SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 23, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Manzanet-Daniels, Webber, Oing, Singh, JJ.

8503 The People of the State of New York, Respondent, Ind. 1083/12

-against-

John Hop Wah, Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered July 17, 2015, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of three years, reversed, on the law, and the matter remanded for a new trial.

In *People v Velez* (131 AD3d 129 [1st Dept 2015]), we held that, where justification is a central issue at trial, the court's instructions, as a whole, must convey that acquittal of a greater charge precludes consideration of lesser offenses that are based on the same conduct. We have consistently reversed convictions where the court's jury charge failed to comply with

Velez, even where the claim was unpreserved (*see e.g. People v Breckenridge*, 162 AD3d 425 [1st Dept 2018], *lv dismissed* 32 NY3d 1169 [2018]; *People v Marcucci*, 158 AD3d 434 [1st Dept 2018], *lv dismissed* 31 NY3d 1015 [2018]; *People v* Valentin, 154 AD3d 474 [1st Dept 2017]; People *v Santiago*, 155 AD3d 506 [1st Dept 2017], *lv dismissed* 30 NY3d 1119 [2018]; *People v Kareem*, 148 AD3d 550 [1st Dept 2017]; *lv dismissed* 29 NY3d 1033 [2017]; *People v Delin*, 145 AD3d 566 [1st Dept 2016], *lv dismissed* 29 NY3d 996 [2017]).

Here, reversal is warranted despite the lack of preservation, because, contrary to our dissenting colleague's contention, the court's charge, as a whole, failed to properly instruct the jury that if it found defendant not guilty of first-degree assault based on a finding of justification, the jury must not consider the lesser second-degree assault counts arising from defendant's use of force. The dissent posits that the instruction here is meaningfully different from *Velez* in that the court "made it clear that a finding of not guilty on the basis of justification of the greater charge of assault in the first degree necessitated an acquittal on all counts." However, we have already considered and rejected the specific argument that it is proper or meaningfully different from *Velez* where a court employs the same language that the jury "must find the defendant

not guilty *on all counts*" if it finds justification on the greater charge (emphasis added). This language is not sufficient to convey to the jury the "stop deliberations" principle (*see Velez*, 131 AD3d at 133).

We acknowledge that the instant trial was conducted in January 2014, before *Velez* was decided, and that the CJI and model verdict sheet were not revised until January 2018 to reflect the *Velez* line of cases. Reversal is warranted nonetheless (*see People v Feuer*, 11 AD3d 633, 634 [2d Dept 2004]). The court here included as an element of each offense that defendant was not justified, which may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted defendant of the top count based on justification. Additionally, the verdict sheet directed that each charge be considered in the alternative and failed to mention justification (*see People v Colasuonno*, 135 AD3d 418, 420 [1st Dept 2016]). In light of this improper charge, it is impossible to discern whether acquittal of the top count was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts.

Moreover, we reject our dissenting colleague's contention that the error was harmless. The facts, as set forth at length

in the dissent, do not demonstrate that there was "overwhelming evidence disproving the justification defense and no reasonable possibility that the verdict would have been different had the charge been correctly given" (*People v Breckenridge*, 162 AD3d at 425-426, quoting *People v Petty*, 7 NY3d 277, 286 [2006]). The credibility of the parties was a key component of this trial. The jury may very well have concluded that defendant's first-degree assault (with a dangerous instrument) was justified, in light of defendant's testimony that he acted in self-defense after the complainant punched him first and ripped his ear lobe, and acquitted him of the top charge, but convicted him of the lesser assault charge for some other reason.

Proper instruction, that deliberations must stop once justification is found on the top count, would prevent such a verdict (*People v Velez,* 131 AD3d at 133). Thus, the possibility remains that the verdict would have been different had the charge been correctly given, particularly since the evidence against defendant disproving justification was not overwhelming.

We have considered and rejected the People's arguments for affirmance.

In light of this determination, we find it unnecessary to reach defendant's remaining contentions, except that we find that the verdict is supported by legally sufficient evidence and is

not against the weight of the evidence.

All concur except Webber, J. who dissents in part in a memorandum as follows:

WEBBER, J. (dissenting, in part)

I disagree that the court's charge to the jury on justification was erroneous and that a new trial is mandated. Accordingly, I would affirm the conviction in all respects.

The 63-year-old complainant, Samuel Walker, testified that he moved to the Bellevue Shelter in midtown Manhattan in July 2011. From around November 2011 until December 16, 2011, Walker shared a room at the shelter with defendant and two other men. During this period, Walker had at least two altercations with defendant, including one in which defendant attempted to take Walker's DVD player.

On the evening of December 16, 2011, when Walker returned to his room, he turned on the light and began to change his clothes. Defendant, who was in his bed, told Walker that he "can't turn the light on," and Walker responded that he had to change his clothes. Defendant got up from his bed, went over to Walker's bed, and reached for Walker's DVD player. Walker told defendant he could not have the DVD player. Walker grabbed it and bent down to put it in his locker. According to Walker, defendant then punched him on the left side of his jaw, causing him to bleed from his mouth and nose. Walker fell to the floor and was unconscious for some time. While he was on the floor, defendant hit him several times in the head, ribs, and back, with a

steel-toed construction boot, which felt like a hammer. Walker tried to get up, but he was too dizzy.

Walker testified that his jaw was broken and that it was wired for a period of time after he had surgery on it. He stated that he still had numbness in his jaw and was limited to eating only soft foods. He also had to take painkillers in order to sleep at night and aspirin for pain during the day, and he still had pain in his back and could not bend over or twist his torso to either the left or the right.

Lawrence Harris, one of the other men who shared the room with defendant and Walker, testified that he was lying in his own bed in the room, almost asleep, at the time of the incident. Harris testified that he heard defendant say to Walker that someone had taken his DVD player that he had left on his bed. Walker responded, "[W]hat are you talking about?," and "You know, I don't steal." Defendant said, "[L]et me show you how I get down," and then hit Walker once. Walker fell to the floor. According to Harris, while Walker was down, defendant repeatedly kicked him for more than one minute.

Harris testified that he eventually interfered, asking defendant, "[W]hat's going on?," but when defendant told him not to "start," Harris stated that he was not going to get involved because he did not want defendant "coming after" him. According

to Harris, defendant attacked Walker, and Walker never swung at defendant or even put up his hands to protect himself.

Defendant testified that he had moved into the shelter in April 2011 and had lived in the room with Walker, Harris and another man since December 2011. Defendant denied complaining to Walker about turning on the light, and claimed that, although they were not friends, there was never animosity between them.

According to defendant, he and Walker each owned a Coby brand DVD player. On December 16, 2011, defendant reluctantly allowed Walker to borrow his charger for the DVD player. When defendant entered the room, he asked Walker, who was sitting on his bed, whether he had seen his DVD player, and Walker responded that he had not seen it. When defendant demanded that Walker return the charger he had lent him, Walker stood up, stated that he did not have the DVD player, and punched defendant on his left ear, connecting with defendant's earring and ripping his ear lobe. Defendant testified that he responded aggressively and defended himself. According to defendant, they exchanged blows with their fists, and he hit Walker's face, eyes, jaw, and ribs. After defendant had punched Walker five times, Walker fell to the floor, and defendant went to his locker.

The court instructed the jurors that defendant had raised the defense of justification, that the People were required to

prove beyond a reasonable doubt that defendant was not justified, and that defendant was not required to prove that he was justified. For the count of first-degree assault, the court instructed the jurors that, as a fourth element, the People were required to prove beyond a reasonable doubt that defendant was not justified in his actions. The court instructed the jurors, "[I]f you find that the People have not proved the fourth element, that is that the defendant was not justified beyond a reasonable doubt, then you must find the defendant not guilty on *all counts*" (emphasis added).

The court charged the jurors regarding the elements of second-degree assault under a dangerous instrument theory, including a fourth element that the People must prove beyond a reasonable doubt that defendant was not justified. Finally, the court instructed the jurors regarding second-degree assault under a theory of intent to cause physical injury, adding as a final element that the People must have proven beyond a reasonable doubt that defendant was not justified.

I disagree with the majority that this Court's rulings in *People v Velez* (131 AD3d 129 [1st Dept 2015]) and its progeny require reversal of the conviction.[1]

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[1]It should be noted that the instant trial was conducted prior to *Velez* and prior to the January 2018 revision to the CJI

The court's charge made it clear that the People had the burden of proving that defendant's conduct was not justified with respect to both the greater and the lesser offenses (*see People v Bolling*, 24 AD3d 1195, 1196-1197 [4th Dept 2005], *affd* 7 NY3d 874 [2006]; *People v White*, 66 AD3d 585 [1st Dept 2009], *lv denied* 14 NY3d 807 [2010]). The court carefully instructed the jury that if they found that the People had not proven the fourth element, which the court had previously identified as justification, "that is that the defendant was justified beyond a reasonable doubt," then they must find defendant not guilty on all counts. This was clearly an admonishment to the jurors that if they found that defendant was justified when they considered assault in the first degree, they must find him not guilty on "all counts" (*see People v Moore*, 85 AD3d 446 [1st Dept 2011], *lv denied* 19 NY3d 976 [2012]).

The court made it clear that a finding of not guilty on the basis of justification of the greater charge of assault in the first degree necessitated an acquittal on all counts, something that this Court in *Velez* found that the trial court had failed to do.

Further, in my opinion, any error in the charge to the jury

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charge on justification.

was harmless as "there was overwhelming evidence disproving the justification defense and no reasonable possibility that the verdict would have been different had the charge been correctly given" (*People v Petty*, 7 NY3d 277, 286 [2006]; *People v Jones*, 3 NY3d 491, 497 [2004]). We have specifically stated in numerous decisions that the *Velez* error was not harmless, suggesting that under certain facts a *Velez* error may be found harmless (*see People v Flores*, 145 AD3d 568, 569 [1st Dept 2016], *lv dismissed* 29 NY3d 997 [2017]; *People v Delin*, 145 AD3d 566, 567 [1st Dept 2016], *lv dismissed* 29 NY3d 996 [2017]; *People v Marcucci*, 158 AD3d 434 [1st Dept 2018], *lv dismissed* 31 NY3d 1015 [2018]; *People v Valentin*, 154 AD3d 474, 475 [1st Dept 2017]). In my opinion, the facts in this case support such a finding.

Walker and Harris both testified that defendant attacked Walker. According to their testimony, defendant punched Walker, causing him to fall to the floor, at which time defendant continued to punch and kick him. Harris testified that Walker never swung at defendant and never even put up his hands to defend himself. Defendant's own testimony was that he intended to do serious harm to Walker, that he struck Walker repeatedly in the face, eyes, jaw, and ribs, in order to hurt Walker and to "bring him down." Defendant testified that during the two-minute fight, he was able to deflect most of Walker's punches, and that

Walker was "in no position to handle" him. Even accepting defendant's testimony that Walker punched him in the ear, connecting with defendant's earring and ripping his ear lobe, Walker's alleged actions would not have justified the deadly physical force admittedly used by defendant to "defend[ ] [him]self." In my opinion, the evidence more than supports the conclusion that the jury considered and rejected the defense of justification.

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Richter, Oing, Moulton, JJ.

8654N U.S. Bank National Association, etc., Plaintiff-Respondent, Index 653140/15

-against-

DLJ Mortgage Capital, Inc., Defendant,

Ameriquest Mortgage Company, Defendant-Appellant.

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Knuckles Komosinski & Manfro LLP, Elmsford (John E. Brigandi of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (David J. Abrams of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 3, 2018, which, to the extent appealed from as limited by the briefs, denied defendant Ameriquest Mortgage Company's motion to reverse a Recommendation of the Special Master dated March 7, 2018, directing it to produce certain financial records, including tax returns from 2006 to 2015, unanimously reversed, on the law, on the facts, and in the exercise of discretion, without costs, and the motion granted, without prejudice to plaintiff's renewal of its motion to compel the production of such documents, or to Ameriquest's opposition to such renewed motion, under the circumstances described in this decision.

Inasmuch as it appears that the documents sought are potentially relevant to an affirmative defense that may be raised by defendant DLJ Mortgage Capital, Inc., and DLJ has not yet answered the complaint, we reverse and grant Ameriquest's motion for reversal of the Special Master's direction that it produce the documents. Our resolution of this appeal is without prejudice to plaintiff's renewal of its motion to compel the production of the documents, or to Ameriquest's opposition to such a renewed motion, upon DLJ's service of its answer.

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

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

ENTERED: APRIL 23, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8793 Shelley Rubin, Index 650839/17
Plaintiff-Appellant,

-against-

Nisha Sabharwal, et al.,
Defendants-Respondents.

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The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellant.

Certilman Balin Adler & Hyman LLP, East Meadow (Paul B. Sweeney of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about February 20, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the fraud-based claims, the breach of contract and rescission claims to the extent based on transactions that occurred before February 16, 2013, the unjust enrichment claim to the extent based on transactions that occurred before February 16, 2011, and the claims against defendants OM Vastra and Vastra Miami, unanimously affirmed, without costs.

Plaintiff's claims for fraudulent inducement, fraud and conspiracy to commit fraud were properly dismissed. Plaintiff failed to assert sufficient facts to establish reasonable reliance and that she exercised due diligence to determine the value of the property. Plaintiff cannot assert reasonable

reliance where she had the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and failed to make use of those means (*see Rosenblum v Glogoff*, 96 AD3d 514, 515 [1st Dept 2012]. As the co-founder and co-chair of a museum specializing, in part, in Indian art, plaintiff had the means to conduct an appraisal of the jewelry prior to purchasing the jewelry, and yet she took no steps to verify the alleged misrepresentations. Moreover, plaintiff had the wherewithal to conduct an appraisal several years after the first transaction when she wanted to sell some of the items and verify the authenticity of the jewelry. Plaintiff could have discovered the truth had she conducted an inquiry into the value of the property during the many transactions at issue in this case.

The alleged misrepresentations - that the items were of "museum quality," of "highest quality," and "generational" - ultimately go to the value of the jewelry, which constitutes "nonactionable opinion that provides no basis for a fraud claim" (*MAFG Art Fund, LLC v Gagosian*, 123 AD3d 458, 459 [1st Dept 2014], *lv denied* 25 NY3d 901 [2015]; *see also Augsbury v Adams*, 135 AD2d 941, 942 [3d Dept 1987]).

The four year statute of limitations applicable to sales of goods was properly applied to plaintiff's breach of contract and rescission claims (UCC § 2-725[1]), and plaintiff's failure to

conduct any due diligence with respect to the jewelry that was sold to her precludes her reliance on the doctrine of equitable estoppel to toll the limitations period (*see Zumpano v Quinn*, 6 NY3d 666, 683-84 [2006]).

Plaintiff's conclusory statements that proceeds from the transactions at issue herein were fraudulently transferred to the Florida entity defendants so they could be "hidden" and "disbursed" are not sufficiently detailed to plead a claim for fraudulent conveyance pursuant to Debtor and Creditor Law § 276 (*Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [1st Dept 2000]).

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

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9039 The People of the State of New York, Respondent, Ind. 1114/12

-against-

Reginald Goldman, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at search warrant hearing; Martin Marcus, J. at jury trial and sentencing), rendered June 9, 2016, convicting defendant of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously reversed, on the law, defendant's motion to suppress DNA evidence obtained by way of a search warrant issued on or about January 31, 2012 granted, and the matter remanded for a new trial.

The hearing court improperly precluded defense counsel from reviewing the People's application for a search warrant to obtain a sample of defendant's saliva for DNA purposes and from participating in the substantive portion of the hearing on the application. Defendant had not yet been charged with the homicide at issue, and he was in custody on unrelated charges.

Counsel was notified of the search warrant proceeding because he represented defendant in connection with the other charges.

In general, search warrant applications are made ex parte (*People v McNair*, 85 AD3d 693, 694 [1st Dept 2011], *lv denied* 17 NY3d 819 [2011]). However, as explained in *Matter of Abe A.* (56 NY2d 288 [1982]), special rules apply to evidence to be taken from a suspect's body, such as blood or DNA samples.

The hearing court excluded defense counsel based on its understanding that the discussion of notice in *Abe A.* applied only to the first "discrete level" of Fourth Amendment analysis identified in that case, involving "the seizure of the person necessary to bring him into contact with government agents," and not the second level, involving "the subsequent search and seizure for the evidence" (*id.* at 295 [internal quotation marks omitted]). The hearing court ruled that defendant's entitlement to notice of the application to seize his person to "bring him into contact with government agents" was satisfied because he was already detained in an unrelated case, and that he was not entitled to notice and opportunity to be heard on the question of whether there was probable cause to support obtaining corporeal evidence from him.

Abe A.'s discussion of due process notice consisted of the following: "At this point it seems appropriate to add, since here

there was no exigency, that the course followed by the People on its original application on notice to the suspect was no more than is required by such circumstances. After all, when frustration of the purpose of the application is not at risk, it is an elementary tenet of due process that the target of the application be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed" (*id.* at 296 [citations omitted]).

We agree with defendant that the mere fact that the *Abe A.* court placed its pronouncement regarding notice in the midst of its discussion of the first level of intrusion at issue there does not establish that the principle announced applied only to that first level. Nothing in the Court's opinion suggests a basis for applying the "elementary tenet of due process" described by the Court only to the first part of an application for an order to physically detain a person and then make a corporeal search. Considering *Abe A.* as a whole, we cannot agree with the warrant court's conclusion that it contained what the People refer to as a "bifurcated holding" regarding notice. Accordingly, defendant is entitled to suppression of the DNA evidence obtained as a result of the warrant issued by the hearing court, and a new trial (*see People v Fomby*, 103 AD3d 28, 30 [3d Dept 2012], *lv denied* 21 NY3d 1015 [2013]). We have

considered and rejected the People's arguments on the subjects of preservation and harmless error.

In addition, at trial the People failed to adequately authenticate an incriminating YouTube video under the standards set forth in *People v Price* (29 NY3d 472 [2017]), which was decided after defendant's trial. The authentication testimony was essentially limited to testimony that the video shown in court was the same as the one posted on YouTube and another website, and that defendant appears in the video. Accordingly, there was no authentication under any of the methods discussed in *Price*.

Because we are ordering a new trial, we find it unnecessary to reach defendant's remaining contentions other than to find that the verdict was supported by legally sufficient evidence and was not against the weight of the evidence. At this juncture, we also do not address any issues that may arise on retrial in the

event the People make further efforts to obtain a DNA sample or to authenticate the video (*see People v Nieves*, 67 NY2d 125, 136-137 [1986]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9040 In re Petros B.,
Petitioner-Appellant,

-against-

Ragat B.,
Respondent-Respondent.

Daniel R. Katz, New York, for appellant.

Anthony DeLorenzo, New York, for respondent.

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about January 16, 2018, which granted respondent mother's objections to that part of the order, same court (Lewis Borofsky, Support Magistrate), entered on or about October 6, 2017, stating that the original amount of petitioner father's child support obligation was $52 per week, and ordered that the correct amount was $120 per week, payable through the Support Collection Unit, and directed the Support Collection Unit to make any corrections to the calculations of arrears after January 18, 2017 to ensure that arrears were calculated using the amount of $120 weekly, unanimously affirmed, without costs.

Contrary to the father's argument, consistent with the procedural history, the objection submitted by the mother sufficiently stated that the Support Magistrate, in reinstating the father's child support obligation, "incorrectly [set] the

child support . . . at $52 per week in that in dismissing the petition to modify the court should have reinstated the last order of support for $120 per week set by the March 17, 2016 order" (*see* Family Court Act § 439[e]).

Further, the record supports the conclusion that reinstatement of $120 per week, as the "original" amount of the father's child support obligation, prior to the filing of his petition for modification, was intended by the Support Magistrate. Inasmuch as the Support Magistrate's assertion of the amount of child support was a notational error, and did not represent an adjudication of a matter of substance, the correction was properly made pursuant to CPLR 5019(a) (*see e.g. McCaffery v 924 Food Corp.*, 295 AD2d 151, 152 [1st Dept 2002]).

Finally, although deference is given to a support magistrate's finding, such finding, clearly in error, was

properly corrected based on the record (*see e.g. Matter of Heintzman v Heintzman*, 157 AD3d 682, 694 [2d Dept 2018]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9041 Francisco Romero, et. al., Index 27482/16
Plaintiffs-Appellants,

-against-

Xcellent Car Wash & Express Lube, et al.,
Defendants-Respondents.

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Seskin & Seskin, New York (Scott H. Seskin of counsel), for appellants.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for respondents.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered June 21, 2018, which, upon renewal, denied plaintiffs' motion for partial summary judgment as to liability, unanimously affirmed, without costs.

Plaintiffs seek to recover damages for injuries that plaintiff Francisco Romero allegedly sustained when his foot fell into an uncovered drain on defendants' premises. In January 2018, the Supreme Court denied plaintiffs' motion for partial summary judgment on liability under the theory of res ipsa loquitur, finding that plaintiffs had failed to meet their prima facie burden. In April 2018, plaintiffs moved for leave to renew the motion, arguing that the Court of Appeals decision in *Rodriguez v City of New York* (31 NY3d 312 [2018]), effected a

change in the law that would necessarily change the motion court's denial of partial summary judgment on liability (*see* CPLR 2221[e][2]). Supreme Court granted leave to renew, and upon renewal, adhered to its prior determination because triable issues of fact remained.

Supreme Court properly denied plaintiffs' motion. Summary judgment on the theory of res ipsa loquitur is appropriate only in "exceptional cases" and not where there are issues of fact with respect to defendants' liability (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209, 212 [2006]; *Jainsinghani v One Vanderbilt Owner, LLC*, 162 AD3d 603, 604 [1st Dept 2018]). On this record, plaintiffs have not established that no issues of fact exist as to whether the accident was due "to any voluntary action or contribution on the part of the plaintiff" (*James v Wormuth*, 21 NY3d 540, 546 [2013]). The evidence submitted showed that the accident occurred in an area unauthorized for customer entry. There were several "do not enter" signs placed outside the car wash service area. In addition, defendants' employees denied that they had permitted plaintiff to enter the restricted area.

Lastly, although plaintiffs are correct that a plaintiff does not bear the burden of demonstrating the absence of his own

comparative fault, plaintiffs failed to show, as per res ipsa loquitur, that no reasonable question exists as to defendants' negligence (*see* Rodriguez, 31 NY3d at 323-324; *Tora v GVP AG*, 31 AD3d 341 [1st Dept 2006]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9042 The People of the State of New York, Respondent, Ind. 11050/93 10083/91

-against-

Roberto Rodriguez, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about September 21, 2017, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Acts of 2005 and 2009, unanimously affirmed.

The motion court properly determined that defendant was ineligible for resentencing on his A-II felony conviction. We see no reason to depart from our previous holdings, in which we rejected statutory, public policy and constitutional arguments similar to those raised here (*see e.g. People v Soroa*, 166 AD3d 434 [1st Dept 2018]; *People v Moore*, 159 AD3d 444 [1st Dept 2018]).

Although it is undisputed that defendant was eligible to apply for resentencing on his class B felony conviction, the court providently exercised its discretion in determining that

substantial justice dictated the denial of that application (*see People v Sosa*, 18 NY3d 436, 442-443 [2012]; *People v Paulin*, 17 NY3d 238, 244 [2011]), particularly in light of defendant's criminal history, including the sex offenses defendant committed against an 11-year-old victim after defendant was paroled on one of his drug convictions.

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9043-
9044 Index 311514/09

Sondra Neuschotz,
Plaintiff-Respondent,

-against-

Nilson Neuschotz,
Defendant-Appellant.

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Robert G. Smith, PLLC,
Nonparty Appellant.

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Robert G. Smith, PLLC, New York (Robert G. Smith of counsel), for appellant.

Blank Rome LLP, New York (Jerry Bernstein of counsel), for respondent.

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Order, Supreme Court, New York County (Michael L. Katz, J.), entered on or about July 25, 2017, which denied defendant husband's motion for pendente lite counsel fees, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 25, 2017, which granted plaintiff wife's application to modify the parties' judgment of divorce by awarding her sole legal custody of the children of the marriage, unanimously dismissed, without costs, as moot, as the children are now emancipated.

The trial court providently exercised its discretion in denying defendant's motion for a further award of counsel fees on the eve of trial on the ground that defendant took a position

that resulted in unnecessary litigation (*see generally* Domestic Relations Law §§ 237(b) and 238). The trial court found that defendant's claims of parental alienation, raised in defending against plaintiff's application for sole legal custody, were wholly without merit and that he was not a credible witness. Upon review of the record, we find no basis for disturbing this determination, which is accorded deference (*Silberman v Silberman*, 216 AD2d 41, 41-42 [1st Dept 1995], *appeal dismissed* 86 NY2d 835 [1995]). Moreover, at the time of the hearing, the children were either emancipated or nearing emancipation, and defendant acknowledged before the court that he did not expect a resumption of his parental access, given the children's ages and hostile disposition toward him. We note that, by granting plaintiff's application for legal custody, the trial court simply allowed the status quo in effect since 2014 pursuant to a so-ordered stipulation to continue. Upon the particular "equities and circumstances" of this case (*see Havell v Islam*, 301 AD2d 339, 347 [1st Dept 2002] [internal quotation marks omitted], *lv denied* 100 NY2d 505 [2003]), and bearing in mind that defendant had already received $120,000 in interim counsel fees, we find that, plaintiff's superior financial position notwithstanding, an

additional award of counsel fees is not warranted.

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: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9045 N.M., an Infant by his Mother and Natural Guardian Carmen P., et al.,
Plaintiffs-Appellants,

-against-

The City of New York, et al.,
Defendants-Respondents.

Index 350326/12

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Alexander J. Wulwick, New York, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about February 28, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the state and federal claims for assault, battery and excessive force, unanimously affirmed, without costs.

The evidence shows that defendant police officers initially approached two individuals for a stop and inquiry regarding a suspected drug transaction in a known drug location. When the 17-year-old infant plaintiff (NM) began to curse and scream at the officers, as well as refuse to cooperate with their instructions, ultimately drawing the attention of a crowd, the police had probable cause to arrest NM for, at minimum,

disorderly conduct, to which NM ultimately pled guilty. NM acknowledged that he resisted the officers' attempts to handcuff him, and that they were only able to handcuff him when an officer allegedly punched him in the face a second time. NM offered no competent proof in the form of expert testimony or otherwise to raise a factual issue as to whether the police force under the circumstances was excessive or that the alleged facial bruising NM incurred was due to unwarranted police conduct (*see Wilson v City of New York*, 147 AD3d 664 [1st Dept 2017]; *see also Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9046 In re 210 East 86th Street Corp., Index 570647/17
Petitioner-Respondent, 87970/15

-against-

Eastside Exhibition Corp.,
Respondent-Appellant.

_____

Marcus Rosenberg & Diamond, LLP, New York (David Rosenberg of counsel), for appellant.

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for respondent.

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Order, Appellate Term, First Department, entered on or about April 27, 2018, which reversed an order of the Civil Court, New York County (Lisa A. Sokoloff, J.), entered on or about May 31, 2017, denying petitioner's motion for summary judgment awarding it possession of certain premises, granted the motion, and remanded the matter to the Civil Court for a determination of use and occupancy and reasonable attorneys' fees, unanimously affirmed, without costs.

It is undisputed that respondent tenant received a notice of default on or about September 21, 2015, in which petitioner landlord demanded that it cure certain defaults under the lease by October 20, 2015. It is also undisputed that respondent failed either to cure the defaults or to obtain a *Yellowstone* injunction (*see First Natl. Stores v Yellowstone Shopping Ctr.*,

21 NY2d 630 [1968]) before the end of the cure period, and did not respond to petitioner until after petitioner had served its notice of cancellation of lease. Accordingly, the lease was terminated and cannot be revived (*166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 159 [1st Dept 2011]).

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

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9047-
9048 In re Serenity G., And Others,

Children Under Eighteen Years of Age, etc.,

Modi K.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about August 30, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 18, 2017, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court's finding that respondent neglected the subject children by inflicting excessive corporal punishment on them and committing acts of domestic violence against their mother in

front of all of them is supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Jermaine J. [Howard J.]*, 121 AD3d 437 [1st Dept 2014]). Petitioner agency's protective specialist testified that three of the children told her that respondent beats them and threatens to make them bleed. One reported that respondent disciplined the children by hitting them with a belt and his hand and that respondent had hit him on his buttocks so hard that he urinated on himself. Another reported that respondent also physically dragged them around the apartment. These out-of-court statements by the three children cross-corroborate each other and were properly admitted into evidence (*see Matter of Ivahly M. [Jennifer L.]*, 159 AD3d 423 [1st Dept 2018]; *Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420 [1st Dept 2017]).

Petitioner's protective specialist also testified that three of the children reported that they frequently observed respondent hit their mother with his hand when the entire family was in the apartment. In addition, one child stated that he saw respondent hit the mother while she was pregnant, throw a fan at her, and stomp on her while she was on the floor. These out-of-court statements by the children cross-corroborate each other and are further corroborated by the order of protection issued in favor of the mother against respondent in 2014 (*see Matter of Emily S.*

[Jorge S.], 146 AD3d 599 [1st Dept 2017]). The children described themselves as "sad" and "scared" when they saw respondent hitting their mother, demonstrating that their emotional states were impaired by the violence they witnessed (*see Matter of Heily A. [Flor F.-Gustavo A.]*, 165 AD3d 457, 457-458 [1st Dept 2018]; *Matter of Isaiah D. [Mark D.]*, 159 AD3d 534 [1st Dept 2018]; *Matter of Emily S.*, 146 AD3d at 600).

The court properly found that respondent father neglected the two youngest children, who were in the two-bedroom apartment during the incidents of domestic violence, in close proximity to the violence, and in danger of physical or emotional impairment (*see Matter of Isabella S. [Robert T.]*, 154 AD3d 606 [1st Dept 2017]; *Matter of Naveah P. [Saquan P.]*, 135 AD3d 581 [1st Dept 2016]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9049 The People of the State of New York, Ind. 2457/16
Respondent,

-against-

Giovanni White,
Defendant-Appellant.

_____

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

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

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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 (Laura A. Ward, J. at plea; Felicia Mennin J. at sentencing), rendered February 21, 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 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: APRIL 23, 2019

CLERK

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

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9050 A.R., an Infant by her Mother and Natural Guardian, Jenny A., et al.,
Plaintiffs-Respondents,

-against-

City of New York,
Defendant,

Board of Education of the City of New York, et al.,
Defendants-Appellants.

Index 161003/13

Rutherford Christie, LLP, New York (Meredith A. Renquin of counsel), for appellants.

Yadgarov & Associates, PLLC, New York (Ronald S. Ramo of counsel), for respondents.

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered April 5, 2018, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The infant plaintiff, then 11 years old, claims that she was injured when she was accidently pushed by another student while playing on the bleachers in an area next to her school. Infant plaintiff testified that students regularly went to the bleacher area when the school bus arrived early, and that no effort was made to prevent them from accessing the bleachers despite a school social worker's testimony that students were not permitted

to play in that area. On the day of the accident, infant plaintiff was playing on the bleachers for about 10 to 20 minutes before she was injured.

Under these circumstances, the motion court properly found that triable issues of fact exist as to whether defendants adequately supervised infant plaintiff in allowing her and her classmates to play on the bleachers and whether adequate supervision would have prevented the accident (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Smith v City of New York*, 83 AD3d 631, 632 [1st Dept 2011]; *Oliverio v Lawrence Pub. Schools*, 23 AD3d 633 [2d Dept 2005]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9051 In re Bracco's Clam & Oyster Bar Inc. doing business as Bracco's Clam & Oyster Bar,
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

Index 153753/17

_____

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for petitioner.

Barbara D Underwood, Attorney General, New York (Blair J. Greenwald of counsel), for respondent.

_____

Determination of respondent, dated December 29, 2016, which, inter alia, sustained charges of violations of various sections of the Alcoholic Beverage Control Law and rules of respondent and imposed a $20,000 fine and various operational requirements, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered on or about September 11, 2017), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The evidence showed that petitioner's premises had been disorderly, inadequately

supervised, and a focal point for police attention throughout and prior to the summer of 2016, culminating in an incident in which patrons threw objects at police officers arresting a drunk driver who had moments earlier attempted to run them over. The evidence further confirms that petitioner operated in a manner inconsistent with the representations made in its liquor license application, and constructed an outdoor seating area where alcohol was served and consumed without respondent's prior approval.

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

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9052 The People of the State of New York, Ind. 1355/14
Respondent,

-against-

Juan Mercado,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered January 5, 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 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: APRIL 23, 2019

CLERK

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

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9053 Wilmington Trust, etc., Index 653546/16
Plaintiff-Appellant,

-against-

MC-Five Mile Commercial Mortgage Finance LLC,
Defendant-Respondent.

_____

Binder & Schwartz LLP, New York (Eric B. Fisher of counsel), for appellant.

Winston & Strawn LLP, New York (Christopher C. Costelo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered August 20, 2018, which denied plaintiff's motion for partial summary judgment on its cause of action seeking specific performance of a contract, with leave to renew after completion of discovery, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff trust consists of a pool of mortgage loans purchased from various mortgage loan sellers, including defendant. Plaintiff alleges that defendant breached one of the representations and warranties it made upon sale of one of the loans and that the breach had a material and adverse effect. As a result, plaintiff claims that it is entitled to exercise its right under the governing mortgage loan purchase agreement (MLPA)

to have defendant repurchase the loan.

The record demonstrates as a matter of law that defendant breached Representation and Warranty No. 40 in the MLPA, because it had knowledge that the subject loan was in default at the time of closing. It is undisputed that the lockbox agreement required by the loan documents was not timely completed and that this constituted an event of default thereunder. Defendant's denial that it had knowledge of these facts is belied by the evidence.

Defendant was a required party to the lockbox agreement; as such, it must have known that it never signed the agreement. Moreover, the record reflects that, just weeks after the MLPA was executed, defendant's counsel was still actively negotiating the lockbox agreement and was aware that the loan had been operating without such an agreement since closing. The knowledge of defendant's counsel, who is defendant's agent, is properly imputed to defendant (*see Center v Hampton Affiliates*, 66 NY2d 782, 784 [1985]).

At the very least, these facts demonstrate that defendant was willfully blind with respect to the status of the lockbox agreement, which is evidence that defendant had knowledge of that status (*see Homeward Residential, Inc. v Sand Canyon Corp.*, 2017 WL 4676806, *20, 2017 US Dist LEXIS 171685, *58 [SD NY Oct. 17, 2017]; *see also Matter of Scher Law Firm, LLP v DB Partners I,*

LLC, 97 AD3d 590, 592 [2d Dept 2012], *lv denied* 20 NY3d 852 [2012]).

The fact that the loan servicer did not identify the missing lockbox agreement in its letter certifying the absence of any defaults is immaterial, as the MLPA specifically provided that no due diligence by that entity would relieve defendant "of any liability or obligation with respect to any representation or warranty."

Plaintiff also established that the breach had the requisite material and adverse effect by increasing the risk of loss (*see Mastr Adjustable Rate Mtges. Trust 2006-OA2 v UBS Real Estate Sec. Inc.*, 2015 WL 764665, *15, 2015 US Dist LEXIS 24988, *42-44 [SD NY Jan. 9, 2015]; *Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 892 F Supp 2d 596, 602 [SD NY 2012]; *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 [1st Dept 2013]). In addition, plaintiff established, and defendant failed to controvert through admissible evidence, that, had a lockbox been in place, the underlying property's net operating income would have been sufficient to cover its expenses, from which it follows that the absence of a lockbox caused plaintiff to advance more than $400,000 in servicing expenses to protect its interest in the property.

Finally, on this record, plaintiff did not waive the MLPA's

lockbox requirement, nor is it estopped to seek remedies for that default. Defendant's waiver and estoppel arguments are based entirely on the allegation, in the affirmation of an attorney who was acting for defendant at the time, that counsel for the Special Servicer (acting on behalf of plaintiff) told him in an August 2015 telephone call to "cease all further action with respect to the [lockbox agreement]" and that the Special Servicer's counsel "would be the ones to handle the matter going forward." Assuming that this account is accurate, the statement of the Special Servicer's counsel that it would take over efforts to rectify the lack of a lockbox, standing alone (and defendant offers nothing more), cannot be deemed to have waived plaintiff's right to pursue its remedies against defendant under the MPLA in the event the Special Servicer's efforts were unavailing (*see Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 968 [1988] [waiver is the voluntary and intentional relinquishment of a known right and "should not be lightly presumed"]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006] [waiver must be based on a party's "clear manifestation of intent"]). In any event, section 19 of the MPLA provides that the none of its terms "may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom

enforcement of the change, waiver, discharge or termination is sought" (*see DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563, 564 [1st Dept 2011]*; Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007]). Since the Special Servicer's counsel's alleged oral statement cannot be construed as a promise not to pursue plaintiff's contractual remedies for the breach, no estoppel arises.

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9054 The People of the State of New York, Ind. 8958/98
Respondent,

-against-

Seth Sudderth,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about November 22, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 points under the risk factor for use of violence, given the threats made by defendant in the course of his sexual abuse of a very young child (*see People v Hosear*, 134 AD3d 633 [1st Dept 2015]). Regardless of whether defendant's correct point score is 125, or 115 as he contends, he remains a level three offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not establish that his physical condition would

prevent him from committing additional sex crimes, especially against young children (*see People v Portalatin*, 145 AD3d 463 [1st Dept 2016]; *see also People v Rodriguez*, 101 AD3d 630 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9055 Cesar A. Benitez, Index 300659/11
Plaintiff, 84104/11

-against-

Church of St. Valentine Williamsbridge New York,
Defendant-Appellant,

St. Thomas Syro-Malabar Catholic Diocese of Chicago in New York,
Defendant.

- - - - -

Church of St. Valentine Williamsbridge New York,
Third-Party Plaintiff-Appellant,

-against-

St. Thomas Syro-Malabar Catholic Diocese of Chicago in New York,
Third-Party Defendant,

Kuzhikodil Enterprise Inc.,
Third-Party Defendant-Respondent.

_____

Rivkin Radler LLP, Uniondale (Merril Biscone of counsel), for appellant.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 22, 2015, which, to the extent appealed from as limited by the briefs, denied third-party plaintiff's motion for summary judgment, unanimously affirmed, without costs.

The court correctly denied the claim of St. Valentine

Williamsbridge New York (St. Valentine) for contractual indemnification, because it was not included as the named "owner" in the indemnification agreements, and there is no evidence that it was a third-party beneficiary of those same agreements between the tenant and the contractor. There is nothing in the agreements suggesting that St. Valentine was intended to be a named indemnitee, and St. Valentine failed to establish that it proffered any consideration in order to be considered a party to the agreements (*see Holt v Feigenbaum*, 52 NY2d 291, 299 [1981]; *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108-109 [1st Dept 2001]).

Moreover, St. Valentine failed to present any facts to support an inference that it was an intended beneficiary of the tenant's agreements with the contractor. The undisputed records shows that St. Valentine was not an operating parish, it considered itself "out of business," and it had no employees.

St. Valentine did not know about the construction project, and was not entitled to enforce the indemnification provisions contained in its tenant's agreements with the contractor (*Artwear, Inc. v Hughes*, 202 AD2d 76, 81 [1st Dept 1994]).

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9056 Jose Cabrera, Index 306043/13
Plaintiff-Respondent,

-against-

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

Abraham M. Florimon, et al.,
Defendants.

_____

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

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Daniel C. Minc of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Faviola Soto, J.), entered March 21, 2018, upon a jury verdict finding defendants-appellants (defendants) 30% responsible for plaintiff's injuries, and awarding plaintiff the principal amounts of $1,500,000 for past pain and suffering, $3,000,000 for future pain and suffering over 10 years, and $600,000 for future medical expenses over 5 years, and bringing up for review an order, same court and Justice, entered on or about February 16, 2018, which denied defendants' motion to set aside the verdict, unanimously modified, on the law and the facts, to vacate the award for future medical expenses and remand for a new trial solely of those damages, unless plaintiff stipulates, within 30 days after

entry of this order, to reduce the award for future medical expenses to $200,000 and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The court properly denied the motion by defendants to set aside the verdict. The jury found that defendants' negligence was a cause of plaintiff's injuries and that defendants were 30% at fault, and these findings were not "utterly irrational" (*Campbell v City of Elmira*, 84 NY2d 505, 510 [1994] [internal quotation marks, citation, and emphasis omitted]). There is no basis for disturbing the jury's credibility determinations (*see KBL, LLP v Community Counseling & Mediation Servs.*, 123 AD3d 488, 489 [1st Dept 2014]). There was a valid line of reasoning and permissible inferences based on the evidence, viewed in the light most favorable to plaintiff, that defendants failed to exercise reasonable care to avoid a collision by accelerating from behind the motorcycle on which plaintiff was a passenger, while the motorcycle was attempting to merge into the bus's lane (*see e.g. Sylvester v Velez*, 146 AD3d 599, 599 [1st Dept 2017]; *Public Adm'r of Bronx County v New York City Tr. Auth.*, 156 AD3d 546, 546 [1st Dept 2017]). Data logs recovered from the bus indicated that it steadily accelerated from 0 to 29.2 miles per hour before quickly stopping. The verdict was legally sufficient and not against the weight of the evidence even if the bus had the right

of way (*see Sylvester, supra*) and was driving just under the speed limit of 30 miles per hour (*see* VTL § 1180[a]; *see also Oberman v Alexander's Rent-A-Car*, 56 AD2d 814, 814-815 [1st Dept 1977], *lv denied* 42 NY2d 806 [1977]).

The awards for past and future pain and suffering did not "deviate[] materially from what would be reasonable compensation" (CPLR 5501[c]) for plaintiff's injuries to multiple body parts (*see e.g. Lewis v New York City Tr. Auth.*, 100 AD3d 554 [1st Dept 2012], *lv denied* 21 NY3d 856 [2013]; *Stevens v Bronx Cross County Med. Group*, 256 AD2d 165 [1st Dept 1998]). The trial evidence showed that plaintiff sustained fractures to his hip, forearm, shoulder, and five ribs. Plaintiff's expert testified that the comminuted fracture to the left acetabulum, i.e. hip socket, prevented the displaced left femur from being pushed back into the socket, and plaintiff also sustained a comminuted fracture to the pubic ramus. Plaintiff underwent an open reduction/internal fixation surgery procedure on his ulna, emergency hip debridement, and subsequent hip surgery. The expert opined that plaintiff would need a hip replacement and cervical neck fusion surgery in the future. Plaintiff also suffered from hip and neck arthritis which the expert believed was caused by the accident, aggravating any aging-related arthritis. Plaintiff was in constant pain after sustaining his injuries as a result of being

hit by a bus which sent him flying off a motorcycle, striking an iron pillar before falling to the ground. He was hospitalized for about five weeks after the accident, used a wheelchair for six months, and then used a walker for two months before switching to crutches. At the time of trial more than four years after the accident, he still needed to use crutches to walk more than five blocks, and to move around at home. There is no basis for disturbing the jury's credibility determinations pertaining to damages, which mainly "came down to a battle of the experts" (*Rose v Conte*, 107 AD3d 481, 483 [1st Dept 2013]).

The award of $600,000 in damages for future medical expenses was speculative and should be reduced to $200,000, based on estimates provided by plaintiff's expert.

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9058 The People of the State of New York, Ind. 261/16
Respondent,

-against-

Odalis Imbert,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered January 10, 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: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9059-
9060N Index 304189/13

Elizabeth S. Strauss,
Plaintiff-Respondent,

-against-

Daniel A. Strauss,
Defendant-Appellant.

_____

The Law Office of William S. Beslow, New York (William S. Beslow of counsel), for appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered February 26, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for sanctions against defendant and his counsel, William S. Beslow, Esq., unanimously affirmed, without costs. Order, same court and Justice, entered May 9, 2018, which, to the extent appealed from as limited by the briefs, awarded plaintiff's counsel, Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP (Cohen Clair), attorneys fees and costs in the amount of $180,000, unanimously modified, on the law and the facts, to vacate the award and remand for further proceedings consistent herewith concerning the amount of reasonable attorneys fees and costs, and otherwise affirmed, without costs.

Defendant does not dispute any of the facts relied upon by the motion court in determining that he and his counsel engaged in sanctionable conduct in the context of this divorce action. The record shows that defendant obtained access to plaintiff's iPad and private text messages, falsely told her that he did not have the iPad and that it was lost, and provided the text messages to his counsel, who admittedly failed to disclose to opposing counsel or the court the fact that defendant was in possession of the iPad and text messages, until two years later when they disclosed that they intended to use the text messages at trial. Nor does defendant explain how or why he was legally permitted to retain plaintiff's iPad without her knowledge, and to access and take possession of plaintiff's personal data located on her iPad (22 NYCRR § 130-1.1[c][1]; *see also Lipin v Bender,* 84 NY2d 562, 571 [1994]). Plaintiff demonstrated that such conduct implicated criminal laws and, while defendant asserts that he needed to preserve the information for use in the custody trial, he also concedes that he had other evidence that would have supported his position at trial. Thus, there would have been no reason to rely on the text messages other than to harass and embarrass plaintiff (22 NYCRR § 130-1.1[c][2]). The foregoing frivolous conduct supports the imposition of sanctions (22 NYCRR § 130-1.2)

As for the amount of attorneys' fees awarded, an award of legal fees and costs may be made upon motion and does not require a full evidentiary hearing (22 NYCRR § 130-1.1[d]). The rule, however, does require "a reasonable opportunity to be heard" and that "[t]he form of the hearing shall depend upon the nature of the conduct and the circumstances of the case" (22 NYCRR § 130-1.1[d]; *see also Martinez v Estate of Carney*, 129 AD3d 607, 609 [1st Dept 2015]). "The court may award costs . . . only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate" (22 NYCRR 130-1.2). Here, plaintiff's application did not include an affirmation from the Cohen Clair firm explaining its invoices, and, although defendant was given the opportunity to submit a surreply on the issue, he was deprived of the opportunity to question the Cohen Clair invoices. Further, the court's award is insufficiently explained in its decision (*See Martinez*, 129 AD3d at 609-610).

Accordingly, the matter is remanded to Supreme Court for a further hearing, solely on the issue of the amount of attorney's fees to be awarded to plaintiff with respect to Cohen Clair's services.

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9061N In re Progressive Insurance Company, Index 652286/18
Petitioner-Appellant,

-against-

Fern Bartner, et al.,
Respondents-Respondents.

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Picciano & Scahill, P.C., Bethpage (Albert J. Galatan of counsel), for appellant.

Law Office of Mark J. Fox, New York (Mark J. Fox of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 5, 2018, which denied petitioner's application to stay arbitration under the supplemental underinsured motorist provision of a policy issued to nonparty Josef Traffic Consulting & Expediting Service (Josef), and dismissed the petition, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for a hearing on the issue of whether respondents were "occupying" Josef's van at the time of the accident.

It is for a court, not an arbitrator, to decide the threshold issue of whether respondents were occupying the van, i.e., whether they were "insureds" entitled to demand arbitration (*see e.g. Matter of Continental Cas. Co. v Lecei,* 47 AD3d 509 [1st Dept 2008]). Unlike the agreement in *Matter of Monarch*

Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA (26 NY3d 659, 669 [2016]), the arbitration clause in the subject policy does not say that the arbitrator will decide arbitrability.

A framed-issue hearing is required because "there is a genuine triable issue" (*Matter of AIU Ins. Co. v Cabreja,* 301 AD2d 448, 449 [1st Dept 2003] [internal quotation marks omitted]) as to whether respondents were occupying the van.

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

ENTERED: APRIL 23, 2019

CLERK

Friedman, J.P., Sweeny, Tom, Moulton, JJ.

9062 In re Williams Alvarez, Ind. 600/17
[M-530] Petitioner,

-against-

Hon. Steven Barrett, etc., et al.,
Respondents.

_____

Williams Alvarez, petitioner pro se.

Letitia James, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Steven Barrett, respondent.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for Christine Scaccia, respondent.

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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: APRIL 23, 2019

CLERK

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

9063 The People of the State of New York, Respondent, Ind. 3032/14

-against-

Leroy Hayes, Defendant-Appellant.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (David Giller of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 24, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and resisting arrest, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 6 years, unanimously affirmed.

The court providently exercised its discretion when it denied defendant's eve-of-trial request for new counsel and defense counsel's request to be relieved. "The court gave defendant ample opportunity to air his grievances against counsel, and this constituted a suitable inquiry, given the lack of substance of those complaints" (*People v Colon*, 145 AD3d 562 [1st Dept 2016], *lv denied* 29 NY3d 947 [2017]; *see also People v Nelson*, 7 NY3d 883, 884 [2006]).

Defendant abandoned his request to impeach "police witnesses by (unspecified) allegations contained in lawsuits against them" (*People v Johnson*, 159 AD3d 474, 475 [1st Dept 2018], *lv denied* 31 NY3d 1083 [2018]), because counsel did not avail himself of the opportunity to provide specific allegations or explain why questions should have been allowed (*see People v McMillan*, 151 AD3d 591, 592 [1st Dept 2017], 30 NY3d 951 [2017]). We decline to review this claim in the interest of justice.

Defendant did not preserve his claim that the content of his direct testimony did not warrant impeachment by way of a statement to the police that the prosecutor had agreed not to use except on cross-examination, or his claim that he was entitled to a hearing on the voluntariness of the statement, as promised, before being impeached by it. Defendant made no objection at all on the first ground, and raised the second ground only by way of a belated mistrial motion after he had already been impeached by the statement and after the prosecutor had introduced the statement on rebuttal. We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal. The statement was proper impeachment (*see People v Johnson*, 27 NY2d 119, 123 [1970]), and, after defendant's untimely complaint, the court ultimately conducted a fair hearing on voluntariness. Furthermore, the record supports the court's

finding that the statement was voluntarily made, so as to permit its use for impeachment purposes notwithstanding the lack of *Miranda* warnings (*see Harris v New York*, 401 US 222 [1971]; *People v Maerling*, 64 NY2d 134, 140 [1984]). Finally, any error regarding the statement was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 23, 2019

CLERK

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

9064 Vincent Monfredo, et al., Index 304302/15
Plaintiffs-Respondents,

-against-

Arnell Construction Corp., et al.,
Defendants-Appellants.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas Hurzeler of counsel), for appellants.

Alexander J. Wulwick, New York, for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered April 10, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiffs Vincent Monfredo and Heidy Monfredo's cross motion for partial summary judgment on the issue of liability as to Labor Law § 240(1), and denied that portion of defendants Arnell Construction Corp., the Department of Education of the City of New York, and New York City School Construction Authority's motion for summary judgment, which sought dismissal of plaintiffs' Labor Law §§ 240(1) and 241(6) claims, the latter as predicated on an alleged violation of 12 NYCRR § 23-5.3(e), unanimously modified, on the law, to grant defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 241(6) claim, and otherwise affirmed, without costs.

The motion court properly granted partial summary judgment

to plaintiffs on the issue of liability as to Labor Law § 240(1), as the statute does not require a complete fall from an elevated safety device for an event to come within its protection (*see Messina v City of New York*, 148 AD3d 493 [1st Dept 2017]). Conversely, it properly denied that portion of defendants' motion that sought summary dismissal of plaintiffs' section 240(1) claim (*see Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012]).

However, plaintiffs' Labor Law § 241(6) claim pursuant to Industrial Code § 23-5.3(e) is not viable, as the record shows that the scaffold in question was not elevated more than seven feet (12 NYCRR 23-5.1[j][1]).

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

ENTERED: APRIL 23, 2019

CLERK

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

9065 In re Lattina B.,
Petitioner-Appellant,

-against-

Daquan H.,
Respondent-Respondent.

Larry S. Bachner, New York, for appellant.

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

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about February 9, 2018, which granted petitioner's supplemental modification petition to the extent of granting joint physical and legal custody to both parents, unanimously affirmed, without costs.

Application by the mother's assigned counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; People v Saunders, 52 AD2d 833 [1st Dept 1976]). A review of the

record demonstrates that there are no non-frivolous issues which could be raised on this appeal. We agree with counsel that the court's decision was well within the bounds of its discretion.

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

ENTERED: APRIL 23, 2019

CLERK

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

9066 The Bank of New York Mellon formerly known as The Bank of New York as Indenture Trustee for Newcastle Mortgage Securities Trust 2007-1, Plaintiff-Appellant, Index 32806/16E

-against-

Mark Johnson also known as Mark A. Johnson, Defendant-Respondent,

Jacqueline A. Johnson also known as Jacqueline A. Johnson, et al., Defendants.

_____

Sandelands Eyet, LLP, New York (Kathleen Cavanaugh of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 11, 2017, which, in this mortgage foreclosure action, denied plaintiff's motion for summary judgment and related relief, unanimously affirmed, without costs.

Issues of fact exist on the issue of standing because there are unexplained discrepancies in the copy of the note attached to the complaint. Although the word "copy" had been stamped on the note, it was crossed out on the first page, but not the other pages and the word "copy" was typewritten on some of the riders. None of these discrepancies were explained or addressed in the

affidavit, making it unclear whether plaintiff possessed the original note when this action was commenced *(see Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361 [2015]).

We have considered the remaining arguments by appellant and find them unavailing.

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

ENTERED: APRIL 23, 2019

CLERK

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

9067 Cheryl H. Daniels, Index 151542/13
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 27, 2017, which, upon a jury verdict, awarded damages in favor of plaintiff and against defendant New York City Transit Authority (NYCTA), unanimously affirmed, without costs.

Plaintiff established a prima facie case of negligence by presenting evidence that the gap between the train doors and the platform edge was a dangerous condition, that did not comply with industry safety standards, and was a proximate cause of her injuries, which occurred when her leg slipped into the gap while she was exiting a crowded subway car. NYCTA's compliance with its own standard of six inches as the maximum permissible gap was not conclusive on the issue of liability (*Tzilianos v New York City Tr. Auth.*, 91 AD3d 435 [1st Dept 2012]; *Sanchez v City of New York*, 85 AD3d 580 [1st Dept 2011]).

Contrary to defendant's argument, plaintiff's expert's testimony regarding gap standards promulgated by the American Public Transit Association (APTA) and the Public Transportation Safety Board (PTSB) did not misleadingly establish industry standards that were non-mandatory guidelines. While mere non-mandatory guidelines and recommendations are insufficient to establish a standard of care, an expert's testimony regarding "generally accepted" standards, which are promulgated by an association such as APTA and the PTSB, and generally accepted in the relevant community at the relevant time, constitutes some evidence of negligence and may establish a standard of care (*Hotaling v City of New York*, 55 AD3d 396 [1st Dept 2008], *affd* 12 NY3d 862 [2009]; *see Sussman v MK LCP Rye LLC*, 164 AD3d 1139 [1st Dept 2018]; *see also Rondin v Victoria's Secret Stores, LLC*, 116 AD3d 555 [1st Dept 2014]). Moreover, the expert noted in his testimony that the standards were voluntary and did not suit all transit systems. His testimony merely served to help the jury determine whether NYCTA's own policy of a six-inch gap was reasonable, in light of the evidence (*Tzilianos*, 91 AD3d at 436).

The trial court did not err in admitting evidence of gap accidents at other stations or precluding NYCTA's witnesses from testifying. Plaintiff demonstrated that the relevant conditions of the subject accident and the previous ones were substantially

the same, though they occurred at other stations (*see Rodriguez v Ford Motor Co.*, 17 AD3d 159, 160 [1st Dept 2005]), and the probative value of the gap accident statistics outweighed any prejudice to NYCTA (*Barry v Manglass*, 55 AD2d 1, 10 [2d Dept 1976]). The trial court did not improvidently exercise its discretion in precluding NYCTA's witnesses, first disclosed on the eve of trial, from testifying in light of NYCTA's lack of diligence and failure to provide a reasonable explanation for its failure to disclose two of the witnesses earlier in response to discovery demands (*see Rosa v New York City Tr. Auth.*, 55 AD3d 344, 345 [1st Dept 2008]; *Shmueli v Corcoran Group*, 29 AD3d 309 [1st Dept 2006]).

Finally, the jury verdict finding that plaintiff was not comparatively negligent is not against the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]) in light of plaintiff's testimony concerning the crowd exiting the

train that prevented her from seeing and avoiding the gap.

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9068 The People of the State of New York, Ind. 5804/13
Respondent,

-against-

Harvey Brown,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine 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 (Ronald Zweibel, J.), rendered February 11, 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: APRIL 23, 2019

CLERK

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

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

9069 Marygrace Brennan, Index 27745/16E
Plaintiff-Respondent,

-against-

3250 Rawlins Avenue Partners, LLC,
et al.,
Defendants,

Ronald Rettner, et al.,
Defendants-Appellants.

_____

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

Joseph P. Dineen, Garden City, for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 19, 2018, which, to the extent appealed from as limited by the briefs, denied defendants Ronald Rettner and Lance Falow's motion to dismiss the cause of action for violations of Debtor and Creditor Law §§ 273 through 276-a, unanimously modified, on the law, to grant the motion as to the claims under Debtor and Creditor Law §§ 276 and 276-a, and otherwise affirmed, without costs.

The complaint alleges that plaintiff purchased a home from defendant 3250 Rawlins Avenue Partners, LLC (Partners), that three years later she gave Partners and defendants Rettner and Falow, members of Partners, notice of claims under the limited

warranty incorporated into the contract of sale, that the claims were ignored, and that Rettner and Falow had transferred unidentified assets and funds from Partners for their own use, leaving Partners unable to satisfy its obligations to plaintiff.

Rettner and Falow argue that the complaint fails to state a cause of action for constructive fraud under Debtor and Creditor Law §§ 273, 274 and 275 because it does not identify any specific fraudulent transfers. However, this is not a fatal defect, because the concrete facts arguably "are peculiarly within the knowledge of [Rettner and Falow]," and the pleading deficiency might yet be cured (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

Rettner and Falow argue correctly that the complaint fails to allege explicitly that the unidentified assets were transferred without fair consideration. However, the complaint implicitly alleges that a necessary element of fair consideration, i.e., good faith, was lacking when the transfers were made. The complaint alleges that Rettner and Falow were members of Partners and that Rettner and Falow diverted Partners' assets for their own use, rendering Partners insolvent. Amplified by plaintiff's counsel's statement in his affirmation that Falow had told him that all of Partners' funds had been distributed to its members, these allegations raise the

presumption that the transfers from Partners, an insolvent company, to Rettner and Falow, company members or insiders, were not made in good faith and, therefore, were made without fair consideration (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]; *Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]).

However, the complaint fails to state a cause of action for actual fraud under Debtor and Creditor Law §§ 276 and 276-a. It alleges that Rettner and Falow, the transferees, had a close relationship with the transferor, Partners, because they were members of Partners. As indicated, it also alleges that the transfer of Partners' assets to Rettner and Falow was not in good faith and therefore was without fair consideration. However, unlike the allegations supporting the constructive fraud claim, the allegations supporting the actual fraud claim are subject to the heightened pleading standard of CPLR 3016(b), and the allegations about fair consideration do not meet that standard, because they were made upon information and belief, and the source of the information was not disclosed (*see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]).

Nor does the complaint allege any other badges of fraud. For example, it does not allege that the transfers were not made

in the ordinary course of business or that Rettner, Falow, or Partners had notice of plaintiff's claims before any of the transfers were made and were unable to pay them (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]; *Matter of Setters v AI Props. & Devs. [USA] Corp.*, 139 AD3d 492, 493 [1st Dept 2016]). Because the complaint fails to state a cause of action for actual fraud under Debtor and Creditor Law § 276, the related claim for attorney's fees under section 276-a must also be dismissed.

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9070 Ramon Vasquez-Tineo, Index 21993/14
Plaintiff-Appellant,

-against-

1764-1766 Westchester Avenue, LLC,
et al.,
Defendants-Respondents.

_____

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

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

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 17, 2018, which denied plaintiff's motion for summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law by his testimony that he fell from an unstable ladder that collapsed while he was painting (*see Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453 [1st Dept 2017]). In opposition, defendants submitted evidence, including testimony of a supervisor of the job site, that raised triable issues of fact as to the

circumstances surrounding the accident, including what ladder plaintiff was using when he fell (*see e.g. Hobbs v MTA Capital Constr.*, 159 AD3d 544 [1st Dept 2017]; *Perez v Folio House, Inc.*, 123 AD3d 519 [1st Dept 2014]).

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

ENTERED: APRIL 23, 2019

CLERK

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

9071 Thomas Devane, Index 155096/17
Plaintiff-Appellant,

-against-

Vishal Garg,
Defendant-Respondent.

_____

Rasco Klock Perez & Nieto, LLC, New York (James Halter of counsel), for appellant.

Garvey Schubert Barer, P.C., New York (Andrew J. Goodman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about December 13, 2018, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the cause of action for tortious interference with contract and the claim for damages on the cause of action for defamation arising from the loss of an investment banking fee, unanimously reversed, on the law, with costs, and the motion denied as to the cause of action for tortious interference with contract, and the claim for damages on both causes of action, insofar as they relate to plaintiff's share of an investment banking fee, limited to 25% of the amount that Rosenblatt Securities, Inc. actually received from defendant's company with respect to Pine Brook Capital Partners II, L.P.'s investment in defendant's company.

The motion court erred in finding, as a matter of law, that there was no agreement between plaintiff and Rosenblatt to share any fees the latter might receive if an introduction that plaintiff made resulted in a successful transaction for Pine Brook, one of Rosenblatt's investment banking clients. While plaintiff, at his deposition, could not remember any details of the conversation he had with Joseph Gawronski of Rosenblatt, he supplied those details in his affidavit in opposition to defendant's motion, and his affidavit was supported by an email that Gawronski sent long before any disputes arose (*see Fields v Lambert Houses Redevelopment Corp.*, 105 AD3d 668, 671 [1st Dept 2013]). While Gawronski submitted an affidavit denying any agreement for Rosenblatt to pay plaintiff *half* of any fee it might receive on account of any investment by Pine Brook in defendant's company, he did not deny having an agreement to pay plaintiff *25%* of Rosenblatt's fee, he had not been deposed at the time defendant made his motion, and any conflict between his and plaintiff's versions of events would simply create an issue of fact warranting denial of defendant's motion.

It is undisputed that plaintiff was an independent contractor, rather than Rosenblatt's employee. Thus, the principle that "a sales representative, hired at will, is not entitled to commissions after the termination of employment"

(*Mackie v La Salle Indus.*, 92 AD2d 821, 822 [1st Dept 1983], *appeal dismissed* 60 NY2d 612 [1983]) is not applicable to plaintiff (*see Handel v STA Travel [N.Y.]*, 216 AD2d 177, 178 [1st Dept 1995]). Contrary to plaintiff's contention, cases about commissions apply to fees for introductions in the securities industry (*see Kern, Suslow Sec. v Baytree Assoc.*, 264 AD2d 639, 640 [1st Dept 1999]).

Plaintiff claims that he and Gawronski agreed that he would be paid a percentage of the revenue that Rosenblatt received. He alleges that Rosenblatt was entitled to a fee of at least $1.8 million. However, the evidence does not support this allegation. The $1.8 million mentioned by plaintiff is 4% of the $45 million in Series A and Series B financing that defendant's company received. In turn, the 4% figure is based on an October 26, 2014 letter that Rosenblatt sent to defendant and Edwin McGuinn. However, the evidence shows that defendant did not sign that letter; his signature was forged. Moreover, even if (arguendo) the letter constituted a binding agreement, the fee to Rosenblatt thereunder was 2% – not 4% – because Rosenblatt and McGuinn agreed to a 50-50 split.

There is evidence in the record that one of defendant's companies paid $100,000 to Rosenblatt, but there is also evidence that one of defendant's companies agreed to pay Rosenblatt 1% of

the amount that Pine Brook invested in the Series A financing (which may be the same as the $100,000).

There are issues of fact as to whether Pine Brook's investment in defendant's company resulted from plaintiff's introduction. Even if a jury were to find in plaintiff's favor, his damages – insofar as they are based on his share of Rosenblatt's investment banking fee – would be limited to 25% of the amount Rosenblatt received (whether it be $100,000 or some other sum).

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

ENTERED: APRIL 23, 2019

CLERK

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

9072 In re Zariah M.E. also known as Zariah E.,

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

Alexys T. also known as Alexus T.,
Respondent-Appellant,

Administration for Children Services,
Respondent,

St. Dominic's Family Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

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

_____

Resettled order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about April 16, 2018, which, upon a finding a permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody of the child to petitioner agency and the Commissioner of the Administration for Children's Services of the City of New York, for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, respondent mother failed to regularly and consistently visit the child and plan for her return (*see* Social Services Law § 384-b[7][a]). The agency's efforts included, but were not limited to referring the mother for parenting skills and mental health services, attempting to assist her in obtaining housing, and attempting to help her schedule visitation with her daughter (*Matter of Cerenithy B. [Ecksthine B.]*, 149 AD3d 637, 638 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]).

Despite these efforts, the mother went months at a time without visiting, which in itself constituted a ground for a finding of permanent neglect (*Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588 [1st Dept 2018]). She also failed to plan for the return of the child, in particular by not addressing her own mental health issues, which was a key component of any

reunification plan (*see Matter of Frank Enrique S. [Karina Elizabeth F.]*, 168 AD3d 539, 540 [1st Dept 2019]).

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9074 Sharena H. McAllister, et al., Index 157948/13
Plaintiffs,

-against-

The City of New York,
Defendant-Respondent,

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered April 27, 2018, which granted defendant City's motion for summary judgment dismissing the complaint and cross claims against it, unanimously affirmed, without costs.

The City established that it did not own or control the walkway on which the decedent (whose death was unrelated to the alleged incident) allegedly tripped and fell into a hole by submitting a deed showing that the property belonged to defendant Housing Authority (NYCHA). The City also established that it did not cause or create the condition by submitting records showing that it did not perform any work in the area during the relevant period (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297

[1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]). One service request in the vicinity of the accident site identified by plaintiff and NYCHA concerned a hole created by an undersized steel plate or manhole cover in a playground. However, the decedent's deposition testimony made no mention of a steel plate, and the decedent testified that the hole he fell on was on the walkway, not in a playground.

Contrary to NYCHA's contention, the City's sewer easement running under the walkway does not impose a duty on the City to maintain or repair the sidewalk, which, according to the unrefuted testimony of a witness, is at least 10 or 20 feet above the easement, unless the easement causes the dangerous condition. The City established that there is no evidence that the hole that caused the accident was related in any way to the easement. In opposition, NYCHA failed to present evidence sufficient to raise an issue of fact as to the cause or creation of the hole.

Contrary to NYCHA's further contention, responsibility for maintaining the walkway in a reasonably safe condition cannot be imposed upon the City on the ground that the City derives a special benefit from the public property, because the public

benefits from the easement (*see Kaufman v Silver*, 90 NY2d 204, 207 [1997]).

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9075 In re John S. Riccobono, Index 101315/17
Petitioner,

-against-

The Waterfront Commission of New York Harbor,
Respondent.

_____

Gerald J. McMahon, New York, for petitioner.

Waterfront Commission of the New York Harbor, New York (Phoebe S. Sorial of counsel), for respondent.

_____

Determination of respondent, dated September 19, 2017, which revoked petitioner's registration as a checker for the Waterfront Commission of New York Harbor, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered on or about November 13, 2017), dismissed, without costs.

Substantial evidence supports respondent's determination to revoke petitioner's registration as a checker with the Waterfront Commission (*see generally Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The record, including petitioner's testimony during article 4 interviews, showed that petitioner had associations with five members of an organized crime family, which were inimical to agency policies and violated

his sensitive position under the Waterfront Commission Act. His associations, which petitioner did not fully disclose, were shown to have spanned about a decade, and included petitioner's attendance at secret "crew dinners" at which members of a crime family discussed business *(see Matter of Ferdico v Waterfront Commn. of N.Y. Harbor*, 169 AD3d 579 [1st Dept 2019]).

Petitioner's due process rights were not violated when the Administrative Law Judge applied an adverse inference against him for failing to testify during the administrative hearing (*Matter of Youssef v State Bd. for Professional Med. Conduct*, 6 AD3d 824, 826 [3d Dept 2004]; *Matter of Steiner v DeBuono*, 239 AD2d 708, 710 [3d Dept 1997], *lv denied* 90 NY2d 808 [1997]).

The penalty of revoking petitioner's license does not shock our sense of fairness (*see Ferdico*, 169 AD3d at 579; *Matter of*

Dillin v Waterfront Commn. of N.Y. Harbor, 119 AD3d 429, 430 [1st Dept 2014]).

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9076 Theo Chino, et al., Index 101880/15
Plaintiffs-Petitioners-Appellants,

-against-

The New York Department of Financial Services, et al.,
Defendants-Respondents-Respondents.

_____

The Ciric Law Firm, PLLC, New York (Pierre Ciric of counsel), for appellants.

Letitia James, Attorney General, New York (Eric R. Haren of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered on or about December 21, 2017, granting respondents' motion to dismiss the proceeding, and denying petitioners' motion seeking discovery, unanimously affirmed, without costs.

This action arises from petitioners' application for a license pursuant to 23 NYCRR § 200.3(c)(2), pertaining to virtual currency. DFS neither approved nor rejected the application because the information petitioners provided was so sparse that no determination could be made, including whether the business activity plaintiffs were seeking to engage in required licensing under the challenged regulation. Petitioners never sought to provide the missing information; nor did they ever pay the

required licensing fee. Petitioners neither exhausted their administrative remedies, nor demonstrated applicability of one of the exceptions to the doctrine of exhaustion (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Sohn v Calderon*, 78 NY2d 755, 767 [1991]; *Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 548-549 [1st Dept 2007]). As for their direct constitutional claims, the motion court correctly determined that petitioners lack standing, as they failed to show some actual or threatened injury to a protected interest by reason of the operation of an unconstitutional feature of the regulation at issue (*Cherry v Koch*, 126 AD2d 346, 351 [2d Dept 1987], *lv denied* 70 NY2d 603 [1987]). Indeed, any injury suffered by petitioners was self-created, by abandonment of the licensing process after submission of an incomplete application. Their motion seeking discovery was properly denied as moot.

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9077 The People of the State of New York, Ind. 5152/15
Respondent,

-against-

Cornelius Cadigan,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler 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 a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered December 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: APRIL 23, 2019

CLERK

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

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

9078 JFURTI, LLC, Index 656273/16
Plaintiff-Respondent,

-against-

Suneet Singal, et al.,
Defendants-Appellants.

_____

Sher Tremonte LLP, New York (Kimo S. Peluso of counsel), for appellants.

Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., New York (Christopher J. Sullivan of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 6, 2018, in favor of plaintiff and against defendants, unanimously affirmed, with costs.

The promissory note and guaranties are absolute and unconditional and the language sufficiently specific to constitute valid waivers of defenses (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). Defendants' arguments based on the UCC's unwaivable obligation of good faith are unavailing. While a duty of good faith is read into every contract under UCC 1-304, Comment 1 states, "This section does not support an independent cause of action for failure to perform or enforce in good faith." Plaintiff and its principal's alleged bad faith relates to

conduct outside the performance or enforcement of the note and guaranties and is too remote to fall under the UCC provision.

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: APRIL 23, 2019

CLERK

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

9079 Thomas H. Christophel, etc., Index 154413/13
Plaintiff-Appellant, 595632/14

-against-

New York-Presbyterian/Weil Medical
College of Cornell University Anesthesiology
Residency Training Program, et al.,
Defendants,

Bridge Back to Life,
Defendant-Respondent.

- - - - -

Bridge Back to Life Center, Inc.,
Third-Party Plaintiff-Respondent,

-against-

The New York Presbyterian Hospital,
Third-Party Defendant.

_____

Leland T. Williams, Rochester, for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about January 22, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendant/third-party plaintiff Bridge Back to Life Center, Inc., for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record amply demonstrates that decedent repeatedly denied suicidal ideation, and none of her treating doctors,

family, friends, or colleagues had any suspicion that she was at risk of suicide. Since there was no indication that decedent was suicidal, and both parties' experts agreed that decedent's decision to commit suicide was an "impulsive" act, Bridge Back to Life Center cannot be held liable for decedent's death as a foreseeable injury of the alleged negligence (*Morillo v New York City Health & Hosps. Corp.*, 166 AD3d 525 [1st Dept 2018]; *see also Hain v Jamison*, 28 NY3d 524, 531-532 [2016]; *Cygan v City of New York*, 165 AD2d 58, 67 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]).

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

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

ENTERED: APRIL 23, 2019

CLERK

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

9080 The People of the State of New York, Ind. 2932/11
Respondent,

-against-

Ismael Suarez,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered December 9, 2011, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The court properly admitted a wanted poster, which contained still photographs from a surveillance video, as background information that completed the narrative of the events leading up to defendant's apprehension (*see People v Rivera*, 96 NY2d 749, 751 [2001]; *People v Martinez*, 95 AD3d 462 [1st Dept 2012], lv denied 19 NY3d 975 [2012]). However, the court improvidently exercised its discretion in refusing to redact the written description of the suspect also contained on the wanted poster (*cf. id.* at 462). Such error was harmless, however, as the

arresting officer testified that he recognized defendant based on the still photograph rather than the written description.

The court properly admitted a photograph of defendant from a prior arrest, depicting him wearing a distinctive jacket that matched the jacket worn by the suspect in the surveillance video, without granting defendant's unelaborated request for a hearing as to whether the prior arrest was lawful. "Hearings are not automatic or generally available for the asking" (*People v Mendoza*, 82 NY2d 415, 422 [1993]). There was no information before the trial court to suggest that the prior arrest might have been unlawful; instead, the only information available was that defendant had pleaded guilty in the prior case without litigating any suppression issues.

A police witness's brief, nonspecific reference to receipt of a "jacket," where defendant's jacket had been suppressed, did not warrant the drastic remedy of a mistrial. Instead, the court

granted the alternative remedy requested by defendant after the mistrial was denied, and this was sufficient to prevent any prejudice.

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

ENTERED: APRIL 23, 2019

CLERK

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

9081 The People of the State of New York, Respondent,

Ind. 4154/15

-against-

Daniel Morel,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 14, 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: APRIL 23, 2019

CLERK

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

9082N Ulises Torres, Index 306632/16
Plaintiff-Appellant,

-against-

Sharon Torres,
Defendant-Respondent.

_____

Brian D. Perskin & Associates P.C., Brooklyn (Brian D. Perskin of counsel), for appellant.

Christine K. Wienberg, New City, for respondent.

_____

Order, Supreme Court, New York County (Michael L. Katz, J.), entered September 24, 2018, which denied plaintiff's motion to vacate the pendente lite order of spousal maintenance and counsel fees awarded to defendant and his request for sanctions and counsel fees, unanimously affirmed, without costs.

The court properly denied plaintiff husband's motion to vacate the pendente lite order of spousal maintenance and counsel fees because he failed to show the existence of fraud (*see* CPLR 5015[a][3]; *Grinshpun v Borokhovich*, 148 AD3d 447 [1st Dept 2017]). Moreover, whether or not defendant wife's nondisclosure of a new tenant in the investment property amounted to misrepresentation or other misconduct, plaintiff did not establish that the information would have been material to the outcome of her request for temporary spousal maintenance and

attorney's fees (*see Matter of Travelers Ins. Co. v Rogers*, 84 AD3d 469 [1st Dept 2011]).

We decline to disturb the pendente lite award, there being no showing of exigent circumstances (*see Sumner v Sumner*, 289 AD2d 129 [1st Dept 2001]). Ordinarily, an aggrieved party's remedy for any perceived inequities in a pendente lite award is a speedy trial, and no exception is warranted here (*see Anonymous v Anonymous*, 63 AD3d 493, 496 [1st Dept 2009]).

We find that the court providently exercised its discretion in denying plaintiff's request for counsel fees and sanctions as there is no basis for concluding that defendant's conduct was frivolous (*Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008]).

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

ENTERED: APRIL 23, 2019

CLERK

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

9083N Pamela Singh, Index 306411/14
Plaintiff-Appellant,

-against-

QLR Five LLC, et al.,
Defendants-Respondents.

Kenneth J. Ready & Associates, Mineola (Gregory S. Gennarelli of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 16, 2018, which, in this action for personal injuries sustained in a motor vehicle accident, denied plaintiff's motion to renew her prior motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff failed to support her motion to renew with "new facts not offered on the prior motion" and "reasonable justification" for her failure to present those facts on the prior motion (CPLR 2221[e]; *American Audio Serv. Bur. Inc. v*

AT & T Corp., 33 AD3d 473, 476 [1st Dept 2006]). Nor would the facts she cites "change the prior determination" (CPLR 2221[e][2]; *204 Columbia Hgts., LLC v Manheim*, 148 AD3d 59, 71 [1st Dept 2017], *lv dismissed* 29 NY3d 1119 [2017]).

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

ENTERED: APRIL 23, 2019

CLERK

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

9084 In re Wilson Lugo, Ind. 2066/17
[M-518] Petitioner,

-against-

Hon. April Newbauer, etc., et al.,
Respondents.

_____

Wilson Lugo, petitioner pro se.

Darcel D. Clark, District Attorney, Bronx (Felicia A. Yancey of counsel), for Darcel D. Clark, respondent.

Letitia James, Attorney General, New York (Domenic Turziano of counsel), for Hon. April Newbauer, 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.

ENTERED: APRIL 23, 2019

CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9151 Patrice McKenzie, et al., Index 22401/16E
Plaintiffs-Respondents,

-against-

Jack D. Weiler Hospital, et al.,
Defendants-Appellants,

Montefiore Health System, Inc., et al.,
Defendants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants.

Morelli & Lassalle, LLP, New City (Doralba Lassalle of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered October 11, 2018, which denied defendants-appellants' motion pursuant to CPLR 3012(b) to dismiss the action for failure to timely serve a complaint, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in denying the motion to dismiss (*see Hernandez v Chaparro*, 95 AD3d 745 [1st Dept 2012]). In opposition to appellants' motion, plaintiffs were required to "demonstrate a reasonable excuse for the delay and a meritorious claim" (*Stevens v Stevens*, 165 AD2d 780, 781 [1st Dept 1990]). Here, plaintiffs offered a reasonable excuse based on their need to receive and review the medical records forming the basis for the medical

malpractice and lack of informed consent claims (*see Rose v Our Lady of Mercy Med. Ctr.*, 268 AD2d 225, 226 [1st Dept 2000]; *Aquilar v Nassau Health Care Corp.*, 40 AD3d 788, 789 [2d Dept 2007]).

As to the merits, plaintiffs offered the medical records of plaintiff Patrice McKenzie, which contain admissions sufficient to establish the potential merits of plaintiffs' action based on the conduct of non-moving defendant Dr. Gary Goldberg for, inter alia, lack of informed consent (*see Adams v Agrawal*, 187 AD2d 886, 887 [3d Dept 1992]; *cf. Marcello v Flecher*, 150 AD3d 1457, 1459-1460 [3d Dept 2017] ["there indeed are limited instances in which. . .the pertinent hospital/medical records. . .may be tendered in lieu of an affidavit of merit"]). The records suggest that McKenzie consented to the removal of her fallopian tubes in the event that malignancy was discovered during the exploratory laparoscopy which she was scheduled to undergo; no

malignancy was discovered during the procedure; but, defendants nonetheless removed her fallopian tubes bilaterally and, in doing so, caused defects of the small bowel and sigmoid colon.

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

ENTERED: APRIL 23, 2019

CLERK