SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 29, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7551-
7552 In re Gabrielle G. (Anonymous)
and Another,

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

Mike G. (Anonymous),
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

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Larry S. Bachner, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

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Orders of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about July 10, 2017, which, to the extent appealed from as limited by the briefs, determined that respondent's consent was not required for the adoption of the subject children, unanimously affirmed, without costs.

Respondent admitted that he did not provide the children with financial support after they were placed into foster care

(*see* Domestic Relations Law § 111[1][d]; *Matter of Rickelme Alfredo B. [Ricardo Alfred B.]*, 132 AD3d 490 [1st Dept 2015]). Petitioner was not required to inform respondent of his financial support obligation (Domestic Relations Law § 111[1][d]; *see Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545 [1st Dept 2014]).

Respondent failed to demonstrate that he received ineffective assistance of counsel (*see Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543, 544 [1st Dept 2014]). He contends that his attorney did not make a sufficient effort to show that he lacked the financial ability to support the children. However, counsel's decision not to question respondent about his financial circumstances may have been strategic (*see People v Sargsyan*, 71 AD3d 401 [1st Dept 2010]). Moreover, respondent presented no evidence that his proposed line of questioning had a realistic chance of succeeding (*see People v Stultz*, 2 NY3d 277, 287 [2004]).

Respondent's argument that Domestic Relations Law § 111(1)(d) violates the equal protection clause by imposing on unwed fathers a duty it does not impose on married fathers is improperly raised for the first time on appeal.

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

> The Decision and Order of this Court entered herein on November 8, 2018 (166 AD3d 416 [1st Dept 2018]) is hereby recalled and vacated (*see* M-6431 decided simultaneously herewith).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Sweeny, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

7670 In re Selena O., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Lakeysha H.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Zachary W. Carter, Corporation Counsel, New York, (Susan Paulson of counsel), for respondent.

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

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about October 5, 2017, which, to the extent appealed from as limited by the briefs, found that respondent mother Lakeysha H. neglected the subject children within the meaning of Family Court Act § 1012, unanimously reversed, on the law and the facts, the findings of neglect vacated, and the petitions dismissed, without costs.

Petitioner Administration for Children's Services (ACS) failed to establish by a preponderance of the evidence that any of the subject children were neglected by the mother. Although

Mariana was struggling in school, the evidence shows that she was enrolled in school, had regular attendance and, in fact, had a special needs teacher assigned to her since the third grade. There were chronic communication difficulties between the school and both parents. Some of the difficulties arose, in part, because of the school's practice of communicating with the mother through Mariana, despite her learning issues. In this case ACS did not meet its burden of proof that the mother failed to exercise a minimum degree of care with respect to Mariana's education as required by the applicable statute (Family Court Act § 1012(f)(i)(A); *Matter of Shanea,* 61 AD3d 403 [1st Dept 2009]). In addition, with respect to Jesus, ACS failed to meet its burden of showing that the mother, who was hearing impaired, failed to exercise a minimum degree of care in not addressing the three-year-old child's speech delays. ACS only presented evidence of one conversation between its caseworker and the mother regarding the child's speech problems, and the caseworker did not make any recommendations or referrals. Further, ACS failed to present any evidence at all that the mother neglected Selena.

Although the parents had a history of neglect, and their parental rights had been terminated as to an older child who had extensive medical needs that were not met, "[a] finding of neglect should not be made lightly, nor should it rest upon past

deficiencies alone" (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 435 [1st Dept 2010]; *Matter of Jessica YY.*, 258 AD2d 743, 746 [3d Dept 1999]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8213 The People of the State of New York, Respondent, Ind. 4258/14

-against-

Lonnie Harrell, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Matthew Bova of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Carolyn Shanahan of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 21, 2015, as amended December 3, 2015, convicting defendant, after a jury trial, of criminal sexual act in the first degree (two counts), attempted rape in the first degree, sexual abuse in the first degree (two counts) and criminal sexual act in the third degree (two counts), and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

There was no violation of defendant's right to be present at all material stages of the trial. He was present during a requested readback of the victim's testimony, and although he was absent for a portion of the preceding discussion regarding the content of the readback, his right to be present did not extend

to that discussion (*see People v Rodriguez*, 76 NY2d 918, 921 [1990]). With regard to the various other portions of the proceedings about which he complains, defendant validly waived and/or forfeited his right to be present (*see People v Spotford*, 85 NY2d 593, 597-599 [1995]; *People v Epps*, 37 NY2d 343, 349-351 [1975], *cert denied* 423 US 999 [1975]). The record fails to support defendant's argument that he made a limited waiver of his right to be present that extended to certain proceedings, but did not extend to other proceedings at issue. The court fully informed defendant of his right to be present and repeatedly warned that the trial would proceed in his absence. Accordingly, each refusal by defendant to come out of the court pens sufficiently established a waiver, regardless of any other colloquies. Furthermore, in determining that defendant had, in fact, refused to be present, the court properly acted on reliable information from court and correction personnel (*see e.g. People v Trubin*, 304 AD2d 312 [1st Dept 2003], *lv denied* 100 NY2d 588 [2003]).

The court properly denied defendant's motions, made before trial and at the close of evidence, to dismiss certain counts of the indictment as multiplicitous. In each of three pairs of counts, two sex acts were alleged that were separate and distinct, and were not merely two different body movements

included in a single crime, as discussed by the Court of Appeals in *People v Alonzo* (16 NY3d 267 [2011]). Indeed, combining the allegations in the challenged pairs of counts into single counts could well have subjected those counts to challenge on the ground of duplicitousness (*see id.* at 269).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8214 In re Global Liberty Insurance Company,
Petitioner-Appellant,

-against-

Nestor Ruben Perez,
Respondent,

Angela Flores, et al.
Proposed Additional Respondents-Respondents.

Index 20041/16

Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Russo & Tambasco, Melville (Andrew Weber of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 6, 2018, which denied petitioner Global Liberty Insurance Company's (Global Liberty) motion, pursuant to CPLR 4404(b), to set aside a prior order (same court and Justice), entered on or about July 12, 2017, denying Global Liberty's motion for a continuance of the framed-issue hearing after the two witnesses subpoenaed by Global Liberty failed to appear, and dismissing the petition on the ground that Global Liberty failed to present any witnesses or other evidence, unanimously reversed, on the law and the facts, without costs, the CPLR 4404(b) motion granted, the July 12, 2017 order vacated, Global Liberty's continuance granted, and the court is directed to reschedule the

framed issue hearing after Global Liberty has an opportunity to seek to enforce the subpoenas.

"It is an abuse of discretion to deny a continuance where the application complies with every requirement of the law and is not made merely for delay, where the evidence is material and where the need for a continuance does not result from the failure to exercise due diligence" (*Balogh v H.R.B. Caterers*, 88 AD2d 136, 141 [2d Dept 1982]). Here, there is no evidence that petitioner Global Liberty was dilatory in issuing subpoenas to the officer who responded to the scene or to respondent Nestor Ruben Perez, neither of whom appeared at the framed issue hearing. Nor is there any evidence that petitioner was in any way responsible for these witnesses' failure to appear. The issue about which they would testify, i.e., whether the vehicle involved in the accident, which fled the scene, was a 2003 Subaru or a 2005 Chevrolet, is central to the issue of whether that vehicle was stolen or was driven by Flores's ex-husband who reported it stolen. Moreover, while Flores and GEICO claim prejudice on the ground that Flores's ex-husband has left the country, Global Liberty has made it clear that it would consent to having him testify by electronic means (*cf. Yu Hui Chen v Chen Li Zhi*, 109 AD3d 815 [2d Dept 2013]), a concession not addressed by Flores and GEICO or the court below.

Under these circumstances, it was an improvident exercise of the court's discretion to deny petitioner's CPLR 4404(b) motion to set aside the July 12, 2017 order.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8215 In re Maudi A.B.,
Petitioner-Respondent,

-against-

Angelo P.N.,
Respondent-Appellant.

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

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

Kenneth M. Tucillo, Hastings on Hudson, attorney for the children.

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Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about March 3, 2017, which denied respondent Angelo P.N.'s motion to vacate Orders of Filiation by Default, same court and Judge, entered on or about September 13, 2016, unanimously affirmed, without costs.

Appellant's motion to vacate was properly denied given his failure to demonstrate a meritorious defense (*see* CPLR 5015[a]).

The mother's affidavits of alleged paternity, sworn to on penalty of perjury, provided sufficient support for a finding of paternity by estoppel (*Matter of South Carolina Dept. of Social Servs. v Starks*, 206 AD2d 312 [1st Dept 1994]). Appellant's conclusory and unsubstantiated assertions are not sufficient to

rebut the mother's statements and to demonstrate a meritorious defense (*see Matter of Derrick T.*, 261 AD2d 108 [1st Dept 1999]; *Matter of Jones*, 128 AD2d 403 [1st Dept 1987]).

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8216 Mercedes Rosario, Index 306160/14
Plaintiff-Respondent,

-against-

Michael Simmons,
Defendant-Appellant,

Alexis Seda,
Defendant.

_____

Richard E. Hershenson, New York, for appellant.

Law Offices of Marc H. Wasserman, P.C., Mount Sinai (Marc H. Wasserman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.H.O.), entered on or about March 23, 2018, which, to the extent appealed from as limited by the briefs, found that defendant Michael Simmons wrongfully converted plaintiff's winning lottery ticket, unanimously affirmed, without costs.

Any presumption that defendant, as bearer of the lottery ticket, was its owner, was rebutted by plaintiff's credible testimony that she purchased the ticket and hid it for safekeeping, only to have it stolen from her (*see Benjamin v Benjamin*, 106 AD2d 599, 600 [2d Dept 1984], *affd* 65 NY2d 756 [1985]). Because defendant refused to return the ticket's

proceeds upon the demand of plaintiff, its rightful owner, he is liable for conversion, regardless of his role in the actual theft of the ticket (*see State of New York v Seventh Regiment Fund*, 51 AD3d 463 [1st Dept 2008], *lv denied* 11 NY3d 706 [2008]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8217 The Trustees of Columbia University in the City of New York, Plaintiff-Appellant, Index 655914/16

-against-

D'Agostino Supermarkets, Inc., Defendant-Respondent.

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Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 7, 2018, which denied plaintiff The Trustees of Columbia University in the City of New York (Columbia)'s motion for summary judgment on the complaint, and granted defendant D'Agostino Supermarkets, Inc. (D'Agostino)'s cross motion for summary judgment striking Columbia's claim for liquidated damages and for entry of judgment against D'Agostino in the amount of $175,751.73, with interest accrued from October 14, 2016 to the date of judgment, unanimously affirmed, without costs.

On or about December 22, 2002, Columbia and D'Agostino entered into a written lease, modified within and by a separate rider, and amended by a Commencement Date Agreement dated 2004,

in which D'Agostino agreed to rent space from Columbia to be used as a supermarket. The lease expiration date was August 23, 2018.

Beginning in 2016, D'Agostino stopped paying rent under the lease, and the total arrears was $261,751.70. On May 27, 2016, with a little over two years remaining on the lease, the parties entered into a Surrender Agreement, in which D'Agostino agreed to make 2 surrender payments of $43,000.00 each, and 11 monthly payments of $15,977.43, beginning on July 1, 2016. The Surrender Agreement also provided that if D'Agostino failed to make any of the payments within five days of receiving a notice of default, then the aggregate of all fixed rent, additional rent or all other sums would become due and payable. D'Agostino paid the two surrender payments but failed to make the monthly payments. Columbia sent a notice of default to D'Agostino on October 14, 2016. D'Agostino did not cure the default. On November 10, 2016, Columbia commenced this action seeking the aggregate sum of all fixed rent in the amount of $1,029,969.54, plus interest, as well as $295,000.00 in additional rent and charges.

We find that the damages at the time of the Surrender Agreement were ascertainable. Columbia's attempt to enforce the liquidated damages provision sought to "secure performance by threat of a large payment rather than to provide a reasonable

assessment of probable damages" (*Bui v Industrial Enters. of Am., Inc.*, 41 AD3d 238, 238 [1st Dept 2007] [internal quotation marks omitted]).

We also find that the liquidated damages provision is unenforceable as "unreasonable and confiscatory," since it would result in an award 7½ times the amount that Columbia would have received if the Surrender Agreement had been fully performed (*see Clean Air Options, LLC v Humanscale Corp.*, 142 AD3d 923, 924 [1st Dept 2016]; *Sandra's Jewel Box v 401 Hotel*, 273 AD2d 1, 3 [1st Dept 2000]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8218 The People of the State of New York, Respondent, SCI 782/15

-against-

Troy Cox,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered May 13, 2015, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8219 Rafael Vargas, Jr., as Index 20660/10
Administrator of the Estate
of Gladys Vargas, deceased,
Plaintiff-Respondent,

-against-

St. Barnabas Hospital,
Defendant-Appellant,

Hebrew Hospital Home, Inc.,
Defendant.

_____

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

The Flanagan Law Group, P.C., Huntington (Suzanne Flanagan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley B. Green, J.), entered November 5, 2015, which, insofar as appealed from as limited by the briefs, denied defendant St. Barnabas Hospital's motion for summary judgment dismissing plaintiff's medical malpractice claim against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that, due to defendant's negligence, the decedent developed a severe sacral decubitus ulcer (bedsore or pressure ulcer) while under defendant's care.

Summary judgment was warranted because the affirmation of

defendant's expert was sufficient to establish prima facie the absence of proximate cause, and plaintiff's expert's affirmation was insufficient to raise any issues of fact (*see generally Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]).

Defendant's expert opined that the ulcer was unavoidable due to the decedent's underlying comorbidities, prior development of an ulcer at the same site, and the necessity of maintaining a head-of-bed elevation of greater than 30 degrees to avoid ventilator-related pneumonia or aspiration.

Contrary to plaintiff's claim, this is not the type of "novel theory" that necessitates a *Frye* hearing (*see Keilany B. v City of New York*, 122 AD3d 424, 425 [1st Dept 2014]; *Sadek v Wesley*, 117 AD3d 193, 200-201 [1st Dept 2014], *affd* 27 NY3d 982 [2016]). Even if it were, defendant's expert established that his theory was based on "generally accepted scientific principles and methodology" (*see Sadek*, 117 AD3d at 201; *see also Craig v St. Barnabas Nursing Home*, 129 AD3d 643, 644 [1st Dept 2015] [finding skin ulcer to be "unavoidable"]; 10 NYCRR 415.12[c][1] [medical facilities must ensure that pressure ulcers or sores do not develop "unless the individual's clinical condition demonstrates that they were unavoidable"]; 42 CFR 483.25[b][1][i] [same]).

In opposition, plaintiff submitted a conclusory affirmation,

which misstated the record, mischaracterized the decedent as "relatively healthy," and minimized the significance of her many comorbidities (*see Craig*, 129 AD3d at 644). The expert also failed to address defendant's expert's assertions regarding the necessity of maintaining head-of-bed elevation of greater than 30 degrees, conflated the distinct concepts of ability to heal and avoidability, and improperly raised a new theory of liability (inadequate discharge planning) that had not been set forth in the complaint or bills of particulars (*see Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]). Moreover, the expert failed to establish that he possessed the appropriate qualifications to opine on the formation of pressure ulcers (*see Craig*, 129 AD3d at 644; *Fortich v Ky-Miyasaka*, 102 AD3d 610, 610 [1st Dept 2013]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8220 72nd Ninth LLC, Index 850009/16
Plaintiff-Respondent,

-against-

753 Ninth Ave Realty LLC, et al.,
Defendants-Appellants,

New York State Department of Taxation
and Finance, et al.,
Defendants.

_____

Kishner Miller Himes, P.C., New York (Ryan O. Miller of counsel), for appellants.

Kriss & Feuerstein LLP, New York (Greg A. Friedman of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 20, 2017, and amended May 26, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its complaint against defendants-appellants and dismissed the affirmative defenses of usury and failure to comply with CPLR 3408, unanimously affirmed, without costs.

Construing the clear and unambiguous terms of CPLR 3408 and RPAPL 1304 so as to give effect to their plain meaning and to effectuate the intent of the Legislature (*see Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60 [2013]), we conclude that the loan at issue is not a "home

loan" covered by CPLR 3408 (*see Independence Bank v Valentine*, 113 AD3d 62, 66 [2d Dept 2013]).

Appellants' usury defense was properly dismissed since the loan was made to a corporation. A civil usury defense may not be invoked by a corporation (General Obligations Law § 5-521[1]), or the individual guarantor of a corporation's debt (*Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992], *lv denied* 81 NY2d 702 [1993]). Appellants have failed to raise an issue of fact as to whether the corporate form was used to conceal a usurious loan to the individual guarantor, Evanthia Koustis (*see Schneider v Phelps*, 41 NY2d 238, 241-242 [1977]). Rather, the record demonstrates that Evanthia Koustis transferred her ownership of the residential property to defendant 212 East 72nd Street LLC in connection with obtaining a prior loan (*see Cohen v Gateway Bldrs. Realty, Inc.*, 43 Misc 3d 1228[A], at *5 [Sup Ct, Kings County, May 27, 2014]).

The applicable interest rate was well below the 16% statutory maximum interest rate (General Obligations Law § 5-501[1]; Banking Law § 14-a[1]), and the interest rate applicable upon default does not fall within the prohibition of the usury statute (*see Bryan L. Salamone, P.C. v Russo*, 129 AD3d 879, 881 [2d Dept 2015]; *Kraus v Mendelsohn*, 97 AD3d 641 [2d Dept 2012]).

In addition, the usury statute does not apply to loans, like the one at issue in this case, that are for amounts greater than $2.5 million (General Obligations Law § 5-501[6][b]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8222 The People of the State of New York, Respondent, Ind. 129/16

-against-

Jeremy Wilson, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at initial predicate felony determination; Neil E. Ross, J. at jury trial and sentencing), rendered May 8, 2017, convicting defendant of forgery in the second degree, criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree (two counts) and criminal possession of a forged instrument in the second degree (three counts), and sentencing him, as a second felony offender, to an aggregate term of 7 to 14 years, unanimously affirmed.

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting his convictions of possession of a forged instrument. Defendant obtained simulated, but realistic, versions of a California driver's license and Canadian and British passports from a theatrical props company.

The evidence, including defendant's confession to the police, clearly established his fraudulent intent. Defendant's intent with regard to the driver's license was not negated by the fact that it contained an inconspicuous statement that it was a "fake" and a "prop," because defendant intended that the disclaimer would go unnoticed by victims of his fraud (*see People v McFarlane*, 63 AD3d 634, 635 [1st Dept 2009], *lv denied* 13 NY3d 837 [2009]). Defendant's arguments concerning the passports are likewise unavailing.

The court properly denied defendant's application to submit third-degree forgery as a lesser included offense of second-degree forgery, because it was not supported by any reasonable view of the evidence (*see People v Glover*, 57 NY2d 61, 64 [1982]). The application for a checking account and debit card at issue constituted a "contract," "commercial instrument," or "other instrument" that would "create" or "otherwise affect a legal right, interest, obligation or status" under the definition of second-degree forgery (*see* Penal Law § 170.10[1]), and there was no factual issue in this regard to be resolved by the jury.

Defendant was properly adjudicated a second felony offender based on a 2001 Indiana conviction (Ind Code § 35-43-5-2). Resort to the accusatory instrument is appropriate in this case (*see People v Jurgins*, 26 NY3d 607, 613-614 [2015]), and the

instrument demonstrated that the conviction involved an act establishing the requisite equivalency to the New York felony of second-degree forgery (Penal Law § 170.10). Defendant's other arguments concerning an alleged lack of equivalency between the statutes are without merit.

By imposing a sentence that was twice the length of the sentence involved in a rejected plea offer, the court did not penalize defendant for exercising his right to a trial. "Given that the quid pro quo of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea" (*People v Pena*, 50 NY2d 400, 412 [1980] [citations omitted]; *see also People v Martinez*, 26 NY3d 196 [2015][10 to 20 year sentence after trial lawful despite plea offer involving probation]). Defendant's cruel and unusual

punishment claim is also without merit. We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8223 In re Pahyttene Uriah V.A.J.C.,
also known as Pahyttene C.,

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

Arkia B.,
Respondent-Respondent,

Catholic Guardian Services,
Petitioner-Respondent,

Kirk C.,
Respondent.

_____

Michele Cortese, Center for Family Representation, Inc., New York (Christine Bruno of counsel), for Arkia B., respondent.

Joseph T. Gatti, New York, for Catholic Guardian Services, respondent.

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

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about July 13, 2018, which, inter alia, suspended for one year a judgment that respondent mother permanently neglected the subject child, unanimously affirmed, without costs.

The court providently exercised its discretion in ordering a suspended judgment that the court found would be in the child's best interests (*see Matter of Zachary CC*, 301 AD2d 714, 715 [3d Dept 2003). The attorney for the child, the only party seeking

reversal, did not cite a single case in which we have reversed a trial judge's suspension of a termination of parental rights as an abuse of discretion. Moreover, respondent Catholic Guardian Services, which has been involved with this family for many years, strongly recommended a suspended judgment, and the mother has complied with her service plan by attending and completing required services, testing negative for drugs, and maintaining consistent visitation.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8224 Louis F. Burke PC, Index 654778/16
Plaintiff-Respondent,

-against-

Ahmed Aezah, et al.,
Defendants-Appellants.

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Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellants.

Winget, Spadafora & Schwartzberg, LLP, New York (Anthony D. Green of counsel), for respondent.

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Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered January 3, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendants' counterclaims for breach of contract, breach of fiduciary duty, legal malpractice, and violation of Judiciary Law § 487, unanimously affirmed, without costs.

We find that the motion court's dismissal of the counterclaims was proper and that defendants have not articulated

any basis to disturb the motion court's ruling (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8225 In re Adam Miller, Index 100362/16
Petitioner-Appellant,

-against-

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

_____

Glass & Hogrogian LLP, New York (John Hogrogian of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for respondents.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered February 9, 2017, which granted the cross motion of respondents The City of New York, New York City Department of Education, and Carmen Farina, Chancellor of New York City Department of Education (collectively, the DOE) to dismiss the petition to vacate the arbitrator's determination to terminate petitioner's employment as a teacher with the DOE, unanimously affirmed, without costs.

The arbitrator's determination that petitioner said, "I'm going to knife you," made gestures of using a knife, and threatened to "tear [a supervisor] apart" in litigation rested primarily on a credibility determination, which is "largely unreviewable" (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]). The arbitrator

credited the supervisor's testimony because it was corroborated by, and consistent with, a contemporaneous email, a police report and an interview with a DOE investigator, in addition to the email and investigation report of the school principal, taken contemporaneously with the incident. The arbitrator reasonably found that petitioner's evidence, the DOE investigator's interviews of six students who were in respondent's classroom at the time of the December 9, 2014 incident, did not disclose whether the students heard the statements at issue or whether they had any significant memory of what happened.

Petitioner's failure to object to the admission of a 2013 stipulation of settlement of a prior investigation waives the issue of admissibility (*see Community Counseling & Mediation Servs. v Chera*, 115 AD3d 589, 590 [1st Dept 2014]), and in any event, there is no evidence that the arbitrator was influenced by the stipulation in the guilt determination.

Petitioner's history of insubordinate behavior, failure to respond to progressive discipline, and refusal to accept responsibility or recognize the gravity of his actions supported

the penalty of termination (*see Leon v Department of Educ. of the City of N.Y.*, 115 AD3d 435, 436 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]). Accordingly, the penalty does not shock the conscience and justify vacatur *(see Matter of Bolt v New York City Dept. Of Educ.*, 30 NY3d 1065, 1068 [2018]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8226 Prince Ampofo, Index 304544/15
Plaintiff-Appellant,

-against-

Thomas Key, Jr., et al.,
Defendants-Respondents.

_____

Okun, Oddo & Babat, P.C., New York (Darren R. Seilback of counsel), for appellant.

Thomas M. Bona, P.C., White Plains (Heather Julien of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 2, 2017, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that plaintiff's claimed right ankle and foot sprains were not serious injuries within the meaning of Insurance Law § 5102(d) through affirmed reports by their orthopedist, who documented normal range of motion (*see Hernandez v Adelango Trucking*, 89 AD3d 407 [1st Dept 2011]; *Whisenant v Farazi*, 67 AD3d 535 [1st Dept 2009]). They also submitted an affirmed report by an orthopedic surgeon who performed a no-fault peer review, which noted that plaintiff's MRI reports showed osteoarthritis and other conditions, and opined that the right ankle arthroscopy performed four months

after the collision was not medically necessary or causally related to the accident.

In opposition, plaintiff failed to raise a triable issue of material fact. He was never diagnosed with anything more severe than a foot or ankle sprain, and his treating podiatrist measured a limitation of only five degrees in one plane of motion at a recent examination (*see Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Hernandez v Adelango Trucking*, 89 AD3d at 408; *Charlton v Almaraz*, 278 AD2d 145 [1st Dept 2000]).

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: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8227 The People of the State of New York, SCI 353/16
Respondent,

-against-

Anthony Batista,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard M. Weinberg, J. at plea; Kevin McGrath, J. at sentencing), rendered August 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: JANUARY 29, 2019

DEPUTY CLERK

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

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8228 Index 150273/13
160646/14
595336/14

William Adagio, et al.,
Plaintiffs,

-against-

New York State Urban Development Corporation, et al.,
Defendants-Respondents,

Racanelli Construction Company, Inc.,
Defendant-Appellant,

United States Roofing Corporation and A-Deck, Inc., et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Lawrence, Worden, Rainis & Bard, P.C., Melville (Roger B. Lawrence of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 24, 2017, which, to the extent appealed from, denied defendant Racanelli Construction Company, Inc.'s motion for summary judgment dismissing defendants New York State Urban Development Corporation, Empire State Development Corporation, New York Convention Center Development Corporation, New York Convention Center Operating Corporation, and Triborough Bridge and Tunnel Authority's (the Javits Defendants) cross claim

against it for contractual indemnification, unanimously affirmed, without costs.

Plaintiff, an employee of nonparty Tishman Construction Corporation of New York, was injured in a slip and fall while carrying a ladder back to its storage location in a yard at the Jacob Javits Center, which was undergoing renovation and the construction of a new building. He had brought the ladder to a particular section of a wall of the new building for use by Tishman's project architect in inspecting fire stop construction work purportedly done by defendant Racanelli. Racanelli was present at the site for 30 minutes during the inspection and later performed two days of remedial work necessitated by the findings of the inspection.

An issue of fact exists whether plaintiff's accident arose out of or resulted from the performance of Racanelli's work so as to trigger the broad indemnification provision in Racanelli's contract with Tishman. The provision, which expressly states that it is to be broadly interpreted in favor of the indemnitees, including the Javits Defendants, requires indemnification by Racanelli for all claims "arising out of or resulting from [inter alia] the performance of [its] Work." Contrary to Racanelli's contention, the finding that it was not liable for plaintiff's injuries does not render it free from liability for

indemnification under this provision, which does not require that the damage or loss underlying a claim be attributable to negligence on Racanelli's part (*see Wilk v Columbia Univ.*, 150 AD3d 502 [1st Dept 2017]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8229- Ind. 3935/11
8229A The People of the State of New York, 2882/13
Respondent,

-against-

Ismael Bencome,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J. at first plea; Michael J. Obus, J. at second plea and sentencing), rendered January 9, 2014,

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

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8231-
8232-
8233 Index 652668/15

Anthony V. Classe, et al.,
Plaintiffs-Appellants,

-against-

Steven Silverberg, et al.,
Defendants-Respondents.

_____

Law Office of Peter Wessel, PLLC, New York (Gergely Klima of counsel), for appellants.

Feldman & Associates, PLLC, New York (Edward S. Feldman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 2, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to hold defendants in contempt for violating a settlement agreement, unanimously affirmed, without costs. Order, same court and Justice, entered March 5, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to hold defendants in contempt for violating a settlement agreement, unanimously affirmed, without costs. Order, same court and Justice, entered May 22, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for leave to renew the prior contempt motion, unanimously affirmed, without costs.

Considering all of the facts and circumstances of this case, the court providently exercised its discretion by refusing to hold defendants in contempt (*see Penavic v Penavic*, 109 AD3d 648, 649 [2d Dept 2013]; *Matter of Manus v Manus*, 139 AD3d 600, 600 [1st Dept 2016]). Plaintiffs failed to establish by clear and convincing evidence the necessary elements of civil contempt (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015][quoting *Matter of McCormick v Axelrod*, 59 NY2d 574 [1983]). In particular, plaintiffs did not sufficiently establish that defendants knowingly disobeyed or violated the so ordered settlement agreement by failing to have all erroneous information regarding Affton Graphics, Inc. removed from the 31 offending websites. Steven Silverberg also averred that he contacted at least some of the offending websites and requested that they remove the erroneous information. Moreover, plaintiffs also did not clearly establish that they were prejudiced by the continuing existence of erroneous information linking Affton Graphics Inc. to defendants. Anthony Classe's conclusory statement that Affton Graphics Inc. lost approximately $80,000 in revenue in 2017 as a result of these erroneous postings is unsupported and insufficient for a finding of civil contempt.

Further, Supreme Court properly denied plaintiffs' motion for leave to renew. The "new facts" regarding Yext's

distribution of erroneous information at the direction of YellowPages.com, a third party vendor, do not change the prior determination (*see* CPLR 2221[e]). Silverberg expressly averred in his affidavit that he contacted YellowPages.com and told them to correct erroneous information in early 2017. The fact that YellowPages.com did not follow through with that request does not warrant a finding of civil contempt. In addition, plaintiffs provided no new facts demonstrating prejudice as a result of the erroneous Internet postings.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

8234N Christian Floyd, Index 300013/14
Plaintiff-Respondent,

-against-

Anthony Keven Player,
Defendant,

Anthony Cella, et al.,
Defendants-Appellants.

_____

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for appellants.

The Altman Law Firm, PLLC, Woodmere (Michael T. Altman of counsel), for respondent.

_____

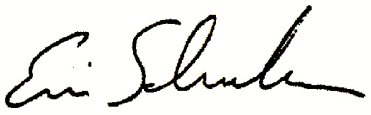
Order, Supreme Court, Bronx County (Laura Douglas, J.), entered on or about January 24, 2018, which, to the extent appealed from as limited by the briefs, denied defendants Anthony Cella and Bellmar Constructions and Maintenance Corp.'s motion to compel plaintiff to appear for further depositions and physical examinations, unanimously affirmed, without costs.

The court providently exercised its discretion in determining that plaintiff's disclosure, in a supplemental bill of particulars, that surgery had been recommended for his spine did not warrant compelling pre-operative and post-operative depositions or physical examinations at that time, and it was warranted in granting the motion only to the extent of directing

plaintiff to provide authorizations for medical records pertaining to his continuing treatment (*see Jenkins v Trustees of the Masonic Hall and Asylum Fund*, 112 AD3d 469 [1st Dept 2013]; CPLR 3043[b]). Plaintiff had previously disclosed at his deposition that his doctor had recommended surgery, and defendants already had an opportunity to inquire about the matter at that time. Further, there was no showing that plaintiff had agreed to undergo the recommended surgery or that his physical condition had changed since he was examined by defendants' designated medical experts.

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

ENTERED: JANUARY 29, 2019



DEPUTY CLERK

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

8236 The People of the State of New York, Respondent, Ind. 5817/13 2829/15

-against-

Ramel Robinson, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered April 8, 2016, convicting defendant, after a jury trial, of kidnapping in the second degree, witness tampering in the third degree (three counts), criminal mischief in the fourth degree, endangering the welfare of a child and aggravated harassment in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 29 to 33 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the kidnapping conviction from 25 years to 10 years, resulting in an aggregate term of 14 to 18 years, and otherwise affirmed.

Defendant's legal sufficiency claim regarding the kidnapping is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence overwhelmingly established that defendant intended to prevent his five-year-old niece's liberation by secreting her or holding here where she was not likely to be found (*see* Penal Law § 135.00[2][a]; *People v Denson*, 26 NY3d 179, 189 [2015]). There is no basis for disturbing the jury's credibility determinations. Among other things, defendant, who was seeking revenge against the victim's mother, took the victim to stay at his girlfriend's motel, a location unknown to the victim's mother, and did not return her or disclose her whereabouts when the victim's mother and other family members repeatedly contacted him. Although at some points defendant left the victim with his girlfriend, defendant expected his girlfriend to assist him in secreting the victim. Similarly, although at other points defendant took the victim to various locations, including public places, the circumstances rendered it unlikely that she would be found.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Contrary to defendant's arguments, the record is

insufficient to establish that counsel's choices regarding his opening statement and requests to charge resulted from his misapprehension of the facts and law. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. In particular, there was no reasonable view of the evidence, viewed most favorably to defendant, that he committed the lesser offense of unlawful imprisonment in the second degree, and counsel cannot be faulted for failing to request it (*People v Caban*, 5 NY3d 143, 152 [2005]). In any event, defendant has not shown a reasonable probability that the court would have submitted that offense, that the jury would have accepted it, or

that a different opening statement would have affected the verdict.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8237 Yocelyn Reyes, Index 22827/14
Plaintiff-Appellant,

-against-

83 Post Avenue Associates, L.L.C.,
Defendant-Respondent.

_____

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for appellant.

Dillon Horowitz & Goldstein LLP, New York (Thomas Dillon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered October 19, 2016, which granted defendant's motion for summary judgment dismissing the complaint in this slip and fall personal injury action, unanimously affirmed, without costs.

Defendant established its entitlement to a judgment as a matter of law, where plaintiff was injured when she slipped and fell on a marble step while descending a staircase in defendant's building. Initially, a worn marble step, without more, is not an actionable defect (*see Savio v Rose Flower Chinese Rest., Inc.*, 103 AD3d 575 [1st Dept 2013]; *Sims v 3349 Hull Ave. Realty Co. LLC*, 106 AD3d 466 [1st Dept 2013]; *Cintron v New York City Tr. Auth.*, 77 AD3d 410, 410 [1st Dept 2010]). Thus, regardless of whether defendant had notice of the allegedly slippery nature of the surface, defendant has established its prima facie

entitlement to summary judgment (*see Sims* at 467; *DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181 [1st Dept 2007]).

In any event, even if the alleged slipperiness of the surface were an actionable defect, defendant established that it did not create the allegedly hazardous condition and did not have notice of it (*see Richards v Kahn's Realty Corp.*, 114 AD3d 475 [1st Dept 2014]). In addition to plaintiff's own testimony that she did not make any complaints about the stairs in question prior to the date of the accident, defendant's witness testified that he was unaware of any complaints, repairs made to the staircase, prior accidents on the staircase, or any building code violations issued to the defendant.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's testimony about the lighting of the stairwell was not sufficient to create an issue of fact, since plaintiff simply testified that she slipped, not that she could not see the stairs (*Richards* at 475). Nor does plaintiff's expert affidavit raise a triable issue of fact, since the expert's opinion concerning the cause of plaintiff's slip was speculative (*see Sarmiento v C & E Assoc.*, 40 AD3d 524, 526-527 [1st Dept 2007]), and did not contain sufficient evidence that the building in

question was subject to the cited provisions of the New York City Administrative Code (*see Hyman v Queens County Bancorp, Inc.*, 3 NY3d 743, 744-745 [2004]; *71 Lexington Corp. v Waitman*, 140 AD3d 670 [1st Dept 2016]).

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8238-
8238A In re Tamala S.,
Petitioner-Appellant,

-against-

Ernest R.,
Respondent-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Steven P. Forbes, Jamaica, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Lee Tarr of counsel), attorney for the child.

_____

Orders, Family Court, Bronx County (Emily Morales-Minerva, J.), entered on or about July 13, 2017 and July 14, 2017, which granted respondent father's motion to change venue to Orange County, and which denied petitioner mother's oral application to amend the existing temporary order of visitation to provide her with extended parenting time during the subject child's summer vacation, 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]). We have reviewed the record and agree with assigned counsel that there are no nonfrivolous issues which could be raised on this appeal,

as Family Court providently exercised its discretion in transferring venue under Family Ct Act § 174, based upon the longtime residency of the child and respondent father in Orange County (*see Greenblum v Greenblum*, 136 AD3d 595, 596 [1st Dept 2016]). Furthermore, the mother's application to modify the temporary order of visitation to include extended vacation time during the summer of 2017 is now moot (*see Fabbricante v Fabbricante*, 148 AD3d 780 [2d Dept 2017]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8239 Jose Silverio, Index 302990/12
Plaintiff-Appellant,

-against-

Ford Motor Company, et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma J. Ruiz, J.), entered on or about May 15, 2017, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on liability against defendants, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff made a prima facie showing of negligence on the part of defendant Gaines by submitting Gaines's deposition testimony, which stated that the accident at issue occurred when Gaines changed lanes into a lane of moving traffic (*see* Vehicle and Traffic Law § 1128(a); *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). In addition, plaintiff was not required to demonstrate his own freedom from comparative negligence to be

entitled to summary judgment as to defendants' liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Derix v Port Auth. of N.Y. & N.J.*, 162 AD3d 522 [1st Dept 2018]).

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: JANUARY 29, 2019

DEPUTY CLERK

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

8240 Jacqueline Ambersley, Index 303933/12
Plaintiff-Appellant,

-against-

Athleta LLC, et al.,
Defendants-Respondents.

_____

Kerner & Kerner, P.C., New York (Kenneth T. Kerner of counsel), for appellant.

McAndrew, Conboy & Prisco, LLP, Melville (Mary C. Azzaretto of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 18, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff was injured when she walked into a transparent glass door while exiting defendant Athleta's retail store. Defendants submitted evidence showing that the glare of the sun was the cause of plaintiff's accident. Notably, plaintiff testified that as she was leaving the store, the sun was in her face, and that she took two steps and confronted a

door that she did not expect (*see Benitez v Olson*, 6 AD3d 560, 561-562 [2d Dept 2004], *lv denied in part, dismissed in part* 3 NY3d 753 [2004]; *see also Rios v Gristedes Delivery Serv. Inc.*, 69 AD3d 499 [1st Dept 2010]).

In opposition, plaintiff failed to raise a triable issue of fact. Although her expert opined that the absence of eye level markings on the exit doors constituted negligence, plaintiff failed to demonstrate how such markings would have prevented her injuries.

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8242 The People of the State of New York, Ind. 2574/15
Respondent,

-against-

Martin Nikaj,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J. at plea; James M. Burke, J. at sentencing), rendered February 10, 2016,

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

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

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

8243 Chef Chloe, LLC, etc., Index 653041/16
Plaintiff-Appellant,

-against-

Samantha Wasser, et al.,
Defendants,

ESquared Hospitality LLC,
Defendant-Respondent,

CCSW LLC,
Nominal Defendant.

- - - - -

ESquared Hospitality LLC, etc.,
Counterclaim and Third-Party
Plaintiff-Respondent,

-against-

Chef Chloe, LLC,
Counterclaim Defendant-Appellant,

Chloe Coscarelli,
Third-Party Defendant-Appellant.

_____

Robins Kaplan LLP, New York (Ronald J. Schutz of counsel), for appellants.

Pryor Cashman LLP, New York (Philip R. Hoffman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 16, 2017, upon an arbitration award, to the extent appealed from as limited by the briefs, declaring that plaintiff was terminated for cause pursuant to the terms of an operating agreement between the parties, unanimously affirmed,

with costs.

Plaintiff seeks vacatur or modification of the arbitration award on the sole ground that the arbitrator exceeded her authority by granting relief that was not specifically demanded in defendant's statement of claim (*see* CPLR 7511[b], [c]; *Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]). The arbitrator found that plaintiff could be terminated as Service Member from nominal defendant CCSW LLC "for cause," as that term was defined in the parties' operating agreement. The record demonstrates that the parties submitted evidence, including testimony, and advanced arguments concerning the issue of for-cause termination and that defendant described the conduct by plaintiff that supported for-cause termination in detailed allegations in the statement of claim and in the answer with counterclaims that it had filed in this action, which was annexed to the statement of claim. In the operating agreement, the parties had agreed that all disputes concerning the terms of the agreement would be submitted to arbitration and that they would be bound by the arbitrator's award. "The language of arbitration demands is not subject to the strict standards of construction applicable to formal court pleadings" (*id.* at 140). To hold that the arbitrator was acting outside the scope of her authority when she determined that plaintiff had been terminated for cause "would

unnecessarily elevate form over substance and preclude an otherwise meritorious arbitration award merely because" the statement of claim did not specifically demand that relief (*id.* at 141).

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8244 D.S. 53-16-F Associates, Index 652789/15
Plaintiff-Appellant,

-against-

Groff Studios Corp.,
Defendant-Respondent.

_____

Howard Justvig, Fresh Meadows, for appellant.

Smith, Gambrell & Russell, LLP, New York (John T. Van Der Tuin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered January 23, 2018, which, following a nonjury trial, declared that plaintiff has no right to use any elevator presently in the building located at 151 West 28th Street, dismissed plaintiff's second cause of action for damages, and dismissed defendant's counterclaim as moot, unanimously affirmed, without costs.

The fact-finding determination of a court should not be disturbed on appeal unless its conclusions could not have been reached under any fair interpretation of the evidence, particularly where the findings of fact rest largely on the credibility of witnesses (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]).

A fair interpretation of the evidence supports the court's

finding that plaintiff did not prove that the "freight elevator" cited in the lease rider referred to the building's northerly interior elevator, rather than the exterior sidewalk elevator [which was later removed] immediately outside plaintiff's store at the time the 1978 lease was executed.

Where the parties' agreement contains an ambiguous provision, their course of conduct with regard thereto is the "most persuasive evidence" of their agreed intention (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 85 [1st Dept 2009]). Here, plaintiff presented no evidence of a course of conduct that supported its interpretation of the lease rider.

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8246 In re Nyshawn L.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Dawne A. Mitchell, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 7, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The petition was facially sufficient to establish the value of three phones stolen from a store. The supporting deposition of the store's operations manager provided the requisite "plain and concise factual statement" (Family Court Act § 311.1[3][h]), because it stated the specific total value of the phones.

Appellant did not preserve his claim that the evidence at

the fact-finding hearing was legally insufficient to establish the value of the phones, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Furthermore, the court's finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence, viewed as a whole, supported the conclusion that the value (*see* Penal Law § 155.20[1]) of the phones was well in excess of the statutory threshold of $1000 (*see People v Nashal*, 130 AD3d 480 [1st Dept 2015], *lv denied* 26 NY3d 1010 [2015]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8247 All State Interior Demolition Inc., et al., Plaintiffs-Respondents, Index 653398/16

-against-

Scottsdale Insurance Company, Defendant-Appellant,

United Interior Renovations, LLC, Defendant.

_____

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered October 24, 2017, which, to the extent appealed from, granted plaintiffs' motion for summary judgment declaring that defendant Scottsdale Insurance Company has a duty to defend them in the underlying personal injury action, unanimously modified, on the law, to deny the motion as to plaintiffs 75 Plaza LLC, RXR Atlas LLC, and RXR Construction & Development LLC, and declare that Scottsdale has no duty to defend those plaintiffs, and otherwise affirmed, without costs.

The policy issued by defendant Scottsdale to defendant United Interior Renovations, LLC provided that an organization would be added as an additional insured on the policy "when

[United] and such ... organization have agreed in writing in a contract or agreement that such ... organization be added as an additional insured on your policy." As plaintiff All State Interior Demolition Inc. is the only organization with which United agreed in writing that it be added as an additional insured on the policy, none of the other plaintiffs are entitled to coverage under the policy as additional insureds (*AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426 [1st Dept 2013]).

Scottsdale contends that it also has no obligation to defend All State because the policy provides that an additional insured will be covered only when the underlying injury or damage was caused, in whole or in part, by United's acts or omissions, and the complaint in the underlying action contains no allegations of negligence against United, which was not even named as a defendant. However, the amended complaint and the bill of particulars allege that on the date of the accident the plaintiff was employed by United, and, when presented with his W-2 payroll records showing that United paid him for all of 2015, including the time that he was working on the subject project, the plaintiff admitted that he was working for United. These pleadings implicate United's demolition actions, alleging, for example, that the plaintiff was injured when he stepped on

"construction debris and materials consisting of concrete and demolition remains." Moreover, the third-party complaint brought in the underlying action by plaintiffs herein against United, incorporates the underlying complaint by reference, alleges that United was negligent, and seeks indemnification from United, and is therefore sufficient to trigger Scottsdale's obligation to defend All State (*see City of New York v Evanston Ins. Co.*, 39 AD3d 153, 157 [2d Dept 2007], citing *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]; *New York City Tr. Auth. v Aetna Cas. & Sur. Co.*, 207 AD2d 389, 391 [2d Dept 1994]).

Even if there were issues of fact whether the underlying plaintiff was working for United, as Scottsdale contends, Scottsdale would have a duty to defend All State in the underlying action, because it failed to establish that there is no possibility that it will be obligated to do so (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 715 [2007]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8248 Juliette Ayala, Index 306555/12
Plaintiff-Appellant,

-against-

James M. Pascarelli, et al.,
Defendants-Respondents.

_____

Ephrem J. Wertenteil, New York, for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about August 15, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff made a prima facie showing of negligence on the part of defendant Pascarelli by submitting Pascarelli's deposition testimony, which stated that the accident at issue occurred when he moved the backhoe into a lane of moving traffic (*see* Vehicle and Traffic Law § 1163[a]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). Plaintiff was not required to demonstrate her own freedom from comparative negligence nor to show that defendants' negligence was the sole proximate cause to

be entitled to summary judgment as to defendants' liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Derix v Port Auth. of N.Y. & N.J.*, 162 AD3d 522 [1st Dept 2018]; *Bermeo v Time Warner Entertainment Co.*, 162 AD3d 404 [1st Dept 2018]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

Renwick, J.P., Richter, Mazzarelli, Webber, JJ.

8249 Patricia Thompson-Shepard, etc., al., Plaintiffs-Appellants, Index 153404/13

-against-

Lido Hall Condominiums, et al., Defendants-Respondents.

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Christopher M. Yapchanyk of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 25, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This action, brought to recover damages for injuries sustained by plaintiff's decedent (unrelated to his death) in a fall on a staircase, rests on "pure surmise" as to the cause of the accident (*see Kane v Estia Greek Rest.*, 4 AD3d 189, 191 [1st Dept 2004]). It is undisputed that the accident was unwitnessed, and plaintiff's testimony, which was limited to after-the-fact observations, reflected that she did not know the cause of the accident.

Defendants waived their objection to the admissibility of

plaintiff's expert's unsworn report by failing to raise it before the motion court (*see Shinn v Catanzaro*, 1 Ad3d 195, 198 [1st Dept 2003]). However, in any event, the report does not raise a triable issue of fact (*see Kane*, 4 AD3d at 190; *Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302 [1st Dept 2006]; *Silva v 81st St. and Ave. A Corp.*, 169 AD2d 402, 404 [1st Dept 1991], *lv denied* 77 NY2d 810 [1991]). Plaintiff attempts to link the expert's opinion that the staircase contained irregular and excessive riser heights with her testimony that upon arriving at the scene of the accident she saw the decedent's leg lodged in a riser. However, her after-the-fact observation does not show that the decedent fell because of the purportedly defective riser. Moreover, insofar as the decedent's hearsay statements cited in the expert's report can be considered, the decedent did not say that he slipped for reasons related to the risers.

In view of the foregoing, it is immaterial whether or not defendants had actual or constructive notice of defective staircase conditions (*see Dapp v Larson*, 240 AD2d 918 [3d Dept 1997]).

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8251 The People of the State of New York, Ind. 820/15
Respondent,

-against-

Marion Duke,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 15, 2015, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8252 Cohl Katz, Index 155146/13
Plaintiff-Respondent,

-against-

260 Park Avenue South Condominium Associates, et al.,
Defendants-Appellants.

_____

Molod Spitz & DeSantis, P.C., New York (Salvatore J. DeSantis of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Paul H. Seidenstock of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered February 12, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that the defect in the step on which plaintiff allegedly slipped and fell did not constitute an unsafe condition via photographs that showed no large cracks or holes in the step and an expert affidavit opining that the measured height differential of between 1/4 to 3/8 of an inch was trivial (*see McCullough v Riverbay Corp.*, 150 AD3d 624 [1st Dept 2017]; *Lovetere v Meadowlands Sports Complex*, 143 AD3d 539, 539 [1st Dept 2016]). In opposition, plaintiff raised an issue of fact via an expert affidavit opining that a chipped

segment of the stair tread, which measured 9 inches in length and varied in height from 1/4 to 1-1/8 inches, caused plaintiff's accident (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 82 [2015]).

Contrary to defendants' contentions, the record also presents issues of fact as to whether plaintiff was intoxicated at the time of the accident and whether her conduct in deciding to descend a darkened stairwell during a power outage was so egregious or unforeseeable as to constitute the sole or superseding cause of the accident (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492 [2006]; *Malleret v Federal Express Corp.*, 100 AD3d 567, 568 [1st Dept 2012]). Moreover, any inconsistencies in plaintiff's account of the accident present credibility issues for determination by a factfinder (*see Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8253 Ind. 2064/15
2372/15

The People of the State of New York,
Respondent,

-against-

Deval Davis,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered August 24, 2016, convicting defendant, upon his pleas of guilty, of attempted assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of eight years, unanimously affirmed.

The record establishes that the sentencing court fully discharged its obligations regarding consideration of youthful offender treatment (*see People v Minemier*, 29 NY3d 414, 419-421 [2017]). The record of the sentencing proceeding, at which the court referred to the plea proceeding, establishes that the court made a determination that there were no mitigating circumstances that would render defendant eligible for YO treatment on an armed

felony conviction, and that it would decline to grant YO treatment in any event.

Upon our own review, we also find, in this case where defendant fired shots at another person on a busy street, that no mitigating circumstances (*see* CPL 710.30[3]) are present, and that regardless of eligibility, YO treatment would be inappropriate. We perceive no basis for reducing the sentence.

Defendant's claim that his counsel rendered ineffective assistance at sentencing by failing to argue for YO treatment or a lesser sentence is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

The court properly imposed separate surcharges on the two

convictions. Although they involved the same pistol, the two convictions involved separate acts, committed on different days (*see People v Brown*, 21 NY3d 739 [2013]).

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK

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

8254 The People of the State of New York, Ind. 191/15
Respondent,

-against-

Richard Lee Bates,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Robert M. Stolz, J.), rendered July 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: JANUARY 29, 2019

DEPUTY CLERK

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

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

8255N-
8256N PF2 Securities Evaluations, Inc., Index 151776/14
Plaintiff-Appellant,

-against-

Guillaume Fillebeen, et al.,
Defendants-Respondents.
- - - - -
Guillaume Fillebeen, et al.,
Counterclaim/Plaintiffs-Respondents,

-against-

PF2 Securities Evaluations, Inc.,
et al.,
Counterclaim/Defendants-Appellants.

_____

Carmel, Milazzo & DiChiara LLP, New York (Christopher P. Milazzo of counsel), for appellants.

Law Office of Robert Steckman, P.C., New York (Robert M. Steckman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 8, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff and counterclaim defendants' (collectively, PF2) motion to compel defendants to produce documents and interrogatory responses and to sit for depositions, and for discovery sanctions, unanimously modified, on the law and the facts, to grant the motion to the extent of compelling defendants to appear for their previously noticed depositions within 60 days after entry of this order, and

otherwise affirmed, without costs. Order, same court (Tanya R. Kennedy, J.), entered April 20, 2018, which, to the extent appealed from as limited by the briefs, upon defendants' motion to compel PF2 to produce documents and interrogatory responses, directed defendants to serve a second request for discovery and inspection and directed PF2 to respond thereto, and denied PF2's cross motion for discovery sanctions, unanimously affirmed, without costs.

PF2's motion for sanctions was properly denied, as defendants' conduct in discovery was neither wilful nor contumacious (*see Pimental v City of New York*, 246 AD2d 467, 468-69 [1st Dept 1998]). In particular, defendants asserted a reasonable basis for delaying depositions – a basis originally advanced by PF2. Further, the motion court closely monitored discovery through five compliance conferences, and PF2 consented to extensions of the discovery schedule and the resolutions of other disputes.

Defendants' service of objections to PF2's 150 interrogatories one month late does not constitute a waiver of the objections, because the interrogatory requests were palpably improper (*Aetna Ins. Co. v Mirisola*, 167 AD2d 270, 271 [1st Dept 1990]). Notably, the then-in-effect rules of the part to which the case was assigned limited interrogatories to 25, including

subparts, and to the identification of witnesses and documents and the calculation of damages, and PF2's requests were in gross violation of the rules in both number and subject matter.

In view of the fact that PF2 timely noticed depositions and defendants did not object to the notices, PF2 is entitled to the depositions. Defendants shall produce their witnesses for the previously noticed depositions within 60 days after entry of this order.

PF2 contends that defendants' motion to compel it to produce documents and interrogatory responses is barred by "laches." None of the cases cited by PF2 applies laches to motions to compel. Cases in which the court found that the right to compel had been waived generally involved situations in which discovery – including motions to compel – had concluded, either by rule or by court order (*see e.g GoSMILE, Inc. v Levine*, 112 AD3d 469, 470 [1st Dept 2013] [motion to compel made after referee resolved all the parties' stated discovery disputes]; *Remark Elec. Corp. v Manshul Constr. Corp.*, 242 AD2d 694 [2d Dept 1997] [motion to compel made after note of issue was filed]). In the instant case, defendants made their motion before the date by which the court ordered all discovery motions to be made (September 30, 2017).

While PF2 asserts conclusorily that it produced all

documents requested, it failed to show that it produced the documents that defendants identified as missing. Moreover, defendants demonstrated that at least some of the documents sought on their motion had been ordered produced in "so ordered" stipulations to which PF2 agreed.

We deny defendants' request for sanctions against PF2 for pursuing this appeal. PF2's arguments are not so lacking in merit as to be deemed frivolous.

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

ENTERED: JANUARY 29, 2019

DEPUTY CLERK