SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 11, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13743 The People of the State of New York, Ind. 5618/11
Respondent,

-against-

William McDaniel,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (W. Robert Fair of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 13, 2012, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the inference that defendant unlawfully entered

a building with intent to commit a crime, and there is nothing in the evidence to suggest a noncriminal purpose for defendant's entry.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13744 In re Nikole S.,
Petitioner-Appellant,

-against-

Jordan W., et al.,
Respondents-Respondents,

Alvin O.,
Respondent.

_____

Louise Belulovich, New York, for appellant.

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

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for Administration for Children's Services, respondent.

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

_____

Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about December 10, 2013, which, after a hearing, denied the petition for custody of the subject child brought pursuant to article 6 of the Family Court Act, unanimously affirmed, without costs.

The record supports Family Court's determination that it was not in the best interests of the child, who had been placed in a non-kinship foster home, to grant the custody petition filed by

petitioner, her adult cousin. The Family Court placed appropriate emphasis upon the fact that petitioner and her then 3-year-old daughter were residing in a household that included a registered sex offender when she filed the custody petition, and that she remained there for a year, despite knowing that she was unlikely to obtain custody while she continued to reside in that home, which reflected a lack of parental judgment (*see Matter of Richard C.T. v Helen R.G.*, 37 AD3d 1118 [4th Dept 2007]; *Matter of Roe v Roe*, 33 AD3d 1152, 1153 [3d Dept 2006]*; cf. Matter of Michaellica Lee W.*, 106 AD3d 639, 640 [1st Dept 2013]). The Family Court also appropriately took into account petitioner's financial issues, which could result in her returning to the home where the sex offender resided, the limited contact between petitioner and child, and the effect awarding custody to petitioner would have upon the agency's ability to reunite respondent mother with the child, before concluding that granting the custody petition would not be in the child's best interests.

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13745 In re Michael Matrisciano, Index 104372/12
Petitioner-Appellant,

-against-

Michael R. Coan, etc., et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Hoguet Newman Regal & Kenney LLP, New York (John P. Curley of counsel), for respondents.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered August 20, 2013, denying the petition, inter alia, to annul respondents' determination, dated August 21, 2012, which purportedly terminated petitioner's employment as a police officer with respondent Metropolitan Transportation Authority Police Department, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The article 78 court correctly denied the petition and dismissed the proceeding on the ground that petitioner did not exhaust his administrative remedies (*see Matter of Cantres v Board of Educ. of City of N.Y.*, 145 AD2d 359 [1st Dept 1988]). The "Waiver of Trial Agreement" (Waiver Agreement) incorporated

the collective bargaining agreement's binding arbitration procedure as the means of determining, in future cases of misconduct, whether petitioner had committed a "serious violation" of respondent police department rules. The department later determined that subsequent to entering into the Waiver Agreement petitioner committed a serious violation. Petitioner began the grievance process by appealing the determination to respondent's director of labor relations, and when that process was unsuccessful, petitioner demanded arbitration. However, before the arbitration commenced, petitioner brought this article 78 proceeding.

Petitioner failed to establish that he was actually terminated before arbitration, in violation of the Waiver Agreement. To the extent a mistake was made when a personnel order, dated August 21, 2012, was issued to all department members stating that petitioner had been terminated, the mistake was corrected, and a revised order, dated April 12, 2013, was issued to all department members stating that petitioner was

suspended. The department's records demonstrate that, effective August 20, 2012, petitioner was on an unpaid leave of absence.

Petitioner also submitted no evidence that he was, as he claims, prejudiced by these events.

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13746 In re New York City Asbestos Litigation — Index 190109/10

- - - - -

Carl A. DiSalvo,
Plaintiff-Respondent,

-against-

A.O. Smith Water Products, et al.,
Defendants,

Neles-Jamesbury, Inc.,
Defendant-Appellant.

_____

Drinker Biddle & Reath LLP, Florham Park, NJ (Stephen R. Long of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Pierre A. Ratzki of counsel), for respondent.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered September 11, 2013, which denied the motion of defendant Neles-Jamesbury, Inc. for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Defendant failed to meet its initial burden of establishing prima facie that its product could not have contributed to the

causation of plaintiff's asbestos-related injury (*see Comeau v W.R. Grace & Co.—Conn.*, 216 AD2d 79, 80 [1st Dept 1995]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462 [1st Dept 1995]). While defendant's representative proffered an affidavit in which he states that it was impossible for plaintiff to have observed valves with the name Neles-Jamesbury, the affidavit was conclusory and without specific factual basis, and thus did not establish the prima facie burden of a proponent of a motion for summary judgment (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]).

We decline to consider defendant's argument that it did not have a duty to warn of asbestos in the insulation used on its valves, a product that it did not manufacture, as the argument was made for the first time on appeal (*see Gonzalez v Fidelity & Deposit Co. of Maryland*, 119 AD3d 432 [1st Dept 2014]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13747 The People of the State of New York, Ind. 143/12
Respondent,

-against-

Israel Espinal,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered March 26, 2013, as amended April 25, 2013, convicting defendant, after a jury trial, of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

The court properly exercised its discretion in admitting evidence of defendant's prior attempted burglary conviction as probative of his intent (*see e.g. People v Patterson*, 41 AD3d 169 [1st Dept 2007], *lv denied* 9 NY3d 925 [2007]). The probative value of the evidence outweighed its potential for prejudice. Given the defense theory that defendant did not intend to burglarize an apartment by entering through a window from a fire escape, but rather was trying to find a location to smoke

marijuana, the evidence of defendant's prior act of entering an apartment through the fire escape was probative of his intent (*see People v Alvino*, 71 NY2d 233, 242 [1987]), and the People "were not bound to stop after presenting minimum evidence" (*id.* at 245). The court minimized the potential prejudice by limiting the amount of evidence that could be introduced and by way of a suitable limiting instruction.

Defendant's sentence, which was the statutory minimum for defendant's conviction, given his persistent violent felony offender status, was not unconstitutionally severe (*see Rummel v Estelle*, 445 US 263, 271 [1980]; *People v Broadie*, 37 NY2d 100, 110-111 [1975], *cert denied* 423 US 950 [1975]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Moskowitz, JJ.

13748 The People of the State of New York, Ind. 347/12
Respondent,

-against-

Gilbert Arzuaga,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about September 27, 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: DECEMBER 11, 2014

CLERK

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

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13749 In re The Law Offices of Adam D. Perlmutter, P.C., Petitioner-Respondent, Index 100220/13

-against-

New York City Police Department, et al., Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for appellants.

Law Offices of Adam D. Perlmutter, P.C., New York (Daniel A. McGuinness of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 23, 2013, which insofar as appealed from as limited by the briefs, granted the petition brought pursuant to CPLR article 78 seeking, among other things, to annul respondent's determination, dated December 3, 2012, denying petitioner's Freedom of Information Law request (FOIL), and directed respondents to disclose the records requested, unanimously affirmed, without costs.

Petitioner seeks all calibration and maintenance records for all Intoxilyzer machines owned or maintained by respondent New York City Police Department since January 2008. Contrary to respondents' contention, the records sought are not exempt from

FOIL on the ground that they "are compiled for law enforcement purposes and . . . , if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings" (Public Officers Law §87[2][e][i]). Respondents' conclusive assertions that such records are often requested in DWI cases involving Intoxilyzer test results, and that thousands of such cases are pending in New York City, do not meet the burden of "identify[ing] . . . the generic risks posed by disclosure of these categories of documents" (*Matter of Lesher v Hynes*, 19 NY3d 57, 67 [2012]; *see also Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 490-491 [2005]).

Respondents' argument that the records sought "are specifically exempted from disclosure by state . . . statute" (Public Officers Law § 87[2][a]) is not properly before us, since that exemption to FOIL was not cited by respondents at the administrative level (*see Matter of Natural Fuel Gas Distrib. Corp v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]). Were we to review it, we would reject it on the merits,

since the statute cited by respondents does not exempt the records from disclosure (CPL 240.20[1][k]; *see also Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13750 Deja L. Flynn, Index 101638/10
Plaintiff-Appellant,

-against-

Sambuca Taxi, LLC, et al.,
Defendants-Appellants,

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

_____

Law Offices of Alexander Bespechny, Bronx (Louis A. Badolato of counsel), for Deja L. Flynn, appellant.

Thomas Torto, New York, for Sambuca Taxi, LLC and MD. H. Sarder, appellants.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered May 23, 2013, which, to the extent appealed from as limited by the briefs, granted defendants the City of New York, New York City Police Department and Chad Moritt's (collectively, municipal defendants), motion for summary judgment dismissing the complaint and any cross claims against them, unanimously affirmed, without costs.

Plaintiff was injured on January 3, 2009, when an unmarked police car collided with a taxi, in which plaintiff was a passenger, at the intersection of 27th Street and Seventh Avenue.

The officer driving the police vehicle testified that, as he and his partner traveled south on Seventh Avenue, between 28th and 27th Streets, they observed a vehicle commit a traffic infraction. They put on their lights and siren and followed the vehicle to the 27th Street intersection, where the offending vehicle ran through the red light. The officer stopped before entering the intersection, and looked left, the direction from which traffic would have been coming, but saw nothing. He then proceeded through the intersection, where the police vehicle collided with the taxi, which was traveling west on 27th Street.

The court properly granted the municipal defendants' motion for summary judgment. As the police vehicle was an authorized emergency vehicle (Vehicle and Traffic Law § 101), performing an emergency operation by "pursuing an actual or suspected violator of the law" (Vehicle and Traffic Law § 114-b), the operator was authorized to proceed through the red light, once it slowed down "as may be necessary for safe operation" (Vehicle and Traffic Law § 1104 [a],[b][2]). Thus, in order to hold the municipal defendants liable, plaintiff must demonstrate that the officer driving the police vehicle acted with "reckless disregard for the safety of others," which requires a showing that he "has intentionally done an act of an unreasonable character in

disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Saarinen v Kerr, et al.*, 84 NY2d 494, 501 [1994] [internal quotation marks omitted]; *see also Campbell v City of Elmira*, 84 NY2d 505, 510-511 [1994])

Here, the officer's uncontroverted testimony was that he came to a complete stop prior to entering the intersection. That he looked in the direction of, but did not see, the approaching taxi did not render his conduct reckless (*see Quock v City of New York*, 110 AD3d 488 [1st Dept 2013]). That issues of fact exist as to whether the police lights were on (which plaintiff saw prior to the accident, but the taxi driver testified he did not), or whether the siren was activated, is not material, as a police vehicle performing an emergency operation is not required to activate either of these devices, in order to be entitled to the statutory privilege of passing through a red light (Vehicle and Traffic Law § 1104[c]). Thus, the evidence demonstrates that the officer driving the police vehicle lawfully exercised the

privilege, and appellants have produced no evidence of any other facts or circumstances which would raise a triable issue as to any reckless conduct by the officer.

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13751 In Re Tyquan C.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about July 25, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts, that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him with the Administration for Children's Services' Close to Home program for a period of 18 months, unanimously affirmed, without costs.

The court's finding was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]) . There is no basis for disturbing the court's determinations concerning identification and credibility. The record

establishes that the victim had a sufficient opportunity to observe appellant, and that he made a reliable identification.

The court properly exercised its discretion in denying appellant's recusal motion (*see People v Moreno*, 70 NY2d 403, 405 [1987]). The court is presumed capable of making a fair fact-finding determination, based on the evidence adduced at that proceeding and the relevant burden of proof, notwithstanding that it had presided over other hearings earlier in the case and made findings of fact on issues other than appellant's guilt or innocence. We have considered and rejected appellant's argument that the court was legally disqualified under Judiciary Law § 14.

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13752 The People of the State of New York, Ind. 4148/11
Respondent,

-against-

Emilio Lebron,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Patricia Curran 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 (Carol Berkman, J.), rendered on or about February 22, 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: DECEMBER 11, 2014

CLERK

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

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13753 408 East 10th Street Tenants' Association, Index 108910/10
Plaintiff-Respondent,

-against-

Charo Nespral,
Defendant-Appellant,

"John Doe," et al.,
Defendants.

_____

Charo Nespral, appellant pro se.

Andrea Shapiro, PLLC, New York (Andrea Shapiro of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia Kern, J.), entered September 17, 2013, which granted plaintiff's motion for partial summary judgment, declared null and void, ab initio, a lease entered into by defendant Charo Nespral for an apartment in a building owned by the City of New York, and denied defendant's cross motion for summary judgment dismissing the complaint and declaring the lease effective, unanimously affirmed, without costs.

The motion court properly granted plaintiff tenant association's motion for summary judgment. Because the subject building is owned by the City of New, the New York City

Department of Housing Preservation and Development's prior written approval was required for plaintiff to enter into the subject lease with defendant. As plaintiff concedes, written approval was never obtained. Thus, the lease is "invalid and unenforceable" (*Parsa v State of New York*, 64 NY2d 143, 147 [1984]; *see* 28 RCNY § 34-04[b]). The motion court properly declined to estop plaintiff from asserting the invalidity of the lease (*see Advanced Refractory Tech. v Power Auth. of State of N.Y.*, 81 NY2d 670, 677-678 [1993]; *Taylor v New York State Div. of Hous. & Community Renewal*, 73 AD3d 634 [1st Dept 2010]).

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

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13754 The People of the State of New York, Ind. 1/09
Respondent,

-against-

Lennie Frankline,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered November 1, 2010, convicting defendant, after a jury trial, of attempted murder in the second degree, burglary in the first degree (two counts), assault in the third degree and endangering the welfare of a child, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The court properly admitted evidence of defendant's assault on the victim, which occurred in Niagara County approximately one week before the crimes at issue. As defendant concedes, this evidence was admissible as background evidence to complete the narrative. Moreover, contrary to defendant's unpreserved claims,

this evidence was also probative of defendant's motive (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Bierenbaum*, 301 AD2d 119, 150 [2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]). We do not find that the amount of such evidence was excessive or inflammatory. Furthermore, the court's thorough instructions minimized any prejudice. In any event, any excessiveness in the scope of the victim's testimony did not warrant the drastic remedy of a mistrial, which was the only remedy defendant sought, and which he requested after the allegedly offending testimony had been completed. Finally, any error in receipt of this evidence was harmless in light of the overwhelming proof of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing defendant's sentence or directing that it be served concurrently with the sentence on defendant's Niagara County conviction.

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13755 The People of the State of New York, Ind. 3293/12
Respondent,

-against-

Larry Nestman,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Desiree Sheridan 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 (Charles H. Solomon, J.), rendered on or about November 27, 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: DECEMBER 11, 2014

CLERK

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

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13756-
13756A Olga Anchumdia,
Plaintiff-Appellant,

-against-

Tahl Propp Equities, LLC, et al.,
Defendants-Respondents.

Index 105436/10

Mark L. Lubelsky and Associates, New York (Simon I. Malinowski of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas Hurzeler of counsel), for Tahl Propp Equities, LLC, Manhattan North Management Co., Inc. and Upaca Terrace Houses, Inc., respondents.

Ken Maguire & Associates PLLC, Garden City (Kenneth R. Maguire of counsel), for Aargo Services, Inc., respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered May 13, 2013, which granted the motion of defendants Tahl Propp Equities, LLC, Manhattan North Management Co., Inc. and Upaca Terrace Houses, Inc. for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Order, same court and Justice, entered May 10, 2013, granting the motion of defendant Aargo Services, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

In this premises liability action, defendants demonstrated

that they satisfied the duty to provide minimal security precautions by providing locking doors, video cameras monitoring the front entrance and the lobby, and an unarmed security guard who monitored the entire building (*James v Jamie Towers Hous. Co.*, 99 NY2d 639, 640 [2003]). While plaintiff further asserts that defendants negligently performed a duty they voluntarily undertook, she does not argue, and did not adduce any evidence below, that she neglected to take certain other precautions or tailored her conduct based on the provision of guards in the lobby, and thus cannot show reliance on such voluntary undertaking (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 521-523 [1980]). Accordingly, defendant's motion was properly granted.

Moreover, defendant security company Aargo Services, Inc. owed no duty to plaintiff. Plaintiff was not a third-party beneficiary of the security agreement between it and the building manager (*Pagan v Hampton Houses*, 187 AD2d 325, 325 [1st Dept 1992]), and because Aargo did not displace the building owners and manager's duty to maintain the premises safely, Aargo cannot

be liable in tort to plaintiff for the performance of its contractual duty to the building owners and managers (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *cf. Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 587-589 [1994]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13758 The People of the State of New York, Ind. 2546N/08
Respondent,

-against-

Jermaine Murphy,
Defendant-Appellant.

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about April 11, 2011,

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

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

ENTERED: DECEMBER 11, 2014

CLERK

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

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13759 The People of the State of New York, SCI. 287/98
Respondent,

-against-

Astrit Ceni,
Defendant-Appellant.

_____

Labe M. Richman, New York, for appellant.

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

_____

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered on or about January 31, 2014, which denied defendant's CPL 440.10 motion to vacate a 1998 judgment of conviction, unanimously affirmed.

The court properly denied defendant's 440 motion. The only branch of the motion that arguably may be addressed under CPL article 440, rather than on direct appeal, is defendant's ineffective assistance of counsel claim. However, the gist of this claim is defendant's assertion that his attorney never told him that he was pleading guilty to the depraved indifference element of the crime of reckless endangerment, leading to negative immigration consequences. Thus, defendant has not set forth any cognizable ineffectiveness claims that are independent

of *Padilla v Kentucky* (559 US 356 [2010]), which was decided after defendant's conviction became final, and which has no retroactive application to this appeal (*see Chaidez v United States*, 568 US __, 133 S Ct 1103 [2013]; *People v Baret*, 23 NY3d 777 [2014]).

All of defendant's remaining arguments, including his claims that the court misadvised him of the immigration consequences of his plea, that the factual portion of the plea allocution was deficient, and that the Supreme Court Information was jurisdictionally defective, are barred by CPL 440.10(2)(c). In each instance, the basis for the argument "is clear from the face of the record and therefore not properly raised in a CPL article 440 motion" (*People v Louree*, 8 NY3d 541, 546 [2007]). There is "no reason to distinguish between issues of law and issues that seek to invoke this Court's interest of justice jurisdiction" (*People v Pedraza*, 56 AD3d 390, 391 [1st Dept 2008], *lv denied* 12 NY3d 761 [2009]). As to each claim, the transcript speaks for itself, and there is no merit to defendant's assertion that some of these claims require further development of the record.

Defendant did not appeal from the underlying 1998 conviction. Accordingly, there was no appellate review, "owing to the defendant's unjustifiable failure to take or perfect an

appeal" (CPL 440.10[2][c]). Defendant's claim that he was not informed of his right to appeal is refuted by the record, including the court worksheet, as well as the presumption of regularity that attaches to judicial proceedings (*see People v Quinones*, 112 AD3d 411 [1st Dept 2013], *lv denied* 22 NY3d 1158 [2014]). Defendant's failure to appeal was "unjustifiable" within the meaning of the statute (*see People v Stewart*, 16 NY3d 839, 841 [2011]), and defendant has presented nothing to the contrary. Moreover, defendant's arguments concerning the circumstances of his failure to appeal are similar to arguments raised on defendant's unsuccessful coram nobis motion (M-950, 2014 NY Slip Op 73661[U] [1st Dept 2014]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13760 Hyman Kramer, etc., Index 602837/09
Plaintiff-Appellant,

-against-

Josef Geldwert, M.D.,
Defendant-Respondent,

John Does,
Defendants.

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Sherwood Allen Salvan, New York, for appellant.

Schlanger & Schlanger, Pleasantville (Michael Schlanger of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 12, 2013, which denied plaintiff's motion for discovery in aid of arbitration and dismissed the matter, unanimously affirmed, without costs.

In exceptional circumstances, pre-hearing discovery pursuant to CPLR 3102(c) may be ordered after the demand for arbitration has been made (*see e.g. Matter of Moock v Emanuel*, 99 AD2d 1003 [1st Dept 1984]). However, a court may not review the interim

orders of an arbitrator (*Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276 [1977]). Thus, judicial review of procedural rulings made in this arbitration administered by the American Arbitration Association is barred (*see Avon Prods. v Solow*, 150 AD2d 236, 239 [1st Dept 1989]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13761-
13762 The People of the State of New York,
Respondent,

-against-

Orlando Velazquez,
Defendant-Appellant.

Ind. 1383/11

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about August 1, 2012, 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 [1st Dept 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: DECEMBER 11, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13478 Eloisa Hierro, Index 304286/09
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered November 14, 2013, which denied defendant's 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 accordingly.

A landlord has a common-law duty to take minimal precautions to protect tenants from a third party's foreseeable criminal conduct (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]). In order to recover damages, a tenant must establish that the landlord's negligent conduct was a proximate cause of the injury (*id.*). Where a plaintiff alleges that a criminal attack in a building was proximately caused by a landlord's failure to provide adequate security, "[the] plaintiff can

recover only if the assailant was an intruder" (*id.* at 551). "To defeat a motion for summary judgment, a plaintiff need not conclusively establish that the assailants were intruders, but must raise triable issues of fact as to whether it was more likely than not that the assailants were intruders who gained access to the premises through the negligently-maintained entrance" (*Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011]). Applying these principles, no triable issue of fact exists here because there is no evidence from which a jury could conclude, without pure speculation, that the assailants were intruders, as opposed to tenants or invitees.

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

ENTERED: DECEMBER 11, 2014

CLERK

Friedman, J.P., Acosta, Saxe, Manzanet-Daniels, Gische, JJ.

13516 Richard Rivera, et al., Index 308178/10
Plaintiffs-Appellants,

-against-

Fernandez & Ulloa Auto Group, et al.,
Defendants-Respondents.

_____

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

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 21, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Rivera's complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), affirmed, without costs.

Defendants' summary judgment motion was timely since it was served within 120 days after the filing of the note of issue (*Derouen v Savoy Park Owner, L.L.C.*, 109 AD3d 706 [1st Dept 2013]).

In support of their motion for summary judgment, defendants made a prima facie showing that plaintiff did not suffer a permanent consequential or significant limitation of use of his

left knee as a result of the subject motor vehicle accident. In their reports, defendants' expert radiologist and orthopedist opined that plaintiff had a chronic condition and suffered no injury causally related to the accident. Defendant's orthopedist found that plaintiff's left knee showed no signs of abnormality and had the same range of motion as the uninjured right knee. In addition, plaintiff's own medical records included an analysis of a post-accident MRI of his left knee concluding that the knee exhibited "[d]egenerative signal posterior horn, medial meniscus, without definitive MRI evidence for tear." This finding was acknowledged, and not contested, in an August 2010 note by plaintiff's treating orthopedic surgeon that was included in plaintiff's medical records and apparently had not been prepared for use in litigation.

Plaintiff's opposition to the summary judgment motion failed to raise a triable issue in response to defendants' prima facie case. Plaintiff submitted his aforementioned orthopedic surgeon's opinion that he suffered a knee injury "secondary" to the car accident. However, the surgeon's opinion failed to raise an issue of fact since the surgeon not only failed to address or contest the opinion of defendants' medical experts that any condition was chronic and unrelated to the accident, but also

failed to address or contest the finding of degenerative changes in the MRI report in plaintiff's own medical records, which the same surgeon had acknowledged in his August 2010 note.

Our dissenting colleague overlooks that recent precedents of this Court establish that a plaintiff cannot raise an issue of fact concerning the existence of a serious injury under the No-Fault Law where, as here, the plaintiff's own experts fail to address indications from the plaintiff's own medical records, or in the plaintiff's own expert evidence, that the physical deficits in question result from a preexisting degenerative condition rather than the subject accident (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014] [plaintiff failed to raise issue of fact where, inter alia, his expert failed to address "detailed findings of preexisting degenerative conditions by defendants' experts, which were acknowledged in the reports of plaintiff's own radiologists"]; *Farmer v Ventkate, Inc.*, 117 AD3d 562, 562 [1st Dept 2014] [plaintiff failed to raise issue of fact where, inter alia, "(h)is orthopedic surgeon concurred that the X rays showed advanced degenerative changes"]; *Mena v White City Car & Limo Inc.*, 117 AD3d 441, 441 [1st Dept 2014] [plaintiff failed to raise issue of fact where, inter alia, "plaintiff's own radiologists noted degenerative conditions in their MRI reports,

but failed to explain why this was not the cause of plaintiff's injuries"]; *Paduani v Rodriguez*, 101 AD3d 470, 470, 471 [1st Dept 2012] [plaintiff failed to raise issue of fact where, inter alia, defendants submitted "a radiograph report of plaintiff's radiologist finding severe degenerative changes" and, "(w)hile (plaintiff's) expert acknowledged in his own report MRI findings of degenerative changes in the lumbar spine, he did not address or contest such findings, and the MRI report of (plaintiff's) radiologist found herniations but did not address causation"]; *Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012] [plaintiff failed to raise issue of fact where, inter alia, "plaintiff's own radiologist . . . confirmed 'degenerative narrowing at the L5-S1 intervertebral disc space' without further comment"]).

All concur except Acosta and Manzanet-Daniels, JJ. who dissent in part in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting in part)

I would find that plaintiff has raised a triable issue of fact as to whether he suffered a serious injury within the meaning of Insurance Law § 5102(d). I would accordingly reverse the motion court's order and reinstate the complaint.

Plaintiff's treating orthopedic surgeon affirmed that the left knee injury was causally related to the accident. Plaintiff's surgeon opined, inter alia, that plaintiff sustained traumatically induced tears of the posterior horn of both the medial and lateral meniscus. He also stated in his report "[p]revious medical and surgical history: noncontributory," consistent with plaintiff's testimony that he had never previously been diagnosed with arthritis, scoliosis or osteoporosis, and had never sustained a trauma to the left knee before the accident. Plaintiff's surgeon opined that plaintiff suffers from atrophy of the quadriceps musculature consistent with unhealed damage to the meniscus, and that the damage to the cartilage of his knee places him at significant risk of needing total joint replacement.

The affirmation of plaintiff's surgeon, attributing the injury to the accident as opposed to any other cause, suffices to

raise a triable issue of fact (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). The fact that defendants' experts attribute the injury to degenerative causes is of no moment. We have held, repeatedly, that it is unnecessary for a plaintiff's expert to specifically refute defense evidence as to degeneration; attributing the injury to another, equally plausible cause, i.e., the accident, is sufficient to raise a triable issue of fact (*see e.g. Vaughan v Leon*, 94 AD3d 646, 648-649 [1st Dept 2012]; *Yuen*, 80 AD3d at 482; *Linton v Nawaz*, 62 AD3d 434, 439-440 [1st Dept 2009], *affd* 14 NY3d 821 [2010]).

In *Malloy v Matute* (79 AD3d 584 [1st Dept 2010]), wherein we confronted strikingly similar facts, we modified to deny defendants' motion for summary judgment as to the claim of serious injury to the right knee and reinstated the complaint, reasoning that while the defendant's experts had ascribed his injuries to degenerative causes, "plaintiff's doctors were unanimous in concluding that the subject accident was the sole competent producing cause of plaintiff's knee injuries, based upon (1) their individual examinations; (2) MRI results; and (3) the necessity of surgery to repair a tear in the medial meniscus." The plaintiff in *Malloy*, like plaintiff here, had no previous knee problems or injuries, and underwent surgery within

months of the accident.

Defendants' reliance on *Henchy v VAS Express Corp.* (115 AD3d 478 [1st Dept 2014]) and *Farmer v Ventkate Inc.* (117 AD3d 562 [1st Dept 2014]) for the proposition that plaintiff must refute defendant's evidence of degeneration is misplaced. The plaintiff in *Farmer* had a preexisting arthritic condition in the knee, and her expert concurred that X rays showed advanced degenerative changes. The plaintiff in *Henchy* submitted no contemporaneous objective evidence of injury or limitations in the knee. It was for these reasons that we deemed their respective experts' opinion as to causation conclusory and insufficient to rebut the defendants' showing. While the MRI, as the majority notes, was not definitive regarding the existence of a tear, the fact that the surgeon visually observed tears and attributed them to a traumatic origin ought to suffice to raise a triable issue of fact.

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

ENTERED: DECEMBER 11, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

13653 The People of the State of New York, Ind. 246/09
Respondent,

-against-

Donald Colbert,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Robert K. Holdman, J.), rendered May 26, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). The evidence overwhelmingly supports the jury's determination that defendant acted with the requisite intent to cause serious physical injury to the decedent.

The trial court properly refused to give a jury instruction on intoxication and to submit the lesser included offenses of manslaughter in the second degree and criminally negligent homicide. Viewing the evidence in the light most favorable to

defendant, as we must, there was no reasonable view of the evidence that defendant was intoxicated to the point that he was unable to form the intent to cause serious physical injury. Nor is there a reasonable view of the evidence that he acted intentionally as to the attack on the decedent but negligently or recklessly as to the risk of death (*see People v Abreu-Guzman*, 39 AD3d 413, 413-414, *lv denied* 9 NY3d 872 [2007]). Simply put, there is no view, let alone a reasonable view, of the evidence that would permit a jury to find that defendant did not act with the requisite intent or did not share that of his codefendant with whom he acted in concert in this brutal attack on the decedent. The evidence – including testimony of an eyewitness to key aspects of the attack, defendant's written and videotaped statements in which he admits, among other things, to delivering eight to ten punches to the point where the decedent was no longer fighting back, the DNA evidence, and the corroborating testimony of the police officers who arrived on the scene shortly after defendant and his codefendant attempted to flee – could only support a finding that defendant acted with the requisite intent to cause serious physical injury. That defendant was not connected to the use of a weapon to stab the decedent, as opposed

to the codefendant, does not require a contrary finding.

We perceive no basis for a reduction in defendant's sentence.

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

ENTERED: DECEMBER 11, 2014

CLERK

CORRECTED ORDER - DECEMBER 18, 2014

Friedman, J.P., Acosta, Saxe, Manzanet-Daniels, Gische, JJ.

13521 The People of the State of New York Ind. 1850/09
Respondent,

-against-

Brian Franqui,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.), rendered April 8, 2011, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to concurrent terms of 25 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

During jury deliberations, the court simultaneously received a jury note requesting supplemental instructions, and another note stating, in pertinent part, that one of the jurors was "not participating at all in the deliberation process" and "sleeps most of the time. Can something be done about this situation?" After it delivered the requested instructions, the court noted that all jurors appeared to have been attentive and awake during

the instructions, and assured counsel it would address the issue of the allegedly sleeping juror. When the court excused the jury at the end of the day, it urged the jurors to get a good night's rest, and invited them to ask for snacks, coffee and breaks as needed. However, it denied defendant's timely request for an inquiry of the juror.

The court should have conducted a "probing and tactful inquiry" pursuant to *People v Buford* (69 NY2d 290, 299 [1987]) into whether, and to what extent, the juror had been sleeping, in order to determine whether this behavior rendered him grossly unqualified (*see People v Herring*, 19 NY3d 1094 [2012]). The court's observation of jury demeanor during the supplemental instruction was not enough to resolve the issue of what was going on in the jury room, and this was not a case where reliance on a general instruction was an appropriate exercise of discretion (*compare People v Marshall*, 106 AD3d 1, 10 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]). Without any inquiry of the allegedly sleeping juror, or of any other juror, it is impossible to know whether the juror was innocuously dozing off from time to time, or whether he slept through so much of the deliberations that he could be deemed absent, such that the verdict was reached by a jury of 11 persons. Accordingly, we are constrained to

reverse.

In light of the foregoing, we do not reach defendant's remaining contentions, except that we find that the verdict was based on legally sufficient evidence satisfying the accomplice corroboration requirement, was not repugnant, and was not against the weight of the evidence.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13763 The People of the State of New York, Ind. 2285N/12
Respondent,

-against-

Juanita Fudge,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about September 5, 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: DECEMBER 11, 2014

CLERK

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

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13764 Kimberly Cruz, Index 23327/13
Plaintiff-Appellant,

-against-

Evan Lise,
Defendant-Respondent.

_____

The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about March 3, 2014, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

In support of her motion, plaintiff submitted an affidavit averring that she had stopped at an intersection when her car was hit in the rear by defendant's vehicle. Since a "rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle," this was sufficient to shift the burden to defendant "to come forward with an adequate nonnegligent explanation for

the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]; *see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Joplin v City of New York*, 116 AD3d 443 [1st Dept 2014]). Defendant's affidavit asserting that plaintiff suddenly stopped in front of him, standing alone, was insufficient to rebut the presumption of negligence (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]; *see also Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 670-671 [2d Dept 2013]; *Renteria v Simakov*, 109 AD3d 749 [1st Dept 2013]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13765 In re The Bank of New York Mellon Corporation State Derivative Litigation — Index 112133/11

- - - - -

Murray Zucker,
Plaintiff-Appellant,

-against-

Gerald L. Hassell, et al.,
Defendants-Respondents,

Bank of New York Mellon Corporation,
Nominal Defendant-Respondent.

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Stull, Stull & Brody, New York (Mark Levine of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Lawrence J. Portnoy of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 2, 2013, which granted defendants' motion to dismiss the complaint to the extent of dismissing it without prejudice, unanimously affirmed, with costs.

Plaintiff is a shareholder of nominal defendant Bank of New York Mellon Corporation (BNYM), a Delaware corporation that provides foreign exchange (FX) services to its clients. Several lawsuits have been brought against BNYM, alleging that it cheated its clients by using the highest price of the day when they were

buying currency and the lowest price of the day when they were selling currency, although it had promised its clients "best execution."

On March 9, 2011, plaintiff (through counsel) demanded that BNYM's board of directors investigate the above-described conduct, take action against those responsible for it, and institute corporate governance initiatives. At some point between March 9 and April 6, 2011, BNYM's board formed a special committee of directors to investigate the matters raised in plaintiff's demand; the special committee retained nonparty Cravath, Swaine & Moore LLP. On December 14, 2011, Cravath informed plaintiff's counsel that the BNYM board had refused his demand that BNYM sue various of its officers and directors.

The complaint fails to allege particularized facts raising a reasonable doubt as to the special committee's independence (*see Scattered Corp. v Chicago Stock Exch., Inc.*, 701 A2d 70 [Del 1997], *overruled in part on other grounds by Brehm v Eisner*, 746 A2d 244, 253 [Del 2000]).

The only basis on which plaintiff challenges special committee member (and defendant) William C. Richardson's independence is that he was retired chair and co-trustee of nonparty Kellogg Trust, and BNYM was a trustee of that trust.

This allegation of a "mere outside business relationship" is insufficient to raise a reasonable doubt about Richardson's independence (*see Beam v Stewart*, 845 A2d 1040, 1050 [Del 2004][1]; *see also Highland Legacy Ltd. v Singer,* 2006 WL 741939, *5, 2006 Del Ch LEXIS 55, *19-25 [March 17, 2006, No. Civ. A. 1566-N]).

Plaintiff alleges that special committee member (and defendant) Mark A. Nordenberg was not independent because he was the Chancellor of nonparty University of Pittsburgh, and Mellon Bank Corporation made a $1 million gift (payable over multiple years) to that university; in addition, BNYM and the BNY Mellon Charitable Foundation of Southwestern Pennsylvania were on the university's 2011 Honor Roll of Donors. However, since plaintiff does not allege how significant (percentagewise) BNYM's and its related entities' gifts were, he fails to show that Nordenberg lacked independence (*see In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A2d 808, 822, 824 [Del Ch 2005], *affd* 906 A2d 766 [Del 2006]). Moreover, in *In re Walt Disney Co.*

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[1] *Beam* is a "demand excused" case rather than a "demand refused" case. However, if allegations are "legally insufficient to excuse demand," then "*[a] fortiori* those same [allegations] are insufficient to warrant overturning the . . . Board's rejection of the demand" (*Allison v General Motors Corp.*, 604 F Supp 1106, 1121-1122 [D Del 1985], *affd* 782 F2d 1026 [3d Cir 1985]).

Derivative Litig. (731 A2d 342, 359 [Del Ch 1998], *revd in part on other grounds sub nom. Brehm v Eisner,* 746 A2d 244 [Del 2000]), a Delaware court found that gifts of more than $1 million to a university did not raise a reasonable doubt as to the independence of the university's president.

Plaintiff alleges that special committee member (and defendant) Michael J. Kowalski was not independent because he was the CEO of nonparty Tiffany & Co., BNYM was Tiffany's principal banker, Tiffany was negotiating a new credit agreement with BNYM at the time Kowalski served as a special committee member, and the negotiation was completed shortly after BNYM's board refused plaintiff's demand. However, since plaintiff does not allege particularized facts establishing the materiality of the credit agreement that Tiffany was negotiating with BYNM to its continued viability, he fails to raise a reasonable doubt as to Kowalski's independence (*see Jacobs v Yang,* 2004 WL 1728521, *6, 2004 Del Ch LEXIS 117, *24 [Aug. 2, 2004, No. Civ. A. 206-N], *affd* 867 A2d 902 [Del 2005]).

We reject plaintiff's argument that the investigation was not conducted in good faith because, by October 6, 2011, when BNYM placed an advertisement in various newspapers saying that its FX conduct was proper, the board had decided to refuse his

demand, so the post-October 6 investigation was a sham (*see Lerner v Prince*, 119 AD3d 112, 125, 130 [1st Dept 2014]; *Levine v Smith*, 591 A2d 194, 214-215 [Del 1990], *overruled in part on other grounds by Brehm*, 746 A2d at 253; *Highland Legacy*, 2006 WL 741939 at *6, 2006 Del Ch LEXIS 55 at *28; *Allison*, 604 F Supp at 1114).

Plaintiff's complaints about the special committee's procedures fail to raise a reasonable doubt as to the reasonableness of the investigation (*see Lerner*, 119 AD3d at 131).

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13766 The People of the State of New York, Ind. 5478/09
Respondent,

-against-

Melvin J. DeJesus,
Defendant-Appellant.

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

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

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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 November 10, 2011,

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

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

ENTERED: DECEMBER 11, 2014

CLERK

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

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13767 William R. Salomon, Index 651683/13
Plaintiff-Appellant,

-against-

Citigroup Inc.,
Defendant-Respondent.

_____

Berger & Webb, LLP, New York (Steven A. Berger of counsel), for appellant.

Proskauer Rose LLP, New York (Joseph Baumgarten of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered March 12, 2014, dismissing the complaint, and bringing up for review an order, same court and Justice, entered February 18, 2014, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

In 1981, plaintiff investment banker agreed to retire from his management position at Salomon Brothers, Inc. (SBI) and entered into a Consulting Agreement with SBI whereby, inter alia, SBI, or its successor(s) would provide plaintiff with full-time secretarial services in exchange for plaintiff's consulting work and client generation. SBI was ultimately acquired by defendant Citigroup. In 2011, it was discovered that a secretary assigned to plaintiff by Citigroup had stolen approximately $3 million

from plaintiff while assisting plaintiff with his personal expenses over the years. Plaintiff commenced this action against Citigroup after the secretary was convicted and sentenced for her theft.

Plaintiff's breach of contract claim against Citigroup, predicated upon an alleged implied warranty by Citigroup to indemnify plaintiff for any personal financial loss incurred due to theft by a Citigroup secretary assigned to him, has no support in the language of the Consulting Agreement (*see generally Rodolitz v Neptune Paper Prods.*, 22 NY2d 383 [1968]). Plaintiff may not read terms into the Consulting Agreement which, when fairly construed in the context of the whole of its provisions, offers no basis to support that such a warranty had been impliedly incorporated by the parties into the agreement (*see generally Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). The Consulting Agreement was drafted by sophisticated, commercially savvy parties, and their intent as to their rights and liabilities thereunder should be gleaned from the language used in the Agreement (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1 [1st Dept 2012]). The fact that the

phrase "full-time services" to be provided by a secretary is not specifically defined in the Consulting Agreement does not afford any basis to infer, as plaintiff suggests, that the parties intended that Citigroup indemnify plaintiff for any theft committed against him by an assigned secretary it employed. Even assuming, arguendo, the "full-time services" phrase was ambiguous, the claimed unspoken warranty to indemnify would constitute an obligation wholly distinct from the contract language that required SBI, or its successor, to simply supply plaintiff with full time secretarial services during the consulting arrangement. Indeed, an implied contractual obligation to indemnify cannot be maintained in the absence of explicit language or facts that clearly and unmistakably identify such a duty (*see Blank Rome, LLP v Parrish*, 92 AD3d 444 [1st Dept 2012]). There is no such language here. Moreover, the Consulting Agreement contained a merger clause that asserted that the parties' "entire agreement" had been set forth within its provisions, and that it could not be amended except in writing (*see Ashwood Capital*, 99 AD3d at 9). The parties did not amend their agreement.

Plaintiff's claim for breach of covenant of good faith and fair dealing, predicated upon Citigroup's alleged failure to

abide by its purported obligation to indemnify plaintiff against any theft committed against him by his assigned Citigroup secretary, is essentially duplicative of the allegations in his breach of contract claim, and should be dismissed, particularly as it seeks the same damages as the breach of contract claim (*see Mill Fin., LLC v Gillett*, __ AD3d __, 2014 Slip Op 06039 [1st Dept 2014]; *Amcan v Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

Plaintiff's cause of action for conversion, predicated upon a vicarious liability theory, was properly dismissed where the factual allegations indicated that the theft was in furtherance of the secretary's own personal gain, not in furtherance of Citigroup's business (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *Naegle v Archdiocese of N. Y.*, 39 AD3d 270 [1st Dept 2007], *lv denied* 9 NY3d 803 [2007]). The secretary's conduct constituted such a gross departure from the normal performance of her secretarial duties that the charged conduct could not be considered as being within the scope of her employment (*see*

Roberts v 112 Duane Assoc. LLC, 32 AD3d 366, 369 [1st Dept 2006], *lv denied* 8 NY3d 815 [2007]) or in furtherance of Citigroup's business (*see Cabrini Med. Ctr.*, 97 NY2d at 251).

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13768 Jamie Perez, Index 109002/08
Plaintiff-Respondent,

-against-

Folio House, Inc., et al.,
Defendants-Appellants.
- - - - -
Folio House, Inc., et al.,
Third-Party Plaintiffs,

-against-

West New York Restoration of CT., Inc.,
Third-Party Defendant.

_____

Carol R. Finocchio, New York, for appellants.

William Schwitzer & Associates LLC, New York (Jeffrey B. Bromfeld of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered April 28, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action and granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action, unanimously modified, on the law, to deny plaintiff's motion and to grant defendants' motion as to the Labor Law § 241(6) cause of action, and otherwise affirmed, without costs. Appeal by West New York

Restoration of CT., Inc. from the aforesaid order unanimously withdrawn, without costs, in accordance with the stipulation of the parties dated October 28, 2014."

Triable issues of fact exist as to how plaintiff's accident occurred and whether it resulted from a violation of Labor Law § 240(1) (*see Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593 [1st Dept 2014]). Plaintiff testified that he lost his balance and slipped and fell from an elevated platform within a larger scaffolding structure to a lower level eight feet below. However, his coworker testified that, when he observed plaintiff both immediately before and immediately after his accident, plaintiff was on the same level of the scaffold. The coworker also testified that there was not another level beneath the area where plaintiff was working, other than the sidewalk bridge three stories below. Plaintiff's foreman testified that, immediately after the accident, he inspected the area where plaintiff had been working, and did not find any gaps in the planking or any openings large enough for a person to fit through. Furthermore, the testimony showed that immediately after the accident plaintiff told his coworker and foreman that he hit or banged his knee on a metal clamp while stepping over a pipe bracing, which resulted in a laceration of his knee. This testimony is

consistent with the testimony by the doctor and the physician's assistant who treated plaintiff at the emergency room on the day of his accident that plaintiff's only complaints at that time pertained to the laceration of his knee and that he did not report to them that he had fallen from a height of between four and eight feet. Thus, plaintiff may simply have tripped or slipped and fallen while walking across the nondefective, level platform of the scaffold (*see Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441 [1st Dept 2012]). The above-cited testimony is sufficient to raise an issue of fact even though none of the witnesses saw the accident happen (*see Noble v 260-261 Madison Ave., LLC*, 100 AD3d 543 [1st Dept 2012]; *Campos*, 117 AD3d at 594).

Defendants failed to establish that plaintiff was the sole proximate cause of his injuries (*see Noble*, 100 AD3d at 544-545).

The Labor Law § 241(6) claim predicated on a violation of Industrial Code (12 NYCRR) § 23-1.7(b) must be dismissed because, even accepting plaintiff's account of his accident, he did not fall through a "hazardous opening" in the platform on which he was working (*see Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]). As to the remaining Industrial Code regulations on which plaintiff predicates his § 241(6) claim, his

failure to address them indicates that he has abandoned them as bases for liability (*see Gary v Flair Beverage Corp.*, 60 AD3d 413 [1st Dept 2009]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13771 Craig Cobb, Index 306864/10
Plaintiff-Respondent,

-against-

Mark Collins,
Defendant-Appellant.

_____

Mark Collins, appellant pro se.

Craig Cobb, respondent pros se.

_____

Judgment, Supreme Court, New York County (Martin Schoenfeld, J.), entered June 5, 2012, after an inquest, awarding plaintiff damages in the amount of $75,000, plus interest, costs and disbursements, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded to Supreme Court for a decision setting forth the facts it deemed essential in determining its award of damages.

At the inquest on damages, while the court stated that it found plaintiff credible, it failed to state the facts it deemed essential in determining its award of damages (CPLR 4213[b]; *General Instrument Corp. v Consolidated Edison Co. of N.Y.*, 99 AD2d 460, 461 [1st Dept 1984]). Accordingly, "intelligent

appellate review is impossible" (*For the People Theatres of N.Y. Inc. v City of New York*, 84 AD3d 48, 60 [1st Dept 2011] [internal quotation marks omitted]), and we remand the matter to Supreme Court as indicated.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13772 The People of the State of New York, Ind. 5363N/11
Respondent,

-against-

Brandon Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn 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 (Robert M. Stolz, J.), rendered on or about July 11, 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: DECEMBER 11, 2014

CLERK

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

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13775 Michael I. Knopf, et al., Index 113227/09
Plaintiffs-Appellants,

-against-

Michael Hayden Sanford, et al.,
Defendants-Respondents.

_____

Berry Law PLLC, New York (Eric W. Berry of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 16, 2013, which denied plaintiffs' motion for summary judgment on their breach of contract and constructive trust causes of action, and for dismissal of defendants' affirmative defenses and counterclaims, unanimously modified, on the law, to grant so much of the motion as sought partial summary judgment on the breach of contract causes of action, and dismissal of the breach of contract, fraud, and prima facie tort counterclaims, and otherwise affirmed, without costs.

In this action, plaintiffs Michael I. Knopf and Norma Knopf, the sole members of plaintiff Delphi Capital Management LLC, seek to recover amounts alleged to be owed by defendant Michael Hayden Sanford and his companies pursuant to various loan agreements.

Plaintiffs established their entitlement to summary judgment on their causes of action for breach of contract via the submission of uncontroverted evidence, including tax forms and defendant Sanford's deposition testimony, as to the amounts loaned to Sanford and his companies, the distributions made, and the profits earned on capital. Defendants' claim that plaintiffs received more in distributions than their capital contribution fails to account for the profits made on Delphi's capital account and the loan for the purchase of a penthouse condominium unit.

Defendants' challenge to the enforceability of the loan agreements is unavailing, and they failed to show "that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). The contract for the penthouse loan is evidenced by a signed writing, by Sanford's and defendant Pursuit Holdings LLC's acceptance and use of the loan funds, and by their subsequent confirmation of indebtedness. While the parties anticipated the execution of a more formal writing, Sanford and Pursuit evidenced a clear intent to be bound in the interim (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368-369 [2005]). Further, although later loan agreements refer to earlier agreements, the later agreements do not alter or reflect an intent to supersede the terms of the earlier agreements (*cf.*

Private One of New York, LLC v JMRL Sales & Serv., Inc., 471 F Supp 2d 216, 223 [ED NY 2007]).

Plaintiffs failed to establish their entitlement to summary judgment on their constructive trust claim, as plaintiffs have not made an evidentiary showing that money damages would be inadequate (*see Evans v Winston & Strawn*, 303 AD2d 331, 333 [1st Dept 2003]). This Court's finding on a prior appeal that the complaint "seeks a judgment that 'would affect the title to, or the possession, use or enjoyment of real property'" (110 AD3d 502, [1st Dept 2013]), did not reach the merits of the claim.

Plaintiffs are entitled to dismissal of the counterclaim for breach of an alleged agreement to provide defendants Sanford and Sanford Partners, L.P. (Partners) with a five to seven million dollar loan of trading capital. The subject agreement provides that plaintiffs shall loan Sanford the "majority of the [Sanford Partners Voyager] Fund's assets," and Sanford admitted that plaintiffs advanced the full amount in the Fund (approximately $1.67 million) at the time the loan was due. Defendants may not rely on parol evidence to vary the terms of the agreement (*see Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 370 [1st Dept 1996]). For similar reasons, the fraud counterclaim must be dismissed because defendants cannot establish reasonable reliance on an

alleged promise that conflicts with the express terms of the agreement (*see Nathanson v Tri-State Constr. LLC*, 60 AD3d 547, 547-548 [1st Dept 2009]).

Plaintiffs are also entitled to dismissal of the counterclaim for prima facie tort, which alleges that Michael Knopf told Sanford's neighbors that, among other things, he was a "fraud" and had stolen money from Knopf. The counterclaim is actually an inadequately pleaded claim for defamation, which fails to "allege the time, place and manner of the false statement and specify to whom it was made" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [internal quotation marks omitted]).

The counterclaim for tortious interference with prospective business relations is viable, and plaintiffs' alleged tortious conduct is not "contractually privileged" (*cf. Lazar's Auto Sales, Inc. v Chrysler Fin. Corp.*, 83 F Supp 2d 384, 391-392 [SD NY 2000]). Indeed, the agreement at issue merely provides plaintiffs with a veto right on encumbrances, and it does not allow them to contact prospective lenders and make statements to them in an effort to thwart defendants' attempts to obtain financing.

We decline to consider plaintiffs' request for an

accounting, as they never sought an accounting in the complaint or in their motion papers. Further, plaintiffs' conclusory arguments for dismissal of the numerous affirmative defenses are unavailing.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13776 In re J. Ezra Merkin, Index 652415/12
Petitioner-Respondent,

-against-

Joshua M. Berman, etc.,
Respondent-Appellant.

_____

Kramer Levin Naftalis & Frankel, New York (Joshua M. Berman of counsel), for appellant.

Dechert LLP, New York (Neil A. Steiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered January 23, 2014, which to the extent appealed from, denied respondent's motion pursuant to CPLR 3212 to direct petitioner J. Ezra Merkin to consent to his becoming a participating investor in a settlement of an action brought by the New York Attorney General (AG) against petitioner (*Cuomo v Merkin* [Index No. 450879/090]), or, in the alternative, for a judgment against petitioner for monetary damages, unanimously affirmed, with costs.

Respondent's claims arise from losses incurred in his individual retirement account (IRAs), which were invested in funds managed by petitioner, who had given control of those assets to Bernard L. Madoff, and which were lost as a result of

Madoff's Ponzi scheme. The AG later commenced a Martin Act suit against petitioner, and respondent commenced an arbitration against him. Ultimately, respondent had to decide whether to forgo participation in the settlement of the Martin Act action and pursue the arbitration. He chose the latter, allegedly based on misleading information provided by petitioner. The arbitrators denied his claim in its entirety.

Contrary to respondent's contentions, petitioner had no duty, directly or through his counsel, to advise respondent, during settlement negotiations in the arbitration proceeding, that under the terms of the AG's settlement, small investors who, like respondent, were aware of Madoff's involvement, would recover the same amount as other investors, notwithstanding that this fact was not stated in the AG's press release, which in fact suggested that small investors who knew of Madoff's involvement would recover less.

No fiduciary duty exists between the parties that would have required disclosure of these facts. If any fiduciary relationship ever existed, it ceased when the parties became adversaries in litigation (*Eastbrook Caribe, A.V.V. v Fresh Del Monte Produce, Inc.*, 11 AD3d 296, 297 [1st Dept 2014], *lv dismissed in part, denied in part*, 4 NY3d 844 [2005]). For the

same reason, respondent failed to demonstrate that petitioner had a duty to disclose arising out of any other relationship between them (*see e.g. 900 Unlimited v MCI Telecom. Corp.*, 215 AD2d 227 [1st Dept 1995]).

Contrary to respondent's contention, the special facts doctrine did not require petitioner to disclose the information at issue, since it applies only in "business dealings" between parties to a prospective transaction (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005]). Respondent's decision whether to proceed to an award in an arbitration against petitioner rather than participate in a settlement is not the kind of transaction to which courts have applied the special facts doctrine (*compare e.g. P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003]; *Allen v Westpoint-Pepperell, Inc.*, 945 F2d 40, 45 [2d Cir 1991]). Furthermore, respondent failed to demonstrate that he could not have discovered the relevant information through the exercise of ordinary intelligence (*see Jana L.*, 22 AD3d at 278). If his

counsel had contacted the receiver of the fund, among other sources, rather than relying on his adversary's counsel's limited information, he would have acquired the relevant information.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13778 The People of the State of New York, Ind. 3980/11
Respondent,

-against-

Marquis Phillips,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 11, 2012, as amended September 27, 2011, convicting defendant, after a jury trial, of predatory sexual assault (five counts), burglary in the first degree as a sexually motivated felony, robbery in the second degree and sexual abuse in the first degree, and sentencing him, as a predicate sex offender and persistent violent felony offender, to an aggregate term of 78 years, unanimously affirmed.

The court did not deprive defendant of his right of self-representation. Viewed in context, defendant's inquiry about whether he had the right to represent himself did not express the "definitive commitment to self-representation" (*People v LaValle*, 3 NY3d 88, 106 [2004]) that would require an

inquiry by the court. Regardless of whether defendant's inquiry constituted a clear and unequivocal request to proceed pro se, that request was untimely, and defendant did not establish "compelling circumstances" warranting a midtrial change of status (*see People v McIntyre*, 36 NY2d 10, 17 [1974]). Moreover, defendant's overall pattern of disruptive behavior and attempts to feign mental illness supports an inference that defendant's inquiry about his right of self-representation was simply a delaying tactic.

The court's imposition of consecutive sentences was lawful. Although they were part of the same incident, the burglary, robbery, sexual abuse and predatory sexual assault offenses were committed through separate and distinct acts (*see People v Brown*, 80 NY2d 361, 364 [1992]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13779 Salim Diarrassouba, etc., et al., Index 101862/07
Plaintiffs-Appellants,

-against-

Consolidated Edison Co. of New York Inc.,
Defendant,

Harrjoy Realty Inc.,
Defendant-Respondent.

_____

Ryanne Konan Law Office and Legal Services, Wappingers Falls (Ryanne G. Konan of counsel), for appellants.

Ahmuty Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 10, 2013, which granted defendant Harrjoy's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

As plaintiffs' concede, their argument concerning Harrjoy's compliance with Administrative Code of City of NY § 27-2046.1 was raised for the first time on appeal, and it is, therefore, unpreserved (*see Matter of Angel Fabrics [Cravat Pierre, Ltd.]*, 51 AD2d 951, 952 [1st Dept 1976], *lv denied* 39 NY2d 711 [1976]). This Court may review legal arguments which appear on the face of the record and which could not have been avoided if brought to

the other party's attention (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). Here, however, the argument is factual, and the record is insufficient for a determination of this issue.

In any event, the unnattended candle was the proximate cause of the fire that resulted in decedent's death.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13780 Gerard Corsini, Index 152066/12
Plaintiff-Appellant-Respondent,

-against-

Elizabeth Morgan, etc., et al.,
Defendants-Respondents-Appellants,

Officers Buttacavole, et al.,
Defendants.

_____

Gerard A. Corsini, New York, appellant-respondent pro se.

Galluzzo & Johnson LLP, New York (Eric M. Arnone of counsel), for Elizabeth Morgan, Jonathan Cary and Daniel J. McKay, respondents-appellants.

Belkin Burden Wenig & Goldman, LLP, New York (David R. Brand of counsel), for Aaron Shmulewitz and Belkin Burden Wenig & Goldman, LLP, respondents-appellants.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered June 24, 2013, which granted so much of defendants Elizabeth Morgan, Jonathan Cary and Dan McKay's (collectively, Morgan defendants) and defendants Aaron Shmulewitz and Belkin Burden Wenig & Goldman, LLP's (collectively, Belkin defendants) motions as sought to dismiss the complaint as against them and denied so much of the motions as sought sanctions against plaintiff, unanimously modified, on the facts, to grant the motions as to sanctions, the matter remanded for further

proceedings consistent with this decision, and otherwise affirmed, without costs.

The claims against the Belkin defendants are largely based on an aiding and abetting theory. However, the allegations of aiding and abetting are unsupported by facts (*see Roni LLC v Arfa*, 72 AD3d 413, 413, 414 [1st Dept 2010], *affd* 15 NY3d 826 [2010]). To the extent the fifth cause of action is based on the sending of the cease and desist letter to plaintiff, plaintiff does not argue on appeal that he has stated a cause of action for intentional infliction of emotion distress based on the letter, and, in any event, the sending of the letter is not outrageous or extreme conduct that would support a claim for intentional infliction of emotional distress (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]).

Plaintiff's allegation that defendant McKay rang his buzzer and announced himself as a police officer after overhearing plaintiff tell a police officer that he would experience emotional distress upon hearing his buzzer ring after his April 2011 arrest does not set forth conduct so outrageous or extreme as to support a cause of action for intentional infliction of emotional distress against McKay (*see Murphy*, 58 NY2d at 303). Further, the complaint alleges no facts showing that defendants

Elizabeth Morgan and Jonathan Cary took an active part in the arrests or played an active role in the prosecution of plaintiff, as opposed to merely reporting the matter to the police, so as to support causes of action for false arrest and malicious prosecution against them (*see Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131 [1st Dept 1999]).

McKay's statement that plaintiff "takes pictures of [defendant Morgan's] children and probab1y puts them on the internet" does not constitute slander per se. To the extent plaintiff argues that the statement that he takes pictures of Morgan's children charges him with the "serious crime" of endangering the welfare of a child (Penal Law § 260.10[1]), he has never denied taking photos of Morgan's children. Further, viewed in the context in which it was made, the statement that plaintiff probably puts the pictures on the Internet merely sets forth an opinion, as opposed to a fact (*see Brian v Richardson*, 87 NY2d 46, 51 [1995]; *Silverman v Clark*, 35 AD3d 1, 15-16 [1st Dept 2006]). Morgan's alleged repeated statements that plaintiff was "a stalker" does not support a claim for slander per se, since the applicable crime of "stalking in the fourth degree" (Penal Law § 120.45), is a class B misdemeanor, which does not

rise to the level of a "serious crime" (*see Cavallaro v Pozzi*, 28 AD3d 1075, 1077 [4th Dept 2006]).

Even accepting plaintiff's allegations as true, the complaint does not establish that all the alleged torts of assaults and batteries, threats, defamation, false arrests, and malicious prosecution were part of "a deliberate, malicious and relentless campaign of harassment and intimidation" engaged in by the Morgan defendants to inflict severe emotional distress on plaintiff (*see Nader v General Motors Corp.*, 25 NY2d 560, 569 [1970]; *Seltzer v Bayer*, 272 AD2d 263, 264-265 [1st Dept 2000]). Rather, the allegations show that the actions taken by the Morgan defendants were in fact prompted by, and in response to, plaintiff's harassing conduct of photographing and recording them under the guise of exercising his First Amendment rights (*compare Shannon v MTA Metro-N. R.R.*, 269 AD2d 218 [1st Dept 2000], *modfg on other grounds* Sup Ct, NY County, June 9, 1999, [pattern of harassment by defendant in retaliation for plaintiff's filing grievance against his supervisor]; *Vasarhelyi v New School for Social Research*, 230 AD2d 658 [1st Dept 1996] [pattern of harassment by defendant school president after plaintiff

controller and treasurer criticized defendant's actions]; *Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 349-350 [1st Dept 1986] [course of conduct by landlord to interfere with tenant's quiet enjoyment of tenancy after tenant's committee had landlord's eviction plan annulled and vacated]).

The record demonstrates that plaintiff's primary purpose in commencing the instant action, as well as two federal actions asserting the same claims, is the harassment of the Morgan defendants and the Belkin defendants. We therefore find it appropriate to impose sanctions in the form of attorneys' fees and costs and to enjoin plaintiff from commencing any further pro se actions against these defendants based on the same claims, without court approval (*see* CPLR 8303-a; 22 NYCRR 130-1.1; *Banushi v Law Off. of Scott W. Epstein*, 110 AD3d 558 [1st Dept 2013]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13781 The People of the State of New York, Ind. 3441/09
Respondent,

-against-

Corey Williams,
Defendant-Appellant.

_____

Robert DiDio & Associates, Kew Gardens (Danielle Muscatello of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 9, 2010, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence to support defendant's accessorial liability (*see* Penal Law § 20.00). Among other things, defendant handed a pistol to his accomplice, after having apparently racked the weapon's slide in preparation for firing. There is no reasonable explanation for defendant's

conduct, viewed in totality, other than that he shared his companion's homicidal intent (*see e.g. People v Allah*, 71 NY2d 830 [1988]).

The court properly denied defendant's request for a justification charge, since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support that charge (*see People v Watts*, 57 NY2d 299, 301-302 [1982]). There was no reasonable view to support either the objective or subjective aspects (*see People v Goetz*, 68 NY2d 96 [1986]) of the justification defense (*see People v Singleton*, 39 AD3d 375 [1st Dept 2007], *lv denied* 9 NY3d 851 [2007]).

The court properly exercised its discretion in imposing reasonable limits on defendant's cross-examination of prosecution witnesses. Since defendant never asserted a constitutional right to pursue any precluded inquiries, his constitutional claim is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). The restrictions imposed by the court generally went to matters of form rather than substance, and defendant received sufficient latitude in which to impeach witnesses.

Defendant's argument that the first-degree assault count should have been dismissed as an inclusory concurrent count following the attempted murder conviction is without merit (*see People v Green*, 56 NY2d 427 [1982]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13782 The People of the State of New York, Ind. 1252/08
Respondent,

-against-

Ronald Perry,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about January 23, 2013, which adjudicated defendant a level three sexual offender and sexual predator pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points for sexual misconduct while confined, based on defendant's prison disciplinary record. Defendant's argument that points should not be assessed for consensual sexual activity that would be lawful outside of prison is similar to arguments this Court has previously rejected

(*People v Perez*, 104 AD3d 403 [1st Dept], *lv denied* 21 NY3d 858 [2013]; *People v Salley*, 67 AD3d 525 [1st Dept 2009], *lv denied* 14 NY3d 703 [2010]), and we find no reason to reach a different conclusion.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13783 Yoon Peng Choo, Index 306758/10
Plaintiff-Appellant,

-against-

The Fiedler Companies, Inc.,
doing business as Fiedler
Waterproof and Masonry and/or
Fiedler Roofing, et al.,
Defendants-Respondents.

_____

Charles I. Epstein, Flushing, for appellant.

Aschettino Struhs, LLP, White Plains (Deborah A. Summers of counsel), for The Fiedler Companies, Inc., respondent.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for Adams and Company Real Estate, Inc., respondent.

Camacho Mauro Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for Cercone Exterior Restoration Corp., respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered June 5, 2013, which granted defendants' motions for summary judgment dismissing the complaint and all cross claims, unanimously reversed, on the law, without costs, and the motions denied.

Plaintiff alleges that she tripped and fell while entering the building owned by defendant Adams and Company Real Estate, Inc., a few steps before the main entrance. Adams hired defendant The Fiedler Companies, Inc. to perform some

waterproofing work around the building, including at the sidewalk joint directly in front of the main entrance, and Fiedler subcontracted the job to defendant Cercone Exterior Restoration Corp. Cercone performed the work on the main entrance joint the day before the accident, placed masonite material over the joint, and taped it down to protect the sealant from pedestrian traffic.

Plaintiff sufficiently identified the cause of her fall and raised triable issues of fact as to whether defendants created the alleged hazardous condition that caused her to fall. Although plaintiff admitted that she did not see the masonite before the accident, when asked why she fell, she testified that the front of her foot kicked or struck something that was not level with the ground, and that she then observed the masonite while she was on the ground. Plaintiff also testified that she entered the building every day for work, that she had never seen the masonite before, and that the ground was always level before the masonite's application. Plaintiff's testimony is sufficient to establish causation (*see Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637, 638 [1st Dept 2013]; *Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007]). That plaintiff testified that she also saw a raised portion of masonite when she was on the ground, and that it might have been

raised because she kicked it, is of no moment since she clearly testified that the cause of her fall was her foot striking something that was not level with the ground (*see e.g. Cuevas v City of New York*, 32 AD3d 372, 373 [1st Dept 2006] ["As it was not [plaintiff's] obligation to prove his claim to defeat the motion for summary judgment, he was entitled to a reasonable inference"]; *cf. Drago v DeLuccio*, 79 AD3d 966 [2d Dept 2010]). The parties' disputes over whether plaintiff tripped on the masonite, as she testified, or on a mat that was allegedly placed on top of the masonite, and whether the poor quality photographs used at the witnesses' depositions contributed to their inability to distinguish the mat from the masonite, raise factual issues not amenable to resolution on a motion for summary judgment (*see Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1st Dept 2011]). Factual issues also exist as to whether Fiedler

sufficiently exercised control over Cercone so as to be vicariously liable for Cercone's potential negligence (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257-258 [2008]).

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13784 The People of the State of New York, Ind. 5910/11
Respondent,

-against-

Antonio Lirano,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered September 28, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth and seventh degrees, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 5½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The police saw defendant walk to an area between the curb and parked cars and make bodily motions, including lowering his hand to the ground, that indicated that defendant was depositing an object on the ground. The police immediately went to the precise spot where such an object would have landed and found a metal box containing

drugs. There was no one else at that particular location, nor were any other objects found there. The only reasonable explanation of these events is that defendant dropped the box.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13785 In re Noella Lum B.,
Petitioner-Appellant,

-against-

Khristopher T. R.,
Respondent-Respondent.

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Mallow, Konstam, Mazur, Bocketti & Nisonoff, P.C., New York (Madeleine Nisonoff of counsel), for appellant.

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

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Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about March 27, 2013, which, after a hearing, denied petitioner mother's motion for an order directing respondent father to cooperate and execute all documents necessary to obtain a renewal passport for the subject child, unanimously reversed, on the law and the facts, without costs, the mother's application granted, and the father directed to cooperate in obtaining a renewed passport for the child.

The parenting agreement entered into between the parties in 2007 provided, among other things, sole physical residential custody to the mother and visitation to the father. The agreement contemplated "air travel" by the child with one parent, and did not prohibit either party from traveling outside of the

United States with the child. The mother previously had traveled internationally with the child, both before and after the parties' separation, until the child's passport expired in 2009. Although the parenting agreement required the parties to execute all documents that may be necessary to give its provisions full force and effect, the father refused to execute documents necessary for the renewal of the child's United States passport (*see* 22 CFR 51.28[a][3][i], [ii][E]). The father, however, failed to demonstrate that there had been a significant change in circumstances warranting modification of the agreement to prohibit international travel (*see Matter of Awan v Awan*, 75 AD3d 597, 598 [2d Dept 2010]; *see generally Matter of Reven W. v Jenny Virginia D.*, 107 AD3d 445, 446 [1st Dept 2013]). Although the father claimed that relations with the mother had deteriorated and that he feared she would abscond with the child, he acknowledged that the mother had complied with all aspects of the parenting agreement, had never threatened to take the child, and had returned from all prior trips with the child, which she had taken with the father's knowledge and consent, in a timely manner and without incident. Moreover, although the father asserted that the mother had family living abroad (which had always been the case), the mother is a citizen of the United States and has

significant family connections here. Indeed, the father characterized the risk of the mother absconding with the child as remote or a 1% chance, and did not object to the child traveling abroad when she turned 12, which would occur three years after the hearing. Moreover, although the Family Court's credibility determinations are entitled to "great deference" (*Matter of Brittni K.*, 297 AD2d 236, 237 [1st Dept 2002] [internal quotation marks omitted]), in this case, the court's determination that the mother posed a flight risk based upon, among other things, her two prior applications for relocation, which were made pursuant to the agreement, "lacks a sound and substantial evidentiary basis" (*id.* at 238 [internal quotation marks omitted]). The evidence does not support the court's finding that the mother would permanently remove the child from the country if she

obtains the requested passport (*see Matter of Hamad v Rizika*, 117 AD3d 736, 737-738 [2d Dept 2014]; *Linda R. v Ari Z.*, 71 AD3d 465, 466 [1st Dept 2010]). We further note that the attorney for the child has at all times supported the mother's application.

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

ENTERED: DECEMBER 11, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13786 In re Edward Fall, Ind. 4003/13
[M-5429] Petitioner,

-against-

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

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Edward Fall petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee of counsel), for municipal respondents.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for state respondent.

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

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

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

ENTERED: DECEMBER 11, 2014

CLERK

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13503-
13504 Index 381649/09

Citibank, N.A.,
Plaintiff-Appellant,

-against-

Beryl M. Barclay,
Defendant-Respondent,

Curtis Lee Hoggard, et al.,
Defendants.

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Hogan Lovells US LLP, New York (Chava Brandriss of counsel), for appellant.

Common Law, Inc., Sunnyside (Karen Gargamelli of counsel), for respondent.

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Orders, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 22, 2013, reversed, on the law, without costs, and the orders vacated.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Leland G. DeGrasse
Barbara R. Kapnick, JJ.

13503-13504
Index 381649/09

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Citibank, N.A.,
Plaintiff-Appellant,

-against-

Beryl M. Barclay,
Defendant-Respondent,

Curtis Lee Hoggard, et al.,
Defendants.

_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Robert E. Torres, J.), entered July 22, 2013, which found that plaintiff had not negotiated in good faith pursuant to CPLR 3408(f), and the order, same court, Justice and entry date, which, to the extent appealed from as limited by the briefs, barred plaintiff from collecting any interest from July 7, 2011 until the date of a final, supported determination on Barclay's application for a loan modification and the release of this case from the settlement part.

Hogan Lovells US LLP, New York (Chava Brandriss, David Dunn and Robin L. Muir of counsel), for appellant.

Common Law, Inc., Sunnyside (Karen Gargamelli and Jay Kim of counsel), for respondent.

ANDRIAS, J.

In June 1994, defendants Barclay and Hoggard borrowed the principal sum of $118,050 from the Money Store, secured by a mortgage on the subject real property. In or about March of 2009, they defaulted on their mortgage payments. On July 31, 2009, plaintiff, the holder of the note and mortgage, commenced this foreclosure action. The first of nine mandatory settlement conferences pursuant to CPLR 3408(a) was held on June 23, 2010.

In an order dated March 20, 2012, Supreme Court found that plaintiff, in violation of CPLR 3408(f), failed to negotiate with defendant Barclay in good faith to reach a mutually agreeable resolution during the settlement conferences, and ordered a hearing "to better determine the extent of the bad faith and the appropriate sanctions." After conducting a hearing, by order dated June 21, 2013, the court, among other things, barred plaintiff from collecting any arrears incurred from July 7, 2011, including interest and late fees, until the date Barclay is given a final supported determination of her loan modification application and the case is released from the settlement part. Considering the totality of the circumstances, we now hold that plaintiff's conduct did not thwart any reasonable opportunities to settle the action and was not so egregious as to warrant the imposition of sanctions against it.

CPLR 3408 was enacted in 2008, as part of the omnibus "Subprime Residential Loan and Foreclosure Laws" (L 2008, ch 472, effective August 5, 2008), remedial legislation intended to assist homeowners at risk of losing their homes to foreclosure due to the subprime credit crisis (See Sponsor's Mem., Bill Jacket (L 2008, ch 472). As part of the protections afforded to homeowners by the legislation, CPLR 3408 requires that conferences be conducted in residential foreclosure actions

> "for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate" (CPLR 3408[a]).

These mandatory settlement conferences are intended to "provide an opportunity for borrowers and lenders to try to reach a solution that avoids foreclosure" (see Letter of Sen Farley, Bill Jacket, L 2008, ch 472 at 6).

CPLR 3408(f), added in 2009 as part of legislation designed to provide broader protection for homeowners (L 2009, ch 507 effective February 13, 2010), states that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually

agreeable resolution, including a loan modification, if possible." "The purpose of the good faith requirement is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution" (2009 Mem of Governor's Program Bill, Bill Jacket, L 2009, ch 507 at 11). The language of the statute and legislative history confirm that the obligation to negotiate in good faith is intended to be a two way street, imposing reciprocal obligations on both the lender and the borrower to cooperate with the other to enable achievement of a reasonable resolution (*see US Bank N.A. v Sarmiento*, 121 AD3d 187, 204 [2d Dept 2014] ["Where a plaintiff fails to expeditiously review submitted financial information, sends inconsistent and contradictory communications, and denies requests for a loan modification without adequate grounds, or, conversely, where a defendant fails to provide requested financial information or provides incomplete or misleading financial information, such conduct could constitute the failure to negotiate in good faith to reach a mutually agreeable resolution"]). Towards this end, 22 NYCRR 202.12-a(c)(4) directs the court to "ensure that each party fulfills its obligation to negotiate in good faith."

The term "good faith" is not defined in the statute. However, this Court has held that compliance with the good faith

requirement of CPLR 3408 is not established by merely proving the absence of fraud or malice on the part of the lender and that "[a]ny determination of good faith must be based on the totality of the circumstances," taking into account that CPLR 3408 is a remedial statute (*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 639 [1st Dept 2012]; *see also Sarmiento*, 121 AD3d at 203-204 ["(T)he issue of whether a party failed to negotiate in 'good faith' within the meaning of CPLR 3408(f) should be determined by considering whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution"]).

"While the aspirational goal of CPLR 3408 negotiations is that the parties 'reach a mutually agreeable resolution to help the defendant avoid losing his or her home' (CPLR 3408[a]), the statute requires only that the parties enter into and conduct negotiations in good faith (see subd [f])" (*Van Dyke*, 101 AD3d at 638). In *Van Dyke*, this Court noted that "there are situations in which the statutory goal is simply not financially feasible for either party" and that

> "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[ ] [mortgagors], and the plaintiff's failure to

> make that offer cannot be interpreted as a lack of good faith" (*id.*).

See *also Wells Fargo Bank, N.A. v Meyers* (108 AD3d 9, 20 [2d Dept 2013] ["it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties"]).

Guided by these principles, we find that Barclay has not established that, under the totality of the circumstances, plaintiff failed to engage in a meaningful effort at reaching a solution during the settlement conferences. Although plaintiff presented Barclay with repeated requests for documentation and, at times, failed to timely comply with deadlines issued by the court, the record establishes that Barclay created a moving target for plaintiff by repeatedly changing her alleged sources of income in her loan modification applications, and failing to disclose substantial and material liens encumbering the property.

Barclay's September 13, 2010 application reported $3,543 in monthly income, $2,096 of which came from co-borrower Hoggard. As to Barclay's earnings, the application was supported by a letter from a restaurant which stated that "Barclay is employed here part-time as a cook. She is paid $150.00 weekly." Hoggard's income was not documented. In her January 14, 2011 application,

Barclay reduced her monthly income to $2,253.75, and did not include any income attributable to Hoggard. Although Barclay's 2009 tax return showed $7,200 in business income, it did not include a Schedule C or C-EZ or report any wages, salaries, tips, or Social Security benefits. An email from the attorney who later became Barclay's counsel stated that Barclay "is not self-employed and does not file taxes as self-employed," and that her income came from her restaurant job.

In her February 16, 2011 Home Affordable Mortgage Program (HAMP) application and her March 11, 2011 in-house loan modification application, Barclay increased her household monthly income to $4,328, of which $2,541 was attributed to Barclay's sister, who had never been mentioned in prior applications. Barclay's counsel, retained after the fourth settlement conference, acknowledged this material shift in Barclay's position as to her sources of income, stating:

> "In previous applications, [Barclay] did not report her sister's income even though her sister has lived in the home for 20 years; she did not know that she could contribute non-borrower information. Also, Ms. Barclay submitted Curtis Hoggard's tax information even though Mr. Hoggard does not live in the home and does not contribute toward the mortgage; she thought she had to contribute his information because he was a co-borrower. Additionally, she no longer works part-time at the restaurant."

These significant changes in the source and amount of Barclay's income warranted requests for further information and contributed to the delays in completing the review of Barclay's loan modification applications. Once Barclay's sister was belatedly listed and Hoggard was removed as a source of income, it was appropriate for plaintiff to review Barclay's applications anew. Indeed, at the April 5, 2011 conference, the parties stipulated that plaintiff would provide additional documentation that was needed. Barclay then submitted her May 29, 2011 application in which monthly income was reduced from $4,328 to $3,442.

Significantly, in each of the applications that Barclay submitted she failed to disclose all of the material aspects of her finances, including but not limited to the substantial liens against the property. Among other items, on January 29, 2004, Barclay was convicted of conspiracy to commit bank fraud (18 USC § 371) and bank fraud (18 USC § 1344), and ordered to pay $220,000 in restitution. On February 22, 2005, this was recorded as a $224,224 lien against the property in favor of the "DEPT OF JUSTICE U.S. ATTORNEY'S OFFICE." On February 12, 2010, Barclay executed a bond and mortgage in the principal sum of $200,000 against the property in favor of the Commissioner of Social Services of the City of New York. The mortgage was recorded on

May 12, 2010. Although Barclay certified under penalty of perjury that all of the information in her loan modification applications was truthful, she did not disclose these liens. Rather, the only lien she disclosed was in the amount of $18,408.49 in favor of Beneficial Finance.

Barclay contends that the delays from the time she submitted her May 29, 2011 loan modification application are entirely plaintiff's fault. Barclay points to plaintiff's failure to issue a determination on that application within 30 days, as required by the court and HAMP guidelines. Barclay also notes that while plaintiff claimed at the July 7, 2014 conference that documents were still missing, it admitted in a July 12, 2014 email, sent four days after the deadline set by the court, that all necessary documents had been provided. However, at the August 30, 2011 CPLR 3408(f) hearing, plaintiff advised Barclay that its title search revealed that $229,000 in judgments and liens had been levied against the property, including the $220,224 due pursuant to the restitution order, and that a quitclaim deed was required from Hoggard, a reasonable request given that his income had been excluded. The court then adjourned the hearing to October 18, 2011, to allow Barclay to address the liens and provide the deed.

Upon being advised of the specific liens on the property,

Barclay continued to deny that the federal lien arising out of her fraud conviction pertained to her. While the federal lien was for $224,000 and Barclay was aware of the restitution order, she directed plaintiff's attention to a $1,063.22 tax lien that was patently irrelevant. When plaintiff's counsel provided proof that the $224,000 lien was levied against Barclay, and that documented liens exceeded $400,000, Barclay continued to assert that the federal lien did not pertain to her and failed to provide proof that the other liens had been satisfied. It was not until the June 8, 2013 hearing that Barclay's counsel acknowledged the federal lien, at which time she maintained, without submitting supporting documentation, that the U.S. Attorney had agreed to subordinate it.

Barclay contends that the liens should not be a factor because the issue was not raised until after she moved to dismiss. However, this does not alter the fact that Barclay concealed material information about her financial circumstances, in all of the loan modification applications, which required her to list all of her income, assets, liabilities and expenses, including all "liens/mortgages or judgments on this property." These omissions affected both the continued viability of the property as suitable collateral for a mortgage loan, and her ability to repay. Plaintiff's contention that she ultimately

acknowledged the lien and that the U.S. Attorney agreed to subordinate the lien does not abrogate her prior lack of good faith in failing to disclose the federal lien and then attempting to deny that it pertained to her.

Supreme Court gave no weight to Barclay's conduct, ignoring the reciprocal obligations imposed by CPLR 3408(f). While this Court is mindful of the remedial nature of CPLR 3408, the goals of the statute would not be served if we were to ignore the role that Barclay's own conduct played in delaying a resolution of this action.

In light of the foregoing, we need not consider plaintiff's alternative arguments that even if the lack of good faith finding is supported by the record, the court lacked the statutory or regulatory authority to impose sanctions under CPLR 3408, and that in any event the sanctions imposed impermissibly rewrote the terms of the parties' loan agreement and were excessive.

Accordingly, the order of the Supreme Court, Bronx County (Robert E. Torres, J.), entered July 22, 2013, which found that plaintiff had not negotiated in good faith pursuant to CPLR 3408(f), and the order, same court, Justice and entry date, which, to the extent appealed from as limited by the briefs, barred plaintiff from collecting any interest from July 7, 2011 until the date of a final, supported determination on Barclay's

application for a loan modification and the release of this case from the settlement part, should be reversed, on the law, without costs, and the orders vacated.

All concur.

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

ENTERED: DECEMBER 11, 2014

CLERK