SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**DECEMBER 6, 2012**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8709 The People of the State of New York, Respondent, Ind. 1284/09

-against-

Argenis Santos,
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 (Ellen Stanfield Friedman of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered April 26, 2010, convicting defendant, after a jury trial, of burglary in the second degree and unlawful imprisonment in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 6 years, unanimously affirmed.

The court properly declined to submit criminal trespass in the second degree as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to

defendant, to support such a charge (*see e.g. People v Zokari*, 68 AD3d 578 [2009], *lv denied* 15 NY3d 758 [2010]; *People v Jones*, 33 AD3d 461 [1st Dept 2006], *lv denied* 7 NY3d 926 [2006]; *People v Mongen*, 157 AD2d 82 [1990], *appeal dismissed* 76 NY2d 1015 [1990]). The jury would have had no basis for finding that defendant entered unlawfully, but without the intent to unlawfully restrain the victim or otherwise commit a crime, and subsequently formed that intent.

Defendant entered the apartment of his former girlfriend unlawfully, hid under a crib, and grabbed her immediately after she discovered him, telling her that neither the police nor her mother could help her now. He then continuously held her in the apartment against her will for 16 hours. Defendant's conduct was thus inconsistent with a claim that, at the time he entered, he simply wanted to talk to the victim about their relationship.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8711-
8712 In re Ansel P.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Elana E. Roffman of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 4, 2011, 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 attempted sexual abuse in the first degree, unlawful imprisonment in the second degree, menacing in the third degree (four counts), criminal mischief in the fourth degree, criminal obstruction of breathing or blood circulation, stalking in the third degree and harassment in the first degree, and placed him on enhanced supervision probation for a period of 15 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 determinations concerning credibility. The evidence established the elements of each offense, and we have considered and rejected appellant's arguments to the contrary.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8713 Karen Lind, et al., as Preliminary Executors of the Estate of Ezra M. Greenspan, etc., et al.,
Plaintiffs-Respondents,

-against-

Edith Wolf Greenspan,
Defendant-Appellant,

Marcia Gordon,
Defendant.

Index 112223/06

Kantor, Davidoff, Wolfe, Mandelker, Twomey & Gallanty, P.C., New York (Steven W. Wolfe of counsel), for appellant.

Harold Salant Strassfield & Spielberg, White Plains (Leonard I. Spielberg of counsel), for respondents.

Order, Supreme Court, New York County (Lewis B. York, J.), entered November 22, 2011, which denied the motion for summary judgment by defendant-appellant to dismiss the complaint as against her, unanimously affirmed, without costs.

The claim in the wrongful death action at issue here did not arise from the same or related transactions as the claim in the Surrogate's Court turnover proceeding. Thus, the remaining claim for conscious pain and suffering in the wrongful death action is not barred by the principle of res judicata (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]). Similarly, that remaining claim

is not barred by the principle of collateral estoppel. The issues raised in the claim were not addressed, either in theory or in fact, in the Surrogate's Court proceeding (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8714 Celene Betancur, Index 108912/08
Plaintiff, 590259/09
590635/09
-against- 590538/10

Lincoln Center for the Performing Arts, Inc., et al.,
Defendants-Appellants,

JDP Mechanical, Inc.,
Defendant-Respondent.

- - - - -

Lincoln Center for the Performing Arts, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Star-Delta Electric, LLC,
Third-Party Defendant-Respondent.

- - - - -

Lincoln Center for the Performing Arts, Inc., et al.,
Second Third-Party Plaintiffs-Appellants,

-against-

JDP Mechanical, Inc.,
Second Third-Party Defendant-Respondent.

[And a Third Third-Party Action]

---

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

Ahmutty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for JDP Mechanical, Inc., respondent.

Murphy & Higgins LLP, New Rochelle (Richard S. Kaye of counsel), for Star-Delta Electric, LLC, respondent.

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for Par Specialty Contracting Corp., respondent.

---

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 11, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability under Labor Law § 240(1) as against defendants Lincoln Center for the Performing Arts, Inc. and Lincoln Center Development Project Inc. (together, Lincoln Center) and Integrated Building Controls, Inc. (IBC), granted defendant JDP Mechanical, Inc.'s (JDP) motion for summary judgment dismissing the complaint and all cross claims against it, denied Lincoln Center and the City's motion for summary judgment on their cross claims for contractual indemnification against JDP, and granted third-party defendant Star-Delta Electric, LLC's motion for summary judgment dismissing Lincoln Center and the City's cross claims for contractual indemnification against it, unanimously modified, on the law, to deny JDP's motion for summary judgment as to the common-law negligence cause of action and the cross claims for common-law and contractual indemnification and contribution against it, to reinstate JDP's third third-party action, and to grant Lincoln Center and the City's cross motion to the extent of awarding them conditional summary judgment on their contractual indemnification

claim against JDP, and otherwise affirmed, without costs.

Plaintiff testified that the ladder she stood on inexplicably wobbled beneath her, causing her to fall and be injured, and there is no evidence in the record from which it could reasonably be inferred that she was the sole proximate cause of her injuries (*see Harrison v V.R.H. Constr. Corp.*, 72 AD3d 547 [1st Dept 2010]).

The record does not support a finding that JDP was a statutory agent for purposes of Labor Law § 240(1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292-293 [2003]). JDP's contract with Lincoln Center Development Project Inc. (Development) limited its responsibilities and potential liability to the work it was hired to perform and/or oversee, which did not include plaintiff's work; plaintiff's work was performed under a separate contract between Development and IBC. Nor is there evidence that JDP controlled the means and methods of plaintiff's work or that it assumed overall authority to correct unsafe work conditions at the project site. However, there is evidence that the temporary flooring on which the ladder rested was a "floating system" and therefore could move, and that JDP was responsible, in part, for selecting the materials for the flooring. Since factual issues exist whether the temporary flooring contributed to plaintiff's accident and whether JDP was

negligent in selecting the materials for the flooring, the cause of action for common-law negligence and the cross claims for indemnification and contribution should not be dismissed as against JDP. There is also evidence that Development approved the installation of the flooring. Thus, Lincoln Center and the City are entitled to conditional summary judgment on their contractual indemnification claim against JDP.

Star-Delta is not contractually obligated to indemnify Lincoln Center and the City for claims arising out of any negligence on its part. While Star-Delta's subcontract with IBC incorporates the "General Conditions" of IBC's contract with Development, which include an indemnification provision, it does not contain an express agreement by Star-Delta to indemnify Lincoln Center and the City (*see Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243 [1st Dept 2001]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8715 Susan Lax, et al., Index 105299/11
Plaintiffs-Appellants,

-against-

Design Quest N.Y. Ltd., et al.,
Defendants-Respondents.

---

Law Office of Jack M. Platt, New York (Neal R. Platt of counsel), for appellants.

Alonso, Andalkar, Small, Toro & Facher, P.C., New York (Joan Toro of counsel), for respondents.

---

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 25, 2012, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to reinstate the claim for breach of contract and allow plaintiffs to replead the fraud claim insofar as it is based on the allegations of fraudulent billing, and otherwise affirmed, without costs.

Given that plaintiffs' alleged oral contract was formed after execution of the parties' written agreement, it did not fall within the parol evidence rule (*see Marine Midland Bank-S. v Thurlow*, 53 NY2d 381, 387 [1981]). Nor was it barred as an oral modification to the parties' contract, as that contract contained no clause prohibiting oral modification (*see* General Obligations Law § 15-301). Nor was dismissal supported by the documentary

evidence. Defendants produced a work permit submitted by one "DL Restoration" indicating it was doing renovation work at plaintiffs' premises. However, even if DL Restoration was performing that work, it does not dispositively preclude that they also performed the additional construction and renovation work at issue (*see United States Trust Co. of N.Y. v Gill & Duffus*, 189 AD2d 655 [1st Dept 1993]).

Plaintiffs' fraud in the inducement claim was based on the alleged misrepresentation by defendants of their expertise and licensing. This claim was properly dismissed as duplicative of the breach of contract claims that alleged defective and deficient work (*see Nastro Contr. v Agusta*, 217 AD2d 874, 875 [3d Dept 1995]).

Plaintiffs' claim that defendants used the contract as a cover for a fraudulent billing scheme states a fraud claim separate from the contract claim (*see e.g. Mitchell Maxwell & Jackson, Inc. v US Realty & Inv. Co.*, 2010 NY Slip Op 31901U (Sup Ct, NY County 2010). However, plaintiffs fail to specify which invoices are inflated. Therefore, the claim lacks the particularity required by CPLR 3016 (*cf. MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287 [1st Dept 2011]). However, plaintiffs should be given leave to replead this part of their complaint, since the claim is otherwise meritorious on its

face.

Finally, plaintiffs' allegations of a run-of-the-mill commercial dispute, involving only these parties, does not rise to the standard necessary to recover punitive damage (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8716 Arelie Flores, an Infant by Her Mother and Natural Guardian, Silvia Hernandez, et al., Plaintiffs-Respondents, Index 350662/09

-against-

Cathedral Properties LLC, et al., Defendants,

171 East 102nd LLC, Defendant-Appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

The Frankel Law Firm, New York (Michael Stewart Frankel of counsel), for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 6, 2012, which, insofar as appealed from, in an action for personal injuries allegedly caused by lead-based paint, denied the motion of defendant 171 East 102nd LLC (171) for summary judgment dismissing the complaint and all cross claims as against it, with leave to renew upon completion of discovery, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

171 established its entitlement to judgment as a matter of law. 171 submitted evidence showing that it did not own the subject building until May 2009, which was approximately 10 years

after the youngest infant plaintiff was allegedly injured and after all of the infant plaintiffs were over the age of seven (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646-647 [1996]; *Duarte v Community Realty Corp.*, 42 AD3d 480 [2d Dept 2007]; *see also Hanlan v Parkchester N. Condominium, Inc.*, 32 AD3d 799 [1st Dept 2006]).

Plaintiffs' opposition failed to raise a triable issue of fact. Although plaintiffs submitted the affidavit of the infant plaintiffs' grandmother, who averred that she was the tenant of record and that she told 171's property manager in July or August 2010 that there were other young children (not parties to this action) living in the subject apartment and that the paint in her unit was chipping and peeling. However, the record is devoid of evidence that she notified 171 that children under the age of seven were residing in her apartment prior to the filing of the complaint (*see Andrade v Wong*, 251 AD2d 609, 610 [2d Dept 1998]).

Contrary to plaintiffs' contention, raised for the first time on appeal, Multiple Dwelling Law § 78, which imposes a duty on landlords to keep their premises in a safe condition, does not require a different result. Plaintiffs failed to prove that the asserted breach caused infant plaintiffs' injuries by submitting an expert's affidavit or any medical evidence that demonstrated that the infant plaintiffs were exposed to lead by visiting the

subject apartment after 171 purchased the building (*see Juarez*, 88 NY2d at 644).

Furthermore, 171's motion for summary judgment should not have been denied in order to complete discovery. Plaintiffs have failed to show that essential facts may emerge upon further discovery; nor have they offered an evidentiary basis to suggest that further discovery may lead to relevant evidence *(see e.g. Auerbach v Bennett*, 47 NY2d 619, 636 [1979]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8717 SSM Realty Group, LLC, Index 108147/10
Plaintiff-Appellant,

-against-

20 Sherman Associates, LLC, et al.,
Defendants-Respondents.

_____

Fred L. Seeman, New York, for appellant.

Altschul & Altschul, New York (Mark M. Altschul of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 5, 2012, which, to the extent appealed from, denied plaintiff's motion for summary judgment striking defendants' eighth, ninth and tenth affirmative defenses and declaring that Article 9.5 of defendant 20 Sherman Associates, LLC's Operating Agreement is null and void and that plaintiff is the manager of the LLC, unanimously affirmed, with costs.

The Operating Agreement states, "Any controversy or claim arising out of or relating to this Agreement shall be finally resolved by arbitration." Contrary to plaintiff's claim, defendants did not waive the right to arbitrate by merely serving

an answer and opposing plaintiff's motion (*see e.g. Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 67 [2007]; *Braun Equip. Co. v Borelli Assoc.*, 220 AD2d 311 [1st Dept 1995]; *Two Cent. Tower Food v Pelligrino*, 212 AD2d 441, 442 [1st Dept 1995]).

Plaintiff does not contend that public policy precludes arbitration of whether it is the manager of the LLC; hence, at a minimum, the second cause of action should be arbitrated. The first cause of action (seeking a declaration that Article 9.5 of the Operating Agreement is null and void) must be arbitrated because it "go[es] to the validity of the substantive provisions of [the] contract" (*see Two Cent. Tower*, 212 AD2d at 442). The issue whether an anti-dissolution provision in an LLC's operating agreement violates public policy does not fall into the categories of matters that cannot be arbitrated (*see generally Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 345-346 [1985]; *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 630-631 [1979]; *Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39, 44 [1st Dept 2003]).

Having correctly declined to strike defendants' arbitration-related affirmative defenses and having found that the arbitration clause in the Operating Agreement applies to the instant dispute, the motion court should not have discussed the

merits of the dispute after declining to make the declarations sought by plaintiff (*see Sprinzen*, 46 NY2d at 632; *Merrill Lynch*, 1 AD3d at 43; CPLR 7501).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8718-
8719 Index 600804/04

Union Carbide Corporation,
Plaintiff-Respondent,

-against-

Affiliated FM Insurance Company,
et al.,
Defendants,

Columbia Casualty Company, et al.,
Defendants-Appellants.

---

Ford Marrin Esposito Witmeyer & Gleser, LLP, New York (Catherine B. Altier of counsel), for Columbia Casualty Company and Continental Casualty Company, appellants.

Litchfield Cavo LLP, New York (Edward Fogarty, Jr., and Brian M. Reid of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Argonaut Insurance Company, appellant.

Proskauer Rose LLP, Chicago, IL (Steven R. Gilford of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

---

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 4, 2011, which granted plaintiff's motion for partial summary judgment striking defendant Argonaut Insurance Company's defense that there should be no insurance coverage because plaintiff expected or intended the bodily injury claims that resulted from exposure to its asbestos products, and denied Argonaut's motion for summary judgment on the same issue, unanimously affirmed, with costs.

Plaintiff met its burden of establishing that the damages at issue were the result of an "occurrence" and thus that defendant's policy provided coverage (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220 [2002]). Indeed, the record supports plaintiff's contention that, although it was aware of some risk involved in the utilization of asbestos, at all times relevant to this appeal, it believed that its asbestos products could be used safely under the right conditions. Plaintiff also offered, as further proof of any lack of intent, evidence that it published regulatory information in trade periodicals and provided information regarding the dangers of asbestos, as well as guidance concerning its proper usage, to its clients and potential customers (*see Santoro ex rel. Santoro v Donnelly*, 340 F Supp 2d 464, 486 [SD NY 2004] [New York law presumes that users will heed warnings provided with a product]). In addition, plaintiff presented evidence that, during the relevant time period, the federal government shared plaintiff's belief that asbestos could be used safely and, to that end, promulgated regulations designed to control, monitor and record asbestos usage — but, importantly, did not ban it.

Since plaintiff established coverage, the burden shifted to defendants to show that, pursuant to the policy's exclusion,

plaintiff intended the damages (*see Consolidated Edison*, 98 NY2d at 220; *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649 [1993]). Defendants have failed in this regard. Defendants asserted that plaintiff intended the damages because it knew that asbestos would cause injuries and that claims would be filed against it. The record, however, shows that plaintiff was merely aware that asbestos could cause injuries and that claims could be filed. Plaintiff's "calculated risk" in manufacturing and selling its products despite its awareness of possible injuries and claims does not amount to an expectation of damage (*Continental Cas.*, 80 NY2d at 649).

Defendants' collateral estoppel argument based on a California jury verdict also fails. The nature of the jury instructions in the California case renders it impossible to discern exactly which facts, or acts of plaintiff, played a part in the jury's decision, or upon exactly which portion of the jury instruction (i.e., malice, oppression or fraud) the jury based its punitive damages award. As such, defendants cannot show an "an identity of issue which has necessarily been decided in the

prior action and is decisive of the present action" (*Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]).

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

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8720 The People of the State of New York, Respondent, Ind. 2559/06

-against-

Ronald Pilgrim, Defendant-Appellant.

---

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

---

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered May 20, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 22 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. The eyewitness testimony of defendant's young son was extensively corroborated.

The court properly exercised its discretion in conducting certain proceedings on an ex parte, in camera basis (*see* CPL 240.90[3]; *People v Contreras*, 12 NY3d 268, 273 [2009]). The principal result of these proceedings was the issuance of protective orders (*see* CPL 240.50) that delayed disclosure of the

People's intention to call defendant's son as a witness. The delay was appropriate under the circumstances of the case, and, in any event, disclosure was made before the juncture set forth in CPL 240.45 for disclosure of witness statements. Defendant was not prejudiced by the ex parte nature of the proceedings. He was not deprived of any opportunity to impeach any witness concerning material matters revealed ex parte, including issues regarding his son's mental condition. When it was revealed that defendant's son had been seeing a therapist, defense counsel recognized that she could subpoena his therapy records, but she elected not to do so.

Defendant did not preserve his constitutional claims concerning the ex parte proceedings, or any of his constitutional and nonconstitutional claims regarding medical evidence, the prosecutor's summation, or the court's acceptance of the jury's verdict. We reject defendant's argument that the latter claim involved a mode of proceedings error exempt from preservation requirements (*see People v Williams*, 16 NY3d 480 [2011]; *see also People v Rodriguez*, 276 AD2d 326 [1st Dept 2000], *lv denied* 96 NY2d 733 [2001]; *People v Perez*, 236 AD2d 298 [1997]) We decline to review these claims in the interest of justice. As an

alternative holding, we reject each of these claims on the merits.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8721 In re Alexis T.,
Petitioner-Respondent,

-against-

Vanessa C.-L.,
Respondent-Appellant.

---

Lisa H. Blitman, New York, for appellant.

Randall S. Carmel, Syosset, for respondent.

Daniel R. Katz, New York, attorney for the child.

---

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 15, 2010, which denied respondent-appellant's motion to dismiss the paternity proceeding on the grounds of equitable estoppel, and ordered DNA paternity testing of petitioner, respondent, the child and respondent's husband, unanimously affirmed, without costs.

The court properly determined that the child's best interests warranted denial of respondent's motion (*see* Family Ct Act § 532 [a]; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]; *Matter of L. Pamela P. v Frank S.*, 59 NY2d 1, 5 [1983]). The record shows that respondent has at all times recognized petitioner as the biological father of the child and had supported and allowed the child to develop a relationship with petitioner. However, a few years after the child's birth,

respondent terminated the child's access to petitioner due to concerns about petitioner's lifestyle — concerns that she had ignored up until that point. Based on the foregoing, the court properly determined that dismissal of the paternity proceeding was not in the child's best interests, as it would sever the already developed relationship between the child and petitioner (*cf*. *Matter of Shondel J.*, 7 NY3d at 328). By contrast, a finding of paternity in favor of petitioner would allow petitioner to reestablish his relationship with, and support of, the child. A finding in favor of petitioner should not affect respondent's husband's relationship with the child, as he would remain free to continue to love and support the child.

The court providently exercised its discretion in denying respondent's application for an adjournment to obtain her husband's testimony (*see Matter of Anthony M.*, 63 NY2d 270, 283 [1984]). Neither the husband's counsel nor respondent's counsel had informed the court that the husband would be unavailable on the last day of the hearing. Nor had respondent's counsel made any efforts to obtain the husband's presence. Moreover, there was no showing that the proposed testimony would be favorable to

respondent (*id*. at 284). Indeed, it was a stipulated fact that respondent and her husband were married at the time of the child's birth, and the husband's good relationship with the child, about which he would purportedly have testified, does not change the equities in this case.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8722-
8723 Index 650517/12

In re Richard P. Nespola,
Petitioner-Respondent,

-against-

The Management Network Group, Inc.,
Respondent-Appellant,

American Arbitration Association,
Respondent.

_____

Husch Blackwell LLP, Kansas City, MO (Jeffrey D. Hanslick of the bars of the States of Missouri, Kansas, and Illinois, admitted pro hac vice, of counsel), for appellant.

Paul Hastings LLP, New York (Zachary D. Fasman of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Charles Edward Ramos, J.), entered August 13, 2012, and order, same court and Justice, entered on or about August 1, 2012, which denied respondent-appellant's motion for summary judgment, granted petitioner's petition and motion to stay arbitration in Kansas, declared that New York is the appropriate location for arbitration, and ordered the parties to proceed to arbitration in New York, unanimously reversed, on the law, without costs, the motion for summary judgment granted, the petition and motion to stay arbitration denied, and this hybrid CPLR article 75/declaratory judgment proceeding dismissed.

Where, as here, the parties have agreed to arbitrate their disputes and to be bound by respondent American Arbitration Association's (AAA) rules, judicial review of interim determinations regarding locale is generally unavailable (*Matter of D.M.C. Constr. Corp. v Nash Steel Corp.*, 41 NY2d 855 [1977] [*revg* 51 AD2d 1040, 1040-1043 [2d Dept 1976] on dissenting opinion of Shapiro, J.; *see also E.B. Michaels v Mariforum Shipping*, 624 F2d 411, 414 [2d Cir 1980]). Indeed, judicial review in these cases is confined to a limited inquiry as to whether the venue determination complied with a minimum constitutional standard of fair dealing, or, in "extreme cases," whether the venue determination was made in bad faith (*D.M.C.*, 51 AD2d at 1043 [Shapiro, J., dissenting]; *Aerojet-General Corp. v Am. Arbitration Assn.*, 478 F2d 248, 251 [9th Cir 1973]).

Here, the AAA's venue determination complied with a minimum constitutional standard of fair dealing. Indeed, the parties were given an opportunity to be heard on the locale, they agreed to be bound by AAA's determination of its own rules, and the AAA interpreted its rules to permit it to determine the appropriate locale (*see Dan River, Inc. v Cal-Togs, Inc.*, 451 F Supp 497, 501-502 [SD NY 1978]; *see also York Research Corp. v Landgarten*, 927 F2d 119, 123 [2d Cir 1991]).

There was no evidence that this was an "extreme" case where

the venue determination was made by the AAA in bad faith. The evidence in the record demonstrated that the AAA made its determination after careful consideration of the parties' arguments. The correctness of the AAA's determination is not a proper concern for the court, and it was improper for the Supreme Court to speculate as to the AAA's reasoning (*Aerojet*, 478 F2d at 252). Moreover, the record does not support the Supreme Court's finding that respondent made misleading statements to the AAA. In any event, even if respondent made misleading statements, petitioner was given an opportunity to respond to those statements, and his responses were before the AAA.

Contrary to petitioner's contention, "traditional venue transfer principles" are inapplicable where, as here, the parties have agreed to arbitrate. Indeed, venue here is a matter of the parties' agreement (*see Dan River*, 451 F Supp at 502; *Natl. Network of Accountants Inv. Advisors, Inc. v Gray*, 693 F Supp 2d 200 [ED NY 2010]).

Nor was there any basis for Supreme Court to intervene on equitable grounds or based on the doctrine of unconscionability. There is no claim here that the parties' agreement was

procedurally or substantively unconscionable when made (*cf. Brower v Gateway 2000*, 246 AD2d 246, 253-254 [1st Dept 1998]). Nor did the AAA's determination render the agreement unconscionable.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8724 Roopnarine Lall, Index 21763/04
Plaintiff,

Jean Ramsaroop Lall,
Plaintiff-Respondent,

-against-

Danny Ali, et al.,
Defendants-Appellants,

Wieslaw Kalemba,
Defendant-Respondent.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Litman & Litman, P.C., East Williston (Jeffrey Litman of counsel), for Jean Ramsaroop Lall, respondent.

Law Offices of Karen L. Lawrence, Tarrytown (David Holmes of counsel), for Wieslaw Kalemba, respondent.

_____

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered February 1, 2011, which, to the extent appealed from as limited by the briefs, denied defendants Ali and Hassan's motion for summary judgment dismissing plaintiff Jean Ramsaroop Lall's claim of serious injury of a nonpermanent nature under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted, and, upon a search of the record, defendant Kalemba's motion for summary judgment dismissing Jean Ramsaroop Lall's complaint as against him is granted. The Clerk is directed to enter judgment in defendants'

favor dismissing Jean Ramsaroop Lall's complaint.

The record demonstrates that plaintiff Jean Ramsaroop Lall did not sustain a serious injury of a nonpermanent nature (Insurance Law § 5102[d]). Defendants' radiologist opined that plaintiff's alleged lumbar spine injuries were degenerative and not related to the accident, and, in opposition, plaintiff failed to refute that evidence (*see Reyes v Esquilin*, 54 AD3d 615 [1st Dept 2008]). Even if the radiologist and physician's unaffirmed reports plaintiff submitted are properly considered, they are insufficient to raise an issue of fact. The radiologist did not address causation, and the physician's opinion was too general (*see Winters v Cruz*, 90 AD3d 412 [1st Dept 2011]).

Because plaintiff cannot meet the serious injury threshold against the appealing defendants, she cannot meet it against the nonappealing defendant (*see Lopez v Simpson*, 39 AD3d 420 [1st Dept 2007]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8725 In re 338 West 46th Street Realty, LLC,
Petitioner-Appellant,

-against-

The State of New York State Division of Housing and Community Renewal, et al.,
Respondents-Respondents,

George Morton, et al.,
Respondents-Intervenors-Respondents.

Index 106941/09

---

Daniel R. Miller, Brooklyn, for appellant.

Gary R. Connor, New York (Aida P. Reyes of counsel), for The State of New York State Division of Housing and Community Renewal and Leslie Torres, respondents.

Bierman & Palitz, LLP, New York (Mark H. Bierman of counsel), for George Morton, Robyn Davis, Edward Eisele, Robert Leonardi and Ute Schmid, respondents.

---

Order and judgment (one paper), Supreme Court, New York County (Emily Jane Goodman, J.), entered June 11, 2010, which to the extent appealed from as limited by the briefs, denied the petition to annul respondents' determination, dated March 27, 2009, denying petitioner's applications for an administrative determination of the legal regulated rents for five apartments, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination had a rational basis, given the

pendency of a Civil Court proceeding involving the rent overcharges issue (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Under all of the relevant circumstances, the doctrine of "primary jurisdiction" (*Sohn v Calderon*, 78 NY2d 755 [1991]) does not support petitioner's argument that respondent agency abused its discretion in determining that it was appropriate for the Civil Court to resolve the rent overcharge issue, especially since the agency made the determination, not the court.

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: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8729 The People of the State of New York, Respondent, Ind. 7570/02

-against-

Harold Jones, Defendant-Appellant.

---

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

---

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered July 27, 2010, resentencing defendant to a term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision (PRS) was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

Defendant's challenge to the voluntariness of the underlying 2003 guilty plea may not be raised on this appeal from the judgment of resentence (*see People v Jordan*, 16 NY3d 845 [2011]; *see also* CPL 450.30[3]), and defendant is not entitled to specific performance of his original plea bargain, which did not

mention a term of PRS (*see People v Harper*, 85 AD3d 617 [2011], *lv denied* 17 NY3d 903 [2011]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8730 In re AREP Fifty-Seventh, LLC, Petitioner-Respondent, Index 101320/12

-against-

PMGP Associates, L.P., Respondent-Appellant.

_____

Alexander Ferrini, III, New York, for appellant.

Quinn McCabe LLP, New York (Christopher P. McCabe of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Donna M. Mills, J.), entered March 9, 2012, which granted the petition seeking a license, pursuant to Real Property Actions and Proceedings Law § 881, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

In this proceeding, petitioner sought a license directing that respondent remove a five-foot section of a sidewalk construction bridge, properly placed in front of petitioner's property, to allow petitioner to erect a crane for its construction project. The court erred in granting the petition. RPAPL 881, the means by which a landowner seeking to make improvements or repairs to its property may seek a license to enter an adjoining landowner's premises when those improvements or repairs cannot be made without such entry, has no application

here. Petitioner did not seek a license for "entry" onto respondent PMGP's "premises" (*id.*). In any event, petitioner failed to explain why "the work could not otherwise be performed" (*Matter of Lincoln Spencer Apts., Inc. v Zeckendorf-68th St. Assoc.*, 88 AD3d 606, 606 [1st Dept 2011]), since the crane could have been relocated.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8731 The People of the State of New York, SCI 65774C/07
Respondent,

-against-

Jose Santiago,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered August 17, 2009, convicting defendant, after a jury trial, of overdriving, torturing, and injuring animals (Agriculture and Markets Law § 353), and sentencing him to a conditional discharge, a $1000 fine, and 30 days of community service, unanimously 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 rejection of defendant's

explanation of his reason for forcefully throwing his dog to the floor, causing injury.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8732 Felix Arrufat, Index 310153/10
Plaintiff-Respondent,

-against-

Dalipchand Bhikhi,
Defendant-Appellant.

_____

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L Gokhulsingh of counsel), for appellant.

Yalkut & Israel, Bronx (Arlen S. Yalkut of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth Thompson, J.), entered January 11, 2012, which, after a traverse hearing, found that personal jurisdiction over defendant was properly obtained, unanimously affirmed, without costs.

The hearing court's determination turned largely on credibility, the resolution of which is entitled to deference on appeal (*see Matter of Brown v Rosario*, 272 AD2d 205 [1st Dept 2000]; *Cadle Co. v Nunez*, 43 AD3d 653, 655 [1st Dept 2007]), and we find no reason to disturb the court's determination here. At the traverse hearing, the process server testified that a man named Elliason, who was present at the two-family home owned by defendant, said that he was a co-tenant with defendant, and accepted service. While defendant denied any knowledge of Elliason, and claimed that the two residences at this address

were leased to two other people, his assertion merely created an issue of credibility. While it was in defendant's power to produce the leases to these other people, he did not do so. That defendant produced documentation indicating that he had another address, did not conclusively establish that he did not reside at the two-family home where Elliason accepted service under CPLR 308(2).

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8733 The People of the State of New York, Respondent, Ind. 1779/09

-against-

Julio Cardova, Defendant-Appellant.

---

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

---

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 2, 2010, as amended September 17, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of four years, unanimously affirmed.

Defendant's legal sufficiency 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 also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The fact that defendant was acquitted of selling drugs but convicted of possessing drugs with intent to sell does not warrant a different

conclusion (*see People v Rayam*, 94 NY2d 557 [2000]; *People v Johnson*, 73 AD3d 578 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]; *see also People v Conyers*, 48 AD3d 362, 363 [2008], *lv denied* 10 NY3d 933 [2008]).

Defendant's claims relating to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 6, 2012

CLERK

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8734-
8735N-
8735NA Santa Roman,
Plaintiff-Appellant,

-against-

Sullivan Paramedicine, Inc.,
et al.,
Defendants-Respondents,

Arie Nudel,
Defendant-Appellant,

Deborah L. Master,
Defendant.

- - - - -

Santa Roman,
Plaintiff-Appellant,

-against-

Sullivan Paramedicine, Inc.,
et al.,
Defendants-Respondents,

Deborah L. Master,
Defendant.

Index 309025/09

---

Edelman & Edelman, PC, New York (David M. Schuller of counsel), for Santa Roman, appellant.

Law Offices of Stewart H. Friedman, Garden City (Robert F. Horva of counsel), for Arie Nudel, appellant/respondent.

Pillinger Miller Tarallo, LLP, Elmsford (Terri S. Hall of counsel), for Sullivan Paramedicine, Inc. and Holli N. Schoonmaker, respondents.

---

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered August 15, 2011, which denied plaintiff's motion for a special trial preference, unanimously affirmed, without costs. Order, same court and Justice, entered April 9, 2012, which denied plaintiff's motion to renew her motion for a special trial preference, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and, upon renewal, the motion granted. Order, same court and Justice, entered March 30, 2012, which granted defendants Sullivan Paramedicine, Inc. and Holli N. Schoonmaker's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

This action seeks recovery for injuries, including a disabling lower back injury, which required surgery, allegedly sustained by plaintiff in a motor vehicle accident. CPLR 3403(a)(3) provides that special trial preferences shall be granted in "an action in which the interests of justice will be served by an early trial." While plaintiff failed to meet her burden in initially moving for a special trial preference on the ground of destitution (*see Martinkovic v Chrysler Leasing Corp.*, 29 AD2d 636 [1st Dept 1968]), the deficiencies were cured on renewal, with the submission of a further affidavit from her pain management specialist, an affidavit from her neurosurgeon, and

the submission of documents evidencing her monthly household income and expenses.

As plaintiff has now shown that her disabling injury prevents her from working, that she exhausted her no-fault coverage, that she receives food stamps, and that she lacks the resources to pay for necessary medical care, the grant of a special trial preferences is warranted (*see Patterson v Anderson Ave. Assoc.*, 242 AD2d 430 [1st Dept 1997]; *Thompson v City of New York*, 140 AD2d 232 [1st Dept 1988]). The affidavit of plaintiff's surgeon was properly submitted on renewal as his prescription for physical therapy was first made only two days before the original motion's return date, and the other additional evidence should have been considered as a matter of substantive fairness (*see* CPLR 2221[e]; *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [1st Dept 2001]).

As to the motion for summary judgment, the moving defendants, the owner and the operator of an ambulance which was the stopped, lead vehicle in the multi-car, rear-end collision at issue here, are entitled to a presumption of negligence against the offending vehicle (*see Francisco v Schoepfer*, 30 AD3d 275 [1st Dept 2006]). However, plaintiff and defendant-appellant raised triable issues of fact as to whether the ambulance driver operated her vehicle negligently and proximately caused the

accident, with evidence that included plaintiff's testimony that the ambulance driver only noticed that the truck in front of her had stopped when she looked up from a mobile communication device shortly before the crash, and the ambulance driver's admission that there was enough room to move around the obstacle in the road instead of stopping abruptly at the end of an entrance ramp to a highway (*see Tutrani v County of Suffolk*, 10 NY3d 906 [2008]; *Evans v Fox Trucking*, 309 AD2d 618 [1st Dept 2003]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8736 The People of the State of New York, Respondent, Ind. 1837/10

-against-

Steven Madsen, 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 (John B.F. Martin of counsel), for respondent.

---

Judgment, Supreme Court, Bronx County (Arlene D. Goldberg, J.), rendered January 6, 2011, as amended February 8, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of eight years, unanimously affirmed.

Defendant's claim that the evidence was legally insufficient to disprove his agency defense is unpreserved and, we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In this observation sale case,

defendant's agency defense rested primarily on defendant's testimony, which was materially contradicted by his written statement to police and his grand jury testimony, and there is no basis for disturbing the jury's credibility determinations.

Defendant's challenges to the prosecutor's summation are unpreserved, notwithstanding his postsummation objections (*see People v Romero*, 7 NY3d 911, 912 [2006]). Moreover, to the extent these belated objections included a request for a curative instruction regarding a misstatement of law made by the prosecutor, the court gave an instruction addressing this issue, but omitting language requested by defendant. Since defendant failed to request any further relief, the court's curative action "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; *see also People v Whalen*, 59 NY2d 273, 280 [1983]). We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent there were any improprieties in the summation, the court's curative actions during the summation,

as well as its final charge to the jury, were sufficient to prevent any prejudice.

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

ENTERED: DECEMBER 6, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Abdus-Salaam, Feinman, JJ.

8738 In re Advocates for Children of New York, Inc., et al., Petitioners-Appellants, Index 107312/11

-against-

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

---

Milbank, Tweed, Hadley & McCloy LLP, New York (Jed M. Schwartz of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

---

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered June 14, 2012, denying the petition seeking, inter alia, to compel respondents to disclose documents requested by petitioners pursuant to the Freedom of Information Law (FOIL), and to enjoin respondents from further extending their time to respond to petitioners' FOIL requests, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners failed to exhaust their administrative remedies with respect to FOIL Request Number 6762. Petitioners' administrative appeal was filed more than 30 days after respondents' letter denying the request (*see Matter of McGriff v Bratton*, 293 AD2d 401 [1st Dept 2002]). Petitioners' argument

that this letter did not constitute a denial of their request because it lacked a notice of the right to appeal, is unavailing since the letter clearly stated that it was the "final response" to the request.

Although respondents failed to meet their burden to show that petitioners' claims pertaining to FOIL Request 6890 were barred by the statute of limitations, given that a postmarked envelope showed that the denial of the administrative appeal was mailed on February 24, 2011, and the proceeding was commenced less than four months later, on June 22, 2011 (*see Matter of LaSonde v Seabrook*, 89 AD3d 132, 139-140 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012]; CPLR 217), petitioners failed to exhaust their administrative remedies. Petitioners' administrative appeal was premature, given that respondents' efforts to respond to the request within the applicable time limitations were ongoing (*see Matter of Braxton v Commissioner of N.Y. City Police Dept.*, 283 AD2d 253 [1st Dept 2001]).

The court also properly denied petitioners' request for a permanent injunction enjoining respondent from extending its time to respond to any future FOIL requests. Such relief is

unavailable under the circumstances (*see* CPLR 7806; *see e.g. Matter of Harvey v Hynes*, 174 Misc 2d 174, 177 [Sup Ct, Kings County 1997]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8739 John J. Ortiz, Jr., an Infant by his Mother and Natural Guardian Carmen Felix, et al., Plaintiffs-Appellants,

-against-

The City of New York, Defendant-Respondent.

Index 20120/07

The Law Office of Judah Z. Cohen, PLLC, New York (Judah Z. Cohen of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 11, 2012, granting defendant's motion for summary judgment and dismissing the complaint, unanimously affirmed, without costs.

In this action for personal injuries sustained by the then 13-year old plaintiff while playing basketball on an outdoor court at a park owned by defendant City of New York, defendant made a prima facie showing of entitlement to judgment as a matter

of law based on the doctrine of assumption of risk (*see Morgan v State of New York*, 90 NY2d 471, 482-486 [1997]). The risks assumed by the infant plaintiff included those created by the gaps in the playing surface. In opposition, plaintiff failed to raise a triable issue of fact.

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8740 Maggi Peyton, etc., et al., Index 111379/11
Plaintiffs-Respondents,

-against-

PWV Acquisition LLC, et al.,
Defendants-Appellants.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Grad & Weinraub LLP, New York (Catharine A. Grad of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 9, 2012, which, to the extent appealed from as limited by the briefs, directed plaintiffs-tenants to post a bond in the amount of $75,000 as an undertaking for preliminary injunctive relief, unanimously affirmed, with costs.

The evidence demonstrated that defendants attempted to modify or substitute an ancillary parking service to which the plaintiffs were entitled, without requisite approval from the Division of Housing and Community Renewal (DHCR). The landlord defendants (PWV defendants) nonetheless entered into a contract to sell the subject open-air parking lot for development purposes to defendant Jewish Home Lifecare, Manhattan, prior to obtaining the requisite approval from the DHCR. In light of the foregoing, and the standard delays that were shown to be attendant to

applications by defendants for regulatory approval of proposed building construction, the $75,000 undertaking required by the court, pending final resolution of plaintiffs' action for declaratory and injunctive relief, was rationally related to defendants' potential damages should the preliminary injunction later prove to have been unwarranted (*see generally 3636 Greystone Owners v Greystone Bldg.*, 4 AD3d 122, 123 [1st Dept 2004]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, JJ.

8744 Eric Frankel, etc., Index 603449/07
Plaintiff-Respondent,

-against-

Vernon & Ginsburg, LLP, et al.,
Defendants-Appellants.

_____

Gordon & Rees, LLP, New York (Bran C. Noonan of counsel), for appellants.

Heller, Horowitz & Feit, P.C., New York (Maurice W. Heller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about October 20, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment insofar as it sought dismissal of plaintiff's first cause of action, for legal malpractice, unanimously affirmed, without costs.

The IAS court properly declined to dismiss the legal malpractice cause of action. Defendants failed to sustain their burden on summary judgment of demonstrating that plaintiff would be unable to prove one of the essential elements of his claim (*see Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011]). On the contrary, the record demonstrated that plaintiff's decedent had viable causes of action for breach of the warranty of habitability and nuisance against defendants in the underlying

action (*see 61 W. 62 Owners Corp. v CGM EMP LLC,* 77 AD3d 330 [1st Dept 2010], *affd in part, mod in part* 16 NY3d 822 [2011]; *Misra v Yedid*, 37 AD3d 284, 285 [1st Dept 2007]). Furthermore, the record demonstrated that plaintiff's decedent might have recovered legal fees, which alone exceeded the amount of the settlement in this matter (Real Property Law § 234).

In light of the foregoing, we need not reach defendants' remaining contentions.

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8745 The People of the State of New York, Respondent, Ind. 786/10

-against-

John James, Defendant-Appellant.

---

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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

---

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 15, 2010, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's credibility determinations. The circumstances of defendant's use of an altered MetroCard supported the inference that he possessed the card with the requisite knowledge and intent. The evidence supports the People's version of the facts, that defendant was aware that a MetroCard with a bent magnetic strip is readily capable of being

used for the purpose of selling rides to other persons, and defendant was intentionally taking advantage of that situation in making such sales.

To the extent defendant is claiming that the petit larceny count of the indictment was facially insufficient, that claim is without merit because the count spelled out the elements of that crime with the specificity required for an indictment (*see* CPL 200.50), and defendant is essentially challenging the underlying factual basis for that charge (*see People v Ogunkmekan*, 95 AD3d 701 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]; *People v Greeman*, 49 AD3d 463, 464 [2008], *lv denied* 10 NY3d 934 [2008])). To the extent defendant is challenging the legal sufficiency of the evidence, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it without merit. Defendant's position at trial was that he was guilty of petit larceny, admitting that he sold "swipes" that

rightfully belonged to the Transit Authority (*compare People v Hightower*, 18 NY3d 249 [2011]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8746-
8747 Index 102230/08

Victor Weingarten,
Plaintiff-Respondent,

-against-

S&R Medallion Corp., et al.,
Defendants-Appellants,

David Beier,
Defendant.

_____

Evan L. Gordon, New York, for appellants.

Cobert, Haber & Haber, Garden City (Eugene F. Haber of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 12, 2011, which denied, in part, defendants S&R Medallion Corp., Shimon Wolkowicki a/k/a Sam Wolkowicki, Rhoda Ryklin and Jonathan Zuhovitzky's motion for summary judgment dismissing the complaint in its entirety, and order, same court and Justice, entered July 17, 2012, which, to the extent appealable, denied defendants' motion to renew the motion for summary judgment, unanimously affirmed, with costs.

The 1997 agreement between the parties did not contain a clause setting forth when or how the profit sharing program which was the subject of the agreement was to terminate, but it did allow for "renewal" of the program pursuant to different terms.

The motion court properly refused to grant summary judgment since defendants failed to demonstrate that its new arrangement with Banco Popular was not a renewal of the previous program, as contended by plaintiff.

The 1997 agreement did not contain a "definitions" section and key terms used in paragraph six (which provided the calculation for Net Income), such as "Other Program Income" and "customer," were left undefined. Under the circumstances, the motion court also properly refused to grant summary judgment on the issue of whether the Backup and Management Fees currently being collected by defendants from Banco Popular, constituted "Other Program Income," a portion of which might rightly belong to plaintiff.

Defendants' argument that the court should ignore the term "Other Program Income" is unavailing (*see JFK Holding Co. LLC v City of New York*, 98 AD3d 273, 276-277 [1st Dept 2012] ["(no) reading of the contract should () render any portion meaningless"]), as are defendants' other contract construction

arguments, since the 1997 agreement cannot, by itself, definitively dispose of the issues raised by plaintiff.

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

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8748 In re Jeovonni G.,

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

Victoria V.,
Respondent-Appellant,

Catholic Guardian Society
and Home Bureau,
Petitioner-Respondent,

Commissioner of Social Services
of the City of New York,
Petitioner.

---

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

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

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

---

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about January 12, 2012, which, following a fact-finding determination that respondent mother had permanently neglected the subject child, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The court providently exercised its discretion in denying respondent's request for an adjournment, given that she had more

than three months to communicate with her counsel and prepare for the fact-finding hearing (*Matter of Steven B.*, 6 NY3d 888, 889 [2006]).

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[3][g][i], [7][a]). There is clear and convincing evidence that the agency exercised diligent efforts to reunite respondent and the child by preparing a service plan, scheduling visits between respondent and the child, referring respondent to parenting skills classes, and conducting meetings and case conferences with respondent (*see Matter of Jamal N. [Shanikqua N.]*, 89 AD3d 537, 538 [1st Dept 2011]). There is also clear and convincing evidence that, despite the agency's diligent efforts, respondent failed to visit the child on a regular and consistent basis, complete a parenting skills program, and permit the agency to obtain information concerning her medication (*id.*).

A preponderance of the evidence supports the finding that it is in the child's best interests to terminate respondent's parental rights so as to free the child for adoption (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows

that the child has resided with his foster parents since placement, and that they have been able to care for his special needs.

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8749 Jerry Eaderesto, Index 104954/08
Plaintiff-Respondent,

-against-

22 Leroy Owners Corp, et al.,
Defendants-Appellants.

---

Flynn, Gibbons & Dowd, New York (Lawrence A. Doris of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for respondent.

---

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 21, 2012, which denied defendants' motion to vacate a self-executing order of preclusion against them, and for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of vacating the preclusion order, and otherwise affirmed, without costs.

The motion court erred in denying that part of defendants' motion to vacate the self-executing preclusion order (*see generally Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). The record shows that defendants provided a reasonable excuse for their default and subsequent 45-day delay in complying with the order, as the handling attorney in a two-partner firm had been stricken with a serious illness. Defendants also demonstrated a meritorious defense to the action by presenting evidence that

plaintiff remained in the shower in defendants' building despite knowing that the water was too hot.

However, the court correctly found that triable issues of fact exist as to whether defendants negligently failed to maintain the mixer on the building's boiler in a reasonably safe condition, and had notice of excessively hot water in the premises (*see Simmons v Sacchetti*, 15 NY3d 797 [2010]; *Sawchuk v 335 Realty 58 Assoc.*, 44 AD3d 532 [1st Dept 2007]). There is also a triable issue as to whether plaintiff's conduct of remaining in the shower to shave, with the water pointed away, when he knew the water to be overly hot, and becoming burned when he fainted from an unrelated illness, constituted a superseding cause of his injuries (*see Simmons* at 798*; Sawchuck* at 532).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8751 The People of the State of New York, Ind. 315/09
Respondent,

-against-

Michael Lynch,
Defendant-Appellant.

---

Joseph F. DeFelice, Kew Gardens, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David C. Bornstein 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 (Maxwell Wiley, J.), rendered on or about October 26, 2011,

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.

ENTERED: DECEMBER 6, 2012

CLERK

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

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8752 In re Diana Hrisinko, Index 110191/08
Petitioner-Appellant,

-against-

Board of Education of the City School District of the City of New York, et al.,
Respondents-Respondents.

_____

The White Rose Group, LLC, Jackson Heights (Jesse C. Rose of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Joan B. Lobis, J.), entered August 19, 2011, which denied petitioner's motion for an order holding respondents in contempt of an order, same court (Marilyn G. Diamond, J.), entered March 3, 2010 (the prior order), unanimously dismissed, without costs.

The 2011 order is not appealable as of right, as it was "made in a proceeding against a body or officer pursuant to [CPLR] article 78" (CPLR 5701[b][1]; *see Matter of Storman v New York City Dept. of Educ.*, 95 AD3d 776, 777 [1st Dept 2012], *appeal dismissed* 19 NY3d 1023 [2012]). We decline to grant petitioner leave to appeal from that order in the interest of justice.

Were we to review the 2011 order, we would find that the

motion court providently exercised its discretion in holding that respondents should not be held in contempt (*see Storman*, 95 AD3d at 777; *Richards v Estate of Kaskel*, 169 AD2d 111, 122 [1st Dept 1991], *lv dismissed in part, denied in part* 78 NY2d 1042 [1991]). Although the prior order declared that petitioner had "been a tenured teacher of 'Commercial Art'" since September 2, 2005, it did not reference the "Commercial Art" position, or any other specific teaching assignment, in its mandate, instead directing only that petitioner be reinstated "to her position as a tenured teacher." "Any ambiguity in the court's mandate should be resolved in favor of the would-be contemnor" (*Kaskel*, 169 AD2d at 122). Accordingly, we find that, in reinstating petitioner to the position of tenured teacher and assigning her to serve as an absent teacher reserve, respondents did not violate any "clear

and unequivocal" mandate (*Storman*, 95 AD3d at 777 [internal quotation marks omitted]; *see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8753 Pedro Melo, Index 309086/09
Plaintiff-Appellant,

-against-

Jose Grullon,
Defendant-Respondent.

---

Frekhtman & Associates, Brooklyn (Andrew Green of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondent.

---

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 3, 2011, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of serious injury resulting in "permanent consequential" or "significant" limitations and fracture, and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a serious injury resulting in either a "permanent consequential" or a "significant" limitation of use of his lumbar spine by submitting an affirmation by a neurologist who examined plaintiff and found a full range of motion of the lumbar spine,

and diagnosed him with a resolved lumbar sprain/strain (*see Baez v Boyd*, 90 AD3d 524 [1st Dept 2011]).

In opposition, plaintiff raised an issue of fact by submitting an MRI report by his radiologist, who found a disc herniation at L4-5; a report by a physician who opined that a subsequent MRI of the lumbar spine revealed an acute compression fracture of the endplate at L-3 and disc herniations at L4-5 and other levels; his chiropractor's affidavit showing range of motion limitations contemporaneous with the accident; and affirmations by three physicians who found continuing limitations and opined that these limitations were permanent and that the lumbar injuries were directly caused by the accident (*see Thompkins v Ortiz*, 95 AD3d 418 [1st Dept 2012]). This record does not support plaintiff's contention that he suffered a permanent loss of use of his lumbar spine (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]).

Defendant established prima facie that plaintiff did not sustain a 90/180-day injury by submitting plaintiff's bill of

particulars and deposition testimony acknowledging that he was confined to bed and home for only a week; in opposition, plaintiff failed to raise an issue of fact (*see Hospedales v "John Doe,"* 79 AD3d 536 [1st Dept 2010]).

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8754 The People of the State of New York, Respondent, Ind. 3339/08

-against-

Edwin Medina, Defendant-Appellant.

---

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

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

---

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 5, 2009, convicting defendant, after a jury trial, of attempted assault in the first degree and three counts of assault in the second degree, and sentencing him to an aggregate term of 3½ 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 determinations concerning credibility of witnesses, intent and accessorial liability.

The court properly exercised its discretion in instructing the jury that it should not consider self-defense or justification. Although there was evidence supporting a justification charge, and the court had agreed to deliver one,

both defendant and his jointly tried codefendant expressly withdrew their requests for such a charge. The court reasonably anticipated, given the evidence and the parties' arguments, that the jury might speculate about such a defense (*see People v Rodriguez*, 52 AD3d 399 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]). Defendant did not preserve his claim that the language of the challenged instruction undermined his lack-of-intent defense and was otherwise prejudicial, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant's remaining argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8755 Maria Giomar Arteaga, Index 400514/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

---

Gullo & Associates, LLC, Brooklyn (Michael Gullo of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

---

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about September 16, 2011, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for leave to amend the complaint to include New York City Transit Authority (NYCTA) as a defendant and to deem her notice of claim on NYCTA timely served, unanimously affirmed, without costs.

Plaintiff served a timely notice of claim on defendant City alleging that she was injured when she slipped and fell on a platform in a subway station. The motion court correctly granted defendant's motion since it demonstrated that the subway station is leased to the NYCTA, and it is an out-of-possession landlord and not liable for negligence on the part of NYCTA (*see McGuire v City of New York*, 211 AD2d 428 [1st Dept 1995]). There is no

prohibition against moving for summary judgment based on an unpleaded defense where the opposing party is not taken by surprise and does not suffer prejudice as a result (*see Rosario v City of New York*, 261 AD2d 380 [2d Dept 1999]). Nor is defendant equitably estopped from relying on the defense (*see Neil v City of New York*, 95 AD3d 608, 609 [1st Dept 2012]).

Plaintiff's cross motion seeking relief as to nonparty NYCTA was properly denied since plaintiff never served a notice of claim on the NYCTA and the statute of limitations of one year and 90 days has expired (*see* Public Authorities Law § 1212[2]; General Municipal Law § 50-e[5]; *Pierson v City of New York*, 56 NY2d 950 [1982]; *Singleton v City of New York*, 55 AD3d 447 [1st Dept 2008]).

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: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8756 In re Daryl Whitley, Index 104522/11
Petitioner-Appellant,

-against-

New York County District
Attorney's Office, et al.,
Respondents-Respondents.

Simpson Thacher & Bartlett LLP, New York (Juan A. Arteaga of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered September 15, 2011, which denied the petition seeking, among other things, to annul respondents' determination denying petitioner's Freedom of Information Law (FOIL) request for certain documents concerning the investigation and prosecution of a crime for which petitioner was convicted, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination was not affected by an error of law (*see* CPLR 7803[3]; *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Respondents correctly determined that disclosure of the requested documents would have

interfered with petitioner's then-pending criminal appeal and any subsequent proceedings in the underlying criminal case (*see* Public Officers Law § 87[2][e][i]; *Matter of Moreno v New York County Dist. Attorney's Off.*, 38 AD3d 358, 358 [1st Dept 2007], *lv denied* 9 NY3d 801 [2007]). Respondents generically identified the kinds of documents sought and the risks of disclosing the documents (*see Matter of Lesher v Hynes*, 19 NY3d 57, 67 [2012]; *Matter of Legal Aid Socy. v New York City Police Dept.*, 274 AD2d 207, 214 [1st Dept 2000], *lv dismissed in part, denied in part* 95 NY2d 956 [2000]). We reject petitioner's contention that respondents were required to set forth particularized findings about whether the FOIL exemption at issue applied to each responsive document (*see Lesher*, 19 NY3d at 67; *Legal Aid Socy.*, 274 AD2d at 213-214).

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

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

ENTERED: DECEMBER 6, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8759-
8760-
8761 In re Michelle L., and Others,

Children Under Eighteen
Years of Age, etc.,

Aisha L.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Graham Morrison of counsel), for respondent.

Andrew J. Baer, New York, attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 6, 2011, which, following a fact-finding determination that respondent mother had neglected the subject children, released one of the children to her maternal grandmother, on consent, and the other child to respondent, on consent, with supervision for 12 months by petitioner agency and under certain conditions, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]), including the

caseworker's testimony that respondent permitted her husband to babysit for one of the children even though the husband had thrown lighter fluid on respondent and had threatened to set her and the stepchildren on fire, had "poked" one of the stepchildren with a knife when the child tried to intervene in a fight between respondent and the husband, and used marijuana in the home (*see Nicholson v Scoppetta*, 3 NY3d 357, 371-372 [2004]). There is no basis to disturb the court's credibility determinations (*see Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784 [1st Dept 2012]).

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

ENTERED: DECEMBER 6, 2012

CLERK