SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 9, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6607 Jeffrey White, Index 156151/13
Plaintiff-Respondent,

-against-

31-01 Steinway, LLC, et al.,
Defendants,

Express, LLC, et al.,
Defendants-Respondents,

Russco, Inc.,
Defendant-Appellant.
- - - - - -
[And a Third-Party Action]

_____

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

Block O'Toole & Murphy, New York (David L. Scher and Christina R. Mercado of counsel), for Jeffrey White, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for Express, LLC, respondent.

Woods Oviatt Gilman, LLP, Rochester (Jennifer M. Schauerman of counsel), for John F. Ruggles and Ruggles Sign Company, Inc., respondents.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 30, 2017 which, insofar as appealed from as limited by the briefs, denied defendant Russco, Inc.'s (Russco) motion for summary judgment dismissing the Labor Law § 240(1)

claim as against it and to amend its answer to assert a cross claim for contractual indemnification against defendant Ruggles Sign Company, Inc. (Ruggles), granted Ruggles's motion for summary judgment dismissing the Labor Law § 240(1) claim as against it, granted defendant Express, LLC's (Express) motion for summary judgment against Russco on its contractual indemnification claim, and granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against Russco, Express and the Steinway defendants, unanimously modified, on the law, to deny Ruggles's motion, Express's motion and plaintiff's motion as against Russco, and otherwise affirmed, without costs.

Plaintiff, Jeffrey White, commenced the instant action alleging that, on April 15, 2013, while employed by nonparty Capitol Design & Construction Service (Capitol) as a sign installer, he fell from a ladder and suffered personal injuries. The work was being performed at 31-01 Steinway Street in Queens in preparation for the opening of a new retail store owned by the Steinway defendants and operated by defendant Express.

Express hired defendant Russco to act as the general contractor on the store renovation project and to hire all necessary subcontractors for the renovation with the exception of the signage and awning work. For the signage and awning work,

Express had a preexisting vendor contract with defendant Ruggles, a national fabricator and installer of signage and awnings, which agreed to manufacture and install signage and awnings at the project. Ruggles was also required to supply all labor, materials, tools, equipment and supervision with regard to the signage and awnings. Ruggles subcontracted the installation of the signage and awnings at the project to Capitol, plaintiff's employer.

Plaintiff testified that the accident happened as follows. Because the sidewalk was congested with pedestrian traffic, plaintiff set up the ladder parallel to the building and straddled atop the ladder, one foot on each side, to perform his work. Plaintiff was installing clips onto the facade of the building by drilling holes when the drill jammed. When plaintiff attempted to release the drill, he lost his balance and dropped the drill, and the ladder "started peeling off the wall." Plaintiff jumped off the ladder to avoid falling with the ladder, sustaining injuries.

George Kavelski, Capitol's shop foreman, testified that plaintiff "lost his balance, was unable to regain it, and stumbled off the ladder" and that "he had the drill and then something happened and I saw his hand move and, next thing I know, he was on the ground." He also testified that the ladder

remained standing after plaintiff's fall.

As an initial matter, Russco's motion for summary judgment dismissing the Labor Law § 240(1) claim as against it on the ground that it is not a proper defendant under the Labor Law was correctly denied as there is an issue of fact as to whether its obligations as the general contractor on the project extended to the work performed by plaintiff. The contract between Express and Russco includes a carve-out provision stating that all signage and awning work on the project would be furnished and completed by a separate vendor hired by Express, which, in this case, was Ruggles. Russco's only responsibility vis-à-vis Ruggles was to provide Ruggles access to the project site and to coordinate the timing of the work Ruggles was hired to perform. Based solely on a reading of the carve-out provision, Russco would not have any liability to plaintiff under Labor Law § 240(1) as it had no authority to control the work plaintiff was performing. However, the contract also provides that Russco is responsible for "taking all reasonable safety precautions to prevent injury or death to persons or damage to property" and that such responsibility extends "to the protection of *all employees on the Project* and all other persons who may be affected by the Work in any way" (emphasis added). The project is defined in the contract as "construction of all Tenant

Improvements for a retail store." Reading these contractual provisions together creates ambiguity as to whether Russco's site safety obligations extended to the signage and awning work that plaintiff was performing when his accident occurred. Further, Douglas Berry, Russco's project manager, testified that Russco was not responsible for the signage and awning work and that if he saw unsafe behavior by a contractor that Russco did not hire, he would only "make note of it and escalate" the issue by calling or sending an email to Express, because Russco had no authority to manage the owner's other contractors. As we cannot say, as a matter of law, that Russco was not responsible for plaintiff's safety while he was working on the project, Russco is not entitled to summary judgment dismissing the Labor Law § 240(1) claim as against it.

However, as there is an issue of fact as to whether Russco may be held liable for plaintiff's injuries under Labor Law § 240(1), both plaintiff's motion for summary judgment on his Labor Law § 240(1) claim as against Russco and Express' motion for summary judgment against Russco on its contractual indemnification claim should be denied.

The motion court properly denied Russco's motion to amend its answer to assert a cross claim against Ruggles for contractual indemnification, as there is no contractual agreement

between Russco and Ruggles.

The motion court also properly granted plaintiff's motion for partial summary judgment against Express and the Steinway defendants as plaintiff established, prima facie, that his accident was caused by Express's and the Steinway defendants' failure to provide an adequate safety device to prevent plaintiff from falling off the ladder, in violation of Labor Law § 240(1), and defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident.

The manner in which plaintiff set up and used the ladder does not constitute evidence that plaintiff was the sole proximate cause of the accident as there is no dispute that the ladder was unsecured and that no other safety devices were provided to plaintiff (*see Vega v Rotner Mgt. Corp.*, 40 AD3d 473, 473-474 [1st Dept 2007]). Further, defendants failed to show that plaintiff was a recalcitrant worker as they did not establish that he was specifically instructed to use a particular safety device other than the ladder and that he refused to do so (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]).

To the extent there are any differences in plaintiff's and Kavelski's testimonies as to how the accident occurred, such differences fail to raise an issue as to whether plaintiff was

the sole proximate cause of the accident. Kavelski's testimony does not dispute that plaintiff fell off the ladder, that the ladder was not secured and that there was no other safety device provided to plaintiff to prevent him from falling off the ladder. Defendants' expert engineer's affidavit also fails to raise an issue as to whether plaintiff was the sole proximate cause of the accident because the expert merely attempted to shift proximate cause of the accident to plaintiff for the way in which plaintiff set up the ladder and stated, in a conclusory fashion, that nothing about the ladder was defective. Moreover, the expert's statement that plaintiff could have set up the ladder a different way is belied by plaintiff's testimony that the ladder could not be set up any other way because of the pedestrian traffic in the area where plaintiff was performing his work.

The Labor Law § 240(1) claim should not be dismissed as against Ruggles. "Labor Law § 240(1) imposes a nondelegable duty upon owners, general contractors, *and their agents* to provide proper protection to persons working upon elevated structures" (*Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990] [emphasis added]). "To be treated as a statutory agent, the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton*

Constr. Corp., 86 AD3d 189, 193 [1st Dept 2011], quoting *Headen*, 160 AD2d at 320). "[O]nce a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity" (*Nascimento*, 86 AD3d at 195).

Ruggles is a proper Labor Law § 240(1) defendant because it was a statutory agent of Express, the owner of the project. It is undisputed that Express hired Ruggles as the sole contractor responsible for the manufacture and installation of all signage and awning work on the project, which was the work that plaintiff was performing when he sustained his injuries. Although Russco may be found liable based on its site safety obligations with regard to the signage and awning work, there is no question that, pursuant to the contract between Ruggles and Express, Ruggles was delegated the supervision and control over such work. Moreover, Ruggles may not escape liability under Labor Law § 240(1) based

on its delegation of the signage and awning work to Capitol, plaintiff's employer.

The Decision and Order of this Court entered herein on June 12, 2018 is hereby recalled and vacated (*see* M—3482 decided simultaneously herewith).

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

ENTERED: OCTOBER 9, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

7020 Cypress Group Holdings, Inc., Index 653408/15
Plaintiff-Respondent,

-against-

Onex Corporation, et al.,
Defendants-Appellants.

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Arnold & Porter Kaye Scholer LLP, New York (Aaron F. Miner of counsel), for appellants.

Fensterstock P.C., New York (Evan S. Fensterstock of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 3, 2017, which, insofar as appealed from, denied defendants' motion to dismiss the contract claim and indemnification claim based on a software application and a related contract, unanimously modified, on the law, to grant the motion as to the software application, and otherwise affirmed, without costs.

Plaintiff purchased nonparty Cypress Insurance Group, Inc. and its subsidiaries (Cypress) from defendants pursuant to a Stock Purchase Agreement (SPA). In the SPA, defendant Onex Corporation undertook to provide plaintiff with a Closing Date Statement setting forth Cypress's adjusted book value as of the day before the closing, and plaintiff undertook to submit a Buyer's Objection within 90 days if it disagreed with the

statement. If plaintiff and Onex could not resolve their dispute within 14 days, they would submit it to a Neutral Accounting Firm. Cypress also represented and warranted, inter alia, that a software application (the Application) that nonparty Systems Task Group International Ltd., d/b/a MajescoMastek (Majesco), had contracted to develop for it was "in adequate operating condition and repair."

After the SPA was entered into, but before the Closing Date, Cypress entered into the Third Addendum to Services Agreement (Third Addendum) with Majesco, which provided that Majesco would give Cypress a "services credit" every month for the balance of the term of the contract and that any outstanding balance owed by Majesco would be forfeited if the contracted was terminated early.

After receiving the Closing Date Statement, plaintiff submitted a Buyer's Objection arguing, in pertinent part, that the Application was worthless. The Neutral Accounting Firm to which the parties resorted when they were unable to resolve their dispute determined that "[u]nder GAAP [generally accepted accounting principles] and the Balance Sheet rules, the Application must be accounted for at fully amortized cost as of the Closing Date. Accordingly, ... no change is required to [defendants'] most current calculation of Adjusted Book Value."

On other issues, the Neutral Accounting Firm found for plaintiff. Subsequently, the parties agreed that payment by Onex to plaintiff of $1,559,258 would "be payment in full satisfaction of all claims raised in the Buyer's Objection" (the release).

Plaintiff alleges in its complaint, inter alia, that defendants breached the SPA by misrepresenting that the Application was in adequate operating condition and repair when it was defective and by executing the Third Addendum, which added to its contractual obligations, without its consent.

Insofar as the causes of action for breach of contract and indemnification are based on the Application, they are barred by the release (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]; *Herman v Melamed*, 110 AD2d 575, 577 [1st Dept 1985], *appeal withdrawn* 65 NY2d 925 [1985]). The parties agreed that payment by Onex to plaintiff of $1,559,258 fully satisfied all claims raised in the Buyer's Objection. Accordingly, the breach of contract claim and indemnification claim based on the Application should be dismissed.

Although the Third Addendum arises out of the same transaction as the Application, res judicata does not apply to the claim based on it, because that claim could not have been brought in the purchase price adjustment procedure (*see e.g.*

Marinelli, 265 AD2d at 8). The SPA limited the "scope of the disputes to be resolved by the Neutral Accounting Firm ... to whether the items in dispute that were included in the Buyer's Objection were prepared in accordance with this Agreement." The Third Addendum was not included in the Buyer's Objection.

Nor does the doctrine of collateral estoppel bar the claim based on the Third Addendum, because that claim was not decided in the purchase price adjustment procedure (*see Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]). Although during that procedure plaintiff raised many of the same issues as in the case at bar, the only relevant issue that the Neutral Accounting Firm decided was that no change was required to the adjusted book value.

Defendants contend that the Third Addendum did not injure plaintiff because it did not extend the term of Cypress's Services Agreement with Majesco and, even if plaintiff has stopped using Majesco, it might be able to avoid paying an early termination fee. However, the documentary evidence does not establish as a matter of law that the Third Addendum did not

extend the term of the Services Agreement (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The Decision and Order of this Court entered herein on June 28, 2018 is hereby recalled and vacated (*see* M-3740 decided simultaneously herewith).

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7216-
7217 In re Jerrold Lerner, et al.,
Petitioners,

-against-

New York City Loft Board, et al.,
Respondents.

- - - - -

In re Muriel Gould,
Petitioner,

-against-

New York City Loft Board, et al.
Respondents.

Index 156109/16
101179/16

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Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for Jerrold Lerner and Jaye Nydick, petitioners/respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for Muriel Gould, respondent/petitioner.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for New York City Loft Board, respondent.

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Determinations of respondent New York City Loft Board (Board), dated November 19, 2015, March 17, 2016, and March 17, 2016, which, respectively, denied the application by petitioners Jerrold Lerner and Jaye Nydick for coverage under article 7-C of the Multiple Dwelling Law (Loft Law), denied their motion for reconsideration, and denied a motion for reconsideration by petitioner Muriel Gould, unanimously confirmed, the petitions denied, and the proceedings brought pursuant to CPLR article 78

(transferred to this Court by orders, Supreme Court, New York County [Barbara Jaffe, J.], entered June 20, 2017), dismissed, without costs.

The Board's denial of the application by tenants Lerner and Nydick for coverage under the Loft Law is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The Board reasonably accepted the Administrative Law Judge's finding that the tenants failed to meet their burden of showing that a certain tenant residentially occupied a unit of the subject building on April 1, 1980, the first day of the window period under the Loft Law (Multiple Dwelling Law § 281[1]), on the basis that the testimony as to when he began residing in the unit lacked credibility and was not corroborated by any documentary evidence (*see Laermer v New York City Loft Bd.*, 184 AD2d 339 [1st Dept 1992], *lv denied* 81 NY2d 701 [1992]; *see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]).

The Board properly found that the tenants failed to establish any "extraordinary circumstances" warranting reconsideration under 29 RCNY 1-07(a)(2).

The landlord, Gould, lacks standing to challenge the denial of her motion for reconsideration, since she was not aggrieved by the Board's denial of the application for Loft Law coverage, and

failed to demonstrate that the Board's declination to rule on her alternative argument for denying the application has caused or will cause her to suffer any actual injury (*see T.D. v New York State Off. of Mental Health*, 91 NY2d 860 [1997]; *Robinson v City of New York*, 143 AD3d 641 [1st Dept 2016]; *see also* 29 RCNY 1-07[a][2]). Furthermore, Gould's argument as to one of the tenants, Nydick, is unpreserved since it was not raised at the administrative level, and this Court has "no discretionary authority" to "reach[] an unpreserved issue in the interest of justice" in this article 78 proceeding (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001] [internal quotation marks omitted]).

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7250 The People of the State of New York, Respondent, Ind. 5178/10

-against-

Mario Rodriguez, Defendant-Appellant.

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Stanley Neustadter, Cardozo School of Law, New York (Jeremy Gutman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered November 7, 2013, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree (two counts), attempted assault in the first degree, criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree, and sentencing him to an aggregate term of 22 years, unanimously affirmed.

Defendant's challenge to evidence of an uncharged crime is unpreserved, and we decline to review in the interest of justice. As an alternative holding, we find that the court providently exercised its discretion in admitting evidence of a prior altercation involving defendant and one of the victims where defendant displayed a firearm and threatened the victim. This

evidence was highly probative background evidence that tended to explain the contentious relationship between defendant and the victim, helped establish a motive for defendant's behavior, placed the events in a believable context, and refuted defendant's defense (*see e.g. People v Dorm, 12 NY3d 16 [2009*]; *People v Steinberg*, 170 AD2d 50, 72-74 [1st Dept 1991], *affd* 79 NY2d 673 [1992]). The probative value of the evidence exceeded any prejudicial effect, which was minimized by the court's instructions.

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

ENTERED: OCTOBER 9, 2018

CLERK

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

7251 Abdoulaye Kouyate, Index 23878/14E
Plaintiff-Appellant,

-against-

Corey M. Croughn, et al.,
Defendants-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about June 22, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 19, 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: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7252 In re Heily A.,

A Child Under Eighteen Years
of Age, etc.,

Flor F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Gustavo A.,
Respondent.

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Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti Singh of counsel), attorney for the child.

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Order of fact-finding and disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about February 21, 2017, which found that respondent mother neglected the subject child, unanimously affirmed, without costs.

The finding that respondent mother neglected the child by permitting her to be exposed to incidents of domestic violence between the parents is supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Exposure to domestic violence is a proper basis for a neglect finding where

the violence occurred in the child's presence resulting in physical, mental or emotional impairment or imminent danger thereof (*see Matter of Emily S. [Jorge S.*], 146 AD3d 599, 600 [1st Dept 2017]; *Matter of Gianna A. [Jashua A.],* 132 AD3d 855, 856 [2d Dept 2015]).

The court will defer to Family Court's findings of fact and credibility determinations where, as here, they are supported by the record (*see Matter of Davion A. [Marcel A.]*, 68 AD3d 406 [1st Dept 2009]).

Petitioner agency established that the actual or threatened harm to the child was a consequence of the failure of the mother to exercise a minimum degree of care in providing proper supervision or guardianship (*Nicholson*, 3 NY3d at 370). The caseworker testified that respondent admitted to her that the child witnessed domestic violence between the parents and that sometimes respondent was the aggressor. The child admitted to the caseworker that she was aware that her parents physically fought with each other and that she was "mad and scared" after being present for one physical altercation (*see Matter of Emily S. [Jorge S.]*, 146 AD3d at 600; *Matter of Serenity H. [Tasha S.]*, 132 AD3d 508 [1st Dept 2015]). In addition, although respondent did not live with the father and the child, she visited and stayed there, despite an order of protection against her and

despite the documented history of domestic violence, thereby exposing the child to violence between the parents without regard to the impact of that violence on the child.

However, the finding that respondent neglected the subject child by misusing alcohol to the extent set forth in Family Court Act §§ 1012(f)(i)(B) and 1046(a)(iii) is not supported by a preponderance of the evidence (*see Matter of Cameron D. [Lavon D.]*, 154 AD3d 849, 850 [2d Dept 2017]; *Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d 685, 687-688 [2d Dept 2014]).

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Webber, Singh, JJ.

7253 Lauren Wholey, et al., Index 162934/15
Plaintiffs-Respondents,

-against-

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

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Hogan Lovells US LLP, New York (Daryl L. Kleiman of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Alan E. Rothman of counsel), for appellants.

Excolo Law, PLLC, New York (Ari Kresch of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 9, 2017, which, to the extent appealed from, denied defendants' motion to dismiss the complaint except for the claim of defective manufacturing, unanimously modified, on the law, to grant the motion as to claims of injuries that occurred during the clinical trial and as to the cause of action for violation of General Business Law §§ 349 and 350 and the causes of action for "fraud," "fraudulent misrepresentation," and "fraudulent concealment," and otherwise affirmed, without costs.

As the sponsors of a clinical trial, defendants owed no duty to plaintiff Lauren Wholey, an enrollee in the trial (*see Sykes v United States*, 507 Fed Appx 455, 462 [6th Cir 2012]; *Abney v Amgen, Inc.*, 443 F3d 540, 550 [6th Cir 2006]). Thus, her claims

concerning the drug Enbrel must be limited to those that allegedly arose after she stopped participating in the trial and was prescribed the drug as a patient.

The claim of violation of General Business Law §§ 349 and 350 must be dismissed, because the generally alleged deceptive practice of failing to provide adequate warnings by concealing information is, as a matter of law, not a practice directed at consumers (*see Amos v Biogen Idec Inc.*, 28 F Supp 3d 164, 173-174 [WD NY 2014]).

The complaint fails to plead the various claims of fraud with the requisite particularity (*see* CPLR 3016[b]; *Devore v Pfizer Inc.*, 58 AD3d 138, 143-144 [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]).

The learned intermediary doctrine does not compel dismissal of the claims that the drug's warning labels were insufficient, since the claims are premised not on defendants' failure to warn plaintiff directly but on their failure to provide proper warnings to her prescribing medical professionals (*see Martin v Hacker*, 83 NY2d 1, 9 [1993]). Nor did defendants show that the warnings are sufficient as a matter of law (*see id.*).

The claim that defendants breached the implied warranties of fitness and merchantability by holding Enbrel out as reasonably fit and suitable when it was actually unreasonably dangerous is

sufficiently pleaded (*see generally Friedman v Medtronic, Inc.*, 42 AD2d 185 [2d Dept 1973]).

Defendants are correct that there is no independent cause of action for punitive damages (*see Rivera v City of New York*, 40 AD3d 334, 344 [1st Dept 2007], *lv dismissed* 16 NY3d 782 [2011]). However, their argument that plaintiffs cannot seek punitive damages in connection with their other claims is incorrect (*see e.g. Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 369 [1st Dept 2007], *affd* 10 NY3d 486 [2008]).

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

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7254 The People of the State of New York, Respondent, Ind. 1497/13

-against-

Sean Steele, Jr., Defendant-Appellant.

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Marianne Karas, Thornwood, for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 29, 2014, convicting defendant, upon his plea of guilty, of operating as a major trafficker and conspiracy in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 19 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the trafficking conviction to 15 years, and otherwise affirmed.

Defendant's challenges to the validity of his plea do not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the plea was knowingly, intelligently and voluntarily made. The record does not

establish any misunderstanding by counsel of the scope of sentencing or that the plea was coerced by any conduct by the court (*see e.g. People v Rivera*, 118 AD3d 626 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]).

We do not, however, find that defendant made a valid appeal waiver, and we find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7255 The People of the State of New York, Ind. 1512/15
Respondent,

-against-

Rodney Stover,
Defendant-Appellant.

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

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

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

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

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

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

ENTERED: OCTOBER 9, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7257- Index 653695/13
7258- 653335/13
7259 652732/13
7260 653901/13

Royal Park Investments SA/NV,
Plaintiff-Appellant,

-against-

Morgan Stanley et al.,
Defendants-Respondents.

- - - - -

Royal Park Investments SA/NV,
Plaintiff-Appellant,

-against-

Credit Suisse AG et al.,
Defendants-Respondents.

- - - - -

Royal Park Investments SA/NV,
Plaintiff-Appellant,

-against-

Deutsche Bank AG et al.,
Defendants-Respondents.

- - - - -

Royal Park Investments SA/NV,
Plaintiff-Appellant,

-against-

UBS AG et al.,
Defendants-Respondents.

_____

Robbins Geller Rudman & Dowd LLP, San Diego, CA (Lucas Olts of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for respondents.

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Orders, Supreme Court, New York County (Charles E. Ramos,

J.), entered on or about April 12, 2017, April 14, 2017, and April 17, 2017, which granted defendants' motions to dismiss the amended complaints with prejudice, unanimously affirmed, with costs.

In these cases, which have been consolidated by this Court for purposes of this appeal, plaintiff alleges that defendants committed fraud in connection with the sale of residential mortgage-backed securities (RMBS). The threshold issue is whether plaintiff's standing is governed by New York or Belgian law.

Between 2005 and 2007, nonparties Fortis Bank, Fortis Bank SA/NV, Cayman Islands Branch (Fortis Cayman), and Scaldis bought RMBS from defendants. Nonparty Fortis Proprietary Investment (Ireland) Limited (Fortis Ireland) bought RMBS from the Credit Suisse defendants. On October 9, 2008, the Belgian State (which owned 49.93% of Fortis Bank), BNP Paribas, and various Fortis entities agreed to "set up a special purpose vehicle" to acquire Fortis' structured credit portfolio. Plaintiff was this special purpose vehicle.

On May 12, 2009, plaintiff, Fortis Bank, Fortis Ireland, and other companies not parties to this appeal entered into the Portfolio Transfer Agreement (PTA), pursuant to which plaintiff

bought "all of the Sellers'[1] right, title and interest in and to the Portfolio Property". The PTA states, "This Agreement and the legal relations among the parties shall be governed by and construed in accordance with Belgian law". Plaintiff is incorporated under the laws of Belgium and has its principal place of business in Brussels.

Between August and November 2013, plaintiff commenced four actions against different defendants alleging fraud, fraudulent inducement, aiding and abetting fraud, and negligent misrepresentation. Plaintiff also sued the Deutsche Bank defendants for rescission.

Supreme Court dismissed the amended complaints with prejudice on the ground that plaintiff lacked standing or capacity to sue.

We affirm. "[C]ourts will generally enforce choice-of-law clauses" (*Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 470 [2015]). However, "when parties include a choice-of-law provision in a contract, they intend application of only that state's substantive law" (*Id.* at 474 [internal quotation marks omitted]). In other words, "[c]hoice of law provisions typically apply to only substantive issues" (*Portfolio Recovery Assoc., LLC*

[1]The Sellers were the parties to the PTA other than plaintiff.

v King, 14 NY3d 410, 416 [2010]).

Unlike substantive law, "matters of procedure are governed by the law of the forum state" *(FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 496 [1st Dept 2017]). The question of whether a plaintiff has standing "is a procedural matter" (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 3d 281 [1st Dept 2007]; *see also Mertz v Mertz*, 271 NY 466, 473 [1936] ["The law of the forum determines ... the capacity of parties to sue or to be sued"]).

Plaintiff contends that pursuant to *Sealink Funding Ltd v Morgan Stanley* (2014 NY Slip Op 31031[u] at *7 [Sup Ct NY County 2014], *affd* 133 AD3d 458 [1st Dept 2015]), whether claim rights were transferred under a contract is a substantive question and not a procedural matter. Plaintiff's reliance on *Sealink Funding* is misplaced as there the parties agreed that English law governed the transfers under the applicable agreements (*id.* at *7). Here, the defendants make no such concession as to the governing law. Accordingly, the motion court properly applied New York law to determine whether plaintiff had standing.

Under New York law, "where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language ... that evinces that intent and effectuates the transfer of such rights"

(*Commonwealth of Pennsylvania Pub. Sch. Employees' Retirement Sys. v Morgan Stanley & Co., Inc.*, 25 NY3d 543, 550 [2015]). Plaintiff does not claim that the PTA contains such language, and thus, the motion court properly found that plaintiff lacked standing to bring the claims it asserts in the instant actions.

In view of the foregoing, it is unnecessary to reach the parties' other arguments.

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7261 The People of the State of New York, Ind. 1115/16
Respondent,

-against-

Cesar Mendez,
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 (Katherine Kulkarni of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J. at plea; Daniel FitzGerald, J. at sentencing), rendered August 25, 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: OCTOBER 9, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7262 In re Areli G.,
Petitioner-Respondent,

-against-

Alexis S.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

_____

Order, Family Court, Bronx County (Dakota D. Ramseur, J.), entered on or about August 24, 2017, which, inter alia, awarded petitioner mother sole legal and physical custody of the subject child during the school year, unanimously affirmed, without costs.

Family Court's determination that it was in the best interest of the subject child to award sole legal and physical custody to the mother during the school year, while giving the father liberal parenting time during school vacations, has a sound and substantial basis in the record (*see Margaret R.-K. v Kenneth K.*, 125 AD3d 419 [1st Dept 2016]). The court had the benefit of a full evidentiary hearing at which it had the opportunity to hear the testimony of both parents and other witnesses, and to assess their demeanor and credibility (*Eschbach*

v Eschbach, 56 NY2d 167 [1982]). It examined and weighed numerous relevant factors (*id.* at 172-74). In light of the record, the father's contention that the court did not properly weigh his role as the child's primary caregiver is unavailing (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]).

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

ENTERED: OCTOBER 9, 2018

CLERK

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

7265 The People of the State of New York, Ind. 1738/11
Respondent,

-against-

Richard Ortiz,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about February 24, 2017, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not establish that his medical condition would reduce his risk of reoffense. The other mitigating factors cited by defendant were adequately taken into account by the risk

assessment instrument, and were in any event outweighed by the seriousness of the underlying offense.

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7266-
7267 Index 20496/13E

Taquita Harrigan,
Plaintiff-Respondent-Appellant,

-against-

Amadou Sow,
Defendant-Appellant-Respondent,

Moses Joseph, et al.,
Defendants-Respondents.

_____

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Christopher M. Lochner of counsel), for appellant-respondent.

The Rosato Firm, PC, New York (Joseph S. Rosato of counsel), for respondent-appellant.

Keane & Bernheimer, PLLC, Valhalla (Connor Fallon of counsel), for, respondents.

_____

Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 23, 2018, dismissing the complaint and all cross claims as against defendants Moses Joseph and Amanda Jackson pursuant to an order, same court and Justice, entered on or about January 16, 2018, which, inter alia, granted the cross motion of Joseph and Jackson for summary judgment, unanimously affirmed, without costs. Defendant Amadou Sow's appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Plaintiff's appeal from the aforesaid order, deemed an appeal from the judgment.

Plaintiff was a passenger in a vehicle owned by defendant Jackson and driven by defendant Joseph, which was hit in an intersection by the livery vehicle owned and operated by defendant Sow. Sow admittedly failed to stop at the stop sign before entering the intersection, due to a mechanical failure of his brakes.

Joseph and Jackson met their prima facie burden of establishing that the motor vehicle accident resulted solely from Sow's negligence. Both drivers' deposition testimony demonstrates that Joseph had the right of way in entering the intersection and that Sow did not stop at the stop sign before colliding with the side of Joseph's vehicle. As the driver with the right of way, Joseph was entitled to anticipate that the other vehicle would obey the traffic laws that required it to yield, and he had no duty to watch for and avoid a driver who might fail to stop at a stop sign (*see e.g. Gonzalez v Bishop*, 157 AD3d 460 [1st Dept 2018]; *Sanchez v Lonero Tr., Inc.*, 100 AD3d 417 [1st Dept 2012]).

Joseph testified that he stopped twice and looked both ways before entering the intersection, and the contention by Sow and plaintiff that Joseph negligently failed to maintain a good lookout is speculative and fails to raise a triable issue of fact (*see Jenkins v Alexander*, 9 AD3d 286, 288 [1st Dept 2004]).

Moreover, under the emergency-like circumstances presented, Joseph's evasive response of accelerating to avoid a collision in the few seconds before impact did not constitute negligence (*Gonzalez v Bishop*, 157 AD3d at 461; *Rooney v Madison*, 134 AD3d 634, 634-635 [1st Dept 2015], *lv denied* 27 NY3d 911 [2016]).

Plaintiff's and Sow's remaining contentions are unavailing.

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7268 The People of the State of New York, Ind. 396N/16
Respondent,

-against-

Tyrone Oliver,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Richard Weinberg, J. at plea; Kevin McGrath, Jr., J. at sentencing), rendered July 27, 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: OCTOBER 9, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7269 The People of the State of New York, Respondent, Ind. 608N/16

-against-

Zenda Clark, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 6, 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: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7270 Jaime Redrovan, Index 306533/11
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Marder, Eskesen & Nass, New York (Joseph B. Parise of counsel), for appellant.

Lawrence Heisler, Brooklyn (Harriet Wong of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about August 17, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law by demonstrating the applicability of the emergency doctrine, in this action where plaintiff was injured when the bus in which he was a passenger stopped suddenly, causing him to fall. Defendant submitted evidence showing that shortly after the bus had started to move after being stopped at a traffic light, a car abruptly pulled in front of it and stopped, cutting the bus off so closely that despite the driver's hard application of the brakes, the bus came within inches of colliding with the car. There is no evidence that the bus driver created the

emergency or could have avoided a collision by taking some action other than forcefully applying the brakes (*see e.g. Orsos v Hudson Tr. Corp.*, 111 AD3d 561 [1st Dept 2013]; *Hotkins v New York City Tr. Auth.*, 7 AD3d 474 [1st Dept 2004]) Plaintiff's opposition, consisting of mere speculation, failed to raise a triable issue of fact.

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7271 The People of the State of New York, Respondent, Ind. 452/15

-against-

Roderick Prude, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Bonnie G. Wittner, J. at plea and sentencing), rendered December 3, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to three years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a conditional discharge for a period of one year, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant's argument that, even if credited, the testimony did not establish reasonable suspicion for stopping him for carrying a knife on the subway is

unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the officer's observation of "part of a knife" – which was attached by a clip to defendant's pocket, with the bulk of the knife inside the pocket – established reasonable suspicion that defendant was violating 21 NYCRR 1050.8(a), which prohibits the carrying of weapons or dangerous instruments on the subway. The officer's ensuing actions, in removing the knife from defendant's pocket, and arresting him after determining that the knife was a gravity knife, were also proper.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7272 The People of the State of New York, Respondent, Ind. 4537/14

-against-

David Fields, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Melissa Jackson, J. at plea; Eduardo Padro, J. at hearing; Patricia Nunez, J. at sentencing), 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: OCTOBER 9, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7273N Port Authority of New York and New Jersey,
Plaintiff-Respondent,

Index 101710/16
590192/13
590331/10

-against-

Guardian Service Industries, Inc.,
Defendant-Appellant.

- - - - -

Guardian Services Industries, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Moretrench American,
Third-Party Defendant-Appellant.

- - - - -

Guardian Service Industries, Inc.,
Second Third-Party Plaintiff-Appellant,

-against-

Nicholson/E.E. Cruz, LLC,
Second Third-Party Defendant-Respondent.

- - - - -

Moretrench American, Corporation,
Third Third-Party Plaintiff-Appellant,

-against-

Phoenix Constructors, et al.,
Third Third-Party Defendants-Respondents.

_____

Bonner Kiernan Trebach & Crociata LLP, New York (Jae W. Joo of counsel), for Guardian Service Industries, Inc., appellant.

Smith, Mazure, Director, Wilkins, Young & Yagerman, P.C., New York (Stacy I. Malinow of counsel), for Moretrench American, Corporation, appellant.

Gerber Ciano Kelly Brady LLP, Garden City (Matthew V. Bruno of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 17, 2017, which granted plaintiff and second third-party defendant's (Nicholson) motion to vacate their default, unanimously affirmed, without costs.

The motion court providently exercised its discretion in determining that plaintiff and Nicholson demonstrated a reasonable excuse for their default and, respectively, a meritorious cause of action and a meritorious defense (*see Benson Park Assoc., LLC v Herman*, 73 AD3d 464 [1st Dept 2010]). The court concluded that the attorney representing plaintiff and Nicholson suffered from various problems including health issues and that his clients should not be prejudiced by his conduct. The court found that the merit of plaintiff's claim and Nicholson's defense of contractual and common law indemnification was demonstrated by the contracts and the testimony of witnesses that water on the job site may have been a proximate cause of the underlying accident.

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

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

ENTERED: OCTOBER 9, 2018

CLERK

CORRECTED ORDER - OCTOBER 15, 2018

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7275 In re Elvis Sanchez, Ind. 3524/14
[M-2401] Petitioner, 147/15
O.P. 150/18

-against-

Hon. E. Biben, etc. et al.,
Respondents.

Elvis Sanchez, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Ellen Biben, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (**John** T. Hughes of counsel), for James Zaleta respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 9, 2018

CLERK

CORRECTED ORDER - OCTOBER 15, 2018

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7274 [M-2118] In re Elvis Sanchez, Petitioner,

-against-

Hon. Susan Knipps, etc., et al., Respondents.

- - - - -

Cyrus R. Vance, Jr., Nonparty Respondent.

Ind. 3524/14
147/15
O.P. 148/18

Elvis Sanchez, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Susan Knipps, Hon. A. Kirke Bartley, Hon. Ellen Biben, Hon. Abraham Clott, Hon. Patrick McGrath and Hon. Bonnie Wittner, respondents.

Cyrus R. Vance, Jr., District Attorney, New York (**John** T. Hughes of counsel), for nonparty respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 9, 2018

CLERK