``

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 27, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Webber, JJ.

3333 Javier Garcia Gonzalez, Index 301382/13
Plaintiff-Appellant,

-against-

1225 Ogden Deli Grocery Corp.,
Defendant,

Pont Eleve Associates,
Defendant-Respondent.

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

Marshall, Conway & Bradley P.C., New York (Lauren Turkel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 29, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment as to liability on his Labor Law §§ 240(1) and 241(6) causes of action against defendant Pont Eleve Associates (Pont Eleve), unanimously modified, on the law, to grant the motion for partial summary judgment on plaintiff's section 240(1)

claim, and otherwise affirmed, without costs.

Plaintiff made a prima facie showing of a violation of section 240(1) by his unrebutted testimony that he fell from an unsecured ladder. Defendants' opposition, consisting exclusively of unsworn hearsay statements from witnesses previously undisclosed in discovery, did not suffice to raise a triable issue of fact. The motion court accordingly erred in denying plaintiff's motion for partial summary judgment on his section 240(1) claim.

Plaintiff testified that he was hired by defendant's commercial tenant, defendant deli, to paint a decoration on a sign attached to the store. The deli owner supplied plaintiff with an A-frame ladder, which the owner opened up and placed at the door, as well as with the necessary paint and brushes. Approximately 25 minutes after plaintiff began painting, the ladder shifted "from side to side" and fell to the ground, causing plaintiff to fall. Plaintiff sustained fractured ribs and injuries to his back and right ankle requiring surgery.

Plaintiff's fall from an unsecured ladder establishes a violation of the statute (*see Hill v City of New York*, 140 AD3d 568 [1st Dept 2016]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014]) for which defendant property owner is

liable, even if the tenant contracted for the work without the owner's knowledge (*see Sanatass v Consolidated Inv. Co., Inc.*, 10 NY3d 333, 335 [2008]). Plaintiff sufficiently identified the location of the deli at his deposition, and also stated that the deli owner offered him money to paint the sign.

In opposition, defendant failed to raise an issue of fact sufficient to defeat summary judgment. The statements of the owner of the deli and the deli worker were unsworn and inadmissible as hearsay. It should be noted that in the over 2 ½ years since the statements were taken, defendant never attempted to obtain affidavits from these witnesses or attempted to depose them, proffering their statements only after plaintiff had moved for summary judgment. Indeed, in its responses to discovery requests, defendant affirmatively represented that it was "not presently in possession of any statements from witnesses to the accident."

While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment "where it is the only evidence upon which the opposition to summary judgment is predicated" (*Narvaez v NYRAC*, 290 AD2d 400, 401 [1st Dept 2002]; *see e.g. Rodriguez v 3251 Third Ave., LLC*, 80 AD3d 434 [1st Dept 2011] [unsworn statement

by the plaintiff's employer that he did not know the plaintiff and that plaintiff did not work for him, unaccompanied by other evidence showing that the plaintiff's presence at the work site was unauthorized, insufficient to raise a question of fact to defeat the plaintiff's motion for partial summary judgment on section 240(1) claim]). In addition, the names of the witnesses were previously undisclosed in discovery, and thus should not be considered in opposition to the motion (*see Rodriguez v New York City Hous. Auth.*, 304 AD2d 468, 469 [1st Dept 2003]).

Defendant's argument that summary judgment should be denied because the accident was unwitnessed is similarly unpersuasive (*see Erkan v McDonald's Corp.*, 146 AD3d 466 [1st Dept 2017]).

Plaintiff having made a prima facie showing of entitlement to summary judgment, which was not refuted by defendant's deficient opposition, the motion court erred in failing to grant plaintiff's motion for partial summary judgment on his section 240(1) claim.

In light of the grant of plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, we need not address his Labor Law § 241(6) claim (*see Fanning v Rockefeller*

Univ., 106 AD3d 484, 485 [1st Dept 2013]; *Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521, 522 [1st Dept 2012]).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5859-
5860 In re Rayquan Reginald M.
and Another,

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

Monique P.,
Respondent-Appellant,

Heart Share Human Services of
New York, Roman Catholic Diocese
of Brooklyn,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Wingate, Kearney & Cullen, LLP, Brooklyn (Kreuza Ganolli of counsel), for respondent.

Dawne A. Mitchell, the Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

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Orders of disposition, Family Court, New York County (Emily Olshansky, J.), entered on or about August 22, 2016, which, upon findings that respondent mother had an intellectual disability as defined in Social Services Law § 384-b(6)(b), terminated her parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court-appointed psychiatrist provided clear and convincing evidence that the children were in danger of being neglected due to the mother's intellectual disability (*see* Social Services Law § 384-b[6][b], [c]; *Matter of Kasey D. [Richard D.]*, 100 AD3d 417, 418 [1st Dept 2012]). There was ample evidence of the mother's maladaptive parenting before the children were removed from her care (see Matter of Melody Xena A., 297 AD2d 613 [1st Dept 2002]), and the foster mother's testimony established that although the mother had been working with a visiting coach for two years, she never progressed to unsupervised visitation, could not control the children, and was unable to get them in and out of their leg braces.

Given the court-appointed psychiatrist's undisputed testimony that the mother was unable to care for the children now or in the foreseeable future and that additional parental training would not enhance her parenting and other skills, a

dispositional hearing was not necessary to find that the termination of her parental rights was in the best interests of the children (*see Matter of Joyce T.*, 65 NY2d 39, 49 [1985]; *Matter of Kasey*, 100 AD3d at 418).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5822 The People of the State of New York, Ind. 99019/15
Respondent,

-against-

Matthew Vitiello,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 30, 2015, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in granting an upward departure (*see People v Gillotti*, 23 NY3d 841 [2014]) based on clear and convincing evidence that defendant possessed over 100 images of child pornography, including forced intercourse with children as young as three years old. Defendant's interest in this abhorrent type of pornography demonstrates a danger to children (*see People v Ryan*, __AD3d__, 2018 NY Slip Op 00098 [1st Dept 2018]; *People v Velasquez*, 143

AD3d 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]).

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 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5823 The City of New York, Index 452440/14
Plaintiff-Appellant,

-against-

Catlin Specialty Insurance Company,
Defendant,

Security Fence Systems, Inc.,
Defendant-Respondent.

- - - -

Security Fence Systems, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Omni Risk Management, Inc.
Third-Party Defendant.

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

Dealy Silberstein & Braverman, LLP, New York (Marc D. Braverman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Lynn R. Kotler, J.), entered June 2, 2016, insofar as appealed from as limited by the briefs, denying plaintiff's motion for summary judgment on the cause of action for breach of contract for failure to procure insurance, granting defendant Security Fence Systems, Inc.'s cross motion for summary judgment and dismissing the complaint as against it, unanimously reversed,

on the law, without costs, the judgment vacated, plaintiff's motion granted to the extent it seeks defense costs in the underlying litigation, and Security Fence's cross motion denied.

Plaintiff (the City) seeks to recover from defendant Security Fence the costs of defending and settling an action brought against it in Richmond County for personal injuries sustained at the fire department's Staten Island Central Office allegedly as a result of a slip and fall on a temporary plywood walkway that was warped, unsecured, and slippery due to snow and ice. It is undisputed that Security Fence failed to procure insurance covering the City for liability arising from Security Fence's snow removal operations not involving a snow plow at the Staten Island office.

The notice of claim, complaint, and amended complaint in the Richmond County action allege that snow and ice were among the causes of the plaintiff's fall. These allegations bring the City's claim within the scope of the coverage that Security Fence agreed, but failed, to procure, and entitle the City to a defense in the Richmond County action (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012]). Therefore, the City may recover from Security Fence its defense costs in

that action (*Morel v City of New York*, 192 AD2d 428, 429 [1st Dept 1993]; *see also Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]).

However, whether the City is entitled to indemnification is determined not by the allegations in the underlying pleadings but by the "actual basis" for the City's liability to the plaintiff (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424, 425 [1985]). From the "actual facts" of the plaintiff's accident (*id.* at 425), it cannot be determined as a matter of law whether the accident arose from Security Fence's snow removal operations and was within the scope of the coverage that Security Fence agreed to procure or arose from some other defect of the plywood and was outside the scope of the required coverage. The plaintiff testified that he never noticed any snow, ice, moisture, or slippery condition on the plywood, and attributed the cause of his slip and fall to the sagging, unsecured condition of the plywood. However, issues of fact are presented by photographs showing snow and ice on the walkway and an accident report attributing the fall to an "unforeseen layer of ice [that] had formed on top of the plywood." Insofar as the accident report is hearsay, it may be considered in opposition to

Security Fence's motion for summary judgment because it was not the only evidence submitted in opposition (*Fountain v Ferrara*, 118 AD3d 416 [1st Dept 2014]).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5824 The People of the State of New York, Respondent, Ind. 1497/13 1461/13

-against-

Anthony Alvarez, Defendant-Appellant.

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Feldman & Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Anthony Alvarez, appellant pro se.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 14, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the fourth degree, and sentencing him to an aggregate term of 18 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant was connected to

all of the drug transactions by extensive evidence, including, among other things, cell phone records and intercepted phone calls. Where applicable, the evidence amply supported inferences that defendant was accessorially liable for the conduct of others (*see* Penal Law § 20.00).

The People established a sufficient chain of custody for the drugs purchased from defendant and codefendant on November 14, 2012, providing reasonable assurances of the identity of the drugs and substantially unchanged condition (*see People v Julian*, 41 NY2d 340 [1977]). Any deficiencies in the chain of custody as to the identity of the drugs went to the weight and not the admissibility of the evidence (*see People v White*, 40 NY2d 797, 799-800 [1976]).

We reject defendant's argument that the court impermissibly amended certain counts of the indictment by giving a supplemental instruction on accessorial liability in response to the deliberating jury's inquiry. An indictment charging a defendant as a principal is "not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as

a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]; *see also People v Duncan*, 46 NY2d 74, 79-80 [1978], *cert denied* 422 US 910 [1979]).

The court providently exercised its discretion in denying defendant's recusal motion (*see People v Moreno*, 70 NY2d 403, 405 [1987]). There is no indication that the court was actually biased against defendant or defense counsel, or that denial of the recusal motion deprived defendant of a fair trial. During the trial, the court occasionally made remarks that should have been avoided. However, these remarks did not prevent the jury from reaching an impartial verdict based upon the evidence presented (*People v Moulton*, 43 NY2d 944, 945 [1978]; *People v Adams*, 117 AD3d 104, 105 [1st Dept 2014], *lv denied* 24 NY3d 1000[2014]).

We have considered and rejected defendant's pro se claims (*see generally Waller v Georgia* (467 US 39, 48 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5825 The People of the State of New York, Ind. 274/14
Respondent,

-against-

David Soto,
Defendant-Appellant.

_____

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

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

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Judgment of resentence, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 21, 2016, resentencing defendant, upon remand from this Court (138 AD3d 533 [1st Dept 2016], *lv denied* 28 NY3d 937 [2016]), to an aggregate term of seven years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences

on the assault and weapon convictions to six years and three to six years, respectively, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5826 Jacqueline Rodriguez, etc., Index 800047/12
Plaintiff-Appellant,

-against-

Washington Heights Dental
Practice, P.C., et al.,
Defendants-Respondents,

Marina Kipnis,
Defendant.

_____

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

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Washington Heights Dental Practice, P.C., respondent.

Landman Corsi Ballaine & Ford P.C., New York (Tina S. Bhatt of counsel), for Rosette Imani, respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered July 1, 2015, which granted defendants-respondents' motions for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

Plaintiff claims that defendants negligently failed to properly perform resuscitative measures when the decedent suddenly suffered a seizure-like episode.

Defendants met their prima facie burden of establishing the absence of a departure "from good and accepted medical practice"

or that "any such departure was not a proximate cause of the [decedent's] alleged injuries" (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). Defendants' experts opined that the emergency care provided by defendants was appropriate and did not cause the decedent's injuries, that the decedent's pulse and oxygen saturation were normal, and that there were no additional emergency care measures defendants could or should have performed.

Plaintiff's expert affirmation was not sufficient to raise any issues of fact because the expert's opinions were not supported by the record (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The expert opined that defendants departed from good and accepted practice by failing to establish an airway prior to administering oxygen, but overwhelming evidence in the record reflects that it was not necessary to establish an airway because the decedent never stopped breathing naturally. In addition, the expert's conclusion that the failure to clear an airway caused the decedent to suffer "a prolonged lack of oxygen" lacks any evidentiary basis, as it is undisputed

that the decedent's pulse, circulation, and oxygen saturation were all normal when the ambulances arrived.

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5829 In re Bronx Boynton Avenue LLC, Petitioner-Appellant, Index 260718/15

-against-

New York State Division of Housing & Community Renewal, et al., Respondents-Respondents.

_____

David L. Moss & Associates, LLC, New York (David L. Moss of counsel), for appellant.

Mark F. Palomino, New York (Jack Kuttner of counsel), for respondents.

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Judgment (denominated decision/order), Supreme Court, Bronx County (Wilma Guzman, J.), entered December 23, 2016, denying the petition seeking to annul an order of respondent New York State Division of Housing and Community Renewal (DHCR), dated June 19, 2015, which denied the petition for administrative review (PAR) and affirmed the order of the DHCR Rent Administrator, dated January 30, 2015, which found a rent overcharge for the subject apartment unit and awarded treble damages, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's denial of the PAR had a rational basis and was not arbitrary and capricious. The finding that the alleged

individual apartment improvements (IAIs) did not justify the rent increase pursuant to Rent Stabilization Code § 2522.4(a)(1), which "is entitled to deference if not irrational or unreasonable" (*Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206, 213 [1989]), was properly based on, among other things, a DHCR inspector's findings following his inspection of the subject apartment (*see Matter of Wembly Mgt. Co. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 205 AD2d 319, 319 [1st Dept 1994], *lv denied* 85 NY2d 808 [1995]). Notwithstanding the passage of more than three years between the alleged completion of the IAIs and the inspection, DHCR's assessment that the defects observed in the apartment were inconsistent with the alleged IAIs was reasonable under the particular circumstances of this case (*see Simkowitz v New York State Div. of Hous. & Community Renewal*, 256 AD2d 51 [1st Dept 1998]; *see also Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 305 AD2d 207 [1st Dept 2003]).

DHCR's imposition of treble damages was not arbitrary and capricious, since petitioner-landlord failed to rebut the presumption that the overcharge was willful (*see Matter of Century Towers Assoc. v State of N.Y. Div. Of Hous. & Community*

Renewal, 83 NY2d 819, 823 [1994]). Indeed, notwithstanding that the apartment renovation was allegedly performed before petitioner owned the building, the discrepancies between petitioner's allegations and submissions concerning the IAIs and the abundant evidence to the contrary affirmatively demonstrated that the overcharge was willful (*see Matter of 985 Fifth Ave. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574-576 [1st Dept 1991], *lv denied* 78 NY2d 861 [1991]).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5830 The People of the State of New York, SCI 3294/15
Respondent,

-against-

Paul Judge Fox,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard M. Weinberg, J. at plea; Tamiko Amaker, J. at sentencing), rendered April 29, 2016, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of three years' probation, unanimously affirmed.

The record sufficiently establishes that defendant's waiver of indictment and prosecution by superior court information satisfied the requirement that a "criminal court has held the defendant for the action of a grand jury" (CPL 195.10[1][a]). First, the criminal court record, including the back of the court papers, supports a finding that defendant was held for grand jury action at his arraignment (*see People v Brown*, 47 AD3d 1162, 1163 [3d Dept 2008], *lv denied* 10 NY3d 838 [2008]; *People v Barber*,

280 AD2d 691, 692-693 [3d Dept 2001], *lv denied* 96 NY2d 825 [2001]). In any event, regardless of whether the events at defendant's criminal court arraignment constituted a holding for the grand jury, any jurisdictional defect was cured by the ensuing events in Part N, a hybrid part. In Part N, defendant waived the case to the grand jury (*see* CPL 180.30[1]), and the court immediately transferred the case from its Criminal Court capacity to its Supreme Court capacity. This effectively ordered defendant held for grand jury action, and permitted the court to accept a waiver of indictment (*see People v Cicio*, __AD3d__, 2018 NY Slip Op 00532 [Jan 30, 2018]; *see also People v Simmons*, 110 AD3d 1371, 1372 [3d Dept 2013]).

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea. The plea minutes demonstrate that defendant voluntarily, knowingly, and intelligently pleaded guilty in exchange for a favorable sentence of probation (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]. The court had sufficient grounds to find that any emotional distress defendant was experiencing as the result of personal problems had no effect on the voluntariness of his plea. The court also properly rejected defendant's claim of innocence, which was contrary to his plea allocution, where he specifically

admitted intent to sell, and the factual information before the court. The evidence indicated that defendant acted in concert with a codefendant in a drug selling operation conducted from defendant's apartment, and it could be reasonably inferred that defendant and the codefendant intended to sell whatever drugs were in the apartment.

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5831 Catherine Mathews, Index 800125/11
Plaintiff-Respondent,

-against-

Stuyvesant Square Chemical
Dependency Services, et al.,
Defendants-Appellants.

_____

Kennedys CMK, LLP, New York (Frank J. Wenick of counsel), for appellants.

Levine & Grossman, Mineola (Steven Sachs of counsel), for respondent.

_____

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered June 24, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by showing that they did not depart from accepted medical practice in treating plaintiff and that they did not cause her claimed injury (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Defendants' expert opined that, after confirming plaintiff's pregnancy, defendants' staff appropriately performed an ultrasound, which resulted in a differential diagnosis of ectopic pregnancy, and then monitored her condition by performing

blood tests to determine BhCG levels (hormones produced during pregnancy). The expert opined, however, that since the ultrasound did not show the location of the ectopic pregnancy, surgery would have been futile, since no surgeon would have known where to operate, and that loss of the fallopian tube could not have been avoided because removal is required following an ectopic pregnancy. The expert also determined that plaintiff was not a candidate for methotrexate treatment because she could not be relied upon to return for follow up evaluation and monitoring.

In opposition, plaintiff raised issues of fact through her expert, who reviewed the medical records and opined that defendants departed from care in failing to diagnose the ectopic pregnancy based on plaintiff's complaints of severe abdominal pain, coupled with the failure of her BhCG levels to rise sufficiently, regardless of the lack of findings on the ultrasound. Plaintiff's expert further stated that defendants departed from accepted medical practices in failing to prescribe methotrexate to terminate the ectopic pregnancy, especially since plaintiff did not wish to continue her pregnancy (*see Torres v Cergnul*, 146 AD3d 509 [1st Dept 2017], *affd* 30 NY3d 1024 [2017]),

and that such treatment likely would have avoided the rupture of plaintiff's fallopian tube and need for surgery.

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5832 The People of the State of New York, Ind. 168/15
Respondent,

-against-

Troy Przybysz,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 7, 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 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5834 The People of the State of New York, Ind. 5452/12
Respondent,

-against-

Devon Veal,
Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 14, 2015, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5835 United National Insurance Company, Index 652639/15
Plaintiff-Appellant,

-against-

Travelers Property Casualty
Company of America, et al.,
Defendants,

Zurich-American Insurance Company,
Defendant-Respondent.

_____

Brad C. Westlye, New York, for appellant.

Coughlin Duffy LLP, New York (Adam M. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 31, 2016, which granted the motion of defendant Zurich-America Insurance Company (Zurich) to dismiss the first, second and fourth causes of action as against it, unanimously affirmed, with costs.

The motion court properly dismissed plaintiff's first and second causes of action for "equitable indemnity" and fourth cause of action for "equitable reapportionment" as against Zurich since there is no recognized cause of action for equitable indemnity or equitable reapportionment under New York law. Furthermore, even assuming that truth of the facts as alleged by

plaintiff, these claims do not "state[] the elements of a legally cognizable cause of action" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]; *see 1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5836-
5836A The People of the State of New York,
Respondent,

-against-

John Woody,
Defendant-Appellant.

SCI 4590/14
Ind. 2963/13

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

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

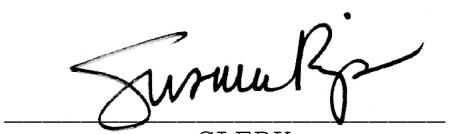
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Maxwell Wiley, J.), rendered December 3, 2014,

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 27, 2018



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

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5837 Zohar CDO 2003-1 Limited, et al., Index 651473/11
Plaintiffs-Appellants,

-against-

Xinhua Sports & Entertainment Limited, et al.,
Defendants,

Loretta Freddy Bush,
Defendant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Joshua Wurtzel of counsel), for appellants.

Drinker Biddle & Reath LLP, New York (Clay J. Pierce of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 14, 2017, which granted the motion of defendant Loretta Freddy Bush to strike plaintiffs' demand for a jury trial, unanimously affirmed, with costs.

The court properly granted the motion to strike plaintiffs' demand for a jury trial. While a party alleging fraudulent inducement that elects to bring an action for damages, as opposed to opting for rescission, may, under certain circumstances, still challenge the validity of the underlying agreement in a way that renders the contractual jury waiver provision in that agreement inapplicable to the fraudulent inducement cause of action (*see*

e.g. J.P. Morgan Sec. Inc. v Ader, 127 AD3d 506, 507-508 [1st Dept 2015]; *Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 102 AD3d 487 [1st Dept 2013]), such circumstances are not present in this case. Plaintiffs merely seek to enforce the underlying agreements by obtaining damages for fraudulent inducement, rather than rescind the agreements, and do not challenge the validity of the agreements in any manner other than by making factual allegations of fraud in the inducement (*see Leav v Weitzner*, 268 App Div 466 [1st Dept 1944]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ

5838 Ines Santana, Index 20894/14E
Plaintiff-Respondent,

-against-

Kardash Reality Corp.,
Defendant-Appellant,

Crowe Paradis Services Corporation,
Defendant.

_____

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Law Office of Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered March 21, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

" [A] landlord may be held liable for injury caused by a defective . . . condition upon the leased premises if the landlord is under a statutory or contractual duty to maintain the premises in repair and reserves the right to enter for inspection and repair" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 642 [1996]). Here, the lease required defendant to make repairs to defects of which it was informed by plaintiff. While plaintiff

did not provide written notice of her defective cabinet, as provided for in the lease, she testified that she personally informed the superintendent three months before the cabinet fell from the wall injuring her, and he attempted to fix it. This supports a conclusion that defendant received actual notice of the defective condition. While her testimony is unclear as to whether her complaint was about the cabinet coming away from the wall, or merely about the door, its frame, and/or its hinge, and it is also unclear whether the entire cabinet fell off the wall, or just the door and its frame, defendant has failed to make a prima facie showing that its superintendent neither negligently repaired the defect nor caused the defect that led to the cabinet falling. Defendant offers no evidence as to what caused the cabinet to fall. While the superintendent denies ever repairing or attempting to repair plaintiff's cabinet, or receiving a complaint about the cabinet from plaintiff, this discrepancy simply raises an issue of fact. The superintendent's assertion that the cabinet fell due to the excessive weight of the contents placed inside of it by plaintiff, is unsupported by any evidence and is, as such, mere speculation. Moreover, defendant failed to make a prima facie showing that it did not improperly install the

cabinets, thereby creating the defect (*see Frees v Frank & Walter Eberhart L.P. No.1*, 71 AD3d 491 [1st Dept 2010]).

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

ENTERED: FEBRUARY 27, 2018

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Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5840 Abel Santiago, Index 20823/14E
Plaintiff-Respondent, 43236/15E
43224/16E

-against-

K Mart Corporation, et al.,
Defendants.

- - - - -

K Mart Corporation,
Third-Party Plaintiff,

-against-

U.S. Security Associates Aviation Services Inc., doing business as U.S. Security Associates, Inc.,
Third-Party Defendant-Appellant.

- - - - -

[And a Second Third-Party Action]

_____

O'Connor Redd, LLP, Port Chester (Hillary Kahan of counsel), for appellant.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered April 24, 2017, which granted plaintiff's motion to amend the complaint to add U.S. Security Aviation Services, Inc. d/b/a U.S. Security Associates, Inc. as a defendant, unanimously reversed, on the law, without costs, and the motion denied.

The proposed claim against U.S. Security (negligence) fails to state a cause of action. U.S. Security, a security company

hired by defendant Kmart, owed no duty to plaintiff, a Kmart customer who was injured in a fight with a Kmart employee inside a Kmart store. Plaintiff was not an intended third-party beneficiary of the contract between Kmart and U.S. Security, which contains a "No Third Party Beneficiaries" clause (*see e.g. Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242 [1st Dept 2013]; *Rahim v Sottile Sec. Co.*, 32 AD3d 77, 79-80 [1st Dept 2006]).

Nor can a duty be imposed on U.S. Security on the ground either that plaintiff relied to his detriment on the continued performance of U.S. Security's contractual duties or that U.S. Security had entirely displaced Kmart's duty to secure its store (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Plaintiff's affidavit says nothing about having knowledge of the contract between Kmart and U.S. Security or about detrimental reliance on U.S. Security's continued performance thereunder (*see Aiello*, 110 AD3d at 246).

As for entire displacement, while the written scope of U.S. Security's services included "the protection of ... customers ... in the Premises," the deposition testimony of the loss prevention manager at the relevant Kmart store makes it clear that, in actual practice, U.S. Security's services at that store were

limited to deterring shoplifting (*see id.* at 245). Furthermore, U.S. Security did not totally displace Kmart's duty to secure its store, because Kmart retained supervisory authority over the security guards and required U.S. Security's staff to complete training in accordance with its (Kmart's) safety policies and procedures (*see id.* at 246).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5841 The People of the State of New York, Respondent, Ind. 2605/16

-against-

Jamie Pugh, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered December 13, 2016, as amended on December 21, 2016, convicting defendant, upon his plea of guilty, of conspiracy in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's challenges to his 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 (*see People v Tyrell*, 22 NY3d 359, 365 [2013]). The court had no obligation to explain that a future felony

conviction could lead to persistent felony offender status (*see e.g. People v Gonzalez*, 5 AD3d 168 [1st Dept 2004], *lv denied* 2 NY3d 800 [2004]). "[T]his Court has repeatedly rejected the argument that a defendant who pleads guilty is entitled to be advised of the effect of the plea on sentences he or she might receive for future crimes" (*People v Parker*, 309 AD2d 508, 508 [1st Dept 2003], *lv denied* 1 NY3d 577 [2003]).

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

ENTERED: FEBRUARY 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5842-
5843N Rodolfo Rodriguez,
Plaintiff-Respondent,

-against-

Nevei Bais, Inc.,
Defendant-Appellant.

Index 20544/14E

Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for respondent.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 25, 2016, which granted plaintiff's motion to strike defendant's answer, unanimously affirmed, without costs. Order, same court and Justice, entered February 16, 2017, which, to the extent appealable, denied defendant's motion for leave to renew plaintiff's motion and to vacate prior orders, unanimously affirmed, without costs.

The motion court providently exercised its discretion in striking defendant's answer on the ground of defendant's willful and contumacious failure to meet multiple court-ordered discovery deadlines (*see* CPLR 3126; *Langer v Miller*, 281 AD2d 338 [1st Dept 2001]; *Helms v Gangemi*, 265 AD2d 203, 204 [1st Dept 1999]).

Plaintiff's motion to strike defendant's answer was not defective. Under the circumstances, where plaintiff's counsel had long endeavored to resolve the discovery issues in and out of court, the affirmation of good faith satisfied 22 NYCRR 202.7 (*see Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 457-458 [1st Dept 2014]).

We reject defendant's argument that the lesser penalties for noncompliance with discovery, set forth in the January 28, 2016 order, precluded the relief sought in the motion to strike. Defendant does not dispute that it failed to meet the deadlines set forth in that order. Nor does it describe any effort to comply with the order after the expiration of the deadlines. Moreover, the order did not provide that the stated penalties for noncompliance were exclusive or barred other relief.

The motion court properly denied defendant's motion for leave to renew and to vacate the order striking its answer. Defendant asserted that medical issues affected its counsel's ability to handle his case load, including this case, but this purportedly new information does not justify the relief sought, as it was uncorroborated by any medical documentation or affidavit from counsel's physicians (*compare Weitzenberg v Nassau County Dept. of Recreation & Parks*, 29 AD3d 683, 684-685 [2d Dept

2006] [attorney's mental illness, which was corroborated by an affidavit from his psychiatrist, was a reasonable excuse for the underlying defaults]).

No appeal lies from the denial of defendant's motion for leave to reargue (*see Brito v Allstate Ins. Co.*, 135 AD3d 568, 569 [1st Dept 2016]).

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

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

ENTERED: FEBRUARY 27, 2018

CLERK