SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 10, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Richter, Kapnick, Kern, Singh, JJ.

9893 In re Cyrus R. Vance, Jr., etc., Ind 70093/19
[M-3192] Petitioner, OP 183/19

-against-

Honorable Gayle P. Roberts, etc., et al.,
Respondents.

_____

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

Janet E. Sabel, The Legal Aid Society, New York (Michelle Fox of counsel), for Sanjay Jaggernauth, respondent.

_____

Petition brought pursuant to CPLR article 78 to vacate an order of respondent Justice, dated June 20, 2019, which severed certain charges against respondent Jaggernauth and removed them to Family Court, unanimously denied, without costs, and the proceeding dismissed.

Sixteen year-old respondent Sanjay Jaggernauth was arrested for two separate incidents occurring on February 9 and 23, 2019. It is alleged that on February 23rd, he followed the complainant from a subway station exit into her apartment building. He followed her up a flight of stairs and grabbed her jacket. During the ensuing struggle, respondent threw the complainant

down a flight of stairs.

Respondent was arraigned in the newly created Youth Part of Supreme Court as an adolescent offender on February 24, 2019. The People sought to prevent removal of the case to Family Court on the ground that the incident involved "significant physical injury" (CPL 722.23[2]). This application was denied on March 5, 2019 on the ground that the People failed to demonstrate any of the aggravating factors enumerated in the statute (*id.*).

On the same day, respondent was charged in a second felony complaint, which alleged that on February 9, 2019, he followed a different complainant from a subway exit into her apartment building, where he approached her. She threatened to call the police, and respondent allegedly grabbed her arm and grabbed and squeezed her breast over her clothing before fleeing the scene.

As with the February 23rd incident, the People moved to prevent the removal of the February 9th case to Family Court pursuant to CPL 722.23(2) on the ground that one of the aggravating factors listed in the statute was present. This motion was granted on March 11, 2019.

On March 25, a grand jury indicted respondent, in a single indictment, for both the February 9th and February 23rd incidents.

On March 27, 2019, the People moved pursuant to CPL

722.23(1) to prevent the removal of the February 23rd charges to Family Court. This motion was denied on April 10, the court holding that the People failed to demonstrate extraordinary circumstances sufficient to override the preference for removal to Family Court. It ordered the February 23rd charges removed to Family Court.

The clerk advised the court that the February 23rd charges could not be sent directly to Family Court because they had been combined in one indictment with the February 9th charges. Defense counsel moved to sever the two sets of charges. The People opposed, arguing, among other things, that once the offenses were joined pursuant to CPL 200.20(2)(b), the court lacked statutory authority to sever them.

On June 20th, the court granted severance of the February 23rd charges and again ordered them removed to Family Court. In response to the People's argument that the court lacked authority to order the severance, the court found that the two sets of charges were not properly joinable. The People sought and obtained a stay of this order and commenced this article 78 proceeding, seeking a writ of prohibition and an order vacating the June 20th order of severance and removal. They argue that the court exceeded its authority and acted in excess of its powers in ordering the severance of the February 23rd charges, as

those charges were properly joined in a single indictment.

"[T]he extraordinary remedy of prohibition lies only where there is a clear legal right, and only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction" (*Matter of Rush v Mordue*, 68 NY2d 348, 352 [1986]). "Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings" (*id.* at 353).

There is no merit in the People's contention that the court lacks the authority to sever charges that were joined in a single indictment. This argument would have validity in cases where charges were *properly* joinable in a single indictment. However, the law is clear that the determination of whether the charges were, in fact, properly joinable in the first instance, is a duty of the court that is not delegated to the prosecution or the grand jury.

The court has a duty to examine the indictment to determine whether joinder is proper pursuant to CPL 200.20(a) or (b). Notably, the People have not provided any precedent to support their position to the contrary. Courts routinely rule on the issue of whether charges in an indictment are properly joinable

under CPL 200.20(2) and sever those charges that are not (*see People v Lane*, 56 NY2d 1, 7 [1982]).

While the People disagree with the court's finding that the February 23rd and February 9th charges were not properly joinable under CPL 200.20(2)(b), determination of this issue is not before us in this article 78 proceeding. Rather, we are only asked, and we only have the authority, to determine whether the court acted without jurisdiction or in excess of its authority.

The People have not established that the court has done so in this case. There is no question that the court had the authority to make the determination as to whether the charges were properly joinable, and, finding that they were not, it had the authority to sever those charges.

Justice Gayle P. Roberts has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.

The interim stay imposed by this Court on June 26, 2019 is vacated.

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10028 The People of the State of New York, Ind. 1082/16
Respondent,

-against-

Jose Colon,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jonathan Cantarero 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 Stolz, J.), rendered May 17, 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 10, 2019

CLERK

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

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10030 In re Crystal Alleyne, Index 155511/17
Petitioner-Appellant,

-against-

The Department of Education of the City of New York, et al.,
Respondents-Respondents.

Stewart Lee Karlin Law Group, P.C., New York (Daniel E. Dugan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 16, 2018, which denied the petition seeking to annul respondents' determination effective June 27, 2016, terminating petitioner's probationary employment, and granted respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The article 78 petition was untimely filed. The effective date of petitioner's termination was June 27, 2016, and she had until October 27, 2016 to challenge respondents' determination, but commenced this article 78 proceeding on June 16, 2017 (*see* CPLR 217[1]); *Matter of Andersen v Klein*, 50 AD3d 296 [1st Dept 2008]; *Todras v City of New York*, 11 AD3d 383, 384 [1st Dept 2004]). The record shows that petitioner was dismissed due to an

unsatisfactory performance rating and because, *inter alia*, of her failure to immediately notify her supervisor of her arrest – not due to the arrest itself, as she claims. Thus, petitioner's argument that the statute of limitations was tolled until the criminal charges against her were dismissed is unavailing (*see Matter of Kahn v New York Dept. of Education* 18 NY3d 457, 472 [2012]).

In any event, petitioner's failure to timely notify respondents of her arrest, in violation of DOE regulations provides a good faith basis for terminating her employment (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Matter of Cardo v Murphy*, 104 AD2d 884 [2d Dept 1984]).

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 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10031 Belgica Garcia, Index 303831/11
Plaintiff-Respondent,

-against-

West 170th Realty Inc., et al.,
Defendants,

Pride Contracting & Restoration Corp.,
Defendant-Appellant,

Consolidated Edison Company of
New York, Inc.,
Defendant-Respondent.

_____

Carman, Callahan & Ingham, LLP, Farmingdale (Lauren M. Mazzara of counsel), for appellant.

Rheingold Giuffra Ruffo & Plotkin LLP, New York (Jeremy A. Hellman of counsel), for Belgica Garcia, respondent.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Consolidated Edison Company of New York, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about January 8, 2019, which denied defendant Pride Contracting & Restoration Corp.'s (Pride) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff commenced this action seeking damages for personal injuries she sustained when she tripped and fell in January 2010 on yellow warning tape that was laying among orange cones and

construction barriers at the sidewalk adjacent to 1345 and 1347 Crowmell Avenue in the Bronx. Pride failed to make a prima facie showing that it did not contract to perform any sidewalk repairs at the premises (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Pride's president testified that it performed no work and had no employees between September 2009 and April 2010 and had never performed any work on Cromwell Avenue. However, a sidewalk construction permit issued to Pride for 1345 Cromwell Avenue, that was valid from December 29, 2009 to January 28, 2010, raised a triable issue of fact (*Alvarez*, 68 NY2d at 324). Pride failed to explain why this permit existed if it performed no work, had no employees, and obtained no work permits from September 2009 and April 2010. Moreover, Pride's president testified that he never searched the company records to determine whether or not the company applied for and received this permit.

Pride's contention that the permit cannot raise an issue of fact because it was issued for 1345 Cromwell Avenue, but plaintiff fell at 1347 Cromwell Avenue is unpersuasive. Both addresses, 1345 and 1347 Cromwell Avenue, were owned by West 170th Realty Inc., whose president testified he hired a contractor named Pride to make sidewalk repairs at one of those two locations. Further, the evidence does not definitively show

whether plaintiff tripped on the sidewalk adjacent to 1345 or 1347 Cromwell Avenue.

Nor did Pride establish that defendant Consolidated Edison Company of New York, Inc. created the condition that caused plaintiff's fall. Although Pride's president testified that it did not own any cones and it used different tape and barriers, the president did not testify that Pride never used warning supplies such as tape, barriers, and cones that may have been left at a work site by third parties. A jury could reasonably conclude that Pride used some supplies that were left at the premises by ConEd to cordon off its work.

Pride also failed to establish, as a matter of law, that the condition that caused plaintiff's accident was open and obvious and not inherently dangerous. Although the photos identified by plaintiff show that the tape, cones, and barriers were readily visible in daylight, plaintiff testified that her accident occurred at night and that there was no streetlight and little illumination where she fell (*Keech v 30 E. 85th St. Co.*, 173 AD3d 645, 645-646 [1st Dept 2019]; *Stolzman v City of New York*, 146 AD3d 531, 532 [1st Dept 2017]; *cf. Sun Ho Chung v Jeong Sook Joh*, 29 AD3d 677 [2d Dept 2006]).

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

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10032 Wells Fargo Bank, N.A., Index 32225/16E
Plaintiff-Respondent,

-against-

Shayne Liburd also known as
Shayne J. Liburd, et al.,
Defendants-Appellants,

New York City Parking Violations
Bereau, et al.,
Defendants.

_____

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for appellants.

Reed Smith LLP, New York (Joseph B. Teig of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered March 13, 2018, which denied the motion of defendants Shayne Liburd a/k/a Shayne J. Liburd and Daldan Inc. (defendants) to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants sustained their initial burden of demonstrating, prima facie, that this action was untimely because more than six years had passed from the date that the debt on the mortgage was accelerated (CPLR 213[4]; *see MTGLQ Invs., LP v Wozencraft*, 172 AD3d 644 [1st Dept 2019]). In opposition, plaintiff failed to

raise a question of fact as to whether the action is timely. Plaintiff's argument that it affirmatively revoked its election to accelerate the mortgage within the six-year limitations period by discontinuing the prior foreclosure action is unavailing as a mere discontinuance of a prior foreclosure action, without more, is insufficient to constitute an affirmative act to revoke a lender's election to accelerate (*see HSBC Bank NA v Vaswani,* 174 AD3d 514 [2d Dept 2019]; *Vargas v Deutsche Bank Natl. Trust Co.*, 168 AD3d 630 [1st Dept 2019]; *HSBC Bank USA v Kirschenbaum*, 159 AD3d 506, 507 [1st Dept 2018]). Plaintiff also failed to put forth any facts that show that the statute of limitations was tolled because plaintiff was a mortgagee in possession (*see MTGLQ Invs., LP v Wozencraft*, 172 AD3d at 645).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10033 The People of the State of New York, Respondent, Ind. 1533/16

-against-

Luis Fajardo, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at hearing; Gregory Carro, J. at plea and sentencing), rendered November 15, 2017, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Evidence credited by the

court established reasonable suspicion justifying a frisk, along with the ensuing police activity.

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10034 The People of the State of New York, Ind. 1496/11
Respondent,

-against-

Victor Mena,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered November 16, 2015, resentencing defendant to a term of 22 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 20 years, and otherwise affirmed.

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 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10035 The People of the State of New York, Respondent, Ind. 645/13

-against-

Rodrigo Neri, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered December 5, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of six months, concurrent with five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-49 [2007]). The evidence in this case amply supports the conclusion that defendant caused physical injury within the meaning of Penal Law § 10.00(9) by cutting the victim's face. The victim's scar constituted, at least, an impairment of physical condition (*see People v Clarke*, 157 AD3d 616, 616-17 [1st Dept 2018], *lv denied* 31 NY3d 1080 [2018]), and it may be reasonably inferred that the knife cut caused "more than slight or trivial pain" (*People v*

Montgomery, 173 AD3d 627, 628 [1st Dept 2019]).

The court properly declined to instruct the jury on the defense of justification for the charges that related to defendant's slashing of the victim with a knife, because there was no reasonable view of the evidence, when viewed most favorably to defendant, to support either the objective or subjective components of that defense. At the time of the slashing, any threat posed by the victim had abated because defendant had not only disarmed the victim, but had rendered him apparently unconscious (*see People v Sparks*, 132 AD3d 513, 514 [1st Dept 2015], *affd* 29 NY3d 932 [2017]).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10036 U.S. Bank National Association, etc., Index 650369/13
Plaintiff-Respondent,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Appellant.

_____

Orrick, Herrington & Sutcliffe LLP, New York (Daniel A. Rubens of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 27, 2018, which, insofar as appealed from, denied defendant's motion for summary judgment, unanimously affirmed, with costs.

The written notice sent from plaintiff to defendant dated December 6, 2011, made within the statutory limitations period and well in advance of any lawsuit, informed defendant that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified. The notice complied with the contractual condition precedent of notifying defendant of its default, such that subsequently identified loans, including the 480 identified by plaintiff's expert during discovery, related back to the time of the initial

notice (*see Home Equity Mtge. Trust Series 2006-1 v DLJ Mtge. Cap., Inc.* ["*HEMT 2006-1*"], 2019 NY Slip Op 06576, *2, ___ AD3d ___ [1st Dept 2019]; *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 147 AD3d 79, 88-89 [1st Dept 2016]; *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Cred. & Cap., Inc.*, 133 AD3d 96 [1st Dept 2015], *mod on other grounds* 30 NY3d 572 [2017]). Since defendant was placed on written notice of breach as to all loans on December 6, 2011, it follows that March 5, 2012 — under the applicable contractual repurchase protocol, the end of the applicable 90-day cure period, at which point defendant was required to repurchase any uncured, nonconforming loans — is likewise the appropriate date of repurchase.

The motion court properly ruled that interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date (*see* "*HEMT 2006-1*," 2019 NY Slip Op 06576, *5, ___ AD3d ___; *Nomura*, 133 AD3d at 106-107).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10037 Hiram Hernandez, et al., Index 301466/11
Plaintiffs-Respondents,

-against-

2075-2081 Wallace Avenue Owners Corp.,
Defendant,

Metro Management and Development, Corp.,
Defendant-Appellant.

- - - - -

Metro Management and Development, Corp.,
Third-Party Plaintiff-Appellant,

-against-

2075-2081 Wallace Avenue Owners Corp.,
Third-Party Defendant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A.H. McGovern of counsel), for appellant.

The Rosato Firm PC, New York (Paul A. Marber of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered on or about February 22, 2019, which treated defendant Metro Management and Development, Corp.'s motion to dismiss the complaint as against it as a motion for summary judgment, and denied the motion as untimely, unanimously affirmed, with costs.

The motion court providently exercised its discretion in treating defendant's motion to dismiss pursuant to CPLR 3211(a)(2) and (7) as a motion for summary judgment (CPLR

3211[c]), since both sides made it unequivocally clear that they were laying bare their proof and deliberately charting a summary judgment course (*see Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320-321 [1st Dept 1987]).

The court correctly denied the motion as untimely, since it was made after the 120-day deadline imposed by CPLR 3212(a) had expired and was unaccompanied by an explanation for the lateness (*see Brill v City of New York* 2 NY3d 648 [2004]).

In any event, defendant's contention that the complaint should have been dismissed for lack of subject matter jurisdiction (CPLR 3211[a][2]) is unavailing. The exclusivity provisions of the Workers' Compensation Law do not implicate the subject matter jurisdiction of the court (*Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170-1171 [2d Dept 2017]).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10038 In re Raymond S.H. Jr.,
Petitioner-Appellant,

-against-

Nefertiti S.M.,
Respondent-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child.

_____

Order, Family Court, New York County (Tamara Schwarzman, J.), entered on or about September 20, 2017, which, insofar as appealed from as limited by the briefs, after a hearing, denied the father's petition for permission to relocate with the parties' child to Florida, unanimously affirmed, without costs.

Family Court's denial of the petition to relocate has a sound and substantial basis in the record (*see Matter of Carmen G. v Rogelio D.*, 100 AD3d 568 [1st Dept 2012]).

Petitioner, who was awarded sole custody of the parties' child in 2015, failed to show by a preponderance of the evidence that the proposed relocation would be in the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]; *Matter of Nairen McI. v Cindy J.*, 137 AD3d 694 [1st Dept 2016]). He asserted a reasonable ground for relocating, namely,

to create a better life for his son and his family, but offered no testimony showing that life in Florida would, in fact, be better. Petitioner claimed to have investigated schools, therapy, and other matters, but provided no concrete examples and no evidence that the Florida schools and services were better than their New York counterparts. The absence of testimony about Florida schools is particularly significant given petitioner's high opinion of the child's New York school.

Petitioner mentioned a two-family house in Florida that his relatives had bought, but offered no detail about that arrangement as it concerned him and the child or about the house itself to enable a comparison with his New York residence. He testified that his Florida relatives were helping him be proactive in finding therapy for the child, but did not describe the kind of financial or other support his relatives might offer (*see Matter of Melissa Marie G. v John Christopher W.*, 73 AD3d 658 [1st Dept 2010]). He also offered no basis for his optimism about obtaining employment in Florida. The record demonstrates that petitioner's plan to relocate to Florida "was less of a plan and more of an amorphous idea" (*Matter of Salena S. v Ahmad G.*, 152 AD3d 162, 163 [1st Dept 2017]). Respondent mother's failure to pay child support is one factor in support of relocation, but it is insufficient to warrant granting relocation on this record

(*see Salena S.*, 152 AD3d at 166).

In contrast, respondent's testimony demonstrated her concern that if relocation were granted she would rarely if ever see her child again, and that this concern was well founded (*see Tropea*, 87 NY2d at 740; *Amato v Amato*, 202 AD2d 458 [2d Dept 1994], *lv denied* 83 NY2d 759 [1994]). Respondent's testimony about her financial inability to afford travel to and from Florida was unrebutted, given her unrebutted testimony about her $11-an-hour job. Petitioner claimed that he would assume financial responsibility for the costs of such visitation, but, given that he was unemployed and receiving public assistance, Family Court appropriately concluded that there would likely be no funds for visitation.

The court recognized that the relationship between the child and respondent, the non-custodial parent, was fraught, and that it needed work and consistency to be repaired. Because relocation would prevent regular therapeutic visitation between respondent and the child, the court appropriately found that this factor weighed against the petition.

Petitioner argues, and the record shows, that the child has thrived since petitioner became the custodial parent. However, these positive developments in the child's life, by petitioner's own description, occurred in New York. Petitioner failed to show

that relocation was necessary to preserve them or that they would be jeopardized if relocation did not occur.

Petitioner's proposed visitation schedule fails to alleviate concerns about preserving an ongoing relationship between the child and respondent. While he claimed to be willing to have the child spend a month of the summer, Thanksgiving break, and a week after Christmas with respondent, he also testified that he feared visitation altogether, because he would not be there to defend or protect the child, and that he did not want the child around respondent at all. The record also shows that the child's former therapist was concerned that petitioner coached the child to impugn respondent. Petitioner further asserted that his proposed visitation schedule was contingent on an order of protection remaining in place, but did not explain how this would be possible. Petitioner's testimony creates the strong impression that visitation according to his proposed schedule would never come to pass (*cf. Matter of David B. v Katherine G.*, 138 AD3d 403, 407 [1st Dept 2016] ["There is every reason to believe (the mother) will comply with liberal visits for the father"]). Petitioner, moreover, did not address the child's visitation with

his siblings, and did not rebut respondent's testimony about the positive nature of the child's relationship with his siblings.

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10039 In re Donovan C.,

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

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Anna B. Wolonciej of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about July 17, 2018, 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 sexual abuse in the first and third degrees, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The victim's delay in reporting the incident was adequately explained. We have considered and rejected defendant's remaining arguments on this issue.

The court also providently exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a 12-month conditional discharge, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given, among other things, the seriousness of the underlying sexual offense against a young child. An adjournment in contemplation of dismissal would not have ensured that, after its term expired, appellant would have remained in and completed an appropriate treatment program.

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10040 Linda Macklowe, Index 350044/16
Plaintiff-Appellant,

-against-

Harry Macklowe,
Defendant-Respondent.

_____

Holwell Shuster & Goldberg LLP, New York (Daniel Sullivan of counsel), for appellant.

Boies Schiller Flexner LLP, New York (David Boies of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered on or about February 5, 2019, to the extent appealed from as limited by the briefs, directing the sale of certain marital artwork listed under Schedules II and III in the Amended Trial Decision and Order, dated December 21, 2018, valuing defendant's marital interest in the 432 Park Avenue "promote" at approximately $2.5 million, and valuing the marital bank debt at $66,878,603, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in directing that certain artwork listed in Schedules II and III be sold and the net proceeds distributed equally between the parties. For these works of art, the parties' retained experts presented wildly divergent valuations - in one instance their valuations differed by $30 million - which the court attributed

to the lack of comparable data, such as a recent auction sale of comparable work by the artist. Given the rare and unique character of the parties' art collection, the court was faced with "unusual circumstances" that made the valuation of certain artwork "unfeasible" (*see Capasso v Capasso*, 119 AD2d 268, 270 [1st Dept 1986]). Contrary to plaintiff's contention, the court properly concluded that, in light of the vast discrepancies between some of the valuations, simply averaging the valuations was not an appropriate solution, because it could "well result in a speculative valuation that is not founded in economic reality" (*see Robinson v Robinson*, 133 AD3d 1185, 1188 [3d Dept 2015]).

Plaintiff proposes alternatively that the matter be remanded for the appointment of a neutral expert. However, in the absence of evidence that the expert testimony was arbitrary, biased, or otherwise incomplete, appointing a neutral expert would serve only to prolong this litigation between octogenarians.

Supreme Court properly valued defendant's interest in the 432 Park Avenue "promote" at approximately $2.5 million, adopting one of the three "scenarios" presented and analyzed by plaintiff's own expert based on the assumption that defendant's interest had been diluted with the influx of capital from outside equity investors. The court found that, while the other two scenarios were speculative, the scenario in which the property

was valued at $2.5 million was based on obligations arising out of certain contracts. While defendant's testimony at trial was evasive and contradictory, and plaintiff submitted evidence that defendant had valued the promote at over $400 million as recently as 2016, the parties agreed that the valuation of the promote was based on a contractual obligation. However, not only did plaintiff fail to cite any provision of the contracts in support of her argument that a higher valuation was warranted, but, in addition, her expert, in presenting such a scenario, implicitly agreed that a $2.5 million valuation was possible.

Supreme Court properly valued the marital debt at $66,878,603, based on a certified financial statement by defendant's accountant as of six weeks after the date of commencement of the action. Although there was some evidence that defendant had represented that the marital debt was less than half that amount six months prior to commencement, there was another financial statement from the same time period estimating the marital debt at $67.5 million. Under the circumstances, we find no reason to disturb the court's valuation (*see generally Poster v Poster*, 4 AD3d 145, 146 [1st Dept 2004], *lv denied* 3 NY3d 605 [2004]).

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 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10041 The People of the State of New York, Ind. 3674/15
Respondent,

-against-

Steven Baylor,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert Myers of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Albert Lorenzo, J.), rendered June 19, 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 10, 2019

CLERK

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

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10042 The People of the State of New York, Respondent, Ind. 3795/16

-against-

Cherif Cisse, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 1, 2016, convicting defendant, upon his plea of guilty, of criminal contempt in the first degree, and sentencing him to a term of 90 days, concurrent with 4 years' probation, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see People v Peque*, 22 NY3d 168, 182-83 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]. Defendant was informed of his potential deportation by way of the notice of immigration consequences served upon him in the presence of his attorney before his guilty plea (*see e.g. People v Arias*, 170 AD3d 576 [1st Dept 2019], *lv denied* 33 NY3d 1066 [1st Dept 2019]). Furthermore, defendant was independently aware of his

potential deportation by virtue of being charged as a "Deportable Alien" in proceedings brought by Immigration and Customs Enforcement.

We decline to review defendant's unpreserved claim in the interest of justice, because the circumstances of the plea render it highly unlikely that defendant could make the requisite showing of prejudice under *Peque* (*id.* at 198-201).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10043 The People of the State of New York, Ind. 3759/14
Respondent,

-against-

Willie Hanford,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Jeffrey Dellheim of 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 (Marcy Kahn, J. at plea; Ann Donnelly, J. at sentencing), rendered July 1, 2015,

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 10, 2019

CLERK

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

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10044 Virginia Reddington Dawes, Index 654585/17
Plaintiff-Respondent-Appellant,

-against-

J. Muller & Company, et al.,
Defendants-Appellants-Respondents.

_____

Frank M. Graziadei, P.C., New York (Frank M. Graziadei of counsel), for appellants-respondents.

Law Office of Michael K. O'Donnell, New York (Michael K. O'Donnell of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 4, 2019, which denied plaintiff's motion for partial summary judgment against defendants for disgorgement of compensation paid to them by plaintiff; granted the motion with respect to plaintiff's claim for an accounting; denied defendants' cross motion to dismiss the breach of fiduciary duty claims against J. Muller & Company (the Company) and J. Muller & Associates (Associates); and granted plaintiff's motion for leave to amend the complaint to add Josephine C. Muller in her individual capacity and DSJ, Inc., unanimously modified, on the law, to grant that portion of plaintiff's motion for partial summary judgment as to liability against Josephine C. Muller, in her capacity as Executor of the Estate of John Gerard Muller (decedent), and otherwise affirmed, without costs.

The court properly concluded that the complaint alleged a fiduciary relationship between plaintiff and the Company and Associates (*see Schulhof v Jacobs*, 157 AD3d 647 [1st Dept 2018]). Decedent was a principal in both entities; he had a fiduciary relationship with plaintiff; and the Company and its employees performed, at the least, accounting services for plaintiff. The court also correctly found that the proposed complaint stated a breach of fiduciary duty claim against Josephine C. Muller individually and DSJ, Inc., a company owned and used by decedent to transfer plaintiff's funds (*see* CPLR 3025[b]; *Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs.*, 173 AD2d 210 [1st Dept 1991]).

It is undisputed that Josephine was a partner in the company and that the company performed services for plaintiff. Under Partnership Law § 24, a partner is bound by a partner's wrongful act to the same extent as the offending partner. Partnership Law § 25 provides that a partnership is liable for a partner's breach of trust; and Partnership Law § 26(a) imposes liability on all partners jointly and severally for a partner's misconduct. Liability may be imposed even if a partner was unaware of the misconduct of the offending partner (*see Clients' Sec. Fund of State of N.Y. v Grandeau,* 72 NY2d 62, 67 [1988]).

With respect to DSJ Inc., the proposed complaint alleged

that it was owned and controlled by decedent, and the proposed complaint and the accounting report stated that it was the recipient of funds from plaintiff's account. These allegations were sufficient to support the claims against it.

The Dead Man's Statute, CPLR 4519, does not harm plaintiff's case because she provided documentary evidence supporting her claims, such as decedent's use of a power of attorney to make a major gift to his daughter, despite the absence of a major gift rider in the power of attorney (General Obligations Law § 5-1514[4]).

The court properly declined to grant plaintiff summary judgment on her faithless servant claim with respect to the Company because defendants raised issues of fact as to whether the Company breached its duty of loyalty to the plaintiff. However, plaintiff's motion for summary judgment on her faithless servant claim should have been granted as to liability against the decedent as the parties do not dispute that decedent breached his duty of loyalty to the plaintiff. Josephine stated that the Company was paid solely for bookkeeping services, that all legal and accounting services were provided by decedent individually and that the Company had no part in the decedent's misconduct (*see Feiger v Iral Jewelry*, 41 NY2d 928 [1977]). Thus, plaintiff is entitled to a disgorgement of the fees which were paid to

decedent individually (*Feiger v Iral Jewelry*, 41 NY2d 928 [1977]; *Art Capital Group, LLC v Rose*, 149 AD3d 447 [1st Dept 2017]).

The mere existence of a fiduciary relationship gives rise to a claim for an accounting (*see Koppel v Wien, Lane & Malkin*, 125 AD2d 230, 234 [1st Dept 1986]). Accordingly, the court properly granted plaintiff this relief in that there was no dispute that decedent had a fiduciary relationship with plaintiff and that Company performed services for her.

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

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10045 Richard Taylor, Index 20038/13E
Plaintiff-Respondent,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Appellant.

_____

Furman Kornfeld & Brennan, LLP, New York (A. Michael Furman of counsel), for appellant.

Hofmann & Schweitzer, New York (Timothy F. Schweitzer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered on or about February 7, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he was injured while working on a construction project at Port Newark in New Jersey. Accordingly, the parties to this appeal agree that substantive New Jersey law applies (*see Aviles v Port Auth. of N.Y. & N.J.*, 202 AD2d 45 [1st Dept 1994]), and that, for the purpose of this case, defendant is the de facto landowner of the property on which plaintiff's incident occurred (*see Estate of Desir ex rel. Estiverne v Vertus*, 214 NJ 303 [2013]; *Hopkins v Fox & Lazo Realtors*, 132 NJ 426 [1993]; *Mandal v Port Auth. of N.Y. & N.J.*, 430 NJ Super 287

[App Div 2013]).

Under New Jersey law, "a landowner . . . is not responsible for harm which occurs to an employee [of an independent contractor] as a result of the very work which the [contractor] was hired to perform" (*Dawson v Bunker Hill Plaza Assoc.*, 289 NJ Super 309, 317-318 [App Div] [citations and internal quotation marks omitted], *certificate denied* 146 NJ 569 [1996]; *see Puckrein v ATI Transp., Inc.*, 186 NJ 563, 574 [2006]). However, a landowner will nevertheless be held liable for injuries to an independent contractor's employee if the landowner "retains control of the manner and means of doing the work subject to the contract[]" (*Puckrein*, 186 NJ at 574 [citation omitted]; *see Dawson*, 289 NJ Super at 318).

Here, the evidence submitted in support of defendant's motion reveals that plaintiff's employer, as required to under the contract, submitted to defendant a plan to rectify misaligned piles, which defendant approved. This approval was provided, despite the fact, that one of defendant's engineers expressed concerns two days later that the plan was unacceptable because of structural issues, and recommended use of another method currently being utilized by defendant at another berth project. Since defendant retained the ability to approve or disapprove the method by which plaintiff's employer rectified the misaligned

piles, defendant failed to establish prima facie that it did not retain control over the manner and means by which plaintiff's employer's work was to be performed.

We have considered the parties' remaining contentions and find them either unavailing or academic in light of our determination.

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10046 The People of the State of New York, Respondent, Ind. 3947/13

-against-

Raul Serrano, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Miriam R. Best, J.), rendered February 23, 2015, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the second degree, and sentencing him to a term of three years' probation, unanimously affirmed.

Defendant's motion to dismiss the indictment on double jeopardy grounds was properly denied. We agree with Supreme Court's determination (46 Misc 3d 960 [Sup Ct, Bronx County 2014]) that defendant's prosecution by indictment for aggravated unlicensed operation of a motor vehicle (Vehicle and Traffic Law § 511) was not barred by double jeopardy protections, notwithstanding defendant's conviction of the lesser included offense of unlicensed operation (Vehicle and Traffic Law § 509), a traffic infraction, before the New York State Department of

Motor Vehicles's Traffic Violations Bureau (which occurred, during the pendency of the indictment, upon defendant's default in answering the summons).

The administrative adjudication was not a criminal punishment that triggers the federal and state constitutional protections against multiple criminal punishments for the same offense (*see Hudson v United States*, 522 US 93, 99 [1997]). "A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment" (Vehicle and Traffic Law § 155). Examination of the statutory scheme for punishing a violation of Vehicle and Traffic Law § 509 does not reveal the proof required to "override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (*Hudson*, 522 US at 100 [1997]).

Defendant's prosecution in the Supreme Court also was not barred by CPL 40.20(2), which states that a defendant "may not be separately prosecuted for two offenses based upon the same act or criminal transaction." Defendant was not "prosecuted" within the meaning of the statute when he was convicted before the Traffic Violations Bureau because he was charged by a summons, and not by an accusatory instrument filed in a "court of this state" (CPL 40.30[1]). This administrative agency is not a "criminal court"

(CPL 10.10). Unlike the situation in a criminal court, traffic infractions may be established by "clear and convincing evidence," and only fines, but not imprisonment, may be imposed.

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

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Gesmer, Kern, Oing, JJ.

10047 Simon Conway, et al., Index 652236/14
Plaintiffs-Appellants,

-against-

Marcum & Kliegman LLP, et al.,
Defendants-Respondents.

_____

Reid Collins & Tsai LLP, New York (Jeffrey E. Gross of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Anthony P. Colavita of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 10, 2018, which granted defendants' motion for summary judgment dismissing the amended complaint, unanimously reversed, on the law, with costs, and the motion denied.

In this accounting malpractice action, plaintiffs, the liquidators of several hedge funds, allege that defendants failed to uncover fraudulent activity by the funds' investment managers. The issue before us is whether the adverse interest exception to the equitable defense of in pari delicto bars the defense in this case (*see Kirschner v KPMG LLP*, 15 NY3d 446 [2010]). We find that plaintiffs raised issues of fact as to the adverse nature of their interests vis-a-vis those of their agents, the funds' investment managers, that preclude summary dismissal of the

complaint on the ground of the in pari delicto defense.

"To come within the exception, the agent must have *totally abandoned* his principal's interests and be acting *entirely* for his own or another's purposes" (*id.* at 466 [internal quotation marks omitted]). The exception is applied only where the fraud is committed "*against* a corporation rather than on its behalf" (*id.* at 467). "So long as the corporate wrongdoer's fraudulent conduct enables the business to survive – to attract investors and customers and raise funds for corporate purposes – this test is not met" (*id.* at 468). Thus, we conclude that the mere continuation of a corporate entity does not per se constitute a benefit that precludes application of the adverse interest exception.

We note that in a prior appeal, this Court upheld plaintiffs' assertion of the adverse interest exception in opposition to defendants' motion to dismiss the original complaint on the pleadings (*Stokoe v Marcum & Kliegman LLP*, 135 AD3d 645 [1st Dept 2016]). The original complaint alleged that the funds' liquidation did not begin until years after the 2007 audits conducted by defendants were completed. This alleged fact was not sufficient to warrant dismissal then, and is not sufficient to warrant dismissal now under CPLR 3212 (*see Greystone Funding Corp. v Kutner*, 137 AD3d 427 [1st Dept 2016]).

Moreover, reliance on speculation about the benefits to be derived from the continued existence of an entity is inconsistent with the analysis of the adverse interest exception in *Kirschner*. It may be possible in every case to construct a hypothetical scenario where the company teetering on the brink of insolvency because of its agent's fraud meets with an opportune circumstance that allows it to resume legitimate business operations. Permitting such speculation would render the adverse interest exception meaningless. Further, an ongoing fraud and a continued corporate existence may harm a corporate entity: The agent may prolong the company's legal existence so that he can continue to loot from it, as appears to have been the case here.

The other purported "benefits" cited by defendants are also insufficient to show that the adverse interest exception is inapplicable, as there exist factual questions as to whether the funds were beneficiaries, rather than victims, of the investment managers' fraud (*see e.g. Whitney Group, LLC v Hunt-Scanlon Corp.*, 106 AD3d 671 [1st Dept 2013] [reversing the grant of summary judgment to a defendant where issue of fact existed whether an alleged benefit to the plaintiff was actually a benefit at all]). Further, any purported benefit flowing to plaintiffs must be tied to "wrongful" conduct by defendants (*Allied Irish Banks, P.L.C. v Citibank, N.A.*, 2015 WL 4104703,

*9, 2015 US Dist LEXIS 88221, *29 [SD NY, June 30, 2015]).

We reject defendants' statute of limitations argument. The claims arising from the 2007 audits accrued in September 2010, when defendants re-affirmed their prior audit opinions to the SEC, and there is no reason for us to reopen this previously resolved issue (*see Stokoe*, 135 AD3d at 645-646; *Kenney v City of New York*, 74 AD3d 630, 630-31 [1st Dept 2010]).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10048 The People of the State of New York, Respondent, Ind. 3612/13

-against-

George Ortega, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered November 18, 2015, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, and the jury's mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The evidence supports reasonable inferences that the victim sustained physical injury when he was struck on the head with a hard, tube-like object, and that, as used by defendant, this object qualified as a dangerous instrument (*see*

Penal Law § 10.00[9], [10], [13]).

The court providently exercised its discretion by declining to issue a missing witness charge concerning a police officer. In opposing the charge, the People established that the officer was unavailable for medical reasons and could not be called as a witness despite reasonably diligent efforts (*see e.g. People v Delacruz*, 276 AD2d 387, 387 [1st Dept 2000], *lv denied* 96 NY2d 758 [2001]), and they also established that the officer's testimony would have been cumulative under the circumstances of the case (*see People v Macana*, 84 NY2d 173, 180 [1994]). In any event, any error in the absence of a missing witness charge was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The item with which defendant struck the victim, which was recovered from defendant upon his arrest, was properly admitted into evidence. Although the People did not establish a chain of custody, the victim and two police witnesses who were present at the time identified the object in court, and the "circumstances

provide[d] reasonable assurances of the identity and unchanged condition of the evidence" (*People v Hawkins*, 11 NY3d 484, 494 [2008]).

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

ENTERED: OCTOBER 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10049 The People of the State of New York, Respondent, Ind. 1251/15

-against-

Albert Escalera, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered December 3, 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 10, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10050N Verina Hixon, Index 157114/16
Plaintiff-Appellant-Respondent,

-against-

12-14 East 64th Owners Corp., et al.,
Defendants-Respondents-Appellants,

Robert Renzulli, et al.,
Defendants.

_____

Waxman & Waxman, P.C., New York (Lawrence D. Waxman of counsel), and Leonard M. Kohen, New York, for appellant-respondent.

Rosenberg & Estis, P.C., New York (Bradley S. Silverbush of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about June 20, 2018, which denied plaintiff's motion for the appointment of a referee to determine the reasonableness of attorneys' fees incurred by 12-14 East 64th Owners Corp, Eric Juneau Blair and Matthew Mirones (the co-op defendants), and denied the co-op defendants' cross motion for sanctions, unanimously affirmed, without costs.

We find that an appeal lies from an order denying a motion to hear and determine pursuant to CPLR 4317(b) (*see Davidson v Sterngrass*, 279 AD 875, 875 [2d Dept 1952]). We agree with the motion court's determination that an order of reference was not necessary, because all of the proof necessary to determine

whether the fees were reasonable was before the court (*see Domino Media v Kranis*, 215 AD2d 278, 278 [1st Dept 1995]; *see also Banco do Estado de Sao Paulo v Mendes Jr. Intl. Co.*, 249 AD2d 137, 139 [1st Dept 1998]). Plaintiff's challenge to the fee award was unsupported by any particularized factual evidence (*see Banco do Estado*, 249 AD2d at 139).

Supreme Court providently denied the application for sanctions in accordance with 22 NYCRR 130-1.1.

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10051- Ind. 4945/15
10051A The People of the State of New York, 30/16
Respondent,

-against-

Gary Kemp,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Daniel P. Conviser, J.), rendered February 7, 2017, as amended March 2, 2017, convicting defendant of predatory sexual assault, aggravated criminal contempt and four counts of criminal contempt in the first degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

We reject defendant's argument that the verdict convicting him of predatory sexual assault was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury's credibility determinations. When the events at issue are viewed as a continuing incident, the evidence established the element of use or threatened immediate use of a dangerous instrument in the

course of the commission of first-degree rape (Penal Law § 130.95[1][b]). We do not find that the parts of this incident were too remote from each other to be linked in considering the proof of this element.

The court providently exercised its discretion in permitting the People to call an expert witness on domestic violence, notwithstanding that they revealed their newly-formed intention to do so on the eve of trial (*see generally People v Colavito*, 87 NY2d 423, 428 [1996]). The disclosure did not violate any requirement of CPL article 240, and defendant does not appear to contend otherwise. Defendant has not shown any bad faith by the prosecution or prejudice to the defense. In particular, the expert gave noncontroversial testimony on domestic violence (*see e.g. People v Byrd*, 51 AD3d 267, 273-274 [1st Dept 2008], *lv denied* 10 NY3d 956 [2008]), and defendant has not established that he would have derived any significant benefit from additional time to prepare for this testimony. In any event, any error in the court's ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). To the extent that defendant is raising a constitutional claim, as opposed to a claim grounded in state evidentiary and discovery law, the constitutional claim is

unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10052 Mark Family Realty LLC., Index 105924/11
Plaintiff-Respondent,

-against-

Anton Sanko,
Defendant-Appellant.

- - - - -

Mary Burnette,
Third-Party Plaintiff,

-against-

Ira Mark,
Third Party Defendant,

Selrob Family LP, et al.,
Third Party Defendants-Respondents.

_____

Landy Wolf PLLC, New York (David A. Wolf of counsel), for appellant.

Mound Cotton Wollan & Greengrass LLP, New York (Jon Quint of counsel), for Selrob Family LP, Selina Henry, Robert Henry, Jane Henry and Sarah Henry, respondents.

Moses & Singer LLP, New York (Philippe Zimmerman of counsel), for Mark Family Realty LLC, respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered May 4, 2018, which, insofar as appealed from, granted third-party defendant Selrob Family LP's cross motion to award it and plaintiff Mark Family Realty LLC prejudgment interest, unanimously affirmed, with costs.

The parties co-own, as tenants-in-common, two adjoining

buildings located at 801 and 803 Greenwich Street, in Manhattan. Each of the tenants-in-common owns one-third of the properties. The properties are operated and managed pursuant to an operating agreement, dated March 17, 1992. Each tenant-in-common is a signatory or a successor-in-interest to an original signatory of the operating agreement. Beginning in and around 2005, the parties became involved in disputes over the disposition of the properties and their respective financial interests and obligations. Ultimately, relating to the claim for partition, Supreme Court referred the matter to a special referee to hear and report on the parties' shares and interests in the properties, whether certain expenses for the repair to the façade were required under the operating agreement, and to conduct an accounting. On December 19, 2016, the tenants-in-common filed an Amended Accounting Stipulation that established the expenses paid and incurred by all the tenants-in-common from August 1, 2005 until August 31, 2016, confirmed that defendant Anton Sanko would treat the expenses listed in the stipulation as reimbursable, allowed plaintiff Mark Family Realty LLC (MFR) and Selrob Family LP (Selrob) to request interest on payments that Sanko did not make on time; and reserved Sanko's right to oppose any request for interest.

As relevant, in a report dated October 13, 2017, the Special

Referee found that repairs effectuated by MFR and Selrob to the façade were required within the meaning of the operating agreement, and did not make any specific decision about partition, public sale, or interest accumulation of the money Sanko owes the other tenants-in-common to repair the properties. In view of the legal nature of MFR and Selrob's claims for reimbursement of sums pursuant to the operating agreement, we find no basis to disturb Supreme Court's finding that MFR and Selrob were entitled to prejudgment interest (CPLR 5001[a]; *see Hunt v Hunt*, 13 AD3d 1041, 1043 [3d Dept 2004], *lv denied* 8 NY3d 812 [2007]). Nor was there prejudice to Sanko by the cross motion, as the Special Referee's report contemplated that MFR and Selrob would seek interest and Sanko reserved the right to oppose such request (*compare e.g. Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]).

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

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10053 In re Maame N.B.,
Petitioner-Appellant,

-against-

Godwin E. D.C.,
Respondent-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about January 9, 2018, which, after a fact-finding hearing, dismissed the petition seeking an order of protection, unanimously affirmed, without costs.

The determination that respondent's actions were insufficient to constitute the family offenses of either menacing in the third degree or harassment in the second degree is supported by a fair preponderance of the evidence (Family Ct Act § 832). The offense of menacing in the third degree was necessarily dismissed since there was no testimony that respondent's conduct was physically menacing (Penal Law § 120.15; *Matter of Akheem B.*, 308 AD2d 402, 403 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004]). The claim of offense of harassment in the second degree was also deficient because petitioner failed to adduce evidence that respondent engaged in a course of conduct or

repeatedly committed acts which alarmed or seriously annoyed petitioner, and which served no legitimate purpose (Penal Law § 240.26[3]; *Matter of Thelma U. v Miko U.*, 145 AD3d 527, 528 [1st Dept 2016]). Petitioner's testimony that respondent threatened to kill her during a November 4, 2016 argument was not found credible by the trial court. Although petitioner testified that respondent repeatedly called her and sent her numerous emails daily, she only introduced two emails at the hearing, one of which, although unpleasant, did not rise to the level of harassment and the other was found inadmissible (*id.*).

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

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10054-
10054A Index 14495/01

Lawrence Lomax,
Plaintiff-Appellant,

-against-

New York City Health and
Hospitals Corporation,
Defendant-Respondent,

Bronx Lebanon Hospital,
Defendant.

_____

Laffan & Laffan LLP, Mineola (Maura V. Laffan of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered July 17, 2015, which granted the motion of defendant New York City Health & Hospitals Corp. (HHC) for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from judgment, same court and Justice, entered August 24, 2015, dismissing the complaint as against defendant Bronx Lebanon Hospital, unanimously dismissed, without costs, as abandoned.

HHC made a prima facie showing that it did not depart from good and accepted medical practice and that any departure was not a proximate cause of plaintiff's injuries by submitting an affirmation from a pediatric neurologist, who opined that imaging

of plaintiff's brain was not indicated when he presented to Lincoln Hospital and North Central Bronx Hospital because he had suffered only one seizure with fever and that plaintiff's injuries were not caused by his arterial venous malformation (AVM) (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Plaintiff's doctor's affidavit was insufficient because it did not indicate that the doctor possessed the requisite knowledge necessary to make a determination of the issues presented (*Limmer v Rosenfeld*, 92 AD3d 609, 609 [1st Dept 2012]). In any event, plaintiff failed to meet his burden in opposition with the affirmation of a physician because, among other things, the physician did not contradict the opinion of HHC's pediatric neurologist that imaging was not indicated and the physician did not opine that plaintiff's damages were caused by HHC's delayed diagnosis of his seizure condition and discovery of his AVM (*see e.g. Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396 [1st Dept 2007]).

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 10, 2019

CLERK

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

10055 The People of the State of New York, Respondent, Ind. 5272/07

-against-

Kelly McTiernan, Defendant-Appellant.

_____

Glenn A. Garber, PC, New York, (Glenn Garber of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered October 28, 2016, as amended November 4, 2016, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing defendant to a term of 20 years, unanimously affirmed.

Defendant's claim that the court incorrectly instructed the jury on the justified use of deadly physical force in the context of defending against a robbery is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. In three places in its oral charge, as well as in a written charge given to the jury on consent, the court stated the correct standard regarding justifiable use of deadly physical force against a robber who is using ordinary physical force. However, at a fourth juncture in

the oral charge, the court mistakenly referred to the robber's use of "deadly" physical force. This isolated misstatement in a charge that, viewed in its entirety, was correct, could not have affected the jury's verdict (*see People v Drake*, 7 NY3d 28, 34 [2006]).

In its charge on justified use of force against a robbery, the court correctly defined robbery by reading its Penal Law definition, including the concept of forcibly retaining the proceeds of a larceny immediately after the taking. The court was not required to grant defendant's request for an instruction that a particular scenario (corresponding to defendant's testimony) would constitute robbery as a matter of law. On the contrary, whether or not the victim used force immediately after taking defendant's phone was a question of fact for the jury (*see People v Gordon*, 23 NY3d 643, 652 n4 [2014]), even if it credited defendant's account.

Defendant's claim that the court should have instructed the jury on the justifiable use of deadly physical force to effect an arrest (*see* Penal Law § 35.30[4][b]) is also unpreserved (*see People v Karabinas*, 63 NY2d 871, 872 [1984], *cert denied* 470 US 1087 [1985]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There is no evidence that defendant stabbed the victim in order

to make or facilitate an arrest for robbery.

The court properly ruled that defendant's testimony about not seeking help for the victim as the result of not knowing "how badly he was hurt" opened the door to a question about defendant's knowledge, based on unspecified "prior experience," that the stabbing could result in death. This single, carefully limited question did not reveal to the jury any *conduct*, lawful or otherwise, by defendant.

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10056 The People of the State of New York, Respondent, Ind. 5578/11

-against-

Arthur L. Harrison, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 30, 2012, 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 10, 2019

CLERK

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

10059 & Index 260269/14
M-7020 NYCTL 1998-2 Trust, et al.,
Plaintiffs-Respondents,

-against-

Alanis Realty LLC, et al.,
Defendant-Appellant,

City of New York Environmental
Control Board, et al.
Defendants.

- - - - -

598 Eagle Avenue LLC,
Proposed Intervenor-Respondent-Appellant.

_____

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

Desiderio, Kaufman & Metz PC, New York (Jeffrey R. Metz of counsel), for 598 Eagle Avenue, respondent-appellant.

The Law Office of Thomas P. Malone, PLLC, New York (Christopher Kohn of counsel), for NYCTL 1998-2 Trust and The Bank of New York Mellon, respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about October 4, 2018, to the extent it denied defendant Alanis Realty LLC's motion to vacate the judgment of foreclosure and sale entered upon its default, unanimously affirmed, and appeal therefrom to the extent it denied the proposed intervenor's cross motion to intervene as moot, dismissed, without costs, as academic.

Defendant failed to demonstrate a reasonable excuse for its

default and a meritorious defense to this foreclosure action (*see* CPLR 5015[a][1]; *Facsimile Communications Indus., Inc. v NYU Hosp. Ctr.*, 28 AD3d 391 [1st Dept 2006]). Contrary to defendant's contention, CPLR 317, which does not require the showing of a reasonable excuse for default, does not apply to this action (Administrative Code of City of NY § 11-340).

Defendant, the owner of the foreclosed property, claims that it did not receive notice of the summons and complaint served on the Secretary of State pursuant to Limited Liability Company Law § 303. This is not a reasonable excuse, given defendant's failure to keep a current address on file with the Secretary of State for at least five years (*see NYCTL 2015-A Trust v Diffo Props. Corp.*, 171 AD3d 538 [1st Dept 2019]).

Defendant's proposed answer and its principal's affidavit contain only conclusory assertions, which do not establish a meritorious defense (see *East N.Y. Sav. Bank v Sun Beam Enters.*, 234 AD2d 131, 132 [1st Dept 1996]). Defendant's claimed willingness to pay the tax lien well after the property was sold at auction is not a defense (*NYCTL 2015-A Trust*, 171 AD3d at 539). Nor did defendant provide any support for its contention that the sales price was unconscionable.

The proposed intervenor, as the subsequent purchaser of the property, should have been permitted to intervene in Supreme

Court. However, now that we are affirming, this issue is academic.

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

M-7020 ***NYCTL 1998-2 Trust v Alanis Realty LLC***

Motion to strike brief and dismiss cross appeal granted to the extent of dismissing the cross appeal as academic.

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10060 In re Nashally M.,
Petitioner,

-against-

Jamaray C.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about May 31, 2016, which, upon a finding, after a hearing, that respondent committed acts constituting a family offense, issued a one-year order of protection in favor of petitioner, unanimously affirmed, without costs.

The expiration of the order of protection does not moot the appeal since enduring consequences may flow from the adjudication that respondent has committed a family offense (*see Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672 [2015]; *Matter of Juana R. v Chelsea R.*, 154 AD3d 613 [1st Dept 2017]). Although the Family Court failed to specify the particular family offense under Family Court Act § 812(a) that respondent committed, remittal is not necessary because the record is sufficient for this Court to conduct an independent review of the evidence (*see e.g. Matter of Kimberly O. v Jahed M.*, 152 AD3d 441, 442 [1st Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Christina KK.*

v Kathleen LL., 119 AD3d 1000, 1001 [3d Dept 2014]; *Matter of Stewart v Lassiter*, 103 AD3d 734 [2d Dept 2013]).

A preponderance of the evidence presented at the fact-finding hearing established that respondent engaged in acts that would constitute the offenses of attempted assault in the third degree (Penal Law § 110.00/120.00[1]), reckless endangerment in the second degree (Penal Law § 120.20), and criminal obstruction of breathing or blood circulation (Penal Law § 121.11). Respondent admitted on the record that he grabbed petitioner's neck and threatened to end her life, and petitioner confirmed that respondent choked her (*see e.g. Matter of King v King*, 150 AD3d 1116, 1117 [2d Dept 2017]).

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10062 The People of the State of New York, Ind. 43/14
Respondent,

-against-

Anthony Randall,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered April 14, 2015,

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 10, 2019

CLERK

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

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

10064- Ind. 4655/11
10064A The People of the State of New York, 5829/11
Respondent,

-against-

Thaddeus Brunson,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

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

_____

Judgments, Supreme Court, New York County (Gregory Carro, J. at suppression hearing; Charles H. Solomon, J. at pleas and sentencing), rendered May 21, 2013, convicting defendant of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of two to four years, unanimously affirmed.

The hearing court providently exercised its discretion in reconsidering its ruling that had granted suppression of certain evidence, and in denying suppression after permitting the People to establish that there had been a typographical error in a grand jury transcript relied upon by the court when it had made its initial ruling. In the initial ruling, the court had discredited

an officer's testimony on the specific basis of a purported one-word inconsistency between the officer's hearing and grand jury testimony. This ruling was rendered invalid by a "flaw in the proceeding" (*People v Williams*, 7 NY3d 15, 21 [2006]), in that the court made its determination on a transcript later found to be objectively and undisputedly inaccurate. The new information that the grand jury stenographer had inaccurately transcribed the single word at issue only "increased the likelihood that the motion to suppress would be decided correctly, based on the best available evidence of what really happened" (*id*. at 20). The considerations of finality and the risk of tailoring evidence discussed in *People v Kevin W*. (22 NY3d 287 [2013]) and *People v Havelka* (45 NY2d 636 [1978]) were minimal or nonexistent because the grand jury stenographer made an essentially ministerial correction and did not present any new evidence on the underlying suppression issues.

The court's ultimate ruling, which denied suppression, was supported by the record. There is no basis for disturbing the

court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10065 The People of the State of New York, Respondent, Ind. 1799/15

-against-

Jarod Skinner, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered October 5, 2016, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10067 The People of the State of New York, Respondent, Ind. 7226/95

-against-

Henry Brown, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about June 11, 2018, which denied defendant's motion pursuant to CPL 440.20 to set aside a sentence imposed on March 5, 1996, unanimously affirmed.

We adhere to our determination that a defendant may not challenge a sentencing error in the defendant's favor (here, sentencing defendant as a second felony offender when he was actually a second violent felony offender), regardless of whether the challenge is made by direct appeal or CPL 440.20 motion (*People v McNeil*, 164 AD3d 1106, 1108 [1st Dept 2018], *lv denied* 32 NY3d 1175 [2019]). As noted in *People v Francis* (164 AD3d 1108 [1st Dept 2018]), *People v Gould* (131 AD3d 874 [1st Dept 2015]) does not support a contrary result. In any event, given that the Court of Appeals has decided that resentencings do not

upset the sequentiality of convictions in determining predicate felony status (*People v Thomas*, 33 NY3d 1 [2019]), it is unclear how defendant would benefit from the resentencing he seeks.

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10068- Ind. 1332/11
10068A- 4955/11
10068B The People of the State of New York, SCI 424/17
Respondent,

-against-

David Dykes,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Rene Uviller, J. at first plea and second plea; Bonnie Wittner, J. at third plea and sentencing), rendered May 3, 2017,

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

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

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

ENTERED: OCTOBER 10, 2019

CLERK

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

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

10069 Luis Sanchez, Index 307433/13
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant,

South Bronx Revitalization, Inc.,
Defendant.

_____

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), appellant.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about July 12, 2018, which, inter alia, denied defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The City failed to establish its prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when he tripped and fell on a defect in the sidewalk. The evidence submitted by the City fails to definitively show that it had no prior written notice of the defect that caused plaintiff's fall (*see Sondervan v City of New York*, 84 AD3d 625 [1st Dept 2011]).

Even if we found that the City met its prima facie burden, plaintiff raised a triable issue of fact as to whether the City had prior written notice of the defective condition through the affidavit of his expert, and of the Big Apple Map, showing an area of "[r]aised or uneven portion of sidewalk" in the vicinity of the fall. Contrary to the City's argument, the Big Apple Map does not provide any information as to the length or distance of a defect and thus, the defect depicted in the Map may extend to where plaintiff was injured (*see Foley v City of New York*, 151 AD3d 431, 433 [1st Dept 2017]). Factual issues as to the precise location of the defect and whether the defect is designated on the map should be resolved by a jury (*see id.*; *Hennessey-Diaz v City of New York*, 146 AD3d 419 [1st Dept 2017]; *Mora v City of New York*, 103 AD3d 610 [2d Dept 2013]).

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

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

ENTERED: OCTOBER 10, 2019

CLERK

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

10070 The People of the State of New York, Ind. 1953/15
Respondent,

-against-

Luis Manuel Sanchez,
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.

_____

Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered July 13, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree and conspiracy in the second degree, and sentencing him to an aggregate term of six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison component of the sentence on the sale

conviction to three years, and otherwise affirmed.

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 10, 2019

CLERK

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

10071N Kerry Smith, et al., Index 305579/14
Plaintiffs-Appellants,

-against-

Lenny E. Pereira,
Defendant-Respondent,

John and Jane Does (1-50), et al.,
Defendants.

_____

Sekas Law Group, LLC, New York (Nicholas G. Sekas of counsel), for appellants.

Law Offices of Jennifer S. Adams, Yonkers (Jeffrey A. Domoto of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about July 31, 2018, which, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of plaintiffs for leave to reargue (denominated a motion for leave to renew and reargue) defendant Lenny E. Pereira's motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiffs' motion, denominated as one for leave to renew and reargue, was not based on new facts unavailable at the time of the original motion, and thus was actually a motion for leave to reargue, the denial of which is not appealable (CPLR 2221[e];

see Lichtman v Mount Judah Cemetery, 269 AD2d 319, 320 [1st Dept 2000], *lv denied in part and dismissed in part* 95 NY2d 860 [2000]). Plaintiffs cannot show due diligence in attempting to obtain the subject physician's affirmation because they did not submit it until they moved to renew and reargue without explanation despite defendant pointing out in its reply papers that the physician's report was unsworn (*see Jones v 170 E. 92nd St. Owners Corp.*, 69 AD3d 483 [1st Dept 2010]).

Furthermore, inasmuch as no appeal lies from the denial of a motion to reargue, and no appeal has been taken from the original determination granting defendant's motion for summary judgment, plaintiffs' arguments addressed to that determination are not properly before us (*see Stratakis v Ryjov*, 66 AD3d 411, 411-412 [1st Dept 2009]).

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

ENTERED: OCTOBER 10, 2019

CLERK