SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 27, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Sweeny, Moskowitz, Freedman, Richter, JJ.

8089 The City of New York, Index 400543/11
Plaintiff-Appellant,

-against-

Endurance American Insurance Company,
Defendant-Respondent.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 18, 2011, which denied the City's motion for summary judgment declaring that Endurance American Insurance Company is obligated to defend it in the underlying personal injury action and to reimburse it for its incurred attorneys' fees and expenses, unanimously reversed, on the law, without costs, the motion granted, and it is so declared, and the matter is remanded for a determination of the attorneys' fees and expenses to be reimbursed.

The commercial general liability insurance policy obtained from Endurance by nonparty Daidone Electric, Inc., the City's traffic signal maintenance contractor, covers the City as an additional insured for liability arising out of ongoing operations performed for it by Daidone. The underlying complaint alleges that the plaintiff's injuries arose out of the negligence of both the City and Daidone in maintaining the "traffic and pedestrian control devices" at the intersection where the plaintiff was struck by a car. These allegations "give[] rise to the reasonable possibility of recovery under the policy" (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; *Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 669-670 [1981]; *Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989]). In any event, additional facts that potentially bring the claim within the policy's coverage are provided by Daidone's contract with the City, the police accident report, and Daidone's repair records (*see Fitzpatrick*, 78 NY2d at 66).

We reject Endurance's contention that the record evidence establishes that Daidone's operations at the subject intersection

had been completed and thus were no longer ongoing at the time of the accident (*compare New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d 540 [1st Dept 2007]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8098 The People of the State of New York, Respondent,

-against-

Ronald Gardner, Defendant-Appellant.

Ind. 6344/09

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

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

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 14, 2010, convicting defendant, after a jury trial, of burglary in the third degree, petit larceny, criminal possession of stolen property in the fifth degree and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

The court properly exercised its discretion in permitting the People to introduce three trespass notices pertaining to prior shoplifting incidents in order to establish that defendant knew he was legally prohibited from entering Macy's stores. Defendant failed to preserve his specific contention that a single notice would have sufficed to prove defendant's knowledge

of that prohibition, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The number of notices was highly probative of defendant's awareness of the prohibition, particularly since defense counsel had indicated that this would be a contested issue (*see People v Cox*, 63 AD3d 626 [1st Dept 2009], *lv denied* 13 NY3d 859 [2009]). The probative value of the notices outweighed any potential prejudice, which the court minimized by way of thorough limiting instructions (*see People v Cornelius*, 89 AD3d 595 [1st Dept 2011], *lv granted* 18 NY3d 993 [2012]). In any event, any error was harmless in light of the overwhelming evidence of defendant's guilt. Defendant's remaining arguments regarding the trespass notices are likewise unpreserved and without merit.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly permitted limited inquiry into two prior convictions, which constituted a small portion of

defendant's extensive record. These convictions were probative of defendant's credibility and were not unduly prejudicial, notwithstanding any resemblance to the instant offense.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8099 In re Malik B.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 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 robbery in the second degree and grand larceny in the fourth degree, and placed him on probation for a period of 18 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 and identification. The evidence established that appellant

participated in the robbery by reaching into the victim's pockets.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Among other things, the seriousness of the offense and appellant's highly unsatisfactory school record warranted an 18-month period of supervision.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8100 The People of the State of New York, SCI 3542/03
Respondent, Ind. 3606/08

-against-

Anthony Smith,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Neal Ross, J. at plea; Ellen Coin, J. at sentencing), rendered on or about October 6, 2009,

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: SEPTEMBER 27, 2012

CLERK

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

Corrected Order - October 4, 2012

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8104 DMDB Adults, Inc., et al., Index 103977/09
Plaintiffs-Appellants,

-against-

Bank of America Corp., etc.,
Defendant-Respondent.

_____

Law Office of Barbara A. Matarazzo, White Plains (Barbara A. Matarazzo of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (Mark Zeichner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 7, 2011, which granted defendant Bank of America Corp. d/b/a Bank of America (BOA)'s motion for leave to reargue, and upon reargument, granted that portion of BOA's motion to dismiss DMDB Adults, Inc. and DMDB Kids, Inc's (DMDB) remaining claims for checks cashed after December 2007 on the grounds that they were time barred, denied plaintiffs' cross motion for summary judgment, and granted BOA's motion to dismiss plaintiffs' third cause of action for conversion, unanimously affirmed, without costs.

Plaintiffs both maintained corporate checking accounts at defendant BOA in New Jersey. DMDB's principals, Dean Hecker and William Hecker, were the only authorized signatories on the accounts. DMDB claims that its then bookkeeper, Debra Haber,

without DMDB's knowledge or consent, illegally diverted and took possession of various checks which she made payable to "cash." According to DMDB, BOA wrongfully paid Haber the sum of $780,226.33 on forged and fraudulent checks issued from the account of DMDB Adults during the period from January 9, 2005 through December 23, 2008, and the sum of $171,457.76 on forged and fraudulent checks issued from the account of DMDB Kids during the period September 7, 2005 through December 23, 2008, without making any inquiry.

DMDB's cause of action based on conversion was properly dismissed, as an action for conversion may not be brought by an issuer or drawer (*see* NJSA 12A:3-420[a]; NJSA 12A:3-105[c]). Since DMDB was identified on the checks as the one ordering payment, by the plain language of this provision, it would be a "drawer," whether or not it authorized the checks to be drawn (*see* NJSA 12A:3-103[3]; *300 Broadway Healthcare Ctr., L.L.C. v Wachovia Bank, N.A.*, 425 NJ Super 33, 38 [App Div 2012]).

All remaining claims against BOA that were not otherwise barred by the Uniform Commercial Code's one year statute of limitations (NJSA 12A:4-406[f]) were also properly dismissed. It is undisputed that DMDB failed to perform its statutory duty of promptly reviewing all bank statements and checks to determine whether there were any irregularities (NJSA 12A:4-406[c]). Thus, the Repeater Rule (NJSA 12A:4-406[d]) would bar DMDB's remaining

claims for forgeries by the same wrongdoer, Haber, unless it could prove that BOA failed to exercise ordinary care in paying the checks (NJSA 12A:4-406[e]) .

This DMDB failed to do, as it offered only the speculative opinion of its principal that BOA was in the best position to determine forgeries. On the other hand, the ordinary care standard specifically does not require bank examination of checks or signatures (*see* NJSA 12A:3-103[a][7]), and BOA submitted the affidavits of two bank employees and a banking expert, attesting that all checks were automatically evaluated by computer at the time of deposit, and that BOA's check processing practices and procedures were consistent with those of all other large money center banks in the metropolitan New York region.

DMDB's argument that they should not be held to the practices outlined in BOA's Customer Agreement because they did not receive a copy of that agreement was not raised in response to the motion for leave to reargue, and in any event, the documentary evidence established that DMDB received a copy of the Customer Agreement

with respect to the DMDB Kids account, and that the Customer Agreement is the same for all accounts opened with BOA.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8105 Trump Securities, LLC, et al., Index 602809/09
Plaintiffs-Respondents,

-against-

The Purolite Company, et al.,
Defendants-Appellants,

Watch Hill Partners LLC,
Defendant.

Kasowitz Benson Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (Yoav Griver of counsel), for respondents.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 12, 2011, awarding plaintiffs $690,485.72 as against defendants The Purolite Company and The Brotech Corporation, and bringing up for review an Order, same court and Justice, entered June 30, 2011, which, inter alia, granted plaintiffs summary judgment on their breach of contract claim against defendants Purolite and Brotech, unanimously affirmed, with costs.

Plaintiffs seek fees allegedly due pursuant to an agreement for financial advisory services entered into between Convertible Capital, Watch Hill Properties and Purolite in connection with

Purolite's efforts to refinance its then-existing debt. The agreement identified Watch Hill as the lead advisor, requiring it to "manage and coordinate" the refinancing process and entitling it to a larger share of the fee than Convertible Capital, which was identified as the "Co-Manager."

Plaintiffs established that Convertible Capital performed its duties under the agreement, including contacting potential lenders, regularly communicating with Watch Hill on the refinancing process, and reviewing one of the ultimate lender's term sheets. While plaintiffs' recovery here is substantial given the more limited nature of the services Convertible Capital provided as compared to Watch Hill, the agreement accounted for the differing roles in its payment structure. That Watch Hill ultimately settled for less than it was owed pursuant to the agreement does not bind plaintiffs in any way or provide a basis

for the Court to alter the terms of the parties' agreement.

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: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8106 In re Isis S.C.,

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

Doreen S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about January 5, 2010, which, upon a fact-finding determination that respondent mother suffers from a mental illness, terminated her parental rights to the subject child and transferred custody and guardianship of the child to the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Petitioner agency presented clear and convincing evidence that respondent is presently and for the foreseeable future unable to provide proper and adequate care for her child by

reason of mental illness (*see* Social Services Law § 384-b[4][c], [6][a]). The agency's submissions included unrebutted expert testimony that respondent suffers from a long-standing schizoaffective disorder and major depression that renders her unable to care for the special-needs child, as well as the expert's detailed report, which was prepared after lengthy interviews with respondent and review of her mental health records (*see Matter of Michele Amanda N. [Elizabeth N.]*, 93 AD3d 610, 611 [1st Dept 2012]; *Matter of Paulidia Antonis R. [Lidia R.]*, 93 AD3d 502 [1st Dept 2012]). Although the expert stated that respondent's mental condition was presently "in remission," he cited respondent's long-standing pattern of intermittent compliance with medication and treatment, which rendered it "highly likely" that her symptoms would return and she would again become delusional.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8107 The People of the State of New York, Ind. 2911/08
Respondent,

-against-

Wilfredo Molina,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Order, Supreme Court, Bronx County (John S. Moore, J.), entered on or about October 1, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant's correct point score is 110 or 115, there is no basis for a discretionary downward departure to level two (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]). The underlying offense was a predatory sex crime against a minor, and its seriousness outweighs the mitigating factors asserted by defendant.

We have considered and rejected defendant's remaining claims.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8111 The People of the State of New York, Ind. 690/08
Respondent,

-against-

Ernest Wilson,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered on or about February 9, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8112 Kristen Rhea Van Liew, Index 100297/09
Plaintiff-Respondent,

-against-

The Heights Management Company, LLC, et al.,
Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellants.

Law Office of Robert F. Danzi, Westbury (Christine Coscia of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 22, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff, a tenant in a building owned and managed by defendants, was assaulted by an intruder who gained access to the building when she opened the door for him and he subsequently pushed his way into her apartment while she was attempting to lock her deadbolt. The complaint should have been dismissed, as plaintiff failed to submit any evidence of a defect in security that caused her assault. Indeed, she admittedly opened a

perfectly functioning lock to allow her assailant access to the building. Under such circumstances, summary judgment is appropriate (*see Elie v Kraus*, 218 AD2d 629, 630-631 [1st Dept 1995], *lv dismissed* 88 NY2d 842 [1996]; *compare Mason v U.E.S.S. Leasing Corp.*, 274 AD2d 79 [1st Dept 2000], *affd* 96 NY2d 875 [2001]).

With respect to plaintiff's allegations that her apartment door had been disabled by defendants' porter, plaintiff admitted that one of the two locks on her door was disabled with her express permission in order for her to gain access to her apartment after locking herself out. Plaintiff refused to allow the locksmith to replace the lock that day, citing the cost. In any event, the apartment door's deadbolt lock was functional and would have kept out the intruder had he not been close behind plaintiff as a result of her allowing him entrance into the building.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8113 The People of the State of New York, Ind. 7219/92
Respondent,

-against-

Sheldon Parker,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (A. Kirke Bartley, J.), rendered October 24, 2011, resentencing defendant, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

In a resentencing proceeding under CPL 440.46, the court

properly made a de novo determination of whether defendant was previously convicted of a violent felony (*see People v Dais*, 19 NY3d 335 [2012])).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8114 In re Angelo P.,

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

Jose C.,
Respondent-Appellant,

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

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 20, 2010, which, insofar as appealed from, upon a fact-finding determination that respondent Jose C. neglected the subject child, placed the child in the custody of the Commissioner of Social Services, unanimously affirmed, without costs.

The preponderance of the evidence supported the finding that respondent neglected the subject child (*see* Family Court Act § 1012[f][i][B]). Two caseworkers testified that the mother reported that the 20-month-old child was found severely bruised after being left alone with respondent, the mother's paramour,

and this was confirmed upon physical examination (*see Matter of Portret M.*, 47 AD3d 424 [1st Dept 2008], *lv denied* 10 NY3d 714 [2008]). Respondent failed to sustain his burden of offering a satisfactory explanation for the injuries (*Matter of Kevin R.*, 193 AD2d 351, 351-352 [1st Dept 1993], *appeal dismissed* 82 NY2d 735 [1993]).

Respondent was a person legally responsible for the child within the meaning of Family Court Act § 1012(g). The evidence established that respondent saw the child four times a week, and acted as the functional equivalent of a parent, by bathing and feeding the child, changing his diaper, and acting as a father figure to him (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414 [1st Dept 2012]). Moreover, because respondent was legally responsible for the child, he was required to seek medical

attention for the child's injuries when they were discovered (*see Matter of Samantha M.*, 56 AD3d 299 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8115 Equity Now, Inc., Index 104044/07
Plaintiff-Respondent,

-against-

Wall Street Mortgage Bankers, Ltd., doing business as Power Express Mortgage Bankers,
Defendant-Appellant,

Power Express Mortgage, Ltd., et al.,
Defendants.

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for appellant.

Stewart Occhipinti, LLP, New York (Charles A. Stewart III of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered September 9, 2011, after a nonjury trial, inter alia, awarding plaintiff damages as against defendant Wall Street Mortgage Bankers, Ltd. (Power Express), unanimously affirmed, with costs.

The evidence at trial established that defendant Trejo was aided and abetted by Power Express in misappropriating trade secrets and breaching his fiduciary duty to his former employer by physically taking the lists that were plaintiff's property, refusing to return them in response to plaintiff's demands, and

using plaintiff's proprietary information on behalf of Power Express (*see Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-393 [1972], *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

Plaintiff was entitled to damages for the profits it lost as a result of defendant's conduct (*Hertz Corp. v Avis, Inc.*, 106 AD2d 246, 251 [1st Dept 1985]).

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

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8116 Kevin B. Davis, Index 301600/10
Plaintiff-Respondent,

-against-

Prestige Management Inc.,
Defendant-Appellant.

D'Amato & Lynch, LLP, New York (Lloyd J. Herman of counsel), for appellant.

Kevin B. Davis, respondent pro se.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered October 14, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted, without prejudice to plaintiff's commencing a new action in a representative capacity on behalf of the Faile Street Housing Development Fund Corporation Condominium (Faile Condominium) with respect to the common elements and finances.

Plaintiff, who owns a unit at the Faile Condominium, lacks standing to sue individually for injury to the common elements or finances (*see e.g. Leonard v Gateway II, LLC*, 68 AD3d 408, 410 [1st Dept 2009]; *Caprer v Nussbaum*, 36 AD3d 176, 186, 190, 192, 204-205 [2d Dept 2006]). Accordingly, the complaint should be

dismissed to the extent plaintiff claims that defendant performed sloppy repairs on the roof (a common element), that the roof needs further repairs, that the hot water heater, furnace, pumps, and/or building doors need to be repaired or replaced, that pipes that are common elements need to be sealed, that defendant has failed to collect common charges, and that defendant has failed to pay Con Edison (resulting in lack of power in the common areas). However, the dismissal does not preclude plaintiff from commencing a derivative action on the condominium's behalf (*Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 637 [2d Dept 2009]).

Plaintiff's claims against defendant with respect to his individual unit should be dismissed because the condominium's by-laws provide that repairs and replacements to the units are the responsibility of the unit owners. In addition, the contract between defendant and the Faile Condominium appoints defendant the managing agent with respect to the common elements only. Therefore, plaintiff – not defendant – is responsible for the windows, pipes (to the extent they are not a common element), cracked kitchen floor, and radiator covers in his unit.

Contrary to the motion court, we do not find that defendant was in complete and exclusive control of the premises. For

example, it could not make repairs costing more than $2,000 or sue delinquent unit owners for overdue common charges without the condominium's authorization, and all repairs and lawsuits were at the condominium's expense (*see e.g. Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393 [1st Dept 2008]; *Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 555-556 [1st Dept 2011]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8117 The People of the State of New York, Respondent,

-against-

Alias Stone, Defendant-Appellant.

Ind. 1299/08

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Cravath, Swaine & Moore LLP, New York (Leah Friedman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 13, 2010, convicting defendant, after a jury trial, of two counts of burglary in the second degree, and sentencing him, as a second felony offender, to concurrent terms of seven years, unanimously affirmed.

The court properly permitted defendant to proceed pro se. Defendant argues that even if he was competent to stand trial, mental illness rendered him incapable of representing himself.

Defendant relies principally on *Indiana v Edwards* (554 US 164 [2008]), in which the Supreme Court held that "the Constitution *permits* States to insist upon representation by counsel for those competent enough to stand trial...but who still

suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves" (*id*. at 178 [emphasis added]). The holding in *Edwards*, however, was expressly limited to circumstances in which a court *denies* a trial-competent defendant's application to proceed pro se on the ground that mental illness nevertheless renders the defendant incapable of self-representation. We need not determine whether there are circumstances in which a court is *required* to insist upon representation by counsel for such a defendant because the record here does not reflect that defendant suffered from such a mental incapacity at the time of trial.

Defendant claims that there were numerous indicia that should have alerted the court that he lacked the mental capacity to represent himself. However, most of the information to which defendant refers was the product of mental evaluations that occurred nearly a year after the trial, in assessing his fitness for sentencing. At the application for self-representation and at trial, defendant may have displayed a belligerent or litigious attitude, but this did not necessarily indicate mental incapacity. Nothing within the knowledge of the court at the relevant time suggested that this was one of those extremely "exceptional context[s]" (*Edwards*, 554 US at 176) in which a

defendant who is competent to stand trial is nonetheless incompetent to proceed pro se.

Defendant's performance during the time he was representing himself did not suggest such an incapacity. Defendant's opening statement, though brief, was cogent and appropriate. While his cross-examination of the People's main witness may have been less than artful, there is no basis for attributing this to mental illness, as opposed to the lack of skill demonstrated by many pro se defendants.

The court properly exercised its discretion in denying defense counsel's mistrial motion, made after defendant abandoned his pro se defense and resumed representation by counsel. As noted, the record does not support the assertion that defendant seriously damaged his own case during the time he was representing himself. In any event,"[i]neptitude, inherent in

almost any case of self-representation, is a constitutionally protected prerogative." (*People v Schoolfield*, 196 AD2d 111, 117 [1st Dept 1994], *lv dismissed* 83 NY2d 858 [1994], *lv denied* 83 NY2d 915 [1994]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8118 The People of the State of New York, Respondent, Ind. 927/08

-against-

Richard Webb, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered on or about December 17, 2009, as amended April 15, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8119N In re Nationwide Insurance Company, Index 260012/11
Petitioner-Respondent,

-against-

Julie Morgan, et al.,
Respondents,

Dairyland Insurance Company,
Respondent-Appellant.

Cottrell Solensky & Semple, P.A., Elmsford (Ebony L. Riley of counsel), for appellant.

Law Offices of Epstein, Gialleonardo & Rayhill, Elmsford (Karen Queenan of counsel), for Nationwide Insurance Company, respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 11, 2011, which granted petitioner Nationwide Insurance Company's petition to, among other things, permanently stay an uninsured motorist arbitration, unanimously affirmed, without costs.

Respondent Dairyland Insurance Company attempted to cancel respondent Turner's automobile insurance policy, issued in Vermont, for nonpayment of the premium by mailing the notice of cancellation via the United States Postal Service's (USPS) 31-digit Intelligent Mail barcode (IMB) for sending bulk mail. Vermont statute requires that a notice of cancellation for

nonpayment of premium "be by certified mail or certificate of mailing" (8 Vt Stat Ann § 4226). Although the statute does not require that a certificate of mailing be on a USPS-provided form (*see Loiselle v Barsalow*, 180 Vt 531, 533, 904 A2d 1168, 1172 [2006]), Dairyland's "register of mail" (i.e., its self-generated documentation to prove compliance with 8 Vt Stat Ann § 4226) failed to constitute a certificate of mailing as required by the statute. Indeed, there is no indication that the notice of cancellation was ever received by the USPS, since there were no stamps, postmarks, or signature of a recipient postal employee on Dairyland's register (*cf. Loiselle*, 180 Vt at 533, 904 A2d at 1172). The affidavits submitted by Dairyland also failed to demonstrate that the register and the IMB tracking record for the notice of cancellation comply with the certificate of mailing requirement (*cf. Loiselle*, 180 Vt at 532-533, 904 A2d at 1171-1172). Accordingly, Dairyland failed to show that Turner's

insurance policy was properly cancelled before the subject accident.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8120 [M-3886] In re Babak Saadatmand, Petitioner, Index 12131/08

-against-

Hon. La Tia W. Martin, etc., et al., Respondents.

Babak Saadatmand, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. La Tia W. Martin, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: SEPTEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8121 In re Diane Word, Index 124015/92
[M-3075] Petitioner,

-against-

Hon. Sherry Klein Heitler, etc.,
Respondent.

Diane Word, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew H. Meier of counsel), for respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8122 The People of the State of New York, Ind. 3071/03
Respondent,

-against-

Anonymous,
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 (Yuval Simchi-Levi of counsel), for respondent.

Order, Supreme Court, New York County, (Charles H. Solomon, J.), entered on or about November 29, 2011, which, upon remand from this Court (87 AD3d 443 [1st Dept 2011]), adhered to its prior order denying defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see e.g. People v Gonzalez*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]). Defendant's extensive criminal record and 30 prison

disciplinary infractions outweighed the positive factors cited by defendant (*see e.g. People v Murray*, 89 AD3d 567 [1st Dept 2011], *lv denied* 18 NY3d 960 [2012]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8123 In re Nicholas A.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about September 22, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility, in which it accepted the victim's account of the incident.

The court properly exercised its discretion when it denied

appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The aggravating circumstances of the offense as well as appellant's poor academic, attendance and disciplinary record at school warranted a 12-month period of supervision.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8124 In re Helen Bookhard, Index 400870/11
Petitioner,

-against-

Gladys Carrion, as the Commissioner for the New York State Office of Children and Family Services, et al.,
Respondents.

Irene B. Dimoh, So. Ozone Park, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for respondents.

Determination on behalf of respondent Commissioner of the New York State Office of Children and Family Services, dated March 24, 2011, which after a fair hearing pursuant to Social Services Law § 422(8)(b), denied petitioner's request to amend and seal an indicated report of child maltreatment maintained at the State Central Register of Child Abuse and Maltreatment, and concluded that the report was relevant and reasonably related to the provision of foster care, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of the Supreme Court, New York County [Cynthia S. Kern, J.], entered on or about July 15, 2011) dismissed, without costs.

Petitioner's request to have the indicated report against her amended to state that it was unfounded was properly denied. Respondent's determination was supported by substantial evidence (see *Matter of Nelk v Department of Motor Vehicles*, 79 AD3d 433 [1st Dept 2011]) based on reports from both of petitioner's foster children that she shook them hard as a means of disciplining them when they misbehaved. The record amply supports the determination to credit the children's accounts over that of petitioner.

Substantial evidence also supported the finding that, consistent with the aim of protecting children from abuse or maltreatment, the maltreatment report was relevant and reasonably related to petitioner's provision of foster care.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8125 Phyllis Muriel Stepper, Index 115721/10
Plaintiff-Appellant,

-against-

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

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 27, 2011, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly determined that the City of New York was an improper party to the action (*see e.g. Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008]). The motion court also correctly determined that to the extent plaintiff challenged the unsatisfactory rating she

received following the 2007-2008 school year, those allegations were time-barred (Education Law § 3813[2-b]). To the extent plaintiff sought to challenge the unsatisfactory rating she received in 2009, those allegations are barred as a result of her failure to file a notice of claim (Education Law § 3813[1]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8126 BDCM Fund Adviser, L.L.C., etc., et al., Plaintiffs/Defendants-Appellants, Index 602116/08

-against-

James J. Zenni, Jr., et al., Defendants/Plaintiffs-Respondents.

Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., New York (Robert I. Bodian of counsel), for appellants.

Storch Amini & Munves, PC, New York (Bijan Amini of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 22, 2011, which, to the extent appealed from, denied plaintiffs' motion to amend the complaint to allege facts post-dating the complaint and to add a claim for tortious interference with prospective business relations, dismissed plaintiffs' claims for unfair competition and disparagement/defamation, and denied plaintiffs' motion to review and vacate a referee's order of preclusion, unanimously affirmed, with costs.

Plaintiffs commenced this action in 2008 asserting, among other things, unfair competition and disparagement/defamation against defendants based on allegations that defendants

disseminated marketing materials containing false and disparaging statements about plaintiffs' business. They later sought leave to amend the complaint to add new allegations arising from post-2008 occurrences to buttress their claims, and to add a claim for tortious interference with prospective business relations.

After the IAS court denied plaintiffs' motion to amend the complaint, they commenced a new action in 2011 asserting the proposed tortious interference claim, and claims for unfair competition and defamation based on the post-2008 occurrences. Consequently, we decline to entertain the portion of this appeal that challenges the denial of the motion to amend. We note that the 2011 action has been assigned to the same Supreme Court Justice presiding over the present 2008 action, that the court has made rulings partially dismissing the claims in the 2011 action, and that the parties have filed notices of appeal and cross appeal challenging those rulings.

In view of the foregoing, plaintiffs' instant appeal from the dismissal of the unfair competition and disparagement/defamation claims is moot. Plaintiffs do not dispute that the 2008 complaint fails to state a cause of action for unfair competition and disparagement, but argue only that the affidavits and new allegations submitted with the motion to amend

sufficiently buttress the claims. However, facts that arise post-complaint may not be used to validate an otherwise insufficiently-pleaded complaint. In any event, the affidavit submitted with the opening papers contain only vague and conclusory allegations, and the affidavit submitted with the reply papers was improper (*see Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [1st Dept 2006]). Plaintiffs' failure to plead facts in the 2008 complaint showing that defendants' misconduct defeated a reasonable expectation of a business opportunity with specific investors is fatal to their unfair competition claim (*see DeBonaventura v Nationwide Mut. Ins. Co.*, 419 A2d 942, 947 [Del Ch 1980], *affd* 428 A2d 1151 [Del 1981]; *Agilent Tech., Inc. v Kirkland, C.A.*, 2009 WL 119865, *5, 2009 Del Ch LEXIS 11, *16 [Del Ch 2009]). As to the disparagement/defamation claim, the allegations in the complaint failed to set forth the "particular words complained of" (CPLR 3016[a]), or specify the persons to whom the allegedly defamatory remarks were made, and the dates, times, and places of the statements (*see Bell v Alden Owners*, 299 AD2d 207, 208 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003]).

Given that the unfair competition and disparagement claims were properly dismissed, plaintiffs' appeal from the denial of

their motion to review and vacate the JHO's order precluding plaintiffs from presenting evidence of individuals and entities who failed to invest with plaintiffs due to defendants' misconduct, is moot. In any event, as plaintiffs failed to submit proper interrogatory responses despite multiple conferences and orders from the JHO, the issuance of the order does not constitute an abuse of discretion (*see Fish & Richardson, PC v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]).

We have reviewed plaintiffs' remaining contentions, including that defendants' refusal to remove the "Attorneys' Eyes Only" designation from certain discovery materials prevented plaintiffs from submitting proper interrogatory responses, and find them unavailing.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8127 The People of the State of New York, Respondent, Ind. 1348/06

-against-

Tony Council, Defendant-Appellant.

Joel B. Rudin, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J., at initial severance motion; Bonnie G. Wittner, J., at further severance motion, jury trial and sentencing), rendered February 8, 2007, convicting defendant of conspiracy in the second degree and two counts of criminal sale of a controlled substance in the first degree, and sentencing him to an aggregate term of 30 years to life, unanimously affirmed.

Defendant challenges the sufficiency and weight of the evidence supporting one of his two convictions of first-degree criminal sale of a controlled substance. Defendant did not preserve his sufficiency claim, and we decline to review it in the interest of justice. As an alternative holding, we find that this conviction was based on legally sufficient evidence. We

also find that it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury could have reasonably inferred, from all the surrounding circumstances, that defendant was not merely present at the sale in question, but that his role was to provide security and deter the buyer from attempting to take the drugs by force.

The motion and trial courts properly denied defendant's severance motion, as evidence relating to the acts of his codefendants was admissible against defendant and necessary to prove conspiracy. We reject defendant's argument that the trial evidence undermined the factual basis for joinder. On the contrary, this evidence, and the reasonable inferences to be drawn therefrom, were consistent with the People's theory of joinder.

The fact that the court made three inquiries of the jury foreperson did not deprive defendant of a fair trial. The repeated inquiries were necessary because three separate issues arose during trial as to the foreperson's ability to serve as a fair and impartial juror. We do not find that the repeated questioning was intimidating, or that it caused defendant any prejudice.

Defendant did not preserve any of his remaining claims

regarding the court's inquiries of the foreperson, or his present arguments regarding the discharge of another juror, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8128-
8128A-
8128B In re Louis N.,

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

Dawn O.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Carol Kahn, New York, for appellant.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about June 28, 2011, which, after a fact-finding determination that respondent mother had abused and neglected the subject child, awarded custody of the child to the grandmother, and order, same court and Judge, also entered on or about June 28, 2011, which granted the grandmother's petition for custody of the child, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about June 28, 2011, which, among other things, directed that the mother stay away from the child, except for visitation approved by the grandmother, until June 28, 2012, unanimously

dismissed, without costs, as moot.

The mother failed to preserve her arguments that Family Court issued an unauthorized disposition (*see generally Matter of Toshea C.J.*, 62 AD3d 587 [1st Dept 2009]). Were we to review them, we would find that Family Court appropriately held a consolidated dispositional hearing to resolve the custody and abuse/neglect petitions (*see* Family Ct Act § 1055-b[a]). We would further find that compliance with the Interstate Compact on the Placement of Children (ICPC) was not required because the award of custody to the out-of-state grandmother was made under article 6 of the Family Court Act (*see* Family Ct Act § 1055-b[a]), to which the ICPC does not apply (*see* Merril Sobie, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Court Act § 651 at 123).

A preponderance of the evidence at the consolidated dispositional hearing showed that extraordinary circumstances existed supporting an award of custody to a nonparent and that it was in the best interests of the child to award custody to the grandmother (*see* Family Ct Act § 1055-b[a]). The child, who is learning disabled and educationally delayed, is now 10 years old, and for 2½ years he has been living in the loving and stable home of his grandparents, who meet all of his needs and who have

addressed the health and emotional problems from which he suffered at the time of his arrival. By contrast, the mother, who was absent from court proceedings for over a year, has not demonstrated any remorse or insight into her parental shortcomings.

Because the order of protection has expired, the appeal from the order is moot (*see Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 520 [1st Dept 2012]; *Matter of Diallo v Diallo*, 68 AD3d 411 [1st Dept 2009], *lv dismissed* 14 NY3d 854 [2010]). Were we to reach the merits, we would find that Family Court providently exercised its discretion in issuing the order, given the evidence of abuse and neglect (*see* Family Ct Act § 1056[1]).

We have considered the mother's remaining contentions, including her argument that the grandmother did not have standing to file a custody petition, and we find them unavailing.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8129 The People of the State of New York, Respondent, SCI 2987/08 SCI 3263/09

-against-

Justin L. Guzman, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay 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 (Eugene Oliver, Jr., J.), rendered on or about October 8, 2009,

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: SEPTEMBER 27, 2012

CLERK

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

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8130 Eastco Building Services, Inc., Index 102322/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Kelly D. MacNeal, New York (Lauren L. Esposito of counsel), for appellant.

Milman Labuda Law Group PLLC, Lake Success (Joseph M. Labuda of counsel), for respondent.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered January 10, 2011, which, to the extent appealed from as limited by the briefs, denied defendant's motion for dismissal of the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

It is well-settled that "[a] cause of action for breach of a construction contract accrues upon substantial completion of the work" (*Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 204 [1st Dept 2007], *appeal dismissed* 10 NY3d 800 [2008], citing *Phillips Constr. Co. v City of New York*, 61 NY2d 949 [1984]). Plaintiff commenced this action more than six years after completing its work, and therefore the claim for breach of

contract is untimely and should have been dismissed (CPLR 213[a]). Additionally, the existence of a valid and enforceable written contract between the parties covering the subject matter in dispute precludes recovery in quasi-contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8131 In re Christine M.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 25, 2011, which, upon a fact-finding determination that appellant acted in an ungovernable and incorrigible manner, adjudicated her as a person in need of supervision and placed her on probation for 12 months, unanimously affirmed, without costs.

The court's determination was well supported by the evidence adduced at the hearing. Even if appellant's treatment of her mother was an isolated incident, Family Court Act § 712(a) defines a "[p]erson in need of supervision" (PINS) as, among other things, "[a] person less than [18] years of age . . . who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally

responsible for such child's care." The Family Court properly construed the plain statutory language which employs the use of "or" when describing three possible types of PINS behavior, those types being: (1) incorrigible behavior; (2) ungovernable behavior; or (3) habitually disobedient behavior. "Habitually" immediately precedes "disobedient" and, therefore, only qualifies "disobedient" and not "incorrigible" or "ungovernable" (*see* Mckinney's Cons Laws of NY, Book 1, Statutes § 254). Thus, unlike disobedience, incorrigible or ungovernable behavior need not be habitual to serve as a sufficient basis upon which to make a PINS determination (*see e.g. Matter of Daniel I.*, 57 AD3d 666, 667 [2d Dept 2008]; *Matter of Sonya LL.*, 53 AD3d 727, 728 [3d Dept 2008]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8132 The People of the State of New York, Ind. 5314/10
Respondent,

-against-

Louis Linder,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin 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 (Charles Solomon, J.), rendered on or about March 15, 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: SEPTEMBER 27, 2012

CLERK

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

Tom, J.P., Mazzarelli, Saxe, Catterson, JJ.

8133 Katz Park Avenue Corp., et al., Index 104524/05
Plaintiffs-Respondents,

-against-

Bianca Jagger,
Defendant-Appellant,

"John Doe", et al.,
Defendants.

Law Offices of Ryan S. Goldstein, P.L.L.C., Bronx (Ryan S. Goldstein of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondents.

Appeal from order and judgment (one paper), Supreme Court, New York County (Howard G. Leventhal, Special Referee), entered August 16, 2010, deemed an appeal from an amended order and judgment (one paper), same court and Special Referee, entered October 5, 2010, awarding plaintiffs $343,827.36 in attorneys' fees and $246,468 in fair market use and occupancy for the period March 1, 2005 through December 31, 2007, unanimously affirmed, without costs, with respect to the amount of the award and the award of fees incurred in making the attorneys' fee application, and otherwise unanimously dismissed, without costs.

We reject the contention that defendant's failure to appeal

from the original order and judgment warrants dismissal of the entire appeal (*see* CPLR 5517, 2001, 5520[c]). The subsequent sua sponte amendment by the Special Referee to vacate the order and judgment for which defendant had timely filed a notice of appeal contains no substantive change relevant to the issues on appeal. However, the issues defendant now seeks to raise with respect to plaintiffs' *entitlement* to attorneys' fees and fair market rate, rather than last regulated rent use and occupancy, are precluded by the non-appealed prior order of Supreme Court (Doris Ling-Cohan, J.) and our dismissal of the appeal from the amendment of that order. In any event, defendant's arguments lack merit. Our decision in *Oxford Towers Co., LLC v Wagner* (58 AD3d 422 [1st Dept. 2009]), relied upon by defendant, is distinguishable. In that case, we denied attorneys' fees where the agreement was not a lease and the landlord sought rescission of that agreement (*see Matter of Casamento v Juaregui*, 88 AD3d 345, 357-358 [2d Dept 2011]). Defendant never had a right to a regulated rent, so there is no basis for using that amount to determine use and occupancy (*see Weiden v 926 Park Ave. Corp.*, 154 AD2d 308 [1st Dept 1989]).

Plaintiffs were entitled to the fees they incurred in obtaining attorneys' fees (*see 1050 Tenants Corp. v Lapidus*, 52

AD3d 248 [1st Dept 2008]). The amounts awarded for attorneys' fees and for use and occupancy were substantially supported by the record and based on the referee's credibility determinations. Furthermore, the referee drew the appropriate adverse inference against defendant, who failed to testify or present any evidence despite being advised of the need to do so and despite several adjournments to facilitate her appearance before the Special Referee. We note that, upon our own review of the evidence submitted to support the fee award (*see Tige Real Estate Dev. Co., v Rankin-Smith*, 233 AD2d 227, 228 [1st Dept 1996]), we find no basis to disturb the determination.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8134-
8135 The People of the State of New York,
Respondent,

-against-

Rivin K. Favourite, etc.,
Defendant-Appellant.

Ind. 1880/07

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

Rivin Favourite, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered November 4, 2009, as amended December 21, 2009, convicting defendant, after a jury trial, of robbery in the first degree and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 23 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. There was ample evidence of defendant's accessorial liability, including evidence that he

threatened the victims and demanded money.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8138 The People of the State of New York, Respondent, Ind. 3762/08

-against-

Curry Winkfield, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 15, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and reckless endangerment in the first degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, 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 determinations concerning identification and credibility The shooting incident was witnessed by two auxiliary police officers, whose testimony was supported by ballistics evidence linking the gun recovered from the car they saw defendant leave the scene in to shell casings

recovered from the scene of the shooting.

The court properly exercised its discretion in permitting defendant's former girlfriend to testify that, in the months before the shooting, she repeatedly saw defendant in possession of a pistol resembling the one used in the incident. This testimony was relevant to establish identity since it tended to show that defendant had the means of committing the crime (*see e.g. People v Del Vermo*, 192 NY 470, 478-482 [1908]; *People v Hall*, 266 AD2d 160 [1st Dept 1999], *lv denied* 94 NY2d 901 [2000]). "Contrary to defendant's argument, a pattern of crimes employing a unique modus operandi is not the exclusive situation in which uncharged crimes may be probative of identity" (*People v Laverpool*, 267 AD2d 93, 94 [1st Dept 1999], *lv denied* 94 NY2d 904 [2000]). The probative value of this evidence outweighed any prejudicial effect, which the court minimized by way of thorough instructions.

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8139 Wendy Webb-Weber, Index 310286/09
Plaintiff-Respondent,

-against-

Community Action for Human Services, Inc., et al.,
Defendants-Appellants,

Paige C. Bond, et al.,
Defendants.

Bond, Schoeneck & King PLLC, New York (Dennis A. Lalli of counsel), for appellants.

Bergstein & Ullrich, LLP, Chester (Stephen Bergstein of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered February 1, 2011, which, insofar as appealed from, denied defendants Community Action for Health Services, Inc., and David G. Bond's motion to dismiss the first and second causes of action as against them, unanimously reversed, on the law, and the motion granted, without costs. The Clerk is directed to enter judgment in favor of said defendants dismissing the complaint as against them.

We accord plaintiff the benefit of every possible favorable inference. Nonetheless, the complaint fails to state a cause of action under Labor Law § 740, since plaintiff does not identify a

specific law, rule or regulation that defendants purportedly violated (Labor Law § 740[2][a]; *see Connolly v Macklowe Real Estate Co.*, 161 AD2d 520, 522-523 [1st Dept 1990]; *Owitz v Beth Israel Med. Ctr.*, 1 Misc 3d 912[A], 2004 NY Slip Op 50046[U], *3 [Sup Ct, NY County 2004]).

Similarly, the complaint fails to state a cause of action under Labor Law § 741, since it does not cite a "law, rule, regulation or declaratory ruling adopted pursuant to law" that defendants violated (Labor Law § 741[1][d]; *see King v New York City Health & Hosps. Corp.*, 85 AD3d 631, 631 [1st Dept 2011], *lv denied* 17 NY3d 712 [2011]; *see Luiso v Northern Westchester Hosp. Ctr.*, 65 AD3d 1296, 1298 [2d Dept 2009]). The plaintiff also fails to allege that she was an employee within the meaning of the statute, which defines an employee as a "person who performs health care services" for a health care provider (§ 741[1][a]). Plaintiff is a licensed clinical social worker who was chief operating officer of defendant Community Action for Health Services, Inc., when she was terminated in September 2009. She alleges that she "secure[d] prescribed medications," "evaluate[d] the need for and arrange[d] for individual patients' appropriate staffing and treatment," and was "personally involved in ensuring that patients received protective and healthful grooming and

other health-related treatment." These allegations establish that plaintiff "merely . . . coordinate[d] with those who [performed health care services]" (*see Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 91 [2008]; *Phillips v Ralph Lauren Ctr. for Cancer Care & Prevention*, 22 Misc 3d 1128[A], 2009 NY Slip Op 50320[U] [Sup Ct, NY County 2009]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8140 The People of the State of New York, Ind. 2207/09
Respondent,

-against-

Michael Carrington, also known
as Deshawn Donely, also known
as Kali Smickle,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about December 10, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: SEPTEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8141N Ellen Zedeck, et al., Index 103448/11
Plaintiffs-Appellants,

-against-

Derfner Management Inc., et al.,
Defendants-Respondents,

Blair Hall, Inc., et al.,
Defendants.

Stroock & Stroock & Lavan LLP, New York (Ernst H. Rosenberger of counsel), for appellants.

Kaye Scholer LLP, New York (James D. Herschlein of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 24, 2012, which, insofar as appealed from, denied plaintiffs' motion to disqualify Kaye Scholer, LLP, from representing all defendants-respondents concurrently, unanimously reversed, on the law, with costs, and the motion granted.

Plaintiffs, holders of 50% ownership interests in defendant corporations, which own residential properties, allege that Jay Lieberman and the late Harold Derfner committed misappropriation, corporate waste, self-dealing, conversion, and fraud at the expense of the corporations and to the benefit of Derfner Management Inc. (DMI), the managing agent for the properties, and

other defendant-respondent entities.

We find that the interests of defendants-respondents conflict with those of defendants that have not appeared on this appeal (*see* 22 NYCRR 1200.0 rule 1.7[a]). In particular, the interests of the Estate of Harold Derfner, which holds a 50% interest in the corporations on whose behalf the derivative claims are brought, differ from the interests of Lieberman and his wholly owned entities, DMI, JayPen Associates, Inc., and Dapper Duds Laundromat, Inc. And there is no evidence in the record that Lieberman and the Estate's personal representative, Peter Derfner, as individuals and as interest holders in the various other defendants-respondents, gave their "informed consent, confirmed in writing" to concurrent representation (*see* 22 NYCRR 1200.0 rule 1.7[b][4]; *see Ferolito v Vultaggio*, AD3d , 2012 NY Slip Op 05707 [1st Dept 2012]; *see also Twin Securities, Inc. v Advocate & Lichtenstein, LLP*, 97 AD3d 500 [2012]). We are unpersuaded by the argument that the answer Kaye Scholer filed on behalf of "[d]efendants who have been served with the complaint" can be construed as an appearance solely on behalf of defendants-respondents. To be sure, Kaye Scholer made a subsequent motion on behalf of all defendants. That motion was never withdrawn or amended to show that Kaye Scholer represents

defendants-respondents only.

Contrary to plaintiffs' contention, the disqualification of Kaye Scholer from representing all defendants-respondents concurrently does not necessarily preclude it from representing any of them (*see* 22 NYCRR 1200.0 rule 1.9[a]).

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

ENTERED: SEPTEMBER 27, 2012

CLERK