SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 18, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5472 Bernadette Douglas, Index 20149/15E
Plaintiff,

-against-

Mister Sports, et al.,
Defendants.
- - - - -
125 Fordham LLC,
Third-Party Plaintiff-Appellant,

-against-

Jay J. Kim doing business as
International Pursuit of
New York, Inc.,
Third-Party Defendant,

LIG Insurance,
Third-Party Defendant-Respondent.

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Babchik & Young, LLP, White Plains (Thomas G. Connolly of counsel), for appellant.

The Chartwell Law Offices, LLP, New York (Christopher Wolseger of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered November 2, 2016, which, upon renewal and reargument, granted third-party defendant LIG Insurance's motion for summary judgment declaring that it is not obligated to defend or

indemnify third-party plaintiff (Fordham) in the underlying personal injury action, and so declared, and denied Fordham's motion for summary judgment declaring in its favor, unanimously affirmed, with costs.

Fordham is not entitled to coverage in the underlying action under the insurance policy LIG issued to defendant International Pursuit of New York, Inc., because the conditions for coverage under the supplementary payments provision of the policy have not been satisfied (*see Rojas v New York El. & Elec. Corp.*, 118 AD3d 642 [1st Dept 2014]). The provision states that if LIG defends an insured (International) in a suit, it will also defend an indemnitee of the insured who is named in the suit (Fordham), if, inter alia, "[t]he obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same 'insured contract' [lease agreement]." The lease agreement between Fordham as landlord and International as tenant requires International to indemnify Fordham for all liabilities "for which [Fordham] shall not be reimbursed by insurance." Thus, so long as Fordham has not exhausted its own insurance, International has no obligation under the lease to provide insurance coverage for it, and, accordingly, LIG has no obligation to provide coverage for Fordham under the terms of the supplementary payments provision of the insurance policy.

Another condition for coverage under the supplementary payments provision is that there be no conflict between the insured's interests and the indemnitee's interests. Given the allegation in the underlying action that the plaintiff tripped and fell due to a defective sidewalk condition, the conflict of interests between International as tenant and Fordham as landlord is evident.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5473 In re Michele S.,

A Child Under Eighteen Years
of Age, etc.,

Yi S.,
Respondent-Appellant,

Administration For Children's
Services of the City of New York,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 19, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 12, 2016, which found that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother neglected the child by inflicting excessive corporal punishment by scratching and pinching the child with enough force as to cause bruising and scratch marks that were visible days after the incident (*see* Family Ct Act § 1046[b][i]; *Matter of*

Naomi J. [Damon R.], 84 AD3d 594 [1st Dept 2011]). The child's out-of-court statements to ACS caseworkers that the mother physically abused her were sufficiently corroborated by the caseworkers' testimony as to their own observations of the child's injuries and the mother's testimony that she also saw a bruise on the child's arm (*see Matter of Jazmyn R. [Luceita F.]*, 67 AD3d 495 [1st Dept 2009]; *Matter of Fred Darryl B.*, 41 AD3d 276 [1st Dept 2007]). In addition, the finding that the mother neglected the child by verbally abusing her is supported by a preponderance of the evidence, because the child's out-of-court statements that the mother would tell her that she wished she had not been born and that it cost too much money to get the child out of foster care was corroborated by the mother's testimony (*see Matter of Michael M.*, 24 AD3d 199, 200 [1st Dept 2005], *lv denied* 6 NY3d 712 [2006]).

In view of our disposition we need not address the alternative basis for the Family Court's finding of neglect.

The mother's challenge to the language in Family Ct Act §

1012(f)(i)(B), "or by any other acts of a similarly serious nature requiring the aid of the court," as unconstitutionally vague is unpreserved and without merit (*see Nicholson v Scoppetta*, 3 NY3d 357 [2004]).

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5474 Wavertree Corporation, Index 651551/11
Plaintiff-Appellant,

-against-

Bellet Construction Co., Inc.,
Defendant-Respondent.

_____

Anderson & Ochs, LLP, New York (Steven S. Anderson of counsel), for appellant.

Camacho Mauro Mulholland, LLP, New York (Andrea S. Camacho and Wendy Jennings of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered October 21, 2016, in favor of defendant, upon a jury verdict, and bringing up for review an order, same court (Barbara Jaffe, J.), entered February 20, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its delay damages and attorneys' fees claims, unanimously affirmed, without costs.

Both the motion and the trial court properly determined that the jury should resolve the question of whether plaintiff was entitled to delay damages and attorneys' fees based on defendant's breach of the contract, and the jury found that defendant did not breach the contract (*see Smith v Putnam*, 145 AD2d 383, 385 [1st Dept 1988], *appeal dismissed in part, denied in part* 74 NY2d 758 [1989]; *Howard L. Jacobs, P.C. v Citibank*, 92

AD2d 786 [1st Dept 1983], *affd* 61 NY2d 869 [1984]).

A rational jury could also have found, based on the trial testimony, that plaintiff waived these claims when it made the final payment to defendant in full, with the approval of its architect, without deducting the liquidated damage amount and the attorneys' fees, given that the contract provided at § 2.3, that an extension of time to complete the project was defendant's remedy in the event delays resulted from plaintiff's actions.

The motion and trial courts also properly concluded that there were issues of fact as to plaintiff's entitlement to attorneys' fees and costs in that §§ 8.2.2 and 8.13.1 of the contract required a finding of fault by defendant, breach of the contract, or that the claim related to the performance of the work. Here, a rational jury could conclude that defendant was not at fault for any damages incurred by plaintiff or that it had waived the claim.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5475 Olyn Phin, Index 301299/13
Plaintiff-Respondent,

-against-

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

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Zachary W. Carter, Corporation Counsel, New York (Max McCann of counsel), for appellants.

Pollack, Pollack Isaac & DeCicco, LLP, New York (Michael H. Zhu of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 12, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The evidence shows that plaintiff resided in and was the leaseholder of an apartment where contraband was discovered pursuant to a search warrant. Plaintiff's residence and tenancy established her dominion and control over the apartment, and thus placed her in constructive possession of the contraband found therein (*see People v Diaz*, 24 NY3d 1187, 1190 [2015]; *People v Manini*, 79 NY2d 561, 573 [1992]). This is so despite the fact that her children's father had access to the apartment and also admitted and was charged with possession of the same contraband,

since "[p]ossession if joint is no less possession" (*People v Tirado*, 38 NY2d 955, 956 [1976]). This is also true despite the fact that plaintiff was not in the apartment when the search warrant was executed and the contraband discovered (*see Boyd v City of New York*, 143 AD3d 609 [1st Dept 2016]; *People v Hines*, 278 AD2d 849 [4th Dept 2000], *affd* 97 NY2d 56 [2001]). Plaintiff's possession of the contraband, in turn, gave rise to probable cause for her arrest. Nor does the record show that there were any material changes in fact to undermine the probable cause between her arrest and the filing of charges against her (*see Brown v City of New York*, 60 NY2d 893, 894-895 [1983]). There is no evidence in the record sufficient to overcome the presumption of validity in the search warrant which led to the discovery of the contraband (*see People v Calise*, 256 AD2d 64, 65 [1st Dept 1998], *lv denied* 93 NY2d 851 [1999]).

The existence of probable cause constitutes a complete defense to plaintiff's state claims (*see Nadal v City of New York*, 105 AD3d 598 [1st Dept 2012], *lv denied* 21 NY3d 861 [2013]; *Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011], *lv dismissed* 19 NY3d 952 [2012]), and federal claims for false arrest, false imprisonment, and malicious prosecution (*see Brown v City of New York*, 289 AD2d 95 [1st Dept 2001]; *Manganiello v*

City of New York, 612 F3d 149, 161-162 [2d Cir 2010]).

The existence of probable cause likewise defeats any claim for the same acts based on a lesser showing of negligence (*see Boose v City of Rochester*, 71 AD2d 59, 62 [4th Dept 1979]; *Garcia v Bloomberg*, 2015 WL 5444122, *4, 2015 US Dist LEXIS 123407, *10 [SD NY 2015], *affd* 662 Fed Appx 50 [2d Cir 2016], *cert denied* __ US ___, 137 S Ct 2266 [2017]).

There is no evidence to support any claim for use of excessive force in effecting her arrest.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5476 The People of the State of New York, Respondent, Ind. 5110/13

-against-

Joseph Solivan, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 3, 2014, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

The record supports the court's finding that a photo array was not unduly suggestive. Defendant and the other participants were reasonably similar in appearance (*see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]), and the

differences between defendant's photo and the other photos were not sufficient to create a substantial likelihood that defendant would be singled out for identification (*id.* at 336; *see also People v Foster*, 272 AD2d 410, 410-11 [2d Dept 2000], *lv denied* 95 NY2d 889 [2000]).

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.,

5477 In re Paul March, Index 651642/16
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

_____

Paul March, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered October 5, 2016, granting respondent's cross motion to dismiss the petition brought pursuant to CPLR article 75 to vacate an opinion and award terminating petitioner's employment as a teacher, unanimously affirmed, without costs.

The court properly found that the award was not arbitrary and capricious, and was supported by the evidence. The Hearing Officer engaged in an analysis of the facts and circumstances, evaluated witness credibility, and arrived at a reasoned conclusion. Petitioner's due process rights were not violated; he was provided with notice, an appropriate hearing, and the opportunity to present evidence and cross-examine witnesses (*see Matter of Kingsley v Redevco Corp.*, 61 NY2d 714 [1984]; *see also*

Matter of Chawki v New York City Dept. of Educ., Manhattan High Schools, Dist. 71, 39 AD3d 321, 323-324 [1st Dept 2001], *lv denied* 9 NY3d 810 [2007]), which he declined. The Hearing Officer's decision to deny any adjournment of the hearing to accommodate respondent's counsel was within the Hearing Officer's discretion under the parties collective bargaining agreement.

Petitioner failed to sustain his burden of demonstrating bias or misconduct by the Hearing Officer. Moreover, there is no support for petitioner's claims that the Hearing Officer conspired with respondent to deprive him of an opportunity to be heard, and issued a biased and unfair decision against him (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]).

The penalty of termination does not shock our sense of fairness, as the record shows that respondent provided petitioner with assistance and numerous opportunities, over a lengthy period of time, to improve his skills. The Hearing Officer's conclusion that petitioner was either unable or unwilling to adjust his

teaching methods to comply with the suggestions and strategies provided to him is supported by the evidence (*see e.g. Matter of Benjamin v New York City Bd./Dept. of Educ.*, 105 AD3d 677 [1st Dept 2013]).

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, JJ.

5479 John Kuzmich, et al., Index 155266/16
Plaintiffs-Respondents,

-against-

50 Murray Street Acquisition LLC,
Defendant-Appellant.

- - - - -

The Real Estate Board of New York
and The Public Advocate for the
City of New York,
Amici Curiae.

_____

Holwell Shuster & Goldberg, LLP, New York (James M. McGuire of counsel), for appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Serge Joseph of counsel), for respondents.

Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for the Real Estate Board of New York, amicus curiae.

Letitia James, Public Advocate for the City of New York, New York (Molly Thomas-Jensen of counsel), for the Public Advocate for the City of New York, amicus curiae.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 3, 2017, which, among other things, denied defendant's motion for summary judgment, granted plaintiffs' cross motion for partial summary judgment, declared that plaintiffs' apartments are subject to rent stabilization, and ordered that a special referee be designated to hear and determine the amount of overcharges and the amount of attorneys' fees and costs incurred by plaintiffs in litigating this action,

unanimously reversed, on the law, without costs, plaintiffs' cross motion denied, defendant's motion for summary judgment granted to the extent of declaring that plaintiffs' apartments were properly deregulated and are not subject to rent stabilization, the orders regarding the special referee vacated, and the matter remanded for further proceedings.

Except for condominiums and cooperatives, dwellings in buildings that receive tax benefits pursuant to Real Property Tax Law § 421-g are subject to rent stabilization for the entire period the building is receiving 421-g benefits (Real Property Tax Law § 421-g[6]). However, 421-g buildings are subject to the luxury vacancy decontrol provisions of Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-504.2(a), unlike buildings that receive tax benefits pursuant to Real Property Tax Law §§ 421-a and 489.

Real Property Tax Law § 421-g does not create another exemption to Rent Stabilization Law § 26-504.2(a). Supreme Court essentially interpreted Real Property Tax Law § 421-g(6)'s prefatory phrase "Notwithstanding the provisions of any local law for [rent stabilization]" to mean "Notwithstanding [the luxury decontrol] provisions of any local law." However, "[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the

legislative intent" (*New York State Psychiatric Assn., Inc. v New York State Dept. of Health*, 19 NY3d 17, 23–24 [2012] [internal quotation marks omitted]). Accordingly, the prefatory phrase, which also appears identically in RPTL 421-a(2)(f), must be read in tandem with the coverage clause of that section. The prefatory phrase and the coverage clause were both necessary to extend rent stabilization to certain dwellings in buildings receiving 421-g benefits.

As plaintiffs point out, if 421-g buildings are subject to luxury vacancy decontrol, then most, if not all, apartments in buildings receiving 421-g benefits would, in fact, never be rent-stabilized, because the initial monthly rents of virtually all such apartments were set, as here, at or above the deregulation threshold. Although courts should construe statutes to avoid "objectionable, unreasonable or absurd consequences" (*Long v State of New York*, 7 NY3d 269, 273 [2006]), the legislative history in this case demonstrates that the legislature was aware of such consequences during debate on the bill that enacted Real Property Tax Law § 421-g.

Plaintiffs also argue that a dwelling in a building receiving 421-g benefits cannot be deregulated upon the setting of the initial rent at or above the deregulation threshold. They contend that a rent-stabilized dwelling cannot be deregulated

unless it is first registered as a rent-stabilized apartment. However, this Court recently rejected this contention in *Matter of Park v New York State Div. of Hous. & Community Renewal* (150 AD3d 105, 113 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2017]).

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

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5483 The People of the State of New York, Ind. 5583/14
Respondent,

-against-

Arya Ramcharan,
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 (Noreen M. Stackhouse 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 October 27, 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 18, 2018

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

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5484 Raul Calleja, Index 301498/12
Plaintiff,

-against-

AI 229 West 42nd Street Property Owner, LLC, et al.,
Defendants.

- - - - -

AI 229 West 42nd Street Property Owner, LLC,
Third-Party Plaintiff-Respondent,

-against-

Nurminen Construction Corporation, et al.,
Third-Party Defendants,

Daffy's Inc.,
Third-Party Defendant-Appellant.

_____

Marshall, Dennehy, Warner, Coleman & Goggin, Rye Brook (Joseph J. Rava of counsel), for appellant.

Law Offices of Crisci, Weiser & McCarty, New York (David P. Weiser of counsel), and Lamonica Herbst & Maniscalco, LLP, Wantagh (Adam Wofse of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 2, 2016, which, to the extent appealed from, denied third-party defendant Daffy's Inc.'s motion to dismiss the third-party complaint as against it, unanimously affirmed, with costs.

The court correctly determined that this third-party action against Daffy's Inc. is not barred by the "Stipulated Order" in

Daffy's bankruptcy proceeding, in which third-party plaintiff AI 229 West 43rd Street Property Owner, LLC, waived and released any claims or causes of action relating to or arising under its lease with Daffy's, and the lease was "rejected and terminated." The motion papers make it clear that AI 229 West seeks to establish Daffy's liability in the underlying personal injury action for the sole purpose of recovering under Daffy's insurance policy in effect at the time of the accident. Because the policy would not inure to Daffy's pecuniary benefit, it was not part of the bankruptcy estate, and thus it is not covered by the Stipulated Order (*see In the Matter of Edgeworth*, 993 F2d 51, 55-56 [5th Cir 1993]). Moreover, this Court has recognized that "a claim asserted for the sole purpose of establishing the liability of a party's insurer is not barred by that party's discharge in bankruptcy" (*Roman v Hudson Tel. Assoc.*, 11 AD3d 346, 247 [1st Dept 2004], citing *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995]).

To the extent Daffy's argues that there is no evidence in the record that it had insurance coverage at the time of the underlying accident and that the third-party complaint is not limited either to the insurance coverage or by any stated amount, these arguments do not compel the dismissal of the third-party complaint as against Daffy's at this stage. AI 299 West, which

admits unequivocally that Daffy's is not liable for any claim in its bankruptcy case or against its estate, will have to establish the facts to support its claim for insurance proceeds. The bankruptcy court's retention of exclusive jurisdiction over issues arising from the bankruptcy does not affect AI 229 West's claim since, as indicated, the insurance proceeds are not included in the bankruptcy estate.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5485 The People of the State of New York, Respondent, SCID 99055/15

-against-

Justin McCalla, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about May 20, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure, based on clear and convincing evidence establishing the existence of aggravating factors not adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861–862 [2014]; *People v Velasquez*, 143 AD3d 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]). As the Board of Examiners of Sex Offenders recommended, an upward departure was supported by the extent of defendant's involvement in child pornography, and his previous federal arrest for possession of child

pornography, which resulted in a dismissal following defendant's completion of a pretrial diversion program.

Although defendant emphasizes that his prior federal arrest did not result in a conviction, the disposition appears to have been similar to an adjournment in contemplation of dismissal, which is not an adjudication on the merits (*Hollender v Trump Vil. Coop.*, 58 NY2d 420 [1983]). In any event, the underlying facts of a dismissed case may be considered in sex offender proceedings (*People v Burch*, 90 AD3d 1429, 1431 [3d Dept 2011]). Rather than profiting from an opportunity for rehabilitation, defendant went on to more serious involvement with child pornography, and this may indicate a danger of recidivism.

We also find that the mitigating factors cited by defendant were accounted for in the risk assessment instrument, and were outweighed by the seriousness of his conduct and prior history.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5486 Ada Lugo, Index 303535/14
Plaintiff-Respondent,

-against-

Belmont Boulevard Housing
Development Fund Company, Inc.,
Defendant-Appellant.

_____

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

Trolman, Glaser & Lichtman, P.C., New York (Tina M. Wells of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 20, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law, in this action where plaintiff was injured when the door to a trash compactor room closed on her thumb. Defendant failed to offer expert analysis to show that the condition of the door was not dangerous or defective, and instead

relied on the testimony of its employees, who merely observed the door and found that it functioned properly (*see Siciliano v Henry Modell & Co., Inc.*, 85 AD3d 534, 536 [1st Dept 2011]; *compare Hunter v Riverview Towers*, 5 AD3d 249 [1st Dept 2004]).

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5487 In re Marie S. C.,
Petitioner-Respondent,

-against-

Jamal Benjamin B.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

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

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about September 23, 2016, which, to the extent appealed from, denied respondent father's objections to the Support Magistrate's denial of the father's motion to vacate a support order that was entered upon his default in 2008, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in denying the father's motion to vacate his default, as the motion was untimely (CPLR 5015[a][1]; *Matter of Commissioner of Social Servs. of the City of N.Y. v Juan H.M.*, 128 AD3d 501 [1st Dept 2015]). The father brought his motion more than six years after it had been entered against him, despite his actual knowledge that the order was outstanding. The clerk's mailing of the order to the father's address as stated on the record constituted

sufficient notice to render the father's motion untimely (128 AD3d at 501).

Even if the father's motion to vacate the default order were timely, the father's motion still fails on the merits, as he failed to provide a reasonable excuse for his default and a meritorious defense (*see Matter of Rickelme Alfredo B. [Ricardo Alfred B.]*, 132 AD3d 490, 490 [1st Dept 2015]).

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5488-
5489 Index 161939/15

Doral Fabrics, Inc., et al.,
Plaintiffs-Appellants,

-against-

Cheryl Gold, individually and as
Preliminary Executrix of the Estate
of Eugene P. Gold, et al.,
Defendants-Respondents,

Jean Pierre Steudler et al.,
Defendants.

_____

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, Lake Success (Brian Thomas McCarthy of counsel), for appellants.

McLaughlin & Stern LLP, New York (Ralph Hochberg of counsel), for Cheryl Gold and Amy Kaufman Gold, respondents.

Katten Muchin & Rosenman LLP, New York (David L. Goldberg of counsel), for UBS AG, respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 27, 2016, which granted defendants Cheryl Gold and Amy Kaufman Gold's and UBS AG's motions to dismiss the complaint as against them, unanimously affirmed, with costs.

The complaint fails to state a cause of action for fraud (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The first step of the purported fraud, that the decedent, Eugene P. Gold, "diverted" income from plaintiff Barker-Doral Fabrics, Inc., did not constitute fraud; rather, as

the complaint alleges elsewhere, it was embezzlement.

The second step of the scheme, the sham loan of the diverted funds to plaintiff Doral Fabrics, Inc., would fulfil the requirements of fraud but for the fact that the decedent was the president and sole shareholder of Doral at the time of the loan; as such, his knowledge is imputed to it (*see 546-552 W. 146th St. LLC v Arfa*, 54 AD3d 543, 544 [1st Dept 2008], *lv dismissed in part, denied in part* 12 NY3d 840 [2009]). Thus, Doral cannot have been deceived; it knew that the loan was a sham. Contrary to plaintiffs' claim, there is record support for defendants' argument that the decedent was Doral's sole shareholder at the relevant time.

Because the complaint fails to state a cause of action for fraud, it is not necessary to consider whether the fraud claim is time-barred and whether New York has jurisdiction over defendant UBS.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5490 Lisa Sanchez, Index 20650/14E
Plaintiff-Appellant,

-against-

Herve Oxcin, et al.,
Defendants-Respondents.

_____

Law Office of Lisa M. Comeau, Garden City (Lisa M. Comeau of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovitz, P.C., Brooklyn (Robert D. Grace of counsel), for Herve Oxcin and Emmanuel Thelusme, respondents.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for Maria Latimer, respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 16, 2016, which granted defendants Herve Oxcin and Emmanuel Thelusme's motion for summary judgment dismissing the complaint as against them on the threshold issue of serious injury under Insurance Law § 5102(d), denied plaintiff's cross motion for summary judgment as to liability, and, upon a search of the record, granted summary judgment in favor of defendant Maria Latimer, unanimously modified, on the law, without costs, to deny summary judgment to all defendants with respect to the claim of serious injury to the cervical spine and to grant plaintiff's motion as to liability, and otherwise affirmed, without costs.

Plaintiff alleges that she suffered serious injuries to her cervical spine, lumbar spine, right shoulder, and right knee as a result of a motor vehicle accident that occurred in September 2013. Plaintiff underwent diagnostic arthroscopic surgery on her right knee in February 2014 and spinal fusion surgery on her cervical spine in April 2014.

The moving defendants relied on plaintiff's testimony that she had been involved in two earlier car accidents that resulted in injuries to her neck, back, and knees, and previous surgery on her knees in 2009. They also submitted the affirmed report of an orthopedist, MRI reports prepared by plaintiff's radiologists, and the unsworn report of a doctor/biomechanical engineer, who opined that the sideswipe accident could not have caused plaintiff's claimed injuries (*see Holmes v Brini Tr. Inc.*, 123 AD3d 628 [1st Dept 2014]).

The orthopedist, without addressing whether plaintiff had normal range of motion compared with normal values, opined that his examinations showed that the affected parts were normal, except for the cervical spine, in which there were limitations that he attributed to preexisting degeneration and the fusion surgery undertaken for that condition. He opined, based on review of her medical records and consideration of her obesity, that all plaintiff's claimed injuries were preexisting and

degenerative. The annexed MRI reports supported that opinion and established prima facie that plaintiff had preexisting degenerative conditions in her lumbar spine, right shoulder, and right knee, thus shifting the burden to plaintiff to address the evidence of degeneration shown in her own medical records (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *see also Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488 [1st Dept 2014]). However, the annexed MRI report of the cervical spine, which was the basis for the orthopedist's opinion, did not include any degenerative findings, although it confirmed the existence of a disc herniation with impingement and a disc bulge.

In opposition, plaintiff submitted the affirmed reports of a physiatrist who examined her two weeks after the accident and her orthopedic surgeon. Neither doctor adequately addressed the evidence of preexisting degenerative conditions. The orthopedist acknowledged plaintiff's previous accident but failed to provide an objective medical basis for determining that the meniscal tears he found were caused by the subject accident, rather than the earlier accident, degeneration, or plaintiff's weight (*see Alvarez*, 120 AD3d 1043; *Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]).

Assuming that the burden shifted to plaintiff to address

causation with respect to her cervical spine injury based on the engineer's unsworn report, since she did not object to its form (*see Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]), plaintiff raised an issue of fact through the reports of her physiatrist and orthopedic surgeon. The physiatrist documented limitations in range of motion upon examination shortly after the accident (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Salman v Rosario*, 87 AD3d 482, 483-484 [1st Dept 2011]). The orthopedic surgeon also measured contemporaneous and continuing limitations, and opined that the cervical spine injury was caused by the subject accident, specifically noting that plaintiff had recovered from the injuries sustained in the earlier accident before incurring the current serious injuries (*see James v Perez*, 95 AD3d 788, 789 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Plaintiff also submitted certified records of all treatment provided by the surgeon who performed the cervical spine surgery and, although not admissible, because unsworn (CPLR 3212[b]), these records are consistent with the sworn expert report (*cf. Garcia v Feigelson*, 130 AD3d 498 [1st Dept 2015] [unaffirmed MRI reports were of no avail to plaintiff even if admissible because they did not address causation or compare results of earlier MRIs]). Since there is no medical or other evidence in the record indicating

that plaintiff had a herniated disc in her cervical spine before the subject accident, nothing further was required of her in opposing the dismissal of her claim of serious injury to that part of her body.

Defendants met their prima facie burden as to the 90/180-day claim by submitting plaintiff's bill of particulars and deposition testimony, in which she admitted that she was not confined to her home and bed for the requisite period of time following the accident (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]). Plaintiff did not raise an issue of fact in opposition.

Plaintiff established her entitlement to summary judgment as to liability. Her uncontested deposition testimony demonstrates that defendants Oxcin and Thelusme's vehicle sideswiped the vehicle in which she was a passenger when it suddenly tried to enter another lane of traffic. Oxcin, the driver, "had a duty not to enter a lane of moving traffic until it was safe to do so," and his failure to heed this duty constitutes negligence per se (*Davis v Turner*, 132 AD3d 603, 603 [1st Dept 2015]; *see* Vehicle and Traffic Law § 1128[a]). Plaintiff's right to partial summary judgment is not restricted by any potential issue of comparative negligence between Oxcin and Thelusme on the one

hand and defendant Latimer, the operator of the vehicle in which plaintiff was a passenger, on the other (*Davis*, 132 AD3d at 603). Defendants submitted no evidence controverting plaintiff's account of the accident, and do not address the issue on appeal.

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5491 The People of the State of New York, Ind. 4219/15
Respondent,

-against-

Robert Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered April 13, 2016,

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

It is unanimously ordered that the 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 18, 2018

CLERK

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

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5492 The People of the State of New York, Respondent, Ind. 3331/12

-against-

Tiffany Solomon, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Renee White, J.), rendered November 19, 2012, 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 18, 2018

CLERK

Acosta, P.J., Sweeny, Gische, Andrias, Gesmer, JJ.

5493N In Re New York City Asbestos Litigation Index 40000/88
- - - - - 190281/14

Theresa Warren, etc.,
Plaintiff-Respondent,

-against-

Amchem Products, Inc., et al.,
Defendants,

J-M Manufacturing Company, Inc.,
Defendant-Appellant.

_____

Segal McCambridge Singer & Mahoney, Ltd., New York (Madina Axelrod of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Gennaro Savstano of counsel), for respondent.

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Order, Supreme Court, New York County (Peter H. Moulton, J.), entered on or about November 9, 2015, which granted plaintiff's motion for spoliation sanctions against defendant J-M Manufacturing Company, Inc. (JMM), unanimously affirmed, without costs.

In or around the 1990's, JMM lost and destroyed numerous banker's boxes containing the records of the manufacture, sale, and marketing of pipe which contained asbestos, a line of business it purchased from Johns-Manville in the 1980s. Although the first claim by an end user for personal injuries was not made with regard to that pipe until 2000, plaintiff adduced evidence

that JMM was on notice that the records might be needed for future litigation, and thus JMM's behavior constituted spoliation (*see Strong v City of New York*, 112 AD3d 15 [1st Dept 2013]; *see also Malouf v Equinox Holdings, Inc.*, 113 AD3d 422 [1st Dept 2014]). JMM was well aware of the long history of personal injury claims arising from other Johns-Manville asbestos-containing products, and the Worker's Compensation claims filed by individuals who worked in the manufacture of the pipes at issue.

JMM contemplated the possibility of litigation, having entered into a litigation cooperation agreement with Johns-Mansville at the time it purchased the pipe business, and internal memos from the 1980's show that executives and lawyers at JMM discussed the risk-benefit of continuing the product line, as well as the possibility that its insurance carriers would withdraw liability coverage for the product (*see e.g. New York City Hous. Auth. v Pro Quest Sec., Inc.*, 108 AD3d 471 [1st Dept 2013]; *Squitieri v City of New York,* 248 AD2d 201, 203 [1st Dept 1998]). Accordingly, the motion court did not abuse its broad

discretion in directing that the jury be charged with an adverse inference at the time of trial (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543 [2015]; *Gogos v Modell's Sporting Goods, Inc.* (87 AD3d 248 [1st Dept 2011]).

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

ENTERED: JANUARY 18, 2018

CLERK

Manzanet-Daniels, J.P., Gische, Andrias, Kern, Singh, JJ.

4901 Anthony Farrugia, Index 151857/12
Plaintiff-Respondent, 590634/13

-against-

1440 Broadway Associates, et al.,
Defendants-Respondents-Appellants,

Harbour Mechanical Corp.,
Defendant-Appellant-Respondent,

The Martin Group, LLC, et al.,
Defendants.

- - - - -

[And a Third-Party Action]

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Westerman Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Joanne Emily Bell of counsel), for appellant-respondent.

London Fischer LLP, New York (Brian A. Kalman of counsel), for respondents-appellants.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Jillian Rosen of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered September 15, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Harbour Mechanical Corp.'s motion for summary judgment dismissing the complaint and cross claims of defendants 1440 Broadway Associates, 1440 Broadway Owner, LLC and 1440 Broadway Mgt., LLC (collectively, the property owner), as against it, and denied the property owner's motion for summary judgment dismissing the complaint as

against them, affirmed, without costs.

Plaintiff, an operating engineer, contends that while working in the pump room of the property owner's building, he was injured when he stepped into an exposed opening or hole in a metal plate[1] that caused him to fall. Harbour Mechanical was a contractor that the property owner retained to convert its building from a gas heating system to a Con Ed "clean steam station" (the conversion project). Plaintiff claims that Harbour, while working on the project, which included removal of an oil tank and other equipment, caused, created, exacerbated or "launche[d] a force or instrument of harm" when it removed the tank and left a large opening in the metal plate exposed (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Plaintiff contends that the opening was not dangerous until the oil tank was removed because the opening had been beneath the equipment (*see Miller v City of New York* (100 AD3d 561 [1st Dept 2012]).

We find that Supreme Court correctly denied Harbour's motion for dismissal of the complaint and cross claims against it, as well as the property owner's motion for summary judgment

[1]The exposed area is sometimes described in the briefs as an opening or hole and the area encompassing the opening or hole is at times as grating made of metal, a metal grate or a metal plate. For expediency, the area at issue will be referred to here as an exposed opening in a metal plate.

dismissing the complaint. Defendants failed to demonstrate their entitlement to judgment as a matter of law (*see Lopez v New York Life Ins. Co.*, 90 AD3d 446 [1st Dept 2011]). Moreover, there are issues of fact whether the exposed opening in the metal plate was open and obvious and not otherwise inherently dangerous (*see generally Powers v 31 E 31 LLC*, 123 AD3d 421 [1st Dept 2014]).

Plaintiff testified at his deposition that on the day of the accident he was working in the building's pump room, repairing a valve on equipment that was only three or four steps away from an exposed opening in a metal plate on the floor. While facing the equipment he was working on, plaintiff stepped back to reach for a tool. As he did so, he stepped into an exposed circular opening in the metal plate, causing him to fall backwards and strike his head on the concrete floor.

Plaintiff's claim against the property owner is that it failed to maintain its property in a reasonably safe condition because the opening was a dangerous condition of which it had notice, but failed to take remedial measures (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). Plaintiff testified that when he first noticed the exposed opening, a few months before his accident, he took a picture of it with his cell phone and showed it to property owner's manager (Kohlbrecher). Kohlbrecher told plaintiff that he was busy at the moment, but that later he would

take a look at the condition for himself.

Plaintiff's claim against Harbour is that when it removed the old fuel tank that was situated on the metal plate, Harbour launched a force or instrument of harm by creating a dangerous condition or making the condition less safe than it was before Harbour did its work. Harbour accedes that it removed a tank and other equipment during the conversion project and that the tank was to be serviced. It denies, however, that it made any structural changes to the metal plate or that the metal plate was inherently dangerous. Harbour maintains that the metal plate and any opening in it, once exposed, was open and obvious, particularly since plaintiff knew it was there and even took a photo of it.

Alternatively, Harbour argues it did not owe plaintiff, a noncontracting third party, a duty of care, and that even if it did expose an opening in the metal plate when it removed the oil tank, it cannot be held liable in negligence for merely doing the work it was contractually retained to do. Harbour denies that under the terms of its contract it had any contractual obligation to cover up, remediate or protect any opening it made when removing equipment from the pump room, and that the property owner and/or subcontractors were responsible for doing so. Harbour contends that it cannot be found to have caused or

created a dangerous condition or have launched a force of harm because it did not make the exposed opening in the metal plate any less safe than it was before its removal of equipment from the pump room.

Although both defendants argue that the exposed opening in the metal plate was open, obvious, readily observable and known to plaintiff, a property owner has a nondelegable duty to maintain its premises in a reasonably safe condition, taking into account the forseeability of injury to others (*Basso*, 40 at 241). Moreover, although a defect or hazard may be discernable, this does not end the analysis, or compel a determination in favor of the property owner (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]). Plaintiff's awareness of a dangerous condition does not negate a duty to warn of the hazard, but only goes to the issue of comparative negligence (*Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 [1st Dept 2010]). Given the exposed opening's proximity to equipment that required service, the circumstances of plaintiff's accident present an issue of fact of not only whether the condition was open and obvious, but also whether it was inherently dangerous (*see Westbrook*, 5 AD3d at 69, 71-73; *see Rubin v Port Auth. of N.Y. & N.J.*, 49 AD3d 422, 422 [1st Dept 2008]). Some hazards, although discernable, may be hazardous

because of their nature and location (*see Westbrook* at 72). Defendants did not establish that the exposed opening - given its location in the floor near other mechanical equipment in the pump room - was not only open and obvious, but that there was no duty to warn, and that the condition was not inherently dangerous (*see Cupo v Karfunkel*, 1 AD3d 48, 51-52 [2d Dept 2003]).

A contractual obligation, standing alone, will not give rise to tort liability in favor of a noncontracting third party (*Espinal* 98 NY2d at 138]). One exception to this broad rule is where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*Espinal* at 140). We depart from the dissent in concluding that Harbour failed to make a prima facie showing that it did not owe plaintiff a duty of care and that it did not negligently cause, create or exacerbate a dangerous condition.

Even if Harbour's contract did not require that it cover, remediate, fill in or repair any of the floor openings resulting from its work, Harbour did not take even minimal corrective measures to protect the exposed opening in the floor after it removed the obsolete oil tank. Thus, while its removal of the tank was in fulfillment of its contractual obligation, a reasonable jury could find that Harbour's leaving an exposed and unprotected opening in the floor exposed, caused or created a

dangerous condition even if previously the metal plate containing the opening was not unsafe. The dissent's view relies on cases where the defendant did not owe a duty of care because the condition the plaintiff complained of was precisely what was called for in the defendant's contract (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351 [2007]; *Peluso v ERM* (63 AD3d 1025 [2d Dept 2009]; *Miller v City of New York*, 100 AD3d 561 [1st Dept 2012]; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 492-493 [1st Dept 2010]). We take no issue with Harbour's argument, and the dissent's view, that Harbour was contractually obligated to remove the tank and that it fulfilled its contract by doing so. Our view, however, is that while the metal plate and its opening was under the tank, it was not a hazard because the tank prevented, or at least made it difficult, for anyone to step into that area. However, once the tank was removed, and the opening below it exposed, the metal plate and its opening was no longer protected. There is a view of the facts that Harbour, by leaving the exposed opening without any kind of warning or minimal protection, created or caused an unsafe condition, or made the previously obscured opening in the metal plate "less safe" than before Harbour did its work (*see Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67 [1st Dept 2004], *lv dismissed* 4 NY3d 739 [2004]; *cf. Santos v Daniello Carting Co., LLC*, 148 AD3d 463, 464 [1st

Dept 2017], *lv denied* 30 NY3d 903 [2017]). Thus the issue is not whether Harbour had a contractual obligation to protect the opening, but whether by leaving the opening in the metal plate exposed it created an unreasonable risk of harm to the plaintiff.

The same issues of fact preclude summary dismissal of 1440 Broadway's cross claim as against Harbour for common-law indemnification and/or contribution (*see Scuderi v Independence Community Bank Corp.*, 65 AD3d 928 [1st Dept 2009]). Contrary to Harbour's argument in support of dismissing the cross claim for contractual indemnification, the indemnification provision in its construction contract does not run afoul of General Obligations Law § 5-322.1, because it contains the language "to the fullest extent permitted by law," which limits Harbour's obligation to indemnify to its own negligence (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *see also Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [1st Dept 2002], 99 NY2d 511 [2003]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

All concur except Andrias and Singh, JJ. who dissent in part in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting in part)

I agree with the majority insofar as it affirms the denial of the 1440 Broadway defendants' motion for summary judgment dismissing the complaint as against them. However, I disagree with the majority insofar as it affirms the denial of defendant Harbour Mechanical's motion for summary judgment dismissing the complaint as against it and 1440 Broadway's crossclaims for common-law indemnification and contribution. Harbour, an independent contractor, demonstrated prima facie that it owed no duty of care to plaintiff by submitting evidence that its contract with 1440 Broadway did not obligate it to cover or remediate any preexisting floor openings exposed by its work, and that 1440 Broadway, which owned the property and was aware of the openings, never requested that Harbour do so. In opposition, plaintiff and 1440 Broadway failed to raise a triable issue of fact as to whether Harbour failed to exercise reasonable care in the performance of its work and "launche[d] a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Consequently, I dissent in part.

1440 Broadway hired Harbour as a general contractor for the installation of a new Con Ed steam station. Months after Harbour and its subcontractors had substantially completed their work, plaintiff, an operating engineer employed by the property

manager, was changing a check valve on a pump in the building's subbasement. After installing the new valve, he turned to grab a tool and his foot allegedly went into an opening in a metal "diamond plate" in the floor that was a couple of feet from the pump, causing him to fall. While plaintiff claims that Harbour exposed the opening when it removed a tank that was covering it, there is conflicting testimony indicating that the opening was located in front of the tank and was already exposed.

Plaintiff had seen the opening, which he estimated was "two feet by two feet," and "maybe a foot deep," "once a couple of months before" his accident. At that time, he took a photograph of it with his cell phone and tried to show it to his supervisor, Wayne Kohlbrecher, who told him that he would take a look at the floor himself later. Although nothing obstructed plaintiff's view of the opening from where he was working, and the room was well lit for the most part, he did not see it on the date of his accident because he "was paying attention to the job and everything else going on in that room."

Generally, a contractual obligation standing alone will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 140). As is relevant to this appeal, an exception applies where "the contracting party, in failing to exercise reasonable care in the performance

of [its] duties, launche[s] a force or instrument of harm" by taking affirmative steps that create or exacerbate a dangerous condition (*id.*).

The majority finds that Harbour failed to make a prima facie showing that it did not owe plaintiff a duty of care under this *Espinal* exception. The majority posits that while Harbour was contractually obligated to remove the tank, a reasonable jury could find that Harbour's leaving an exposed and unprotected opening in the floor of the pump room, without any kind of warning, negligently created or exacerbated a dangerous condition because the tank had previously covered or "at least made it difficult" for anyone to step into that area, so that its removal made the area "less safe" than it was before.

However, "[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects" (*Rappaport v DS & D Land Co., L.L.C.*, 127 AD3d 430, 431 [1st Dept 2015]). Where the creation of the allegedly dangerous condition is precisely what was called for in the contract, the contractor cannot be said to have created an unreasonable risk of harm to plaintiff (*see Miller v City of New York*, 100 AD3d 561 [1st Dept 2012]; *see also Peluso v ERM*, 63 AD3d 1025 [2nd Dept 2009] [Where a contractor fulfilled its

contractual obligations in accordance with contract specifications and in the absence of evidence that it assumed a continuing duty to return to the premises after completing its work, it cannot be said to have affirmatively created a dangerous condition]).

Applying these principles, Harbour established prima facie that it did not owe plaintiff a duty of care through evidence that: (i) the opening in the metal plate predated its work and was there to allow for removal of the plate to service the piping for the old heating system and for maintenance for the trench beneath; (ii) the metal plate was not altered or damaged by Harbour in the course of its work; (iii) Harbour had no contractual obligation to remediate or repair any preexisting floor openings or metal plates that would become obsolete as a result of the change in the heating system; (iv) Harbour substantially completed its work by September or October 2011, months before plaintiff's accident in February, 2012, and was told to remove all of its equipment and that other parties would fill in obsolete floor penetrations; (v) two punch lists created by an engineering firm hired on behalf of 1440 Broadway did not list any open items relating to openings in the grate or floor and 1440 Broadway never made any complaints or contacted Harbour about the plate, the piping or the opening in the plate before

plaintiff's accident; and (vi) 1440 Broadway retained a third party to remediate and cover all obsolete openings in the floor in a separate project after plaintiff's accident (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007]; *Miller v City of New York*, 100 AD3d at 561; *Agosto v 30th Place Holding, LLC*, 73 AD3d 492, 492-493 [1st Dept 2010]; *Peluso v ERM*, 63 AD3d at 1025-1026).

In *Fung*, the defendant was contracted to plow snow. The plaintiff alleged that the defendant created or exacerbated a dangerous condition because its failure to salt or sand the area it plowed left open the possibility that the mounds of snow may have melted and refrozen, or that its plowing left a thin sheet of snow. The Court of Appeals held that "by merely plowing the snow, as required by the contract, [the] defendant's actions could not be said 'to have created or exacerbated a dangerous condition'" and that the defendant owed no duty of care to the plaintiff because the contract did not require the defendant to salt or sand the area absent a request to do so, and no such request had been made (9 NY3d at 361).

In *Miller*, this Court held that the defendant contractor could not be held liable to plaintiff for injuries sustained as a result of an alleged defect in the roadway where its contract with the utility called for the contractor to leave the trench an

inch and a half below grade and the utility failed to raise an issue of fact whether the contractor performed its contractual obligations negligently and created an unreasonable risk of harm to plaintiff (100 AD3d at 561). Contrary to the utility's contention, we found that no issue of fact existed as to whether the defendant breached its contractual duty to "protect and maintain" the 1½-inch-deep trench for five days after completing its work by failing to place cones or barricades in the vicinity (*id.*).

In *Agosto*, the defendant contractor was hired to remove the tiles from a lobby floor. Six weeks after the defendant finished its work, the plaintiff tripped on an area of the floor that had not been completed by the contractor hired to install the new flooring. This Court held that the defendant could not be said to have created an unreasonable risk of harm to plaintiff because the contract only required it to remove tiles, and there was no evidence that the defendant failed to exercise due care in performing the contract. Although the contractor had exposed a concrete section of floor, "the creation of that allegedly dangerous condition was precisely what was called for in [its] contract" (73 AD3d at 492-493).

In *Peluso*, the defendant contractor was required to backfill an excavated parking lot and tamp it down, but not repave it.

Approximately two months after the defendant had satisfactorily completed its work, the plaintiff allegedly was injured when she tripped and fell on rocks that had accumulated in the lot. The Second Department held that the contractor owed no duty to the plaintiff and did not affirmatively create a dangerous condition absent evidence it breached its contractual obligation to backfill the excavated areas or assumed a continuing duty to return to the premises and remedy any defects that developed there (63 AD3d at 1025-1026). Further, the defendant justifiably relied on the contract specifications and "reasonably believed that the employer would repave the parking lot after their work was completed, thereby eliminating any dangerous condition likely to cause injury" (*id.* at 1026).

As in *Fung*, *Miller*, *Agosto* and *Peluso*, while plaintiff attributes the dangerous condition to Harbour's work, there is no evidence that Harbour breached its contractual obligations or was negligent in the performance of its duties. Harbour removed the tank from the pump room as required and was not contractually obligated to take any action with respect to the preexisting floor opening allegedly exposed by its work. In fact, 1440 Broadway never requested that Harbour take any remedial action with respect to the opening in its punch lists or otherwise, and told Harbour that the work would be done by another contractor.

Harbour cannot be held liable to plaintiff for a failure to become "an instrument for good," which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party (*see Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]*; Berger v NYCO Plumbing & Heating Corp.*, 127 AD3d 676, 678 [2nd Dept 2015]). Furthermore, as in *Rappaport* (127 AD3d 430, 431, *supra*), the opening in the metal plate was visible to 1440 Broadway and it employees. Indeed, plaintiff acknowledges that he was fully aware of the existence of the opening and claims that he informed his supervisor about it because of safety concerns. Given these circumstances, the majority's holding would unduly expand an independent contractor's duty of care to a third party (*see Church*, 99 NY2d at 111).

Accordingly, the complaint should be dismissed as against Harbour. Further, in the absence of any evidence that Harbour breached a duty of care to plaintiff, Harbour is also entitled to summary judgment dismissing 1440 Broadway's cross claims against

it for common-law indemnification and contribution (*see San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590 [1st Dept 2012]; *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891 [1st Dept 2003]).

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

ENTERED: JANUARY 18, 2018

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5170-
5171N Umberto Arpaia,
Plaintiff-Respondent,

-against-

Michael Herbst,
Defendant-Appellant.

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Umberto Arpaia,
Plaintiff-Appellant,

-against-

Jonah Engler Silberman,
Defendant-Respondent.

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Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for Michael Herbst, appellant.

Edelman, Krasin & Jaye PLLC, Westbury (Kara M. Rosen of counsel), for Umberto Arpaia, respondent/appellant.

Montfort, Healy, McGuire & Salley, Garden City (Donald S. Neumann, Jr. of counsel), for Jonah Engler Silberman, respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 22, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to renew and/or vacate an order conditionally precluding him from offering any proof in support of his lost earnings and 90/180-day claims against defendant Jonah Engler Silberman, unanimously reversed, on the law and the facts, without costs, to grant the motion to vacate the preclusion order on condition that plaintiff's lawyer,

within 30 days of the date hereof, pay to defendant Silberman the sum of $2,500 to compensate him for costs in opposing the motion. Appeal from order, same court (Paul A. Goetz, J.), entered April 24, 2017, which denied defendant Michael Herbst's motion for summary judgment dismissing plaintiff's loss of earnings and 90/180-day claims, unanimously dismissed, without costs, as academic.

In order to be entitled to vacatur of a preclusion order, plaintiff is "required to show a reasonable excuse for his failure to comply with the order and a meritorious claim" (*Nieves v Citizens Advice Bur. Jackson Ave. Family Residence*, 140 AD3d 566, 567 [1st Dept 2016], citing *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). Here, plaintiff's two-week delay in complying with the conditional preclusion order was excusable because his attorneys reasonably misconstrued the order. Plaintiff and his attorneys believed that the request for payroll documents did not apply to plaintiff's father because he was not "hired after the subject occurrence," and plaintiff had previously submitted his father's W-2 forms. Moreover, defendant was not prejudiced by the delay because plaintiff did eventually provide extensive financial discovery, including the payroll documents, and plaintiff appeared for a deposition, which took place after defendant received the additional financial

documents. Plaintiff's deposition testimony, together with the accountant's affidavit, provide a basis for plaintiff's lost earnings claim and thereby demonstrate a meritorious claim (*Nieves* at 567 [granting the motion to vacate the order of preclusion where default of one and one-half months was caused by law office failure and the defendant was not prejudiced]).

However, because we are concerned with plaintiff's failure to comply with prior discovery orders, we impose a monetary sanction upon plaintiff and condition the grant of relief accordingly (*id.* at 567; *see also Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 145 AD3d 624, 625 [1st Dept 2016] [noting that in light of the strong public policy in favor of deciding actions on their merits, imposing a monetary sanction on plaintiff for its failure to comply with prior discovery orders was appropriate]).

Defendant Michael Herbst's motion for summary judgment dismissing plaintiff's loss of earnings and 90/180-day claim, which is premised upon his contention that the preclusion order in the action against defendant Silberman prevents plaintiff from offering proof of his claims against Herbst, is rendered academic

by our decision vacating the preclusion order.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 18, 2018

CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5216 In re Luis Velez, Index 100618/16
Petitioner,

-against-

New York State Office of
Children, et al.,
Respondents.

_____

Law Offices of Frank J. Livoti, P.C., Garden City (Frank J. Livoti of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Mark S. Grube of counsel), for respondents.

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Amended decision after hearing, of respondent New York State Office of Children and Family Services (OCFS), dated June 3, 2016, which found petitioner to have committed maltreatment of a child, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR 7804(g) (transferred to this Court by order of the Supreme Court, New York County [Lucy Billings, J.], entered November 21, 2016), dismissed, without costs.

The determination of OCFS is supported by substantial evidence (*see Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417 [1991]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]) which included the statements of the subject

child and the child's mother, reflected in the investigating caseworker's progress notes, indicating that petitioner had struck the mother and pulled her hair while he was driving and the child was riding in the back seat. The incident caused the child to become afraid and cry (*see Matter of Brown v Velez*, 153 AD3d 517 (2d Dept 2017]), and petitioner admittedly had swerved the car and feared an accident (18 NYCRR § 432.1[b][1]).

OCFS properly credited the agency's investigatory records containing the mother's and the child's statements, which were consistent with each other, as well as with the mother's statements to emergency room personnel and the police (*see Matter of Parker v Carrion*, 90 AD3d 512 [1st Dept 2011]). OCFS was not required to credit petitioner's version of events over that of the mother's and the child's (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *compare e.g. Matter of Veronica C. v Carrion*, 55 AD3d 411 [1st Dept 2008]; *Matter of Gerald HH. v Carrion*, 130 AD3d 1174 [3d Dept 2015]). Further, contrary to petitioner's argument, OCFS was entitled to find maltreatment even where the evidence presented at the criminal trial did not result in conviction (*see Matter of Kordasiewicz v Erie County Dept. of Social Servs.*, 119 AD3d 1425, 1426 [4th Dept 2014]).

Finally, substantial evidence supports OCFS's determination that petitioner's maltreatment of the child is "relevant and

reasonably related" to his employment at a childcare agency, or his potential adoption of a child or his provision of foster care (*see* Social Services Law § 422[8][c][ii]). Petitioner's refusal to take responsibility for his actions, acknowledge that he endangered the child, or appreciate the seriousness of his conduct, demonstrated that he is likely to commit maltreatment again – a factor reasonably related to his potential employment in the childcare field (*see Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]; *see also Matter of Boyd v Perales*, 170 AD2d 245 [1st Dept 1991], *lv denied* 78 NY2d 851 [1991]). Such information is provided to social workers investigating or treating child abuse or maltreatment, and to prospective employers, licensing agencies and adoption and foster-care agencies (*see Matter of Lee TT. v Dowling*, 87 NY2d 699, 703 [1996]).

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 18, 2018

CLERK

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

5343 Arthur Wiscovitch, Index 157394/12
Plaintiff-Respondent,

-against-

Lend Lease (U.S.) Construction
LMB Inc., formerly known as Bovis
Lend Lease LMB, Inc., et al.,
Defendants-Appellants.

_____

Cerussi & Spring, P.C., White Plains (Christopher B. Roberta of counsel), for appellants.

Kazmierczuk & McGrath, Forest Hills (John P. McGrath of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered December 19, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff, a steelworker, was employed by nonparty AJ McNulty & Co. on the Gotham Building construction project located in Long Island City. The defendants were the project's construction manager and owner.

On the day of the accident, plaintiff was assigned to a safety gang and was required to dismantle the safety protections that had been installed over openings in the construction floor for stairwells and elevator shafts so that workers could move on

to another floor of the project. Plaintiff testified that such openings were covered "for protection so [the workers] don't fall through them." The openings were covered and protected using cribbing, wood planks and safety cables. The cribbing, which acted as a small frame, was placed over the hole, the planks were laid on top of the cribbing and, finally, three safety cables were erected around the openings after they were covered with the cribbing and planks.

Plaintiff was injured when he was disassembling a safety protection over an opening in the construction floor made for an elevator shaft. Specifically, plaintiff testified that he was squatting down as he was removing the planks from the opening and that when he pulled one of the planks toward him to remove it, his left foot slipped on an oily substance on the floor causing his leg to kick out from under him. The far end of the plank then went down into the opening causing the end of the plank that plaintiff was holding to come up and hit plaintiff on the side of the neck. He was dragged toward the opening with the plank, and was pulled into one of the safety cables around the opening, which stopped him from falling completely into the opening. However, plaintiff injured his neck and back while trying to maintain control of the plank. Plaintiff testified that the cribbing had not been tied down or secured and that he observed

right after the accident that the cribbing actually fell into the hole.

We find that the motion court properly denied defendants' motion for summary judgment. Liability under Labor Law § 240(1) applies "where the [safety] device 'proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (*Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310, 312 [1st Dept 1997], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Initially, contrary to defendants' assertion, the cribbing and planking together constituted a safety device designed to protect the workers on the project from falling into the opening in the construction floor (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446 [1st Dept 2013] [plaintiff granted summary judgment on the Labor Law § 240(1) claim based on a showing that the plywood cover over the hole in which he fell was an inadequate safety device because it was unsecured at the time of the accident]). Further, it is undisputed that the cribbing was not secured at the time of plaintiff's accident, which allowed the plank plaintiff was holding to fall into the opening, dragging plaintiff toward the opening, causing his injuries.

To the extent defendants assert that they cannot be held

liable under Labor Law § 240(1), on the ground that plaintiff's accident was not caused by the inadequacy of a safety device but rather by him slipping on an oily substance, this does not support granting summary judgment to the defendants. Although plaintiff testified that he slipped due to the oily substance on the floor, the safety device comprised of the cribbing and planking, which was installed to prevent workers from falling into the opening in the floor, could be found by a trier of fact to be a proximate cause of plaintiff's injuries. Even if the oily substance on the floor was a proximate cause of plaintiff's accident, "[t]here may be more than one proximate cause of a workplace accident" (*Pardo v Bialystoker Ctr. & Bikur Cholim*, 308 AD2d 384 [1st Dept 2003]).

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

ENTERED: JANUARY 18, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4863 The People of the State of New York, Ind. 3582/09
Respondent,

-against-

Gentry Montgomery,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered May 24, 2012, reversed, and a new trial ordered.

Opinion by Acosta, P.J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Judith J. Gische
Barbara R. Kapnick
Marcy L. Kahn, JJ.

4863
Ind. 3582/09

_____x

The People of the State of New York,
Respondent,

-against-

Gentry Montgomery,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered May 24, 2012, convicting him, after a jury trial, of robbery in the first degree and attempted robbery in the first degree, and imposing sentence.

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

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

ACOSTA, P.J.

At issue in this case is whether defendant was deprived of due process and the right to present a defense when the trial court precluded him from presenting reverse *Molineux* evidence showing that another person had committed three uncharged robberies similar to the four robberies for which defendant was indicted. Indeed, the prosecutor relied on the theory that defendant was responsible for all four robberies in opposing defendant's request for separate trials, but later argued that there was insufficient evidence to link defendant to the unindicted robberies in opposing defendant's reverse *Molineux* request. The court also denied defendant's request to introduce his arrest fingerprint card, which defendant argues did not show that he had a scar on the palm of his hand, in contrast to a trial witness's description of her assailant. We find that these ruling were erroneous and, in combination, denied defendant a fair trial.

Factual Background

Pretrial suppression hearing evidence, including surveillance video, established seven robberies as part of a pattern committed by the same man: 1. Park View Café on June 2, 2009, at 6:30 a.m.; 2. Twin Donuts on June 8, 2009 at 6:30 p.m.; 3. Mi Pueblo Mexican Grocery on June 8 at 9:40 p.m.; 4. Starbucks

on June 8 at 11:00 p.m.; 5. Sanaa Deli1 on June 8 at 11:55 p.m.; 6. United Fried Chicken and Pizza [UFC] on June 9, 2009 at 12:35 a.m.; and 7. Seven Seas Deli on June 9 at 3:50 a.m.

Each complainant in the June 8 and 9 robberies described the perpetrator as a heavyset, bald black male, about five feet, seven inches, to five feet, nine inches, tall, with a goatee and wearing a New York Yankees shirt. Defendant was identified as a suspect in each robbery following his arrest on street-level drug charges, because he resembled the man in the surveillance video of one of the robberies.

Witnesses to three of the robberies did not identify defendant as the perpetrator. The UFC witness identified a lineup filler, and the Park View Café and Twin Donut witnesses did not recognize anyone in the lineup as the man who had robbed them.

The prosecutor obtained an indictment against defendant on the four robberies in which he had been identified: first-degree robbery at Mi Pueblo and Seven Seas, and attempted first degree robbery at Starbucks and Sanaa.

Defendant moved to sever the counts for trial on the grounds that he would be unduly prejudiced if all four robberies were tried together, because there was "a substantial likelihood" that, if the jury believed he committed one or more of the

robberies, it would "bootstrap the evidence in those offenses . . . to convict him of the other crimes."

The People argued that a joint trial of all four counts was appropriate because proof of each robbery would be material proof of the others. They contended that each offense was part of a "pattern robbery" and that proof of each "would be relevant at a trial of the other robberies or attempted robberies to help prove the defendant's identity." The court denied the motion.

At the first trial, the People were unable to produce a witness from the Sanaa Deli robbery, and that count was dismissed. The jury deliberated over the course of three days, repeatedly announcing that it was unable to reach a unanimous verdict. Ultimately, the court declared a mistrial.

Before the retrial, the prosecution stated that it was dropping another of the robberies from its case and would be proceeding to trial on only two of the seven robberies, the Mi Puebla and Starbucks incidents.

Defense counsel repeatedly asked the court for permission to introduce reverse *Molineux* evidence. He sought to show that defendant had not committed the Starbucks and Mi Puebla robberies by showing that he had not committed one or more of the other five robberies. Among other things, counsel sought to introduce surveillance video from three of the robberies not on trial to

show that the same perpetrator who committed those robberies, as seen on the videos did not match defendant's description.

Counsel also sought to introduce what he called "negative identification" evidence. Eyewitnesses to five of the seven robberies, who were unavailable at trial, "could not identify defendant from the PhotoManager System, photo arrays and/or lineups," and one witness who had testified at the first trial "recanted his prior identification." Counsel also asked for disclosure of evidence of the other robberies on *Brady* grounds (*Brady v Maryland*, 373 US 83 [1963]).

The prosecutor opposed, arguing that evidence tending to establish that a defendant did not commit an uncharged crime was irrelevant to prove that he did not commit the charged crime.

The court denied the application in its entirety. The court concluded that there was "no proof the same person was responsible for all of the robberies for which the defendant was placed in lineups other than police speculation of an alleged pattern based upon similarity or descriptions." There was nothing "particularly unique or sufficiently similar to the crimes at issue here to support the inference that the same man was responsible for all" of the crimes. That witnesses in the uncharged crimes had not identified defendant was irrelevant to whether he had committed the robberies for which he was on trial.

The court also denied counsel's request for the disclosure of the names and contact information of the persons who had not identified defendant. It said that the names were not *Brady* material, because they were "not the subject of this trial."

The Second Trial

On the evening of June 8, 2009, Anayeli Lezama, her sister, and her father were working at her uncle's grocery store, Mi Pueblo Mexicana, at 2109 First Avenue between 108th and 109th Streets. At about 9:40 p.m., a man came in and went directly to the cash register. There were no customers in the store. Lezama, who had been sitting behind the counter talking on the phone, got up and walked over to the man. In the well lit store, Lezama observed that the man was a black man in his 40s, about five feet, seven inches, tall, with a "chubby" build, with some stubble around his mouth as if he had not shaved for a few days, wearing a navy blue Yankees "practice jersey."

Lezama asked how she could help him. The man told her in a low voice to give him all the money, adding, "I have a gun. If not I will shoot you." Lezama saw that the man's hand was under his shirt and that he had "like a bulk down there." She immediately opened the register and gave the man all of the $1 bills. Lezama testified that, when she handed the robber the cash, he took it from her with his left hand, with his palm

facing up. She noticed there was a small circular white mark on the palm that looked like dry or dead skin. Because the robber had a dark complexion, it was noticeable on his palm. The robber took the bills, and demanded, "Give me all the money." Lezama told him, "[T]hat is all the money I have." The robber then left the store.

During the robbery, Lezama's sister had been seated on a stool opposite the cash register and could not see the robber's face. Lezama's father had been in the middle of the store and also had not seen her interaction with the robber. After the robber left, Lezama told them what had happened and called 911. The police arrived within moments. Lezama drove around the area with the officers but did not find the robber. The officers also showed her photographs at the precinct, but she did not see the robber.

At 11:00 p.m. on the same night, Virgin Marie Hernandez was the supervisor at Starbucks on 125th Street and Lenox Avenue, working with Duccu, her barista. She was about to close up when a man entered the store. The man was a little taller than Hernandez, who was five feet, three inches, tall, chubby and bald, with slight facial hair around his mouth. He approached the counter and faced Hernandez; part of his body and his face were captured on the video footage. Hernandez asked what she

could get for him. He whispered something that Hernandez did not understand. She again asked, "What [] can I get for you?" The man answered, "[G]ive me everything in your draw[er]s." Hernandez was so frightened that she froze and stared at the man for several seconds. The man gestured downward with his hand inside his pocket; Hernandez believed that he was pointing a gun at her.

Duccu walked over to see what was going on. Hernandez told him that the man was trying to rob them. The man said, "Don't move," to both of them as he continued pointing "something" at Hernandez in a "threatening" manner. Hernandez explained that in order to unlock the register to give him the money, she needed the keys to the register. The man allowed her to go but ordered Duccu to stay where he was. Duccu pretended to wipe the counter and, turning toward Hernandez, told her to take the keys and run down to the basement. As he suggested, Hernandez ran downstairs. There, she watched the surveillance television, saw another customer walk into the store, and then saw the customer, the robber and Duccu walk out. After they left, she went back upstairs and called the police. Police officers arrived, and took her to the precinct to speak to the detectives. She looked at photographs but did not see the robber's picture.

On June 10, 2009, Detective Michael McCready was assigned to

investigate the robberies. Other detectives had already obtained the Starbucks surveillance tape and pulled several still photographs from it, which McCready used in a "Wanted Poster" that he created. On June 11th, McCready received two photographs of defendant that had been taken on June 9th. Given the similarity of his appearance in those photographs to the appearance of the robber in the Starbucks video, McCready considered defendant a "person of interest." On June 18th, McCready arranged for defendant to be placed in lineups to be viewed separately by Hernandez and Lezama.

Lezama identified defendant as the man who had robbed her. When Hernandez viewed the lineup, she focused on number 5 (defendant). However, number 5 had more facial hair than the robber had had, and the lighting in the lineup room was not as bright as at Starbucks, so she initially said that she did not recognize anyone. When the detective asked again, she said that she recognized number 5 but he "look[ed] darker." She did not mean that his skin color looked darker; she meant that looking at defendant through the glass made him look darker than he had looked in the store.

Following the lineups, Detective McCready arrested defendant. Looking at defendant's hands, McCready noticed "a brown spot around the thumb area, and some white area around the

end of the finger" on the palm right beneath the four fingers of his left hand that looked like a callus.

Detective Edward Sanabria, an expert latent print examiner with the New York City Police Department, received two latent fingerprints for examination, which he testified were taken from the 125th Street Starbucks. After examining them, Sanabria concluded that only one was "of value," and determined that it did not match defendant's prints.

Defense counsel attempted to introduce the left-hand palm print from defendant's fingerprint card to demonstrate that it was unblemished and therefore in conflict with Lezama's description of the robber's left palm. Sanabria testified that finger and palm prints can be affected by cuts, wounds, blisters, and even dry hands. He said that if he encountered a situation where the quality of the prints was affected by dry hands, he would note that on the fingerprint document.

When defense counsel asked that defendant's fingerprint card be marked for identification so that it could be shown to the witness, the prosecutor objected on hearsay and, later, foundation grounds, because it was not a document that Sanabria had prepared, only one that the he had relied upon. Defense counsel explained that the prints were relevant because Lezama had testified that the robber had a mark on his hand, and

Sanabria had used defendant's prints for examination purposes. The court concluded that defense counsel did not have the foundation to admit the prints, because Sanabria was not the proper witness for introducing them.

At trial, both Lezama and Hernandez identified defendant as the robber. Hernandez testified that at the time of trial, defendant had more facial hair than he had had at the time of the robbery.

Analysis

Unindicted Robberies

Evidence that a defendant did not commit an uncharged robbery alleged to be part of a pattern of robberies is admissible when proof that the robberies were committed by the same person is strong enough that the evidence of defendant's innocence of the uncharged robbery would cast doubt on his guilt of the charged robberies (*People v DiPippo*, 27 NY3d 127, 135-136 [2016]; *People v Wright*, 270 AD2d 213, 214 [1st Dept 2000]). As the Court noted in *DiPippo*,

> "Where a defendant seeks to pursue a defense of third-party culpability at trial, evidence offered in support of that defense is subject to 'the general balancing analysis that governs the admissibility of all evidence' (*People v Primo*, 96 NY2d 351, 356 [2001]). Thus, a court must determine whether the evidence is relevant and, if so, whether 'its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury' (*id.* at 355; *see People v*

> *Negron*, 26 NY3d 262, 268 [2015]). Further, '[t]he admission of evidence of third-party culpability may not rest on mere suspicion or surmise' (*Primo*, 96 NY2d at 357; *see Holmes v South Crolina*, 547 US 319, 327 [2006]; *People v Schulz*, 4 NY3d 521, 529 [2005])" (27 NY3d at 135-136).

As relevant to this case, the Court also stated that it had

> "previously recognized that reverse *Molineux* evidence—i.e., evidence that a third party has committed bad acts similar to those the defendant is charged with committing — is relevant to, and can support, a third-party culpability proffer where the crimes reflect a 'modus operandi' connecting the third party to the charged crimes. . . Typically, in evaluating evidence of similar acts for the presence of a modus operandi when such evidence is offered by the People, we look to whether the 'similarities were unusual enough to compel the inference that the [same individual] committed both. Thus, the . . . *modus operandi* must be sufficiently unique to make the evidence of the uncharged crimes "probative of the fact that [the individual] committed the one charged."' Although defendant urges us to adopt a more relaxed standard for such proof when it is offered on behalf of the defense (*see e.g. United States v Aboumoussallem*, 726 F2d 906, 911-912 [2d Cir 1984]; *United States v Stevens*, 935 F2d 1380, 1404 [3d Cir 1991]; *State v Scheidell*, 227 Wis 2d 285, 304, 595 NW2d 661, 671 [1999]), we have no need to do so here because defendant's proof meets the ordinary standard for evaluating such evidence [that is, where the crimes reflect a 'modus operandi' connecting the third party to the charged crimes])" (*id.* at 138-139]).

Here, the facts of the unindicted robberies reflect a "modus operandi" connecting a third party to the charged crimes. Specifically, there is strong evidence that the same person committed at least the six robberies that occurred on June 8 and 9. Every witness gave a similar description of the robber: a bald black male, somewhere in his mid-40s, about five feet, nine inches, tall, weighing approximately 200 pounds, and wearing a blue Yankees

t-shirt. Every witness gave a similar description of the robber's modus operandi: he entered the store, approached the counter, suggested he had a gun, which he never displayed, and demanded cash from the register. The robberies all occurred in close geographic and temporal proximity, and they all occurred on the evening of June 8 or the early morning of June 9, with the exception of the Park View Café robbery, which had occurred a week earlier, on June 2. Moreover, surveillance video from four of the robberies removed all doubt — the man described by the witnesses, wearing a distinctive Yankees shirt, is seen committing four of the robberies on the same night, two of them never charged.[1]

Given defendant's right to use reverse *Molineux* evidence, defense counsel sought to introduce two categories of evidence. First, counsel wanted to introduce the surveillance videos from the three robberies for which defendant was not on trial to show that

[1]The court excluded the evidence of the other robberies on relevance grounds, a legal determination, i.e., it ruled that there was no "no proof the same person was responsible for all of the robberies," and never reached the question whether, in exercise of its discretion, it would have limited the evidence of the other robberies (*People v Negron*, 26 NY3d 262, 269 [2015] [where court justified exclusion of evidence on relevance grounds and not because probative value outweighed potential for undue prejudice or jury confusion, reversal required if a finding that evidence would have been admissible was "permissible" after appropriate balancing]; *see also People v Cronin*, 60 NY2d 430 [1983] [a trial court also errs when it wrongly perceives that it has no discretion to exercise]).

he was not depicted in them: the jury was entitled to make its own assessment that the person sitting before them in the courtroom did not match the person shown in the three videos. There was no evidentiary rule that would have excluded the surveillance videos.

Second, defense counsel sought to introduce evidence that three witnesses from uncharged robberies had viewed lineups in which defendant participated, but had not identified him as the man who had robbed them. Had defense counsel presented the failure-to-identify testimony directly through each eyewitness, no evidentiary bar could have been raised: each eyewitness would have been qualified to say that he or she had viewed defendant in a lineup and that defendant was not the man who had robbed him or her. Had defense counsel been unable to find each of the eyewitnesses, or been otherwise unavailable to testify, and had instead sought only to introduce one or more of the failures to identify through the detective who had supervised the lineup, the detective's testimony would have been hearsay. Counsel could have overcome the hearsay objection by showing that the identifications were admissible on constitutional grounds because they were reliable (*see People v Benjamin*, 272 AD2d 276, 277 [1st Dept 2000], *lv denied* 95 NY2d 904 [2000]). Because the court precluded admission of the failure-to-identify testimony on relevance grounds, counsel did not have a full opportunity to demonstrate the

reliability of the testimony.

Since the prosecutor was permitted to use surveillance video and eyewitness testimony from one robbery to prove that defendant had committed another, to satisfy due process, defendant must be permitted to use such evidence to prove that he did not commit the other robberies.

Fingerprint Card

The court also erred when it prevented defendant from admitting his fingerprint card. An adequate foundation is established if a police department fingerprint expert states that the card has been delivered to him from the department's files and that prints on the card have not been altered (*People v Basciano*, 109 AD2d 945, 946 [3d Dept 1985]).

Here, NYPD latent print examiner Sanabria laid an adequate foundation to admit defendant's fingerprint card. Sanabria testified that he was provided defendant's prints at the examination office, including a full set of his finger and palm prints. The paperwork he was given with defendant's prints stated that the prints had been obtained on June 9, 2009, the day of defendant's arrest on unrelated narcotics charges. Sanabria's testimony that he had received defendant's fingerprint card in the normal course of his business, and that he had relied on it in making his examination assessment was adequate to establish its

authenticity and unchanged condition (*People v Basciano*, 109 AD2d 945). Indeed, there was no allegation that the fingerprint card was ever out of police control, nor was there any hint that the fingerprint card had been tampered with or otherwise changed (*see People v Quinones*, 191 AD2d 398, 399-400 [1st Dept 1993], *lv denied* 82 NY2d 708 [1993]).

Counsel should have been permitted to introduce the fingerprint card and explore with Sanabria whether the left-palm print showed the markings that Lezama had described on the robber's left palm. Any weakness in the foundation went to the weight of the fingerprint evidence, not its admissibility (*People v Pacheco*, 274 AD2d 746 [3d Dept 2000], *lv denied* 95 NY2d 937 [2000]; *People v Guzman*, 272 AD2d 883 [4th Dept 2000], *lv denied* 95 NY2d 866 [2000]).

Nor was the cumulative effect of these errors (reverse *Molineux* and fingerprint card) harmless. The fingerprint card could have gone a long way to support defendant's theory by showing that a unique characteristic of the perpetrator was missing from defendant's palm. Defendant was arrested on an unrelated crime shortly after the Starbucks and Mi Puebla robberies. Any scars on his palm may have been depicted on his palm print.

Moreover, other than the two eyewitness identifications and the Starbucks surveillance video, nothing connected defendant to

the robberies: there was no fingerprint - or DNA - evidence recovered, defendant was not arrested in proximity to the crime scene, and, when his apartment was searched, nothing was found that connected him to the robberies; the police did not find the distinctive Yankees shirt he was alleged to have worn during the robberies. In addition, both eyewitness identifications were cross-racial (*see People v Boone* ___ NY3d ___, 2017 Slip Op 08713 [Dec 14, 2017]).

Eyewitnesses to three robberies — United Fried Chicken, Park View Café, and Twin Donuts — did not identify defendant in the lineup. The Seven Seas Deli robbery witness did not recognize defendant's photo when it was shown to him only days after the robbery in an array. Although he had identified defendant in the subsequent lineup, he did not identify him in court at the first trial, and expressed doubts about his prior identification, first admitting that he was less than sure that defendant was the man who had rob him, because "sometimes people look alike," and that after the lineup he "felt" unsure about the identification he had made, but then insisting that he hd identified the right man. Although the Sanaa Deli robbery witness identified defendant in the lineup, the witness never appeared in court to testify.

That the evidence was not overwhelming was confirmed by the fact that a prior jury that heard the same evidence as well as the

testimony of a third eyewitness who had identified defendant in a lineup was unable to reach a verdict (*see e.g. People v Bell*, 191 AD2d 361 [1st Dept 1993]).

In any event, there is a reasonable possibility that the erroneously precluded evidence would have affected the verdict. Since the prosecutor had bootstrapped its identification testimony, repeatedly telling the jury that two eyewitnesses from two separate robberies had identified defendant as the man who had robbed them, evidence that defendant's fingerprint card did not support Lezama's account and evidence that three other eyewitnesses had not identified defendant would have been a credible defense.

Accordingly, the judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered May 24, 2012, convicting defendant, after a jury trial, of robbery in the first degree and attempted robbery in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, should be reversed, and a new trial ordered.

All Concur.

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

ENTERED: JANUARY 18, 2018

CLERK