SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 3, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9985 In re Lenora D.,
Petitioner-Respondent,

-against-

Richard J.R.,
Respondent-Appellant,

Victoria L.H.,
Respondent.

_____

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

Larry S. Bachner, New York, for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the child.

_____

Order, Family County, Bronx County (Tamra Walker, Referee), entered on or about March 2, 2018, which, after a hearing, found that extraordinary circumstances existed to permit petitioner maternal grandmother to seek custody of the subject child, and granted the grandmother's petition for sole custody of the child with visitation to the father, unanimously affirmed, without costs.

Petitioner grandmother demonstrated the requisite

extraordinary circumstances to establish her standing to seek custody of the child after her mother died unexpectedly (*see Matter of Suarez v Williams*, 26 NY3d 440 [2015]; Domestic Relations Law § 72[2][a]). For about four years before the mother's death in 2017, the mother and the child had lived in the grandmother's household, and the mother and grandmother together provided for all the child's financial and other needs. In contrast, the father resided with the child for about two years after her birth, until the mother moved out with the child in about 2008. Thereafter, the father saw the child sporadically and provided minimal financial support (*see Suarez*, 26 NY3d at 450-451). Given the child's need for stability in the aftermath of her mother's sudden death, the grandmother met her burden of showing extraordinary circumstances (*see id.*; *Roberta P. v Vanessa J.P.*, 140 AD3d 457 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Danzy v Jones-Moore*, 54 AD3d 858 [2d Dept 2008]).

The record also supports the finding that it is in the child's best interests to be in the grandmother's custody (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). The grandmother has supported the child and provided a stable and loving home where the child is thriving and all of her needs are met (*see Matter of Ruth L. v Clemese Theresa J.*, 104 AD3d 554

[1st Dept 2013], *lv denied* 21 NY3d 860 [2013]). The child is fully bonded with the grandmother, who has provided her with financial and emotional support, especially after the mother's death, and provided for all of her medical care and educational needs.

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

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

ENTERED: OCTOBER 3, 2019

CLERK

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

9986 Sears Holdings Management Corp., etc., Plaintiff-Respondent, Index 650142/15

-against-

Rockaway Realty Associates, LP, et al., Defendants-Appellants.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Sydney A. Fetten of counsel), for appellants.

Bruckmann & Victory, LLP, New York (Richard J. Sprock of counsel), for respondent.

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered October 30, 2018, which granted plaintiff's motion for partial summary judgment as to liability for the third (breach of contract) and fourth (quantum meruit/unjust enrichment) causes of action, unanimously modified, on the law, to deny the motion as to the fourth cause of action, and to dismiss that cause of action, and otherwise affirmed, with costs, to be paid by defendants.

Plaintiff met its burden on its motion for summary judgment for breach of contract by submitting admissible evidence, including the emails from Mr. Poyker, an employee of one of the defendants, that defendants' refused to repair the interior of plaintiff's store, which constituted a breach of the parties'

agreement. As defendants submitted no relevant admissible evidence in opposition to the motion, we affirm the grant of summary judgment for breach of contract in plaintiff's favor (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

However, the fourth cause of action requires dismissal because it constitutes an indistinguishable dispute regarding the same operative facts as the claim for breach of contract (*Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]; *see also Board of Mgrs. of Honto 88 Condominium v Red Apple Child Dev. Ctr., a Chinese Sch.*, 160 AD3d 580, 581-582 [1st Dept 2018]).

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

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

ENTERED: OCTOBER 3, 2019

CLERK

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

9988 The People of the State of New York, Respondent, Ind. 3249/12

-against-

David Gooden, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about May 3, 2016, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). We do not find any overassessment of points or mitigating factors that were inadequately taken into account by

the risk assessment instrument. The evidence before the hearing court, which assessed 150 points, demonstrated defendant's high risk of reoffense and did not warrant a departure.

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

ENTERED: OCTOBER 3, 2019

CLERK

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

9989 161 Ludlow Food, LLC doing business as No Fun, Plaintiff-Appellant, Index 153500/16

-against-

L.E.S. Dwellers, Inc. formerly known as Diem, Inc., et al., Defendants,

Sara Romanoski, Defendant-Respondent.

Mark A. Marino, PC, New York (Mark A. Marino of counsel), for appellant.

Sara Romanoski, respondent pro se.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 24, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' CPLR 3211(g) motion to dismiss plaintiff's claim for slander *per se*, unanimously affirmed, with costs.

This is a case involving public petition or participation (Civil Rights Law § 76-a). Dismissal of plaintiff's claim for slander *per se* was warranted because the individual defendant's alleged false statements were made at a Community Board meeting, and the claim lacked a substantial basis in law, as required to survive dismissal (CPLR 3211[g]; *600 W. 115th St. Corp v Von Gutfeld*, 80 NY2d 130 [1992], *cert denied* 508 US 910 [1993]).

Plaintiff corporation failed to state how the statements at issue harmed its reputation, business standing, or corporate integrity, sufficient to withstand a motion to dismiss (*see Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32 [1st Dept 2011].

The context of the statements provides further support for dismissal. Defendant made the comments at a Community Board meeting where plaintiff's liquor license was under discussion and, in turn, the issue of whether it had a valid COO would have been directly relevant, and the meeting was attended by plaintiff's managing member, such that plaintiff had the opportunity to correct the alleged misstatements and present his own, competing views (*see 600 W. 115th St. Corp v Von Gutfeld*, 80 NY2d at 138).

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: OCTOBER 3, 2019

CLERK

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

9992 Anthony Shimukonas, Index 118167/09
Plaintiff-Appellant,

-against-

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

_____

Jason Levine, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered October 29, 2018, which denied plaintiff's motion to set aside the jury verdict awarding zero damages for past and future pain and suffering and grant a new trial on such damages, unanimously modified, on the facts, to grant the motion as to the award for past pain and suffering and direct a new trial on such damages, unless, within 30 days after entry of this order, the parties stipulate to an award of $200,000 for past pain and suffering and entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff sustained injuries when a New York City police officer smashed him in the nose with a bullet-proof shield after entering his apartment to execute a search warrant. After a trial, the jury found that the officer violated plaintiff's

rights under the Fourth Amendment to the U.S. Constitution by using excessive force while arresting him and that the excessive force was a substantial factor in causing his injuries. However, the jury awarded plaintiff no damages for pain and suffering.

Although plaintiff waived the argument that the jury's verdict was inconsistent, he is not precluded from seeking to set aside the verdict on the ground that it is insufficient and against the weight of the evidence (*see Mescall v Structure-Tone, Inc.*, 100 AD3d 490, 490-491 [1st Dept 2012]).

We find that the award of zero damages for future pain and suffering is not against the weight of the evidence or inadequate. The jury could reasonably have found that plaintiff's injuries had healed to the extent that he would not be afflicted with future pain (*see Gribbon v Missionary Sisters of Sacred Heart*, 244 AD2d 185 [1st Dept 1997]).

However, we find that the jury's failure to award damages for past pain and suffering is contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation (CPLR 5501[c]; *see Kennett v Piotrowski*, 234 AD2d 983, 984 [4th Department 1996]). The undisputed evidence establishes that plaintiff was in pain the first night after being struck, that for about two weeks after the incident his broken nose and orbital bone fractures were "kind of rough,"

that he could only breathe through his mouth, that he had to get medication, that he suffered "really bad" headaches, and that he required reconstructive nasal surgery as a result of his injuries. Thus, we modify to award damages for past pain and suffering to the extent indicated.

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

ENTERED: OCTOBER 3, 2019

CLERK

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

9993 In re Edward L.,
Petitioner-Appellant,

-against-

Jasmine M.,
Respondent-Respondent.

Steven N. Feinman, White Plains, for appellant.

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for respondent.

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

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about October 17, 2018, which, to the extent appealed from as limited by the briefs, granted petitioner four annual supervised visits with the subject children approximately three months apart for two hours each, and ordered that the children may have additional visits with petitioner in their discretion, unanimously affirmed, without costs.

The Family Court's determination that four annual supervised visits is in the best interest of the subject child has a sound and substantial basis in the record and should not be disturbed (*Linda R. v Ari Z.*, 71 AD3d 465, 465-466 [1st Dept 2010]; *see also Matter of Custer v Slater*, 2 AD3d 1227, 1228 [2d Dept 2003]). The record showed that the father has a history of being

unable to control his anger, using corporal punishment on the children and screaming and speaking poorly of their mother during phone calls, causing them distress. Accordingly, Family Court providently determined that unsupervised visitation would have a negative impact on the children's physical and emotional well-being (*see Matter of Arcenia K. v Lamiek C.*, 144 AD3d 610, 610 [1st Dept 2016]; *Matter of Arelis Carmen S. v Daniel H.*, 78 AD3d 504, 504 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]; *Matter of Frank M. v Donna W.*, 44 AD3d 495, 495 [1st Dept 2007]). In addition, while the children's wishes are not controlling, they are entitled to considerable weight and both children expressed through their attorney that they do not wish to have a significant relationship with their father (*see Matter of Madison H. [Demezz J.H.]*, 173 AD3d 458, 459 [1st Dept 2019]; *Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]).

The Family Court did not improperly delegate its authority by leaving to the children's discretion whether they wanted to

have visits or telephone contact with their father outside of the mandatory four annual supervised visits (*see Matter of Don B. v Camilla E.*, 164 AD3d 1144, 1145 [1st Dept 2018]).

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

ENTERED: OCTOBER 3, 2019

CLERK

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

9994 Daniel Beauvoir, et al., Index 305806/14
Plaintiffs-Appellants-Respondents,

-against-

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

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants-respondents.

Zachary W. Carter, Corporation Counsel, New York (Zachary S. Shapiro of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about June 21, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiffs' federal and rights claim based on an illegal strip search, and granted defendants' motion for summary judgment dismissing plaintiffs' state law claims and the remainder of plaintiffs' federal civil rights claims, unanimously affirmed, without costs.

The court properly dismissed all of plaintiffs' state law claims based on their failure to file timely notices of claim, except as to plaintiff Green's malicious prosecution claim (*see* General Municipal Law §§ 50-e, 5-I). In any event, the one-year-and-90-day statute of limitations is a bar to all the state claims, including plaintiff Green's malicious prosecution claim

and we lack any discretion to allow expired claims to proceed thereafter (*see Pierson v City of New York*, 56 NY2d 950, 954-955 [1982] ["To permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50-e"]; *Galloway v NYC Police Department*, 7 AD3d 444, 445 [1st Dept 2004] [section 50-i statute of limitations requirement is strictly construed]).

Defendants met their prima facie burden by submitting evidence of a presumptively valid warrant for a no-knock search of plaintiffs' residential apartment, founded upon a police investigation of a 911 complaint regarding drugs sold from the premises, coupled with two follow-up controlled buys of marijuana at the subject apartment using a known, reliable confidential informant as the purchaser. Upon executing the warrant, the police found marijuana, crack and drug paraphernalia in the son's bedroom to which the plaintiffs' held access keys, and there was also mail addressed to plaintiff Green in the bedroom. Based on such evidence, the officers had probable cause to arrest plaintiffs for constructive possession of the drugs and contraband seized, given plaintiffs' dominion and control over the apartment, which was leased in their names (*see Phin v City*

of New York, 157 AD3d 553, 553-554 [1st Dept 2018]). Such evidence affords a complete defense to the federal claims based on false arrest, false imprisonment, and malicious prosecution (*see Savane v District Attorney of N.Y. County*, 148 AD3d 591 [1st Dept 2017] [where similar claims should have been dismissed against the ADA as there was probable cause for the arrest]; *Garcia v City of New York*, 115 AD3d 447 [1st Dept 2014], *appeal dismissed* 24 NY3d 1081 [2014]). Plaintiffs also failed to raise an issue of fact as to use of excessive force or injury (*see Davidson v City of New York*, 155 AD3d 544 [1st Dept 2017]).

As to plaintiff Beauvoir's federal claim based on his testimony that he was subjected to a visual cavity search at the precinct following his arrest on misdemeanor charges, such claims, while not formally pled, may be entertained as they were raised before the motion court, addressed, and as such, this Court may nostra sponte conform the pleadings to the proof (*see* CPLR 3025[c]; *O'Neill v New York Univ.*, 97 AD3d 199, 209 [1st Dept 2012]). The motion court properly found issues of fact as to whether the search occurred and the identity of the officers involved, as well as the reasons underlying the search, including whether the officers involved had reasonable suspicion to believe that plaintiff Beauvoir was secreting contraband. Thus, both defendants' cross motion for dismissal of this claim and

plaintiff's motion for summary judgment on the claim were properly denied (*see People v Hall*, 10 NY3d 303 [2008], *cert denied* 555 US 938 [2008] [the "reasonableness" of the search conducted in light of the facts presented is the "touchstone" for purposes of claims brought under the fourth amendment]; *Shields v City of New York*, 141 AD3d 421, 422 [1st Dept 2016] [strip search of arrestee charged with minor offense violates fourth amendment without proof of reasonable suspicion that he is concealing weapons or contraband]).

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: OCTOBER 3, 2019

CLERK

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

9995 Focus & Struga Building Developers, LLC, Plaintiff-Appellant, Index 110303/11

-against-

1330 3d Avenue Corp., Defendant-Respondent.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 30, 2019, dismissing the complaint as time-barred and awarding defendant damages on its counterclaim for indemnification and attorneys' fees, unanimously modified, on the law and the facts, to vacate the award in favor of defendant on the counterclaim, and otherwise affirmed, without costs.

Under the terms of the parties' contract, plaintiff was required to commence any action related to the contracted work within a year of the "substantial completion" of the work or "the last day on which Contractor performed Work at the site or delivered material to the site, whichever occurs first." Plaintiff alleged in its verified complaint dated September 6, 2011, that it last performed labor at or supplied materials to the site on July 16, 2010, more than one year before it commenced

the action against defendant. Thus, the motion court providently determined that plaintiff's claims were time-barred based on plaintiff's own admission (*see* CPLR 4401). We reject plaintiff's argument that defendant's motion was an improper late motion for summary judgment (*see Luna v Hyundai Motor Am.*, 25 AD3d 321, 323 [1st Dept 2006]). That the court's order referenced the "substantial completion" section of the contract, rather than the last day of work or delivery of materials, was an inconsequential misstatement.

Defendant, however, failed to show that it was entitled to indemnification, including attorneys' fees, for a subcontractor's claim for unpaid fees. Under the plain terms of the contract, plaintiff was not required to pay a subcontractor until it received payment from defendant for that subcontractor's work (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Defendant did not adduce any evidence showing that it paid plaintiff for the subcontractor's work, triggering plaintiff's obligation to pay the subcontractor.

Contrary to defendant's contention, paragraph 8.13 did not require plaintiff to indemnify defendant for all claims. Rather, that paragraph required plaintiff to indemnify defendant for claims related to the work and corresponding attorneys' fees only if those claims were "attributable to bodily injury, sickness,

disease or death, or to injury to or destruction of tangible property." Paragraph 28 of the Rider required plaintiff to indemnify defendant for all claims related to the project, provided those claims were "caused in whole or in part by Contractor." However, defendant failed to show that the subcontractor's claim for nonpayment was caused in whole or in part by plaintiff. As noted above, there was no evidence that defendant paid plaintiff for the subcontractor's work, triggering plaintiff's obligation to remit the payment to the subcontractor. Accordingly, defendant should not have been awarded damages on its counterclaim for indemnification and attorneys' fees.

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: OCTOBER 3, 2019

CLERK

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

9996 The People of the State of New York, Ind. 4600/16
Respondent,

-against-

Steven Spellman,
Defendant-Appellant.

_____

Janet E. Sabel, Legal Aid Society, New York (Harold V. Ferguson, Jr. counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Kevin McGrath, J.), rendered September 14, 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: OCTOBER 3, 2019

CLERK

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

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

9997 & M-7027 In re Richard Robbins, Petitioner-Appellant,

-against-

The New York City Landmarks Preservation Commission, Respondent-Respondent,

315 West 103 Enterprises LLC, et al., Intervenors-Respondents.

Index 100647/18

Richard Robbins, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for New York City Landmarks Preservation Commission, respondent.

Goldberg Weg & Markus PLLC, New York (Steven A. Weg of counsel), for 315 West 103 Enterprises LLC and 315 West 103 St. Development LLC, respondents.

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 30, 2018, denying the petition seeking (1) to annul the determination of the New York City Landmarks Preservation Commission (Commission), dated January 19, 2018, which granted a certificate of no effect to intervenors, (2) to compel review of the application for a certificate of appropriateness, and (3) to direct the Commission to comply with petitioner's freedom of information request, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding stems from a long-standing dispute over the expansion of intervenors' rowhouse, next door to petitioner's residence, for which a permit was originally issued in 2009 by nonparty New York City Department of Buildings (DOB). The area encompassing both properties was designated a historic district by respondent New York City Landmarks Preservation Commission (LPC) on June 23, 2015.

A writ of mandamus compelling LPC to conduct certificate of appropriateness review does not lie (CPLR 7803[1]). LPC is granted discretion to decide whether a certificate of no effect is appropriate, after considering "whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement . . . in an historic district" (Administrative Code of City of NY § 25-306[a][1][a]), and whether a "new improvement . . . would affect or not be in harmony with the external appearance of other, neighboring improvements . . . in such district (*id.* at [a][1][b]). As such, LPC did not violate lawful procedure when it determined that the modifications proposed by intervenors in 2017 could be approved with a certificate of no effect by LPC staff (CPLR 7803[3]). Similarly, the decision to grant a certificate of no effect was not arbitrary and capricious, based on the application submitted to LPC for modifications at the rear of the building and for

replacement of the rooftop bulkhead (Administrative Code § 25-306[a][1]; former 63 RCNY §§ 2-15[b][1]-[2] & 2-19[e][1]; *see Matter of Save America's Clocks, Inc. v City of New York*, 33 NY3d 198, 207 [2019]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 [1974]).

Contrary to petitioner's contention, LPC was precluded from considering the propriety of improvements to the real property for which the DOB had issued a permit prior to the historic district designation (Administrative Code § 25-321). The permit was not revoked, and its expiration prior to designation did not render it invalid (*compare Matter of 339 W. 29th St. LLC v City of New York*, 125 AD3d 557, 557-558 [1st Dept 2015]).

As to petitioner's FOIL request, the issue was not ripe for judicial review at the time petitioner commenced this proceeding (CPLR 7801[1]). LPC responded within the appropriate time frame and petitioner agreed to a rolling production of documents, which was ongoing, as evidenced by the record (*see* Public Officers Law § 89[3][a]). Thus, petitioner is not entitled to litigation costs as a prevailing party (Public Officers Law §89[4][c][i]). Alternatively, Supreme Court providently exercised its discretion in declining to award costs (*id.*).

We need not determine whether dismissal for failure to name

intervenors as necessary parties was required (CPLR 1001).

M-7027 - ***Richard Robbins v The New York City Landmark Preservation Commission***

Motion to enlarge record denied.

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

ENTERED: OCTOBER 3, 2019

CLERK

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

9998 William Etkin, Index 652122/17
Plaintiff-Appellant,

-against-

Sherwood 21 Associates, LLC,
Defendant,

The Board of Managers of the
500 West 21st Street Condominium,
Defendant-Respondent.

_____

Morrison Cohen LLP, New York (Terence K. McLaughlin of counsel), for appellant.

Law Offices of Leonard A. Sclafani, New York (Leonard A. Sclafani of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered June 25, 2018, which granted defendant Board of Managers of the 500 West 21st Street Condominium's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

The motion court correctly dismissed the cause of action for breach of fiduciary duty against defendant board of managers arising from scratched windows in plaintiff's unit. Plaintiff alleges that the board failed to ensure the replacement of the windows by the sponsor and failed to provide notice of the defective windows to the condominium unit owners. However, under the condominium offering plan and purchase agreement, the condominium sponsor bears sole and complete responsibility for

correcting defective windows, and plaintiff does not allege that the board of managers at any time undertook responsibility for the windows. Nor is there an allegation or any documentary evidence that the board had a duty to act in any prescribed manner in the circumstances (*see Pomerance v McGrath*, 124 AD3d 481, 483 [1st Dept 2015] ["how aggressive the board should be toward the Sponsor" is a matter of the board's business judgment], *lv dismissed* 25 NY3d 1038 [2015]).

Plaintiff is correct that the alteration and construction agreement between himself and the board only released the sponsor and the board from claims arising out of that agreement (*see Gordon v Board of Mgrs. of the E. 12th St. Condominium*, 102 AD3d 521, 521 [1st Dept 2013]). However, as indicated, the court correctly dismissed the complaint as against the board because plaintiff failed to allege facts that, on their face, stated a cause of action for breach of fiduciary duty.

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: OCTOBER 3, 2019

CLERK

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

9999 The People of the State of New York, Respondent, Ind. 3193/14

-against-

Carlos De Jesus, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered August 13, 2015, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant did not preserve any of his challenges to the court's main and supplemental charges and to certain allegedly inadmissible evidence, and we decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal. The absence of a definition of the term credit card could not have caused any prejudice because the nature of the stolen card was not at issue. The court responded meaningfully to a jury note by accurately stating all the elements of the crime. A security guard's testimony about what

he was told by two persons (who also testified at trial) was admissible as part of the narrative to explain the events leading up to defendant's apprehension (*see e.g. People v Nieves*, 294 AD2d 152 [1st Dept 2002], *lv denied* 98 NY2d 700 [2002]).

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

ENTERED: OCTOBER 3, 2019

CLERK

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

10000 The People of the State of New York, Ind. 5032/15
Respondent,

-against-

Miguel Vitinio-Tapia,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered April 10, 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: OCTOBER 3, 2019

CLERK

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

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

10001 The People of the State of New York, Respondent, Ind. 1553/14

-against-

William J., 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 (Katherine Kulkarni of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered May 12, 2016 convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to five years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of adjudicating defendant a youthful offender, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal. We find the sentence excessive only to the extent it did not include youthful offender treatment.

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

ENTERED: OCTOBER 3, 2019

CLERK

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

10002 The People of the State of New York, Respondent, Ind. 3448/14

-against-

Benjamin Vazquez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered November 7, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of six years, unanimously affirmed.

In challenging the court's suppression rulings, the only relief defendant requests is dismissal of the indictment, and he expressly requests this Court to affirm his conviction if it does not grant a dismissal. However, even if we were to grant the suppression motion in its entirety, the proper remedy would be vacatur of the plea and a remand for further proceedings, including an independent source hearing regarding the victim's ability to make an in-court identification (*see People v Burts*, 78 NY2d 20, 23-24 [1991]). Since we do not find that dismissal

of the indictment would be appropriate, we affirm on this basis.

In any event, we also find that the hearing court properly denied defendant's suppression motion. The stop of defendant, based on a detailed description, was at least supported by reasonable suspicion, and the ensuing showup in close spatial and temporal proximity to the crime was not unduly suggestive.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 3, 2019

CLERK

CORRECTED ORDER - NOVEMBER 8, 2019

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

10003 The People of the State of New York, Ind. 636/15
Respondent,

-against-

Marvin Clark,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Gabe Newland of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered February 16, 2016) convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the **second** degree and criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of 4½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the weapon conviction to 3½ years, and otherwise affirmed.

We do not find that defendant made a valid waiver of his right to appeal. We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 3, 2019

CLERK

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

10004 Robert Gordon, Index 651077/16
Plaintiff-Respondent,

-against-

Donna Schaeffer,
Defendant-Appellant.

_____

Kreisberg & Maitland, LLP, New York (Gabriel Mendelberg of counsel), for appellant.

Hoffner PLLC, New York (David S. Hoffner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about June 21, 2018, which, inter alia, granted plaintiff's motion for summary judgment as to liability for breach of contract, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of defendant's liability by showing that the parties had entered into a contract in the form of a so-ordered stipulation, that plaintiff performed his obligations thereunder, and that defendant failed to abide by the stipulation's terms requiring that plaintiff be given notice and an opportunity to exercise his right of first refusal to purchase certain jewelry. Defendant's argument that the so-ordered stipulation was not supported by consideration is unavailing, given that the stipulation was in partial settlement of the parties' claims with respect to the subject jewelry (*see*

Denburg v Parker Chapin Flattau & Klimpl, 82 NY2d 375, 383 [1993]). Moreover, the stipulation was so-ordered by the motion court in the prior action, giving its terms the weight of a court order (*see Ford v City of New York*, 54 AD3d 263, 266 [1st Dept 2008]).

Contrary to defendant's contention, plaintiff's motion as to liability need not be denied because he failed to demonstrate damages as a result of the breach (*see Northway Mall Assoc. v Bernlee Realty Corp.*, 90 AD2d 739 [1st Dept 1982]). Nor, contrary to defendant's further contention, must a party seeking money damages, as opposed to specific performance, establish that it was ready, willing, and able to perform at the time of the breach in order to establish the other party's liability for the breach (*see Analisa Salon, Ltd. v Elide Props., LLC*, 46 AD3d 721, 726 [2d Dept 2007]).

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: OCTOBER 3, 2019

CLERK

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

10005 The People of the State of New York, Respondent, Ind. 1329/14

-against-

Christian Rodriguez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered January 14, 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: OCTOBER 3, 2019

CLERK