SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 20, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13458 MMCT, LLC, Index 650573/13
Plaintiff-Appellant,

-against-

JTR College Point, LLC, et al.,
Defendants-Respondents.

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Ellenoff Grossman & Schole LLP, New York (Jordan Wolff of counsel), for appellant.

Herrick, Feinstein LLP, New York (William R. Fried of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 8, 2013, which, to the extent appealed from as limited by the briefs, granted defendant Jason Halpern's motion to dismiss the fraud cause of action as against him, unanimously affirmed, with costs.

Plaintiff alleges that Halpern made three false pre-investment statements to Michael Gallin, a member of plaintiff. The first was that phases one and two of the construction project, and the environmental studies for the project, were already under way. Plaintiff alleges conclusorily that this

statement was false but fails to allege any facts that would support an inference that the statement was false at the time it was made (*see Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403 [1st Dept 2008]; *Neiman v Felicie, Inc.*, 55 AD2d 521 [1st Dept 1976]; CPLR 3016[b]). Moreover, plaintiff cannot establish justifiable reliance on Halpern's statement, since neither the complaint nor Gallin's affidavit makes mention of whether plaintiff's representatives or its members, who are sophisticated investors, inspected the project site or bookkeeping to ascertain the status of the project before investing in it (*see Dragon Inv. Co.*, 49 AD3d at 404).

The second alleged misrepresentation was that the project was in a "great area" and that Halpern would prefer to invest his own money rather than rely on his family. This statement is non-actionable opinion or puffery (*see ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 399 [1st Dept 2008]).

The third alleged misrepresentation was made in a "Confidential Information Memorandum" (CIM) which outlined the goals and structure of the project. Plaintiff alleges the CIM contains material misrepresentations of fact that were made with the knowledge that they were false when made. Among those misrepresentations are that the investment was a loan and that

plaintiff was certain to recover its investment with a profit. The CIM states, however, that its sole purpose is to provide "general information" about the development project and that "[n]othing contained in this memorandum is or shall be relied upon as a promise or representation as to the past or future performance of the Property." The CIM also contains a disclaimer that "[a]ny estimates and projections have been prepared by, and based upon information that involves significant subjective judgments, assumptions and analyses of management, outside consultants and third parties which may or may not be accurate;" Although plaintiff contends its investment was functionally a loan, the CIM provides that it is a "preferred investment interest" secured by a "preferred equity interest" combined with a 5% share of the "project net profit," indicating that this was a performance based investment.

Plaintiff has not satisfied the heightened pleading standard for a fraud claim under CPLR § 3016(b) because it failed to identify any of the allegedly, false representations that Halpern made with the then present intent to induce plaintiff's investment in the project. Moreover, the fraudulent inducement claim duplicates the breach of contract claim because plaintiff has not alleged any representation that is collateral to the

contract (*RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516 [1st Dept 2008] *lv dismissed* 11 NY3d 804 [2008]). "A fraud-based claim is duplicative of breach of a contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008] [internal quotation marks omitted]).

Leave to replead was properly denied since plaintiff had an opportunity to review the project's ledger entries for the relevant time period before Halpern brought this motion, and has made no showing that it can state a cause of action.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13143 In re Lystra Fatimah N.,
Petitioner-Respondent,

-against-

Rafael M.,
Respondent-Appellant.

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Leslie S. Lowenstein, Woodmere, for appellant.

_____

Order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about June 12, 2013, which, after a fact-finding hearing, granted petitioner an order of protection for one year, unanimously reversed, on the law, without costs, and the order of protection vacated.

The court found that respondent committed acts constituting the family offense of aggravated harassment in the second degree (Penal Law § 240.30) based on petitioner's testimony that on two specific occasions, and many other times, respondent made telephone calls in which he threatened her. While the court's findings are amply supported by the record, the statutory language that a communication "will constitute aggravated harassment in the second degree when [made] with intent to

harass, annoy, threaten or alarm another person" has since been found to be unconstitutionally vague and overbroad (*People v Golb*, 23 NY3d 455, 465-468 [2014]), requiring that the order be vacated.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13328 In re Kenneth Cole Productions, Inc., Shareholder Litigation — Index 650571/12

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Erie County Employees Retirement System,
Lead Plaintiff-Appellant,

-against-

Michael J. Blitzer, et al.,
Defendants-Respondents.

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Bernstein Litowitz Berger & Grossmann LLP, New York (Lee Rudy of counsel), for appellant.

Sidley Austin LLP, New York (Andrew W. Stern of counsel), for Michael J. Blitzer, Robert C. Grayson, Denis F. Kelly, and Philip R. Peller, respondents.

Willkie Farr & Gallagher LLP, New York (Tariq Mundiya of counsel), for Kenneth D. Cole, KCP Holdco, Inc and KCP Mergerco, Inc., respondents.

Kaye Scholer LLP, New York (Catherine Schumacher of counsel), for Paul Blum, respondent.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered September 5, 2013, which, insofar as appealed from as limited by plaintiff's briefs, granted the motions of defendants Michael J. Blitzer, Robert C. Grayson, Denis F. Kelly, Philip R. Peller, Paul Blum, Kenneth D. Cole (Mr. Cole), KCP Holdco, Inc. (Holdco), and KCP Mergerco, Inc. (Mergerco) to dismiss the complaint pursuant to CPLR 3211, unanimously

affirmed, with costs.

Contrary to plaintiff's claim, the motion court was not required to apply the "entire fairness" standard to the transaction by which Mr. Cole (the majority shareholder of former defendant Kenneth Cole Productions, Inc. [the Company], a New York corporation) took the Company private. *Alpert v 28 Williams St. Corp.* (63 NY2d 557 [1984]) – on which plaintiff principally relies – states, "[C]orporate freeze-outs of minority interests by mergers occur principally in three distinct manners: (1) two-step mergers, (2) parent/subsidiary mergers, and (3) 'going-private' mergers where the majority shareholders seek to remove the public investors . . . . *This court does not now decide if the circumstances which will satisfy the fiduciary duties owed in [a] two-step merger will be the same for the other categories"* (*id.* at 567 n 3 [emphasis added] [citation omitted]). *Alpert* involved a two-step merger (*id.* at 563) where "[t]he merger plan did not require approval by any of the minority shareholders" (*id.* at 564). By contrast, the merger in the case at bar required the approval of the majority of the minority (*i.e.*, non-Cole) shareholders.

Although Mr. Cole had a conflict of interest, he did not participate when the Company's board of directors voted on the

merger. Plaintiff has not alleged that the remaining members of the board (Blitzer, Grayson, Kelly, Peller, and Blum) were self-interested.

Plaintiff does contend that the members of the special committee which the Company established to evaluate Mr. Cole's proposal (Blitzer, Grayson, Kelly, and Peller) were controlled by Mr. Cole. However, at least under Delaware law, which all parties urge us to consider, "it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election" (*Aronson v Lewis*, 473 A2d 805, 816 [Del 1984], *overruled in part on other grounds by Brehm v Eisner*, 746 A2d 244, 253-254 [Del 2000]; *see also Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A2d 1040, 1052 [Del 2004]; *Lerner v Prince*, 119 AD3d 122, 130 [1st Dept 2014]).

The complaint's allegations that the proxy statement sent to the Company's shareholders was incomplete and misleading were insufficient (*see Kimeldorf v First Union Real Estate Equity & Mtge. Invs.*, 309 AD2d 151, 158 [1st Dept 2003]).

In this particular case, pre-discovery dismissal based on the business judgment rule was appropriate since there are no allegations sufficient to demonstrate that the members of the

board or the special committee did not act in good faith or were otherwise interested (*see e.g. Kassover v Prism Venture Partners, LLC,* 53 AD3d 444, 450 [1st Dept 2008]; *cf. Ackerman v 305 East 40th Owners Corp.,* 189 AD2d 665 [1st Dept 1993] [holding pre-discovery dismissal based on the business judgment rule was inappropriate where the pleadings suggested that directors acted in bad faith]).

Since the breach of fiduciary duty claims against Mr. Cole, Blitzer, Grayson, Kelly, Peller, and Blum were properly dismissed, the claim against Holdco and Mergerco for aiding and abetting the individual defendants' breaches of fiduciary duty failed to state a cause of action (*id.* at 449; *see also Kaufman v Cohen,* 307 AD2d 113, 125 [1st Dept 2003]).

The complaint did not plead an aiding and abetting claim against Blum; plaintiff may not amend its complaint via its appellate brief.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13357 Luz Maria Freire-Crespo, Index 106600/09
Plaintiff-Respondent,

-against-

345 Park Avenue L.P., et al.,
Defendants-Respondents,

Triangle Services, Inc.,
Defendant-Appellant.

_____

Nicoletti Gonson Spinner LLP, New York (Kevin Pinter of counsel), for appellant.

Rosenberg Minc Falkoff & Wolff LLP, New York (Jesse M. Minc of counsel), for Luz Maria Freire-Crespo, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for 345 Park Avenue L.P. and Rudin Management Co., Inc., respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered December 23, 2013, which, inter alia, granted defendants-respondents' (codefendants) motion to the extent it sought summary judgment on their cross claims for contractual indemnification against defendant-appellant Triangle Services, and denied Triangle Services's cross motion for summary judgment dismissing the complaint and cross claims as untimely, unanimously affirmed, without costs.

CPLR 3212(a) provides that unless the court sets another date, a motion for summary judgment must "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). Moreover, the controlling preliminary conference order dictated the same 120-day time limit. The reassignment of the matter thereafter to a part whose rules provide for a standard 60-day time limit did not serve to eliminate that provision of that preliminary conference order, in the absence of a further order or directive explicitly providing for a reduced time limit, or some other means of directing that the time limits of the new part's rules would supersede the preliminary conference order. *Fine v One Bryant Park, LLC* (84 AD3d 436, 437 [1st Dept 2011]) does not hold to the contrary; it did not involve a reassignment after the issuance of a preliminary conference order.

Supreme Court properly denied as untimely Triangle Services's cross motion for summary judgment dismissing the complaint. While the court providently exercised its discretion in its implicit determination that the illness of counsel for codefendants during the relevant time period constituted good

cause for the four-day delay in serving their notice of motion (*see Popalardo v Marino*, 83 AD3d 1029, 1030 [2d Dept 2011]), Triangle Services's crossmotion was served even further beyond the deadline, and unlike codefendants, Triangle Services set forth no explanation, let alone good cause, for its delay (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 86 [1st Dept 2013]). Nor did Triangle Services, in moving for dismissal of plaintiffs' claim against it, establish a right to the sought relief as a matter of law.

As to the indemnification claim, codefendants were properly awarded summary judgment on their contractual indemnification claims against Triangle Services, because their service contract in effect at the time of the incident, which required Triangle Services to clean the accident location, contains a broad indemnification provision and does not require a showing of negligence on Triangle's part.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13535 The People of the State of New York, Ind. 2387/10
Respondent,

-against-

Calvin Williams,
Defendant-Appellant.

_____

Seymour W. James Jr., Legal Aid Society, New York (David Crow of counsel), and Dechert LLP, New York (L. Danielle Toaltoan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered November 30, 2010, as amended March 3, 2011, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him to a term of 1⅔ to 5 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that defendant threatened the use of force in the course of committing larceny (Penal Law §§ 160.00; 160.05). "The obvious implication of a remark such as 'do as I say and nothing will happen' is that, should the speaker not be obeyed, something

untoward would in fact happen." (*People v Zagorski*, 135 AD2d 594, 595 [2d Dept 1987]). Here, defendant made several such threatening remarks or gestures, including announcing that he was committing a robbery, warning store employees not to call the police or "make [defendant] do something," and making references to a possible firearm. Although some of defendant's behavior was unusual, he was clearly conveying a threat to use immediate force if the victims offered any resistance. The evidence fails to support inferences that defendant was actually disclaiming any intent to use a firearm or other force, or that he really meant larceny when he referred to robbery.

The court properly granted the People's request to charge third-degree robbery as a lesser included offense of second-degree robbery (Penal Law § 160.10[2][b]), since there was a reasonable view of the evidence that defendant forcibly stole property without displaying what appeared to be a firearm. There was a reasonable view that, while defendant may have made a verbal threat to use a firearm, his conduct failed to satisfy the "display" element, as delineated in *People v Lopez* (73 NY2d 214 [1989]).

The court properly denied defendant's motion to suppress the stolen property recovered from his bag. The police had probable

cause to arrest defendant when, within minutes, an eyewitness to the robbery identified defendant as the perpetrator. Based on the totality of the information in their possession, including a radio communication, the police could have reasonably inferred that they were speaking with a victim or witness with personal knowledge of a violent crime, who was identifying defendant as the perpetrator (*see e.g. People v Ransdell*, 254 AD2d 63 [1st Dept 1998], *lv denied* 92 NY2d 1037 [1998]). The search of the bag was justified by exigent circumstances (*see People v Jimenez*, 22 NY3d 717 [2014]; *People v Smith*, 59 NY2d 454, 458-459 [1983]), including the presence of the bag in the grabbable area of the unhandcuffed defendant, the violent nature of the crime, and specific reason to believe that the bag contained a weapon.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13536 Kelly Coffey, Index 114073/09
Plaintiff-Respondent,

-against-

CRP/Extell Parcel I, L.P., et al.,
Defendants-Appellants,

Stroock & Stroock & Lavan LLP,
Defendant.

_____

Boies, Schiller & Flexner LLP, Armonk (Jason C. Cyrulnik of counsel), for appellants.

Held & Hines, LLP, New York (James K. Hargrove of counsel), for respondent.

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Order, Supreme Court, New York County (Debra James, J.), entered August 2, 2013, which directed defendants CRP/Extell Parcel I, L.P. and CRP/Extell Parcel I GP, L.L.C. (CRP) to amend their undertaking to provide for all outstanding post-judgment interest, at the statutory rate, that had accrued on the money judgment as of the date of the order, unanimously affirmed, with costs, and the matter remanded for calculation of the amount of interest due.

The April 2, 2013 judgment directed CRP to release and return to plaintiff "the down payments that total $1,035,000.00, deposited in their escrow account, together with any interest

accumulated thereon," plus "interest on the sum of $1,035,000.00 from September 2, 2008 at the statutory rate of 9% as calculated by the clerk in the amount of 426,958.77," and costs and disbursements in the amount of $611.25, for a total sum of $427,570.02. CRP returned plaintiff's down payments, and on June 4, 2013, it posted with the clerk of the court an undertaking in the amount of $427,570.02, for the purpose of obtaining a stay of enforcement of the portion of the judgment requiring it to pay interest, pending a determination on appeal. Plaintiff then moved for an order directing CRP to increase the undertaking to account for the post-judgment interest on the outstanding amount that began accruing on April 2, 2013, upon the entry of the judgment, that would continue to accrue pending the appeal. CRP objected, contending that plaintiff would not be entitled to recover post-judgment interest on the judgment amount owed because the judgment consisted almost entirely of interest.

The court granted plaintiff's motion to the extent of directing CRP to amend "the existing bond to provide for all interest that has accrued as of this date [July 31, 2013], post judgment at the statutory rate," finding that the amendment of the undertaking sought by plaintiff was for post-judgment interest on a money judgment, and not for compound interest or

interest on interest.

The court properly determined that plaintiff is entitled to post-judgment interest on the outstanding portion of the money judgment from the time of entry of the judgment until full satisfaction (*see* CPLR 5003; 5519[a][2]; *Wiederhorn v Merkin*, 106 AD3d 416, 416-417 [1st Dept 2013], *lv denied* 21 NY3d 864 [2013]; *HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 12 Misc 3d 1166[A] [NY Sup Ct 2006]). We direct CRP to pay plaintiff the amount of interest that has accrued on the judgment from April 2, 2013 up through the time the judgment is (or has been) satisfied.

We deny plaintiff's request for sanctions against defendants.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13537 The People of the State of New York, Ind. 459/04
Respondent,

-against-

Pedro Alvarez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi 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 (Jeffrey Atlas, J.), rendered on or about June 22, 2004,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13538 Chris Stier, Index 103134/09
Plaintiff-Respondent,

-against-

One Bryant Park LLC, et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

_____

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani, Jr. of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered October 31, 2013, which, to the extent appealed from as limited by the briefs, upon reargument, adhered to the original determination granting plaintiff's motion to strike defendant Bank of America Corp's answer for failure to timely provide discovery, unanimously reversed, on the law and the facts, without costs, defendant's answer reinstated and the matter remanded to the IAS court for a calculation of attorneys' fees and costs in accordance with this decision.

Defendant demonstrated that it undertook diligent efforts to comply with the court's orders in response to plaintiff's motion

to strike (*see Allstate Ins. Co. v Buziashvili*, 71 AD3d 571, 573 [1st Dept 2010]). Plaintiff had caused earlier extended delays in scheduling a deposition, and the record does not reveal that plaintiff suffered any prejudice directly attributable to defendant's delay (*cf. Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 457 [1st Dept 2014]). Under these circumstances, while we agree with the motion court that some sanction is appropriate, the extreme sanction of striking the answer is not appropriate (*see Elias v City of New York*, 71 AD3d 506, 507 [1st Dept 2010]). Since defendant made a significant effort to comply with the compliance order only after plaintiff filed the motion to strike defendant's answer, under the circumstance here, defendant should pay the attorneys' fees and costs incurred by plaintiff in making the motion to strike; we remand to the motion court for the calculation of such fees and costs (*see 24 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471-472 [1st Dept 2013]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13539 Rosemarie A. Herman, etc., et al., Index 650205/11
Plaintiffs-Appellants,

-against-

Julian Maurice Herman, et al.,
Defendants-Respondents,

Mayfair York LLC, et al.,
Defendants.

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Law Offices of Craig Avedidian, P.C., New York (Craig Avedidian of counsel), and Jaspan Schlesinger LLP, Garden City (Steven R. Schlesinger of counsel), for appellants.

Akerman LLP, New York (M. Darren Traub of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about February 8, 2013, which, to the extent appealed from as limited by the briefs, upon granting plaintiffs' motion to renew and granting in part their motion to reargue an order, same court and Justice, entered June 15, 2012, dismissing certain causes of action, adhered to its prior decision, unanimously affirmed, without costs. Appeal from so much of the order as denied reargument on the issue of the applicability of the infancy toll, unanimously dismissed, without costs.

Plaintiff Rosemarie A. Herman brings certain claims in her individual capacity, as beneficiary of two trusts (the trusts) which held her interest in six properties, and as natural guardian for her two sons who are remainder beneficiaries and contingent remainder beneficiaries of the trusts. The underlying properties were eventually transferred into six limited liability companies (LLCs) in which the trusts were 50% owners, and defendant J. Maurice Herman, Rosemarie's brother, the other 50% owner and sole managing member. Plaintiffs' claims arise from Maurice's purchase of Rosemarie's trust interests in 1998 allegedly at far below market value, without her knowledge, and with the alleged cooperation or collusion of defendant Michael Offit, trustee of both trusts.

The court, upon granting renewal, properly dismissed the second cause of action alleging conspiracy to breach fiduciary duty against Maurice as duplicative, as an alternative ground, since a separate tort is pleaded connecting Maurice to plaintiffs' alleged injury. The first cause of action alleges breach of fiduciary duty against Maurice and Offit based, in part, on allegations that Maurice colluded with Offit in connection with Offit's breaches of his fiduciary duties and participated in that misconduct, largely in connection with the

1998 transaction and its concealment from Rosemarie (*see e.g. American Baptist Churches of Metro. N.Y. v Galloway*, 271 AD2d 92, 101 [1st Dept 2000]; *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]; *Danahy v Meese*, 84 AD2d 670, 672 [4th Dept 1981]).

The court also properly adhered to its ruling dismissing the 13th cause of action against Maurice alleging breach of the limited liability agreements relating to the LLCs, and the 14th cause of action alleging breach of fiduciary duty by Maurice in connection with his management of the LLCs, to the extent that these claims were brought derivatively on behalf of the LLCs. As Maurice purchased the trusts' interests in 1998, neither the trusts nor Rosemarie were members of the LLCs in 2011 when the lawsuit commenced, and they thus lacked standing to bring the derivative claims (*see Tzolis v Wolff*, 39 AD3d 138 [1st Dept 2007], *affd* 10 NY3d 100 [2008]; *Cohen PDC, LLC v Cheslock-Bakker Opportunity Fund, LP*, 2010 NY Slip Op 33108[U] [Sup Ct, NY County 2010], *affd on other grounds*, 94 AD3d 539 [1st Dept 2012]).

The motion court correctly concluded that the trusts, as former members of the LLC, can nevertheless pursue individual claims under the 13th and 14th causes of action, to challenge the 1998 transaction, as that transaction allegedly deprived them of

their interests in the LLCs (*Bernstein v Kelso & Co.*, 231 AD2d 314, 322-323 [1st Dept 1997]). The 22nd cause of action for an accounting by the LLCs, however, alleged solely as a derivative claim on behalf of the trusts, was properly dismissed, as the trusts were no longer members of the LLCs when the lawsuit commenced (*Tzolis*, 39 AD3d 138; *Cohen PDC, LLC*, 2010 NY Slip Op 33108[U], **13-15).

The court also properly denied plaintiffs' nonspecific request to amend the complaint.

Finally, plaintiffs' argument that the court erred in concluding that the infancy toll (CPLR 208) does not apply to the plaintiff sons' claims is not properly before us, as the court denied reargument as to that issue. Therefore, we dismiss the appeal from that aspect of the order. In any event, the argument has been rendered moot, as this Court recently modified the motion court's orders entered June 15, 2012 to declare the infancy toll applicable (__ AD3d __ , 2014 NY Slip Op 07267 [1st Dept 2014]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13540 The People of the State of New York, Ind. 633/12
Respondent,

-against-

Michael Torres,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea 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 (Carol Berkman, J.), rendered on or about September 4, 2012,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13541-
13541A The People of the State of New York,
Respondent,

-against-

Yolanda Cordero,
Defendant-Appellant.

Ind. 4200N/07
1861N/08

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Scoot A. Rosenberg, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Laura Ward, J.), rendered January 27, 2011, convicting defendant, upon her pleas of guilty, of criminal possession of a controlled substance in the second degree and bail jumping in the first degree and sentencing her to an aggregate term of five years, unanimously affirmed.

As to the controlled substance conviction, we find that defendant's waiver of her right to appeal was invalid, but we perceive no basis for reducing the sentence.

As to the bail jumping conviction, 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 nonfrivolous points which could be raised on this appeal as to that conviction.

Pursuant to CPL 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 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: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13542-
13542A In re Stephanie M.,

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

Miguel R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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The Reiniger Law Firm, New York (Douglas H. Reiniger of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 8, 2013, which placed the subject child in the care of petitioner agency pending a permanency hearing, and order of fact-finding, same court and Judge, entered on or about April 4, 2013, which found that respondent had neglected the child by inflicting excessive corporal punishment and failing to make adequate plans for her care, unanimously affirmed, without costs.

The determination that the father neglected the subject child is supported by a preponderance of the evidence, which showed that he refused to allow the then 17-year-old child to return home after her living situation became untenable, indicating that he wished to relinquish care of the child, and refused to participate in services to reunite the family (*see Matter of Amodie T. [Karen S.]*, 107 AD3d 498 [1st Dept 2013]). The evidence also supported the finding that the father inflicted excessive corporal punishment during an altercation in March 2012, and that there had been prior incidents involving use of corporal punishment (*see Matter of Sheneika V.*, 20 AD3d 541, 542 [2d Dept 2005]; *compare Matter of Kennya S. [Kensader S.]*, 89 AD3d 570 [1st Dept 2011]; *see also e.g. Matter of Rosina W.*, 297 AD2d 639 [2d Dept 2002]).

Contrary to the father's argument, the evidence supported the conclusion that the aid of the court was necessary in that the child was residing with her baby in a mother and child program where they had been placed shortly after the child entered foster care. The child's permanency goal was "an alternative planned permanent living arrangement," which is focused on helping a young adult learn to live independently. Thus, the child continued to require the agency's assistance to help her learn to live on her own and care for her baby (*see*

Matter of Sheena B. [Rory F.], 83 AD3d 1056, 1058 [2d Dept 2011]).

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13543-
13543A-
13544 Index 154849/13

Atul Bhatara,
Plaintiff-Respondent,

-against-

Hans Futterman,
Defendant-Appellant.

_____

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (John D'Ercole of counsel), for appellant.

Richard L. Yellen & Associates, LLP, New York (Brendan C. Kombol of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 13, 2013, against defendant in the total amount of $326,475.07, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 15, 2013, which granted plaintiff's motion for summary judgment in lieu of complaint, and denied defendant's cross motion to compel arbitration, and appeal from order, same court and Justice, entered December 13, 2013, which corrected its order entered August 15, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff made a prima facie showing of his entitlement to summary judgment in lieu of complaint by producing the note executed by defendant for a $200,000 loan and proof of

defendant's failure to pay in accordance with the note's terms (*see e.g. Ness v Fellus*, 92 AD3d 551, 551-552 [1st Dept 2012]). In opposition, defendant failed to raise a triable issue of fact. The court was not required to consider any extrinsic documents referenced in the note (*see Nordea Bank Finland PLC v Holten*, 84 AD3d 589, 590 [1st Dept 2011]). That the note was secured by a combined 3% membership interest in a business owned by defendant does not "alter its essential character as an instrument for the payment of money only, and accordingly, is immaterial to plaintiff's right to relief pursuant to CPLR 3213" (*Solanki v Pandya*, 269 AD2d 189 [1st Dept 2000]). We note that in paragraph 14 of the note, defendant expressly agreed that his obligations to make payment under the note "shall at all times continue to be absolute and unconditional in all respects, and shall at al[l] times be valid and enforceable irrespective of any other agreements . . . which might otherwise constitute a defense to th[e] [n]ote." Further, defendant agreed in paragraph 9 of the note that no release of any security for the payment of the note shall affect his liability for payment under the note.

We reject defendant's contention that the loan was usurious, since the stated rate of interest for the loan was 10% per year,

well below the statutory maximum of 16% per year (*see Blue Wolf Capital Fund II, L.P. v American Stevedoring Inc.*, 105 AD3d 178, 182 [1st Dept 2013]; General Obligations Law § 5-501[1]; Banking Law § 14-a[1]), and since the transfer of any membership interests did not occur until after his default (*see Hicki v Choice Capital Corp.*, 264 AD2d 710, 711 [2d Dept 1999]).

Defendant's cross motion to compel arbitration was correctly denied, since defendant specifically agreed in paragraph 16 of the note that any action arising from any disputes under the note shall be commenced in the Supreme Court of the State of New York.

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: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13545 Hess Corporation, Index 153188/12
Plaintiff-Appellant,

-against-

Genesis Realty Group LLC,
Defendant,

Haran Realty Co., LLC, et al.,
Defendants-Respondents.

_____

Cozen O'Connor, New York (Edward Hayum of counsel), for appellant.

Wachtel Missry LLP, New York (Julian D. Schreibman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered March 25, 2014, which denied plaintiff's motion for summary judgment against defendants-respondents, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Since there is no underlying or master agreement for the purchase of fuel oil from plaintiff by defendants-respondents, "each shipment represents a separate agreement to purchase [fuel oil]" (*Sharp Elecs. Corp. v Arkin-Medo, Inc.*, 86 AD2d 817 [1st Dept 1982], *affd* 58 NY2d 986 [1983]). Thus, Uniform Commercial

Code § 2-717 is inapplicable, and defendants-respondents are not entitled to withhold payment for fuel oil deliveries in 2010 to offset payments made for earlier fuel oil deliveries on which they believe they may have been shorted.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13546 The People of the State of New York, Ind. 1656/09
Respondent,

-against-

Santos Lopez,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered December 6, 2011, convicting defendant, after a jury trial, of four counts of assault in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 22 years to life, unanimously affirmed.

After a careful inquiry, the court properly exercised its discretion when it precluded cross-examination of one of the People's witnesses about her past status as a confidential informant (*see People v Corby*, 6 NY3d 231, 234-235 [2005]; *see also People v Schlau*, 117 AD3d 461, 462-463 [1st Dept 2014], *lv denied* 23 NY3d 1067 [2014]). The witness's service as an informant had concluded a year before the instant crime and did not involve defendant, the People demonstrated that the witness

had legitimate safety concerns regarding disclosure of her status, and there was nothing in the circumstances of the case to raise a suspicion that her past informant status contributed to her becoming a prosecution witness in this case. Since defendant never asserted that the court's evidentiary ruling not only violated state law, but also violated his constitutional rights, his present constitutional claims are unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also Duncan v Henry*, 513 US 364, 366 [1995]), and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). In any event, any error was harmless under the standards for both constitutional and nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly denied defendant's request for a jury instruction regarding intoxication. Although there was evidence that defendant had consumed alcohol and marijuana at relevant times, the evidence, viewed most favorably to defendant, was insufficient to allow a reasonable juror to harbor a doubt concerning any element of the charges (*see People v Beaty*, 22 NY3d 918 [2013]).

Defendant's challenge to a remark made by the prosecutor in summation is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13547 The People of the State of New York, Ind. 2972/12
Respondent,

-against-

Carol Williams,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Jill Konviser, J.), rendered on or about March 15, 2013,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13548 Wanda Garcia, Index 300874/11
Plaintiff-Respondent,

-against-

1265 Morrison LLC,
Defendant-Appellant,

Total Realty Associates, Inc.,
Defendant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Tracy P. Hoskinson of counsel), for appellant.

Evan J. Camhi, Lake Success, for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 8, 2013, which, to the extent appealed from, denied defendant 1265 Morrison LLC's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured after she allegedly slipped and fell on water as she walked down defendant's interior staircase, because defendant failed to submit evidence from a witness with knowledge as to the building's janitorial schedule in effect at the time of the accident and whether the schedule was followed on the day of

the accident (*see Seleznyov v New York City Tr. Auth.*, 113 AD3d 497, 498 [1st Dept 2014]; *Gautier v 941 Intervale Realty LLC*, 108 AD3d 481, 481-482 [1st Dept 2013]).

Contrary to defendant's contention, plaintiff's testimony, that immediately after the accident she noticed the stairs were wet and that there was a mop and bucket under the stairwell, provides a nonspeculative basis for her version of the accident and sufficiently establishes a nexus between the hazardous condition and the circumstances of her fall (*see DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486, 487 [1st Dept 2014]; *Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637, 637-638 [1st Dept 2013]). In focusing on the persuasiveness of plaintiff's evidence, defendant is asking this Court to engage in issue-determination rather than issue-finding (*see Jacques v Richal Enters.*, 300 AD2d 45, 45-46 [1st Dept 2002]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13551- Ind. 4107/11
13551A The People of the State of New York, SCI 1830/12
Respondent,

-against-

Jason Quinones,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about September 4, 2012,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13552 The City of New York, Index 450008/13
Plaintiff-Respondent,

-against-

New York Marine and General
Insurance Company,
Defendant-Appellant,

Britt Realty Development Corp.,
Defendant.

_____

Carroll McNulty & Kull LLC, New York (Ann Odelson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about May 1, 2014, which, to the extent appealed from as limited by the briefs, declared that defendant New York Marine and General Insurance Company (Marine) is obligated to defend plaintiff City of New York in an underlying personal injury action, and denied Marine's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The underlying complaint alleged that the plaintiff therein tripped and fell on a tree stump. It was further alleged that the negligence of defendant Britt Realty Development Corp. contributed to the accident by permitting construction debris on

the sidewalk, or otherwise creating an obstruction. Since these allegations are potentially covered by the Marine policy issued to Britt, in which the City was named as an additional insured "only with respect to operations performed by or on behalf of [Britt] for which the [City] has issued a permit," Marine is obligated to defend the City in the underlying action (*cf. QBE Ins. Corp. v Jinx-Proof Inc.*, 102 AD3d 508, 509-510 [1st Dept 2013], *affd* 22 NY3d 1105 [2014]).

Certainly, since, at this juncture, the claims at issue may have arisen from a covered event, namely Britt's management of its construction activities, Marine is obligated to provide the City a defense.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13553 Keith Luebke, Index 114861/08
Plaintiff-Respondent,

-against-

MBI Group, et al.,
Defendants,

Pinnacle Contractors of NY, Inc., et al.,
Defendants-Appellants.

_____

Nicoletti Gonson Spinner LLP, New York (Angela A. Lainhart of counsel), for appellants.

Queller, Fisher, Washor Fuchs & Kool, LLP, New York (Jonny Kool of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered January 23, 2014, which granted plaintiff's motion for reargument and, upon reargument, denied defendants Pinnacle Contractors of NY, Inc. and Prudential Douglas Elliman Real Estate's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The court properly considered plaintiff's untimely motion to reargue, made while an appeal was pending, since it has jurisdiction to reconsider its prior interlocutory orders during the pendency of the action without regard to the statutory time limits for motions to reargue (*Profita v Diaz*, 100 AD3d 481 [1st Dept 2012]).

Plaintiff was allegedly injured when he attempted to exit the building through a glass door, and the door fell on him because pins had come loose from the hinges. Defendants failed to establish that they did not have actual or constructive notice of this dangerous work site condition, and thus are not entitled to summary dismissal of the Labor Law § 200 and common-law negligence claims (*see Burton v CW Equities, LLC*, 97 AD3d 462 [1st Dept 2012]). Defendant Pinnacle's project manager and defendant Prudential's facilities director failed to recall whether it was before or after plaintiff's accident that they saw a defective hinge on the door. The project manager's inconsistent testimony elsewhere in his deposition that he first learned of the defect when it was reported to him after the accident merely presents an issue of credibility to be determined by the trier of fact (*Yaziciyan v Blancato*, 267 AD2d 152 [1st Dept 1999]). Issues of fact are also raised by apparent discrepancies in the documentary evidence submitted by defendants as to when the door hinges were repaired. In any event, plaintiff raised issues of fact by submitting an affidavit by his foreman, who averred that the door repeatedly became dislodged from its frame when he walked through it during the one-week period immediately preceding the accident, requiring him to correct this defect manually by resetting the door into its

frame; that Pinnacle's project manager visited the site about once or twice a week; and that Pinnacle's laborers repeatedly transported materials through the door, which was the only means of ingress or egress on the site, during visits by the Pinnacle manager.

Defendants failed to establish their entitlement to summary dismissal of the Labor Law § 241(6) claim. Contrary to their argument that plaintiff was not injured at a "building or other structure in the course of demolition" (Industrial Code [12 NYCRR] § 23-3.3[f]), the gut renovation project involved the destruction of interior walls, which altered "the structural integrity of the building" and therefore constitutes demolition (*see Cardenas v One State St., LLC*, 68 AD3d 436, 439 [1st Dept 2009] [internal quotation marks omitted]). Defendants also failed to establish that plaintiff's accident was not caused by a failure to provide "safe access to and egress from" the building,

which "shall consist of entrances ... so protected as to safeguard the persons using such means from the hazards of falling ... materials" (12 NYCRR 23-3.3[f]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13554 The People of the State of New York, Ind. 5628/09
Respondent,

-against-

Tyese Funderbunk,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Jason S. Gould of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered October 26, 2010, as amended December 10, 2010, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously affirmed.

The court properly denied defendant's suppression motion. The only police activity challenged on appeal is an officer's act of opening a car door during a lawful traffic stop, which ultimately led to the recovery of contraband. Defendant concedes that the police were entitled to order the occupants to come out

of the car (*see People v Robinson*, 74 NY2d 773 [1989], *cert denied* 493 US 966 [1989]), but argues that they were not entitled to open a car door without individualized suspicion of criminality.

Opening a door is a minimally intrusive safety precaution, incident to a valid automobile lawful traffic stop (*People v David L.*, 56 NY2d 698 [1982] *revg on dissent*, 81 AD2d 893, 895-896 [2d Dept 1981]). Such an action is comparable to, and actually less intrusive than, ordering the occupants to exit the car. We find nothing in *People v Garcia* (20 NY3d 317 [2012]) to suggest that *David L.* should no longer be followed.

Here, an officer acted reasonably in opening a door because the car's excessively tinted windows obstructed the view of the car's interior, including the rear seat passenger area, and the officer heard a fellow officer direct the rear passenger to stop moving and place his hands in view. Accordingly, opening the

door was a reasonable safety precaution (*see e.g. People v Gonzalez*, 298 AD2d 133 [2002], *lv denied* 99 NY2d 558 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13555 The People of the State of New York, Ind. 3505N/08
Respondent,

-against-

Hector Castillo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered August 24, 2011, as amended January 10, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of eight years, unanimously affirmed.

Defendant's motion to suppress evidence acquired as a result of eavesdropping was properly denied. The eavesdropping warrant applications made the type of particularized showing of necessity required by CPL 700.15(4). The affidavits submitted in support of the original and subsequent warrants detailed the investigators' use of noneavesdropping techniques that had provided significant but limited information. The affidavits explained, in detail, why these techniques had been successful only up to a point, and why continued use of the same methods

would have little chance of yielding the necessary evidence (*see People v Rabb*, 16 NY3d 145 [2011]; *People v Giraldo*, 270 AD2d 97, 98 [1st Dept 2000], *lv denied* 95 NY2d 934 [2000]; *People v Acevedo*, 261 AD2d 308 [1st Dept 1999], *lv denied* 94 AD2d 819 [1999]).

This Court has conducted an in camera review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]). After reviewing those minutes, we find no basis for suppression of evidence or for the unsealing of the minutes.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Tom, J.P., Friedman, Andrias, Feinman, Kapnick, JJ.

13556N A.N. Frieda Diamonds, Inc., Index 108991/10
Plaintiff-Appellant,

-against-

Yaron Kaminski,
Defendant-Respondent.

_____

Weg and Myers, P.C., New York (David A. McGill of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Linda Fridegotto of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 3, 2014, which, to the extent appealed from, denied plaintiff's motion for leave to amend the complaint to add a cause of action for fraud, unanimously reversed, on the law and the facts, with costs, and the motion granted.

The court improvidently exercised its discretion in denying plaintiff's motion for leave to amend the complaint where there is no evidence that defendant would be prejudiced or surprised by the proposed amendment (*see* CPLR 3025[b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; *JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dept 2013]). The record shows that defendant was aware of the fraud allegations since plaintiff's filing of the Adversary Proceeding Complaint in January 2011

during proceedings before the U.S. Bankruptcy Court, where discovery on the fraud issue had been completed; that the Bankruptcy Court directed that the fraud claim be adjudicated with the other claims pending before Supreme Court; and that the allegations in the present proposed amended complaint are the same as those raised before the Bankruptcy Court.

Plaintiff has alleged fraud with the requisite particularity (*see* CPLR 3016[b]; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]), and has made a sufficient showing of merit (*see Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). The facts alleged show that defendant knowingly misrepresented that he had scheduled meetings with potential diamond buyers in Dallas, that he made such representation to induce plaintiff to give him $700,000 worth of diamonds to take with him, and that plaintiff justifiably relied on the representation to its detriment (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Plaintiff's proof permits a reasonable inference of fraudulent intent (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492-494 [2008]).

Under the circumstances, plaintiff's inadvertent delay in seeking leave to amend is excusable (*cf. Jablonski v County of Erie*, 286 AD2d 927 [4th Dept 2001]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Richter, JJ.

13557 The People of the State of New York, Ind. 3037/08
Respondent,

-against-

Marlon Bennett,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about November 29, 2012, which adjudicated defendant a level two offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although the record contains insufficient evidence to support the assessment of 10 points under the risk factor of forcible compulsion, defendant's presumptive risk level remains well within risk level two even after deducting those points. The court properly exercised its discretion in declining to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate by a preponderance of the evidence any mitigating factors that would

warrant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant, who has a long history of past convictions, including one involving endangerment of a minor, committed a sexual offense against his minor stepdaughter. We do not find that the mitigating factors cited by defendant warrant a downward departure to level one, when viewed in light of all the circumstances (*see e.g. People v Harrison*, 74 AD3d 688 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13558 Nilda Torres, Index 151709/12
Plaintiff-Appellant,

-against-

The Harmonie Club of the City of New York,
Defendant-Respondent,

Fifth Avenue and 60th Street Corporation, et al.,
Defendants.

_____

Seligson, Rothman & Rothman, New York (Martin S. Rothman, Adam S. Ashe and Alyne I. Diamond of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn Freed, J.), entered September 26, 2013, which denied plaintiff's motion to vacate an order of the same court and Justice, entered April 10, 2013, which had granted, on default, defendant the Harmonie Club of the City of New York's motion to dismiss the complaint against it for failure to, among other things, serve a bill of particulars, unanimously affirmed, without costs.

Although plaintiff's counsel filed an authorization for electronic service, he sent all counsel a notice declining to accept electronic service, and defaulted in responding to defendant's motion to dismiss the complaint. For the first time

on appeal, plaintiff asserts that her counsel failed to respond to defendant's motion because he mistakenly believed that email service was not permitted. This excuse is unpreserved and, in any event, unavailing (*see Vazquez v Lambert Houses Redevelopment Co.*, 110 AD3d 450, 451 [1st Dept 2013]).

Plaintiff also failed to demonstrate a meritorious claim against defendant, because she did not provide an affidavit from a person with knowledge of the facts underlying her claim. The bill of particulars attached to plaintiff's motion to vacate her default is insufficient, because it was signed only by her counsel, who did not have personal knowledge of the facts (*see Silva v Lakins*, 118 AD3d 556, 557 [1st Dept 2014]).

Plaintiff failed to preserve her argument that defendant conceded in another action that this action is viable; in any event, the argument is unavailing.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13559 The People of the State of New York, Ind. 3930/12
Respondent,

-against-

Martin Jefferson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered on or about January 10, 2013, 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: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13562 The People of the State of New York, Ind. 717/12
Respondent,

-against-

Ashley Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen 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 (Rena K. Uviller, J.), rendered on or about April 17, 2013,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13563-
13564 In re Jesus Michael P.,
and another,

Children Under the Age of Eighteen
Years, etc.,

Sonia R.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

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

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

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Orders, Family Court, New York County (Susan Knipps, J.), entered on or about August 1, 2013 and October 26, 2013, which, to the extent appealed from as limited by the briefs, terminated respondent-appellant mother's parental rights to the subject children and committed their custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's determination that termination of the mother's parental rights is

in the children's best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children are residing with kinship foster parents who are certified to provide for the children's medical needs and who want to adopt them (*see Matter of Jada Serenity H.*, 60 AD3d 469, 470 [1st Dept 2009]). A suspended judgment is not appropriate, because the mother significantly delayed addressing the problems that caused the children to be removed from her care, and those problems remained unresolved at the time of disposition (*id.*). In addition, the evidence shows that the mother never presented a realistic and feasible plan to provide an adequate and stable home for these children, who have special needs, and that she never sought to modify the court's order suspending visitation (*see Matter of Rayshawn F.*, 36 AD3d 429, 430 [1st Dept 2007]; *Matter of Rutherford Roderick T. [Rutherford R.T.]*, 4 AD3d 213, 214 [1st Dept 2004]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13566 In re New York City Asbestos Litigation — Index 190472/12

- - - - -

William Berensmann, et al.,
Plaintiffs-Respondents,

-against-

3M Company formerly known as Minnesota Mining & Manufacturing Co., et al.,
Defendants,

Georgia-Pacific LLC, etc.,
Defendant-Appellant.

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Lynch Daskal Emery LLP, New York (Scott R. Emery of counsel), for appellant.

Levy Konigsberg LLP, New York (James M. Kramer of counsel), for respondent.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered on or about December 13, 2013, which denied defendant's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiffs' claims related to defendant Georgia-Pacific LLC's (defendant) wallboard products allegedly containing asbestos, and otherwise affirmed, without costs.

The complaint alleges that plaintiff William Berensmann was exposed to asbestos-containing sheetrock and joint compound

manufactured by, among other companies, defendant. As an initial matter, it is undisputed that defendant never manufactured wallboards containing asbestos, and thus, the claims relating to defendant's wallboards are dismissed.

Summary judgment in defendant's favor was otherwise properly denied since defendant failed "to unequivocally establish that its product could not have contributed to the causation of plaintiff's injury" (*Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]). That plaintiff may have had the subjective belief that the joint compound that he used to perform repairs in his home did not contain asbestos does not warrant a different determination, where the evidence demonstrates that defendant did manufacture joint compound containing asbestos at the relevant times. Although the record shows that defendant began to manufacture and ship asbestos-free joint compound around the time that plaintiff purchased defendant's product, issues of fact exist as to whether asbestos-free joint compound was available in Manhattan where plaintiff made his purchase of the subject

product (*see e.g. Lloyd v W.R. Grace & Co.--Conn.*, 215 AD2d 177 [1st Dept 1995]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13567-
13568 The People of the State of New York, Ind. 5116/11
779/12
Respondent,

-against-

Juan Olivares,
Defendant-Appellant.

_____

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

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

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Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about August 21, 2012,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13569 Rosa E. Paporters, Index 308877/10
Plaintiff-Appellant,

-against-

Adrian I. Campos, et al.,
Defendants-Respondents.

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Dario, Yacker, Suarez & Albert, LLC, New York (Anthony R. Suarez of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 9, 2013, which, granted plaintiff's motion to renew, and upon renewal, adhered to a prior order, same court and Justice, entered on or about February 15, 2013, denying plaintiff's motion to vacate an order, same court and Justice, entered or about June 30, 2011, granting defendants' motion to dismiss the complaint on default, unanimously affirmed, without costs.

In this action for personal injuries in which plaintiff alleges that she was injured on July 17, 2009, when her car was rear-ended by a Department of Sanitation (DOS) vehicle, plaintiff's motion to vacate the order granting dismissal upon her default was properly denied. Even assuming that plaintiff demonstrated a reasonable excuse for the default based on law

office failure (CPLR 2005, 5015[a]), the action is barred by the statute of limitations. Although plaintiff timely filed a notice of claim in September 2009, this action was not commenced until October 26, 2010, more than one year and 90 days after the accident giving rise to her claim (*see* General Municpal Law § 50-i[1]). Additionally, plaintiff improperly named DOS, which is not a suitable entity, as a defendant, rather than the City of New York (*see* NY City Charter §§ 396). Thus, plaintiff cannot demonstrate a meritorious cause of action (*see* CPLR 5015[a][1]; *Carroll v Nostra Realty Corp.*, 54 AD3d 623 [1st Dept 2008], *lv dismissed* 12 NY3d 792 [2009]). Moreover, plaintiff has not provided an affidavit or other evidence demonstrating that she sustained serious injuries (*see Laourdakis v Torres*, 98 AD3d 892 [1st Dept 2012]; *QRT Associates, Inc. v Mouzouris*, 40 AD3d 326, 326-27 [1st Dept 2007]).

Plaintiff's argument that she should be permitted to amend

her complaint to add the City as a defendant is improperly raised for the first time on appeal (*see Butler v Gibbons*, 173 AD2d 352 [1st Dept 1991]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13570 The People of the State of New York, Ind. 1684/07
Respondent,

-against-

Ryan Randolph,
Defendant-Appellant.

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Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Ryan Randolph, appellant pro se.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 1, 2009, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

The court properly granted the People's application to preclude defendant from cross-examining a witness about an arrest, because the mere fact of an arrest is not a permitted area for impeachment (*People v Miller*, 91 NY2d 372, 380 [1998]). Moreover, defense counsel expressly acquiesced in that ruling, disclaiming any desire to inquire about a mere arrest. While defendant presently asserts that the court also precluded inquiry into the witness's purported guilty plea, the court made no such

ruling. On the contrary, both sides agreed that no record of a conviction existed.

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

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13573 The People of the State of New York, Ind. 1338/12
Respondent,

-against-

Jayvon Roberts,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner 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 (Richard D. Carruthers, J.), rendered on or about February 15, 2013,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13576 Mercedes Colwin, Index 111400/09
Plaintiff-Respondent,

-against-

Bruce Katz, M.D., et al.,
Defendants-Appellants,

Juva Skin Laser Center, Inc.,
Defendant.

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Dwyer & Taglia, New York (Peter R. Taglia of counsel), for appellants.

Mercedes Colwin, New York, respondent pro se.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered April 16, 2014, which, insofar as appealed from, denied defendants Bruce Katz, M.D. and Bruce Katz, M.D., P.C.'s (defendants) motion for summary judgment dismissing the claim that defendant Bruce Katz, M.D. departed from accepted standards of care by performing overly aggressive surgery, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff failed to raise a triable issue of fact in opposition to defendants' prima facie showing as to her sole remaining claim, that defendant Katz, a dermatologist, performed overly aggressive liposuction of her abdomen, hips, and inner and outer thighs, using excessive force on the right side of her body

and causing chronic lymphedema of her right lower extremity (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Defendants' expert's affirmation and plaintiff's medical records established that, while short-lived swelling or edema was expected at the site of liposuction, there was no evidence of a causal connection between the procedure and prolonged lymphedema, especially in a remote site, five weeks later, and identified other likely causes for plaintiff's condition.

Plaintiff's submission, the affirmation of her expert, an internist, lacked probative value because the expert failed to profess the requisite personal knowledge on the issue of the existence of a deviation from the standard of care in the performance of liposuction, whether acquired through his practice or studies or on some other foundational basis (*see Romano v Stanley*, 90 NY2d 444, 452 [1997]; *Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 355 [1st Dept 1990]). In any event, the expert minimized the nature and extent of plaintiff's past medical history and failed to address or controvert many of the points made by defendants' expert, for example, the exclusion of other possible causes for plaintiff's condition, the remoteness of the

lymphedema in the right ankle and foot to the surgical site, and the delay in the onset of the condition (*see Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012]; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]).

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

ENTERED: NOVEMBER 20, 2014

CLERK

Saxe, J.P., Moskowitz, Degrasse, Richter, JJ.

13577 The People of the State of New York, Dkt. 1953C/12
Respondent,

-against-

Jessie Swindell,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Loriann Ann Farrington 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, Bronx County (Denis J. Boyle, J.), rendered on or about April 25, 2012,

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

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

ENTERED: NOVEMBER 20, 2014

CLERK

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

Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13578 Victor Pantojas, Index 303460/10
Plaintiff-Appellant,

-against-

Mamadou Niang,
Defendant-Respondent.

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Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for appellant.

Russo, Apoznanski & Tambasco, Melville (Gerard Ferrara of counsel), for respondent.

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Order, Supreme Court, Bronx County (Faviola A. Soto, J.), entered September 16, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The motion for summary judgment should have been denied, as defendant made the motion more than 120 days after the note of issue was filed, and he failed to show good cause for doing so (CPLR 3212[a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). In any event, defendant failed to establish prima facie that he was not the owner of the vehicle that struck plaintiff's car, as the DMV Abstract of Registration shows that he had been issued license plates with the number that plaintiff alleged was on the plates on the vehicle that struck him, and the abstract shows

that defendant did not surrender those plates until after the accident (*see Phoenix Ins. Co. v Guthiel*, 2 NY2d 584, 587-588 [1957]; *Morgan v Termine*, 2 Misc 2d 109 [Sup Ct, Kings County 1956]). Nor did the Declaration Sheet for Insurance Coverage establish as a matter of law that defendant did not own the vehicle that struck plaintiff's car.

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

ENTERED: NOVEMBER 20, 2014

CLERK

Renwick, J.P., Saxe, Moskowitz, DeGrasse, JJ.

13580N In re Government Employees Insurance Company, etc., Petitioner-Respondent, Index 260824/11

-against-

Bineshwerie Boohit, et al., Respondents,

Regina Brodie, et al., Additional Respondents-Appellants.

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Epstein, Gialleonardo & Rayhill, Elmsford (Karen Queenan of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 31, 2014, which, following a framed-issue hearing, granted petitioner's application to permanently stay an uninsured motorist arbitration, unanimously affirmed, without costs.

Petitioner established by admissible proof that a vehicle owned by additional respondent Regina Brodie and insured by additional respondent Nationwide Insurance Company was involved in the alleged accident. At the hearing, no objection was made to the admission of a police report containing the license plate number of the vehicle. Accordingly, the evidence is presumed to have been unobjectionable and any error is considered waived

(CPLR 4017; *Matter of Government Empls. Ins. Co. v Martin*, 102 AD3d 523 [1st Dept 2013]). In any event, the contents of the police report were admissible under the present sense exception to the hearsay rule, as they were sufficiently corroborated by Brodie's and respondent Mohanee Boohit's testimony (*see id.*). No basis in the record exists to disturb the court's credibility determinations (*see Matter of American Tr. Ins. Co. v Wason*, 50 AD3d 609, 609-610 [1st Dept 2008]).

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

ENTERED: NOVEMBER 20, 2014

CLERK