SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 13, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7515-
7516-
7517-
7518-
7519-
7520 Index 150869/17

Sarah Weinberg,
Plaintiff-Appellant-Respondent,

-against-

David Kaminsky, et al.,
Defendants-Respondents,

Jeffrey Asher, et al.,
Defendants-Respondents-Appellants.

____

Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel), for appellant-respondent.

Paduano & Weintraub LLP, New York (Leonard Weintraub of counsel), for respondents-appellants.

Gordon & Rees, New York (Ryan J. Sestack of counsel), for David Kaminsky, respondent.

Woods Lonergan PLLC, New York (Lawrence R. Lonergan of counsel), for Danielle Kaninsky, respondent.

Tarter Krinsky & Drogin LLP, New York (Michael E. Camporeale of counsel), for Linda Salamon and 371 West 46th Street Properties, LLC, respondents.

Bravermnan Greenspaun, P.C., New York (Kelly A. Ringston of counsel), for Leslie Sultan, respondent.

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Order, Supreme Court, New York County (Manuel Mendez, J.), entered February 22, 2017, which denied plaintiff’s motion for a stay of eviction, and order, same court and Justice, entered August 4, 2017, which, to the extent appealed from, granted defendants David Kaminsky, Danielle Kaminsky (together, the Kaminsky defendants), Jeffrey Asher, Robinson Brog Leinwand, Green, Genovese & Gluck P.C. (collectively, the Asher defendants), and Leslie Sultan’s motion to dismiss the complaint as against them, denied the Asher defendants’ motion for sanctions, and denied plaintiff’s cross motion to amend the complaint, and order, same court and Justice, entered January 25, 2018, which granted defendants Linda Salamon and 371 West 46th Street Properties, LLC’s (collectively, the Salamon defendants) motion to dismiss the complaint as against them and denied plaintiff’s cross motion to amend the complaint, unanimously affirmed, without costs.

The claims against Sultan and the Asher defendants are barred by the doctrine of res judicata (*see Weinberg v Sultan*, 142 AD3d 767 [1st Dept 2016] [affirming, inter alia, summary dismissal of legal malpractice claims]). Although the present claims against these defendants do not sound in malpractice, they

arise out of the same transaction as the dismissed malpractice claims (*see Matter of Josey v Goord*, 9 NY3d 386, 389-390 (2007]). Further, they are duplicative of the dismissed malpractice claims, since they do not allege independent intentionally tortious conduct (*see Atton v Bier*, 12 AD3d 240, 242 [1st Dept 2004]).

The claims against the remaining defendants are not subject to dismissal under res judicata, because they were dismissed not on the proof but on the sufficiency of the pleadings (*see Imprimis Invs. v Insight Venture Mgt.*, 300 AD2d 109, 110 [1st Dept 2002]). However, the instant complaint, while more verbose than the prior complaint, still fails to state a cause of action for "overreaching, undue influence and fraud" (*see Weinberg v Sultan*, 142 AD3d 767). Many of the allegations in the complaint and the proposed amended complaint are made upon information and belief, which is "not sufficient to establish the necessary quantum of proof to sustain allegations of fraud" (*Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]).

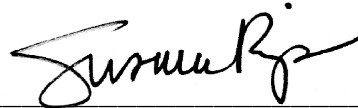
In light of the deficiencies in the complaint, plaintiff could not show a likelihood of success on her claims; thus, the court properly denied her motion for injunctive relief (*see Lee v*

215 W. 88 St. Holdings, LLC, 106 AD3d 460 [1st Dept 2013]; CPLR 6301). The foregoing notwithstanding, the court providently exercised its discretion in denying the Asher defendants' motion for sanctions at this stage.

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

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

ENTERED: NOVEMBER 13, 2018



CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7573 The People of the State of New York, Ind. 1584/12
Respondent,

-against-

Luis Gonzalez,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

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

____

Judgment, Supreme Court, Bronx County (Judith J. Lieb, J.), rendered April 20, 2015, unanimously affirmed.

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

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

ENTERED: NOVEMBER 13, 2018

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CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7574 & M-4928 Chi Hung Ngo, Index 154173/16
Plaintiff-Respondent,

-against-

Chi Vy Ngo also known as
Chivy Ngo, et al.,
Defendants-Appellants,

69 Clinton NPG, LLC,
Defendant.

____

Joseph C. Cacciato, New York, for appellants.

Max D. Leifer, P.C., New York (Max D. Leifer of counsel), for respondent.

____

Order, Supreme Court, New York County (Lucy Billings, J.), entered October 2, 2017, which, inter alia, granted plaintiff's motion for summary judgment on liability, unanimously affirmed, with costs.

In support of his motion, plaintiff, a 49% shareholder in a closely held corporation, made a prima facie showing that the sale of corporate real property, without his knowledge, was improper (*see Deutsche Bank Nat. Trust Co. v Gordon*, 84 AD3d 443 [1st Dept 2011]). None of defendants' submissions raise a material issue warranting the denial of plaintiff's motion. We

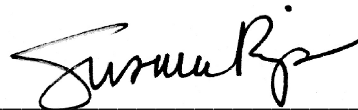
have considered defendants' remaining arguments and find them unavailing.

M-4928 - *Ngo v Ngo*

Motion for leave to amend the record denied.

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7575 In re Evan J.,

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

Donavan J.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

John R. Eyerman, New York, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about March 21, 2017, which, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child, and transferred custody of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7], [3][g]). The record shows that the agency exerted diligent efforts to encourage and strengthen the father's relationship with the child

by referring him to counseling, domestic violence, parenting, and drug treatment programs, advising him of the need to attend and complete such programs, and facilitating regular visitation with the child (*see e.g. Matter of Nejia C. [Kevin E.C.-Laurel S. McC.]*, 155 AD3d 431 [1st Dept 2017]; *Matter of Felicia Malon Rogue J.[Lena J.]*, 146 AD3d 725 [1st Dept 2017]).

The father engaged in some of the services to which he was referred and completed domestic violence and parenting programs. However, despite the agency's diligent efforts, during the statutorily relevant period, he failed to meaningfully address the problems leading to the child's placement, particularly, his domestic violence issue. Indeed, notwithstanding having attended a domestic violence program, the father was arrested and incarcerated for assaulting the mother in violation of an order of protection, and posted threatening comments on social media directed at the foster mother (*see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]; *Matter of Cerenithy B.[Ecksthine B.]*, 149 AD3d 637, 638 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]; *Matter of Charles Jahmel M.[Charles E.M.]*, 124 AD3d 496 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]). The father also failed to visit the child consistently. The agency was not a guarantor of the father's success in overcoming his predicament (*see Matter of*

Sheila G., 61 NY2d 368, 385 [1984]).

Nor did the court abuse its discretion in denying the father's counsel's request for a continuance to secure further testimony from a former caseworker whose progress notes were admitted into evidence (*see generally Matter of Steven B.*, 6 NY3d 888 [2006]; *Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559, 560 [1st Dept 2011], *lv dismissed, denied* 18 NY3d 975 [2012]). The caseworker had abruptly resigned and moved out of state where she was not amenable to service of a subpoena.

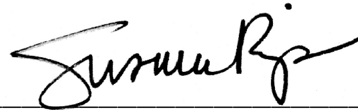
A preponderance of the evidence at the dispositional hearing supports the finding that the child's best interests would be served by terminating the father's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]) so as to facilitate the child's adoption by his kinship foster mother, with whom he has lived since the age of four months, and with whom he is well-cared for and thriving (*see Matter of Nephra P.[John Lee P.]*, 149 AD3d 642 [1st Dept 2017]).

Contrary to the father's argument, especially in light of his lack of insight or meaningful progress over a period of several years, a suspended judgment was unwarranted (*see Matter*

of Walter D.H.[Zaire L.], 91 AD3d 950, 951 [2d Dept 2012]). Termination of the father's parental rights, freeing the child for adoption, would provide the child with the opportunity to have a permanent family situation.

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7576 In re Miller Tabak & Co., LLC, et al., Petitioners-Appellants, Index 655416/16

-against-

Roy F. Coppedge IV,
Respondent-Respondent.

____

Fishman Decea & Feldman, Armonk (Thomas B. Decea of counsel), for appellants.

Elliot Felig & Associates, New York (Elliot Felig of counsel), for respondent.

____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about December 14, 2017, which denied the petition to vacate an arbitration award and granted the cross petition to confirm the award, unanimously affirmed, without costs.

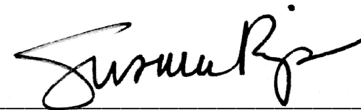
The arbitral award, inter alia, imposing joint and severable liability was not made in manifest disregard of the law (*see generally Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 [2006], *cert dismissed* 548 US 940 [2006]). Nor does it present any basis for concluding that the imposition of joint and several liability violates a public policy of the State (*see Transparent Value, L.L.C. v Johnson*, 93 AD3d 599 [1st Dept 2012]).

Petitioners waived any claim of arbitrator bias based on one

arbitrator's participation in a previous arbitration, which had been disclosed to the parties, by failing to raise any such claim or objection until the hearing was in progress (*see Matter of Atlantic Purch., Inc. v Airport Props. II, LLC*, 77 AD3d 824, 825 [2d Dept 2010]). In any event, there is no evidence to support any such claim (*id.*).

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7577-
7578 The Mazursky Group, Inc., Index 654064/13
Plaintiff-Respondent,

-against-

953 Realty Corp.,
Defendant-Appellant,

Melvin Stier,
Defendant.

____

Goldberg Weprin Finkel Goldstein LLP, New York (Neal M. Rosenbloom of counsel), for appellant.

Abbott Bushlow & Schechner, LLP, Ridgewood (Alan L. Bushlow of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Robert R. Reed, J.), entered March 22, 2017, awarding plaintiff money damages, interest and fees as against defendant 953 Realty Corp., unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 28, 2017, which, inter alia, granted plaintiff's motion for summary judgment on the cause of action for breach of contract, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The parties entered into a retainer agreement pursuant to which defendant 953 Realty Corp. would pay plaintiff a contingency fee of 25% of any real estate property tax benefit

plaintiff obtained for it under the New York City Industrial and Commercial Incentive Program (ICIP). In 2011, plaintiff succeeded in securing an ICIP benefit for defendant for a period of 25 years, retroactive to the 1999-2000 tax year and extending to the 2023-2024 tax year. The parties then entered an indemnification agreement, inter alia, obligating defendant to pay plaintiff an annual contingency fee for the entire 25-year term of the ICIP benefit. Defendant paid plaintiff 25% of the ICIP benefit it received for the tax years between 1999-2000 and 2012-2013, but refused to pay for any subsequent years.

Contrary to defendant's argument, neither the retainer agreement nor the indemnification agreement was procedurally unconscionable when made (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10–11 [1988]). The agreements were entered into by sophisticated entities as part of a normal commercial transaction, there is no evidence of deceptive or high-pressure tactics, neither agreement contains "fine print," and there was no disparity in bargaining power. Nor was either agreement substantively unconscionable, as the terms of the contracts are not unreasonably favorable to plaintiff (*see id.* at 12; *see also Matter of Lawrence*, 24 NY3d 320, 339 [2014]).

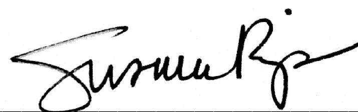
Defendant failed to preserve the argument that the fee is

unenforceable because it is disproportionate to the value of the services rendered, and we decline to review this mixed question of law and fact (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]).

Supreme Court correctly awarded as general damages the amount of fees that plaintiff was entitled to through 2023-2024, when the ICIP benefit expires. These damages were the natural and probable consequences of defendant's breach; they were equal to the sums that defendant undertook to pay under the parties' agreements, thereby assuming a definite obligation to pay a specific amount over a period of years, and were unquestionably within the parties' contemplation (*see American List Corp. v U.S. News & World Report*, 75 NY2d 38, 42-44 [1989]).

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7579 The People of the State of New York, Ind. 6397/10
Respondent,

-against-

Anthony Vasquez,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered December 18, 2012, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, with 3 years' postrelease supervision, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

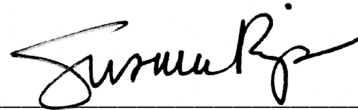
At no time before sentencing did the court ever inform defendant that the enhanced sentence he would receive if he violated the conditions of his plea agreement would include postrelease supervision (PRS) (*see People v McAlpin*, 17 NY3d 936 [2011]). The references by the prosecutor and defense counsel to PRS immediately before the court imposed sentence did not provide the kind of notice that would require defendant to preserve this

claim (*see People v Ziegler*, 149 AD3d 634 [1st Dept 2017]; *People v Singletary*, 118 AD3d 610 [1st Dept 2014]).

In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7580 In re Part 60 RMBS Putback Litigation Index 777000/15
- - - - - 779000/15
In re Part 60 RMBS Monoline Insurer Litigation

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Orrick, Herrington & Sutcliffe LLP, New York (Richard A. Jacobsen of counsel), for appellants.

McKool Smith, P.C., New York (Zachary W. Mazin of counsel), for respondents.

____

An appeal having been taken to this Court by the appellants in the Putback and Monoline actions from an order of the Supreme Court, New York County (Marcy Friedman, J.), entered October 13, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Marcy Friedman, J., with costs.

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

ENTERED: NOVEMBER 13, 2018

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CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7582 The People of the State of New York, Ind. 2207/15
Respondent,

-against-

Anthony Myers,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James M. Burke, J.), rendered April 6, 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: NOVEMBER 13, 2018

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CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7583 The People of the State of New York, Ind. 7959/98
Respondent,

-against-

Cosme Soroa,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about May 30, 2017, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2005, unanimously affirmed.

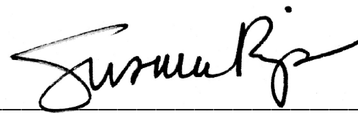
The court correctly denied resentencing on the ground that defendant was less than three years from his parole eligibility date when he filed his motion (*see People v Mills*, 11 NY3d 527, 536 [2008]). We see no reason to depart from our previous holdings, in which we rejected statutory and equal protection arguments similar to those raised here (*see People v Moore*, 159 AD3d 444 [1st Dept 2018]; *People v Horning*, 143 AD3d 520 [1st Dept 2016], *lv dismissed* 28 NY3d 1124 [2016]; *People v Paniagua* 45 AD3d 98, [1st Dept [2007]). Defendant's Eighth Amendment

challenge to his life sentence is unavailing (*see People v Broadie*, 37 NY2d 100 [1975], *cert denied* 423 US 950 [1975]).

In any event, regardless of eligibility, the record also supports the motion court's finding that substantial justice dictates denial of resentencing, particularly in light of defendant's having been convicted of another drug felony while on parole.

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7584 In re Roberto O.,

A Child Under Eighteen Years
of Age, etc.,

Lakeysha H.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

____

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

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

____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about July 31, 2017, which denied respondent-mother's motion to vacate an order of fact-finding and disposition (one paper), same court and Judge, entered upon her default on or about July 22, 2016, terminating her parental rights to the subject child on the ground of permanent neglect and committing his custody and guardianship to petitioner agency The Children's Aid Society and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

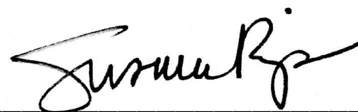
The Family Court properly denied respondent's motion to vacate her default, because her moving papers failed to demonstrate a reasonable excuse for her absence from the fact-finding hearing and a meritorious defense to the permanent neglect petition (*see* CPLR 5015[a][1]; *Matter of Christopher James A. [Anne Elizabeth Pierre L.]*, 90 AD3d 515 [1st Dept 2011], *lv denied* 18 NY3d 918 [2012]). Respondent's assertion that she missed the fact-finding hearing because she did not know when it was scheduled to commence was not a reasonable excuse for her failure to appear due to the fact that it is undisputed that she, her counsel and an ASL interpreter were present when the date for the hearing was selected. In addition, she presented no evidence as to what measures she took to ensure that she was kept apprised as to when the hearing would commence by contacting her counsel, her guardian ad litem, the court or petitioner agency (*see Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418, 419 [1st Dept 2013], citing *Matter of Giovanni Maurice D. [Wilner B.]*, 99 AD3d 631 [1st Dept 2012]).

We find that respondent failed to controvert the allegation that she permanently neglected the child by failing to establish that she complied with her service plan by completing a parenting class, a mental health evaluation and consistently visiting the

child within the relevant one-year period. Moreover, the fact that respondent waited about 11 months before moving to vacate the findings of permanent neglect and that the court found that it was in the child's best interests to free him for adoption weighed in favor of denying the motion (*see Matter of Nasir Levon L. [Ashley Bernadette B.]*, 110 AD3d 565 [1st Dept 2013], *lv denied* 22 NY3d 1099 [2014]; *Matter of Tashona Sharmaine A.*, 24 AD3d 135, 136 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]). Respondent also failed to establish a meritorious defense to the permanent neglect petition since she made only a conclusory statement that she would present evidence that the agency never made diligent efforts and that the services she had been asked to complete for reunification with the child were unnecessary (*see Matter of Sean Michael N. (Lydia T.-Shawn N.)*, 106 AD3d 561 [1st Dept 2013]).

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7586 Nestor D. Tejada, Index 302795/14
Plaintiff-Respondent,

-against-

LKQ Hunts Point Parts, et al.,
Defendants-Appellants.

____

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

Mitchell Dranow, Sea Cliff, for respondent.

____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about September 26, 2017, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claims that he suffered a serious injury involving "significant" and "permanent consequential" limitation of use of his lumbar spine and a 90/180-day injury under Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion with respect to plaintiff's claim of "permanent consequential" limitation of use of his lumbar spine and his 90/180-day claim, and otherwise affirmed, without costs.

Defendants met their prima facie burden of demonstrating lack of serious injury to plaintiff's lumbar spine by submitting

the expert reports of a neurologist and orthopedist who found near normal range of motion and opined that plaintiff's subjective complaints were not substantiated by clinical objective findings (*see Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567 [1st Dept 2017]; *Reyes v Se Park*, 127 AD3d 459, 460 [1st Dept 2015]). Defendants further showed that plaintiff's lumbar spine condition was not causally related to the March 2013 motor vehicle accident through the report of their radiologist, who opined that plaintiff's MRI showed multilevel degenerative disc disease (*see Rabb v Mohammed*, 132 AD3d 527 [1st Dept 2015]; *Young Kyu Kim v Gomez*, 105 AD3d 415 [1st Dept 2013]).

In opposition, plaintiff raised a triable issue of fact as to the existence of an injury involving a "significant" limitation of use of his lumbar spine, but not as to a "permanent consequential" limitation of use injury (*see Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]; *Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]). Plaintiff's orthopedic surgeon, who performed a discectomy procedure in May 2014, sufficiently addressed the findings of degeneration by opining that the MRI films did not show degeneration and that plaintiff's acute onset lumbar condition was causally related to the accident (*see Rabb v Mohammed*, 132 AD3d at 528; *Young Kyu Kim v Gomez*, 105 AD3d at

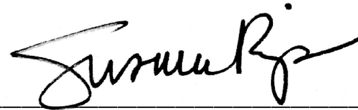
415). Plaintiff also demonstrated the existence of significant limitations in his lumbar spine range of motion, both shortly after the accident and nine months later, through the reports of his orthopedic surgeon and his post-accident treatment records (*see Castillo v Abreu*, 132 AD3d 520, 521 [1st Dept 2015]). Since the medical records were submitted by defendants and were properly before the court, plaintiff was entitled to rely on them (*see Wenegieme v Harriott*, 157 AD3d 412 [1st Dept 2018]).

However, plaintiff failed to provide a reasonable explanation for his complete cessation of treatment for his lumbar spine conditions after the May 2014 procedure. Plaintiff's claim that he ceased treatment because of an inability to pay due to a lack of no-fault insurance, is unpersuasive in light of his testimony that he had other insurance (*see Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]; *Vila v Foxglove Taxi Corp.*, 159 AD3d 431 [1st Dept 2018]). The cessation of treatment renders the opinion of a nontreating physician, based on an examination of plaintiff in December 2016, speculative concerning the permanence and causation of plaintiff's condition at that time (*id.* at 432; *see Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]).

Plaintiff's allegation in his bill of particulars that he was confined to home and bed for just eight weeks after the accident, defeats his 90/180-day claim (*see Streeter v Stanley*, 128 AD3d 477, 478 [1st Dept 2015]).

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

ENTERED: NOVEMBER 13, 2018



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Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7587 In re NRT New York LLC doing business as Citihabitats, Petitioner-Respondent, Index 652641/17

-against-

Suzy Spell, et al.,
Respondents-Appellants.

CKR Law, LLP, New York (Siddartha Rao of counsel), for appellants.

Margolin & Pierce, LLP, New York (Errol F. Margolin of counsel), for respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 2, 2018, which, upon a decision dated January 29, 2018 granted petitioner's motion to vacate an arbitration award, vacated the arbitration award, and directed judgment in favor of petitioner in the amount of $183,000, unanimously reversed, on the law, without costs, the motion denied, and the award confirmed. The Clerk is directed to enter judgment in favor of respondents.

Petitioner Citihabitats commenced the underlying arbitration to recover a sales commission pursuant to an Exclusive Agency to Lease Agreement (Agreement) entered into by respondent Suzy Spell concerning respondent Charles Spell's condominium apartment.

Under the Agreement, Citihabitats was entitled to recover a rental commission from any tenant who rented the apartment during the term of the Agreement, if Citihabitat procured the transaction. Citihabitats was also entitled to recover a 6% sales commission from the Spells if they sold the apartment to a tenant "procured by" Citihabits "within 6 months after expiration of the lease term or extension thereof." Shortly after the Agreement was executed, the Spells entered into a one-year lease renting the apartment to the Farhats, who were introduced by another broker, and the Farhats paid a commission to Citihabitats. Almost two years later, the Farhats bought the apartment.

After hearing testimony, the arbitrator concluded that, upon expiration of the lease term, the Farhats continued to occupy the premises on a month-to-month basis. Therefore no sales commission was due under the Agreement. The arbitrator also noted factors supporting his conclusion that denying Citihabitats' claim was equitable.

CPLR 7511 provides just four grounds for vacating an arbitration award, including that the arbitrator "exceeded his power" (CPLR 7511[b][1][iii]), which "occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the

arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). Mere errors of fact or law are insufficient to vacate an arbitral award (*Matter of Kowaleski*, 16 NY3d 85, 90-91 [2010]). "[C]ourts are obligated to give deference to the decision of the arbitrator, ... even if the arbitrator misapplied the substantive law in the area of the contract" (*id.*).

Here, the arbitrator's conclusion that a sales commission was not due under the precise terms of the Agreement because the lease was not extended is neither wholly irrational nor contrary to any strong public policy. Accordingly, the motion to vacate should have been denied and the award confirmed (*see Ingham v Thompson*, 113 AD3d 534 [1st Dept 2014], *lv denied* 22 NY3d 866 [2014]; CPLR 7511[e]).

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

ENTERED: NOVEMBER 13, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7588- Ind. 4843/14
7589 The People of the State of New York, 1690/17
Respondent,

-against-

Glenn Cruzado,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Patricia Nunez, J.), rendered July 27, 2017,

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

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

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

ENTERED: NOVEMBER 13, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7590 The People of the State of New York, Ind. 3942/13
Respondent,

-against-

Norberto Torres,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered March 26, 2015, unanimously affirmed.

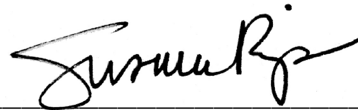
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 13, 2018



CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7591 Maria Caminiti, as Administratrix of the Estate of Pasquale Caminiti, etc., Plaintiff-Respondent, Index 150298/13

-against-

Extell West 57th Street LLC, et al., Defendants-Appellants.

____

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Joel M. Maxwell of counsel), for appellants.

Fortunato & Fortunato, PLLC, Brooklyn (Louis A. Badolato of counsel), for respondent.

____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 6, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the Labor Law § 240(1) claim, and denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, and grant defendants' motion for summary judgment dismissing so much of the Labor Law § 241(6) claim as based on alleged violations of Industrial Code §§ 23-1.2, -1.5, -1.16, -1.17, -1.30, -1.31, -2.1, and -2.4, and otherwise affirmed, without costs.

The court properly found that plaintiff's testimony about

her now-deceased husband’s statement regarding his accident is admissible as a declaration against interest (*see generally Basile v Huntington Util. Fuel Corp.*, 60 AD2d 616, 617 [2d Dept 1977]; Guide to NY Evid rule 8.11, Statement Against Penal or Pecuniary Interest, www.nycourts.gov/judges/evidence/8-HEARSAY/8.11). Decedent’s statement that he should have known better than to use the ladder as he did, established that he knew his statement was against his interest. Although the statement was uncorroborated, it had sufficient indicia of reliability, in that the experienced, 52-year-old electrician described his accident to his wife alone in an emergency room while awaiting surgery, in the absence of any coercion or attempt to shift blame away from himself (*cf. Nucci v Proper*, 95 NY2d 597, 602 [2001]). Accordingly, we decline to reach plaintiff’s alternative arguments as to the statement’s admissibility.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting decedent’s statement that he was working on a ladder when it started to move, and when he tried to stabilize the ladder, it tipped and struck him in the chest (*see Rom v Eurostruct, Inc.*, 158 AD3d 570 [1st Dept 2018]). Plaintiff was not “required to present further evidence that the ladder was

defective” (*Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]).

However, defendants raised triable issues of fact as to whether decedent’s injuries were caused by an accident involving a ladder. Two accident reports set forth his alleged statement that he was working on the ladder when he started feeling chest pains and his legs became “unsteady” or “wobbly.” Moreover, decedent’s coworker, who was working in the same apartment unit separated from decedent by a concrete wall but went over to decedent’s area, not in response to any commotion but for routine purposes, saw that the ladder was in the upright position about 10 feet away from decedent when he expressed that he was suffering from chest pains (*cf. Lipari v AT Spring, LLC*, 92 AD3d 502 [1st Dept 2012]). Although decedent was disoriented and unable to answer basic questions at some points, he eventually became alert while in the hospital, yet his medical records do not refer to any ladder accident.

Contrary to plaintiff’s assertion, defendants preserved their arguments about triable issues of fact by asserting them in their memorandum of law in opposition to plaintiff’s partial summary judgment motion. However, defendants failed to preserve their argument that even if plaintiff was injured by the ladder,

his conduct was the sole proximate cause of his injuries, and we decline to review this fact-sensitive argument in the interest of justice.

The court should have dismissed the Labor Law § 241(6) claim insofar as predicated on Industrial Code §§ 23-1.2, -1.5, -1.16, -1.17, -1.30, -1.31, -2.1, and -2.4, which were abandoned "since plaintiff failed to specify any particular subsection(s) and subdivision(s) of these provisions" (*McLean v Tishman Constr. Corp.*, 144 AD3d 534, 535 [1st Dept 2016]).

Defendants' remaining arguments concerning the common-law negligence and Labor Law §§ 200 and 241(6) claims are unpreserved, and we decline to review them, since their resolution involves facts relevant to issues not brought to plaintiff's attention below, and they are not purely legal arguments that are clear from the face of the record (*see Bonaerge v Leighton House Condominium*, 134 AD3d 648, 648 [1st Dept 2015]).

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

ENTERED: NOVEMBER 13, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7592 In re Elie W., Jr.,

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

Elie W., Sr.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

Andrew J. Baer, New York, for appellant.

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

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

Order of fact-finding and disposition, Family Court, New York County (Jane Pearl, J.), entered on or about August 3, 2017, which, inter alia, determined after a hearing that respondent father neglected the subject child, unanimously affirmed, without costs.

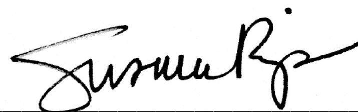
The finding of neglect is supported by a preponderance of the evidence that respondent's actions posed an imminent danger to the child's emotional and physical well-being (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]). The child's mother testified that she and respondent engaged in numerous physical

altercations, one of which lasted for hours, in the child's presence, and the agency caseworker testified that she observed bruises all over the mother's body after the most recent altercation (*see Matter of Elijah T. [Melvin G.]*, 154 AD3d 635, 636 [1st Dept 2017]). The record shows that, during that altercation, not only did the child witness the domestic violence, but he also became involved in the altercation when he ran towards the mother and was knocked over, and hit his head on the corner of a table, when respondent thrust out his arm (*see Matter of Kenny J.M. [John M.]*, 157 AD3d 593 [1st Dept 2018]).

Contrary to respondent's arguments, there is no basis in the record for disturbing Family Court's credibility determinations (*see Matter of Frantrae W.*, 45 AD3d 412 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]; *Matter of Ilene M.*, 19 AD3d 106 [1st Dept 2005]).

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

ENTERED: NOVEMBER 13, 2018



CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7593 The People of the State of New York, Ind. 6080/16
Respondent,

-against-

Jesus Ramos,
Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered August 12, 2016, convicting defendant, after a nonjury trial, of two counts of attempted forcible touching and one count of sexual abuse in the third degree, and sentencing him to concurrent terms of 15 days, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, in which it credited the testimony of the victim and two police officers, and found defendant not to be credible.

The court properly denied defendant's motion to suppress a statement he made when, after the officer informed defendant he

was being arrested for forcible touching and sexual abuse, the officer added the remark, "You can't touch people on the train." *Miranda* warnings were not required because the officer's declarative comment was not reasonably likely to elicit an incriminating response (*see e.g. People v Huffman*, 61 NY2d 795, 797 [1984]; *People v Wilson*, 279 AD2d 381 [1st Dept 2001], *lv denied* 96 NY2d 869 [2001]). Rather than engaging in formal questioning or its functional equivalent, the officer essentially informed defendant of the accusation against him (*see People v Ealey*, 272 AD2d 269, 270 [1st Dept 2000], *lv denied* 95 NY2d 865 [2000]). In any event, although defendant claims that the exculpatory statement at issue contained prejudicial matter, any error in the admission of the statement was harmless, particularly in a nonjury trial.

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

ENTERED: NOVEMBER 13, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7594 The People of the State of New York, Respondent, Ind. 2014/16

-against-

Roberto Cruz-Torres, Defendant-Appellant.

____

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

____

Judgment, Supreme Court, Bronx County (Judith J. Lieb, J.), rendered February 15, 2017, unanimously affirmed.

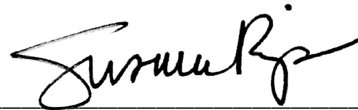
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: NOVEMBER 13, 2018



CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7595 The People of the State of New York, Ind. 81/16
Respondent,

-against-

Azariah Brundage,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered November 30, 2016, unanimously affirmed.

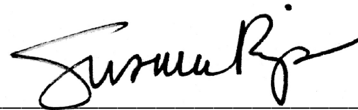
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 13, 2018



CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

7596N Great American Insurance Company of New York, Index 157164/13
Plaintiff-Appellant,

-against-

L. Knife & Son, Inc, et al.,
Defendants-Respondents-Appellants.

- - - - -

L. Knife & Son, Inc, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

TGA Cross Insurance, Inc.,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

Mound Cotton Wollan & Greengrass LLP, New York (Kevin F. Buckley of counsel), for appellant.

Phillips Nizer LLP, New York (Lauren J. Wachtler of counsel), for L. Knife & Son, Inc, and U.B. Distributors, LLC, respondents-appellants.

Cullen and Dykman LLP, Garden City (Douglas J. Bohn of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 11, 2017, which, inter alia, denied the parties’ respective motions for summary judgment except to the extent of dismissing plaintiff’s fourth cause of action, unanimously affirmed, with costs.

Discovery has not resolved the questions of fact outlined by this Court in a prior decision in this insurance coverage dispute (138 AD3d 531 [1st Dept 2016]). Rather, the record presents triable issues with respect to whether defendants or their broker made any misrepresentation about the total insurable value of the property and the value of the contents of the property, whether plaintiff's decision to issue the policy and the premium charged relied on that alleged misrepresentation, and whether the wholesale broker was acting on behalf of plaintiff or defendants (*see id.*).

The court properly dismissed plaintiff's fourth cause of action alleging that defendants' confirmation of total insurable value was a condition precedent to the insurance contract. Had plaintiff intended to make total insurable value a condition precedent to contract, it should have been expressly stated (*see generally Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]).

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

ENTERED: NOVEMBER 13, 2018

CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7597 The People of the State of New York, Respondent, SCI 287/12

-against-

Semira Ramirez, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered January 9, 2013, convicting defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing her to a term of two years, with two years' postrelease supervision, unanimously affirmed.

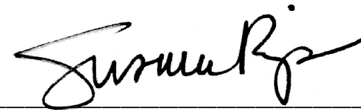
The totality of the circumstances establishes that defendant's ultimate guilty plea was knowing, intelligent and voluntary (*see generally People v Tyrell*, 22 NY3d 359, 365 [2013]). At the ultimate plea proceeding, it was made clear that defendant's sentence included a two-year prison term and two years' postrelease supervision, and she confirmed that she understood. This cured any deficiencies in a previous, withdrawn

plea, which failed to adequately explain the sentencing consequences, and defendant has not demonstrated any basis for vacatur of the instant plea.

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

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7598 Adirondack Insurance Exchange, et al., Index 155658/16
Plaintiffs-Appellants,

-against-

Julio Hewu, et al.,
Defendants-Respondents.

____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about December 21, 2017,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 17, 2018,

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

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

ENTERED: NOVEMBER 13, 2018

____
CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7599 In re Jolanda K.,
Petitioner-Respondent,

-against-

Damian B.,
Respondent-Appellant.

____

George E. Reed, Jr., White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

Bruce A. Young, New York, attorney for the child.

____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about May 2, 2017, denying respondent's motion seeking visitation and vacatur of a final order, entered on or about January 30, 2017, which, upon his default, granted sole legal and physical custody of the subject child to petitioner-mother, without visitation, unanimously modified, on the law and in the interest of justice, to the extent of remanding for further proceedings on the issue of visitation, and otherwise affirmed, without costs.

While "default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously" (*Matter of Dayon G. v Tina T.*, 163 AD3d 461, 462 [1st

Dept 2018] [internal quotation marks omitted]), this policy "does not relieve the defaulting party of the burden of establishing a reasonable excuse for the default" (*Matter of Roshia v Thiel*, 110 AD3d 1490, 1491 [4th Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 1037 [2013]).

Respondent father's excuse that he did not know about two court dates in January 2017 was unreasonable as there was ample evidence that he was present in court when the dates were set, the court made reference at the prior hearing that there were upcoming court dates in January, and the court mailed a notice to appear to the father at his reported address. Because the father failed to establish a reasonable excuse for his default, this Court need not determine whether he established a meritorious defense (*see Matter of Ne Veah M. [Michael M.]*, 146 AD3d 673, 674 [1st Dept 2017]).

However, the final custody order did not make any provision for visitation, and the father's pro se motion explicitly sought visitation with the child. Family Court implicitly denied this request without providing any rationale. Visitation is a joint right of the child and noncustodial parent and, absent "exceptional circumstances," it "follows almost as a matter of course," and is presumed to be in the child's best interest

(*Weiss v Weiss*, 52 NY2d 170, 174-176 [1981]). The record of the custody hearing established that the father had regular unsupervised and overnight visitation with the child throughout the prolonged custody proceedings, although there were some late pickups and missed visits in the months before the custody order was issued. We note the child's attorney represents that the child strongly wishes to resume visits with the father (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]). Accordingly, we remand for further proceedings, including a hearing, to determine the issue of visitation between the father and child.

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

ENTERED: NOVEMBER 13, 2018

CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7600 Charlette Thompson, Index 301674/12
Plaintiff-Appellant,

-against-

Andrew Toscano, et al.,
Defendants-Respondents,

Charles A. Ross, et al.,
Defendants.

____

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

Pillinger Miller Tarallo, LLP, Elmsford (Donna Brautigam of counsel), for respondents.

____

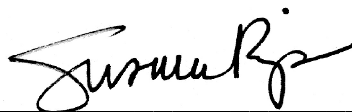
Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered November 18, 2016, which granted the motion of defendants Andrew Toscano and Maria Toscano to set aside the jury verdict awarding plaintiff, inter alia, $400,000 for past pain and suffering and $750,000 for future pain and suffering over 25 years to the extent of setting the matter down for a new trial on damages unless plaintiff stipulates, within 30 days of service of a copy of the order with notice of entry, to a reduced award of $300,000 for past pain and suffering and $250,000 for future pain and suffering, unanimously affirmed, without costs.

The 29-year-old plaintiff was a passenger in a minivan

involved in an accident with a vehicle owned and operated by the Toscanos. Plaintiff suffered a partial labral tear to the left shoulder, for which she underwent surgery, and had two courses of physical therapy. Plaintiff testified that she continued to suffer from intermittent pain and had a loss of range of motion to her left arm. Her surgeon opined that she might require further physical therapy and surgery in the future. After reviewing comparable injuries and awards, the trial court appropriately concluded that the amounts awarded by the jury were excessive and that the amounts of $300,000 for past pain and suffering and 250,000 for future pain and suffering constituted reasonable compensation for the injuries sustained (*see e.g. Morales v Manhattan & Bronx Surface Tr. Operating Auth.*, 106 AD3d 459 [1st Dept 2013]; *Konfidan v FF Taxi, Inc.*, 95 AD3d 471 [1st Dept 2012]).

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7601- Index 650497/16
7602 WebMD LLC,
Plaintiff-Respondent,

-against-

Aid in Recovery, LLC,
Defendant-Appellant.

____

Greenberg Traurig, LLP, New York (Robert J. Kirshenberg of counsel), for appellant.

Browne George Ross, LLP, New York (Jeffrey A. Mitchell of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered August 8, 2017, against defendant in plaintiff's favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about July 28, 2017, which granted plaintiff's motion for summary judgment on its complaint and dismissed the defense of failure to mitigate damages, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court correctly granted plaintiff summary judgment on its breach of contract cause of action. Defendant's claim that there is a question of fact as to the parties' intent to be bound is unavailing, given the written agreement signed by the parties

(*see e.g. Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 266 [1st Dept 1995]); Defendant's reliance on *Martin H. Bauman Assoc. v H & M Intl. Transp.* (171 AD2d 479 [1st Dept 1991]) is misplaced, as the issue in that case was "whether the parties entered into a valid *oral* contract" (*id.* at 483 [emphasis added]). The question of Shane SantaCroce's authority to sign the contract on defendant's behalf is a separate issue from intent to be bound.

Plaintiff concedes that SantaCroce did not have actual authority to sign the contract on defendant's behalf. However, even if SantaCroce did not have apparent authority, defendant ratified the agreement by its acceptance of benefits flowing therefrom (*see IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 83 AD3d 573, 575 [1st Dept 2011], *affd* 20 NY3d 310 [2012], *cert denied* 569 US 994 [2013]). It is undisputed that plaintiff displayed defendant's advertisements on plaintiff's website and that people clicked on the advertisements.

The court also correctly granted plaintiff summary judgment on its account stated cause of action. Defendant claims that it disputed plaintiff's invoices, but submitted no evidence in support of the claim (*see Scheichet & Davis, P.C. v Novahicka*, 93 AD3d 478 [1st Dept 2012]). Defendant not only retained the

invoices without objection for more than five months (*see Spectra Audio Research v 60-86 Madison Ave. Dist. Mgt. Assn.*, 267 AD2d 23 [1st Dept 1999], *lv dismissed* 95 NY2d 791 [2000]), but also paid some of them (*see Shaw v Silver*, 95 AD3d 416 [1st Dept 2012]; *Scheichet*, 93 AD3d at 478; *Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]). While the invoices do not reflect a credit that plaintiff gave defendant, plaintiff's summary judgment motion does reflect the credit (*see Shaw*, 95 AD3d at 416 ["The account stated was not impeached by an error that was rectified at trial"]).

Plaintiff moved not only for summary judgment on its complaint but also to dismiss the mitigation defense. Defendant failed to oppose that part of plaintiff's motion; hence, we decline to review the arguments defendant makes about mitigation on appeal (*see Callisto Pharm., Inc. v Picker*, 74 AD3d 545 [1st Dept 2010]; *Lally v New York City Health & Hosps. Corp.,* 277 AD2d 9 [1st Dept 2000], *appeal dismissed* 96 NY2d 896 [2001]).

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

ENTERED: NOVEMBER 13, 2018

CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7603 The People of the State of New York, Ind. 2922/11
Respondent,

-against-

George Castro,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered September 24, 2012, convicting defendant, after a jury trial, of grand larceny in the first degree, criminal possession of stolen property in the first degree and money laundering in the first degree, and sentencing him to an aggregate term of 7 to 21 years, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. Although defendant was in custody and had not yet received *Miranda* warnings, the record supports the hearing court's finding that the statement defendant made in a car on the way to the District Attorney's office was spontaneous and not the product of interrogation or its functional equivalent. The investigator's brief declarative statement about the seriousness

of defendant's situation neither called for a response nor was reasonably likely to elicit one (*see e.g. People v Huffman*, 61 NY2d 795, 797 [1984]; *People v Wilson*, 279 AD2d 381 [1st Dept 2001], *lv denied* 96 NY2d 869 [2001]). Moreover, the investigator specifically told defendant that discussion of the case would be deferred until they arrived at the office, and defendant remained silent for 5 to 10 minutes before spontaneously making his statement. Accordingly, there was also no basis to suppress defendant's post-*Miranda* statements.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). As we concluded on a codefendant's appeal, "[i]t is a reasonable inference, from the totality of the circumstances, that defendant knew the large sums of money coming into an account under his control could not have had any legitimate origin," and defendant's "overall course of conduct, including his use of the funds, had no reasonable innocent explanation" (*People v Stephens*, 118 AD3d 455, 455 [1st Dept 2014], *lv denied* 24 NY3d 1005 [2014]). Although this defendant, unlike codefendant Stephens, testified in his own defense, there is no basis for disturbing the jury's credibility determination rejecting that testimony.

Defendant's claim that he was denied a fair trial because his jointly tried codefendants asserted antagonistic defenses to his own is unpreserved because he failed to move for severance or join in a codefendant's unsuccessful severance motion, and we decline to review this claim in the interest of justice. As an alternative holding, we reject it on the merits (*see generally People v Mahboubian*, 74 NY2d 174 [1989]). The defenses were not so irreconcilable as to require separate trials, and the joint trial did not deprive defendant of a fair trial or result in the receipt of evidence prejudicial to defendant that would have been inadmissible at a separate trial.

Defendant likewise failed to preserve his arguments concerning a cross-examination conducted by a jointly tried codefendant, including his constitutional claims, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's reasons for declining to make a severance motion (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the

ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that the absence of a severance motion lacked any strategic explanation or was objectively unreasonable, that defendant was actually entitled to a severance, or that a severance, even if granted, would have affected the fairness or outcome of the trial (*see People v Castillo*, 29 NY3d 935 [2017]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 13, 2018

CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7604 In re The People of the State of New York, ex rel. Lizzie-Anne Beal, on behalf of A.P., Index 452219/17
Petitioner-Appellant,

-against-

Joseph Ponte, etc.,
Respondent-Respondent.

____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Guyon H. Knight of counsel), and Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth Bender of counsel), for appellant.

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

____

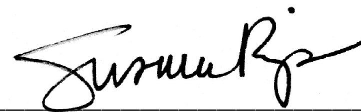
Appeal from judgment (denominated an order), Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about August 9, 2017, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal is moot because petitioner is no longer incarcerated. We decline to apply the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Petitioner's arguments concerning mootness and

the exception to that doctrine are unavailing (*see People ex rel. Lassiter v Schriro*, 114 AD3d 593 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]).

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7605 The People of the State of New York, Ind. 5477/13
Respondent,

-against-

Fabio Abreu,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 28, 2014, unanimously affirmed.

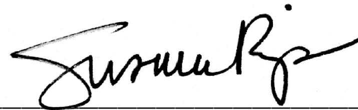
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7606 The People of the State of New York, Ind. 331/13
Respondent,

-against-

Jhonel Feliciano,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Marcy L. Kahn, J.), rendered February 7, 2014,

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

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

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

ENTERED: NOVEMBER 13, 2018

CLERK

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

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7607 In re Rosa N.,
Petitioner-Respondent,

-against-

Luis F.,
Respondent-Appellant.

____

Bruce A. Young, New York, for appellant.

Marion C. Perry, Brooklyn, for respondent.

____

Order of protection, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 12, 2017, which ordered respondent, for a period of two years, to stay away from petitioner, to refrain from communicating with her, including by third-party contact or social media, and to refrain from committing any criminal offense against her, unanimously affirmed, without costs.

Respondent may not argue for the first time on appeal that petitioner failed to establish that he wilfully violated the temporary order of protection on the ground that he had had no notice of the order (*Matter of Hyder B.J. v Widad Al-S.*, 256 AD2d 25 [1st Dept 1998], *lv denied* 94 NY2d 751 [1999]). In any event, his argument would apply only to communications made between December 28, 2016, when the temporary order of protection was

issued, and January 22, 2017, the date on which he acknowledged receiving it. Petitioner testified that she continued to hear from respondent until February 21, 2017, and, at the hearing, respondent admitted to sending petitioner texts after receiving the order of protection, which he said he refused to read. Family Court properly rejected respondent's defense based on his refusal to read the order (*see Matter of Lisa T. v King E.T.*, 147 AD3d 670, 670 [1st Dept 2017], *affd* 30 NY3d 548 [2017]; *Leggio v Leggio*, 190 Misc 2d 571, 580 [Fam Ct, Albany County 2002]).

The court's statement of the facts it deemed essential to its finding that respondent violated the temporary order of protection is sufficient for purposes of CPLR 4213(b). The court stated that it credited petitioner's testimony about communications through February 2017. Moreover, respondent admitted to violating the temporary order of protection after receiving it.

The court's finding that respondent committed a family offense also satisfies CPLR 4213(b). The court credited petitioner's testimony that on December 21 respondent held her by the throat, choked her, prevented her from breathing, and threatened her. These acts satisfy the elements of criminal obstruction of breathing or blood circulation (*see* Penal Law §

121.11), a family offense (*see* Family Court Act § 812). Moreover, at the hearing, respondent made only a vague, blanket denial as to petitioner's testimony. Thus, the finding that respondent committed a family offense is supported by a fair preponderance of the evidence (*see* Family Court Act §§ 832). Respondent offers no reason for us to revisit the court's credibility determinations.

Nor does it avail respondent to cite the burden of proof in a criminal proceeding (*see* Family Court § 832). A proceeding under Family Court article 8 provides "a civil, non-criminal alternative to a criminal prosecution when family members commit certain designated criminal offenses" (*Matter of V.C. v H.C.*, 257 AD2d 27, 31 [1st Dept 1999] [internal quotation marks and citations omitted]; *see* 1 NY Law of Domestic Violence § 3:41).

We reject respondent's belated demand for a dispositional hearing. He neither demanded one before Family Court nor objected to the court's failure to hold one (*see Matter of Tonya B. v Matthew B.*, 90 AD3d 463 [1st Dept 2011]). There is no explicit statutory requirement of a dispositional hearing in article 8 proceedings (*see Matter of Marisela N. v Lacy M.S.*, 101 AD3d 425 [1st Dept 2012]). Moreover, no purpose would have been served by a separate dispositional hearing here, because the only

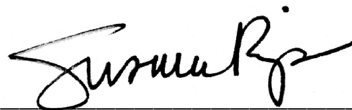
remedy petitioner sought was an order of protection (*see id.*).

Respondent correctly argues that the expiration of an order of protection does not render an appeal therefrom moot, given the significant enduring consequences of such an order (*see e.g. Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]). However, the issue has not arisen, because the order on appeal is still in effect. Moreover, contrary to respondent's apparent contention, the fact that the order may have lasting adverse consequences for him does not alone warrant reversal or modification.

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

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7608 The People of the State of New York, Ind. 162/15
Respondent,

-against-

Joseph Graham,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 1, 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: NOVEMBER 13, 2018

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CLERK

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

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7609 Michael Edwards, Index 310238/11
Plaintiff-Respondent,

-against-

Manuel Rosario, et al.,
Defendants,

Earlybird Delivery Systems,
LLC, et al.,
Defendants-Appellants.

____

Varvaro, Cotter & Bender, White Plains (Gregory Walthall of counsel), for appellants.

Michelstein & Ashman, PLLC, New York (Stephen J. Riegel of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 19, 2017, which denied defendants-appellants' (Earlybird) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Earlybird established prima facie that defendant driver Alvin Almonte was an independent contractor, rather than an employee, through testimonial evidence establishing that Almonte was paid on a per-delivery basis, that he received a 1099 tax form, as opposed to a W-2, that he received no employee benefits, that he was required to provide and maintain his own vehicle,

that he was not reimbursed expenses associated with his job, including the use of his vehicle, that he had full discretion in hiring and paying his helpers, and that the drivers who worked for Earlybird were free to choose their hours and routes and to work for other companies (*see Chaouni v Ali*, 105 AD3d 424 [1st Dept 2013]). Further, the "Independent Contractor Agreement" between Earlybird and Almonte provided that Almonte could choose his own hours, could reject any assignments given to him, had sole and absolute discretion and control over the manner and means of performing the deliveries as long as the deliveries were made safely and promptly, was not entitled to any unemployment or workers' compensation benefits, was not to have any taxes deducted by Earlybird, and was responsible for all fees and expenses associated with his job.

In opposition, plaintiff raised an issue of fact through evidence showing that Almonte had worked exclusively for Urban Express for about 10 years, during which period he worked regular hours, five days a week, that he had to check in with dispatchers for assignments and after he had finished his deliveries, that he used and returned forms provided by the company for deliveries, that he was required to use helpers for high-value deliveries, that the helpers' information was maintained in a "registry,"

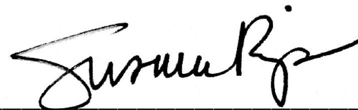
that he was required to procure insurance in an amount dictated by contract, and that he was required to wear a uniform with the company's logo, which he wore on the day of the accident (*see Anikushina v Moodie*, 58 AD3d 501 [1st Dept 2009], *lv dismissed* 12 NY3d 905 [2009]; *Bermudez v Ruiz*, 185 AD2d 212 [1st Dept 1992]).

An issue of fact also exists as to whether the accident occurred within the scope of Almonte's employment. Earlybird established prima facie that the accident occurred outside the scope of Almonte's employment through Almonte's testimony that he had finished his deliveries and was waiting for defendant Manuel Rosario to run a personal errand when it happened. However, plaintiff submitted a handwritten statement by Almonte that he was on his way to do a pickup when the accident occurred. While the unsworn statement constitutes inadmissible hearsay, it may be considered in opposition to Earlybird's motion because it is not

the only evidence offered by plaintiff (*see Erkan v McDonald's Corp.*, 146 AD3d 466, 468 [1st Dept 2017). In addition, plaintiff testified that he saw Almonte's work partner leave a nearby building and get into the delivery van after the accident.

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7611-
7611A In re Giovanni Z., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Kaitlyn C.,
Respondent-Appellant,

Jorge Z.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

____

Steven N. Feinman, White Plains, for appellant.

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

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

____

Order of disposition, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about October 11, 2017, to the extent it brings up for review a fact-finding order, same court (Linda Tally, J.), entered on or about March 27, 2017, which determined, after a hearing, that respondent mother abused her youngest child and derivatively abused her other two children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal

from the order of disposition.

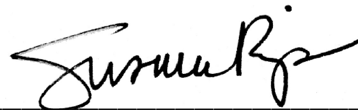
Petitioner agency demonstrated that the mother abused her two-year-old son who was diagnosed with a fracture of his right humerus (*see Matter of Angelique H.*, 215 AD2d 318, 319-320 [1st Dept 1995]; *Matter of Vincent M.*, 193 AD2d 398, 402 [1st Dept 1993]). The mother failed to satisfactorily rebut the agency's prima facie showing that the child's injury occurred in her care and would not ordinarily have been sustained except by her own acts or omissions (*see* Family Ct Act § 1046[a][ii]; *Matter of Naykym S.*, 60 AD3d 578 [1st Dept 2009]; *Matter of Benjamin L.*, 9 AD3d 153, 155 [1st Dept 2004]). There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]]).

In light of the nature and severity of the abuse inflicted by the mother upon the youngest child, as well as her failure to seek prompt medical attention for the injury, history of abuse,

and observed scars and lacerations on her other children, the finding of derivative abuse was proper (*see Matter of Quincy Y.*, 276 AD2d 419 [1st Dept 2000]; *Matter of Ashlyn Q. [Talia R.].*, 130 AD3d 1166, 1168-1169 [3d Dept 2015]).

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7612 In re Brian McLane, Index 654315/15
Petitioner-Appellant,

-against-

AT&T, Inc., et al.,
Defendants-Respondents,

Cerberus Capital Management, L.P.,
Defendant.

____

Law Office of Uri Nazryan, PLLC, Brooklyn (Uri Nazryan of counsel), for appellant.

Clifton Budd & DeMaria, LLP, New York (Arthur J. Robb of counsel), for respondents.

____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 17, 2017, which granted the CPLR 3211(a)(7) motion of defendants AT&T, Inc., Yellowpages.com, LLC, YP Holdings, LLC, and Kent Johnson to dismiss the complaint insofar as asserted against them, unanimously affirmed, without costs.

We find that plaintiff's claims are preempted by federal law, pursuant to Labor-Management Relations Act § 301 29 USC § 185), as they require interpretation of a collective bargaining agreement.

Plaintiff's breach of contract claim is premised on his assertions that the parties agreed, as part of his employment

contract, that he would be covered by AT&T's collective bargaining agreement (CBA) with a local union, with protections including that plaintiff would not be an at-will employee; that he could not be disciplined without union representation; and that he could not be terminated without three prior warnings; and that defendants breached these provisions. Plaintiff's promissory fraud claim asserts that defendants entered into this agreement knowing that they would not honor it. Finally, plaintiff's tortious interference claim asserts that his supervisor caused defendants to breach the parties' agreement.

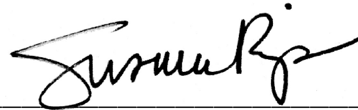
Hence, on their face, plaintiff's claims require consideration of the CBA's scope and whether his termination in fact violated the terms of the CBA. Since an essential element of plaintiff's claims is that one or more of the defendants breached the CBA, "resolution of the [claims] requires an interpretation of the CBA to determine whether the plaintiff's termination was justified and procedurally proper under the provisions of the CBA. Therefore, the [claims are] preempted by federal law" (*Pabon v Many*, 99 AD3d 773, 774 [2d Dept 2012]; *see*

29 USC § 185[a]; *Griffiths v Triangle Servs., Inc.*, 59 AD3d 278, 278-279 [1st Dept 2009]).

In light of our affirmance on preemption grounds, we need not reach any of the other issues raised in the parties' briefs.

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

ENTERED: NOVEMBER 13, 2018



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Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7613-
7614-
7615 The People of the State of New York, Respondent,

Ind. 4775/14
3545/14
946/15

-against-

Luis Miranda,
Defendant-Appellant.

____

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

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

____

Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered November 10, 2015, convicting defendant, upon his pleas of guilty, of three counts of criminal contempt in the first degree and sentencing him to concurrent terms of 1 to 3 years, unanimously affirmed.

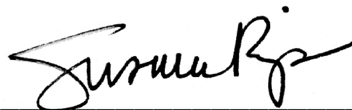
Defendant did not preserve his claim that his pleas were rendered involuntary by an allegedly unlawful or improper plea condition that originally required him to vacate his apartment in return for a conditional discharge, and we decline to review the challenge in the interest of justice. As an alternative holding, we reject this claim on the merits.

The presentence condition that defendant vacate his

apartment was bargained for by defendant and was valid. It was reasonably related to defendant's rehabilitation (*see* CPL 400.10[4]; Penal Law § 65.10[2][l]) and reduced the likelihood that he would engage in further criminal activity against the victim and his family. Furthermore, it was not contrary to any constitutional or statutory provision or public policy (*see* *People v Seaberg*, 74 NY2d 1, 7 [1989]; *People v Hannah*, 65 AD3d 1378 [2d Dept 2009], *lv denied* 13 NY3d 907 [2009]).

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

ENTERED: NOVEMBER 13, 2018



CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7616 The People of the State of New York, Respondent, SCI 2702/17

-against-

Ballal Hossain,
Defendant-Appellant.

Howard Greenberg Law Firm, Brooklyn (Jonathan Rosenberg of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Kevin B. McGrath, J.), rendered February 23, 2018, convicting defendant, upon his plea of guilty, of grand larceny in the second degree (two counts) and grand larceny in the third degree, and sentencing him, to an aggregate term of 2 1/3 to 7 years, unanimously affirmed.

The record refutes defendant's assertion that the court failed to consider mitigating factors in exercising its sentencing discretion on defendant's open plea (taken without a

sentence promise). Defendant's remaining contentions regarding sentencing procedure are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits (*see e.g. People v Marcano*, 199 AD2d 86 [1st Dept 1993]).

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

ENTERED: NOVEMBER 13, 2018

CLERK

Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7617-
7618 The People of the State of New York, Respondent, Ind. 2872/14 5817/12

-against-

Priscilla Lopez,
Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

____

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered March 25, 2015, unanimously affirmed.

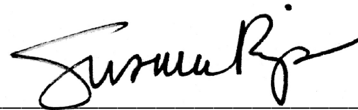
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 13, 2018



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Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7619 The People of the State of New York, Ind. 4578/15
Respondent,

-against-

Robert Cagle,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered January 7, 2016, unanimously affirmed.

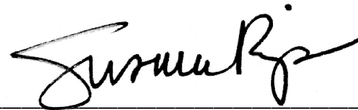
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: NOVEMBER 13, 2018



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Renwick, J.P., Tom, Mazzarelli, Webber, Kern, JJ.

7620N Qwantiasha Fling, Index 24267/14E
Plaintiff-Appellant,

-against-

Integrity Business Solutions,
Inc., et al.,
Defendants-Respondents.

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Phillips & Associates, PLLC, New York (Jessenia Maldonado of counsel), for appellant.

Laurence M. Savedoff, PLLC, Bronx (Laurence M. Savedoff of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered April 21, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion pursuant to CPLR 3215(c) to dismiss the complaint for failing to move for a default judgment within the one-year deadline, unanimously reversed, on the law, without costs, and the motion denied.

Although plaintiff's excuse for failing to move for a default judgment within one year of defendants' default is not entirely compelling, it must, however, be weighed against the merits of plaintiff's claim and the prejudice to defendants (*see LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]). Here, plaintiff's affidavit sets out a meritorious

action, and defendant Hutchins’s denials, contained in his own affidavit, merely raise triable issues of fact. Furthermore, defendants have offered no evidence of any prejudice from the delay, and there is strong public policy in favor of deciding cases on the merits (*see Nedeltcheva v MTE Transp. Corp.*, 157 AD3d 423 [1st Dept 2018]).

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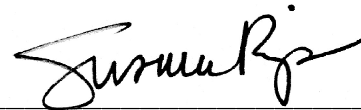

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