SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 2, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

4389 The People of the State of New York, Respondent, Ind. 2869/14

-against-

Sekou Shutsha,
Defendant-Appellant.

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

Sekou Shutsha, appellant pro se.

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered June 10, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously reversed, on the law, and the matter remanded for a new trial.

In a prior decision (151 AD3d 657 [1st Dept 2017]), this Court held defendant's appeal in abeyance and remitted the matter

to the Supreme Court for a suppression hearing addressing whether there were exigent circumstances justifying the warrantless search of defendant's bag incident to his arrest. After conducting a *Mapp* hearing on that issue, the court (Gregory Carro, J.) suppressed the physical evidence from defendant's bag. As the People concede, in light of this decision, defendant's conviction must be reversed and the matter remanded for a new trial.

We reject defendant's contention that he is entitled to any other pretrial suppression hearings.

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

ENTERED: JANUARY 2, 2018

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Renwick, J.P., Kapnick, Gesmer, Kern, JJ.

4796-
4797 Jan F. Kärst,
Plaintiff-Appellant,

-against-

W.P. Carey Inc.,
Defendant-Respondent.

Index 653827/15

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Hughes Hubbard & Reed LLP, New York (Christopher Paparella and Sarah Cave of counsel) for appellant.

Debevoise & Plimpton LLP, New York (Jyotin Hamid of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about February 16, 2017, which denied plaintiff's motion for summary judgment, unanimously affirmed, with costs. Order, same court and Justice, entered on or about April 13, 2017, which, to the extent appealed from, denied plaintiff's motion to renew, unanimously affirmed, with costs.

In this breach of contract action, there are material issues of fact surrounding the purpose of the payments received by plaintiff between December 2013 and September 2014, that render summary judgment improper. Moreover, even though the parties agree that interest is due to plaintiff, they disagree about the date from which interest should run, as well as the amount on

which it should be calculated.

Between June 2003 and September 2008, plaintiff, a former employee of nonparty W.P. Carey International LLC (WPCI), was granted approximately 2.5 million units of interest in WPCI, as well as other subsidiary companies, in exchange for plaintiff's "provision of services." Plaintiff was "not required to make any Capital Contributions . . . in exchange for [the] Units." These units of interest entitled plaintiff to fee income distributions from the various companies. Also, on or about September 30, 2008, plaintiff entered into a "put agreement" with W.P. Carey & Co. LLC (WPC),[1] the parent company of plaintiff's former employer, WPCI, and others. Pursuant to the put agreement, plaintiff had the right to require WPC to purchase his interest units (the Put Right). Once plaintiff gave notice of his intention to exercise his Put Right, the appraisal process was triggered, which would result in the determination of the value of his interest units, or the put purchase price. Within 30 days of the conclusion of the appraisal process, plaintiff was to tender his interest units in exchange for the put purchase price, which was to be paid in shares of WPC restricted stock.

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[1] WPC is defendant's predecessor.

Plaintiff exercised his Put Right on October 1, 2013, thereby triggering the appraisal process, which according to plaintiff, concluded in April 2015,[2] and ultimately valued plaintiff's interest units at 14.3 million dollars. Plaintiff contends that after he exercised his Put Right, WPC "seized" his ownership interests because plaintiff did not receive any fee income distributions, and defendant retained 100% of the profit shares for itself. Moreover, because plaintiff did not receive his shares of WPC stock in exchange for his interest units until April 7, 2016, WPC, according to plaintiff, also prevented plaintiff from reaping the financial benefits associated with holding the WPC stock, including dividend payments.

Plaintiff argues that because defendant seized his interest units on October 31, 2013, he is entitled to recover prejudgment interest on the value of the WPC shares as well as accrued dividends on the WPC stock that was used to pay the put purchase price, running from October 31, 2013. Plaintiff relies upon a September 2015 email from defendant's tax director saying that no income was allocated to plaintiff after October 31, 2013. In

[2] The parties dispute the date on which the appraisal process concluded, which impacts the date on which the parties were required to close the put transaction.

response, defendant argues that plaintiff received over one million dollars between December 2013 and September 2014 and that such payments were income distributions, thereby showing that plaintiff's interests were in fact not seized. Defendant points to an affidavit from its chief executive officer, which plaintiff included in his moving papers on the motion below, and that was submitted in an earlier special proceeding to confirm the appraisal value, in which the CEO averred that WPCI made income distributions to plaintiff after October 31, 2013. On reply on the motion below, plaintiff submitted K-1s for 2013 and 2014, which, according to plaintiff, show that his profit share in the subsidiary companies was listed as "NONE" and that any payments were actually a return of capital.[3] Moreover, plaintiff contends that defendant created a "feigned factual dispute" by contradicting its own documents - i.e. the September 2015 email and the affidavit from its CEO.

Ultimately, the parties dispute the purpose of the payments

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[3] Whether or not the motion court properly excluded the K-1s because they were first submitted on reply is irrelevant, because we find that there are issues of fact that preclude summary judgment. In any event, it was defendant that provided the K-1s to plaintiff in the first place, and thus, already had the documents in its possession prior to plaintiff submitting them on reply.

made between December 2013 and September 2014 and whether defendant did in fact "seize" plaintiff's interest units, which, in turn, affects the date from which interest should be calculated. Thus, because there are issues of fact surrounding the one million dollars worth of payments, plaintiff's motion for summary judgment was properly denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [failure to tender "sufficient evidence to eliminate any material issues of fact" requires denial of a summary judgment motion]).

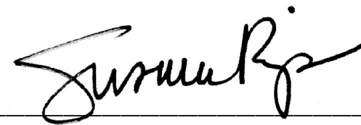
Moreover, and contrary to plaintiff's argument, this is not a case where an affidavit contradicts prior deposition testimony (*see Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]), or a sworn bill of particulars (*see Johnson v Marriott Mgt. Servs. Corp.*, 44 AD3d 450, 451 [1st Dept 2007], *lv denied* 10 NY3d 716 [2008]), thereby feigning an issue of fact; it merely contradicts an email.

On his renewal motion, plaintiff failed to offer new facts that would change the prior determination (CPLR 2221[e][2]). While he submitted his post-summary judgment requests for admissions and defendant's objection thereto as well as the K-1s and emails that he had submitted on the original motion, to the extent he asked defendant to admit that "no income earned or

received by the International companies after October 31, 2013 was allocated to" him, and other such disputed facts, the requests were improper (*see New Image Constr., Inc. v TDR Enters. Inc.*, 74 AD3d 680, 681 [1st Dept 2010]; *Marguess v City of New York*, 30 AD2d 782 [1st Dept 1968], *affd* 28 NY2d 527 [1971]). The proper requests related to the K-1s and emails and therefore were not new facts.

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

ENTERED: JANUARY 2, 2018



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Richter, J.P., Webber, Kern, Moulton, JJ.

4843 Lilian Hairston, etc., Index 21039/11E
Plaintiff-Respondent,

-against-

Liberty Behavioral Management
Corporation, et al.,
Defendants-Appellants.

Barry, McTiernan & Moore LLC, New York (David H. Schultz of counsel), for appellants.

The Law Offices of Joseph M. Lichtenstein, P.C., Mineola (Mark R. Bower of counsel), for respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered September 16, 2016, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the amended complaint, unanimously modified, on the law, to grant the motion with respect to the Public Health Law § 2801-d causes of action, and otherwise affirmed, without costs.

On September 9, 2009, plaintiff's decedent, Guillermo DeJesus, who suffered from schizophrenia and bipolar disorder, voluntarily entered defendants' substance abuse rehabilitation facility, Arms Acres, for treatment of his long-term alcoholism. DeJesus was admitted to Arms Acres's detoxification program, and was administered medications for his psychiatric conditions.

Arms Acres's records indicate that DeJesus made no progress in treatment. Over the course of several days, he exhibited behavioral problems, suffered from hallucinations, and was disoriented. Three days after he entered Arms Acres, DeJesus walked outside the facility, but was brought back in a confused state. Sometime thereafter, he left the facility again and could not be located. On October 18, 2009, DeJesus's body was discovered in the woods about a mile from the facility's grounds. According to the death certificate, the cause and manner of DeJesus's death were undetermined.

Plaintiff brought this action against defendants alleging, inter alia, negligence, wrongful death and violation of Public Health Law § 2801-d. Defendants moved for summary judgment dismissing the amended complaint on the grounds that they owed no duty of care to DeJesus, that plaintiff could not show causation, and that Arms Acres could not be held liable under Public Health Law § 2801-d. In a decision entered September 16, 2016, the motion court sustained the negligence and wrongful death claims, concluding that defendants owed a duty of care to DeJesus, and that triable issues of fact exist on causation. The court also declined to dismiss the statutory claim.

On appeal, defendants contend that they are entitled to

summary judgment because plaintiff cannot prove causation.[1] It is well settled that a movant for summary judgment bears the initial burden of presenting affirmative evidence of its entitlement to summary judgment (*Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). Merely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden (*Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Alvarez v 21st Century Renovations Ltd.*, 66 AD3d 524, 525 [1st Dept 2009]).

We conclude that defendants did not meet their initial burden of establishing their entitlement to summary judgment on the negligence and wrongful death claims. In their motion papers, defendants argued that the record was devoid of evidence as to what happened after DeJesus left Arms Acres, and what caused his death. Defendants, however, failed to submit affirmative evidence establishing that their alleged negligence did not, as a matter of law, proximately cause DeJesus's death. The fact that DeJesus's body was discovered a month after he disappeared is not sufficient, in itself, to warrant summary judgment in defendants' favor. Although defendants submitted

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[1] Defendants do not challenge the motion court's conclusion that they owed a duty of care to DeJesus.

DeJesus's death certificate, that document states only that the manner and cause of death were undetermined, and does not definitively rule out the requisite causal connection. Further, the autopsy report submitted with defendants' motion papers is incomplete, and does not identify the cause of death.

Because defendants merely pointed to perceived gaps in plaintiff's proof, they are not entitled to summary judgment on the negligence and wrongful death claims (*see Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012] [summary judgment denied because the movants merely pointed to gaps in the plaintiff's proof instead of carrying their burdens on their motions]; *Artalyan, Inc. v Kitridge Realty Co., Inc.*, 79 AD3d 546, 547 [1st Dept 2010] [The defendants' "contention that they should have been granted summary judgment because plaintiffs could not establish as a matter of law that they were negligent misapprehends their burden on their own motion"]).[2]

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[2] In light of our conclusion that defendants did not meet their prima facie burden, the burden never shifted to plaintiff to raise a triable issue of fact (*see Alvarez*, 66 AD3d at 525). Thus, we need not address whether the expert affidavit submitted by plaintiff is sufficient to raise an issue of fact as to causation. We also note that, in reply, defendants presented no expert affidavit calling into question any of the conclusions reached by plaintiff's expert, and only attacked the expert by way of an attorney's affirmation.

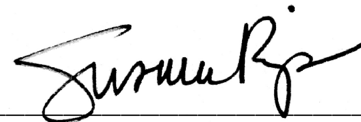
However, the motion court should have dismissed plaintiff’s Public Health Law § 2801-d causes of action.[3] Arms Acres is a detoxification and rehabilitation facility governed by the Mental Hygiene Law, and regulated by the Office for Alcoholism and Substance Abuse Services pursuant to certificates issued by that Office. It is not a nursing home or similar facility under the Department of Health, and thus is not governed by the Public Health Law, and not subject to the private right of action available under Public Health Law § 2801-d(1) (*see Burkhart v People, Inc.*, 129 AD3d 1475, 1477 [4th Dept 2015]; Public Health Law § 2800). As such, plaintiff may not maintain a private cause

[3] This Court’s prior order permitting plaintiff to assert a statutory claim for punitive damages was not a determination on the merits and thus is not “law of the case” (*see McCoy v Metropolitan Transp. Auth.*, 53 AD3d 457, 458 [1st Dept 2008]; *James v R & G Hacking Corp.*, 39 AD3d 385, 386 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007]).

of action pursuant to Public Health Law § 2801-d against defendants (*see Burkhart*, 129 AD3d at 1478; *Randone v State of New York*, 30 Misc 3d 335 [Ct Cl 2010]; *see also Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016]).

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

ENTERED: JANUARY 2, 2018



CLERK

Friedman, J.P., Gische, Webber, Singh, JJ.

5306 The People of the State of New York, Ind. 4117/13
Respondent,

-against-

Luis Lema,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about May 13, 2016, which adjudicated defendant a level one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The question of whether defendant should be required, as a matter of the court’s discretion, to register as a sex offender as the result of his conviction of unlawful surveillance (for making cell phone videos under women’s dresses on the subway) is not properly before us on this appeal. Because the order adjudicating defendant a sex offender is appealable, we need not dismiss the appeal. However, the issue defendant wishes to raise is not reviewable.

Defendant challenges the SORA hearing court's denial of his motion made pursuant to Correction Law § 168-a(2)(e), which provides, uniquely, that a conviction of unlawful surveillance in the second degree under Penal Law § 250.45(2), (3), or (4) constitutes a sex offense requiring registration, except where, "upon motion by the defendant, the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate." The People argue that such a motion can only properly be brought before the trial court, before its determination whether a defendant is to be certified as a sex offender, and that even if a SORA court is authorized to rule on such a motion, defendant's motion was properly denied.

We agree with the People that the statute does not give a SORA court the power to determine a motion under Correction Law § 168-a(2)(e). While we find it significant that the provision assigns the duty of ruling on the motion to "the trial court" – notably the only time that phrase is used in SORA's numerous sections – we do not consider the use of the phrase to be a sufficient basis for our interpretation, because it is arguably malleable enough not to be limited to the court that actually

presided over the defendant's trial. However, Correction Law § 168-d(1)(a), describing the "duties of the court," provides a more definite indication of statutory intent, by way of language that clearly contemplates that certification as a sex offender occurs "upon conviction" and after consideration of any motion pursuant to Correction Law § 168-a(2)(e). Nothing else in the statutory scheme contradicts this understanding.

This reading of section § 168-a(2)(e) is consistent with our decision in *People v Miguel* (140 AD3d 497, 497 [1st Dept 2016], *lv denied* 28 NY3d 908 [2016]), in which we held that "[s]ex offender certification is part of the judgment of conviction, and the proper occasion for defendant to have challenged that certification was on an appeal from the judgment." In *Miguel*, we found that the defendant's claim that his underlying New York felony was not an offense requiring sex offender registration presented a question about the propriety of certification, that the SORA court's treatment of the issue was therefore an "essentially academic exercise," and that the issue was unreviewable on appeal. The same is true of defendant's argument, which amounts to a claim – unpreserved at trial and not advanced on direct appeal – that the *trial* court erred in failing to relieve him of the obligation to register under the standard

set forth in Correction Law § 168-a(2)(e).

Contending that his motion was properly addressed to the SORA court, defendant relies chiefly on *People v Simmons* (129 AD3d 520 [1st Dept 2015], *lv denied* 26 NY3d 903 [2015]) and *People v Liden* (19 NY3d 271 [2012]). Neither argument is persuasive. In *Simmons* we addressed and rejected an argument, also raised before and rejected by the SORA court, that the defendant should be exempted from sex offender registration pursuant to Correction Law § 168-a(2)(e). However, in *Simmons* neither the parties nor this Court addressed the question of whether the defendant's appeal of his sex offender certification was properly before us. Accordingly, *Simmons* lacks precedential value as to this issue (*see People v Miller*, 145 AD3d 593, 594 [1st Dept 2016], *lv denied* 29 NY3d 950 [2017]).

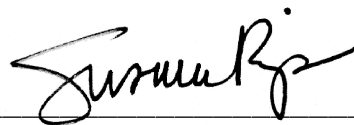
Defendant's reliance on *Liden* is also misplaced. Recognizing a narrow exception to the general rule that rulings of administrative agencies may only be reviewed in article 78 proceedings, the *Liden* court held that a defendant could challenge, at his SORA hearing, a determination of the Board of Examiners of Sex Offenders that he was required to register based on an out-of-state conviction, and that the Appellate Division could review the SORA court's ruling. *Liden*'s particular facts

are distinguishable and it does not stand for a broad proposition that a SORA court has the authority to decide any and all questions of registrability. Its reasoning does not extend to this case, in which the statute prescribes that the trial court, not the Board, determines whether "registration would be unduly harsh and inappropriate," and that it do so in a manner that permits certification to occur "upon conviction" if the motion is denied.

In any event, regardless of the issue of reviewability, requiring this defendant to register as a sex offender would not be "unduly harsh and inappropriate." As in *Simmons*, the "circumstances of the surveillance were repulsive, and they raise concerns about defendant's character and potential for recidivism" (*Simmons*, 129 AD3d at 521).

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

ENTERED: JANUARY 2, 2018



CLERK

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

5317 The People of the State of New York, Ind. 1033/12
Respondent,

-against-

Roberto Gonzalez,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about December 19, 2013, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's claim that the court erred in certifying him as a sex offender on his underlying conviction of second-degree unlawful surveillance (a crime for which sex offender registration is not automatic) is not reviewable on this appeal from a risk level determination (*see People v Lema*, ___ AD3d ___, Appeal No. 5306 [decided herewith]). Defendant's failure to challenge his certification on direct appeal of his conviction thus precludes review of his present claim.

In any event, regardless of the issue of reviewability, while defendant agreed to register as a sex offender as a condition of his plea bargain, the plea court expressly and appropriately exercised its discretion in certifying him as a sex offender. Although an exemption from sex offender registration for an unlawful surveillance conviction under Penal Law § 250.45(3) may be available if "registration would be unduly harsh and inappropriate" (Correction Law § 168-a[2][e]), defendant has not made such a showing, particularly given the circumstances of his crime (*see People v Simmons*, 129 AD3d 520 [1st Dept 2015], *lv denied* 26 NY3d 903 [2015]). As in *Simmons*, the "circumstances of the surveillance were repulsive, and they raise concerns about defendant's character and potential for recidivism" (*Simmons*, 129 AD3d at 521).

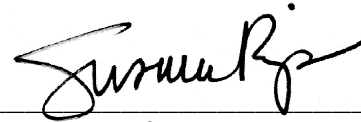
The court properly assessed 15 points under the risk factor for drug or alcohol abuse. Defendant's admissions to corrections officials of his extensive history of substance abuse provided clear and convincing evidence of such abuse, thus satisfying the standard set forth in *People v Palmer* (20 NY3d 373, 378-379 [2013]).

The court properly exercised its discretion in declining to

grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, and the record does not establish any basis for a departure

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

ENTERED: JANUARY 2, 2018



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

5318 Burhan Zayed, Index 21602/15
Plaintiff-Respondent,

-against-

New York City Department of Design
and Construction, et al.,
Defendants-Appellants.

____

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

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered December 28, 2015, which, among other things, denied defendants' motion to dismiss the complaint for failure to comply with CPLR 217-a and the notice of claim requirements of General Municipal Law §§ 50-e(5) and 50-i(1), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Although plaintiff successfully sought leave to file a late notice of claim before expiration of the statute of limitations, and was granted a 30-day extension of time to do so, he did not avail himself of that opportunity and, by any calculation, the one-year and 90-day statute of limitations then expired

(*see* CPLR 217-a; General Municipal Law §§ 50-e[5]; 50-i[1]).

The motion court was not permitted to grant an extension after the statute of limitations had run since, to do so, would render meaningless the portion of General Municipal Law § 50-e(5) that expressly prohibits the court from doing so (*Pierson v City of New York*, 56 NY2d 950, 955 [1982]). CPLR 2004 cannot be used to extend the statute of limitations (*Rybka v New York City Health & Hosps. Corp.*, 263 AD2d 403, 406 [1st Dept 1999]; CPLR 201; *see also Pierson*, 56 NY2d at 954).

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

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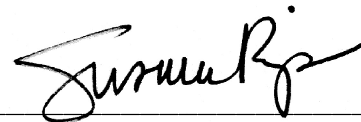

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Manzanet-Daniels, J.P., Mazzarelli, Andrias, Gesmer, Oing, JJ.

5319-
5320 In re Ramsezs L.,

A Child under Eighteen Years
of Age, etc.,

Frances Arkeyna L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Lennice G., E.,
Petitioner-Respondent.

____

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

Law Offices of Sergio Villaverde, PLLC, New York (Sergio Villaverde of counsel), for Lennice G., E., respondent.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for Administration for Children's Services, respondent.

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

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Orders, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about April 14, 2016, which, after a hearing, terminated the subject child's placement with the Administration for Children's Services and awarded custody of the subject child (DOB 2/11/10) to his paternal aunt, and denied and dismissed the petition for custody by the child's maternal

grandmother and step-grandfather, unanimously affirmed, without costs.

The Referee's determination that an award of custody of the subject child to his paternal aunt rather than to his maternal grandmother and step-grandfather was in the child's best interests and would best promote his welfare and happiness has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Ernestine L. v New York City Admin. for Children's Servs.*, 71 AD3d 510 [1st Dept 2010]).

The Referee properly considered the factors of quality of the home environment and parental guidance, financial status and ability to provide for the child, and ability of each petitioner to provide for the child's emotional and intellectual development, taking into account his individual needs (*Eschbach*, 56 NY2d at 172).

The Referee considered the totality of the circumstances, which included the child's special needs, the paternal aunt's long career in the field of special education and her experience in raising and providing parental guidance to two biological children, a number of relatives and several foster children, as well as the maternal grandmother's criminal record, history of drug abuse, and her parenting of the child's mother, who was, at

the time of the proceedings, incarcerated, and properly concluded the aunt was better equipped to identify and address the child’s educational and emotional needs, to provide a stable and healthy home environment for the child (*Matter of Dedon G. v Zenhia G.*, 125 AD3d 419 [1st Dept 2015]), and best equipped to provide him guidance and a better opportunity to pursue higher education (*Elba M. v Alba R.*, 213 AD2d 362 [1st Dept 1995]).

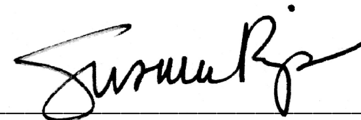
We hold that, for the reasons detailed in his opinion, the Referee properly concluded that, although the grandparents were not “unfit,” they were “less fit” custodians for the child (*Eschbach*, 56 NY2d at 174).

As the Referee also recognized, an award of custody to either petitioner would have disrupted the child’s life since, by the time the order was issued, he had never lived with either petitioner, and had been living in his most recent foster placement for over a year. The Referee endeavored to mitigate the disruption by ordering frequent and liberal visitation with the grandparents and requiring the aunt to pay for the child to visit them in New York at least once each year. The disruption caused by the child’s relocation to the Virgin Islands will ultimately be outweighed by the benefits of being in the aunt’s care.

Whether or not the mother, who was not the child's custodial parent before the proceedings began and who did not seek custody in the course of the proceedings, has standing to appeal (*see e.g. Matter of Valenson v Kenyon*, 80 AD3d 799 [3d Dept 2011]), she has shown no grounds to reverse the orders.

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

ENTERED: JANUARY 2, 2018



CLERK

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

5321 Celeste Wenegieme, Index 303029/13
Plaintiff-Appellant,

-against-

Delroy Harriott, et al,
Defendants-Respondents.

____

Gropper Law Group PLLC, New York (Joshua Grooper of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered October 6, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion with respect to plaintiff's claim of serious injury to her cervical and lumbar spine and the 90/180 day claim, and otherwise affirmed, without costs.

Assuming defendants made a prima facie showing that plaintiff did not sustain a serious injury to her cervical spine or lumbar spine, plaintiff raised triable issues of fact as to those claims. In support of their motion, defendants submitted

MRI reports showing multiple bulging discs and a herniated disc, as well as other medical records. Since the records were properly before the court and not disputed by defendants, plaintiff was entitled to rely upon them to show objective evidence of injury (*Bent v Jackson*, 15 AD3d 46, 47-48 [1st Dept 2005]; *see also Mitchell v Calle*, 90 AD3d 584, 585 [1st Dept 2011]). Plaintiff demonstrated the existence of significant limitations in spinal range of motion, both shortly after the accident and recently, through the affirmed report of her treating physiatrist (*see Castillo v Abreu*, 132 AD3d 520, 521 [1st Dept 2015]), who also opined that plaintiff's limitations were causally related to the accident (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Plaintiff's gap in treatment is not dispositive, as she explained that, after 11 months of therapy, her physician told her any further treatment would be palliative in nature. Moreover, her physician stated that her condition remained persistent throughout treatment (*see Roldan v Conti*, 137 AD3d 507, 508 [1st Dept 2016]; *see also Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]).

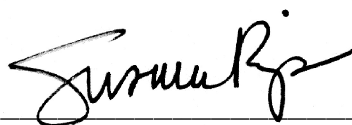
Defendants made a prima facie showing that plaintiff's shoulder injuries were not causally related to the accident, but

involved preexisting congenital and degenerative conditions, as reflected in her radiologist's MRI report (*see Barreras v Vargas*, 151 AD3d 620, 620-621 [1st Dept 2017]). Plaintiff failed to raise an issue of fact. Her physician provided only a conclusory opinion that her right shoulder injuries were caused by the accident, without addressing the preexisting degenerative conditions documented in her own MRI, or explaining why her current reported symptoms were not related to the preexisting conditions (*see Lee v Lippman*, 136 AD3d 411, 412 [1st Dept 2016]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

The 90/180 day claim is reinstated inasmuch as there was no motion to dismiss it.

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

ENTERED: JANUARY 2, 2018



CLERK

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

5322 The People of the State of New York, Ind. 970/13
Respondent,

-against-

Tony Jordan,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Bruce Allen, J. at jury trial and sentence), rendered August 12, 2014, convicting defendant of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. In addition to the presumption of possession of firearms by all occupants of an automobile in which the weapons are found (Penal Law § 265.15 [4]), there was compelling circumstantial evidence,

including the presence of defendant's DNA, that connected defendant with a pistol and a revolver found in his own bag. The evidence supports the jury's rejection of defendant's claim that other persons placed the weapons in his bag without his knowledge.

Even assuming that defendant's comments – amidst numerous complaints about defense counsel, the prosecutor, the court, and the prosecution witnesses – that he wanted to cross-examine witnesses himself and act on his own behalf can be construed as an unequivocal request to proceed pro se, which ordinarily triggers further inquiry (*see e.g. People v McIntyre*, 36 NY2d 10, 17 [1974], he nevertheless abandoned any such request (*see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Berrian*, 154 AD3d 486 [1st Dept 2017]; *People v Hirschfeld*, 282 AD2d 337, 339 [1st Dept 2001], *lv denied* 96 NY2d 919 [2001], *cert denied* 534 US 1082 [2002]).

The hearing court providently exercised its discretion in declining to adjourn the suppression hearing from the morning to afternoon, after denying counsel's motion to withdraw. Counsel had been retained one month earlier, and was aware of the scheduled hearing date. The court noted that only one witness would testify, and counsel acknowledged that he had reviewed the

Rosario material. The record does not support defendant's claim that counsel needed more time to prepare adequately for this simple hearing.

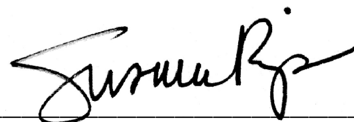
To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). There is no indication that defense counsel rendered constitutionally deficient assistance at the suppression hearing. The record does not establish that defendant would have prevailed on any suppression theory he now claims should have been advanced by counsel, and fails to negate strategic explanations for counsel's conduct of the hearing. We have considered and rejected defendant's ineffective assistance claims relating to counsel's failure to make certain objections during trial.

Defendant did not preserve his challenges to certain testimony by a detective and to portions of the prosecutor's summation, and we decline to review them in the interest of

justice. As an alternative holding, we find no basis for reversal. To the extent there were any improprieties, they were not so egregious or prejudicial as to warrant reversal in the interest of justice.

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

ENTERED: JANUARY 2, 2018



CLERK

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

5323 Paul Sonkin, Index 651480/16
Plaintiff-Appellant,

-against-

Stacy Sonkin,
Defendant-Respondent.

____

Paul F. Condzal, New York, for appellant.

The Isaacs Firm PLLC, New York (Randi S. Isaacs of counsel), for respondent.

____

Order and judgment (one paper), Supreme Court, New York County (Lori S. Sattler, J.), entered October 31, 2016, to the extent appealed from, dismissing the complaint, unanimously affirmed, with costs. A sanction is imposed upon plaintiff in the amount of $5,000, which amount shall be deposited with the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance, for engaging in frivolous conduct. A sanction is imposed upon plaintiff's attorney, Paul F. Condzal, in the amount of $5,000, payable to the Lawyers' Fund for Client Protection, for frivolous appellate practice. The Clerk is directed to enter judgment in accordance with 22 NYCRR 130-1.2 against plaintiff and counsel in those amounts.

Plaintiff seeks to invalidate and vacate the parties'

divorce judgment on the ground that defendant did not personally sign an updated statement of net worth and the stipulation of settlement that was eventually incorporated but not merged into the judgment.

Plaintiff contends that there were no documents before the motion court to warrant dismissal based on documentary evidence pursuant to CPLR 3211(a)(1). However, the court cited the documentary evidence that was proffered and upon which it relied, including the challenged documents themselves. These documents are valid on their face and in any event have been ratified by the parties (*see Achache v Och*, 128 AD3d 563 [1st Dept 2015]). The documents serve as a complete defense to plaintiff's causes of action.

The court also correctly dismissed the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The court was not required to accept as true, factual allegations that were conclusory, inherently incredible, or speculative (*Erich Fuchs Enters. v American Civ. Liberties Union Found., Inc.*, 95 AD3d 558 [1st Dept 2012]). Nor does the complaint meet the requirement that for a cause of action based on fraud "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]; *see also* CPLR 5015[a][3]). Indeed, it contains no

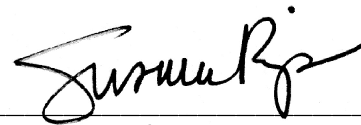
allegations at all of fraud or similar misconduct.

We grant defendant's request that we impose sanctions upon plaintiff and his counsel (22 NYCRR 130-1.1[a]). The action below, and the appeal before us now, both of which counsel prosecuted, are plainly without merit (22 NYCRR 130-1.1[c][1]). Moreover, this appeal constitutes plaintiff's third unsuccessful challenge in this Court to the stipulation of settlement, which the parties entered into in 2012 (*see Sonkin v Sonkin*, 137 AD3d 635 [1st Dept 2016]; *Sonkin v Sonkin*, 117 AD3d 479 [1st Dept 2014]). In our 2016 decision and order, which affirmed, inter alia, an award of counsel fees to defendant, we held that the award was proper based in part on plaintiff's "multiple, unsuccessful attempts to void or rescind the support provisions contained in the stipulation" (*Sonkin*, 137 AD3d at 636). Where a matrimonial litigant engages in a "relentless campaign to prolong th[e] litigation," sanctions in this Court are appropriate

(*Heilbut v Heilbut*, 18 AD3d 1, 8 [1st Dept 2005]; 22 NYCRR 130-1.1[c][2]).

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

ENTERED: JANUARY 2, 2018



CLERK

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

5324 Almah LLC, Index 652117/14
Plaintiff-Appellant,

-against-

AIG Employee Services, Inc.,
et al.,
Defendants-Respondents.

____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Jennifer J. Barrett of counsel), for respondents.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about May 23, 2017, which granted defendants' motion to dismiss the first and fourth causes of action pursuant to CPLR 3211(a)(1) and (5), unanimously reversed, on the law, without costs, and the motion denied.

It is ambiguous whether defendant AIG Employee Services, Inc. is an "assign" under the release that plaintiff previously gave to nonparties (to this action) The Goldman Sachs Group, Inc. (GS) and Goldman, Sachs & Go. (together, the GS Parties). "A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations" (*Goldman Sachs Group, Inc. v Almah LLC,* 85 AD3d 424, 426 [1st

Dept 2011] [emendations and internal quotation marks omitted], *lv dismissed* 18 NY3d 877 [2012]). On the one hand, defendants' interpretation – that AIG is an assign – is reasonable because Black's Law Dictionary (10th ed 2014) says "assign" is the same as "assignee," and AIG was an assignee of GS. On the other hand, plaintiff's interpretation – that AIG is not an assign – is also reasonable. If AIG were the GS Parties' assign, the GS Parties would arguably have been in immediate breach of the settlement agreement. Moreover, *Morales v Rotino* (27 AD3d 433 [2d Dept 2006]) supports plaintiff's interpretation.

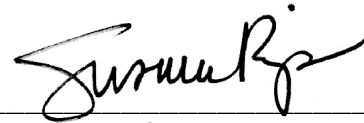
If a contract is ambiguous, the complaint should not be "dismissed pre-answer before the development of a full factual record as to the parties' intent" (*Telerep, LLC v U.S. Intl. Media, LLC,* 74 AD3d 401, 403 [1st Dept 2010]).

In light of the above, it is unnecessary to consider whether the release would bar the first and fourth causes of action if

AIG were an assign.

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

ENTERED: JANUARY 2, 2018



CLERK

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

5325 John Koeppel, Index 650889/13
Plaintiff-Appellant,

-against-

Volkswagen Group of America, Inc.,
et al.,
Defendants-Respondents.

____

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for appellant.

Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago IL (Andrew Spangler of the bar of the State of Illinois admitted pro hac vice of counsel), for respondents.

____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about February 24, 2017, which denied plaintiff's motion for leave to renew defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

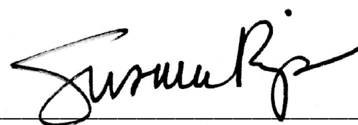
This Court affirmed the dismissal of the complaint for failure to allege facts from which it could be inferred that defendants participated in plaintiff's business partners' alleged scheme to defraud plaintiff out of his ownership of a Volkswagen dealership (128 AD3d 441 [1st Dept 2015]). Thereafter, this Court affirmed denial of plaintiff's first motion for renewal (145 AD3d 436 [1st Dept 2016]). Plaintiff again seeks renewal, this time on the basis of emails between his former business

partners and an employee of defendants, claiming they are proof that defendants were part of the scheme.

Plaintiff again has failed to provide reasonable justification for his failure to present the new evidence on defendants' motion (CPLR 2221[e][3]). Further, the new facts, even if considered, do not change the original determination (CPLR 2221[e][2]). The emails contain no facts establishing that defendants knew of the alleged fraud.

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

ENTERED: JANUARY 2, 2018



CLERK

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

5327 The People of the State of New York, Ind. 4619/13
Respondent,

-against-

Oluwatosin Olatujoye,
Defendant-Appellant.

____

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

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

____

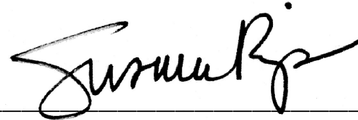
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J. at plea and sentencing), rendered May 13, 2014,

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 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: JANUARY 2, 2018



CLERK

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

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

5328 Anna Pezhman, Index 100151/16
Plaintiff-Appellant,

-against-

Chanel, et al.,
Defendants-Respondents.

____

Anna Pezhman, appellant pro se.

Proskauer Rose LLP, New York (Edna D. Guerrasio of counsel), for respondents.

____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered November 22, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The allegedly defamatory statements of defendant law firm and its attorneys were made in the course of the firm's representation of defendant Chanel in a prior action and are therefore protected by the absolute privilege attaching to statements made in the course of, and relating to, judicial proceedings (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171 [1st Dept 2007], *abrogated on other grounds Front, Inc. v Khalil*, 24 NY3d 713 [2015]). Because the challenged statements were "pertinent" to the proceeding in which they were made (*see*

Sexter, 38 AD3d at 173), they are absolutely privileged. Nor is this a case like *Halperin v Salvan* (117 AD2d 544, 548 [1st Dept 1986]), in which "the underlying lawsuit was a sham action brought solely to defame the defendant" (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015], citing e.g. *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 920 [1st Dept 2010]; *Sexter*, 38 AD3d at 172 and n 5).

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

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

ENTERED: JANUARY 2, 2018

CLERK

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

5331 Darryls Rawls, Index 305509/14
Plaintiff-Respondent,

-against-

David Simon, et al.,
Defendants-Appellants.

____

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for appellants.

Diamond & Diamond, Brooklyn (Stuart Diamond of counsel), for respondent.

____

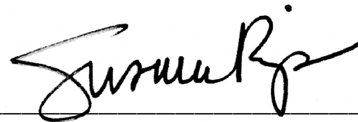
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about February 22, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Triable issues of fact exist in this action where plaintiff pedestrian was struck by defendants' vehicle. The record shows that the parties disagree about where the accident occurred with plaintiff asserting that he emerged from the back of a bus, raising an issue as to whether defendant driver had an opportunity to see him prior to the collision, whereas defendant maintains that plaintiff stepped out from in front of the bus, giving him no time to react. Moreover, defendant testified that he was traveling between 25 and 27 miles per hour at the time of

the impact, but given that the front of the bus, by his own testimony, was 2½ car lengths from a red light, issues of fact exist as to whether defendant was traveling at an excessive speed, and whether he would have had time to react had he been traveling at a slower speed as he approached the light (*see e.g.* *Gelster v Jaoude*, 81 AD3d 1297 [4th Dept 2011]; *compare DeJesus v Alba*, 63 AD3d 460 [1st Dept 2009], *affd* 14 NY3d 860 [2010]). Such conflicting versions of how the accident occurred raise credibility issues, and "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

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

ENTERED: JANUARY 2, 2018



CLERK

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

5332 The People of the State of New York, Sci 3495/15
Respondent,

-against-

Shaquille D.,
Defendant-Appellant.

____

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

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

____

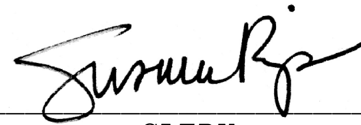
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J., at plea; Abraham Clott, J., at sentencing), rendered October 21, 2015,

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

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

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

ENTERED: JANUARY 2, 2018



CLERK

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

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

5333 Billiard Balls Management, LLC doing business as Slate,
Plaintiff-Respondent, Index 153477/16

-against-

Mintzer Sarowitz Zeris Ledva & Meyers, LLP,
Defendant-Appellant.

____

Kennedys CMK LLP, New York (Sean T. Burns of counsel), for appellant.

Chesney & Nicholas, LLP, Syosset (Stephen V. Morello of counsel), for respondent.

____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 7, 2016, which denied defendant's motion to dismiss this legal malpractice action for failure to state a cause of action and as untimely, unanimously affirmed, with costs.

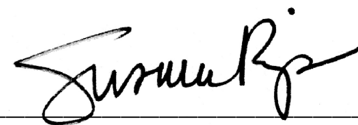
Plaintiff Billiard Balls Management (Billiard) sufficiently stated a claim for legal malpractice. The record clearly establishes an attorney-client relationship, as defendant entered into two stipulations extending Billiard's time to answer in an underlying personal injury action, which were filed in court, and represented itself as Billiard's attorney (*see Cooke v Laidlaw Adams & Peck*, 126 AD2d 453, 455 [1st Dept 1987]; *compare*

Pellegrino v Oppenheimer & Co., Inc., 49 AD3d 94, 99 [1st Dept 2008]).

The motion court also properly determined that the action was timely commenced (CPLR 214[6]). Assuming that the malpractice claim accrued on January 11, 2013, when the time to answer the underlying complaint expired, or the earlier date of December 28, 2012, when the insurer disclaimed coverage, Billiard was prevented from exercising any legal remedy by virtue of the underlying motion court's order, which denied the underlying plaintiff's motion for a default judgment against Billiard, until that order was subsequently reversed by the Second Department in September 2015 (*Gershman v Ahmad*, 131 AD3d 1104 [2d Dept 2015]; *see Coyle v Lefkowitz*, 89 AD3d 1054, 1056 [2d Dept 2011]; *Brown v State of New York*, 250 AD2d 314, 319 [3d Dept 1998]).

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

ENTERED: JANUARY 2, 2018



CLERK

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

5334 In re Tyjaa E. and Another,

Dependent Children Under Eighteen Years of Age, etc.,

Kareem McC.,
Respondent-Appellant,

Crystal E.,
Respondent,

The Administration for Children's Services,
Petitioner-Respondent.

____

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the children.

____

Order of fact-finding and disposition (one paper) of the Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about January 18, 2017, insofar as it determined, after a hearing, that respondent-father neglected one of the subject children and derivatively neglected the other, unanimously affirmed, without costs.

The findings of neglect are supported by a preponderance of the competent evidence (*see* Family Ct Act § 1046[b][i], [iii];

see also Matter of Daphne G., 308 AD2d 132, 135 [1st Dept 2003]). The record shows that the older child was subject to actual or imminent danger of injury or impairment of her emotional and mental condition from exposure to repeated incidents of domestic violence occurring in respondents' small shelter apartment, including the precipitating incident, during which the father choked, kicked and stomped on the mother's stomach, while she was pregnant with the younger child, in close proximity to the older child (*see Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]; *Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 404-405 [1st Dept 2013]). Since the conduct that formed the basis for the finding of neglect as to the older child was proximate in time to the younger child's birth, it can reasonably be concluded that the condition still existed (*see Matter of Jamarra S. [Jessica S.]*, 85 AD3d 803 [2d Dept 2011] [citations omitted]).

The medical records which included statements regarding domestic violence were properly admitted (*see People v Ortega*, 15 NY3d 610, 619 [2010]), and accorded the proper weight (*see Matter of Miguel S.*, 140 AD2d 202 [1st Dept 1988]). Further, the Family Court's credibility determinations are entitled to deference on appeal and are supported by the record on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]; *Matter of*

Aaron C. [Grace C.], 105 AD3d 548 [1st Dept 2013]).

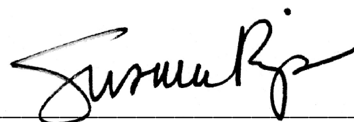
Contrary to the father's arguments, the court's rulings were proper, and the denial of his general requests for adjournments were a provident exercise of the court's discretion (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; CPLR 4011).

The father was afforded due process and was not deprived of the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 712-714 [1998]; *People v Baldi*, 54 NY2d 137, 146-147 [1981]). The father's contention that he did not have sufficient opportunity to confer with trial counsel is unpreserved (*see People v Garay*, 25 NY3d 62, 67 [2015], *cert denied* 136 S Ct 501 [2015]), and unsupported. The court's rulings limiting the scope of questioning at trial was likewise a provident exercise of discretion. The court properly proceeded to disposition in the

absence of objection (*see Matter of Kasey Marie M.*, 292 AD2d 190 [1st Dept 2002]).

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

ENTERED: JANUARY 2, 2018



CLERK

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

5335 The People of the State of New York, Ind. 3515/12
Respondent,

-against-

Jamie Turner,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered November 30, 2015, convicting defendant, after a jury trial, of burglary in the first and second degrees, and three counts of robbery in the second degree, and sentencing her, as a second felony offender, to an aggregate term of 14 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). "Defendant's accomplice liability could reasonably be inferred from the chain of events, which supports the inference that defendant intentionally took part in the [crime] by leading the victim . . . into a trap" (*People v Thomas*, 113 AD3d 447, 447 [1st Dept 2014], *lv denied* 22 NY3d 1159 [2014]; *see also People v*

Ficarrota, 91 NY2d 244, 249-250 [1997]). Defendant's theory that she unwittingly helped robbers enter the victim's apartment is implausible, as well as being incompatible with her behavior during and after the crime.

The court providently exercised its discretion in denying defendant's mistrial motion, which was the only remedy requested, when a lone juror may have briefly seen defendant in restraints. "[A] jury's brief and inadvertent viewing of a defendant in handcuffs does not warrant reversal" (*People v McCollough*, 135 AD3d 490, 490 [1st Dept 2016], *lv denied* 27 NY3d 1002 [2016]). Moreover, the juror assured the court that she could remain impartial.

Defendant was not deprived of a fair trial by testimony that a codefendant's nickname was "Two Guns," and that defendant called this codefendant, who was her boyfriend, by that nickname. This evidence did not suggest that defendant, herself, had committed any uncharged crimes, and the nickname was not particularly inflammatory.

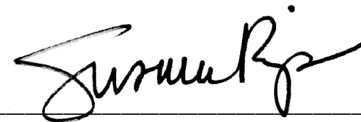
The court addressed the concerns of some jurors that audience members were taking photographs of them by conducting a thorough inquiry and determining that while some audience members

had cell phones, none of those phones contained photographs of the courtroom.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 2, 2018



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

5336 The People of the State of New York, Ind. 5826/14
Respondent,

-against-

Nelson Villanueva,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margaret Bierer 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 (Thomas Farber, J.), rendered September 8, 2015,

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

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

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

ENTERED: JANUARY 2, 2018

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CLERK

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

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

5337 The People of the State of New York, Ind. 1188/15
Respondent,

-against-

Donald Cheatham,
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 (Marcy L. Kahn, J. at plea; Ann M. Donnelly, J. at sentencing), rendered August 19, 2015, unanimously affirmed.

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

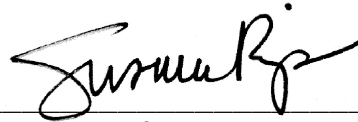
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

service of a copy of this order.

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

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

ENTERED: JANUARY 2, 2018



CLERK

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

5338N Tatiana Nedeltcheva, et al., Index 160991/15
Plaintiffs-Appellants,

-against-

MTE Transportation Corp., et al.,
Defendants-Respondents.

____

Parvan P. Parvanov, New York, for appellants.

Marjorie E. Bornes, Brooklyn, for respondents.

____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered August 10, 2016, which denied plaintiffs' motion for a default judgment, and granted defendants' cross motion to the extent of directing plaintiffs to accept defendants' answer and, sua sponte, deeming it timely filed and served nunc pro tunc, unanimously affirmed, without costs.

Plaintiffs were not entitled to a default judgment because the affidavits of service of the summons and complaint indicate that service was not effectuated at the proper address (CPLR 3215[f]). In any event, the motion for a default judgment was also properly denied since it was unsupported by a complaint or affidavit sworn to by a person with personal knowledge of the facts in this personal injury action (*see Saks v New York City Health & Hosps. Corp.*, 302 AD2d 213 [1st Dept 2003]). The court

also exercised its discretion in a provident manner in directing that plaintiffs accept service of defendants' answer in light of the approximate one-month delay in service of an answer, a lack of showing of prejudice to plaintiffs, and considering the deficiencies in the service of process (*see Yu v Vantage Mgt. Servs., LLC*, 85 AD3d 564 [1st Dept 2011]; *Scott v Allstate Ins. Co.,* 124 AD2d 481, 484 [1st Dept 1986]). Furthermore, as noted by the motion court, there is a strong public policy in this state is to resolve disputes on the merits (*see Arrington v Bronx Jean Co., Inc.*, 76 AD3d 461, 462 (1st Dept 2010]).

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

ENTERED: JANUARY 2, 2018

CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5339 The People of the State of New York, Ind. 3655/12
Respondent,

-against-

Kareem White,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered January 23, 2015,

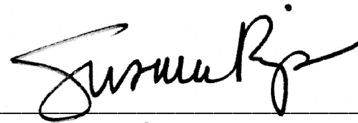
Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from

be and the same is hereby affirmed.

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

ENTERED: JANUARY 2, 2018



CLERK

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

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5340 In re Gerard Hayden, Index 102025/15
Petitioner-Appellant,

-against-

William J. Bratton, etc., et al.,
Respondents-Respondents.

____

Ungaro & Cifuni, New York (Nicholas Cifuni of counsel), for appellant.

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

____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered August 12, 2016, which denied the petition to annul respondents' determination, dated August 12, 2015, denying petitioner's application for accidental disability retirement, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

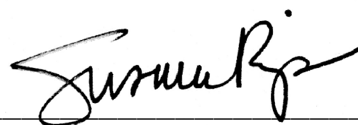
Petitioner failed to establish a causal connection between his disabling condition, acoustic neuroma, which has not been previously recognized as a "new onset disease[]," under Retirement and Social Security Law § 2(36)(c)(v), and his exposure to World Trade Center contaminants (*see Matter of Ryan v Kelly*, 154 AD3d 629 [1st Dept 2017]; *Matter of Stavropoulos v Bratton*, 148 AD3d 449, 453 [1st Dept 2017]). Petitioner's neuro-

oncologist, his only physician to comment on causation, stated that "[i]t is *possible* that . . . exposure may have contributed to pathogenesis." This combination of "possible" and "may" consists of speculation, which, absent explanation or supporting medical, epidemiological, or other evidence, does not satisfy the evidentiary standard for previously unrecognized "new onset diseases" (*see Stavropoulos* at 453). There is no basis to set aside the finding of the Board of Trustees, reached by a tie vote, as a matter of law (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]).

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

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5341 In re Chad Nasir S., and Another,

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

Charity Simone S.,
Respondent-Appellant.

Abbott House,
Petitioner-Respondent.

____

Neal D. Futerfas, White Plains, for appellant.

John R. Eyerman, New York, for respondent.

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

____

Orders, Family Court, New York County (Susan Knipps, J.), entered on or about July 26, 2016, which, to the extent appealed from as limited by the briefs, found that respondent mother is mentally ill within the meaning of Social Services Law § 384-b, unanimously affirmed, without costs.

Although this nondispositional order is not appealable as of right (*see* Family Ct Act § 1112[a]), the finding that the mother is mentally ill within the meaning of Social Services Law § 384-b constitutes a permanent and significant stigma that might impact her status in future proceedings (*see Matter of Nekia C.*, 155 AD3d 431 [1st Dept 2017]). Accordingly, the Court, on its

own motion, deems the notice of appeal to be a request for leave to appeal, and hereby grants leave to appeal (*id.*).

Clear and convincing evidence supports the finding that the mother suffers from a mental illness as defined by Social Services Law § 384-b(4)(c) and (6)(a). The court-appointed psychologist who examined the mother for several hours and reviewed her extensive medical history opined that she is presently and for the foreseeable future unable to provide adequate care for the children due to mental illness (*see* Social Services Law § 384-b[4][c]; [6][a]; *see Matter of Jeremiah M. [Sabrina Ann M.]*, 109 AD3d 736 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]). His uncontroverted testimony established that the mother's prognosis was "quite poor" because she lacks insight into her mental illness, refuses counseling and psychotropic medication, and did not continue her therapy once her therapist stopped working at the facility she was attending. The psychologist also noted that there was a possibility that the mother would require future hospitalizations, which could leave the children without someone to care for them (*see Matter of Sharon Crystal F. [Nicole Valerie D.]*, 89 AD3d 639, 640 [1st Dept 2011], *lv denied* 18 NY3d 808 [2012]; *Matter of Susan F.*, 106 AD2d 282, 283 [1st Dept 1984]).

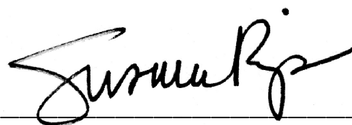
Although the mother is correct that hearsay statements made by the father in the expert's report were inadmissible and should have been stricken, any error was harmless. The admissible evidence in the record, including the portions of the expert's report that did not include hearsay, was sufficient to support the finding that the mother is mentally ill within the meaning of Social Services Law § 384-b (*see generally Lubit v Lubit*, 65 AD3d 954, 956 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]; *Matter of Benjamin L.*, 9 AD3d 153, 158-159 [1st Dept 2004]).

Family Court properly drew a negative inference from the fact that the mother, while present at the hearing, did not

testify (*see Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562 [1st Dept 2013]).

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5342 Tyrone Jones, Index 24434/14E
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

____

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

Raphaelson & Levine Law Firm, New York (Jason S. Krakower of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 17, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when he slipped and fell on ice. Defendant submitted evidence, including the testimony of its supervisor of caretakers that the sidewalks abutting its building were free of ice and snow when he arrived at the building on the date of plaintiff's accident.

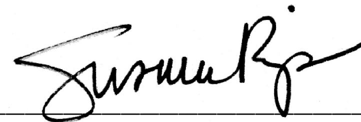
In opposition, plaintiff raised triable issues of fact as to whether a hazardous icy condition existed and whether defendant

had notice of that condition. Plaintiff's climatological expert opined, after reviewing relevant climatological reports, that snow had ceased falling two days before plaintiff's accident, but snow and ice would have remained on the ground in untreated areas on the morning of his accident, thus giving defendant sufficient time to discover and remedy the hazardous ice condition (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564 [1st Dept 2011]). Plaintiff also testified that before he fell he saw ice covering part of the sidewalk. He described the ice that he saw after his fall as "[b]rownish" and "dirty," thereby raising issues as to whether the icy condition had been on the sidewalk long enough to clear it before the accident (*see Perez v New York City Hous. Auth.*, 114 AD3d 586 [1st Dept 2014]; *Wright v Emigrant Sav. Bank*, 112 AD3d 401 [1st Dept 2013]). Furthermore, contrary to defendant's contentions, plaintiff identified the cause of his

fall, since he testified that he saw ice on the ground when he looked sideways, when he fell, face down, onto it (*see Lakins v 171 E. 205th St. Corp.*, 118 AD3d 451 [1st Dept 2014]).

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5344 The People of the State of New York, Ind. 8640/93
Respondent,

-against-

Michael Ferguson,
Defendant-Appellant.

Feldman and Feldman, Uniondale (Arza Feldman of counsel), for appellant.

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

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered February 10, 2015, convicting defendant, after a jury trial, of attempted rape in the first degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 5 to 10 years, unanimously affirmed.

Defendant's claim that the evidence was legally insufficient to establish attempted first-degree rape because there was no evidence of penetration is unpreserved for appellate review (*People v Gray*, 86 NY2d 10, 19 [1995]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

Unlike the completed crime, attempted rape does not require any proof of penetration. The victim's testimony about defendant's unsuccessful efforts to engage her in sexual intercourse by force overwhelmingly established both that defendant intended to commit rape and that he came dangerously close to doing so (*see e.g. People v Jackson*, 11 AD3d 369 [1st Dept 2004], *lv denied* 3 NY3d 757 [2004]; *People v Tenden*, 232 AD2d 244 [1st Dept 1996], *lv denied* 89 NY2d 947 [1997]).

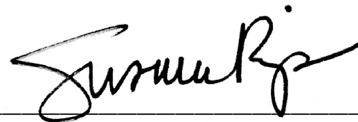
The court properly permitted the victim to testify as to her understanding of the term "penetration," because this explained why she initially told the police, medical personnel and her friend that no penetration had occurred. The victim was obviously not rendering an opinion on the law, and defendant's arguments in this regard are without merit. In any event, any error in admitting that testimony was harmless, because defendant

was not convicted of the completed crime of rape (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5345 Anthony Gonzalez, et al., Index 152557/13
Plaintiffs-Respondents,

-against-

Paramount Group, Inc.,
Defendant,

Allianz Global Investors U.S. LLC,
Defendant-Appellant.

____

Fabiani Cohen & Hall, LLP, New York (Allison A. Synder of counsel), for appellant.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondents.

____

Order, Supreme Court, New York County (Jennifer G. Schechter, J.), entered April 24, 2017, which to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment as to liability on their Labor Law § 240(1) claim against defendant Allianz Global Investors U.S. LLC, unanimously affirmed, without costs.

Plaintiff Anthony Gonzalez was injured when, while making an opening in a concrete wall for HVAC ductwork to be installed, cinderblocks above the opening fell and struck his knee. Contrary to Allianz's argument, the cinderblocks above the opening that fell were "falling objects" under Labor Law § 240(1)

required to be secured for the purposes of the undertaking (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Czajkowski v City of New York*, 126 AD3d 543 [1st Dept 2015]; *see also Stawski v Pasternack, Popish & Reif, P.C.*, 54 AD3d 619 [1st Dept 2008]).

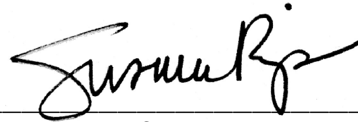
Allianz failed to raise a triable issue of fact warranting denial of plaintiffs' motion for partial summary judgment. As Supreme Court correctly indicated, the testimony and expert opinion that a safety device was neither necessary nor customary "is insufficient to establish the absence of a Labor Law § 240 (1) violation" (*Bonaerge v Leighton House Condominium*, 134 AD3d 648, 649 [1st Dept 2015]). *O'Brien v Port Auth. of N.Y. & N.J.* (29 NY3d 27 [2017]) is not to the contrary. Unlike in *O'Brien*, the experts here do not differ as to whether a safety device that was provided was adequate, but rather differ as to whether a safety device was required at all (*see Zimmer v Cheming County Performing Arts*, 65 NY2d 513 [1985]). In light of the uncontroverted fact that no safety devices were provided, it would be error to submit to the jury for their resolution the

conflicting expert opinion as to what safety devices, if any, should have been employed (*O'Brien* at 34).

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

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5346 Josette Basso, Index 103062/12
Plaintiff-Appellant,

-against-

EarthLink, Inc., et al.,
Defendants-Respondents.

____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Seyfarth Shaw LLP, New York (Gena B. Usenheimer of counsel), for respondents.

____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 20, 2016, which granted defendants' motion for summary judgment dismissing the complaint alleging age and gender discrimination under the State and City Human Rights Laws (HRLs), unanimously affirmed, without costs.

Plaintiff carried her "de minimis burden" of showing a prima facie case of discrimination based on age and gender (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113-114, 115 [1st Dept 2012] [internal quotation marks omitted]; *Baily v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 123 [1st Dept 2007]; *see generally* Executive Law § 296; Administrative Code of City of NY § 8-107[1][a]). Defendants do not dispute that plaintiff's age, 64 years, and gender are protected classes, or that plaintiff was

qualified for the position at issue. In addition, plaintiff demonstrated that her employment was terminated, that she was replaced by a younger man, and that she had been the only branch manager nationwide who was over 60 years old.

The motion court nevertheless correctly granted summary judgment dismissing the complaint because plaintiff failed to raise an issue of fact whether defendants' reason for terminating her employment was pretextual (*see Melman*, 98 AD3d at 113-114). Defendants demonstrated a legitimate, nondiscriminatory reason for eliminating plaintiff's branch manager position. Specifically, defendant EarthLink, Inc., was reorganizing and consolidating some branches to improve operational efficiency, so it eliminated one of two branch manager positions in the New York area. In addition, plaintiff's work performance, in particular, her sales record, was inferior to that of the other branch manager, Naim Mustafaj, a younger male.

Plaintiff does not argue that the consolidation itself was pretextual, and she failed to raise triable issues of fact whether defendants' assertion that she was terminated due to her comparatively poor work performance was pretextual (*see Cronin v Aetna Life Ins. Co.*, 46 F3d 196, 204 [2d Cir 1995]). She does not dispute the accuracy of the objective statistical sales data

on which defendants relied, which showed that Mustafaj performed better in the first quarter of 2012, leading up to her termination in April 2012. Instead, plaintiff cited facts to try to show that these three months of data are not an accurate or fair reflection of her overall performance. Her arguments, however, do not raise an issue of fact whether defendants' preference for an employee with a higher average for those three months was false. While defendants failed to find plaintiff another lateral or downgraded position, defendants terminated numerous other branch managers, including Mustafaj, plaintiff's younger male "replacement," within nine months of her termination, without finding them other positions in the company.

Nor do comments of her supervisor, defendant Michael Nicolosi, raise any triable issue regarding a discriminatory motive. Plaintiff's claims that Nicolosi did not spend much time with her, and her impression that he was uncomfortable around older women, and preferred to work with younger men, does not raise any triable issue. A plaintiff's "feelings and perceptions of being discriminated against are not evidence of discrimination" (*Bickerstaff v Vassar College*, 196 F3d 435, 456 [2d Cir 1999], *cert denied* 530 US 1242 [2000] [internal quotation marks and brackets omitted]).

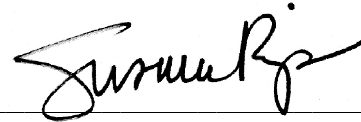
That Nicolosi told her to terminate two younger male sales executives does not show discriminatory intent, nor do his criticisms of her team. One derogatory reference to plaintiff and her male colleagues as girls when they lagged behind on the way to a restaurant, on an unspecified date, is "at most [a] stray remark[]" that does not, without more, constitute evidence of discrimination (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]).

Plaintiff incorrectly argues that the motion court failed to separately evaluate her City HRL claims under the City HRL's more liberal standard (*Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see* Administrative Code § 8-130). The court cited the applicable "mixed motive standard" under the City HRL (*Hudson*, 138 AD3d at 514; *Williams*, 61 AD3d at 78 n 27), and separately, and correctly, concluded that plaintiff failed to raise a triable

issue under this standard as well because she failed to show there were any issues of fact whether defendants acted with a gender or age discriminatory motive in concluding that Mustafaj was better suited to remain as the sole branch manager.

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5347 In re Mexvalo, S. De R.L. De C.V., Index 654716/16
Petitioner-Respondent,

-against-

Desarrolladora Farallon S.
De R.L. De C.V.,
Respondent-Appellant.

____

Balestriere Fariello, New York (John G. Balestriere of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Michael I. Verde of counsel), for respondent.

____

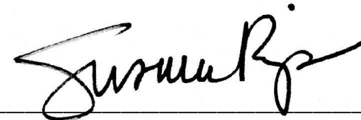
Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered February 23, 2017, inter alia, confirming an arbitration award, unanimously affirmed, with costs.

The record does not support respondent's contention that the arbitration award should be vacated on the ground of improper influence (*see* CPLR 7511(b); *Matter of Sobel [Charles Schwab & Co., Inc.]*, 37 AD3d 877 [3d Dept 2007]). The documentary evidence shows that the neutral's potential retention by an affiliate of petitioner on an unrelated matter, which was fully disclosed, occurred after the arbitral tribunal reached a decision on the merits. The sufficiency of the evidence is for

the arbitrators to determine (*Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991]). The tribunal rationally found, after lengthy cross-examination of the chief legal officer of petitioner's affiliate, that the legal costs that petitioner claimed as damages were credible, that petitioner was willing to provide redacted invoices for in camera inspection, and that, under the terms of the governing documents, petitioner was unconditionally responsible for indemnifying its affiliate for those costs and for recouping the funds from respondent.

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5348 The People of the State of New York, Respondent, Ind. 3450/14

-against-

Christopher Morales, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton 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 (Edwardo Padro, J.), rendered November 4, 2015,

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

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

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

ENTERED: JANUARY 2, 2018

CLERK

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

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5350 The People of the State of New York, Ind. 3136/08
Respondent,

-against-

Ramon Florian,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 18, 2011, unanimously affirmed.

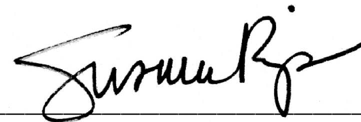
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: JANUARY 2, 2018



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Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5352 Op 105/17
[M-2417] In re 399 Exterior Street Associates, LLC,
Petitioner,

-against-

The City of New York,
Respondent.

____

Kramer Levin Naftalis & Frankel LLP, New York (James G. Greilsheimer of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Deborah R. Kerzhner of counsel), for respondent.

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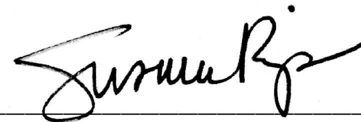
Petition, pursuant to Eminent Domain Procedure Law (EDPL) § 207, to set aside the determination of respondent City of New York, published April 6 and 7, 2017, which approved the acquisition of certain real property and zoning thereof for the project commonly referred to as the Development of the Lower Concourse Harlem River Park in the Bronx, denied, the determination confirmed, and the proceeding dismissed, without costs.

The determination and findings of the City fully satisfied the requirements of EDPL 204(B). There is no requirement that, in its determination and findings, the City address every objection raised at the public hearing (*see Matter of Arbern*

Sutphin Props., LLC v City of New York, 85 AD3d 1158, 1159-1160 [2d Dept 2011]). In any event, the record does not show that the City failed to consider petitioner's objections.

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5354 The People of the State of New York, Ind. 1113/14
Respondent,

-against-

Christian Darabie,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered March 31, 2015,

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

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

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

ENTERED: JANUARY 2, 2018

CLERK

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

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5355 Jonathan Bloostein, et al., Index 651242/12
Plaintiffs,

-against-

Morrison Cohen LLP, et al.,
Defendants.
- - - - -
Morrison Cohen LLP, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Stonebridge Capital, LLC,
Third-Party Defendant-Respondent,

Brown Rudnick LLP,
Third-Party Defendant.
- - - - -
[And Fourth Party Action]

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (David Ebert of counsel), for appellants.

Warner & Scheuerman, New York (Jonathon D. Warner of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered July 12, 2016, which, to the extent appealed from as limited by the briefs, granted third-party defendant Stonebridge Capital, LLC's motion to dismiss the claim for contribution as against it, unanimously affirmed, without costs.

Defendants/third-party plaintiffs are not entitled to

contribution, because plaintiffs (investors) seek to recover for purely economic loss resulting from a breach of contract (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21 [1987]; *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]).

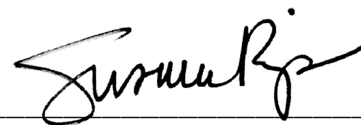
The allegations that third-party defendant Stonebridge, a financial servicer, signed transaction documents without reviewing them or alerting other parties to a last-minute change fall squarely within the scope of Stonebridge's contractual duties to assist investors in the execution of the transaction. The third-party complaint fails to allege that Stonebridge owed a duty of reasonable care to the investors independent of their agreement (*see Fidelity & Deposit Co. of Md. v Levine, Levine & Meyrowitz, CPAs, P.C.*, 66 AD3d 514 [1st Dept 2009]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320 [1995]).

Nor did Stonebridge's role as a financial services provider give rise to an extra-contractual duty of care (*Starr v Fuoco Group LLP*, 137 AD3d 634 [1st Dept 2016], *lv dismissed* 28 NY3d 1083 [2016]). Further, the investors expressly acknowledged in their agreement with Stonebridge that, with respect to its work structuring the subject transaction, it was not a fiduciary, and they were not relying on it for legal, tax, or accounting advice.

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

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5356 The People of the State of New York, Ind. 6065/08
Respondent,

-against-

Andre Evans,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 7, 2011, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 24 years to life, unanimously affirmed.

The record supports the court's finding that a witness's unavailability to testify at trial "was procured by misconduct on the part of defendant" (*People v Geraci*, 85 NY2d 359, 366 [1995]), and therefore that the witness's grand jury testimony could be introduced at trial. Evidence that the witness, who testified at the grand jury proceeding related to another defendant, was very reluctant to testify "in public" even before defendant's companions made attempts to intimidate her at

defendant’s behest does not vitiate the court’s conclusion that defendant’s “misdeeds were a significant cause of the witness’s decision not to testify” (*People v Smart*, 23 NY3d 213, 220 [2014]). Accordingly, defendant forfeited his right to confront this witness. In any event, any error was harmless in view of the overwhelming evidence of defendant’s guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

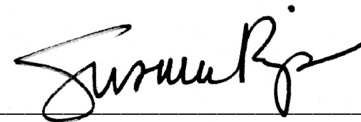
By failing to object, by making generalized objections, or by failing to request further relief after the court took curative actions, defendant failed to preserve his challenges to the prosecutor’s summation, and we decline to review them in the interest of justice. As an alternative holding, we find that the remarks at issue generally constituted reasonable comments on the evidence and fair responses to the arguments advanced in the defense summation (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]). To the extent any of the prosecutor’s comments, viewed in isolation, were inappropriate, they were not so egregious as to warrant reversal (*see People v D’Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81

NY2d 884 [1993]), particularly in light of the overwhelming evidence of guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5357N Patricia Curran, Index 101673/13
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants.

____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Law Office of Robert A. Horn, New York (Robert A. Horn of counsel), for respondent.

____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 15, 2016, which denied defendants' motion for a protective order, unanimously modified, on the facts, to grant the motion to the extent of limiting discovery to documents concerning the rear stairs of the bus on which plaintiff fell, and the absence of warning signs and handrails in the rear of the bus, for a period of five years preceding the date of the accident, and records relating to any modifications or changes to the interior stairs, handrails, or warning signs in the rear of the bus from the day of the accident to the day of the inspection, and the production of the bus for inspection and photographing by plaintiff in the presence of defendants'

representatives, and, as so modified, affirmed, without costs.

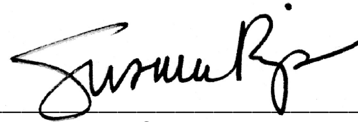
Predecessor models of the bus on which plaintiff fell and buses with front-facing rear seating are not relevant to whether the bus on which plaintiff fell was defectively designed (CPLR 3101[a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Similarly, while material concerning the rear stairs, handrails, and warning signs in the rear of the subject bus, i.e., the alleged dangerous conditions, is relevant, material concerning other sections of the bus or other defects is not relevant. The production of 15 years' worth of records is burdensome (*see* CPLR 3103[a]).

Plaintiff failed to demonstrate that she would be prejudiced by defendants' representatives observing and recording her inspection and photographing of the subject bus. Defendants' representatives may be present during the inspection, provided they do not interfere with the examination.

Defendants are not required to create a document, such as a certification of no changes, if none exists, but plaintiff is entitled to discovery regarding any changes to the subject bus from the date of the accident to the date of the inspection.

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

ENTERED: JANUARY 2, 2018



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Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5364 John D. Mastrobattista, Index 111452/06
Plaintiff-Respondent-Appellant,

Anne Roome,
Plaintiff,

-against-

Raquel Moura Borges, et al.,
Defendants-Appellants-Respondents,

Pier Head Associates, Ltd.,
Defendants, et al.

____

Mitchell Silberg & Knupp LLP, New York (David B. Gordon of counsel), for Raquel Moura Borges, appellant-respondent.

Daniel Cobrink P.C., New York (Daniel Cobrinik of counsel), for A2B LLC, appellant-respondent.

Law Offices of James M. McCarrick, New York (James M. McCarrick of counsel), for respondents-appellants.

____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.) entered August 18, 2016, which, to the extent appealed from and as limited by the briefs, denied defendants Raquel Moura Borges's and A2B LLC's motions for summary judgment dismissing the causes of action for encroachment and trespass, and granted the motions as to the cause of action to enforce a restrictive covenant, unanimously affirmed, without costs.

This action arises from a dispute between the owners of

neighboring properties located on East 62nd Street in Manhattan. Plaintiff John Mastrobattista owns the building located at 169 E. 62nd Street. Defendant A2B LLC owns the adjacent building, located at 167 E. 62nd Street; defendant Raquel Moura Borges is the former managing member of A2B. The buildings share a party wall.

In or about January 2004, defendants developed a plan for a vertical expansion of their premises, adding a new penthouse, deck, and privacy fence to the top of their building. This expansion involved use of the party wall as support, increasing the load the wall had to bear. During the course of the expansion, which proceeded over plaintiffs' objections, the roof of plaintiffs' building was cut through, allegedly causing leaks in and damage to plaintiffs' building.

Plaintiffs allege, among other claims, defendants' violation of a restrictive covenant dating from 1869, trespass, and encroachment. Plaintiffs maintain that the new structures permanently encroach on plaintiffs' respective sides of the party wall, as well as place an additional, excessive load on the wall.

Defendants A2B and Borges moved for summary judgment dismissing the complaint. The motion court denied defendants' motion insofar as it sought dismissal of plaintiffs' causes of

action for trespass (third cause of action) and encroachment (continuing trespass) (second and fifth causes of action) finding that plaintiffs' allegations concerning changes to the party wall undermining its structural integrity "states a cause of action for violations of plaintiff's easement and property rights." The motion court granted the motion to the extent it sought dismissal of the remaining causes of action, including the first cause of action for breach of a restrictive covenant.

The motion court correctly denied the motion insofar as it sought dismissal of the causes of action for encroachment and trespass. "A party wall is for the common benefit of contiguous proprietors. Neither may subject it to a use whereby it ceases to be continuously available for enjoyment by the other. . . A wall may be carried by either owner beyond its height as first erected, provided only it is strong enough to bear the weight and strain" (*Varriale v Brooklyn Edison Co.*, 252 NY 222, 224 [1929]). It was defendants' burden, as movants, to offer evidence establishing their prima facie entitlement to summary judgment (*see Kebbeh v City of New York*, 113 AD3d 512 [1st Dept 2014]). This they have failed to do. Indeed, plaintiffs in opposition proffer evidence that the alterations to the party wall have undermined the structural integrity of their buildings.

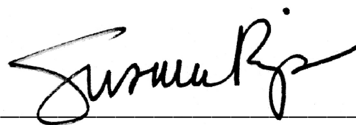
Plaintiffs’ engineer opined that defendants failed to detail a flashing system and to adhere to industry standards, occasioning damage. He further opined that it was impossible to ascertain whether the new masonry is properly tied to the old masonry so as to provide the requisite structural stability.

The cause of action to enforce a restrictive covenant was correctly dismissed for lack of standing (*see Steinmann v Silverman*, 14 NY2d 243 [1964]). The covenant was entered into in 1869 by the original owner of one lot that included both of the subject properties and his immediate neighbor, and it contains no explicit provision that it is for the benefit of anyone other than the grantee.

We have considered the parties’ remaining arguments and find them unavailing.

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

ENTERED: JANUARY 2, 2018



CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4828 The People of the State of New York, Ind. 3998/13
Respondent,

-against-

Lorenzo Rodriguez,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered December 18, 2014, affirmed.

Opinion by Webber, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Troy K. Webber
Cynthia S. Kern
Peter H. Moulton, JJ.

4828
Ind. 3998/13

____x

The People of the State of New York,
Respondent,

-against-

Lorenzo Rodriguez,
Defendant-Appellant.
____x

Defendant appeals the judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered December 18, 2014, convicting defendant, after a jury trial, of burglary in the second degree, and imposing sentence.

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

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

WEBBER, J.

On August 28, 2013, at approximately 9:10 p.m., complainant Lopez returned to her top floor, one bedroom apartment in upper Manhattan, which she shared with her husband and two other individuals. When Lopez entered her bedroom, she encountered a stranger, later identified as defendant, standing near the bedroom window. Lopez screamed to her husband that someone was in the apartment. Defendant retreated out the window and up the fire escape ladder. Lopez then noticed that her iPad was missing from her bedroom table and her piggy bank was missing from where she had left it near the bedroom window.

At the same time, Police Officer Orlando Corchado and his partner, Officer Lassen, were on the roof of the building, performing a vertical patrol, checking every floor and then ascending to the roof.[1] Corchado was about 6 to 10 feet from the fire escape when he saw defendant climb up the fire escape ladder toward the roof. Defendant was wearing latex gloves and was carrying a white piggy bank in his left hand. Corchado asked defendant in English why he was there. Defendant answered in Spanish that he worked for the super. Ignoring Corchado's further request that he stop, defendant climbed back down the

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[1]The building was part of the Trespass Affidavit Program which authorized the police to enter.

ladder.

Defendant reappeared at Lopez’s window, climbed into the bedroom, and moved through the bedroom toward the apartment’s outer door. Along the way, he handed the piggy bank to Lopez’s husband and said, “I’m sorry, here’s your piggy bank.” Moments later, Corchado and Lassen followed defendant through the window into the Lopez apartment. Corchado asked Lopez if she knew defendant and if he worked for the super. Lopez replied that defendant “was a thief.” As Corchado proceeded after defendant, he saw him – who was in the hallway of the apartment – reach behind his back and remove an iPad mini that was stuffed in the back waistband of his jeans. Defendant appeared about to discard the iPad when one of the residents of the apartment grabbed it from him. Defendant was placed under arrest by Corchado. Police Officer Lassen searched defendant and recovered from his pockets two flashlights, an iPad charger, a cell phone and latex gloves. Defendant was transported to the hospital and then to the precinct. While in a holding cell at the precinct, and before the administration of his *Miranda* rights, defendant stated that he was visiting his girlfriend who resided on the 4th floor of the building, and climbed up the fire escape so as to avoid being discovered by her husband.

Virtually from the beginning of the prosecution, defendant

filed numerous pro se motions, all before the trial court. Defendant filed cross grand jury notice indicating his desire to testify before the grand jury. He then filed a motion to dismiss the indictment based upon the legal insufficiency of the evidence before the grand jury, specifically his failure and the failure of his girlfriend to testify before the grand jury. Defendant also filed two motions for reassignment of counsel, both of which were granted. Defendant later filed a motion for a reduction in bail and a motion to dismiss the indictment on speedy trial grounds.

On May 8, 2014, shortly prior to the commencement of the suppression hearings, and represented by his third court-appointed attorney, defendant moved to proceed pro se. He informed the court that he wished to represent himself because "all of" his attorneys had "lied" to him.

In response to the court's inquiry, defendant stated that he had never before represented himself; that he had been represented by counsel in a trial that occurred 13 years earlier; that the highest level of education he had completed was the "[f]ourth grade of elementary school"; that he could not "read any English at all," and would require an interpreter to help him read the documents in the case.

The court stated to defendant that representing oneself at

trial was "a very, very bad idea" – which the court compared to "a doctor treating himself for his own illness" – and stated that it was "better" for defendant to allow "a trained person who is not personally involved in the case" to "look at the evidence." The court stated that defendant may "allow emotion and [his] lack of legal training to lead [him] to make some bad determinations at trial." While acknowledging that defendant had the right to choose to represent himself, the court stated "it's a bad decision."

The court also stated that if defendant chose to proceed pro se, he would be required to select a jury which involved knowing the rules of the court as well as the number of applicable challenges; decide whether to deliver an opening statement; question the People's witnesses; and decide without advice from anyone whether he would testify on his own behalf. The court informed defendant that neither the court nor the prosecution could provide him with legal advice. The court also suggested that defendant's effectiveness might be hampered because he would have to communicate with the jury through an interpreter. Finally, the court informed defendant that he would be required to abide by the court's rulings, just as any lawyer would, and would not be permitted to "talk out of turn" or "interrupt the court." Defendant assured the court that he understood all

requirements.

At the next court appearance, on May 13, 2014, counsel stated that he had spoken with defendant the previous day, and that defendant had given counsel permission to sit at counsel table and advise him. The court acquiesced and commenced the suppression hearing. On cross-examination of the People's first witness, the arresting officer, the court sustained the People's objection to defendant's very first question. Defendant then announced that he was "not going to continue here," and started to leave the courtroom. The court stated that while defendant was free to leave, the hearings and trial would continue without him. Defendant asserted that the court could not continue without him because "I'm my own attorney."

After further consultation with counsel, counsel informed the court that defendant had asked him to continue the hearing. Defendant stated that he would let counsel represent him, but that if he "[saw] that things are going wrong" he would not come back to court. The court reiterated that if he refused to return, they would proceed in his absence.

On the next day of the proceedings, on May 15, 2014, counsel reported that defendant again stated to him that he wanted to represent himself, and that he did not want counsel present. The court again acceded to defendant's request to proceed on his own,

however, directed counsel to remain. Defendant argued the suppression motion, contending that he had not been read his *Miranda* rights and therefore the statement should be suppressed. The court denied the suppression motion.[2]

The court then commenced the *Sandoval* hearing. The court first explained the procedure to defendant and then asked the People which prior convictions they sought to question defendant about should he testify. The People argued that they wanted to question defendant about two 1999 felonies– one for robbery in the second degree and the other for grand larceny in the third degree. The People stated that they wished to question defendant as to the underlying facts of each conviction, and elicit that defendant was currently on parole as a result of the felony conviction. The People also stated that they wished to question defendant about a 2010 misdemeanor for endangering the welfare of a child. Defendant argued that the People should be barred from questioning him about "things from my past." He argued that he was young and had made mistakes. The court ruled that if defendant testified, he could be asked about the two 1999 felony convictions and the 2010 misdemeanor conviction, but not about the underlying facts or his parole status.

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[2]The People stated that they would not seek to introduce defendant's precinct statement on their direct case.

The court then told defendant that potential jurors would be brought into the courtroom to begin voir dire. Defendant asserted that he was not prepared and requested additional time. The court denied the request, reiterating that it had tried to explain to defendant the difficulty of self-representation. The court reminded defendant that counsel was ready and able and willing to represent defendant. Defendant rebuffed the court's suggestion stating that counsel did nothing but urge him to plead guilty in return for a sentence of seven or eight years. When, during voir dire, the court denied defendant's for-cause challenge to a panelist, defendant declared that he did not "want to continue with this trial," and attempted to leave the courtroom. Defendant left the courtroom. A few minutes later, a court officer reported that defendant refused to return to court and did not want to be present for the duration of the trial.

The next day, May 16, 2014, defendant, after having met with counsel, apologized to the court for disrupting the proceedings, and stated that he again wished to proceed pro se. The case was adjourned to May 19, 2014. Due to an accident involving the Department of Correction bus on which defendant was a passenger, defendant was brought to the hospital and unable to appear in court. Defendant refused to come to court on May 20, 2014. When he appeared in court on May 22, 2014, defendant stated that he

continued to experience pain in his back. The court allowed defendant to continue to represent himself, but warned him that if there were any further disruptions they would proceed in his absence. At this point in the proceedings, defendant asked if he could plead guilty in exchange for a sentence of five years. The People refused to consent to such a plea. The court told defendant that upon a plea of guilty, he would sentence defendant to seven years incarceration. Defendant refused.

On June 18, 2014, when trial was scheduled to begin, defendant reported that he was still "getting therapy" for his back. The court adjourned the case to July 30, 2014, after telling defendant that a trial date would be set after defendant was physically fit. On July 30, 2014, defendant stated that he would be ready to begin trial on September 3, 2014.

On September 3, 2014, defendant stated that he wanted to submit a 30.30 motion. The court informed him that he could submit the motion at any time. On September 18, 2014, defendant requested a reduction in bail and the court scheduled a bail application on October 14, 2014. On that date, the court again urged defendant to allow counsel "to give you advice while sitting at the table with you." Defendant maintained that he would defend himself, that "the lawyers are not helping me," and that he did not want counsel next to him or giving him advice.

At that time, counsel filed a speedy trial motion “to dismiss or release” that defendant had written pro se, as well as his own affirmation in support of the motion. The court denied the motion in a written decision dated October 20, 2014.

On October 20, 2014, defendant stated that he was “not ready for trial,” and asked for another month to “read all the papers.” It was noted that all *Rosario* material had been turned over to defendant on May 15, 2014, and the court recalled that on July 30, 2014, defendant had said he could be ready for trial on September 3, 2014. Defendant insisted that he was not ready for trial. The court acknowledged that it was very difficult to prepare for trial while in custody and representing oneself without a lawyer. However, the court concluded that defendant had five months since the trial last started, and 2 ½ months since defendant’s injury, to be ready for trial.

Defendant accused the court of not being “just and fair,” and declared that “[i]f you continue to trial, you can do so by yourself, and then it will be on papers that I am not refusing to come to trial, but I am not ready.” The court explained that if defendant decided not to be present the trial would proceed in his absence. Defendant said, “I’m sorry, but I am leaving” and insisted, “[i]t is illegal to start without me.” Defendant left the courtroom, telling the court, “I’m not coming so [do not]

call me to court anymore."

The trial continued in defendant's absence with counsel representing him. In the middle of jury selection, defendant returned to the courtroom and stated that he wanted to represent himself. The court denied defendant's request stating that defendant had demonstrated that he could not abide by the court's rulings. Defendant stated that he would remain, select a jury himself and question the witnesses himself. Defendant was removed from the courtroom. Counsel asked the court to reconsider and to allow defendant to represent himself. The court declined to do so and the trial proceeded in defendant's absence.

Defendant argues that his waiver of his right to counsel at the suppression and *Sandoval* hearings was not knowingly, voluntarily, and intelligently made.

Clearly, a criminal defendant has a constitutional right to represent himself. Even where the accused may in fact be harming himself by insisting upon conducting his own defense, deference should be made to his individual autonomy and desire to represent himself (*People v McIntyre,* 36 NY2d 10 [1974]; *United States ex rel. Maldonaldo v Denno*, 348 F2d 12 [2d Circuit 1965], *cert denied sub nom. DiBlasi v McMann*, 384 US 1007 [1966]). The right must be honored provided the defendant makes an unequivocal

request, knowingly waives the right to counsel and has not engaged in conduct which would interfere with a fair and orderly proceeding (*see e.g. People v Arroyo*, 98 NY2d 101 [2002]; *People v Smith* 92 NY2d 516 [1998]).

As stated in *McIntyre*, "the right to defend pro se is ironic and perhaps enigmatic" (*McIntyre,* 36 NY2d at 14). "The multifaceted problems generated by a motion to proceed pro se" is a difficult task for the trial court (*id.*). Here the court was faced with a defendant who was adamant in representing himself. Defendant rebuffed all attempts by the court to abandon his stated wishes to represent himself. It was clear that if defendant were not allowed to proceed pro se there was the danger of the trial not proceeding and/or defendant disrupting the proceedings. Indeed, later in the proceedings, after defendant disrupted the proceedings and the court denied defendant's fourth request to proceed pro se, defendant had to be removed from the courtroom.

Defendant argues that the court failed to meet its obligation to engage in a "searching inquiry" to ensure that a defendant is "aware of the dangers and disadvantages of proceeding without counsel" (*People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied sub nom. New York v Wingate*, 565 US 1261 [2012]; *see also People v Cole*, 120 AD3d 72 [1st Dept 2014], *lv*

denied 24 NY3d 1082 [2014]). There is no mandatory catechism for the searching inquiry the court is required to engage in, and the court need not follow any particular formula (*People v Providence*, 2 NY3d 579, 580, 583 [2004]). The inquiry is adequate if it "accomplish[es] the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer" (*Arroyo*, 98 NY2d at 104). In determining the validity of a waiver, a court is not limited to examining the colloquy immediately preceding the waiver, but may consider the record as a whole (*see Providence*, 2 NY3d at 581). Further, "a searching inquiry 'encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity'" (*Cole*, 120 AD3d at 75, quoting *Crampe*, 17 NY3d at 482).

According to defendant, the court's inquiry was insufficient to ensure defendant's understanding with regard to two broad categories of information: (1) the nature of the charges against defendant and his sentencing exposure; and (2) the pitfalls of self-representation and the benefits of counsel.

The court's colloquy was consistent with the New York Model Colloquies, Waiver of Counsel. Defendant was made aware of the

risks inherent in proceeding pro se and was apprised of the singular importance of the lawyer in the adversarial system of adjudication (*Arroyo*, 98 NY2d at 104). The court drew defendant's attention to numerous tasks for which he would be responsible, if he proceeded pro se – jury selection, opening statement, questioning of witnesses, and summation. With regard to jury selection, the court specified some of the specialized knowledge defendant would require. The court advised defendant that he was susceptible to making bad decisions both because of "emotion" that would result from being personally involved in the case and because of "lack of legal training." Indeed, the inquiry here, was far more substantial than the inquiry that this Court found lacking in *Cole*, where the trial court "gave nothing more than generalized warnings" and provided the defendant with only one example of the tasks he would have to perform if he represented himself at trial (*Cole*, 120 AD3d at 80). The record is clear that defendant had a clear understanding of the pitfalls of self-representation and the benefits of counsel.

The record is also clear that defendant was well aware of the nature of the charges against him. In his pro se motions, defendant stated that he was charged with the felony of burglary in the second degree. Defendant correctly cited the Penal Law section. Defendant also moved, pro se, to dismiss the indictment

based upon legal insufficiency, indicating a knowledge of the crime as well as its elements.

What is unclear is whether prior to the waiver, defendant was aware of the sentencing parameters, specifically that he faced a minimum of 5 years and a maximum of 15 years. The People point to defendant's statements that counsel was persistent in his recommendation that he take the seven or eight years offered by the People. They also point to defendant's statement that he would enter a plea of guilty in exchange for five years incarceration. The People argue that these statements, both made after the waiver, by defendant, reflect defendant's understanding that he faced considerably more time in prison if he did not plead guilty. However, as defendant argues, even if this indicates that defendant was aware that he faced a term of incarceration longer than seven or eight years, it does not sufficiently demonstrate that defendant was aware of his actual sentencing exposure of 15 years. As this Court stated in *Cole*, "[t]he colloquy should also include [both] the nature of the charges and the range of allowable punishments" (*Cole*, 120 AD3d at 75). The court's failure to ensure that defendant was aware of his sentencing exposure mandates the conclusion that defendant's waiver of the right to counsel was invalid.

Defendant asserts that a finding that his right to counsel

was violated at the suppression and *Sandoval* hearings, requires remand for new hearings.[3] Defendant also argues that he is independently entitled to outright reversal of his conviction based on rulings made by the court.

"When a defendant has wrongly been denied counsel at a particular proceeding, [a reviewing court] do[es] not inquire whether the presence of counsel would have changed that proceeding's result," but rather assumes that the defendant would have prevailed at the proceeding (*People v Wardlaw*, 6 NY3d 556, 559, 560 [2006]). "But the remedy to which a defendant is entitled ordinarily depends on what impact, if any, the tainted proceeding had on the case as a whole. Where it had none, the conviction will be affirmed notwithstanding the error . . ." (*id.* at 559). In *Wardlaw*, the defendant was charged with the rape of his nine-year-old niece. The morning after the alleged rape, the defendant voluntarily went to the police precinct and made various inculpatory statements. At the *Huntley* hearing, the defendant's motion to dismiss his attorney and proceed pro se was granted. Following the hearing, where the defendant represented himself, his motion to suppress his statements was denied. The

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[3] It is unclear why defendant refers to pretrial hearings regarding the admissibility of a precinct statement, as this statement was adjudicated as a part of the suppression hearings.

defendant proceeded to trial with representation of counsel and was convicted. In affirming the conviction, the Court of Appeals held that the deprivation of counsel at the *Huntley* hearing was harmless in light of the "truly overwhelming" evidence of the defendant's guilt (*id*. at 560). The Court pointed to the victim's testimony, the testimony of her brother and mother, who testified that she reported the assault immediately; a nurse and a doctor, who testified as to her physical condition when they examined her the next day and the presence of semen in her vagina and anus; and a DNA expert, who testified that the semen was that of the defendant.

The "normal remedy for a violation of the right to counsel at a suppression hearing is a new suppression hearing, with a new trial to follow if, after the new hearing, the evidence is suppressed" (*id*. at 559). However, a new hearing would serve no purpose, and need not be ordered, where it is clear beyond a reasonable doubt that the result at a new trial would be the same even if the defendant prevailed at the suppression hearing.

As noted by the trial court in its decision on the suppression motion, the statement allegedly made by defendant to the arresting officer that he worked for the super was clearly not the product of any custodial interrogation but rather was a response to an investigative inquiry. Further, neither the piggy

bank nor the iPad were recovered from defendant by law enforcement officers. The record is uncontroverted that defendant returned the piggy bank to Lopez's husband and a tenant of the apartment grabbed the iPad as defendant attempted to discard it.

Even assuming counsel would some how be successful in arguing for the suppression of statements and property recovered, the evidence of defendant's guilt was overwhelming. Defendant was caught red-handed. Lopez encountered defendant — a person she did not know and did not allow into her home — in her bedroom. Defendant was observed wearing latex gloves by Lopez and P.O. Corchado. He was also observed to be in possession of Lopez's piggy bank.

Similarly, even assuming counsel would have been able to secure a more favorable *Sandoval* ruling, and defendant would have testified on his own behalf, the evidence overwhelmingly proved defendant knowingly and unlawfully entered the Lopez apartment with the intent to take property.

Defendant's argument that the court committed reversible error by denying his request for a one-month adjournment on October 20, 2014 is without merit. The adjournment was requested by defendant based upon his stated inability to review *Rosario* material. In denying defendant's request, the court took into

consideration that the materials were not particularly voluminous and that defendant had been in possession of the documents for five months. Given this, we find there was no abuse of discretion in denying the adjournment (*see People v Singleton*, 41 NY2d 402, 405-406 [1977]).

Defendant also argues that the court erred in denying his motion for a mistrial based on the court's instruction regarding defendant's absence from the courtroom. Defendant contends that the court's failure to follow the pattern jury instruction on "Absent Defendant" was prejudicial. In its instruction the court stated that defendant "decided" to "exercise" his right to be absent, and had "reasons for his decision." The pattern charge states "a defendant has the right to be present and the right not to be present," and then directs the jury not to draw any inference from the defendant's absence. According to defendant, the language employed by the court unduly emphasized that defendant chose to absent himself, and thereby "sen[t] the prejudicial message that defendant fled the jurisdiction, or declined to participate because he knew he was guilty." Contrary to defendant's assertions, nothing in the formulation used by the court, as compared to the pattern charge, suggested that defendant absconded. Arguably, it inured to defendant in dispelling any notion that he was excluded from the courtroom by

the court. Indeed, in response to the motion for a mistrial, the court stated that it had told the jury that defendant chose not to attend the trial precisely to avoid giving the jurors the impression that defendant had absconded.

While such "choice" language is inappropriate where the exceptional circumstance of a defendant who first appears and later absents himself is not involved, any error here was harmless (*see e.g. People v Wilson*, 138 AD3d 637 [1st Dept 2016], *lv denied* 28 NY3d 939 [2016]; *People v Brisbane*, 205 AD2d 358 [1st Dept 1994], *lv denied* 84 NY2d 933 [1994]). There is no reasonable basis for concluding that the verdict would have been different if the court had followed the pattern charge. After giving the initial absence charge that resulted in the mistrial motion, the court twice gave the jury instructions regarding absence that were consistent with the pattern charge and included no language related to defendant's exercising his right, choosing, or deciding to be absent. Further, as stated previously, the evidence of defendant's guilt was overwhelming.

Defendant's argument that the People committed misconduct in summation by "misstat[ing] the elements of the charged crime" and "constructively amend[ing] [the prosecution's] trial theory" is unpreserved and we decline to review it in the interest of justice. Counsel's unelaborated objections were inadequate to

make his position known to the trial court (*see People v Vega*, 238 AD2d 278 [1st Dept 1997], *lv denied* 90 NY2d 911 [1997]). As an alternative holding, we find it unavailing. The record reflects that the People in their summation accurately stated the statutory definition of building, under which unlawful entry into a part of a building with the requisite intent constitutes burglary even if defendant entered the building as a whole with license or without the intent to commit a crime (*see People v Smith*, 144 AD2d 600 [2d Dept 1988]).

We find no compelling reason for reducing defendant's sentence in the interest of justice. We have considered and rejected defendant's additional arguments.

Accordingly, the judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered December 18, 2014, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony

offender, to a term of incarceration of 14 years and 5 years post release supervision, should be affirmed.

All concur.

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

ENTERED: JANUARY 2, 2018

CLERK