Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11402 The People of the State of New York, Ind. 2847/13
Respondent,

-against-

LaShawn Cook,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered January 5, 2016, convicting defendant, after a jury trial, of robbery in the second and third degrees, unlawful imprisonment in the first degree, grand larceny in the fourth degree and criminal possession of a controlled substance in the seventh degree, and sentencing her, as a second felony offender, to an aggregate term of eight years, unanimously modified, on the law, to the extent of vacating the third-degree robbery conviction and dismissing that count, and as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the second-degree robbery conviction to five years, and otherwise affirmed.

The verdict 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, including its evaluation of inconsistencies in the complainant's

testimony. Defendant's acquittal of another charge does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

As the People concede, the third-degree robbery count should be dismissed as a lesser included offense.

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11403 Lloyd's Syndicate 2987, et al., Index 160612/18
Plaintiffs-Respondents,

-against-

Furman Kornfeld & Brennan, LLP, et al.,
Defendants-Appellants.

_____

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Marian C. Rice and James D. Spithogiannis of counsel), for appellants.

Nagel Rice LLP, New York (Bruce Nagel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered July 20, 2019, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this legal malpractice action, plaintiffs allege that they sustained damages when they relied on defendants' negligent advice that they could disclaim coverage of their insured in an underlying malpractice action. In support of their motion to dismiss, defendants properly relied on documentary evidence, including the challenged disclaimer letter and the relevant policy, since their authenticity is undisputed and their contents are "essentially undeniable" (*see DSA Realty Servs., LLC v Marcus & Millichap Real Estate Inc. Servs. of N.Y., Inc.*, 128 AD3d 587 [1st Dept 2015]; *see also Kaplan v Conway & Conway*, 173 AD3d 452, 453 [1st Dept 2019]; CPLR 3211[a][1]). The disclaimer letter

sets forth an analysis of plaintiffs' right to refuse coverage to their insured on two independent bases. Plaintiffs' failure to allege with specificity or argue that one of the two bases for defendants' advice was incorrect, requires dismissal of this legal malpractice action.

Aside from this, defendants' alleged malpractice concerning other issues is subject to the attorney-judgment rule (*see Rosner v Paley*, 65 NY2d 736 [1995]). Since plaintiffs failed to show that the issues were elementary or subject to settled authority, defendants could not be liable for malpractice based on their prediction of how a court would interpret the policy (*see id.*; *Byrnes v Palmer*, 18 AD 1 [2d Dept 1897], *affd* 160 NY 699 [1899]).

Further, plaintiffs' failure to explain how it was that any alleged error by defendants prejudiced their defense in the subsequent coverage action also mandates dismissal of the malpractice claim (*see Brookwood Cos., Inc. v Alston & Bird LLP*, 146 AD3d 662, 667 [1st Dept 2017]).

The breach of contract claim, based on the allegations, is also subject to dismissal for the same reasons, and as

duplicative of the malpractice claim (*see Courtney v McDonald*, 176 AD3d 645 [1st Dept 2019]).

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11404 In re Aryanna S. also known as Aryanna H., Dkt. B-14973/17

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

Sean S.,
Respondent-Appellant,

Good Shepherd Services,
Petitioner-Respondent.

_____

Marion C. Perry, Brooklyn, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about May 18, 2018, which, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and transferred custody of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Although respondent failed to demonstrate either a reasonable excuse for his default in appearing for the fact-finding hearing or a meritorious defense (*see* CPLR 5015[a][1]), Family Court reopened the hearing, in the interest of justice, for the limited purpose of permitting him to offer evidence on the issues of permanent neglect and the child's best interests. Respondent's contention that the court erred in not granting him a trial de novo is unpreserved and in any event unavailing (*see*

e.g. Matter of Charity W. [Sharon P.], 79 AD3d 1722 [4th Dept 2010], *lv denied* 16 NY3d 707 [2011]).

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record demonstrates that petitioner made diligent efforts to encourage and strengthen the parental relationship by, among other things, referring respondent to a batterer's program, a substance abuse program, a parenting skills program, and mental health services, as well as scheduling visitation with the child and keeping itself apprised of his progress (*see Matter of Tion Lavon J. [Saadiasha J.]*, 159 AD3d 579 [1st Dept 2018]). However, despite these efforts, respondent failed to plan for the child by complying with the requirements of his service plan. During the relevant period, respondent failed, among other things, to complete a substance abuse treatment program and to engage regularly in mental health services. He relapsed into illegal drug use and failed to attend a batterers' program or obtain suitable housing (*see Matter of Jaydein Celso M. [Diana E.]*, 146 AD3d 448 [1st Dept 2017]).

The record supports the determination that termination of respondent's parental rights is in the best interest of the child and that a suspended judgment is not warranted. There is no indication that respondent is able to care for the child or will be able to do so in the future; a suspended judgment would only serve to prolong the lack of permanence in the child's life (*see*

Matter of Julianna Victoria S. [Benny William W.], 89 AD3d 490 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). Moreover, the child has a loving relationship with the foster mother with whom she had been living for the past several years and who wishes to adopt her (*see Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11405 Deborah Thomas, Index 103397/11
Plaintiff-Appellant,

-against-

Jonathan Mintz, etc., et al.,
Defendants-Respondents.

_____

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

James E. Johnson, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered August 2, 2018, which granted defendant's motion to dismiss the complaint alleging discrimination, retaliation, and hostile work environment under the New York State Human Rights Law (HRL) and the New York City HRL, unanimously modified, on the law, to deny the motion as to the retaliation claim, and otherwise affirmed, without costs.

Under the lenient notice pleading standard afforded to employment discrimination cases, the complaint states a cause of action for retaliation (*see Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019], citing *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). It alleges that plaintiff filed a discrimination complaint in December 2010, that defendant Jonathan Mintz was notified of the complaint in November 2011, and that six months later plaintiff was charged with departmental misconduct that allegedly had

occurred more than a year earlier.

The complaint fails to state causes of action for discrimination and a hostile work environment, because it does not allege that defendants' actions occurred under circumstances that give rise to an inference of discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305, 310 [2004]; *Massaro v Department of Educ. of the City of N.Y.*, 121 AD3d 569 [1st Dept 2014], *lv denied* 26 NY3d 903 [2015]). It does not allege facts that would establish that similarly situated persons who were male or were not of African American descent were treated more favorably than plaintiff was (*see Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621 [1st Dept 2013]). Instead, the complaint merely asserts the legal conclusion that defendants' adverse employment actions and plaintiff's termination were due to race and gender (*see Askin*, 110 AD3d at 622). The hostile work environment cause of action fails for the additional reason that the handful of potentially insensitive comments made by her superior over the course of a few years do not rise to a level that is actionable under either the State or the City HRL (*see*

Forrest, 3 NY3d at 311; *Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

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

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11406 Kathryn Musano, Index 452429/14
Plaintiff-Appellant,

-against-

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

James Sacco,
Defendant.

_____

Martin + Colin, P.C., White Plains (William Martin of counsel), for appellant.

Hardin Kundla McKeon & Poletto P.A., New York (Eric Koplowitz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 29, 2019, which, insofar as appealed from, granted defendants-respondents' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a social worker, was menaced with a knife by a tenant, while on the job at a facility owned and operated by defendant nonprofit entities, and funded by the City defendants, to provide housing and services to individuals suffering from mental illness and/or chronic homelessness.

The court correctly concluded that the City defendants were acting in a governmental capacity when they provided funding for the facility and its services. A party seeking to impose liability on a municipality acting in a governmental capacity must establish the existence of a special duty to plaintiff, which is more than the duty owed to the public generally (*see*

Applewhite v Accuhealth, Inc., 21 NY3d 420, 425-426 [2013]). Here, plaintiff presented no evidence that would provide a basis for finding that a special duty was owed to her by the City defendants.

Regarding defendants owner and managing agent of the premises, a landowner must act as a reasonable person in maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). The owner and managing agent demonstrated that the incident was not reasonably foreseeable in that the tenant was a resident in the facility for nine years and had no record of violent behavior or threats of violence to others (*see Waldon v Little Flower Children's Serv.*, 1 NY3d 612 [2004]). Plaintiff asserts that the tenant was an unsuitable tenant for the facility because of his mental illness and prior criminal conduct. However, the tenant's criminal conduct took place 15 years before the incident.

Plaintiff argues that the facility lacked adequate security given its "high risk" population. However, surveillance cameras controlling building access and functioning locks on office doors, which were present here, have been found to be sufficient to satisfy the "minimal precautions" standard (*Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]; *see Estate of Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d 418 [1st Dept

2017]). Furthermore, since the incident was over in less than a minute and security personnel were alerted and responded, additional security could not have prevented the incident (*see* *Waldon* at 613-614).

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11407 The People of the State of New York, Ind. 2651/18
Respondent, 2652/18

-against-

Derrick Lee,
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 (Valerie Figueredo 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 (Laurie Peterson, J.), rendered September 28, 2018,

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

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

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

ENTERED: APRIL 23, 2020

CLERK

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

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11409 The People of the State of New York, Ind. 4108/14
Respondent,

-against-

Willie Caraway,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 11, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of two years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea, without assigning new counsel. In his written submissions, defendant had an ample opportunity to raise his complaints about his attorney. Based on its familiarity with prior proceedings in the case, including pretrial hearings and the thorough plea allocution, the court was readily able to determine that defendant's claims were insufficient to warrant further inquiry (*see People v Mitchell*, 21 NY3d 964, 967 [2013]), and that there was no conflict of interest requiring substitution of counsel. The allegedly coercive conduct of counsel about which defendant complained

consisted essentially of providing sound advice to plead guilty (*see e.g. People v Chimilio*, 83 AD3d 537, 538 [1st Dept 2011], *lv denied* 17 NY3d 814 [2011]), and there is nothing in the record to suggest ineffective assistance (*see People v Ford*, 86 NY2d 397, 404 [1995]).

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11410 In re Credit Suisse Securities (USA) LLC, Petitioner-Appellant, -against- Nicholas B. Finn, Respondent-Respondent. Index 655870/18

_____

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for appellant.

Lax & Neville LLP, New York (Robert R. Miller of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered May 13, 2019, confirming an arbitration award and awarding damages to respondent, unanimously modified, on the law, to exclude the amount awarded in severance pay, and otherwise affirmed, without costs.

Petitioner seeks to vacate an arbitration award finding it liable to respondent, a former investment adviser in its U.S. private banking division, for deferred compensation benefits that had not yet vested before his departure. It is undisputed that, if respondent were involuntarily terminated without cause, these benefits would immediately vest, but that if he voluntarily resigned, he would forfeit any right thereto.

The arbitration panel did not engage in misconduct in excluding certain evidence, as this did not violate fundamental fairness (*see* 9 USC § 10[a][3]; *Tempo Shain Corp. v Bertek, Inc.*, 120 F3d 16, 20 [2d Cir 1997]). Evidence of respondent's

negotiations with certain other potential employers was reasonably excluded as cumulative. The panel also acted reasonably in proceeding without the live testimony of a particular defense witness when scheduling difficulties prevented his timely appearance, as several other defense witnesses had already testified, and his testimony in an earlier, similar case was available for review. The panel assured petitioner that it was capable of setting aside any testimony not relevant to the instant dispute, and there is no indication that it did not do so.

Vacatur is also not warranted on the basis of manifest disregard of the law, which requires a finding that the arbitrators refused to apply or altogether ignored a governing legal principal of which they knew and that the law so ignored was well defined, explicit, and clearly applicable to the case (*see Zurich Am. Ins. Co. v Team Tankers A.S.*, 811 F3d 584, 589 [2d Cir 2016]). Contrary to petitioner's contention, the law is not clear that its announcement of the closing of the U.S. private banking division, i.e., respondent's inevitable termination, did not constitute a constructive discharge (*see Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d 81, 89-90 [2d Cir 1996]; *Lopez v S.B. Thomas, Inc.*, 831 F2d 1184, 1188 [2d Cir 1987]; *Bader v Special Metals Corp.*, 985 F Supp 2d 291, 310 [ND NY 2013]; *see also generally Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621 [2006]). Unlike the cases relied upon by

petitioner, this case does not involve the employer company's purchase or acquisition by another company (*see Evans v Winston & Strawn*, 303 AD2d 331, 333 [1st Dept 2003]; *Criscuolo v Joseph E. Seagram & Sons, Inc.*, 2003 WL 22415753, *8, 2003 US Dist LEXIS 18991, *25-26 [SD NY, Oct. 21, 2003]; *Boss v Advanstar Communications, Inc.*, 911 F Supp 109, 110, 112 [SD NY 1995]).

The panel also did not ignore or refuse to apply clear law governing the calculation of damages. Although damages for breach of an employment agreement may be offset by replacement compensation paid by a new employer (*see Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74 [1966]; *Donald Rubin, Inc. v Schwartz*, 191 AD2d 171, 172 [1st Dept 1993]), the arbitration panel could reasonably have concluded that the transition payments respondent received from his new employer did not in fact "replace" the deferred compensation benefits withheld by petitioner, as they were subject to additional conditions and restrictions (*see In re Lehman Bros. Holdings Inc.*, 703 Fed Appx 18, 22 [2d Cir 2017]). Moreover, unlike the compensation at issue in the cases relied upon by petitioner, respondent's right to the benefits at issue vested upon his termination without cause. Petitioner offers no authority for the proposition that mitigation or offset is a defense to payment of *vested* compensation - at least where, as here, the new company was under no obligation to make a replacement payment (*see id.* at 21-22).

The arbitrators, however, exceeded their authority by making

an award of severance pay, since the issue was not validly before them.

We have considered petitioner's remaining arguments and find them unavailing. In light of this disposition, we need not reach respondent's argument regarding possible alternative bases for the award.

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11411 Claudia Powell, Index 301647/16
Plaintiff-Appellant,

-against-

Centers FC Realty, LLC,
Defendant-Respondent.

Raskin & Kremins, LLP, New York (Rhonda Katz of counsel), for appellant.

Caitlin Robin & Associates PLLC, New York (Kevin Volkommer of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about December 21, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence showing that the alleged sidewalk defect was a trivial defect and not actionable as a matter of law (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). In opposition, plaintiff failed to

raise a triable issue of fact, since she did not submit any evidence showing that the condition was hazardous (*see Forrester v Riverbay Corp.*, 135 AD3d 448 [1st Dept 2016]; *compare Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130, 1131 [1st Dept 2018]).

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11413 The People of the State of New York, Ind. 1214/16
Respondent,

-against-

Justin Ramirez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson 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 (Marc Whiten, J.), rendered August 11, 2016

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

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

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

ENTERED: APRIL 23, 2020

CLERK

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

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11414 Philip Shawe, Index 155890/14
Plaintiff-Appellant,

-against-

Elizabeth Elting,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York (Debra A. James, J.), entered on or about February 7, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 10, 2020,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11416 Jessica Barrish, et al., Index 154308/13
Plaintiffs-Respondents,

-against-

Joseph Ari Chiesa,
Defendant-Appellant.

_____

Scott W. Pearl, P.C., New York (Scott W. Pearl of counsel), for appellant.

Reavis Page Jump LLP, New York (Mark H. Moore of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about April 26, 2019, which denied defendant's motion for partial summary judgment dismissing the fourth cause of action for intentional infliction of emotional distress, unanimously affirmed, with costs.

Defendant's motion was properly denied because a plaintiff can recover damages for emotional distress arising out of the intentional destruction of property (*see Weisman v Weisman*, 108 AD2d 853, 854 [2d Dept 1985]). Here, the May 15, 2012 criminal complaint and the October 12, 2012 transcript of the plea allocation defendant submitted in support of his motion establish that he pleaded guilty to the crime of aggravated animal cruelty and acknowledged that he "intensely assaulted and caused the death of a companion animal, that is, a cat, belonging to [plaintiff Jessica Barrish]."

Defendant submitted no evidence that established his initial

burden to show that his conduct, in intentionally torturing and killing Jessica's cat and leaving its body for Jessica to find, was not extreme, outrageous or intended to cause, or disregarded a substantial probability of causing, severe emotional distress. He also failed to demonstrate that there is no causal connection between his conduct and Jessica's alleged injuries (*see Murphy v Murphy*, 109 AD2d 965, 966-967 [3d Dept 1985]).

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11418 Rafael Koblence, Ind. 653282/17
Plaintiff-Appellant,

-against-

Modern Pawn Brokers, Inc.,
et al.,
Defendants-Respondents.

_____

Kagen & Caspersen PLLC, New York (Joel M. Taylor of counsel), for appellant.

Herrick Feinstein LLP, New York (Sean E. O'Donnell of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered March 4, 2019, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the cause of action under NY UCC article 9, and otherwise affirmed, without costs.

The breach of contract claim was correctly dismissed, as plaintiff failed to plead or demonstrate his own performance under the parties' security agreement, and merely speculated as to any damages (*see Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]).

The cause of action under General Business Law § 349 was correctly dismissed, as this dispute concerns a pawnbroker transaction that was unique to the parties and involved one-of-a-kind collateral, rather than conduct that could affect consumers at large or have an impact on consumer transactions involving the same type of item (*see Koch v Acker, Merrall & Condit Co.*, 18

NY3d 940, 941 [2012]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

The claim under NY UCC article 9 should not have been dismissed on timeliness grounds. It did not require allegations of deception (NY UCC 9-610), and was brought within three years of the subject transaction (*see* CPLR 214[2]). The allegations that plaintiff was not provided notice of the disposition of the collateral between defendants and that the collateral was disposed of for far less than its actual value are sufficient to state a cause of action under NY UCC article 9 (*see* NY UCC 9-610; 612; 627[b]; *Federal Deposit Ins. Corp. v Forte*, 94 AD2d 59, 66 [2d Dept 1983]).

General Business Law § 46 does not confer a private right of action, as the statute carries its own legal enforcement mechanisms (*see Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 40 [1999]). Contrary to plaintiff's contention, by its terms, General Obligations Law § 5-501(6)(b) applies to loans in

excess of $2.5 million.

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

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11419N BAC Home Loan Servicing, LP, formerly known as Countrywide Home Loans Servicing LP, Plaintiff-Appellant, Index 382072/09

-against

Roland Moreno, Defendant-Respondent,

Mortgage Electronic Registration Systems, Inc. as Nominee for Countrywide Bank FSB, et al., Defendants.

_____

Friedman Vartolo LLP, New York (Zachary Gold of counsel), for appellant.

Shiryak, Bowman, Anderson, Gill & Kadochnikov, LLP, Kew Gardens (Matthew J. Routh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 26, 2015, which denied plaintiff's motion for a default judgment and an order of reference, and sua sponte deemed the action abandoned and dismissed the complaint pursuant to CPLR 3215(c), unanimously affirmed, without costs.

To the extent that the order sua sponte dismissed the complaint, that portion of the order is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335 [2003]). However, given the nature of the motion court's sua sponte relief in dismissing the complaint, and in the interest of deciding appeals on the merits, we sua sponte deem the notice of appeal to be a motion for leave to appeal, and grant such leave (*see Ray v Chen*, 148 AD3d 568, 569 [1st Dept 2017]; CPLR 5701[c]).

Nevertheless, we find that the court providently exercised its discretion in denying plaintiff's motion for entry of a default judgment and referral of the action to foreclose on a residential mortgage, and dismissed the action pursuant to CPLR 3215(c). The court's May 7, 2015 residential foreclosure status conference order, made only after the case lay dormant for many years, required plaintiff to file a motion for an order of reference within 60 days, and appear at a final status conference on June 29, 2015 for proof of compliance. It also warned that failure to comply could result in dismissal. Plaintiff then waited until September 11, 2015 to move for an order of reference and a judgment of foreclosure and sale.

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

ENTERED: APRIL 23, 2020

CLERK

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11420N Lane's Floor Coverings & Interiors, Inc., Plaintiff-Appellant, -against- Anthony DiLalla, et al., Defendants-Respondents. Index 157933/16

Davidoff Hutcher & Citron LLP, New York (Andrew K. Rafalaf of counsel), for appellant.

Zeichner Elman & Krause LLP, New York (Bruce S. Goodman of counsel), for respondents.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 10, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to amend the complaint and to compel defendants to produce certain documents, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff alleges that defendants assisted its former controller in fraudulently cashing checks drawn on its account. The complaint identifies five such checks. Plaintiff seeks to amend the complaint to add allegations concerning an additional 60 fraudulently cashed checks, and to compel defendants to produce documents relating to the entire fraudulent scheme.

The court denied plaintiff's motion on the ground that the proposed claims failed to state a cause of action, because plaintiff had not complied with defendant bank's 90-day-notice requirement with respect to potentially fraudulent checks.

However, there is no evidence that plaintiff agreed to the Account Disclosures and Rules containing that notice requirement in connection with the account on which the fraudulently cashed checks were drawn. While plaintiff subsequently agreed to the Account Disclosures and Rules in connection with other accounts held at the bank, given the procedural posture of this case, defendants failed to establish that plaintiff's claims are "patently lacking in merit" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; CPLR 3025[b]). In addition, defendants demonstrated no prejudice or surprise resulting from the amendment (*see Verizon N.Y. Inc. v Consolidated Edison, Inc.*, 38 AD3d 391, 391 [1st Dept 2007]).

In accordance with the foregoing, plaintiff is entitled to discovery with respect to the additional fraudulent checks.

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

ENTERED: APRIL 23, 2020

CLERK

Friedman, J.P., Renwick, Kapnick, Gesmer, Kern, JJ.

10095 Richard Lyons, et al., Index 160496/15
Plaintiffs-Appellants-Respondents,

-against-

New York City Economic Development Corporation, et al.,
Defendants-Respondents-Appellants.

_____

Foulke Law Firm, Goshen (Evan M. Foulke of counsel), for appellants-respondents.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about June 19, 2018, which, to the extent appealed from as limited by the briefs, granted those branches of defendants' motion which were for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 causes of action, but denied that branch of defendants' motion which was for summary judgment dismissing plaintiffs' Labor Law § 241(6) cause of action, unanimously modified, on the law, to deny defendants' motion in its entirety as premature, without costs, and as so modified, affirmed.

According to the record, at the time defendants filed their motion, no depositions had taken place. The record does not show that the parties have exchanged any paper discovery, such as records concerning the installation, maintenance, or repair of the mesh walkway on which plaintiff Richard Lyons fell.

Accordingly, plaintiffs met their burden of demonstrating

that facts essential to justify opposition to the motion may lie within defendants' exclusive knowledge or control (*see* CPLR 3212[f]), and defendants' motion should have been denied in its entirety as premature, with leave to renew upon the completion of discovery (*see Marabyan v 511 W. 179 Realty Corp.*, 165 AD3d 581, 582 [1st Dept 2018]; *Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 624-626 [1st Dept 2013]).

The parties' remaining contentions are academic in light of our determination.

The Decision and Order of this Court entered herein on October 17, 2019 is hereby recalled and vacated (*see* M-8682-8683 decided simultaneously herewith).

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

ENTERED: APRIL 23, 2020

CLERK

Friedman, J.P., Renwick, Kapnick, Gesmer, Kern, JJ.

10095 Richard Lyons, et al., Index 160496/15
Plaintiffs-Appellants-Respondents,

-against-

New York City Economic Development Corporation, et al.,
Defendants-Respondents-Appellants.

_____

Foulke Law Firm, Goshen (Evan M. Foulke of counsel), for appellants-respondents.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about June 19, 2018, which, to the extent appealed from as limited by the briefs, granted those branches of defendants' motion which were for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 causes of action, but denied that branch of defendants' motion which was for summary judgment dismissing plaintiffs' Labor Law § 241(6) cause of action, unanimously modified, on the law, to deny defendants' motion in its entirety as premature, without costs, and as so modified, affirmed.

According to the record, at the time defendants filed their motion, no depositions had taken place. The record does not show that the parties have exchanged any paper discovery, such as records concerning the installation, maintenance, or repair of the mesh walkway on which plaintiff Richard Lyons fell.

Accordingly, plaintiffs met their burden of demonstrating

that facts essential to justify opposition to the motion may lie within defendants' exclusive knowledge or control (*see* CPLR 3212[f]), and defendants' motion should have been denied in its entirety as premature, with leave to renew upon the completion of discovery (*see Marabyan v 511 W. 179 Realty Corp.*, 165 AD3d 581, 582 [1st Dept 2018]; *Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 624-626 [1st Dept 2013]).

The parties' remaining contentions are academic in light of our determination.

The Decision and Order of this Court entered herein on October 17, 2019 is hereby recalled and vacated (*see* M-8682-8683 decided simultaneously herewith).

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

ENTERED: MARCH 23, 2020

CLERK

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

11172 Grecia Nolasco, Index 306199/11
Plaintiff-Respondent,

-against-

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

Metropolitan Transportation Authority,
et al.,
Defendants-Appellants,

New York City Housing Authority,
Defendant.

_____

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

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

James E. Johnson, Corporation Counsel, New York (James E. Johnson of counsel), for City of New York, respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about September 12, 2018, which denied the motion of defendants Metropolitan Transportation Authority and New York City Transit Authority (NYCTA) for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted in its entirety. The Clerk is directed to enter judgment accordingly.

Plaintiff commenced this action to recover for injuries she allegedly sustained when, after exiting a taxi and attempting to step onto the sidewalk, her foot became stuck in a catch basin

causing her to fall. The catch basin was located adjacent to a public sidewalk beneath defendants' subway station.

Defendants' motion for summary judgment should have been granted as defendants established, prima facie, that they did not own, control, maintain or make special use of the catch basin, which was the proximate cause of plaintiff's accident (*see Adriana G. v Kipp Wash. Hgts. Middle Sch.*, 165 AD3d 469 [1st Dept 2018]). Defendants provided the testimony of NYCTA's employee, a civil engineer, who testified that defendants do not own the catch basin at issue, that they are not responsible for repairing or maintaining the catch basin and that it is the City that owns, repairs and maintains such catch basins. Further, an employee of the City's Department of Environmental Protection (DEP) testified that DEP generally maintains such catch basins.

In response, neither plaintiff nor the City raised an issue of fact sufficient to defeat defendants' motion for summary judgment. Although the DEP employee testified that it appeared portions of the sidewalk area near the catch basin had been altered or added by some entity other than DEP and photographic evidence shows that the sidewalk area at issue is in close proximity to the entrance to defendants' subway station, and a concrete support pole for the elevated platform and tracks is located thereon, such evidence fails to raise an issue of fact as to defendants' liability. Plaintiff testified on three separate occasions that the cause of her accident was her right foot

getting stuck in the catch basin. She never testified that any issue with the sidewalk contributed to her fall.

Moreover, the fact that defendants failed to submit any evidence to show that they have never made special use of, or worked on, the sidewalk near the catch basin, despite several court orders requiring the production of such records, is irrelevant. Such discovery is not material and necessary to the prosecution of the action as there is no evidence in the record that the sidewalk or the condition thereof contributed in any way to plaintiff's accident (*see* CPLR 3101[a]).

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

ENTERED: APRIL 23, 2020

CLERK

Richter, J.P., Mazzarelli, Gesmer, Singh, JJ.

11346 The People of the State of New York, Respondent, Ind. 2410/11 671/15

-against-

Nelson Ferrer, Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Dana B. Wolfe of counsel), for appellant.

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Judgment, Supreme Court, New York County (Alvin Yearwood, J.), rendered June 13, 2016, unanimously affirmed.

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

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

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

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

ENTERED: APRIL 23, 2020

CLERK

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

11348 Judith O'Connor, Index 101138/12
Plaintiff-Appellant,

-against-

Tishman Construction Corporation,
et al.,
Defendants-Respondents,

Hugh O'Kane Electric Co. Inc.,
Defendant.

_____

DeToffol & Associates, New York (Joshua Gittleman of counsel), for appellant.

Blank Rome LLP, New York (Gregory P. Cronin of counsel), for Tishman Construction Corporation, The New School and The New York State Dormitory Authority, respondents.

James E. Johnson, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for The City of New York and The Department of Transportation, respondents.

_____

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered July 24, 2018, which granted defendants the City of New York's and the Department of Transportation's (DOT) (collectively City defendants) motion for summary judgment dismissing the complaint, and granted defendants Tishman Construction Corporation, The New School and the New York State Dormitory Authority's (collectively Tishman defendants) cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion and cross motion denied.

Plaintiff allegedly fractured her right knee after she tripped and fell on a "mound of concrete with a piece of metal"

while walking on the sidewalk in front of 65 Fifth Avenue in Manhattan. Plaintiff sued the City and Tishman defendants, alleging that defendants were on notice of the alleged defect because they either created or allowed it to remain on the sidewalk, and that their negligence in maintaining the area was a proximate cause of her accident.

It is undisputed that the piece of metal in the mound of concrete was the remnant of a street sign. Nor is it disputed that the City was not provided with prior written notice of the condition within the 15-day grace period to make the repair pursuant to the Administrative Code of City of NY § 7-201(c)(2).

The City defendants moved for summary judgment, contending that its employees did not cause or create the alleged sidewalk defect. DOT's records show that the City did not perform work at the location for two years prior to the date of the accident, and that it did not have notice of the alleged sidewalk defect. The City defendants also asserted that a DOT sign search shows that no signs were installed, repaired, or removed from the sidewalk for approximately 20 years before the accident. In support of these contentions, the City submitted an affidavit from DOT's Supervising Superintendent of Maintenance Joseph Farina.

The Tishman defendants cross-moved for summary judgment to dismiss the complaint and all cross claims asserted against them. Primarily, they argue that the City created the defect. The Tishman defendants rely on Farina's April 25, 2014 deposition

testimony given in another case brought against the City, captioned *Joan Goldstein v The City of New York, Urban Foundation Engineering, LLC and The New School* (index No. 100652/12) (the Goldstein action). G*oldstein* involved a trip and fall over precisely the same sidewalk defect a few months after plaintiff fell. At his 2014 deposition, Farina testified that on June 8, 2000 DOT performed "Meter and sign work, reinstall parking meters" and "drive rail installed" at the subject location. He also stated that the City maintained the DOT signs and repaired them, that there was a record of a repair to the subject location, but not the drive rail, in 2006, and that there was no record of any permits by contractors or others to remove the relevant sign. Additionally, he stated that if the sign and sidewalk were not flush, the sign was improperly installed by the City.

Plaintiff opposed both motions, primarily contending that Farina's deposition transcript from the *Goldstein* action conflicted with his affidavit in this case and creates triable issues of fact as to whether the City defendants caused or created the defect. Additionally, plaintiff claimed that the Tishman defendants had a duty of care as the owners of their "sidewalk easement" to have the street signs "cut down for their construction project" and to maintain the sidewalk in reasonably safe condition under Administrative Code § 7-210.

Supreme Court granted defendants' motions and dismissed the

complaint and cross claims. Plaintiff appeals. We reverse.

First, the City defendants' motion for summary judgment should have been denied. The City defendants fail to demonstrate that their employees did not cause or create the alleged defect. Farina provided an affidavit in the case at bar, stating that a DOT record search "revealed no records of maintenance, repair, installation, or removal of drive rails or sign supports by DOT for the aforementioned location and timeframe." This timeframe constituted "twenty years prior to and including February 16, 2011" the date of the incident. Farina's 2012 affidavit and 2014 deposition appear to be in direct conflict. Neither the affidavit nor the deposition conclusively establishes the work, if any, the City performed in the subject location and whether the City defendants affirmatively created the defect which resulted in an alleged dangerous condition (*see San Marco v Vill./Town of Mount Kisco*, 16 NY3d 111, 117 [2010], citing *Oboler v City of New York*, 8 NY3d 888, 888-890 [2007]). Accordingly, the City defendants may be held responsible for their alleged negligence without prior written notice (*San Marco,* 16 NY3d at 117).

Second, we find that the Tishman defendants' cross motion for summary judgment should have been denied. Although it is undisputed that the alleged defect is a remnant of a street sign, the Tishman defendants did not meet their initial burden because they failed to submit an affidavit or deposition testimony from a

witness with knowledge that establishes that its employees did not cause or create the alleged defect (*see* CPLR 3212[b]). Further, defendants The New School and New York State Dormitory Authority, as owners of the property adjacent to the public sidewalk, had a nondelegable duty to maintain the sidewalk in a safe condition, including the area around the street sign (*Vullo v Hillman Hous. Corp.*, 173 AD3d 600, 600-601 [1st Dept 2019]; *Bronfman v East Midtown Plaza Hous. Co., Inc.*, 151 AD3d 639, 640 [1st Dept 2017]).

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

ENTERED: APRIL 23, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11397 P360 Spaces, LLC, Index 156534/15
Plaintiff-Respondent,

-against-

Patricia Orlando, et al.,
Defendants-Appellants,

John Doe, et al.,
Defendants.

_____

Harris Beach PLLC, Albany (Svetlana K. Ivy of counsel), for appellants.

Brill & Meisel, New York (Allen H. Brill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered May 8, 2019, which denied defendants-appellants' motion to vacate a judgment, unanimously affirmed, without costs.

Defendants failed to demonstrate their entitlement to relief from the judgment on the ground of newly discovered evidence that could not have been discovered before the entry of the judgment (CPLR 5015[a][2]), given that their submissions consisted of tax maps and floor plans publicly filed years before plaintiff moved

for summary judgment (*see Matter of Chatham Towers, Inc. v Bloomberg*, 39 AD3d 308, 309 [1st Dept 2007]).

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

ENTERED: APRIL 23, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Sallie Manzanet-Daniels
Anil C. Singh
Peter H. Moulton, JJ.

11240
Dkt. N10722/14N

_____x

In re F. W., and Another,

Children Under Eighteen Years
of Age, etc.,

Monroe W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.
_____x

Respondent appeals from an order of the Family Court, Bronx County (Elenor C. Reid, J.), entered on or about September 27, 2018, which, to the extent appealed from as limited by the briefs, denied that branch of respondent father's motion for an "expedited hearing" to determine whether the subject children who were removed through a failed trial discharge should be returned to him.

The Bronx Defenders, Bronx (David Shalleck-Klein and Saul Zipkin of counsel), and NYU School of Law Family Defense Clinic Washington SQ. Legal Services, New York (Christine Gottlieb and Amy Mulzer of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Anna W. Gottlieb and Fay Ng of counsel), for respondent.

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

SINGH, J.

We are asked to decide whether Family Court properly denied respondent's motion for an expedited hearing on a post-dispositional neglect proceeding. We find that Family Court should have granted the motion and held a prompt hearing in accordance with the parent's and the children's right to due process. Accordingly, we reverse.

On or about April 25, 2014, the Administration for Children's Services (ACS) filed a neglect petition against respondent Monroe W. (father) on behalf of his two young children. ACS alleged that the father perpetrated acts of violence against the mother in the children's presence. On November 19, 2014, Family Court entered a finding of neglect against the father. The children were initially released to the custody of their mother. They were later removed from her care and placed in nonkinship foster care.

The father moved by order to show cause (OSC) seeking a trial discharge of the children to him.[1] On March 7, 2016, the children were discharged to the father. However, a few months

[1] A trial discharge "shall mean that the child is physically returned to the parent while the child remains in the care and custody of the local social services district" (Family Court Act (FCA) §§ 1055[b][i][E]; 1089[d][2][viii][C]). There is no time limit on how long a child may reside with a parent on trial discharge status (*id.*).

thereafter, the children were removed from the father's care and placed back in nonkinship foster care based on an allegation of excessive corporal punishment, which was later determined "unfounded" after an ACS investigation. On February 7, 2017, Family Court directed the agency to trial discharge the children to the father "unless significant barrier to reunification" existed.

Again, on January 24, 2018, ACS removed the children from the father's care based on an allegation of corporal punishment. The father filed another OSC seeking an "expedited hearing to determine whether the children [] can be returned to their home with their father."

On January 26, 2018, the parties appeared before Family Court, at which point the issue of whether the father was entitled to an expedited hearing arose. The Attorney for the Children (AFC) stated that she was not ready to participate in a hearing, as she had not yet spoken to the children and was "double booked," but she also did not believe that the father was entitled to an expedited hearing as the matter was post-disposition. In response, the court asked to be further briefed on the issue. The parties agreed.

Two weeks later, on February 14, 2018, the hearing commenced. It took six months to complete. Testimony at the

hearing suggested that the children manifested negative effects from the family separation. The father testified that they would become upset at the end of their visits and tell him that they wanted to go home with him. The children's foster mother reported that the four-year-old child had begun wetting the bed.

At the April 4, 2018 court appearance, the father's counsel requested a decision on the motion seeking an expedited hearing. The court stated that the branch of a motion seeking an expedited hearing was now moot as the court "granted an expedited hearing" and they were "just in the midst of it." The father's counsel responded that the court had "granted the beginning of an expedited hearing and gave everyone a chance to do replies," referring to the directive of the court from January 2018. The court did not respond.

Throughout the next few months the father's counsel repeatedly asked for earlier dates for the continued hearing. Counsel did not move to renew the application seeking an expedited hearing. In his summation, the father's counsel did not ask for a ruling on the timing of the hearing, and instead stated that the "court was correct to grant an expedited hearing."

On August 7, 2018, Family Court issued its decision from the bench, finding that the allegations against the father were

not credible, and directed a conditional trial discharge. The children, now ages five and seven, were finally discharged to the father on March 25, 2019.

In a subsequent memorandum decision dated September 24, 2018, the court denied the branch of the father's application for an expedited hearing. The court reasoned that Family Court Act (FCA) § 1089, which is triggered by the court's determination after a dispositional hearing that placement of a child with the Commissioner of ACS is in the child's best interest, does not qualify its references to a hearing, nor does it provide for an expedited hearing. Thus, in the absence of an express statutory provision granting a parent the right to a hearing within a specific time thereafter, Family Court rejected the father's argument that he was entitled to a hearing within a "matter of days," holding that the court has "broad discretion to determine the time to hold a hearing." The court also noted that the father was afforded due process at the fact-finding and dispositional hearing stages. The court did not address its earlier statement[2] that the motion seeking an expedited hearing

[2] We reject ACS' argument that since Family Court denied the father's request for an expedited hearing, the denial should have been appealed immediately. The transcripts and record do not reflect a denial until its written decision, dated September 24, 2018, which the father appeals from.

was moot.

Initially, we agree with the parties that although the children were ultimately discharged to the father, after a six-month hearing, the issues raised on this appeal fall into an exception to the mootness doctrine in that they (1) are likely to reoccur; (2) typically evade review; and (3) involve "significant or important questions not previously passed on" (*Matter of Hearst Corp v Clyne*, 50 NY2d 707, 714-715 [1980]; *see Matter of Elizabeth C. [Omar C.]*, 156 AD3d 193, 198-202 [2d Dept 2017]). Accordingly, while the merits of the court's ultimate trial decision are not before us on this appeal, we decide whether the court's denial of the father's motion for an expedited hearing was proper.

We begin our discussion with the undisputed principle that a parent's interest "in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests" (*Troxel v Granville*, 530 US 57, 65 [2000]). Accordingly, parents are afforded the protections of the Due Process Clause of the 14th Amendment in protecting this interest (*see id.* at 66; *see also Matter of Marie B.*, 62 NY2d 352, 358 [1984]). Similarly, the children have a parallel "right to be reared by [their] parent" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 546 [1976]).

We reject ACS's assertion that, in light of the prior finding of neglect against the father, the government has a greater interest in ensuring a correct adjudication, even if that may lengthen the proceeding. We agree that ACS has an interest in correct adjudication because "an erroneous failure to place the child [in foster care] may have disastrous consequences" (*Matter of Tammie Z.*, 66 NY2d 1, 4-5 [1985]). This concern must be weighed against the "significant emotional harm" inflicted upon children by temporarily separating them from their parents (Vivek S. Sankaran, "*Out of State and Out of Luck*: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children," 25 Yale L & Pol'y Rev 63, 64 fn 7 [2006]).[3]

We find that a parent's private interest in having custody of his or her children, the children's private interest in residing with their parent, and the undisputed harm to these interests are factors that merit equal consideration. On this record, ACS fails to establish that the lengthy delay was related

[3] Studies have established that "[e]ven short-term removals that are reversed can have lasting effects on vulnerable children" (Stephanie Clifford and Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of "Jane Crow,"* NY Times, July 21, 2017 [available at https://www.nytimes.com/2017/07/21/nyregion/ foster-care-nyc-jane-crow.html] [last accessed April 4, 2020]).

to its interest in protecting the children. Rather, the hearing was prolonged over six months because of the court's and attorneys' scheduling conflicts. There is no indication that the completion of the hearing was caused by difficult legal issues, or by the need to obtain elusive evidence, or by some other factor related to an accurate assessment of the best interest of the children (*see generally Federal Deposit Ins. Corp. v Mallen*, 486 US 230, 242 [1988], citing *Mathews v Eldridge*, 424 US 319, 334-335 [1976]).

Even though this is a post-dispositional matter, the father is entitled to the strict due process safeguards afforded in neglect proceedings. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" (*Santosky v Kramer,* 455 US 745, 753 [1982]). This rationale equally applies to the primacy of a parent's fundamental liberty interest, and the importance of procedural due process in protecting that interest, particularly when a parent and child are physically separated (*cf. Matter of Elizabeth C.*, 156 AD3d at 203). Accordingly, we find that a parent is entitled to a prompt hearing on the agency's determination to remove the children from his or her physical

custody through a failed trial discharge.

Finally, we note that the FCA is silent as to the specific procedural time frames that apply when a child has already been removed from a parent's physical custody after a fact-finding determination. We decline to impose a specific time frame as to what constitutes a "prompt" or "expedited" judicial review.[4] Instead, we rely on the general precept that a post-deprivation hearing "should be measured in hours and days, not weeks and months,"[5] based on the facts and circumstances of the matter (*Egervary v Rooney*, 80 F Supp 2d 491, 503 [ED Pa 2000], *revd on other grounds sub nom. Egervary v Young*, 366 F3d 238 [3d Cir 2004] [collecting and citing cases and concluding that a seven-month delay in judicial review of a child removal violated due process]).

Accordingly, order of the Family Court, Bronx County (Elenor C. Reid, J.), entered on or about September 27, 2018, which, to

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[4] Contrary to the father's argument, the FCA cannot be read to establish a right to a hearing within 30 days in cases such as this one. Any imposition of a defined time frame is a matter to be addressed by the legislature within the constraints of due process.

[5] We recognize that Family Court has a large caseload with competing deadlines which may cause slight delays. We do not hold that in every instance a hearing that takes "weeks and months" is inappropriate, especially when there is a sound basis for delay. Rather, there should be a case-by-case evaluation, but the court should value promptness whenever possible.

the extent appealed from as limited by the briefs, denied that branch of respondent father's motion for an "expedited hearing" to determine whether the subject children who were removed through a failed trial discharge should be returned to him, should be reversed, on the law, without costs, and that branch of the father's motion granted.

All concur.

Order, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about September 27, 2018, reversed, on the law, without costs, and that branch of the father's motion granted.

Opinion by Singh, J. All concur.

Richter, J.P., Manzanet-Daniels, Singh, Moulton, JJ.

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

ENTERED: APRIL 23, 2020

CLERK