SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 24, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Saxe, Gische, JJ.

9727 In re Minerva Guzman, Index 106140/11
Petitioner-Appellant,

-against-

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

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Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 5, 2012, confirming an arbitration award, dated May 4, 2011, which terminated petitioner's employment as a public school teacher upon a finding that she engaged in a fraudulent scheme to enroll her granddaughter in public school using a false address, and dismissing the proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, unanimously modified, on the law, to vacate the finding of guilt as to Specification 1-A-1 (that petitioner engaged in the scheme to avoid payment of non-resident tuition) and vacate the penalty of termination, and to remand the

matter for the imposition of an appropriate penalty, and otherwise affirmed, without costs.

Despite making a strong case that petitioner and her daughter-in-law were not credible regarding the family's living situation, respondent Department of Education failed to sufficiently establish that the child's residence had been moved to petitioner's New Jersey home, or that petitioner and her son and daughter-in-law engaged in the scheme motivated by the desire to save on out-of-state tuition. Nor did the hearing officer make, or explicitly justify, any finding that the child was not a City resident. Thus, there is no rational basis upon which to conclude that petitioner engaged in the scheme with the purpose of defrauding respondent out of non-resident tuition (*see Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [1990]; *Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]).

However, as petitioner concedes, substantial evidence supports the charge that she acted in concert to file a false instrument (Specification 1-B), to wit, engaged in a scheme to use a school aide's address to enroll her granddaughter in the school at which she taught, and that she improperly obtained the school's services (Specification 1-A-2), since the child should not have been enrolled there.

In light of the foregoing, we remand for the imposition of an appropriate lesser penalty.

The Decision and Order of this Court entered herein on April 4, 2013 is hereby recalled and vacated (*see* M-2387 decided simultaneously herewith).

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9906 BDC Finance L.L.C., Index 650375/08
Plaintiff-Appellant-Respondent,

-against-

Barclays Bank PLC,
Defendant-Respondent-Appellant.

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Barclays Bank PLC,
Counterclaim-Plaintiff
-Respondent-Appellant,

-against-

BDC Finance L.L.C.,
Counterclaim-Defendant
-Appellant-Respondent.

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Richards Kibbe & Orbe LLP, New York (Craig A. Newman of counsel), for appellant-respondent.

Sullivan & Cromwell LLP, New York (Robinson B. Lacy of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 15, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on liability on its breach of contract claim, granted in part defendant's motion for summary judgment dismissing that claim, and denied defendant's motion as to its breach of contract counterclaims, modified, on the law, to grant plaintiff's motion, to deny defendant's motion, and otherwise affirmed, without costs.

On May 5, 2005, plaintiff BDC Finance LLC and defendant Barclays Bank PLC entered into a total return swap, a derivative transaction whereby BDC would obtain the benefits, and assume the risk, of an investment in a portfolio of corporate debt instruments in exchange for paying financing fees to Barclays, which owned the loans. The agreement was memorialized in a series of documents, including a standard form Master Agreement, a standard form Credit Support Annex (CSA), and a negotiated Master Confirmation that modified certain provisions of the standard forms.

Under the agreements, each party had the right to demand collateral from the other party based on changes in the value of the underlying debt instruments. If more collateral was needed, Barclays could make a collateral call for BDC to transfer an amount known as the "Delivery Amount." Conversely, if collateral needed to be returned, BDC could make a collateral call for Barclays to transfer an amount called the "Return Amount." Thus, if BDC determined that Barclays was over-collateralized, then BDC could demand the return of any excess collateral.

At issue in this case is Barclays' alleged failure to meet a $40 million collateral call made by BDC. Barclays maintains that the agreements permitted it to dispute BDC's collateral call by notifying BDC and making a partial payment of what Barclays

considered to be the undisputed amount. In support, Barclays points to Paragraph 3(b) of the CSA, which provides that "[s]ubject to Paragraphs 4 and 5, upon a demand made by [BDC] . . . [Barclays] will Transfer to [BDC] [the amount of collateral] specified by [BDC] in that demand" (i.e., the Return Amount). Paragraph 4(b) provides that if the demand is made by 1:00 p.m., the transfer of collateral must be made by the end of the following business day, but if the demand is made after 1:00 p.m, the transfer must be made by the end of the second business day.

According to Barclays, Paragraph 5 of the CSA sets forth a mechanism for resolving disputes over the proper amount of the collateral calls. Under that provision, the disputing party is required to both notify the other party of the dispute and transfer the undisputed amount by the end of the business day following the date of the demand. The parties are then required to consult with each other in an attempt to resolve the dispute, and if that fails, they must utilize the CSA's formal dispute resolution process.

BDC maintains that the dispute procedures contained in Paragraph 5 of the standard form CSA were expressly modified by the Master Confirmation that was negotiated by the parties. The Master Confirmation contains a "Delivery of Collateral" clause that provides that "[n]otwithstanding anything in the [CSA] to

the contrary . . . [Barclays] shall Transfer any Return Amounts . . . not later than the Business Day following the Business Day on which [BDC] requests the Transfer of such Return Amount." Unlike the form CSA, this clause requires that any transfer take place by the business day following the demand, regardless of whether the demand was made before or after 1:00 p.m. According to BDC, the Delivery of Collateral clause also nullifies the CSA's dispute resolution procedures and requires transfer of the entire Return Amount pending resolution of a dispute, and not just the undisputed amount. In other words, BDC maintains that if Barclays disagreed with the Return Amount demanded, it was required to pay first, and dispute later. Barclays, on the other hand, contends that the Delivery of Collateral clause modified only the timing of the transfer and left intact the dispute resolution process.

As relevant here, an Event of Default occurs when a party fails to perform any obligation required under the CSA if such failure is continuing after any applicable grace period has elapsed (Master Agreement § 5[a][iii][1]). The CSA states that an Event of Default exists if a party fails to transfer required collateral and such failure continues for two business days after notice of that failure is given (CSA ¶ 7[i]). If an Event of Default occurs, the non-defaulting party may, upon proper notice

to the defaulting party, designate a Early Termination Date for all outstanding transactions (Master Agreement § 6[a]).

On October 6, 2008, BDC determined that Barclays was over-collateralized, and demanded, pursuant to Paragraph 3(b) of the CSA, that Barclays transfer a $40,140,405.78 Return Amount. Barclays made no payment that day, believing that it owed BDC only $5,080,000 in excess collateral (the undisputed amount). The next day, October 7, 2008, having received no payment by mid-afternoon, BDC again wrote to Barclays asking that it remit the $40 million Return Amount. Barclays, however, did not transfer the $40 million Return Amount by the deadline. Nor did Barclays transfer the $5,080,000 undisputed amount. In fact, Barclays made no payment on October 7, 2008.

The following day, October 8, 2008, Barclays sent BDC a flat $5 million payment, which was a day late and $80,000 less than the undisputed amount. That same day, BDC sent Barclays a "Notice of Failure to Transfer Return Amount" (the default notice). In the default notice, BDC informed Barclays that it had been required, by October 7, 2008, to either pay the $40 million Return Amount or the undisputed amount. The notice declared a Potential Event of Default against Barclays, and advised Barclays that if it failed to cure within two business days, it would be in default under Section 5(a)(iii)(1) of the

Master Agreement and Paragraph 7(i) of the CSA. Despite this notice, Barclays did not cure by remitting the balance of the $40 million Return Amount.

On October 13, 2008, BDC sent Barclays a notice declaring Barclays in default for having failed to transfer the $40 million Return Amount within the cure period (the termination notice). The termination notice advised Barclays that the default was continuing, and designated the following day as the Early Termination Date ending all transactions pursuant to Section 6(a) of the Master Agreement. The termination of the agreements obligated Barclays to return BDC's collateral that it was holding, which, according to BDC, amounted to approximately $297 million. On October 17, 2008, BDC requested Barclays to remit this amount, but Barclays never did. This litigation ensued.

BDC's default notice stated that in order to have properly disputed the collateral call, Barclays was required to have both notified BDC of the dispute and transferred the undisputed amount of $5,080,000 by October 7, 2008. The evidence in the record establishes as a matter of law that Barclays did not do this. Barclays' payment of $5 million on October 8, 2008 was a day late. Accordingly, BDC notified Barclays that it had two business days to pay the Return Amount. Still, Barclays did not remit the $40 million, placing it in default. Barclays' default,

in turn, entitled BDC to terminate the transactions and demand return of its collateral.[1] Because Barclays did not return BDC's collateral, it breached the agreements, and summary judgment on liability should have been granted to BDC.[2]

Barclays unpersuasively argues that its $5 million payment within the two-day period cured any default. Having failed to timely pay the undisputed amount by the deadline, Barclays lost any right it may have had to suspend payment of the full $40 million. Under Paragraph 7(i) of the CSA, a default occurs when a party fails to make a required transfer of collateral, and that failure continues for two business days after notice. In BDC's default notice, Barclays' specific failure was identified in the caption: "Notice of Failure to Transfer Return Amount." The default notice specified that Barclays would be in default if "this failure" — i.e., the failure to pay the $40 million – continued for two business days. Thus, to effect a cure, Barclays was required to transfer the full $40 million Return

[1] At the time of the termination notice, Barclays still had not paid the $40 million, thus making its default "continuing" under Section 6(a) of the Master Agreement.

[2] The motion court properly concluded that BDC could not terminate based on Barclays' alleged improper valuation of its own post-September 15 collateral calls. BDC failed to provide Barclays with the requisite notice and opportunity to cure this alleged breach.

Amount, not simply the undisputed amount.

There is no merit to the dissent's contention that the language in BDC's default notice allowed Barclays to pay either the full Return Amount or the undisputed amount within the cure period. The dissent gives no weight to the heading section of the notice, which plainly identifies the default as "Failure to Transfer Return Amount." The heading does not advise Barclays of its failure to remit the undisputed amount because by the time the notice was sent, that option was no longer available.

Moreover, it makes little sense, as the dissent suggests, for Barclays to have been given an additional two days to pay the undisputed amount. The dispute resolution procedures in the CSA set forth a very strict and tight deadline requiring Barclays, in the event of a dispute, to transfer the undisputed amount within one business day of the demand, i.e., by October 7, 2008. BDC's default notice advised Barclays that it failed to meet that deadline and thus was in default on the $40 million collateral call. Barclays' only option at that point was to remit the full Return Amount, which it failed to do.

The dissent's view of the options available to Barclays during the cure period turns on the belief that the agreements permitted Barclays to dispute the Return Amount before paying it in full. We disagree. The plain and unambiguous language of the

Delivery of Collateral clause requires Barclays to transfer any Return Amount demanded by BDC no later than the business day following the demand. This obligation is unconditional and absolute and exists "[n]otwithstanding anything in the [CSA] to the contrary." Thus, the Delivery of Collateral clause expressly supercedes the form language in the CSA which would have otherwise permitted Barclays to dispute before paying (*see H. Fox & Co., Inc. v Blumenfeld*, 24 AD3d 722, 722-723 [2d Dept 2005] [contractual provision that applied "(n)otwithstanding anything to the contrary set forth in this lease" was unambiguous and controlled over any other lease provision]). Likewise, the dissent's conclusion that the Delivery of Collateral clause only modifies the transfer timing provisions of the CSA finds no support in the language of the agreements. Although BDC may have been willing to allow Barclays to pay the undisputed amount if it did so by the close of business on October 7, once that deadline passed, it was entitled to call an event of default based on the wording of the Master Confirmation (*see e.g. Triax Capital Advisors, LLC v Rutter*, 83 AD3d 490 [1st Dept 2011], *appeal dismissed* 17 NY3d 804 [2011] [emails between the parties cannot be used to create an ambiguity in an otherwise clear agreement]).

We recognize that the Delivery of Collateral provision is unilateral and requires Barclays, and not BDC, to pay first and

dispute later. We disagree, however, with the dissent's conclusion that this results in a harshly uneven allocation of economic power requiring this Court to, in effect, rewrite the parties' contact (*see Jade Realty LLC v Citigroup Commercial Mtge. Trust 2005-EMG*, 83 AD3d 567, 568 [2011], *affd* 20 NY3d 881 [2012] ["The fact that contractual terms are novel or unconventional does not bring them or the contract in question to the level of absurdity"] [internal quotation marks omitted]). The CSA still required BDC to calculate the Return Amount in a commercially reasonable manner and in good faith (CSA ¶ 11[d]). Furthermore, if Barclays disagreed with the Return Amount, it could have paid it and then made its own collateral call the next business day (CSA ¶ 3[a]). And if Barclays wanted to dispute the Return Amount, it still could have done so provided that, as the agreements required, Barclays paid the full Return Amount while the dispute was pending. Since the Delivery of Collateral clause is contained in an agreement negotiated by two sophisticated commercial entities, the court should not, in the guise of contractual interpretation, alter the plain language of the clause (*see Jade Realty LLC*, 83 AD3d at 568).

There is no merit to the dissent's suggestion that there is an issue of fact as to whether there was an undisputed amount owed by Barclays after BDC issued its $40 million collateral

call. Although there may have initially been some confusion about the amount in dispute, Barclays ultimately concluded that it owed BDC $5,080,000.[3] More importantly, in its response to BDC's Requests for Admission, Barclays made a formal judicial admission that "$5,080,000 was the undisputed amount . . . of BDC's October 6, 2008 collateral call." Contrary to the dissent's position, Barclays does not contest in this litigation that there was an undisputed amount owed to BDC. In fact, Barclays' appellate brief repeatedly refers to its $5 million payment as "the undisputed amount."

The dissent also maintains that issues of fact exist as to whether Barclays' communications with BDC constituted timely notice of a dispute under the CSA. Even if that were true, BDC would still prevail. As noted earlier, the dispute resolution procedures required Barclays to not only provide notice of the dispute by October 7, 2008, but to also transfer the undisputed amount by that date. The evidence in the record undeniably shows that Barclays failed to pay the undisputed amount by the deadline, and establishes as a matter of law that Barclays did not comply with the CSA's dispute resolution procedures.

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[3] Although the dissent states that Barclays did not make this determination until the late afternoon of October 7, the record reflects that Barclays acknowledged that it owed $5,080,000 on the morning of October 7.

Barclays is not entitled to summary judgment on its counterclaims alleging that BDC failed to meet Barclays' collateral calls made on October 10 and 14, 2008. BDC was not required to meet those calls because at the time they were due, Barclays was already in default and BDC had terminated the transactions (*see* CSA ¶ 4[a]).

All concur except Andrias, J.P. and Gische, J. who dissent in part in a memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (dissenting in part)

In this dispute arising out of a Total Return Swap agreement between hedge fund BDC and Barclays Bank, each party asserts that it was entitled to terminate the agreement based on the other's alleged default in transferring collateral. The motion court denied BDC's motion for summary judgment on its breach of contract and declaratory judgment claims, granted Barclays' motion for summary judgment to the extent of dismissing that portion of BDC's breach of contract claim alleging that Barclays was required to pay the full amount of BDC's October 6, 2008 collateral call prior to disputing it, and denied Barclays' motion for summary judgment as to its counterclaims.

The majority would modify to grant BDC summary judgment, based on BDC's argument that even if Barclays was entitled to dispute BDC's October 6, 2008 collateral call before paying it, Barclays did not follow the dispute mechanism set forth in the parties' agreement. Because I believe that issues of fact exist in this regard, I respectfully dissent.

The agreement consists of a Master Agreement, a Schedule and a Credit Support Annex (CSA), all on ISDA forms, and a Master Confirmation drafted by the parties. The CSA allowed BDC to request a "Return Amount" of what it calculated to be excess collateral based on changes in the value of the Reference Assets

(debt instruments). The CSA's "Transfer Timing" provision stated that the transfer of the Return Amount would be made by (i) the end of the next business day following a request made no later than the Notification Time (1:00 p.m.) or (ii) the end of the second business day following a request made after the Notification Time. In contrast, the "Delivery of Collateral" provision of the Master Confirmation Agreement provided that notwithstanding anything in the CSA to the contrary, Barclays "shall Transfer any Return Amounts in respect of Transactions not later than the Business Day following the Business Day on which" BDC requested it.

The CSA suspended Barclays' obligation to transfer a Return Amount following, among other things, notice of a dispute under the contractual procedure for resolving disputes over collateral calls. This included a two-step dispute resolution mechanism: (1) informal, under which the disputing party had to notify the other party of the dispute and transfer the undisputed amount to the other party, and the parties would attempt to resolve the dispute between themselves, and (2) formal, which required the party who made the collateral call to recalculate by seeking four quotations at mid-market from Reference Market makers, and use their average to determine the Reference Assets value.

Preliminarily, I believe that the motion court correctly

found that Barclays was not required to pay the full amount of BDC's $40 million collateral call prior to disputing it. "An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 196 [1st Dept 1995]). Applying this principle, the delivery of collateral provision in the parties' Master Confirmation Agreement should be read as modifying only the Transfer Timing provision of the CSA. Under this interpretation, the Master Confirmation Agreement does not modify any portion of CSA's dispute resolution or conditions precedent provisions, which remain in full force and effect.

BDC's reading of the agreements forces Barclays, not BDC, to pay first, then dispute any collateral call. The "court will endeavor to give the [contract] [the] construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other" (*Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994] [internal quotation marks omitted]). This is because "[i]t is highly unlikely that two sophisticated business entities, each represented by counsel, would have agreed to such a harshly uneven allocation of economic power under the Agreement" (*id.*). As both parties were allowed to act as

valuation agents with respect to collateral, it is illogical that the agreements would require only one party to pay first and dispute later. Reading the agreements as a whole so as to achieve the purpose of the parties, and giving all of the agreements' provisions full force and effect, the motion court properly rejected BDC's reading of the agreements as requiring Barclays to have paid the full amount of BDC's October 6th collateral call prior to disputing a portion of it.

The majority disagrees, stating that the plain and unambiguous language of the Delivery of Collateral clause required Barclays to transfer any Return Amount demanded by BDC no later than the business day following the demand. However, this interpretation is belied by BDC's own conduct prior to the litigation. During the afternoon of October 7, 2008, BDC advised Barclays by email that "[a]t present, we have not received payment, nor has Barclay's exercised its dispute right. We remind you that pursuant to paragraph 4(b) and Paragraph 5 of the [CSA], by 5:00 p.m. today Barclays must *either* pay the amount set out in the request *or* exercise its dispute rights" (emphasis added). Consistent with this interpretation, in the "Notice of Failure to Transfer Return Amount" it sent to Barclays on October 8, 2007, BDC again stated that "[p]ursuant to Paragraph 4(b) and Paragraph (5) of the CSA, by 5:00 p.m. NY time on Tuesday,

October 7, 2008, Barclays was required to *either* (i) pay the relevant Return Amount or (ii) notify BDC that Barclay's disputes the calculation of the Return Amount and make a payment with respect to the undisputed amount" (emphasis added). Thus, BDC unequivocally advised Barclays that it had the right to pay or dispute and, at a minimum, BDC is bound by this interpretation of the contract with respect to its October 6th collateral call.

The majority finds that even if Barclays was entitled to pay or dispute, Barclays defaulted because it failed to tender either the full amount of BDC's $40 million collateral call of October 6, 2008, or invoke the parties' dispute mechanism by timely submitting the "undisputed amount" of $5,080,000 in full by October 7, 2008. The majority also finds that when BDC sent Barclays a "Notice of Failure to Transfer Return Amount" on October 8th, Barclays could only cure by remitting the full $40 million return amount within two days of the notice. The majority reasons that "[h]aving failed to timely pay the undisputed amount by the deadline, Barclays lost any right it may have had to suspend payment of the full $40 million." I disagree and believe that the motion court correctly found issues of fact whether Barclays intended its communications with BDC following BDC's October 6th collateral call to be a notice of dispute under the CSA, whether they imparted sufficient notice to BDC, and

whether BDC complied with the informal dispute mechanism.

On October 6th, Barclays sent BDC a collateral call for the Return Amount of $11.75 million. Hours later, BDC sent Barclays a collateral call for the Return Amount of $40 million. BDC's demand arose out of a dispute over Barclays' methodology in calculating its own collateral calls. After the Lehman Brothers' Bankruptcy, Barclays changed its valuation method because it believed the value of the underlying assets was falling faster than the previously used LoanX prices reflected. BDC claims this inflated Barclays' collateral calls, which BDC continued to pay.

Upon receipt of BDC's October 6th collateral call, Barclay's immediately advised BDC that "[w]e do not agree with this call" and asked BDC if it wanted "to invoke the dispute mechanism." BDC responded that it was not seeking to invoke the dispute mechanism, and that it was making its own collateral call for a Return Amount under the CSA, which was independent of any requests for Delivery Amounts made by Barclays, which BDC would continue to address in accordance with the agreement. Barclays responded that "[w]e show that BDC owes Barclays, not the other way around" and employees of the parties agreed later that day that BDC owed Barclays $13.52 million, which BDC paid. Thus, questions of fact exist as to whether there was any undisputed amount owed by Barclays to BDC when Barclays refused to pay the

$40 million return amount on October 6, 2008, and whether Barclays' responses that day, considered in light of the past practice of the parties, were sufficient to invoke the informal dispute resolution mechanism agreed to by the parties.

The majority states that Barclays has admitted that $5,080,000 was the undisputed amount of BDC's October 6, 2008 collateral call and that this amount had to be paid by October 7th. However, it was not until October 7th that the parties began discussing whether Barclays was holding more collateral than it had asked for, and it was not until 4:05 p.m. that day that an employee of Barclays, after accounting for the payments that Barclays received from BDC on October 6th, advised BDC that "Barclays agrees to return 5,080,000. This is for margin call made on 10/6." Thus, as BDC's expert reported, "[i]t appears that BDC understood that the $5.08 million reflected excess collateral based on Barclays' own valuations, not BDC's", and was not based on BDC's $40 million demand. Specifically, Barclay's demanded $11.75 million from BDC on October 6th and BDC made payments that day of $3.1 million and $13.52 million for a total of $16.53 million, resulting in an overpayment of $5.08 million. Consistent with this, the Judicial Admission on which the dissent relies, states in full: "Barclays denies Request No. 38, except admits that *after receiving BDC wire transfers on October 6,*

2008, Barclays concluded that $5,080,000 was the undisputed amount, as that term is used in the Credit Support Annex, of BDC's October 6, 2008 collateral call" (emphasis added). Barclays has disputed in this litigation that it owes any part of the $40 million demanded by BDC on October 6th, which was based on Barclays' change in its valuation methods.

The next day, October 8th, Barclays transferred $5 million to BDC. Barclays asserts that the $80,000 balance was then deducted from its own collateral calls to BDC. Particularly, after making the $5 million payment, Barclays sent BDC a collateral call stating "[a]s of COB Oct 7, 2008 Barclays Bank PLC are calling for ... $20,500,000 for value Oct 8, 2008." After receiving a $7.25 million transfer from BDC on the morning of October 9th, Barclays reduced its collateral call from $20.5 million to $13.25 million, which BDC paid that afternoon. Barclays maintains that the amount of its collateral calls would have been $80,000 greater if Barclays had returned $5,080,000 the day before instead of $5 million. The ISDA Master Agreement does contemplate "netting," stating that whenever amounts would otherwise be payable by each party to the other, in the same currency and with respect to the same Transaction, the two amounts shall be set off and only the net amount shall be payable. Thus, a question of fact also exists as to whether

Barclays paid the undisputed amount of $5,080,000 in full.

As to the timeliness of the payment, even if it was due on October 7th, on October 8, 2008, BDC sent Barclay's a "Notice of Failure to Transfer Return Amount", stating:

> "Pursuant to Paragraph 4(b) and Paragraph 5 of the CSA, by 5:00 p.m. NY time on Tuesday, October 7, 2008, Barclays was required to either (i) pay the relevant Return Amount or (ii) notify BDC that Barclays disputes the calculation of the Return Amount and make a payment with respect to the undisputed amount. As of 5:00 p.m. NY time on October 7, BDC received neither payment or notice of dispute. Therefore, a Potential Event of Default has occurred under the Master Agreement with respect to Barclays.
>
> "This notice constitutes a "notice of failure" pursuant to Paragraph 7(i) of the CSA. Please be advised that if this failure continues for two business days, an Event of Default will have occurred with respect to Barclays under Section 5(a)(iii)(1) of the Master Agreement."

Paragraph 7.1 refers to the failure to make, when due, a collateral payment "required to be made by [the party]." A failure to make a transfer does not become an Event of Default unless the non-defaulting party gives the allegedly defaulting party notice of a failure to perform and "that failure continues for two Local Business Days after notice of that failure is given to that party."

While the Notice of Failure references Barclays' obligation to "(i) pay the relevant Return Amount or (ii) notify BDC that Barclays disputes the calculation of the Return Amount and make a

payment with respect to the undisputed amount," in describing the "Potential Event of Default" it does not address Barclays' alleged shortfall or untimeliness in remitting the undisputed amount of $5,080,000, and Barclays was not notified that it had defaulted in that respect. Rather, the notice states that "BDC received neither payment or notice of dispute." As set forth above, the $5,080,000 figure was based on BDC's overpayment of Barclays' October 6th collateral calls, and an issues of fact exists as to whether Barclays provided BDC with adequate notice that it disputed BDC's October 6, 2008 collateral call seeking the $40 million. Even if the "Potential Event of Default" is viewed as Barclays' failure pay the Return Amount or notify BDC that it disputed the collateral and pay the undisputed amount, the notice gave Barclays two days to cure this failure and did not state that this could only be accomplished by paying the full Return Amount. Thus, even if Barclays was in default, contrary to the majority's view, Barclays could cure by either paying the Return Amount or the undisputed amount. In holding otherwise, the majority focuses on the heading section of the notice, which reads "Notice of Failure to Transfer Return Amount." However, I do not believe that the heading can be used to override the express language used therein.

Insofar as BDC claims it was entitled to declare an early termination of the agreements based on Barclays' improper valuations of its own collateral calls, if BDC received a collateral call with which it disagreed, its only alternatives under the agreements were either (i) to pay Barclays, or (ii) to use the dispute resolution mechanism as mandated by paragraph 5 of the Credit Support Annex. Further, in holding that paragraph 5 gave BDC its exclusive recourse upon receiving an objectionable collateral call, the motion court properly found that the CSA's dispute resolution process was a "mandatory" part of the "agreed upon" contract (*see VCG Special Opportunities Master Fund Ltd. v Citibank, N.A.*, 594 F Supp 2d 334, 343 [SD NY 2008], *affd* 355 F Appx 507 [2d Cir 2009]). Accordingly, having failed to follow the CSA's dispute resolution clause, BDC cannot seek to avoid that agreement's requirements and retroactively challenge Barclays' calculation of its post-September 15 collateral calls.

The motion court correctly found that it cannot be determined whether BDC defaulted with respect to the collateral calls made by Barclays on October 10th and October 14th until it

is determined whether Barclays first defaulted with respect to the October 6th collateral call.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Clark, JJ.

10576 Robert Banushi, Index 402693/10
Plaintiff-Appellant,

-against-

Law Office of Scott W. Epstein, et al.,
Defendants-Respondents.

_____

Robert Banushi, appellant pro se.

Antin, Ehrlich & Epstein, LLP, New York (Kimberly S. Edmonds of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 18, 2012, which granted defendants' motion for summary judgment dismissing the complaint and for an order enjoining plaintiff from commencing any further actions or making any motions against them without prior court approval, unless he is represented by counsel, and denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

Notwithstanding the public policy requiring free access to the courts, the motion court's order barring plaintiff from initiating further litigation or motion practice against defendants without prior court approval unless he is represented by counsel was justified by plaintiff's continuous and vexatious litigation against defendants (*Matter of Robert v O'Meara*, 28 AD3d 567 [2d Dept 2006], *lv denied* 7 NY3d 716 [2006]; *Capogrosso*

v Kansas, 60 AD3d 522 [1st Dept 2009], *cert denied* ___ US ___, 133 S Ct 278 [2012]; *see also Melnitzky v Apple Bank for Sav.*, 19 AD3d 252, 253 [1st Dept 2005]). Among other things, in addition to the instant action, plaintiff filed a lawsuit in state court and a lawsuit in federal court and a counterclaim in a third suit, as well as a disciplinary complaint, all alleging legal malpractice based on the same sparse allegations, and all unavailing.

Contrary to plaintiff's contentions, the order is not overly broad; it granted the part of defendants' motion that sought injunctive relief only as to litigation against them.

While defendants, in their appellate brief, request a modification to require court approval even if plaintiff is represented by counsel, and indeed requested such relief from the Supreme Court, we are precluded from granting affirmative relief to a nonappealing party (*see Cox v NAP Constr. Co., Inc.*, 40 AD3d 459, 462 [2007], citing *Hecht v City of New York*, 60 NY2d 57 [1983]; *Sharp v Stavisky*, 221 AD2d 216, 217 [1995]).

The motion court properly denied plaintiff's cross motion to amend the complaint to include additional allegations that defendants produced a forged retainer agreement in connection with their representation of him in the underlying assault case. Plaintiff acknowledged that an attorney-client relationship

existed and failed to state how the forged retainer differed from the purportedly valid signed retainer. He further failed to allege the elements of fraud (*see J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [1st Dept 2005]). Moreover, the motion court correctly held that plaintiff's breach of contract and legal malpractice claims were barred by the applicable statutes of limitations, res judicata, and collateral estoppel, and plaintiff's additional allegations would not alter that determination.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10835 The People of the State of New York, Respondent, Ind. 6381/89

-against-

William Fields, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about June 2, 2010, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed defendant 15 points for drug or alcohol abuse. Regardless of whether these points should have been assessed, defendant's point score would still be far above the threshold for a level three adjudication.

Defendant's argument for a downward departure is not only unpreserved, but is based on facts outside the record, relating to events that postdated the order being appealed. In any event, defendant has not established that his psychiatric placement is a factor that should affect his risk level.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10836 Emiliana Nunez, et al., Index 108771/10
Plaintiffs-Respondents,

-against-

Wah Kok Realty Corp.,
Defendant-Appellant.

_____

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

Zuller Law Offices, New York (Michael E. Zuller of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 18, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied. Triable issues of fact exist as to whether the large, spreading Christmas tree on which plaintiff tripped was an open and obvious and not inherently dangerous condition (*see Centeno v Regine's Originals*, 5 AD3d 210, 211 [1st Dept 2004]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10837 In re Tamara A.,
Petitioner-Respondent,

-against-

Anthony Wayne S.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Collela of counsel), attorney for the child.

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Order of protection, Family Court, Bronx County (Monica Drinane, J.), entered on or about October 18, 2012, and in force until October 12, 2014, after a hearing, ordering respondent, inter alia, to stay away from petitioner and the subject child, unanimously affirmed, without costs.

A fair preponderance of the evidence supports the court's finding that respondent committed acts that would constitute harassment in the second degree and disorderly conduct (*see* Family Court Act §§ 812[1]; 821[1]; 832). A person is guilty of harassment in the second degree when, "with intent to harass, annoy or alarm another person ... [h]e ... subjects such other person to physical contact, or attempts or threatens to do the same" (Penal Law § 240.26[1]; *see e.g. McGuffog v Ginsberg*, 266

AD2d 136 [1st Dept 1999]). A person is guilty of disorderly conduct when, "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," he engages in "violent, tumultuous or threatening" behavior (Penal Law § 240.20[1]; *see e.g. Matter of Clark v Ormiston*, 101 AD3d 870, 870-871 [2d Dept 2012]). Petitioner testified that while she and respondent were sitting in the Family Court waiting room, respondent stood up, faced her, and said, "[S]omeone is going to get a bullet in their head." Petitioner, the child's maternal grandmother, testified that she believed respondent was talking about her, because she was preparing to adopt the child. She testified that she was afraid of respondent because they never got along, he had treated her with disrespect, and he had assaulted her daughter. Petitioner also testified that immediately after respondent made the statement, agency caseworkers who were in the waiting room entered the courtroom and informed the court. Petitioner's testimony was undisputed. Although the court adjourned the hearing to allow respondent to testify, he later declined to do so.

Contrary to respondent's contention, a single incident is legally sufficient to support a finding of harassment in the second degree (*see Matter of Victor S. v Kareem J.S.*, 104 AD3d 405 [1st Dept 2013]. The court properly drew a negative

inference from respondent's failure to testify (*see Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562 [1st Dept 2013]). The court properly questioned petitioner, who at the time was proceeding pro se (*see Matter of Krista I. v Gregory I.*, 8 AD3d 696, 699 [3d Dept 2004]). Upon review of the available transcript of the July 23, 2012 hearing, we find that the court harbored no bias against respondent.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10839 Roberto Santana, etc., Index 116416/08
Plaintiff-Respondent,

-against-

Edwin De Jesus, et al.,
Defendants-Appellants.

_____

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellants.

Trolman Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 15, 2012, upon a jury verdict, awarding plaintiff, among other things, $750,000 for the decedent's conscious pain and suffering, including pre-impact terror, unanimously modified, on the facts, to vacate that award and to direct a new trial on that issue, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of that award from $750,000 to $375,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The evidence at trial was legally sufficient to support the jury's verdict finding that defendants were 100% at fault for the death of plaintiff's decedent (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Ample evidence supported the finding that

defendant Edwin De Jesus, a bus driver for defendant New York City Transit Authority, breached his duty to exercise due care, or see that which he should have seen through the proper use of his senses (Vehicle and Traffic Law § 1146[a]; *Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]; *Bello v New York City Tr. Auth.*, 50 AD3d 511, 512 [1st Dept 2008]).

We reject defendants' contentions that plaintiff's experts were unqualified or that their testimony was speculative (*see Schechter v 3320 Holding LLC*, 64 AD3d 446, 449-450 [1st Dept 2009]; *Seong Sil Kim v New York City Tr. Auth.*, 27 AD3d 332, 334 [1st Dept 2006], *lv denied* 7 NY3d 714 [2006]). At best, these arguments speak to the evidence's weight, not admissibility, and the jury here clearly found their testimony persuasive (*see Matter of Moona C. [Charlotte K.]*, 107 AD3d 466, 467 [1st Dept 2013]; *Rubio v New York City Tr. Auth.*, 99 AD3d 532, 533 [1st Dept 2012]). It was well within the jury's province to accept their opinions and reject that of defendants' expert (*see Rojas v Palese*, 94 AD3d 557, 558 [1st Dept 2012]; *Torricelli v Pisacano*, 9 AD3d 291, 293 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

However, considering the circumstances here, such as the duration of conscious pain and suffering endured by plaintiff's decedent, including pre-impact terror, we find that the award materially deviated from reasonable compensation, and reduce it

as indicated (CPLR 5501; *see Segal v City of New York*, 66 AD3d 865 [2d Dept 2009]; *see also Garcia v Queens Surface Corp.*, 271 AD2d 277 [1st Dept 2000]).

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

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10840-
10840A In re Julien Javier F., etc.,
and Another,

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

Christina F., etc.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith D. Waksberg of counsel), and Proskauer Rose LLP, New York (Susan D. Friedfel of counsel), attorneys for the children.

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Orders of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about August 14, 2012, which, upon fact-finding determinations that the mother violated the terms of the suspended judgments, terminated her parental rights to the subject children, and transferred custody and guardianship of them to petitioner Children's Aid Society (the agency) and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, with respect to the fact-finding determinations, and the appeals therefrom otherwise dismissed, without costs.

No appeal lies from the orders of disposition, as they were entered upon the mother's default (*see* CPLR 5511; *Matter of Skyler S.M. [S. LaToya J.]*, 83 AD3d 549 [1st Dept 2011]).

A preponderance of the evidence supports Family Court's finding that the mother violated the terms of the suspended judgments (*see Matter of Christian Anthony Y.T. [Donna Marie T.]*, 78 AD3d 410 [1st Dept 2010]). Notwithstanding the mother's efforts to comply with some of the terms of the suspended judgments, the credible evidence adduced at the hearing established, inter alia, that she missed some of the planning conferences, and her apartment was not maintained in a suitable manner due to mold and gnat infestation. Although the mother was required to remain drug and alcohol free, she relapsed in January 2011, approximately six months after the suspended judgment period had begun. She also failed to obtain clearance for her live-in paramour because it might "hurt her case," or for other friends that she allowed to live in her apartment.

It is not necessary for a parent to violate all of the terms of a suspended judgment for a violation to be found (*see Matter*

of Gianna W. [Jessica S.], 96 AD3d 545 [1st Dept 2012] [finding that the failure to secure suitable housing was a material violation and constituted grounds for revocation]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10841 Hoffinger Stern & Ross, LLP, Index 113111/09
Plaintiff-Respondent,

-against-

Philip Neuman, et al.,
Defendants-Appellants.

_____

The Griffith Firm, New York (Edward Griffith of counsel), for appellants.

Law Offices of Stephen R. Stern, P.C., Melville (Stephen R. Stern of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Louis B. York, J.), entered April 11, 2012, which granted plaintiff's motion for summary judgment on its cause of action for an account stated, deemed appeal from judgment, same court and Justice, entered April 23, 2012 (CPLR 5520[c]), and so considered, said judgment unanimously reversed, on the law, without costs, and the judgment vacated, and plaintiff's motion denied.

In light of the strong policy of resolving disputes on the merits, and in the absence of a claim of prejudice by plaintiff, the court properly considered defendants' opposition to plaintiff's motion, despite the fact that it was served five or six hours after the time to which the parties stipulated (*see Green v Mohamed*, 275 AD2d 599 [1st Dept 2000]).

Defendants raised an issue of fact whether they objected to

the March 5, 2008 invoice that is the sole basis of the account stated cause of action (*see Russo v Heller*, 80 AD3d 531 [1st Dept 2011]). In correspondence throughout early March 2008, including a letter dated March 6, defendants refer to "the amount allegedly owed," and, from plaintiff's responding correspondence, it appears that plaintiff understood that language as a challenge to the validity of the invoice.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10846 Princes Point LLC, etc., Index 601849/08
Plaintiff-Appellant,

-against-

AKRF Engineering, P.C., et al.,
Defendants-Respondents,

John Doe(s) partners, et al.,
Defendants.

_____

Gaines & Fishler, LLP, Staten Island (Robert M. Fishler of counsel), for appellant.

Seyfarth Shaw LLP, New York (Donald Dunn Jr., of counsel), for AKRF Engineering, P.C., respondent.

Herrick, Feinstein LLP, New York (Scott E. Mollen of counsel), for Allied Princes Bay Co., Allied Princes Bay Co. #2, L.P., Muss Development L.L.C. and Joshua Muss, respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 2, 2013, which granted defendants Allied Princes Bay Co., Allied Princes Bay Co. #2, Muss Development L.L.C., and Joshua Muss's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

To the extent plaintiff based its claims on certain alleged misrepresentations by defendants Allied Princes Bay Co. and Allied Princes Bay Co. #2 as to property it contracted to purchase from them, the claims are precluded by this Court's

determination in a prior appeal that "plaintiff accepted all defects in the property at issue and was not relying on any assurances made by defendants as to the condition of the property" (94 AD3d 588, 589 [1st Dept 2012]).

We have considered plaintiff's remaining contentions, including that it is entitled to specific performance of the contract with an abatement in the purchase price, and find them unavailing.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10847 The People of the State of New York, Respondent, Ind. 4665/09

-against-

Michael Vasquez, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about September 7, 2010, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10848 In re Nasir Levon L.,

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

Ashley Bernadette B.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

_____

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

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 27, 2011, which denied respondent mother's motion to vacate orders of fact finding and disposition, same court and Judge, entered on or about August 1, 2011, determining that she permanently neglected the subject child, terminating her parental rights, and committing the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for her default and a meritorious defense to the petition (*see* CPLR 5015

[a][1]; *Matter of Tyieyanna L. [Twanya McK.]*, 94 AD3d 494 [1st Dept 2012]). Her delay in obtaining a mental health treatment discharge report until the day she had to appear in court, and alleged public transportation difficulties on that same day, do not establish a reasonable excuse for the failure to appear, especially as respondent does not claim that she was unfamiliar with the public transportation system or had not previously used it to travel to Family Court (*see Matter of Christian E.*, 66 AD3d 433 [1st Dept 2009]; *Matter of Male H.*, 179 AD2d 384 [1st Dept 1992], *lv dismissed in part and denied in part* 79 NY2d 1026 [1992]).

There is no evidence that respondent completed the mental health treatment program called for in her service plan within the relevant one-year period so as to demonstrate a meritorious defense to the allegations of permanent neglect. The program discharge summary submitted by respondent states that she was

inconsistent and noncompliant with treatment, had no interest in treatment, and terminated treatment of her own accord (*see Matter of Tyieyanna L.*, 94 AD3d at 494).

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10849 Carmen Caro-Fortyz, Index 301059/10
Plaintiff-Respondent,

-against-

Donald Peterson, et al.,
Defendants-Appellants.

_____

Weiner, Millo, Morgan & Bonanno, LLC, New York (Keith A. Nezowitz of counsel), for appellants.

Jacoby & Meyers, LLP, Newburgh (Marie M. DuSault of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered March 6, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendants established entitlement to judgment as a matter of law, in this action where plaintiff pedestrian alleges that she was injured when, while crossing the street, she was hit by a truck driven and owned by defendants. Defendants submitted the deposition testimony of defendant driver stating that he was traveling straight in the left lane, at about five-to-seven miles per hour, and did not see plaintiff before the accident, as well as the deposition testimony of plaintiff stating that she got hit shortly after stepping out into the street from between two cars

parked on the east side of the street. Plaintiff failed to raise a triable issue of fact as to whether she did not walk into the side of the moving truck.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10850 112 East 35th Street, LLC, Index 603218/07
Plaintiff-Respondent,

-against-

The New York Society of the New Church,
Defendant-Appellant.

_____

Fryer & Ross LLP, New York (Gerald E. Ross of counsel), for appellant.

Debra J. Millman, P.C., New York (Craig F. Wilson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about January 9, 2012, which, after a nonjury trial, dismissed without prejudice the first cause of action, which seeks a declaration with respect to the parties' "Utilities Agreement," and the third cause of action, which seeks money damages, and, upon the second cause of action, enjoined defendant from ceasing to provide utilities to the residential building purchased by plaintiff, unanimously modified, on the law, to reinstate the first and third causes of action, and to remand the matter for review of the Utilities Agreement pursuant to Religious Corporations Law § 12, and otherwise affirmed, without costs.

We hold that the parties' Utilities Agreement requires court approval, pursuant to Religious Corporations Law § 12(1), because

it modifies the parties' previously approved Purchase Agreement (*see Beacon Term. Corp. v Chemprene, Inc.*, 75 AD2d 350, 354 [2d Dept 1980], *lv denied* 51 NY2d 706 [1980]; *see also* Religious Corporations Law § 12[9]).

In light of plaintiff's lack of other access to gas, steam, and electricity, we find that the injunction against defendant's termination of utilities to the residential building should remain in effect until this matter is resolved.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10851 Dashawn Brown, an Infant by His Mother and Natural Guardian, Chivonne Wigfall, et al., Plaintiffs-Appellants, Index 115509/10

-against-

Beautiful Village Redevelopment Associates, Defendant-Respondent.

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Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 23, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Security-camera footage of the subject accident shows that the infant plaintiff fell because he laid his entire body down on the narrow railing in the stairwell of the apartment building in which he lived and lifted his hands in the air in an attempt to shift them from the post to the railing. This uncontradicted evidence demonstrates as a matter of law that defendant was not negligent, requiring dismissal of the complaint.

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: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10852 The People of the State of New York, Ind. 1983/00
Respondent,

-against-

Devrol Palmer,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered March 14, 2011, resentencing defendant to a term of 17 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find that term to be excessive.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10853N Michelle Edelstein, Index 313371/09
Plaintiff-Respondent,

-against-

Ronald J. Edelstein,
Defendant-Appellant.

_____

Weisman Law Group P.C., Cedarhurst (Bari M. Lewis of counsel), for appellant.

Benowich Law, LLP, White Plains (Leonard Benowich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered August 14, 2012, which, to the extent appealed from, upon renewal, granted plaintiff's motion to hold defendant in contempt of court for failing to comply with court orders relating to pendente lite financial obligations, and directed incarceration of defendant for the lesser of 60 days or until he pays the sum of $436,527.24, unanimously reversed, on the law, without costs, and the matter remanded for an evidentiary hearing on defendant's stated financial inability to comply with all of the obligations contained in the orders.

As a matter of due process, a hearing is required on a contempt motion that will result in incarceration when the party opposing the motion asserts a defense of financial inability to

comply (*see* Domestic Relations Law § 246[3]; *Bergman v Bergman*, 84 AD3d 537, 539 [1st Dept 2011]). Here, in opposition to the original contempt motion, defendant requested a hearing on his ability to pay, and submitted evidence to show that all of his income was going toward paying his monthly pendente lite obligations for spousal and child support, as well as the mortgage and virtually all expenses of maintaining the marital residence, tuition for the parties' five children, and other expenses of the household. He asserted that he could not continue to meet those obligations and also comply with the portions of the prior orders requiring him to pay additional lump sum amounts, including over $262,000 to a contractor to make repairs to the marital residence and $150,000 to the wife's attorney for interim legal fees. He submitted a statement of net worth showing assets worth about $1.5 million, which he contended had no ready market value, and asserted that, even if those assets could be sold, he then would have no income with which to satisfy his continuing support obligations. Defendant also submitted an affidavit of the family's long-time accountant concerning defendant's income and opining that defendant could not comply with the additional orders requiring the lump sum payments without liquidating all of his assets. Plaintiff responded that defendant was being deceitful and hiding assets

and income that would enable him to comply, pointing to inconsistencies in his submissions and to his comfortable lifestyle.

Upon renewal, plaintiff requested a hearing in connection with her contempt motion, and argued that no means other than contempt were available to obtain satisfaction because defendant's disclosed income was insufficient and he had no remaining assets that could be sequestered or used to satisfy a money judgment.

Since the issue of defendant's financial ability to comply with all of the obligations imposed by the court's orders turns on issues of credibility, which cannot be resolved on the face of the submitted documents, a hearing is required before a determination can be made.

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

ENTERED: OCTOBER 24, 2013

CLERK

Andrias, J.P., Friedman, Acosta, DeGrasse, Freedman, JJ.

10854N Hilda A. Gentry, Index 100411/11
Plaintiff-Appellant,

-against-

William A. Finnigan, et al.,
Defendants-Respondents.

_____

Scarcella Law Offices, White Plains (M. Sean Duffy of counsel), for appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Matthew S. Matera of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered April 6, 2012, which granted defendants' motion for a change of venue from New York County to Ulster County, unanimously affirmed, without costs.

Plaintiff properly commenced this action arising from a motor vehicle accident in New York County based on the corporate defendant's place of business (CPLR 503[a]). However, the court providently exercised its discretion in granting defendants' motion to change venue for the convenience of material witnesses (CPLR 510[3]). Defendants showed that the New York State trooper who responded to the scene of the accident in Ulster County was willing to testify, but would be extremely inconvenienced by having to travel to New York County (*see Henry v Central Hudson Gas & Elec. Corp.*, 57 AD3d 452 [1st Dept 2008]). Moreover, most

of the medical records and witnesses are located in Ulster County (*see Lopez v Chaliwit*, 268 AD2d 377 [1st Dept 2000]; *Abulhasan v Uniroyal-Goodrich Tire Co.*, 232 AD2d 219 [1st Dept 1996]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10855-
10855A-
10855B

Ind. 917/09
2346/09
3552/09

The People of the State of New York,
Respondent,

-against-

Raphael Black,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 2, 2010, as amended July 28, 2010 and August 26, 2010, convicting defendant, after a jury trial, of burglary in the second degree (two counts), grand larceny in the third degree and bail jumping in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 34 years to life, unanimously affirmed.

Defendant, who was convicted of two separate burglaries, asserts that one of these convictions was against the weight of the evidence. We reject this argument (*see People v Danielson*, 9 NY3d 342, 348 [2007]), and instead find that the evidence supporting the conviction at issue was overwhelming. The DNA expert's testimony established the reliability of her

methodology. Based on this testimony, there was no reasonable possibility that the DNA found at the scene of the burglary belonged to anyone other than defendant (*see People v Harrison*, 22 AD3d 236 [1st Dept 2005], *lv denied* 6 NY3d 754 [2005]). Defendant's identity as the person who committed the burglary was further established by his use of the same distinctive modus operandi in both burglaries.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court limited the extent to which the People could elicit defendant's very extensive and serious criminal history, and his burglary and trespass convictions, among other things, were probative of his credibility and were not unduly prejudicial.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that although the prosecutor made some inappropriate propensity arguments and appealed to the emotions of the jurors, defendant was not

deprived of a fair trial, and the errors were harmless in light of the overwhelming evidence supporting all of the charges (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10856 In re Zion Hia, Index 114065/11
Petitioner-Appellant,

-against-

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

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 8, 2012, which denied the petition seeking, inter alia, a declaration that respondent The New York City Department of Citywide Administrative Services (DCAS) acted arbitrarily in establishing an agency-specific civil service promotional list unique to respondent The New York City Department of Correction (DOC), from which list he was not selected for promotion, and granted respondents' cross motion to dismiss the proceeding brought pursuant to CPLR Article 78 as time-barred, unanimously affirmed, without costs.

On July 6, 2011, DCAS established a promotional list for DOC to fill the position of Administrative Construction Project Manager. The list identified two eligible candidates, one of

whom was petitioner. As the eligibility list contained fewer than three names, DOC was not required to make a selection therefrom for promotion (*see* New York Civil Service Law §61(1); 55 RCNY Rule 4.7.1[c]). The eligibility list was accessible to petitioner on July 11, 2011, through DCAS's automated Interactive Voice Response System, to which petitioner was directed by both DCAS' Notice of Examination and its Notice of Result. In addition, the list was published in *The Chief Leader*, a civil service oriented newspaper, on July 29, 2011.

DCAS's determination became final and binding upon its promulgation of the eligibility list, at which time petitioner knew or should have known that he was aggrieved thereby (*see Martin v Ronan*, 44 NY2d 374, 380 [1978]; *Johns v Rampe*, 23 AD3d 283, 284 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]). In the absence of any statute or regulation entitling petitioner to individual written notice of the eligibility list, no such notice was required (*see Johns*, 23 AD3d at 284-285).

As the petition was brought more than four-months after the challenged determination became final and binding, it is time-barred (*see* CPLR 217[1]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10857 In re Grigoriy Zaltsman, Petitioner, Index 402178/12

-against-

New York City Housing Authority, Respondent.

_____

Grigoriy Zaltsman, petitioner pro se.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated August 14, 2012, which, after a hearing, terminated petitioner's Section 8 rent subsidy on the ground of fraud, 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 [Alice Schlesinger, J.], entered March 2, 2013), dismissed, without costs.

Substantial evidence supports NYCHA's determination that petitioner engaged in a scheme with his landlord to submit false information on his Section 8 application and subsequent renewal forms, so as to obtain housing subsidies to which they were never entitled, thus defrauding the agency of $23,990 over the 2½-year period of his participation in the program before the fraud was

discovered (CPLR 7803[4]; *Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]).

That federal criminal charges arising from the investigation were dismissed against petitioner, and were pursued only against the landlord, is of no moment, as NYCHA has the authority to determine that he committed such misconduct in its own forum under a lesser evidentiary standard and to terminate his subsidy upon such a finding, even absent a criminal conviction (24 CFR 982.553[c]; *Matter of Maldonado v New York City Hous. Auth.*, 63 AD3d 568, 569 [1st Dept 2009]). Under the circumstances, the penalty of termination of petitioner's subsidy does not shock the judicial conscience (*see Matter of Fazal v Wambua*, 105 AD3d 638 [1st Dept 2013]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Gische, Clark, JJ.

10858 In re Shakil G., and Another,

Children Under the Age
of Eighteen Years, etc.,

Abdul G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, 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 (Diane Pazar of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jody Adams, J.), entered on or about November 18, 2011, which, after a fact-finding hearing, determined that respondent father had neglected the subject children, unanimously affirmed, without costs.

The record demonstrates by a preponderance of the evidence that on February 16, 2011, respondent neglected the subject children by engaging in acts of domestic violence upon the older child, the child's mother and his older sister (not a subject of this proceeding) while in the youngest child's presence, which caused the older child to become so frightened that he had to be rushed to the emergency room after he started to hyperventilate

(*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Ta Aisha H. [Terrence H.—Patrice J.]*, 99 AD3d 487 [1st Dept 2012], *lv denied* 20 NY3d 855 [2012]). The older child's out-of-court statements were corroborated by his testimony, his older sister's testimony and his medical records (*see* Family Ct Act § 1046[a][vi]).

The evidence supports a finding of derivative neglect as to the youngest child, because it establishes that respondent suffers from such an impaired level of parental judgment as to create a substantial risk of harm for any child in his custody (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [1st Dept 2012]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10859 The People of the State of New York, Respondent, Ind. 3628/10

-against-

Ronald Pinkney, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about February 1, 2011, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10860-
10860A Paul Mohan, et al., 115997
116254
Claimants-Appellants,

-against-

The State of New York,
Defendant-Respondent.

_____

Lisa M. Comeau, Garden City, for appellants.

Eric T. Schneiderman, Attorney General, New York (Bethany A. Davis Noll of counsel), for respondent.

_____

Judgment of the Court of Claims of the State of New York (Alan C. Marin, J.), entered on or about March 13, 2012, dismissing the claims after a nonjury trial, unanimously affirmed, without costs.

"In a nonjury trial, the decision of the fact-finding court should not be disturbed on appeal unless it is obvious the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Watts v State of New York*, 25 AD3d 324, 324 [1st Dept 2006] [internal quotation marks omitted]). Here, there exists no basis to disturb the trial court's determination that the opening in the median barrier on the Hutchinson River Parkway did not constitute a dangerous

condition. The record shows that the court carefully considered the conflicting expert testimony and its decision to find the conclusions of the State's expert to be more credible was supported by the evidence.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10862-
10863 Juliet E. Orgill, et al.,
Plaintiffs-Respondents,

-against-

Ingersoll-Rand Company, et al.,
Defendants-Appellants.

Index 101142/10

_____

Epstein Becker & Green, P.C., New York (Sheila A. Woolson of counsel), for appellants.

The Ottinger Firm, P.C., New York (Denise Rubin Glatter of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Debra A. James, J.), entered March 8, 2013, which, respectively, denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiffs' motion for class certification, unanimously affirmed, without costs.

The record does not conclusively demonstrate whether the "Shared General Expense" (SGE) that was deducted from certain employees' total compensation was, as defendants argue, part of the calculation of the employees' commissions or, as plaintiffs argue, a deduction from wages in violation of Labor Law § 193. While defendants' arguments presume that the SGE deduction was part of the commission calculation, defendants proved neither that contention nor, in the admitted absence of an express

agreement as to when commissions were earned and became wages, the contention that plaintiffs impliedly agreed to the deduction (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616-617 [2008]; *Cuervo v Opera Solutions LLC*, 87 AD3d 426 [1st Dept 2011]). Indeed, the record pages to which defendants themselves cite show that, until mid-July 2008, plaintiffs did not properly understand the purpose of the deduction, believing it to be a set-off for defendants' matching contributions to the employee benefits system. Only when defendants stopped matching contributions, and plaintiffs inquired, did defendants advise that the SGE was not a deduction from gross commissions but a part of the calculation itself. Moreover, the commission reports issued by defendants throughout the relevant period reflect that the commissions were earned *before* the SGE was deducted.

Contrary to defendants' contention, plaintiffs satisfied the commonality prerequisite for class certification (*see* CPLR 901; *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-422 [1st Dept 2010]). All members of the class allege the deprivation of monies that defendants allegedly wrongfully deducted as SGE (*see City of New York v Maul*, 59 AD3d 187, 189-190 [1st Dept 2009], *affd* 14 NY3d 499 [2010]). We reject defendants' contention that individual issues will predominate because the court will have to determine what each member of the class understood the SGE

deduction to be and whether he or she objected to it. The central issue is when commissions were earned, and that is the same for all class members. It is only after that issue is determined that the court may be required to consider whether there was an implied agreement to alter the time when commissions were earned, and, as the motion court found, no individualized consideration will be required as to an implied agreement because defendants intentionally treated all class members the same way. In any event, the other questions of law or fact common to the class would still predominate over any such individual question (*see* CPLR 901[a][2]).

Defendants' remaining arguments in opposition to class certification are unavailing since they are all premised on the contention that there is a lack of commonality.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10864-
10864A In re Trey C., and Another,

Children Under the Age
of Eighteen Years, etc.,

Amber C.,
Respondent-Appellant,

Administration For Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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

_____

Orders of fact-finding and disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 18, 2012, which, inter alia, upon respondent's default, determined that respondent, a person legally responsible for the subject children, abused the child Annyika B. and derivatively abused the child Trey C., and directed respondent to comply with the terms and conditions specified in an order of protection, unanimously reversed, on the law, without costs, and the matter remanded for a new fact-finding hearing.

The court erred in entering the orders on respondent's alleged default. Her failure to appear at the scheduled hearing

dates did not constitute a default inasmuch as her counsel was present, stated that she wished to proceed, and affirmed that she had respondent's authorization to do so (*see Matter of Bradley M.M. [Michael M.-Cindy M.]*, 98 AD3d 1257 [4th Dept 2012]; *Matter of Shemeco D.*, 265 AD2d 860 [4th Dept 1999]; *cf. Matter of Aaron C. [Grace C.]*, 105 AD3d 548, 548-549 [1st Dept 2013]; *Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]).

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10865 The People of the State of New York, Respondent, Ind. 6515/10

-against-

Herman Everett, Defendant-Appellant.

_____

Law Offices of Leslie H. Ben-Zvi, New York (Leslie H. Ben-Zvi of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered December 16, 2011, convicting defendant, after a nonjury trial, of assault in the second degree, and sentencing him to a term of two years, unanimously affirmed.

The verdict was based on legally sufficient evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The element of serious physical injury (Penal Law § 10.00[10]) was established, because the victim's permanent loss of four front teeth constituted a protracted impairment of her health or protracted loss or impairment of the function of a bodily organ (*see People v Lanier*, 44 AD3d 547 [1st Dept 2007], *lv denied* 9 NY3d 1035 [2008]; *People v Howard*, 79 AD2d 1064 [3rd Dept 1981]). Since the teeth are lost, the victim can never eat with them, notwithstanding that she has been fitted with a prosthetic

device; accordingly, her loss is not just protracted, but permanent. While the fact that damage to an organ has been successfully repaired may affect whether the injury qualifies as serious (*see e.g. People v Rosado*, 88 AD3d 454, 455 [2011], *lv denied* 18 NY3d 928 [2012]), this does not apply when the organ is permanently lost, irrespective of whether it is replaced by a prosthesis.

Furthermore, the victim's loss of four front teeth also constituted a "serious and protracted disfigurement," since "a reasonable observer would find her altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315 [2010]; *see also People v Snyder*, 100 AD3d 1367, 1368 [4th Dept 2012], *lv denied* 21 NY3d 1010 [2013][disfiguring dental injuries]). The fact that the victim received a removable prosthetic device did not ameliorate the seriousness of her injuries, since whenever she removes the device, the disfigurement will be readily apparent.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10866 The People of the State of New York, Ind. 4243/10
Respondent,

-against-

Jeffrey Figueroa,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes 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 January 31, 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: OCTOBER 24, 2013

CLERK

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

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10867 White Knight NYC Ventures, LLC, Index 117340/09
Plaintiff-Respondent,

-against-

15 West 17th Street, LLC, et al.,
Defendants-Appellants,

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

_____

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for appellants.

Jeffrey B. Hulse, Sound Beach, for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 18, 2012, which, insofar as appealed from, granted plaintiff's motion for an order confirming the Referee's Report of Sale and directed entry of a deficiency judgment against defendants 15 West 17th Street, LLC, Joseph Sabbagh and Isaac Mishan, unanimously affirmed, with costs.

By submitting a detailed appraisal prepared by a certified appraiser pursuant to Executive Law § 160-a(5)(a), plaintiff met its burden of establishing, prima facie, the mortgaged premises' fair market value as of the date of the foreclosure auction (*see Trustco Bank, N.A. v Gardner*, 274 AD2d 873, 874 [3d Dept 2000]). Defendants' assertions that the certified appraisal suffered from

"deficiencies" in its square footage calculations and choice of capitalization rate are unavailing, as those "claimed deficiencies" do not preclude its consideration. Rather, the assertions of error bear on the question of the weight the appraisal should be given (*see Champlain Natl. Bank v Brignola*, 249 AD2d 656, 657 [3d Dept 1998]).

In opposition, defendants' submission of an affidavit from a real estate broker was insufficient to raise a triable issue of fact. Although a real estate broker's affidavit may be properly received on the issue of market value (*see Union Chelsea Natl. Bank v Rumican 190 Corp.*, 257 AD2d 463, 464 [1st Dept], *lv denied*, 93 NY2d 989 [1999]), the three-page affidavit submitted by defendants conclusorily states the broker's opinion as to the value of the mortgage premises, without any substantiation or analysis. An "estimate of value," rather than a "full appraisal," is insufficient to raise an issue of fact as to valuation (*Trustco Bank*, 274 AD2d at 874). To the extent the

affidavit submitted by defendant Joseph Sabbagh addresses the issue of the premises' valuation, it is similarly conclusory.

We have considered all other issues and find them to be without merit.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10868 Fernando C. Dias, Index 400091/11
Plaintiff-Respondent,

-against-

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

_____

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for appellants.

Siegel & Connerty, LLP, New York (Steven Aripotch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered August 1, 2012, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff, employed by defendants' subcontractor on the Second Avenue Subway Project, made a prima facie showing of his entitlement to judgment as a matter of law. He submitted, among other things, his deposition testimony that he was directing a backfill truck over a water main trench to a utility trench, when he fell through an unshielded opening in the water main trench (*see Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561 [1st Dept 2011]).

In opposition, defendants failed to raise a triable issue of fact. Although plaintiff's coworker's affidavit stated that

plaintiff was directing the backfill truck to the water main trench before he fell into the trench, § 240(1) was violated under either version of the accident (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592 [1st Dept 2010]). Further, the backfilling of the trench had not yet commenced at the time of plaintiff's accident. Accordingly, we reject defendants' argument that fully shielding the trench would have been contrary to the objectives of plaintiff's work (*compare Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011]). Nor was plaintiff the sole proximate cause of his accident. The safety devices provided — sheets of metal that partially covered the trench — were inadequate. Further, plaintiff's conduct in walking backwards while directing the truck was, at most, comparative negligence, which is not a defense under § 240(1) (*see Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 281 [1st Dept 2005]).

The evidence plaintiff offered on reply was properly submitted in response to the evidence submitted and the arguments

made by defendants in their opposition papers (*see Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250, 251 [1st Dept 2002]). In any event, even if plaintiff's evidence were not considered, he would still be entitled to summary judgment.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10869 Standard Charter Bank, Index 653506/11
Plaintiff-Respondent,

-against-

Ahman Hamad Al Gosaibi and
Brothers Company, et al.,
Defendants-Appellants.

_____

Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for appellants.

Hogan Lovells US LLP, New York (Marc J. Gottridge of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 14, 2012, which denied defendants' motion to dismiss the complaint seeking to enforce a foreign money judgment, and granted plaintiff's cross motion for summary judgment in the amount of the judgment plus interest, unanimously affirmed, with costs.

Contrary to defendants' contention, the proceeding that resulted in the underlying judgment in the Bahrain Center for Dispute Resolution was not a compulsory arbitration, but a judicial proceeding. Thus, there is no special requirement for appeals and no other due process violation in defendants' being required to litigate in that tribunal (*see Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493, 505 [1970]). While

the procedures of the tribunal are more restrictive than those of New York courts, they are not unlike those of many civil law jurisdictions the judgments of which are enforceable in New York. Having had notice of the hearing and an opportunity to be heard (of which they took advantage), defendants were afforded due process, even if the procedures were not as generous as those of New York (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 222 [2003], *cert denied* 540 US 948 [2003]). Nor was plaintiff required to plead the absence of each ground for non-enforcement of the judgment that might be available as a defense under CPLR 5304. Plaintiff alleged that the judgment was "conclusive." It thus alleged, implicitly, that none of the CPLR 5304 factors were present. Under the rule requiring that pleadings be afforded a liberal construction, this is sufficient.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10871 In re Micah Zyair F.W.,

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

Tiffany L.
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Andrew H. Rossmer, Bronx, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about September 20, 2012, to the extent it is based upon the finding that respondent mother permanently neglected the subject child, unanimously affirmed, without costs.

Petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship, including referring respondent to programs addressing her drug abuse, anger management issues, and parenting skills, and that nevertheless respondent failed to complete any program, visit consistently, or take steps to provide a stable and suitable home for the child

(*see Matter of Sheila G.*, 61 NY2d 368 [1984]; *Matter of Amilya Jayla S. [Princess Debbie A.]*, 83 AD3d 582 [1st Dept 2011]; *Matter of Arden Jermaine H.*, 33 AD3d 369 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]; Social Services Law § 384-b[3][g][i], [7][a]).

The court properly denied counsel's request for an adjournment when respondent, who was fully aware of the scheduled date for continuation of the fact-finding hearing, did not appear.

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10872N Nathaniel Klipper, et al., Index 110711/03
Plaintiffs,

Drew Doscher, et al.,
Plaintiffs-Respondents,

-against-

Liberty Helicopters, Inc., et al.,
Defendants-Appellants,

Liberty Helicopter Tours, Inc., et al.,
Defendants.

_____

Jones Hirsch Connors Miller & Bull P.C., New York (Richard Imbrogno of counsel), for appellants.

Ryan & Conlon, LLP, New York (Kieran J. Conlon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 1, 2013, which, insofar as appealed from as limited by the briefs, denied defendants Liberty Helicopters, Inc., Liberty Helicopters, Inc. (NY), Meridian Consulting Co., Inc. and Paul Tramontana's motion to compel plaintiff Doscher to produce any transcripts of his testimony in his divorce action, unanimously modified, on the law and the facts, to grant the motion to the extent of compelling Doscher to produce to the motion court, for in camera review, those portions of the transcript of his divorce action, and documents related thereto, that reveal information relevant to his claims for lost earnings

and future revenue, and otherwise affirmed, without costs.

By asserting a claim for lost earnings and future revenue, plaintiff Doscher put his financial status in issue, and waived the protection afforded by Domestic Relations Law § 235(1) (*see Janecka v Casey*, 121 AD2d 28 [1st Dept 1986]). Portions of transcripts and related documents that reflect Doscher's financial status before the accident are material and necessary to defendants in their defense of this action (*see Janecka*, 121 AD2d at 32; CPLR 3101[a]). Upon its in camera review of these materials, the motion court will be able to tailor Doscher's production to defendants so as to balance his right to privacy with their right to relevant information (*see Solomon v Meyer*, 103 AD3d 1025, 1026 [3d Dept 2013]).

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

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

ENTERED: OCTOBER 24, 2013

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10873N Westchester Medical Center, Index 309307/09
Plaintiff-Respondent,

-against-

James Amoroso,
Defendant-Appellant.

_____

Ian Anderson, Kew Gardens, for appellant.

The Stuttman Law Group, P.C., White Plains (Dennis D. Murphy of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 29, 2012, which, to the extent appealed from, denied defendant's motion for an order of preclusion and summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action seeking payment for medical services provided by plaintiff hospital, defendant's preclusion motion was properly adjudicated (*see* Rule 202.8[f] of the Uniform Rules of the New York State Trial Courts). Contrary to defendant's argument, there is no evidence that the proper procedure for resolving the pre-preliminary conference discovery motion was not followed or that the motion court was not thoroughly familiar with the content of the filed motion prior to signing the order challenged on appeal. Although defendant alleges that plaintiff failed to

respond to a demand for a bill of particulars over a 2½ year period of time, no preliminary conference order existed and no further demands or motions seeking plaintiff's compliance with the lone discovery request were brought or made. Additionally, no conditional orders pertaining to discovery compliance were sought by defendant. Thus, defendant failed to establish a pattern of willful non-compliance with discovery and the drastic penalty of an order of preclusion is not warranted (*see Cherokee Owners Corp. v DNA Contr. LLC*, 74 AD3d 411 [1st Dept 2010]; *Ripka Rotter & King, LLP v Kahn Gordon Timko & Rodriguez, P.C.*, 83 AD3d 613 [1st Dept 2011]; *Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999]).

Defendant's argument that plaintiff's name, as it appears in the caption, is a misnomer and that due to the error plaintiff lacks the capacity to bring this action in New York State courts was improperly raised in reply and we decline to reach it (*see Matter of Landmark West! v Burden*, 15 AD3d 308 [1st Dept 2005], *lv denied* 5 NY3d 713 [2005]; *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995]), except to, *sua sponte*, allow plaintiff to amend the caption. We note that the named plaintiff is a commonly used "dba" and that there is no prejudice

to defendant (*see generally Suarez v Shorehaven Homeowners Assn.*, 202 AD2d 229 [1st Dept 1994]; *Air Ttite Mfg. v Acropolis Assoc.*, 202 AD2d 1067 [4th Dept 1994]).

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

ENTERED: OCTOBER 24, 2013

CLERK