SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 12, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10715- Ind. 3944/08
10716 The People of the State of New York,
Respondent,

-against-

Antonio Martinez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered April 5, 2010, as amended May 9, 2012, convicting defendant, after a jury trial, of rape in the first degree, sexual abuse in the first degree, sexual misconduct, and endangering the welfare of a child, and sentencing him to an aggregate term of 10 to 20 years, 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, 348-49 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's account was consistent with medical testimony and was partially corroborated by other evidence.

Defendant did not preserve his statute of limitations argument regarding the charge of endangering the welfare of a child, and we decline to review it in the interest of justice. We note that defense counsel may have had a strategic reason for keeping this misdemeanor charge in the case for the jury's consideration, even if it was time-barred.

We perceive no basis for reducing the sentence.

All concur except Andrias, J. who dissents in part in a memorandum as follows:

ANDRIAS, J. (dissenting in part)

In March 2008, defendant was convicted, after a jury trial, of rape in the first degree, sexual abuse in the first degree, sexual misconduct, and endangering the welfare of a child based on allegations that on May 18, 1998, he engaged in sexual intercourse with a six year old child who was staying with his family while her parents were away. Defendant was acquitted of course of sexual conduct against a child in the first degree.

Defendant was originally sentenced, as a first felony offender, to concurrent determinate prison terms of 20 years for the first-degree rape charge, seven years for the first-degree sexual abuse charge, and one year for each of the misdemeanor charges. The determinate sentences imposed on the felony counts were illegal and defendant was resentenced to an aggregate term of 10 to 20 years.

The case turned largely upon the credibility of the victim, whose parent reported the alleged sexual abuse to the police in 2007. Although a different verdict would not have been unreasonable, I agree with the majority that this is not an appropriate case to substitute our credibility determinations for those made by the jury and that none of the arguments raised by defendant warrants reversal of his convictions. However, I believe that the sentence of 10 to 20 years, the maximum

available at defendant's resentencing (*see People v Spears*, 228 AD2d 193 [1st Dept 1996]), is unduly harsh under the particular circumstances of this case.

Defendant is 53 years old. He has no prior criminal record and had otherwise lived a law abiding life. Born into poverty in the Dominican Republic, he became a lawful resident of the United States and the successful owner of an automobile repair shop in New York with six employees. While defendant left school in the 8th grade to help support his family, he put his two children through college. Numerous family members, community members and customers submitted letters on defendant's behalf attesting to his good works. Defendant will be deported and barred from the United States after he completes his sentence, at which time he will most likely be in his 60's (*see People v Marra*, 96 AD3d 1623, 1627 [4th Dept 2012] ["We agree with defendant, however, that in light of his age, his lack of a prior criminal record, and other mitigating circumstances, the sentence of a determinate term of 18 years [for first-degree rape] followed by 15 years of postrelease supervision is unduly harsh and severe"] *affd* 21 NY3d 979 [2013]).

While the People argue that defendant's sentence was fair and proper, I note that prior to trial the People had offered defendant a plea to second degree rape, a class D felony, with a

probationary sentence. Through jury selection, the People continued to offer a 10 year probationary sentence, with a plea to either first-degree sexual abuse or second-degree rape (*see People v Cruz*, 41 AD3d 893 [3d Dept 2007], *lv denied* 10 NY3d 933 [2008]).

Accordingly, I dissent in part and as a matter of discretion in the interest of justice would reduce defendant's sentence to an aggregate term of 6 to 12 years, which appropriately takes into account the abhorrent nature of his conduct.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10687 The People of the State of New York, Respondent, Ind. 5488N/10

-against-

Austin Lee, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 31, 2011, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree, and sentencing him, as a second felony drug offender, to a determinate term of six years, to be followed by five years' post-release supervision, to run consecutively to a one-year sentence imposed on an unrelated 2008 fourth degree drug possession conviction, unanimously modified, on the law, to the extent of remanding to Supreme Court for further sentencing proceedings consistent herewith.

Defendant was sentenced to 90 days and five years' probation in an unrelated 2008 case. While on probation, he was arrested in Manhattan and charged with two drug related crimes, one of which was an A-I felony and the other an A-II.

Defendant pleaded guilty to the A-II drug charge in full satisfaction of the 2010 indictment, for which he received a determinate prison sentence of six years plus five years' postrelease supervision. At the same time, he also pleaded guilty to a probation violation on the 2008 indictment, for which he was sentenced to one year. Although defendant asked the sentencing court to run the sentence in the 2008 case concurrently with his determinate sentence in this case, the court declined to do so, noting that he had been allowed to plead guilty to the lesser A-II drug charge.

Defendant is not appealing his resentencing in the 2008 case, but the legality of the sentence he received in this case. He claims that because the trial court imposed a definite one-year sentence in the 2008 case and a determinate sentence in this case, the two sentences must run concurrently, not consecutively. He argues that because the sentences were made to run consecutively, they are illegal (see Penal Law § 70.35; *People v Leabo,* 84 NY2d 952 [1994]). While we agree that if the 2008 sentence is definite, then the sentence in this case should have run concurrently, we cannot determine the issue of the legality of defendant's sentence on the record presently before us. The sentencing court did not characterize the one-year probation violation sentence as either determinate or definite, leaving an

ambiguity in the record. This matter is, therefore, remanded for the sentencing court to clarify the record by stating whether the sentence is definite or determinate. We find no merit to the People's position that we should not reach the issue because only the 2010 sentence was appealed (*see People v Jablonski*, 93 AD3d 1319 [4th Dept 2012]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10985 The People of the State of New York, Respondent, Ind. 2809/01

-against-

Fernando Cristostomo, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and White & Case LLP, New York (Charles R. Koster of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

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Order, Supreme Court, Bronx County (Nicholas Iacovetta, J.), entered August 24, 2012, which denied 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 [2006], *lv denied* 7 NY3d 867 [2006]). Courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). The resentencing statute "involves a complex balancing of several sets of compelling and in some respects competing concerns" (*People v Sosa*, 18 NY3d 436, 442 [2012]), requiring the "exercise of judicial discretion to determine whether relief to an eligible

applicant is in the end consonant with the dictates of substantial justice" (*id.* at 443).

The underlying conviction involved a series of undercover sales, made over a period of several months, in which the amounts of drugs sold and the surrounding circumstances indicated that defendant was not a low level seller. Furthermore, defendant committed a very serious violent felony while on work release from his drug conviction, and he had a poor prison disciplinary record. These negative factors far outweighed the positive factors cited by defendant, such as his educational and vocational accomplishments while incarcerated, his expressions of remorse for his criminal actions and the support of his family members.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10986 Wanda Torres, Index 307062/09
Plaintiff-Appellant,

-against-

1420 Realty, L.L.C., et al.,
Defendants-Respondents,

Jose Toribio,
Defendant.

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Brian J. Isaac, New York, for appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered July 20, 2012, which granted defendants-respondents' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff sustained injuries when she fell after the paint bucket she was using as a step stool tilted over, allegedly due to the uneven condition of the floor of her apartment in defendants' building. Plaintiff's independent and superseding act of using the paint bucket as a step stool, which was placed on an uneven floor, was not foreseeable, thereby breaking the

chain of causation (*see Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]; *compare Gonzalez v Handwerger* 180 AD2d 411 [1st Dept 1992]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10987-
10987A In re Benjamin D. and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Vianuvia D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about May 30, 2012, which, upon a fact-finding determination that appellant mother had neglected the subject children, transferred custody of them to petitioner until the next permanency hearing, and directed her to comply with drug treatment at VIP and participate in family therapy with one of the children, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed, without costs, as moot. Appeal from fact-finding order of the same court and Judge entered on or

about April 25, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court properly found that the mother had neglected the subject children through the infliction of excessive corporal punishment on them, based on the testimony of the caseworker and the hospital records, which indicated that she hit one of the children in the face on one occasion, and hit him with metal bed poles, after a visit from the caseworker. The children's statements concerning the mother's conduct were corroborated by the caseworker's observation of a scratch on one child's jaw, and the hospital records (*see Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987]).

The court properly drew a negative inference from the mother's failure to testify (*see Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013]). ACS could not have requested that the court draw a negative inference against the mother until after she rested her case.

The court properly concluded, based on the mother's excessive corporal punishment directed at her son, that she had derivatively neglected her daughter (*see Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10988 Chris Koerner, Index 16001/06
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The Board of Education of
the City of New York,
Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellant.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Simon Ramone of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 14, 2012, which, insofar as appealed from, denied The Board of Education of the City of New York's motion for summary judgment dismissing plaintiff's claims pursuant to Labor Law § 200 and common-law negligence, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

A general awareness that a dangerous condition may be present is legally insufficient to charge a defendant with constructive notice (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]). Thus, awareness of unsanitary conditions at the school was insufficient evidence that defendant

was on notice of the presence of the fungal pathogen Candida Dubliniensis, the fungus that allegedly caused plaintiff's eye infection (*see Litwack v Plaza Realty Invs., Inc.*, 40 AD3d 250 [1st Dept 2007], *affd* 11 NY3d 820 [2008]).

Further, plaintiff failed to proffer any evidence that the fungus existed at the school at all, other than speculation based on plaintiff's unusual infection (*see e.g. Cleghorne v City of New York*, 99 AD3d 443 [1st Dept 2012]). And while defendant failed to meet its initial burden as movant on the issue of causation, this failure is rendered moot in light of our determination that insufficient evidence that a dangerous condition, and notice of it, existed in the first instance.

Lastly, no evidence was adduced that defendant exercised supervision and control over plaintiff's work, so as to impart liability pursuant to Labor Law § 200 (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]; *Reilly v Newireen*

Assoc., 303 AD2d 214 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

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: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10989 Wanda Morales, as Administratrix of the Goods, Chattels and Credits Which Were of Yadiel Ruben Rivera,
Plaintiff-Appellant,

-against-

New York City Health & Hospitals Corporation,
Defendant-Respondent.

Index 304543/10

_____

Landers & Cernigliaro, P.C., Carle Place (Frank G. Cernigliaro of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 8, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the medical malpractice claims based on plaintiff's decedent's first two visits to defendant's emergency room, unanimously affirmed, without costs.

Plaintiff alleges that Jacobi Medical Center, a division of defendant New York City Health & Hospitals Corporation, committed malpractice in the care and treatment of plaintiff's decedent, Yadiel Ruben Rivera, during his three visits to the pediatric emergency department at Jacobi in January 2010, which resulted in his death at the age of three months due to a severe form of

bacterial meningitis. The infant presented on January 2 with a 100.3 degree fever that spiked to 105 degrees, and again on January 4 with a fever of 104.3.

Defendant made a prima facie showing sufficient to warrant judgment dismissing the claims arising from the first two visits, through the affirmations of its medical expert and of the doctor who treated the infant during those two visits. The expert opined, inter alia, that the applicable standard of care did not require laboratory studies after the first visit, because the standard of care in treating infants with fever who otherwise look well had changed with the advent of vaccines, which now prevent most infections that used to be of concern to emergency medicine staff. He opined that the doctor appropriately ordered urinalysis at the second visit. The burden then shifted to the plaintiffs to lay bare their proof and demonstrate the existence of a triable issue of fact (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *and see Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007]).

In opposition to defendant's prima facie showing, plaintiff failed to raise a triable issue of fact as to whether defendant committed malpractice in the care and treatment of plaintiff's

decedent during his first two emergency room treatments. Plaintiff has not shown that defendant should have ordered blood cultures during these visits.

Accordingly, defendant's motion was properly granted.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10990 New Delhi Television Limited, Index 652589/12
Plaintiff-Appellant,

-against-

Nielsen Holdings N.V., et al.,
Defendants,

The Nielsen Company (US), LLC, et al.,
Defendants-Respondents.

_____

Pepper Hamilton LLP, New York (Thomas McC. Souther of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Aidan Synnott of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 16, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the amended complaint in its entirety as against The Nielsen Company (US), LLC, AC Nielsen Corporation, and AC Nielsen Company, LLC (Nielsen defendants), unanimously affirmed, without costs.

In this action commenced by plaintiff, a news network headquartered in India, against the Nielsen defendants, operators of a global marketing research firm that measures television ratings data, alleging that their joint venture, TAM Media Research Private Limited (TAM), which they created with defendants WPP PLC and Kantar Group, Ltd, fraudulently

misrepresented or corrupted the data, the amended complaint was properly dismissed on the ground of forum non conveniens (*see* CPLR 327[a]). Although the Nielsen defendants do not refute that they are New York corporations, plaintiff is located in India, the underlying events occurred in India, the evidence and the witnesses are located in India, and TAM, a necessary but unnamed party, is located in India (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *United States Aviation Underwriters v United States Fire Ins. Co.*, 134 AD2d 187, 190 [1st Dept 1987], *affd* 73 NY2d 723 [1988]). Additionally, plaintiff has not shown that India is an inadequate alternative forum (*see id.*).

As noted above, TAM is a necessary party that plaintiff failed to name as a defendant. Dismissal is also warranted on this basis (*see* CPLR 1001[a]). TAM's conduct is at issue in every cause of action, and the amended complaint, which mentions TAM hundreds of times, alleges that TAM is defendants' joint venture (*see Henshel v Held*, 13 AD2d 771 [1st Dept 1961]).

Finally, the negligence claims were properly dismissed for failure to state a claim because the complaint fails to identify any duty defendants owed to plaintiff (*see* CPLR 3211[a][7]; *Evans v 141 Condominium Corp.*, 258 AD2d 293, 295 [1st Dept 1999]).

We note that defendants have agreed to toll the statute of limitations for the period that this lawsuit was pending.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10991 Ilene Katz, Index 115075/07
Plaintiff-Appellant,

-against-

Chandranath Sen, M.D., et al.,
Defendants-Respondents,

Alan Jacobs, M.D., et al.,
Defendants.

_____

Joseph H. Neiman, Jamaica Estate, for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered June 5, 2012, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Chandranath Sen, MD, and Peter Costantino, MD (defendants), for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleged in her complaint that she was improperly diagnosed with a small tumor, or microadenoma, in her pituitary gland and underwent surgery that turned out to have been unnecessary because there was no tumor found. She alleged that defendant Sen had doubts concerning the positive finding of the MRI, but did not advise her of those concerns and proceeded to perform the surgery with defendant Cosantino.

In support of their motion for summary judgment, defendants met their prima facie burden by submitting the affirmation of a medical expert who opined, inter alia, that they did not deviate from good medical practice in their treatment of plaintiff and properly relied on the MRI and MRI report, and that Dr. Sen properly explained to plaintiff the risks and benefits of surgery and "obtained informed consent as to the treatment options available for the pituitary microadenoma," after advising her that she could wait and observe/monitor the tumor (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]).

In opposition, plaintiff articulated a claim, not separately pleaded in her complaint, that defendants did not obtain informed consent because they did not disclose that Dr. Sen had reservations about whether or not a tumor actually existed, and that she would not have consented to the surgery had she known that there might not be a tumor shown on her MRI films. Assuming the complaint adequately pleaded lack of informed consent, plaintiff's opposition to the motion was insufficient to raise an issue of fact as to whether defendants' disclosure of "the risks, benefits and alternatives to the procedure or treatment" departed from what "a reasonable practitioner would have disclosed," since "[e]xpert medical testimony is required to prove the

insufficiency of the information disclosed to the plaintiff" (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; *Leighton v Lowenberg*, 103 AD3d 530 [1st Dept 2013]; CPLR 4401-a). Absent any expert opinion supporting plaintiff's assertion that defendants were required to disclose any reservations or doubts to her, summary judgment dismissing the complaint was properly granted (*see Gardner v Wider*, 32 AD3d 728 [1st Dept 2006]). Moreover, defendants' expert, in reply to plaintiff's expanded lack of informed consent theory, opined unequivocally that it would have not been within the standard of care to advise plaintiff of the possibility that no tumor was present, because there was no basis for such a finding prior to surgery.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10994 Eric Hadar, et al., Index 652811/11
Plaintiffs-Respondents,

-against-

Clay Pierce, et al.,
Defendants-Appellants,

Michael Rosenbaum, et al.,
Defendants.

_____

Joseph Hage Aaronson LLC, New York (Gregory P. Joseph of counsel), for appellants.

Kasowitz, Benson, Torres & Friedman LLP, New York (Michael J. Bowe of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 9, 2013, which, to the extent appealed from, denied defendants Clay Pierce and Patterson Belknap Webb & Tyler LLP's motion to dismiss the complaint as against them, unanimously reversed, on the law, with costs, the motion granted, and the complaint dismissed as against those defendants. The Clerk is directed to enter judgment accordingly.

The first through fourth causes of action are based on the purportedly false statements made in the complaint in a prior Supreme Court action and the petition in a Surrogate's Court proceeding, both of which were signed by defendants. These statements are absolutely privileged because they were pertinent

to the respective litigations (*Pomerance v McTiernan*, 51 AD3d 526, 528 [1st Dept 2008]). The allegations that Eric Hadar (a defendant in the prior action and a plaintiff in the instant case) had neglected his management duties and charged inflated fees were pertinent to a litigation that accused him of breach of fiduciary duty and breach of contract, sought his removal as managing partner, managing member, and general partner, and sought an accounting. Similarly, the allegations in the Surrogate's Court proceeding that Eric had wasted trust assets through self-dealing and mismanagement were pertinent to a litigation that sought to remove him as a trustee.

Contrary to plaintiffs' contention, the prior proceedings – which, we note, were not commenced by defendants, who were but counsel to the litigants – were not a sham, i.e., instituted for the sole purpose of defaming Eric (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 172 n 5 [1st Dept 2007]). The complaint in the case at bar alleges that Eric's father, Richard Hadar, instigated the prior proceedings to seize control of certain real estate assets and/or gain leverage to extort concessions from Eric.

The judicial proceedings privilege applies to causes of action other than defamation (*see e.g. Joseph v Joseph*, 107 AD3d 441 [1st Dept 2013]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 54 [1st

Dept 2012]; *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 920-921 [1st Dept 2010]). However, it does not apply to the sixth cause of action, which alleges malpractice, because the gravamen of the malpractice claim is that defendants failed to exercise the skill, prudence, diligence, and care expected of members of the legal profession. Nevertheless, the malpractice cause of action does not plead in sufficient detail that defendants colluded with Richard as required in order to sustain a malpractice cause of action in the absence of privity (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 595 [2005]; *Griffith v Medical Quadrangle*, 5 AD3d 151 [1st Dept 2004]).

The judicial proceedings privilege does not apply to the seventh cause of action, which alleges malicious prosecution, because that cause of action, by definition, involves a prior proceeding (*see e.g. Colon v City of New York*, 60 NY2d 78 [1983]). However, the malicious prosecution claim should be dismissed because defendant Robert Weir had probable cause to bring the Surrogate's Court proceeding, which sought, inter alia, to remove Eric as a trustee (*see Butler v Ratner*, 210 AD2d 691, 693 [3d Dept 1994], *lv dismissed* 85 NY2d 924 [1995]). One of the grounds on which Weir sought Eric's removal was his possession of a controlled substance, for which he subsequently pleaded guilty

(*see* Surrogate's Court Procedure Act §§ 719[1]; 711[2]).

If appellants had raised this argument below, Eric would not have been able to counter it (*see generally Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). It is undisputed that he suffers from substance abuse, was arrested for drug possession and pleaded guilty to attempted criminal possession of a controlled substance in the third degree (a class C felony), and that his negotiated sentence included some incarceration.

The eighth cause of action, which alleges tortious interference with prospective economic relations, is based on a March 11, 2009 letter that defendant Pierce wrote to nonparty Samuel Ross (counsel for certain limited partners of nonparty Lawrence One, L.P.). Even if the letter is not covered by the judicial proceedings privilege, (a question we need not decide), the tortious interference claim should be dismissed because the complaint fails to allege that but for defendants' wrongful conduct plaintiffs would have entered into an economic relationship (*see Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]). Rather, it alleges that the outside partners

of Lawrence One, L.P. were too wary of crossing Richard (who had a reputation for bare-knuckles litigation) to proceed with the sale of their limited partnership interests to Eric and his trust.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10995 Lew Nussberg, etc., Index 650741/09
Plaintiff-Respondent,

-against-

Gary Tatintsian, etc., et al.,
Defendants-Appellants,

Viktoria Pukemova,
Defendant.

_____

Clarick Gueron Reisbaum LLP, New York (Gregory A. Clarick of counsel), for appellants.

Franzino & Scher, LLC, New York (Davida S. Scher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 2, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to preclude the lay testimony of certain witnesses on the identification and authenticity of the art works in question, and sua sponte granted plaintiff summary judgment for breach of contract under a 2009 Consignment Agreement, unanimously affirmed, with costs.

This action involves a series of 98 works from the Russian Suprematist school of art. Plaintiff consigned these works to defendants in 2009 pursuant to a series of written agreements. The defendants sold the works in Russia and have not paid

plaintiff. Plaintiff sued for conversion, seeking return of the works, and defendants were permitted by this Court (90 AD3d 563 [1st Dept 2011]) to interpose the defense that the works that they accepted on consignment were forgeries.

The motion court correctly determined that expert testimony is required to identify and authenticate the works of art; specifically, the testimony of an expert who viewed the consigned works before they left the United States in 2009 and who can testify that they were forgeries when they left and were forgeries on their return. This is consistent with how art work and forgeries are identified, authenticated and detected (*see e.g. Thome v Alexander & Louise Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

The motion court also properly granted plaintiff summary judgment for defendants' breach of the 2009 Consignment Agreement. Plaintiff initially brought an action sounding in conversion, since he wanted the works returned. Defendants have stated that that is impossible, as the works have been already been sold. Plaintiff is therefore due $2.6 million dollars under the 2009 Consignment Agreement, to be offset by any works from the 2009 Consignment that are proven to have been fraudulent both

in 2009 and again today. Although plaintiff did not move for the relief granted, defendants were plainly on notice of this claim (*see Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10996 American Transit Insurance Company, Index 302091/12
Plaintiff-Appellant,

-against-

Maria Marte-Rosario, et al.,
Defendants,

Empire Acupuncture, PC, et al.,
Defendants-Respondents.

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The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Law Offices of Melissa Betancourt, P.C., Brooklyn (Melissa Betancourt of counsel), for Empire Acupuncture, PC, respondent.

Amos Weinberg, Great Neck, for Multiple Medical Health Services P.C. and Infinite Chiropractic, PLLC, respondents.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 24, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment against defendants Multiple Medical Health Services, P.C. and Infinite Chiropractic, PLLC, unanimously reversed, on the law, with costs, the motion granted, and it is declared that plaintiff owes no coverage duty to said defendants.

Plaintiff established its entitlement to summary judgment by submitting an affidavit of service demonstrating that the notices scheduling independent medical examinations (IMEs), in connection with a no-fault insurance claim filed by Maria Marte-Rosario,

were properly mailed to her and her counsel, and the doctor's affidavit establishing Marte-Rosario's failure to appear at the scheduled IMEs (*see American Tr. Ins. Co. v Solorzano*, 108 AD3d 449 [1st Dept 2013]). The affidavit of service raised a presumption that a proper mailing occurred, which defendants failed to rebut by submitting a returned letter to Marte-Rosario from her counsel, with the name of her street apparently misspelled; in any event, there is no evidence rebutting the showing that the notices were served on Marte-Rosario's counsel (*see Matter of Ariel Servs., Inc. v New York City Envtl. Control Bd.*, 89 AD3d 415 [1st Dept 2011]). As it is undisputed that Marte-Rosario's appearance at scheduled IMEs was a condition precedent to coverage, plaintiff was entitled to deny the claim (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). Defendant Empire Acupuncture, PC (Empire), which has not appealed from the order, requests modification of the order to deny plaintiff's motion for summary judgment against it and grant Empire's motion for summary judgment against plaintiff. Contrary to plaintiff's contention, the court's reference to a "default" by Empire does not render the portion of the order pertaining to Empire nonappealable pursuant to CPLR 5511, since Empire opposed plaintiff's motion for summary judgment against it (*see Spatz v*

Bajramoski, 214 AD2d 436, 436 [1st Dept 1995]). However, although we are empowered to search the record and grant the relief sought by Empire under these circumstances (*see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106 [1984]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]), we have considered and rejected Empire's arguments on the merits.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10997 The People of the State of New York, Ind. 2575/11
Respondent,

-against-

Christian Cabrera Godoy,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Ronald A. Zweibel, J.), rendered on or about September 22, 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: NOVEMBER 12, 2013

CLERK

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

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

10998-
10999 In re Maura B.,
M-4445 Petitioner-Appellant,

-against-

Giovanni P.,
Respondent-Respondent.

_____

Law Offices of Ilysa M. Magnus, P.C., New York (Ilysa M. Magnus of counsel), for appellant.

Giovanni P., respondent pro se.

Jo Ann Douglas, New York, attorney for the child.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about February 8, 2012, which dismissed the petitions to modify custody for lack of jurisdiction, unanimously affirmed, without costs. Order, same court and hearing officer, entered on or about July 19, 2012, which denied petitioner's motion for emergency temporary custody of the child, unanimously affirmed, without costs.

Family Court correctly determined that it lacked subject matter jurisdiction over this custody matter (*see* Domestic Relations Law §§ 76-b, 76-e; *Stocker v Sheehan*, 13 AD3d 1 [1st Dept 2004]). The initial custody determination was made by the Court of Florence, Italy, in 2005. Since then, numerous proceedings have been held in Italy, where respondent has resided

since 2000. At the time the petition was filed, in 2011, a proceeding was ongoing in Italy, pursuant to which the parties had recently undergone a forensic evaluation, and a decision as to custody was expected imminently. And, in response to Family Court's inquiry, the Appellate Court of Florence advised that Italy would not decline jurisdiction.

The court also properly declined to exercise temporary emergency jurisdiction (*see* Domestic Relations Law § 76-c). The child was no longer present in this jurisdiction, and petitioner's unsubstantiated allegations were insufficient to establish that it was necessary in an emergency to protect the child.

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

M-4445 - *Maura B. v Giovanni P.*

Motion by the attorney for the child to strike petitioner's reply brief is granted to the extent of striking references to matters dehors the record.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11000-
11001 David H. Engelke,
Plaintiff-Appellant,

-against-

Brown Rudnick Berlack Israels LLP,
Defendant-Respondent.

Index 114511/05

_____

Greenberg Freeman LLP, New York (Michael A. Freeman of counsel), and Trenam, Kemker, PA, Tampa, FL (John D. Goldsmith of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellant.

LeClair Ryan, New York (Ronald S. Herzog of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 17, 2012, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's motion to strike defendant's answer pursuant to CPLR 3126 or, in the alternative, for partial summary judgment dismissing an affirmative defense of general release, unanimously affirmed, with costs.

The motion court properly dismissed the claim of legal malpractice. Even if plaintiff established the requisite conflict based on the existence of a prior attorney-client relationship, which relationship the parties do not dispute, plaintiff failed to establish that he incurred any damages

attributable to defendant's breach of duty (*Kodsi v Gee*, 100 AD3d 437, 438 [1st Dept 2012]; *Leder v Spiegel*, 31 AD3d 266, 268 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]; *Estate of Steinberg v Harmon*, 259 AD2d 318 [1st Dept 1999]). Plaintiff argues that, by exclusion from the settlement between Pinnacle and Athle-Tech, he was forced to incur more than $1 million in attorney's fees in defending against the second Athle-Tech litigation. However, plaintiff cannot show with sufficient certainty that he would have been able to settle with Athle-Tech and thereby have avoided or reduced his costs. Nor can any alleged damages be attributed to a breach of duty of loyalty based on defendant's prior representation of plaintiff in connection with the Montage SPA. By the time the settlement was made final, plaintiff's indemnification obligations under the Montage SPA were extinguished.

The court also properly denied plaintiff's motion to strike defendant's answer based on the destruction of electronic evidence. Plaintiff had all of the disputed documents and cannot claim any prejudice in pursuing his claim (*see Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013]; *McMahon v Ford Motor Co.*, 34 AD3d 263, 264 [1st Dept 2006]). Plaintiff further fails to establish that any failure to produce the emails was willful (CPLR 3126).

In view of the foregoing, plaintiff's motion seeking to dismiss defendant's affirmative defense was properly denied as moot.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11002 In re Audrey Moore, Index 400587/12
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents.

_____

The Bronx Defenders, Bronx (Christa Douaihy of counsel), for appellant.

Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for respondents.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 31, 2012, denying the petition to annul respondent's determination, dated November 16, 2011, which terminated petitioner's tenancy on the ground of chronic rent delinquency, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner was chronically delinquent in the payment of rent was rationally based on the record (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). A rent ledger showed that, between June 2010 and October 2011, petitioner paid rent in only a single month, and that, during this time, her outstanding rent balance grew from an initial deficit of $355.70 to a final

balance of $2,591.20.

Petitioner's contentions that the Hearing Officer failed to comply with, or give adequate consideration to, a number of the tenancy termination provisions set forth in respondent's Management Manual are unpreserved, as she raised these arguments neither at the administrative hearing (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]) nor before Supreme Court (*see Logiudice v Logiudice*, 67 AD3d 544, 545 [1st Dept 2009]). Assuming without deciding that they apply in this type of proceeding, we would find them unavailing, as respondent made extensive efforts to secure payment prior to initiating termination proceedings.

Petitioner did not present evidence which would have established a defense of breach of the warranty of habitability. Nor did the "Hearing Officer have an obligation to develop the record on petitioner's behalf, even though she was pro se" (*Matter of Rivera v New York City Hous. Auth.*, 107 AD3d 404, 405 [1st Dept 2013]).

Petitioner's argument that the Hearing Officer acted arbitrarily in denying her request for reconsideration also fails. Petitioner has not pointed to any rule or regulation that would entitle her to request administrative reconsideration of a final agency determination. In any event, even under the

standards governing judicial reconsideration, reargument was not warranted, since the fact that petitioner might have become current with her rent subsequent to the hearing would not negate the determination, based on the evidence presented at the hearing, of chronic rent delinquency (*see Rivera* at 405).

The penalty imposed does not shock our sense of fairness (*see Matter of Devins v New York City Hous. Auth.*, 92 AD3d 581, 582 [1st Dept 2012]).

We have considered petitioner's remaining contentions, including that she was deprived of procedural due process, and find them unavailing.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11003 In re Sarah McL.,
Petitioner-Appellant,

-against-

Clarence L.,
Respondent-Respondent.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Order, Family Court, New York County, (Lori S. Sattler, J.), entered on or about December 27, 2011, which, after a fact-finding hearing, dismissed the petition seeking an order of protection against respondent, unanimously affirmed, without costs.

While the Family Court may have erred in precluding testimony regarding threats that respondent allegedly made toward petitioner in 2009 and 2010 since the previous petition was concluded by stipulation, on consent of the parties, and the issues were not adjudicated on the merits (*see Brown v Keating*, 166 AD2d 220, 220 [1st Dept 1990]), the Court carefully evaluated

the testimony concerning the most recent claims and found the petitioner to not be credible. Thus, we see no reason to disturb the court's findings and conclusions.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11004 American Home Assurance Company, Index 110838/10
Plaintiff-Appellant,

-against-

Highrise Construction Company, et al.,
Defendants,

21-23 South William Street, LLC, et al.,
Defendants-Respondents.

_____

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for 21-23 South William Street, LLC and Wall Street Builders, LLC, respondents.

O'Dwyer & Bernstein, LLP, New York (Victor Greco of counsel), for Luz Vasquez, respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 15, 2011, which denied plaintiff's motion for summary judgment on its first cause of action for a judgment declaring that it had no duty to provide a defense or indemnification in the underlying personal injury action because plaintiff properly cancelled the subject insurance policy with defendant Highrise Construction Company (Highrise) before the underlying accident occurred, unanimously reversed, on the law, without costs, the motion granted, and it is so declared.

Supreme Court found that the refusal of the Workers'

Compensation Board (WCB) to consider proof of the cancellation of the subject construction insurance policy was entitled to res judicata effect as to whether plaintiff was liable to Highrise under the policy. This was error because a cancelled policy does not cover accidents occurring after cancellation (*see Zappone v Home Ins. Co.*, 55 NY2d 131, 136 [1982]), and here, there is overwhelming evidence of the policy's cancellation due to Highrise's failure to make any payments towards the insurance premium.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Here, the determination in the Workers' Compensation proceedings establishes that the doctrine of res judicata is inapplicable. The Workers' Compensation Law Judge's (WCLJ) decision was not "on the merits" as to whether the subject policy had actually been cancelled prior to the date of the decedent's accident. Rather, the WCLJ precluded plaintiff from introducing evidence on the cancellation issue due to its failure to appear at one of the scheduled hearings before the WCB (*see Espinoza v Concordia Intl.*

Forwarding Corp., 32 AD3d 326, 328 [1st Dept 2006] ["(a) prior order that does not indicate an intention to dismiss the action on the merits is not a basis for the application of the doctrine of res judicata"]). Moreover, plaintiff's subsequent application for review of the WCLJ's decision on the grounds that the policy had been cancelled was denied by the WCB panel, based on plaintiff's failure to submit its application within 30 days after notice of the filing of the decision, as required by Workers' Compensation Law § 23 (*see Matter of Friss v City of Hudson Police Dept.*, 187 AD2d 94 [3d Dept 1993]).

Nor is the doctrine of collateral estoppel applicable in this case. The issue of cancellation of the policy or whether plaintiff had a duty to defend or indemnify Highrise in the underlying action was never actually litigated before the WCB (*see Tounkara v Fernicola*, 63 AD3d 648, 650 [1st Dept 2009]).

Although "Employers' Liability insurance is inextricably linked to Workers' Compensation coverage" *(Continental Ins. Co. v State of New York*, 99 NY2d 196, 199 [2002]), coverage under the two parts may be evaluated separately (*see Western Bldg. Restoration Co., Inc. v Lovell Safety Mgt. Co., LLC*, 61 AD3d 1095, 1100-1102 [3d Dept 2009]; *see also Preserver Ins. Co. v Ryba*, 10 NY3d 635 [2008]). Accordingly, there is no basis for

requiring plaintiff to defend and indemnify Highrise under the employer liability portion of the policy in an action arising from the decedent's accident.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11005 The People of the State of New York, Ind. 222/09
Respondent,

-against-

Harold Williams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Edward Davidowitz, J.H.O. at suppression hearing; Harold Adler, J. at suppression ruling; Robert A. Neary, J. at jury trial and sentencing), rendered July 18, 2011, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the court's finding that an officer recovered a pistol from defendant by way of a lawful stop and frisk based on reasonable suspicion. A fair reading of the record fails to support defendant's assertion that the officer's conduct exceeded the proper bounds of a frisk. On the contrary, the evidence demonstrates that the officer removed a pistol from defendant's

waistband only after the officer made contact with the grip of the pistol, and thus confirmed that it was a weapon. Moreover, based on the information known to the officer before he made physical contact with defendant, including the officer's observation of a pistol-shaped bulge, he not only had reasonable suspicion that defendant was carrying a weapon, but knew exactly where the weapon was located. Accordingly, it was reasonable for the officer to make an immediate seizure as a safety measure (*see People v Taggart*, 20 NY2d 335, 342-343 [1967], *appeal dismissed* 392 US 667 [1968]).

The trial court properly exercised its discretion in admitting testimony about a police bulletin received by the arresting officers, which contained a basic description of a recent pattern of armed robberies involving three unidentified men. This evidence provided necessary background material to complete the narrative of events leading up to defendant's arrest and explain why the police officers' attention was drawn to defendant and his companions (*see People v Morris*, NY3d , 2013 NY Slip Op 06633; *People v Barnes*, 57 AD3d 289 [1st Dept 2008], *lv denied* 12 NY3d 781 [2009]). One of the primary issues in the case was police credibility, and this evidence was necessary to prevent undue speculation by the jury (*id.*). Furthermore, any prejudicial effect was minimized by the court's limiting instructions, which the jury is presumed to have followed.

Defendant's constitutional arguments, his claim of prosecutorial misconduct in summation, and his challenge to the timing of the court's limiting instruction are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

The court properly denied defendant's request for a jury charge on temporary and lawful possession. There was no reasonable view of the evidence, viewed in the light most favorable to defendant, that his possession of a weapon resulted from the performance of a lawful act (*see People v Williams*, 50 NY2d 1043, 1045 [1980]). Defendant's request for this charge was based on his written statement admitting that he placed his companion's loaded pistol into his own waistband "for fun." "Fun" is not a legal excuse for possessing a weapon.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Tom, J.P., Andrias, Friedman, Freedman, Clark, JJ.

11006N-		Index 308022/11
11007N-		311374/11
11008N-		311376/11
11009N-		305934/11
11010N-		3000881/12
11011N-		301576/12
11012N-		20700/12
11013N-		305237/11
11014N-		308007/11
11015N	Edwin Velez, Plaintiff-Respondent, -against- Port Authority of New York and New Jersey, et al., Defendants-Appellants. - - - - - James Coffin, Plaintiff-Respondent, -against- Port Authority of New York and New Jersey, et al., Defendants-Appellants. - - - - - Kanerahtiio Deer, Plaintiff-Respondent, -against- Port Authority of New York and New Jersey, et al., Defendants-Appellants. - - - - -	304788/12

Donald Geren, et al.,
Plaintiffs-Respondents,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

- - - - -

Donald Geren, et al.,
Plaintiffs-Respondents,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

- - - - -

Nicholas Giovinco,
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

- - - - -

Michael McGeeney, et al.,
Plaintiffs-Respondents,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

- - - - -

Keith Myiow,
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

- - - - -

Thomas Stevenson, et al.,
Plaintiffs-Respondents,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

- - - - -

Michael Vocson,
Plaintiff-Respondent,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

_____

Harrington, Ocko & Monk, LLP, White Plains (I. Paul Howansky of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

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Orders, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 9, 2012 (Velez Action); (Mary Ann Brigantti-Hughes, J.), June 18, 2012 (Coffin Action); Mark Friedlander, J.), May 8, 2012 (Deer Action); (Alison Y. Tuitt, J.), June 28, 2012 (Geren Action No.1); (Mark Friedlander, J.), July 9, 2012 (Geren Action No.2); (Mark Friedlander, J.), July 17, 2012 (Giovinco Action); (Alexander W. Hunter, J.), September 20, 2012 (McGeeney Action); (Alison Y. Tuitt, J.), June 29, 2012 (Myiow Action); (Norma Ruiz, J.), February 15, 2012 (Stevenson Action); and (Lucindo Suarez, J.), on or about August 31, 2012 (Voscon

Action); which denied defendants' motions for a change of venue, unanimously affirmed, without costs.

In these 10 consolidated appeals, defendant Port Authority of New York and New Jersey (Port Authority) argues that plaintiffs' selection of Bronx County for venue purposes is improper. Citing CPLR 505(a), Port Authority argues that plaintiffs failed to show that it had a principal office in Bronx County or that the complained of injuries arose in Bronx County facilities owned by it. However, CPLR 505(a) is inapplicable and McKinney's Unconsolidated Laws of NY § 7106, as added by L 1950, ch 301, § 6 applies (*see Bollman v Port Auth. of N.Y. and N.J.*, 17 AD3d 182 [1st Dept. 2005]).

To the extent Port Authority argues that a general statute can repeal special or local acts without expressly naming them, the express language of CPLR 505(a) limits its application to public authorities constituted under the laws of the State of New York, and that definition does not apply to the Port Authority, which is an entity of "special character ... created by compact between two States and approved by Congress as required by the United States Constitution" (*Agesen v Catherwood*, 26 NY2d 521, 524 [1970]).

Even assuming, arguendo, that Port Authority falls within the ambit of public authorities defined in CPLR 505(a), there is

no basis to conclude that the Legislature intended to eliminate all special venue provisions governing public authorities such as the Unconsolidated Laws. Where, as here, a special statute (i.e., Uncons. Laws § 7106) is in conflict with a general act covering the same subject matter (i.e., CPLR 505[a]), the special statute "controls the case and repeals the general statute insofar as the special act applies" (*Bollman*, 17 AD3d at 182-183 [internal citation omitted]).

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

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11017 The People of the State of New York, Respondent, Ind. 4006/10

-against-

Rondell Wilkins, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered August 31, 2011, convicting defendant, after a jury trial, of assault in the second degree and tampering with physical evidence, and sentencing him, as a second felony offender, to an aggregate term of three years, unanimously affirmed.

Defendant's general motion to dismiss did not preserve his legal sufficiency claims (*see People v Gray*, 86 NY2d 10, 19 [1995]), notwithstanding that the court reserved decision on the motion and defendant made a more specific motion, for the first time, at sentencing (*see People v Padro*, 75 NY2d 820 [1990]). We decline to review these claims in the interest of justice. As an alternative holding, we reject them 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]). We find no basis for disturbing the jury's credibility determinations.

The element of physical injury was established by an officer's testimony that after defendant threw loose tobacco in his eyes, the officer felt "burning...like fire in [his] eyes," his eyes "tear[ed] up," his vision became "blurry," and severe pain persisted for about 20 minutes, until alleviated by medical attention. The evidence supported the conclusion that the officer felt "substantial pain" (Penal Law § 10.00[9]), which means "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]).

The elements of tampering with physical evidence (Penal Law § 215.45[2]) were established by evidence that defendant discarded small ziploc bags as he fled from police who had observed him engaging in an apparent drug transaction. The evidence supports the conclusion that defendant committed an act of concealment (*see People v Eaglesgrave*, 108 AD3d 434 [1st Dept 2013]), and that although the police were unable to find these items, they were "contraband or evidence that defendant intended to prevent the police from discovering" (*see People v Green*, 54 AD3d 603, 603-604 [1st Dept 2008], *lv denied* 11 NY3d 897 [2008]).

We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11019 Mark Lindkvist, Index 103353/08
Plaintiff-Respondent, 560636/08
590573/11

-against-

Travelers Insurance,
Defendant,

Maxons Restorations, Inc., et al.,
Defendants-Appellants.

- - - - -

Maxons Restorations, Inc.,
Third-Party Plaintiff-Appellant,

-against-

JLC Environmental Consultants, Inc.,
Third-Party Defendant-Appellant.

- - - - -

New Concept Environmental Cleaning Corp.,
Second Third-Party Plaintiff-Appellant,

-against-

JLC Environmental Consultants Inc.,
Second Third-Party Defendant-Appellant.

_____

Babchik & Young, LLP, White Plains (Ephraim J. Fink of counsel), for Maxons Restorations, Inc., appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for New Concept Environmental Cleaning Corp., appellant.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for JLC Environmental Consultants, Inc., appellant.

Lewis & Fiore, New York (Charles G. Fiore of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.),

entered February 15, 2013, which denied JLC Environmental Consultants, Inc.'s motion and Maxons Restorations, Inc.'s and New Concept Environmental Cleaning Corp.'s cross motions in limine for the preclusion of plaintiff's experts' testimony, unanimously modified, on the law, to preclude plaintiff's experts from testifying as to a causal connection between plaintiff's alleged mold exposure and his injuries, and, upon such preclusion, plaintiff's personal injury claim dismissed, and otherwise affirmed, without costs.

In this action, plaintiff seeks, inter alia, recovery for personal injuries and property damage sustained as a result of mold remediation work performed by Maxons Restorations, Inc., New Concept Environmental Cleaning Corp. and JLC Environmental Consultants, Inc. to address a condition that existed in his apartment after it was flooded.

The proposed expert testimony purporting to establish that a mold condition existing in plaintiff's apartment caused his injuries is inadmissible as it fails to set forth "plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). Plaintiff's experts do not identify the specific mold

alleged to be the cause of plaintiff's injuries, set forth that the specific mold is capable of causing the claimed injuries, or quantify the level of exposure needed to cause the illness at issue, a worsening of plaintiff's respiratory and dermatologic conditions (*see id.*; *Cleghorne v City of New York*, 99 AD3d 443, 446 [1st Dept 2012]; *Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 419-420 [1st Dept 2008], *appeal dismissed* 12 NY3d 847 [2009]). Indeed, plaintiff's mold expert conceded that he was not qualified to render an opinion as to "any significance of elevated mold spore exposure" and failed to address the other possible sources of mold in the apartment. Plaintiff's medical experts, inter alia, take plaintiff's claim that his symptoms worsened due to mold exposure at face value, without reference to plaintiff's extensive preexisting medical conditions, and assume the existence of a mold condition capable of causing the claimed injuries (*see Rivera v Crotona Park E. Bristow Elsmere*, 107 AD3d

550 [1st Dept 2013]; *cf. Cornell v 360 W. 51st St. Realty, LLC*, 95 AD3d 50, 58 [1st Dept 2012]).

In the absence of the precluded expert testimony, plaintiff cannot establish a claim for personal injuries.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11020 The People of the State of New York, Ind. 4242/11
Respondent,

-against-

Flor Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered August 8, 2012, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of two to four 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 credibility determinations. The

evidence supports the conclusion that defendant exercised dominion and control over two illegal knives found in a dresser containing defendant's clothing, located in his apartment, in the bedroom where he was apprehended.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Saxe, J.P., Renwick, DeGrasse, Manzanet-Daniels, JJ.

11022-
11023 Index 103871/10

Emery Celli Brinckerhoff & Abady, LLP,
Plaintiff-Respondent,

-against-

Michael Rose,
Defendant-Appellant.

[And a Third-Party Action]

_____

The Law Office of Richard E. Lerner, P.C., New York (Richard E. Lerner of counsel), for appellant.

Emery Celli Brinckerhoff & Abady, LLP, New York (O. Andrew F. Wilson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered May 10, 2012, awarding plaintiff the aggregate amount of $560,052.77 on its claim for an account stated against defendant Michael Rose, pursuant to an order, same court and Justice, entered May 7, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the account stated claim, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established its entitlement to judgment as a matter of law on its claim for an account stated "by showing that

its client received, retained without objection, and partially paid invoices without protest" (*Scheichet & Davis, P.C. v Nohavicka*, 93 AD3d 478, 478 [1st Dept 2012] [internal quotation marks omitted]; *see Miller v Nadler*, 60 AD3d 499 [1st Dept 2009]).

Defendant's argument that plaintiff failed to make a prima facie case because it submitted no expert opinion that its retainer agreement and the legal services it rendered were fair and reasonable is unpreserved. Were we to reach the merits, we would find it unavailing. It is not part of a plaintiff's prima facie case on a claim for an account stated to show the reasonableness of the retainer agreement or its legal services (*see e.g. Scheichet & Davis. P.C.* at 478; *Miller* at 499). Indeed, in *Miller*, we found that "[p]laintiff's failure to comply with the rules on retainer agreements ... does not preclude it from suing to recover legal fees for the services it provided" (*Miller* at 500), and "[i]n the context of an account stated pertaining to legal fees, a firm does not have to establish the reasonableness of its fee" (*Lapidus & Assoc., LLP v Elizabeth St., Inc.*, 92 AD3d 405, 405-406 [1st Dept 2012] [internal quotation marks omitted]).

If a defendant client's legal malpractice claim is intertwined with a plaintiff law firm's claim for legal fees, the

plaintiff will not be entitled to summary judgment on its account stated claim. However, if the malpractice claim is not so intertwined, courts are not precluded from granting the plaintiff summary judgment (*see Morrison Cohen Singer & Weinstein v Ackerman*, 280 AD2d 355, 356 [1st Dept 2001]).

Here, it was not an improvident exercise of the motion court's discretion to rule, in effect, that defendant had waived his right to raise malpractice by not filing an amended answer by the deadline set by the court (*see Quintanna v Rogers*, 306 AD2d 167, 168 [1st Dept 2003]). Furthermore, the record shows that plaintiff performed a great deal of work that was unrelated to the purported malpractice.

Defendant's argument that the judgment improperly calculates pre-judgment interest is unpreserved. Were we to consider it, we would note that defendant cites no authority in support of his position.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11024 Marcia Francis, Index 12458/11
Plaintiff-Appellant,

-against-

Gladstone A. Francis,
Defendant-Respondent.

_____

Roberta Horne, Bellerose, for appellant.

Christopher W. Edwards, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Nelida Malave-Gonzalez, J.), entered October 19, 2012, which awarded plaintiff $868.66 bi-weekly in temporary maintenance, and denied plaintiff's request for counsel and appraisal fees, unanimously reversed, on the law, without costs, the award of temporary maintenance vacated, and the matter remanded for a reconsideration of the award in light of the directives of Domestic Relations Law § 236 (B)(5-a), and for a reconsideration of the request for counsel and appraisal fees.

To determine temporary maintenance, the motion court had to apply Domestic Relations Law § 236(B)(5-a), which had become effective on October 12, 2010. While the motion court properly followed the calculations provided in that section to arrive at a presumptive award of temporary maintenance, it did not address the fact that defendant was paying the carrying costs on the

marital residence, where both parties still reside, and that plaintiff specifically requested an order directing that defendant continue to pay those costs, as well as her unreimbursed medical expenses (*see Khaira v Khaira*, 93 AD3d 194, 197 [1st Dept 2012]; *Woodford v Woodford*, 100 AD3d 875, 877 [2nd Dept 2012]; *see also H.G. v N.K.*, 40 Misc 3d 1242[A] [Sup Ct, Kings County 2013]). Significantly, this Court has viewed the "formula adopted by the new maintenance provision as covering all the spouse's basic living expenses, including housing costs" (*Khaira*, 93 AD3d at 200). Accordingly, we vacate the award and remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B)(5-a).

We note that in reconsidering the award of temporary maintenance, the motion court should consider the payment of these carrying costs on the marital residence, half of which should be credited to defendant in calculating the award. The court should also articulate any other factors it may consider in deviating from the presumptive award, including plaintiff's medical condition and her inability to work. Any award of maintenance should be made effective as of the date of application (see Domestic Relations Law § 236[B][6][a]; *Nacos v Nacos*, 96 AD3d 579 [1st Dept 2012]; *H.K. v J.K.*, 32 Misc 3d 1226[A] n 4 [Sup Ct, New York County 2011]).

Given the rebuttable presumption that counsel fees shall be awarded to the less monied spouse (DRL § 237), we also remand for a reconsideration of plaintiff's request for counsel and appraisal fees. The motion court's denial of those requests was based on the now vacated award and a mathematical error in the calculation of the parties' respective incomes following the award of temporary maintenance.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11025 In re Derek Guerasio, Index 103194/12
Petitioner,

-against-

New York State Unified Court System,
Respondent.

_____

O'Rourke & Degen, PLLC, New York (Ronald D. Degen of counsel), for petitioner.

John W. McConnell, Office of Court Administration, New York (Pedro Morales of counsel), for respondent.

_____

Determination of respondent, dated March 6, 2012, which, inter alia, concurred in the Hearing Officer's findings that petitioner engaged in misconduct by failing to report for his scheduled work assignment on 197 days between December 7, 2009, and February 14, 2011, and in the Hearing Officer's recommendation that petitioner be terminated from his position as a Senior Court Officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered September 14, 2012), dismissed, without costs.

Substantial evidence supports the determination that petitioner engaged in misconduct by missing 197 days of work between December 7, 2009, and February 28, 2011, and that

petitioner's absences were not caused by his psychological disorders (*see Matter of Association of Surrogates & Supreme Ct. Reporters Within City of N.Y. v State of N.Y. Unified Ct. Sys.*, 48 AD3d 228 [1st Dept 2008]; *Matter of Garayua v Board of Educ. of Yonkers City Sch. Dist.*, 248 AD2d 714 [2d Dept 1998]).

The penalty of termination does not shock our sense of fairness (*see e.g. Matter of Dickinson v New York State Unified Ct. Sys.*, 99 AD3d 569 [1st Dept 2012]; *Matter of Truss v Westchester County Health Care Corp.*, 301 AD2d 607 [2d Dept 2003]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11026-
11027-
11027A In re Julian Raul S., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Oscar S.,
Respondent-Appellant,

Catholic Guardian Society & Home Bureau,
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Joseph T. Gatti, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children.

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Orders of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about December 20, 2012, which, following a fact-finding determination that appellant father had permanently neglected the subject children, terminated his parental rights and transferred custody and guardianship of two of the children to petitioner agency and the Commissioner of Social Services, for the purpose of adoption, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 21, 2012, unanimously dismissed, without costs, as subsumed in the appeals from the

December 20, 2012 orders.

The agency proved by clear and convincing evidence that it exerted diligent efforts to reunite the family, through multiple referrals for services, including drug treatment, parenting skills, anger management and domestic violence programs, scheduling and supervising visitation and therapy, and by monitoring the children's care during the multiple trial discharges (*see Matter of Sheila G.*, 61 NY2d 368, 373 [1984]; *Matter of Jeremiah Emmanuel R. [Sylvia C.]*, 101 AD3d 571, 572 [1st Dept 2012], *lv denied* 20 NY3d 863 [2013]). The court properly determined that the father had permanently neglected the children, despite completion of numerous programs and referrals, because he failed to demonstrate that he had overcome his problem with domestic violence, and he was unable to meet the children's special needs (*see Matter of Dina Loraine P. [Ana C.]*, 107 AD3d 634 [1st Dept 2013]).

The alternative of a suspended judgment was properly rejected, given the long history of failed attempts to return the children to the parents (*see Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]). The therapist for two of the children noted that the foster parents were able to provide these

children with stability and meet their special needs, which was paramount to the children's growth and progress at this point in their lives.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11031 Errol McDonald, Index 150975/12
Plaintiff-Respondent-Appellant,

-against-

Edelman & Edelman, P.C., et al.,
Defendants-Appellants-Respondents.

_____

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Scott E. Kossove of counsel), for appellants-respondents.

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 19, 2012, which granted so much of defendants' motion as sought to dismiss the first, third and fourth causes of action and denied so much of the motion as sought to dismiss the second cause of action, unanimously affirmed, with costs against defendants.

Defendants argue that the second cause of action, which seeks an accounting, is based on breach of fiduciary duty, in light of the attorney-client relationship, and seeks money damages, and is therefore barred by the three-year statute of limitations set forth in CPLR 214(6). They improperly raised this argument for the first time in reply on their motion (*see Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510 (1st Dept 2012]). In any event, the argument is unavailing. Plaintiff's

claim for an accounting so that he can recoup disbursements allegedly improperly charged against his jury award has little to do with whether defendants performed their legal services in a non-negligent manner (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co.]*, 3 AD3d 143 [1st Dept 2004], *affd* 3 NY3d 538 [2004]). It has to do with whether defendants owe plaintiff a fiduciary duty to account for money or property allegedly belonging to him, and is therefore governed by the "residual" six-year statute of limitations set forth in CPLR 213(1) (*see Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 443 [1995]; *Bouley v Bouley*, 19 AD3d 1049, 1051 [4th Dept 2005]).

The first cause of action, alleging legal malpractice, accrued at the time that plaintiff's appeal from the order that granted summary judgment dismissing his underlying Labor Law claims was dismissed for want of prosecution, in July 2006, notwithstanding his lack of knowledge of the dismissal (*see McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Plaintiff then had three years to commence a malpractice action against defendants (*see* CPLR 214[6]), absent an applicable ground for tolling the limitations period. He did not commence this action until March 2012.

Plaintiff relies on the continuous representation doctrine. However, in June 2008, defendants sent him a letter enclosing the

Second Department's affirmance of the underlying judgment and formally closing their representation of him. The letter, which plaintiff did not object to, demonstrates that the parties lacked "a mutual understanding of the need for further representation on the specific subject underlying the malpractice claim" (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 9-10 [2007] [internal quotation marks omitted]). Even accepting that defendants concealed from plaintiff the fact that his appeal was dismissed as abandoned, their letter placed him on notice that his attorney-client relationship with them had ended.

Plaintiff also relies on the doctrine of equitable estoppel to preclude defendants from pleading the statute of limitations defense. However, application of that doctrine would be inappropriate, since, despite his notice of the conclusion of defendants' representation of him in the underlying action, plaintiff failed to exercise reasonable diligence to ascertain whether his appeal from the dismissal of his Labor Law claims was still viable (*see Pahlad v Brustman*, 8 NY3d 901 [2007]). In any event, defendants' alleged mere silence as to the abandonment of the appeal is insufficient to invoke the doctrine of equitable estoppel (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491-492 [2007]).

We note that the complaint also fails to state a cause of

action for malpractice, since it does not plead that but for defendants' alleged negligence in failing to prosecute the appeal from the dismissal of the Labor Law claims plaintiff would have prevailed on the claims (*see e.g. Waggoner v Caruso*, 14 NY3d 874 [2010]; *Lieblich v Pruzan*, 104 AD3d 462 [1st Dept 2013]).

The fourth cause of action, which alleges a violation of Judiciary Law § 487, is untimely because it was asserted more than three years after plaintiff received defendants' June 2008 letter (*see* CPLR 214[2]; *Melcher v Greenberg Traurig, LLP*, 102 AD3d 497 [1st Dept 2013]). We note also that the complaint fails to state a cause of action under the statute, since it does not allege that plaintiff suffered any injury proximately caused by any deceit or collusion on counsel's part, and no such injury can reasonably be inferred from the allegations (*see Bohn v 176 W. 87th St. Owners Corp.*, 106 AD3d 598, 600 [1st Dept 2013], *lv dismissed in part, denied in part* ___ NY3d ___, 2013 NY Slip Op 88248 [2013]).

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

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11032 Martin Evans, as Guardian of the Property of Shari Perl, etc., et al., Plaintiffs-Appellants, Index 602898/05

-against-

Stephen H. Rosen, et al., Defendants,

Dean Palin, et al., Defendants-Respondents,

Rebecca Perl, etc., et al., Nominal Defendants.

_____

Bressler, Amery & Ross, P.C., New York (David H. Pikus of counsel), for appellants.

Law Office of Donovan Wickline, P.C., Brooklyn Heights (Donovan L. Wickline of counsel), for respondents.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 11, 2011, which, insofar as appealed from, granted the motion of defendants Dean Palin and 32 West 22nd Street LLC, to dismiss the fourth amended and supplemental complaint as against them, unanimously affirmed, without costs.

In this action alleging, inter alia, the misappropriation of real estate interests by defendant Shallo, the real estate broker for the subject properties, the court properly determined that the facts as pleaded against defendants Palin and 32 West 22nd Street LLC did not state a cause of action against them (*see* CPLR

3211[a][7]). In the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for imposition of a constructive trust against them (*cf. Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

As to the claim that Palin aided and abetted Shallo's breach of fiduciary duties when he and Shallo, as members of 32 West 22nd Street LLC, purchased one of the properties, there were no allegations that Palin knowingly participated in the breach or provided "substantial assistance" to Shallo (*Kaufman v Cohen*, 307 AD2d 113, 124-125 [1st Dept 2003]). As the motion court found, at most, the complaint alleges that Palin negotiated the purchase, knew that Shallo was an investor on the buyer side and that Shallo was a broker for the seller (*compare Yuko Ito v Suzuki*, 57 AD3d 205 [1st Dept 2008].

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11033 Honeymoon Diamonds, Index 653132/11
Plaintiff-Appellant,

-against-

International Jewelers
Underwriters Agency Ltd., et al.,
Defendants-Respondents.

_____

Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Henry Mascia of counsel), for International Jewelers Underwriters Agency Ltd., respondent.

Clayman & Rosenberg LLP, New York (Paul S. Hugel of counsel), for Lexington Insurance Company, respondent.

Steven G. Legum, Mineola, for Premium Financing Specialists Corp., respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered July 12, 2012, which, inter alia, granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff claims to have sustained a loss which it alleged would have been covered under an insurance policy issued by defendant Lexington Insurance Company (Lexington), which was cancelled prior to the date of loss. The policy was cancelled after plaintiff failed to pay its monthly premium pursuant to a premium financing agreement.

The policy issued by Lexington was cancelled in accordance with the request of the premium finance company defendant Premium Financing Specialists Corp. (PFS), acting as the agent of the insured pursuant to a standard provision of such financing contracts that appoints the premium finance agency as the insured's attorney in fact (*see Matter of ELRAC, Inc. v White*, 299 AD2d 546, 547 [2d Dept 2002]; *see also Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 434 [1972], *cert denied* 410 US 931 [1973]). Banking Law § 576(1)(a) and (b) set forth the requirements that a premium finance agency must follow to cancel a borrower's policy upon default, and it is undisputed that these procedures were followed in this matter.

Plaintiff nonetheless asserts that both Lexington and its broker, defendant International Jewelers Underwriters Agency Ltd. (International), should have "called upon" PFS to see that the policy remained in effect by drawing down the necessary sums for premiums. However, insurance brokers have "no continuing duty to advise, guide or direct a client to obtain additional coverage" (*see Murphy v Kuhn*, 90 NY2d 266, 273 [1997]), and the premium finance agreement at issue imposes no express requirement on either the insurer or the broker to do so.

Plaintiff's allegation that subsequent to its loss, it was told by a representative of International that the policy was in

effect at the time of the loss and that there was coverage, does not state any cause of action. Assuming that plaintiff is asserting a claim for negligent misrepresentation, plaintiff is unable to establish reliance upon such a statement and that the reliance was justified (*see Rotanelli v Madden*, 172 AD2d 815, 816-817 [2d Dept 1991], *lv denied* 79 NY2d 754 [1992]). Here, the only proximate cause of plaintiff's damages was the failure to pay the monthly premiums as required.

PFS's "power of attorney" under the premium financing agreement is a limited power conveyed to the premium finance lender to cancel the insurance which it financed. Contrary to plaintiff's assertion, the premium finance agreement did not authorize PFS to withdraw funds to keep coverage in force. Nor did the document that plaintiff attached to its answering papers, a payment letter dated December 29, 2010, which specified only that plaintiff authorized one payment to PFS, via transfer, authorize continued, future payments. That transfer took place

on December 29, 2010 (after cancellation of the financed insurance had already been effected), and PFS's request for reinstatement of coverage was declined by the insurer on January 26, 2011.

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11034-
11034A In re Arianna S., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Virginia R.,
Respondent-Appellant,

Commissioner for Social Services
of the City of New York,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Adira Hulkower of counsel), attorney for the children.

_____

Order of fact-finding, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about July 26, 2012, which, after a hearing, found that respondent mother had neglected her children, unanimously reversed, on the law and the facts, without costs, and the petition dismissed. Appeal from order of disposition, same court and Judge, entered on or about September 21, 2012, unanimously dismissed, without costs, as abandoned.

Since the court concluded that it could not determine whether or not the mother had used excessive corporal punishment, petitioner failed to meet its burden by a preponderance of the

evidence on the only allegation in the petition (Family Ct Act § 1046[b][i]). Although the issue is not preserved, we conclude the court improperly based its determination on claims of neglect not raised in the petition, without affording appellant a reasonable opportunity to prepare to answer this claim (*see* Family Ct Act § 1051 [b]; *Matter of Vallery P. [Jondalla P.]*, 106 AD3d 575 [1st Dept 2013]). Moreover, the petitioner failed to demonstrate by a preponderance of the evidence that the children were impaired or at risk of impairment by the mother's admitted financial and emotional stressors (*see Matter of Jeffrey M. [Noemi C.]*, 102 AD3d 608 [1st Dept 2013]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11035 The People of the State of New York, Ind. 6979/03
Respondent,

-against-

Joshua Roy-Hill,
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 (Nicole Coviello of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a order of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about May 9, 2012,

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: NOVEMBER 12, 2013

CLERK

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

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11036 In re Jacqueline Hill, Index 400773/12
Petitioner-Respondent,

-against-

The New York City Housing Authority,
Respondent-Appellant.

_____

Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for appellant.

Jacqueline Hill, respondent pro se.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 5, 2012, granting the petition brought pursuant to CPLR article 78 to the extent of annulling the determination of respondent New York City Housing Authority (NYCHA), dated March 7, 2012, which, after a hearing, terminated petitioner's public housing tenancy upon a finding of nondesirability, and remanded the matter to respondent NYCHA for reconsideration, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and, upon such review, respondent's determination unanimously confirmed, the petition denied, and the proceeding dismissed, without costs.

The petition raised an issue of substantial evidence and thus, the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). "Accordingly, we will treat the

substantial evidence issues de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Filonuk v Rhea*, 84 AD3d 502, 502 [1st Dept 2011] [internal quotation marks omitted]).

The determination sustaining the charges - that petitioner unlawfully possessed controlled substances in her public housing apartment and near the premises, in violation of her residential lease and applicable laws and regulations, thus constituting non-desirable conduct - is supported by substantial evidence (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). NYCHA submitted evidence that petitioner pleaded guilty to two charges relating to drug usage, including third-degree criminal possession of a controlled substance with intent to sell, following an arrest in her apartment. Petitioner admitted at the hearing that she was arrested inside her apartment and that the police found 53 bags of heroin, but denied that she intended to plead guilty to a crime involving intent to sell. The evidence that petitioner pleaded guilty to charges arising out of the conduct also established the administrative charges of nondesirability, and the court erred in questioning the facts established by the conviction (*see Matter of Bland v New York City Hous. Auth.*, 72 AD3d 528 [1st Dept 2010]; *Property Clerk of N.Y. City Police Dept. v Krasnik*, 41 AD3d 245 [1st Dept 2007]).

The arrest at her apartment resulted from a police raid on her apartment, and the hearing officer rationally concluded that such conduct presented a danger to the health, safety, and peaceful enjoyment of the other public housing tenants.

Although the hearing officer credited petitioner with voluntarily checking herself into an in-patient drug treatment facility some seven months before the hearing, and maintaining her sobriety during that time period, the penalty of termination does not shock the conscience (*see Matter of Coleman v Rhea*, 104 AD3d 535 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]; *Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630, 631 [1st Dept 2011]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11037 Galia Theophilova, Index 309230/08
Plaintiff-Appellant,

-against-

Todor Dentchev,
Defendant-Respondent.

_____

Law Office of Glenn S. Koopersmith, Garden City (Glenn S. Koopersmith of counsel), for appellant.

Pryor Cashman LLP, New York (Melina Sfakianaki of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered September 4, 2012, to the extent appealed from as limited by the briefs, granting awards to plaintiff wife for enhanced earning capacity and equitable distribution without interest, unanimously modified, on the law, to the extent of awarding plaintiff interest post-dating the Special Referee's report and recommendation at the statutory rate on the award of enhanced earning capacity, and otherwise affirmed, without costs.

The trial court properly exercised its discretion in declining to award interest predating the Special Referee's report and recommendation dated February 3, 2011 on the enhanced earning capacity award (*see Rubin v Rubin*, 1 AD3d 220, 221 [1st Dept 2003], *lv denied* 2 NY3d 706 [2004]). Postreport interest on this distributive award is mandatory pursuant to CPLR 5002 and

thus, should have been awarded (*Moyal v Moyal,* 85 AD3d 614, 615 [1st Dept 2011]; *Haymes v Haymes*, 298 AD2d 117, 119 [1st Dept 2002], *lv denied* 100 NY2d 509 [2003]).

Plaintiff's arguments that she is entitled to interest, retroactive to the date of the commencement of this action on the remaining portion of the equitable distribution award, is unpreserved, and we decline to consider it in the interest of justice (*see Recovery Consultants, Inc. v Shih-Hsieh*, 141 AD2d 272, 276 [1st Dept 1988]).

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

ENTERED: NOVEMBER 12, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11040 [M-4035 & M-4908
In re Dale Robertson also known as William Grant,
Petitioner,

-against-

The State of New York, et al.,
Respondents.

Ind. 3214/09

Dale Robertson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael F. Albanese of counsel), for the State of New York and Bronx County Criminal Court, respondents.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for New York City Department of Probation, 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,

And a cross motion having been made on behalf of respondent to dismiss the petition,

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, the cross motion granted, and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 12, 2013

CLERK