumstances, and there was no prejudice to defendant. To the extent that defendant raises an issue of ineffective assistance of his counsel as to this claim,

has not made a CPL 440.10 motion. To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5810 The People of the State of New York, Ind. 2498/11
Respondent,

-against-

Eddie Echols,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 6, 2013, as amended June 11, 2013, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

Late at night in a high crime area, a plainclothes police officer who was trained and highly experienced in detecting concealed weapons noticed that defendant was walking with his left arm at a 90-degree angle with his left hand at his waistband, while his right arm was swinging normally. Although

such a hand and arm position may have some innocent explanation, it is objectively suggestive of the presence of a firearm in the waistband, which the suspect is steadying or keeping in place with his hand (*see e.g. People v White*, 117 AD3d 425 [1st Dept 2014], *lv denied* 23 NY3d 1044 [2014]).

The officer noticed that defendant looked closely at the unmarked police car, made eye contact with the officers in it, dropped his left hand away from his waist, and turned around to watch the car pass him. Defendant then returned his left hand to his waistband and walked away quickly while looking back at the car. When the officers drove in reverse towards defendant, he looked back and walked away even faster. When the car backed alongside defendant, and as one officer began to get out of the car, defendant made a spontaneous statement to the effect of "I didn't do anything." That statement made little or no sense unless defendant realized he was in the presence of the police.

Defendant immediately fled, again holding his waistband with his left hand. Defendant's flight, combined with everything that preceded it, gave the trained and experienced officer grounds to reasonably suspect that defendant was carrying a weapon. This

justified the officers' pursuit of defendant, which led to the recovery of a revolver after defendant surrendered it (*see e.g. White*, 117 AD3d at 425; *People v Stephens*, 47 AD3d 586, 588-589 [1st Dept 2008], *lv denied* 10 NY3d 940 [2008]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5811 The Exeter Law Group LLP, Index 161667/14
Plaintiff-Defendant,

-against-

Immortalana Inc., et al.,
Defendants.
- - - - -
Immortalana Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Mitchell Wong, et al.,
Third-Party Defendants,

Law Office of Z. Tan PLLC,
Third-Party Defendant-Appellant.

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Law Office of Z. Tan PLLC, New York (BingChen Li of counsel), for appellant.

Katz Melinger PLLC, New York (Kenneth J. Katz of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about October 31, 2016, which, to the extent appealed from as limited by the briefs, denied third-party defendant Law Office of Z. Tan PLLC's (the firm) motion to dismiss the legal malpractice claim as against it, unanimously affirmed, without costs.

Defendants/third-party plaintiffs (hereinafter referred to as the clients) sufficiently stated a claim for legal malpractice

against the firm. In particular, the clients alleged an attorney-client relationship; the firm's failure to exercise ordinary and reasonable skill and knowledge; and damages flowing from additional costs in retaining substitute counsel to restructure the client entities so as to avoid taxes, and the cost of taxes occasioned by the improper corporate structure (*see generally AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). The engagement letter does not conclusively establish that the services rendered by the firm were outside the scope of the engagement (CPLR 3211[a][1]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5812-
5813 The People of the State of New York,
Respondent,

-against-

Anonymous,
Defendant-Appellant.

Ind. 2069/12

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 5, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 2½ years, unanimously affirmed.

The sentencing court correctly determined that defendant's 1988 conviction of attempted burglary in the second degree qualifies as a predicate violent felony. Accordingly, we reject defendant's contention that he should be adjudicated a second felony drug offender without reference to a violent felony.

Defendant's 1988 conviction qualifies only if it occurred within 10 years of his commission of the instant offense on May

4, 2012, with that 10-year look-back period extended by any periods of incarceration during that time (Penal Law § 70.06[1][b]). At issue on appeal is a four-year period during which defendant was incarcerated on a 1993 drug conviction that was affirmed by this Court, but that resulted in a federal district court's grant of habeas corpus relief in 1997 on the ground that a courtroom closure violated defendant's right to a public trial. Ordinarily, in such a case, those four years would not toll the 10-year look-back period (*People v Small*, 26 NY3d 253, 260 [2015]; *People v Dozier*, 78 NY2d 242, 249 [1991]; *People v Love*, 71 NY2d 711, 716 [1988]). We assume, without deciding, that this determination by a lower federal court renders the 1993 conviction unconstitutionally obtained under *Love* (*but see People v Kin Kan*, 78 NY2d 54, 59-60 [1991]).

However, in 1997, shortly after the federal court's ruling, defendant pleaded guilty under the same indictment for the same conduct underlying the 1993 offense, and the time served on the 1993 conviction was credited towards his sentence on the 1997 conviction. As a result, that time was effectively served on a constitutionally valid conviction for the same underlying conduct, and the sentencing court properly extended the look-back period by those four years (*see* Penal Law § 70.30[5]; *People v Cortez*, 231 AD2d 450 [1st Dept 1996], *lv denied* 89 NY2d 863

[1996]). For recidivist sentencing purposes, the new conviction by plea validated the time served on the old conviction. Accordingly, the 1988 conviction was properly counted as a predicate violent felony.

We have considered and rejected the People's argument regarding mootness, and defendant's arguments regarding the scope of our review.

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5814-
5815 Index 153945/14

Ames Ray,
Plaintiff-Appellant,

-against-

Christina Ray, et al.,
Defendants-Respondents.

_____

McLaughlin & Stern LLP, New York (Peter C. Alkalay of counsel), for appellant.

Law Offices of Donald Watnick, New York (Donald E. Watnick), for respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 28, 2016, awarding defendants sanctions against plaintiff, unanimously modified, on the law and the facts, to vacate the award of sanctions, and otherwise affirmed, without costs.

As this Court's decision in the prior appeal indicates, the 2010 complaint was dismissed not on the merits but due to pleading defects (*see Ray v Ray*, 108 AD3d 449 [1st Dept 2013]). Therefore, the present complaint is not barred by the doctrines of res judicata or collateral estoppel (*Hodge v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 269 AD2d 330 [1st Dept 2000]).

Nevertheless, the complaint was correctly dismissed for

failure to state a cause of action. The petition lacks the factual allegations and evidence required to support the contention that Christina Ray fraudulently transferred funds to Guarnerious and Dechert LLP in violation of Debtor and Creditor Law § 273 (*see generally Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013]).

Similarly, the complaint does not plead intent to defraud sufficiently to support a claim under DCL § 276. The fraudulent conveyance claims are not pleaded in sufficient detail to satisfy the heightened particularity requirement of CPLR 3016 [b] (*see Ray*, 108 AD3d at 451). Additionally, plaintiff did not properly rely on the "badges of fraud" to show actual intent to defraud or hinder present or future creditors (*RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]).

In light of our decision to grant the motion on the pleadings, the award of sanctions is vacated (*Omansky v Lapidus &*

Smith, 273 AD2d 110, 111 [1st Dept 2000]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5816 In re Domenick E. Natale, Deceased Index 4202/14

- - - - -

Christine Bricker,
Petitioner-Respondent,

-against-

Cynthia Hazell, et al.,
Objectants-Appellants.

_____

John Newman, Huntington, for appellants.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (David A. Bamdad of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about December 22, 2016, which, to the extent appealed from as limited by the briefs, denied objectants' motion for summary judgment dismissing the probate petition on the ground of lack of due execution and granted petitioner's cross motion for summary judgment dismissing that objection, unanimously affirmed, without costs.

On its face, the propounded document satisfies the requirements of EPTL 3-2.1(a). In addition, "a full attestation clause regularly authenticated . . . is entitled to great weight" (*Matter of Cottrell,* 95 NY 329, 335 [1884]), and a self-proving affidavit raises a presumption of "due execution" (*Matter of Schlaeger,* 74 AD3d 405, 407 [1st Dept 2010]).

Objectants rely on the fact that the sole surviving attesting witness had no memory of the will execution ceremony and, indeed, thought it improbable that she had signed the will at the address indicated in the self-proving affidavit. However, with respect to the first point, "[a] will may be admitted to probate notwithstanding the failed or imperfect memory of both attesting witnesses" (*Matter of Collins*, 60 NY2d 466, 468 [1983]; *see also e.g. Cottrell*, 95 NY at 333-334; *Matter of Halpern*, 76 AD3d 429, 432 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). With respect to the second point, courts have "permit[ted] probate even where the attesting witnesses . . . testified against the will" (*Collins*, 60 NY2d at 470; *see also Cottrell*, 95 NY at 333-335, 338-340).

To be sure, a failure of the attesting witnesses' "recollection intensifies the care and vigilance that must be exercised in examining the remaining evidence" (*Collins*, 60 NY2d at 473). However, the fact that the attorney supervising the will ceremony was decedent's wife and would have inherited the entire estate had she survived her husband is not suspicious. It was natural for decedent to bequeath all his property, in the first instance, to his wife. By contrast, in *Matter of Kindberg* (207 NY 220 [1912]), there is no indication that the lawyer who drew the will and would take the major part of the testator's

estate (*see id.* at 226) had any close relationship with the testator.

In sum, "[i]n opposition to the petitioner's prima facie showing that the will was properly executed . . ., the objectant[s] failed to raise a triable issue of fact to support [their] objection for improper execution" (*Matter of Tuccio,* 38 AD3d 791, 791-792 [2d Dept 2007], *lv denied* 9 NY3d 802 [2007]).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5817 The People of the State of New York, Ind. 3362/15
Respondent,

-against-

Alexander McCloud,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (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 (Bonnie Wittner, J.), rendered March 31, 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 22, 2018

CLERK

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

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

5818 Felix Perdomo, Index 303099/15
Plaintiff-Respondent,

-against-

Luis Llanos, et al.,
Defendants-Appellants.

_____

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for appellants.

Wingate, Rusotti, Shapiro & Halperin, LLP, New York (Victor Goldblum of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about May 11, 2017, which, among other things, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff's vehicle was stopped when it was struck in the rear by a vehicle owned by defendant Ari Fleet, Lt. and operated by defendant Luis Llanos. Plaintiff's evidence, including his affidavit attesting to these facts, established a prima facie case of negligence on the part of defendants (*see Francisco v Schoepfer*, 30 AD3d 275, 275 [1st Dept 2006]).

Defendants failed to rebut plaintiff's prima facie showing.

Defendants' assertion that plaintiff's vehicle stopped suddenly is insufficient to rebut the presumption of negligence (*Francisco*, 30 AD3d at 276).

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

ENTERED: FEBRUARY 22, 2018

CLERK

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

5819 The People of the State of New York, Ind. 5410/14
Respondent,

-against-

Nelson McKinsey,
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 (Alan Gadlin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered February 2, 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 22, 2018

CLERK

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

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

5821N The Bronx Islamic Society, Inc., Index 22008/16
Plaintiff-Respondent,

-against-

Terrence H. Ally, et al.,
Defendants-Appellants.

_____

Arthur L. Gallagher, Bronx, for appellants.

Law Office of John J. Janiec, New York (John J. Janiec of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about November 18, 2016, which permanently enjoined defendants from, inter alia, entering or remaining upon plaintiff's premises or coming within 1,000 feet of the premises, unanimously modified, on the facts, to delete the language "or coming within 1,000 feet of the premises," and otherwise affirmed, without costs.

Plaintiff, a corporation organized under article 10 of the Religious Corporation Law, owns and operates a mosque. Defendants are founding members of plaintiff, and defendants Mohamed Rafeek Baksh and Mohamed Shabir Khan are former members of its board of trustees. Plaintiff alleges that when Baksh and Khan were removed from the board, they conspired with defendant Terrence Ally to undermine the new leadership. Plaintiff thus

purported to terminate their memberships, and now seeks to enjoin them from, inter alia, coming within 1,000 feet of its property.

The motion court correctly found that the underlying membership dispute is not capable of judicial resolution, i.e., that it cannot be "decided solely upon the application of neutral principles of . . . law, without reference to any religious principle" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]; *accord Matter of Ming Tung v China Buddhist Assn.*, 124 AD3d 13, 18 [1st Dept 2014], *affd* 26 NY3d 1152 [2016], *cert denied* ___ US ___, 137 S Ct 628 [2017]). As plaintiff's bylaws "condition membership on religious criteria," plaintiff's decision to terminate defendants' memberships is binding on the courts (*Congregation Yetev Lev*, 9 NY3d at 288).

Contrary to defendants' contentions, the issue whether their memberships were validly terminated under plaintiff's bylaws is at the core of this dispute. Plaintiff seeks to exclude defendants from its organization and property. If defendants were members, the exclusions would be subject to procedures set forth in the bylaws. If, however, their memberships were validly terminated, those procedures would not apply, and there would be no basis for defendants to challenge the exclusions (*see Ming Tung*, 124 AD3d at 19).

Although plaintiff sought only a preliminary injunction, the motion court properly granted final relief sua sponte. While, generally, permanent injunctions are not permitted before trial (*see Oppenheim v Thanasoulis*, 123 App Div 494 [1st Dept 1908]; *Durkin v Durkin Fuel Acquisition Corp.*, 224 AD2d 574 [2d Dept 1996]), further proceedings in this matter would simply be wasteful, in view of the fact that plaintiff's termination of defendants' memberships is binding on the courts (*cf.* CPLR 3211[c]; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987] [notice of court's intention to treat CPLR 3211(c) motion as it would a CPLR 3212 motion not required where "action involves no issues of fact, but only issues of law fully appreciated and argued by both sides"]).

Defendants also object to the injunction against entering within 1,000 feet of plaintiff's premises as an unconstitutional restriction on speech. We need not reach this issue as we find that the 1,000 foot restraint is unnecessary to accomplish

plaintiff's goals and that the injunction against defendants' entering or remaining on plaintiff's premises is sufficient.

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

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

ENTERED: FEBRUARY 22, 2018

CLERK