SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 16, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13339 In re Isabel Drayton, Index 400729/08
Incapacitated Person-Appellant,

-against-

Jewish Association for
Services for the Aged,
Guardian-Respondent,

98 St. Mark's Limited Partnership,
Landlord-Respondent.

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Cardozo Guardianship Clinic, New York (Rebekah Diller of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker, New York (Judy C. Selmeci of counsel), for Jewish Association for Services for the Aged, respondent.

Mitofsky Shapiro Neville & Hazen, LLP, New York (William J. Neville of counsel), for 98 St. Mark's Limited Partnership, respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 9, 2014, which, insofar as appealed from as limited by the briefs, denied so much of the incapacitated person-appellant's (IP) application as sought (1) to vacate a

judgment of possession of Civil Court, New York County, Housing Part (Laurie Lau, J.), entered on or about November 12, 2013, in favor of landlord-respondent and against the IP, pursuant to a Stipulation of Settlement (the Settlement), dated November 12, 2013, between landlord and guardian-respondent Jewish Association for Services for the Aged (JASA); (2) a declaration that JASA did not have the authority to enter into the Settlement; and (3) to refer the matter to Supreme Court, New York County, Guardianship-Housing Part, unanimously reversed, on the law, without costs, the judgment of possession and Stipulation of Settlement vacated, and the matter remanded to the joint Guardianship-Housing Part in Supreme Court, New York County for further proceedings.

In early 2013 the IP's landlord commenced a second holdover proceeding alleging nuisance caused by the IP's hoarding. In March 2013, JASA, as the IP's guardian, and landlord entered into a stipulation resolving the proceeding which provided, inter alia, that if JASA was unable to substantially comply for one year with specified standards of cleanliness, landlord could seek a judgment of possession and warrant of eviction; the parties agreed that the only issue before the Housing Court would be whether there had been a substantial breach of the stipulation. Shortly thereafter, landlord returned to Housing Court, alleging

continued hoarding activity by the IP. In a decision dated August 30, 2013, Housing Court, found "sharp material disputes" as to whether the March 2013 stipulation had been breached and ordered a hearing. However, JASA, concerned about its ability to successfully defend the IP at the hearing, and the implications for the IP's relocation without advanced planning if she were to be evicted, asked the Housing Court to stay the holdover proceeding while it applied to the article 81 court for authority to place the IP in either a different apartment or a residential facility. Housing Court denied JASA's stay application, without prejudice to it seeking relief from the article 81 court. The hearing on the breach of stipulation was set for November 12, 2013.

On October 25, 2013, JASA presented a proposed order to show cause to the article 81 court, asking for the Housing Court proceeding to be stayed, and for expanded powers as the guardian regarding the IP's place of abode. The article 81 court declined to sign the order to show cause and instead directed JASA to submit a letter seeking clarification of its order appointing it as guardian. JASA complied, and in response the Supreme Court sent a letter to JASA indicating that it was of the view that the extant order appointing it as guardian already authorized it to

choose the IP's place of abode. It appears that the IP was not copied on the correspondence. On November 12, 2013, rather than proceed with a hearing in Housing Court as to whether the earlier stipulation had been breached, the guardian and landlord entered into a new stipulation that provided the IP would vacate her apartment no later than seven weeks from the date the settlement was so ordered. The IP did not see or know the terms of the stipulation before it was signed, and did not appear before the Housing Court on that date.

The 2009 Guardianship Order issued pursuant to Mental Hygiene Law article 81 gave JASA the authority to choose the place of the IP's abode in the community, "only if necessary." Where an IP does not want to move from her home, the statute mandates that if it is reasonable under the circumstances to maintain her in her community and preferably in her home, the guardian has no authority to relocate that IP to more restrictive housing such as a nursing home or other residential housing (Mental Hygiene Law § 81.22[a][9]). The decision to move an individual from her home or community to a nursing home or other residential facility affects "constitutionally protected liberty interests" (*Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H. v City of New York*], 89 NY2d 889, 891 [1996]; *see also Matter of*

Eggleston v Gloria N., 55 AD3d 309 [1st Dept 2008]). Thus, Mental Hygiene Law § 81.36(c) provides that when a guardian seeks the authority to remove the IP from her home and community against her wishes, the IP must be provided with a hearing on notice before the article 81 court. Alternatively, the article 81 court may for good cause shown issue an order modifying the guardian's powers to include such placement power, and shall set forth the factual basis for dispensing with the hearing (*id.*). Here, because Supreme Court declined to sign the proposed order to show cause, no hearing was held. Nor can the article 81 court's letter be deemed to satisfy the statutory requirement of setting forth a factual basis for not conducting a hearing. Accordingly, the Settlement signed by JASA and landlord was entered into without first complying with Mental Hygiene Law § 81.36(c).

Stipulations of settlement, particularly those made in open court, are favored by the courts and not lightly cast aside (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *34 Funding Assoc., Inc. v Pollak*, 26 AD3d 182 [1st Dept 2006]). The existence of mistake, however, can be a sufficient basis to invalidate an agreement (*see Hallock*, 64 NY2d at 230]). The mistake must be "mutual, substantial and must exist at the time

the parties enter[ed] into the contract" (*Thor Props., LLC v Chetrit Group LLC*, 91 AD3d 476, 478 [1st Dept 2012]). Both landlord and JASA had the mistaken understanding that the guardian had authority to terminate the IP's tenancy without reference to Mental Hygiene Law § 81.36(c). This understanding was communicated implicitly, if not explicitly, to the Housing Court judge who so ordered the stipulation of settlement. As the misunderstanding "pervade[ed] the entire transaction," it is a basis for voiding the stipulation (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). The general rule is simply not at issue here, that an attorney who lacks actual authority may enter into a binding settlement if the court concludes that the attorney's actions indicate "apparent authority" to act on behalf of the attorney's client (*Clark v Bristol-Myers Squibb & Co.*, 306 AD2d 82, 84 [1st Dept 2003]). JASA lacked authority to enter into the stipulation of settlement in disregard of the IP's constitutional right to a hearing on notice. The stipulation of November 12, 2013 is void, as is the Housing Court judgment of possession issued on about the same date.

This case highlights the benefit of having one judge preside over an IP's Housing Court and article 81 proceedings.

Accordingly, upon remand, the Clerk of the Housing Court and the Clerk of the Supreme Court shall transfer both proceedings to the Supreme Court, New York County's joint Guardianship-Housing Part for further proceedings, including a hearing pursuant to article 81 as to the guardian's placement powers, and the hearing ordered by Housing Court as to whether the March 2013 stipulation was breached.

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

ENTERED: APRIL 16, 2015

CLERK

Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13989 The People of the State of New York, etc.,
Plaintiff-Respondent,

-against-

Maurice R. Greenberg, et al.,
Defendants-Appellants.

Index 401720/05

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Boies, Schiller & Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for Maurice R. Greenberg, appellant.

Kaye Scholer LLP, New York (Vincent A. Sama of counsel), for Howard I. Smith, appellant.

Eric T. Schneiderman, Attorney General, New York (Claude S. Platton of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 29, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The State's disgorgement claim was legally viable, despite the settlement of actions brought by American International Group, Inc. shareholders and by the corporation, and the accompanying releases (*see People v Ernst & Young LLP*, 114 AD3d 569, 570 [1st Dept 2014]). Defendants failed to carry their prima facie burden of demonstrating the lack of incentive compensation paid to defendants as a result of the sham

transactions in which they are alleged to have participated, so the burden never shifted to the State to raise an issue of fact to support the disgorgement claim (*see William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Contrary to defendants' contention, the State did not waive the disgorgement claim by not seeking discovery on the issue and not mentioning it in the note of issue (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]); indeed, at oral argument the motion court noted that had discovery regarding this remedy been sought prior to an adjudication of liability, it would have been appropriate to grant a protective order. Nor does the record support defendants' contention that the State had agreed at a discovery conference that it was not pursuing disgorgement.

Defendants failed to demonstrate conclusively that the claim for a permanent injunction under the Martin Act was not warranted under the circumstances, which at least raised issues of fact as to the imminence of harm. The existence of a federal consent judgment imposing a similar but more lenient injunction, and not providing for any acknowledgment of guilt (*see Securities & Exch. Commn. v Citigroup Global Mkts., Inc.*, 827 F Supp2d 328, 332-333 [SD NY 2011], *vacated and remanded* 752 F2d 285 [2d Cir 2014]),

does not preclude the injunction sought here by the State.

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

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

ENTERED: APRIL 16, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14557N-
14558N Craig Wickman, et al.,
Plaintiffs-Appellants,

-against-

Pyramid Crossgates Company, et al.,
Defendants-Respondents.

Index 154585/12

George S. Bellantoni, White Plains, for appellants.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for Pyramid Crossgates Company, Crossgates Mall Company, LP, Crossgates Mall Company Newco, LLC, Crossgates Mall General Company, LLC, Crossgates Mall Holdings, Inc., Crossgates Mall General Company Newco, LLC, Pyramid Management Group, LLC, Pyramid Management Group, Inc., and The Pyramid Companies, respondents.

Burke, Scolamiero, Mortati & Hurd, LLP, Albany (Bryan D. Richmond of counsel), for UNICCO Service Co., respondent.

Flink Smith Law, LLC, Albany (Robert H. Coughlin, Jr. of counsel), for IPC International Corporation, respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about June 10, 2013, which, upon granting plaintiff's motion to vacate the court's default order, entered on or about March 15, 2013, considered defendants' motions to change venue from New York County to Albany County on the merits and granted the motions, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about

March 15, 2013, unanimously dismissed, without costs, as academic.

The court properly vacated the March 2013 order and considered defendants' motions on the merits as plaintiffs showed that the short delay in filing opposition to defendants' motions was due to law office failure, and defendants were not prejudiced (*see* CPLR 2004; *see also Attarian v Cutting Edge Marble & Granite*, 285 AD2d 432 [1st Dept 2001]; *Scott v Allstate Ins. Co.*, 124 AD2d 481, 483-484 [1st Dept 1986]).

Venue in this action for personal injuries sustained by plaintiff Craig Wickman when he slipped and fell in defendants' shopping mall was properly transferred to Albany County. As noted by plaintiffs, residents of Kentucky, the designation of New York County as the venue for trial of this action was proper, since the principal places of business of two of the corporate defendants are located within that county (CPLR 503 [c]; *Parker v Ferraro*, 61 AD3d 470 [1st Dept 2009]). However, the situs of plaintiff's injury provides a basis for a discretionary change of venue to Albany County (CPLR 510 [3]) in that, "things being equal, a transitory action should be tried in the county where the cause of action arose" (*Young Hee Kim v Flushing Hosp. & Med. Ctr.*, 138 AD2d 252, 253 [1st Dept 1988]). This rule "is

predicated on the notion of convenience for trial witnesses to be present at trial" (*Chimarios v Duhl*, 152 AD2d 508, 509 [1st Dept 1989]; *see also Freeman v Suk Ho Chun*, 179 AD2d 437 [1st Dept 1992]).

In support of the discretionary change of venue, defendants submitted affidavits by the housekeeping supervisor for defendant UNICCO Service Co. s/h/a UGL Services UNICCO Operations Co., an individual who witnessed the injured plaintiff's fall and the police sergeant who responded to the scene, all of whom reside in Albany County. While the sergeant's report indicates only that he arrived well after the accident and was provided second-hand information by the other plaintiff, an eyewitness to the fall is clearly in a position to provide material testimony, and she would be inconvenienced by a trial in New York County (*see Bonfeld v Suburban Tr. Corp.*, 236 AD2d 335 [1st Dept 1997]). Since the only nexus of this matter to this county is the principal place of business of the property manager and the

security contractor for the shopping center, venue in the county where the action arose will better serve the convenience of a material witness and promote the ends of justice (*see Tricarico v Cerasuolo*, 199 AD2d 142 [1st Dept 1993]).

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14812 Karen Dosanjh, Index 112243/11
Plaintiff-Respondent,

-against-

Satori Laser Center Corp., doing business as Satori Laser Hair Removal, Inc.,
Defendant-Appellant.

_____

Barry, McTiernan & Moore, New York (David H. Schultz of counsel), for appellant.

Siler & Ingber, LLP, Mineola (Maria Nanis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 25, 2014, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff seeks to raise the inference of negligence by the application of the doctrine of res ipsa loquitur. However, she failed to present expert evidence, or any other evidence, to establish that the burns she allegedly suffered as the result of a laser hair removal treatment were the kind of injuries that ordinarily do not occur in the absence of negligence (*see Seung Ja Cho v In-Chul Song*, 286 AD2d 248 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]). Indeed, the "Treatment Consent and Release"

she signed included among the risks of the treatment "discomfort, redness, [and] blistering," which suggests that burns resulting in redness and scarring may be common side effects of laser hair removal. Without expert testimony or other evidence as to the standard of care in performing laser hair removal and the known risks of the procedure, there is no evidentiary basis for a conclusion that the presence of the burns inescapably demonstrates negligence (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 212 [2006]).

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14813 Armand Retamozzo, Index 113920/09
Plaintiff-Appellant,

-against-

Diana Friedland, et al.,
Defendants-Respondents.

_____

Louis Rosado and Associates, Buffalo (Louis Rosado of counsel), for appellant.

Nixon Peabody LLP, Jericho (Alexander E. Gallin of counsel), for Jason Quinones and Manuel Chaparro, respondents.

Eric T. Schneiderman, Attorney General, New York (Bethany A. Davis Noll of counsel), for Diana Friedland, Michelle Miranda, Francis Sheehan, Brian Murphy and Michele Doney, respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered June 3, 2013, which denied plaintiff's motion to vacate an order and ensuing judgment dismissing plaintiff's verified amended complaint as a sanction for willfully refusing to comply with discovery orders, unanimously affirmed, without costs.

There is no basis for vacating the order and ensuing judgment. Even if CPLR 5015(a)(1) is applicable, plaintiff failed to provide a reasonable excuse for not moving to confirm or reject a special referee's report recommending a conditional dismissal of the amended complaint due to plaintiff's willful

noncompliance with discovery orders (*see* 22 NYCRR 202.44[a]). Plaintiff's contention that he did not have notice of the filing of the report is "demonstrably false," as the record shows that the report was filed and published online on May 10, 2012, and that on May 22, 2012 defense counsel informed plaintiff of the report's online publication (*Wilf v Halpern*, 234 AD2d 154, 154 [1st Dept 1996]).

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

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14814 Elena Sanilevich, Index 308226/14
Plaintiff-Appellant,

-against-

Saniel Sanilevich,
Defendant-Respondent.

_____

Law Offices of Sandra M. Radna, P.C., New York (Sandra M. Radna of counsel), for appellant.

Chemtob Moss & Forman, LLP, New York (Michael F. Beyda of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Matthew F. Cooper, J.), entered September 18, 2014, which granted the father permission to travel with the child to Israel from September 20, 2014 to September 29, 2014 upon certain conditions, including the provision of a $250,000 security, unanimously dismissed, without costs, as moot.

The period of travel that the order covered - September 20, 2014 to September 29, 2014 - has passed, thus rendering this

appeal moot. As an alternate holding, we find that the court did not abuse its discretion.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14815 The People of the State of New York Ind. 2470/12
Respondent,

-against-

Lyxon Chery,
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 (Patricia Curran of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered February 19, 2013, convicting defendant, after a jury trial, of robbery in the first degree and two counts of robbery in the second degree, and sentencing him to an aggregate term of five 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]). Whether the incident constituted a robbery or a fight presented a credibility issue for the jury, and we perceive no basis for disturbing its resolution of that issue. The victim's testimony established each of the elements of the crimes of which defendant was convicted, including the element of physical injury. The evidence supports the inference

that the victim sustained substantial pain as the result of being beaten with a dangerous instrument (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

The court properly permitted the prosecution to impeach defendant with omissions from the spontaneous statement he made to the police at the time of his arrest (*see People v Savage*, 50 NY2d 673 [1980], *cert denied* 449 US 1016 [1980]). Under the circumstances, defendant's failure to make the serious accusations against the victim that defendant made at trial, while only informing the officer of relatively trivial alleged misconduct, was an unnatural omission (*see People v Foy*, 220 AD2d 220 [1st Dept 1995], *lv denied* 87 NY2d 901 [1995]).

The court properly exercised its discretion in denying defendant's request for a missing witness instruction regarding the arresting officer's partner (*see generally People v Gonzalez*, 68 NY2d 424, 427 [1986]). The case did not turn on police

credibility, and there is no indication that the uncalled officer could have provided material, noncumulative testimony.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14816N Leandra Rodriguez, Index 301815/14
Plaintiff-Respondent,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants,

"John Doe," etc.,
Defendant.

_____

James B. Henly, New York (Jesse A. Raye of counsel), for appellants.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 7, 2014, which denied defendants' motion to change venue from Bronx County to New York County, unanimously affirmed, without costs.

The failure to move for a change of venue on the ground of improper venue within 15 days of service of a demand to change

venue was fatal to the motion (*see* CPLR 511[b]; *Banks v New York State & Local Employees' Retirement Sys.*, 271 AD2d 252, 253 [1st Dept 2000]; *Pittman v Maher*, 202 AD2d 172, 174 [1st Dept 1994]).

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14818 Akea Royal, Index 100082/12
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

The Law Firm of Ravi Batra, P.C., New York (Ravi Batra of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered December 20, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The then 19-year old plaintiff allegedly entered defendant's residential apartment building with a friend pursuant to an invitation from a person she believed to be a tenant in apartment 8E, but who in fact was an illegal squatter. Plaintiff had visited the occupant in the eighth-floor apartment on approximately 10 prior occasions. Evidence submitted on the motion indicated that defendant learned that the registered tenant of apartment 8E had vacated the premises and recent noise complaints attributed to the apartment prompted defendant to investigate with the assistance of the police. After the police

knocked on the door of apartment and identified themselves, a key was used to enter the apartment. The squatter was arrested and plaintiff, who had medically determined cognitive deficits, and cerebral palsy, attempted to escape from police through a window in the apartment. Plaintiff fell when she lost her grip on the cable that was affixed to the building, and was injured. Plaintiff alleges, inter alia, that defendant was negligent in failing to secure the building's front door and apartment 8E, in failing to provide window guards, and allowing a cable to be placed near the eighth-floor window that she exited.

Plaintiff's negligence claim was properly dismissed, as her deliberate intervening act of attempting to leave the building through an eighth-floor window was the sole proximate cause of her injuries (*see Harris v New York City Hous. Auth.*, 194 AD2d 714 [2d Dept 1993]). Plaintiff's argument that it was foreseeable that she would seek to escape through the window because of her cognitive deficits is unavailing. There were no allegations that defendant should have known of plaintiff's alleged mental infirmities, and owed plaintiff a duty of care on such basis (*compare Campbell v Cluster Hous. Dev. Fund Co.*, 247 AD2d 353 [2d Dept 1998] [the defendant had knowledge of the plaintiff's mental infirmities]).

Plaintiff's claims for false arrest, false imprisonment and malicious prosecution were properly dismissed as plaintiff was not arrested, but rather, was issued an appearance ticket (*see Nadeau v LaPointe*, 272 AD2d 769 [3d Dept 2000]).

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

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14819-
14820 Index 158192/14

In re 111 West 57th LH LLC, et al.,
Petitioners-Appellants,

-against-

The Board of Managers of the Windsor Park Condominium, et al.,
Respondents-Respondents.

_____

Appeals having been taken to this Court by the above-named appellants from orders of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about September 23, 2014, and on or about September 29, 2014.

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 25, 2015,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14821 The People of the State of New York, Ind. 3209/11
Respondent,

-against-

Elsie Detres-Perez,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 3, 2012, convicting defendant, upon her plea of guilty, of conspiracy in the second degree and criminal possession of a controlled substance in the third degree, and sentencing her to an aggregate term of 4⅓ to 13 years, unanimously affirmed.

Since the record establishes that defendant's forfeiture agreement was part of the judgment of conviction (*see* Penal Law § 60.30), defendant's challenge to that agreement is reviewable on this appeal (*see People v Carmichael*, 123 AD3d 1053 [2d Dept 2014]). However, her claim that the court coerced the agreement

is unpreserved (*see People v Abruzzese*, 30 AD3d 219, 220 [1st Dept 2006], *lv denied* 7 NY3d 784 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the prison sentence.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14822 In re Steven F.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 27, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress his statements to the police. "The record establishes that appellant was not questioned until after the police gave *Miranda* warnings to both appellant and his mother" (*Matter of Johnny H.*, 111 AD3d 576 [1st Dept 2013]). The evidence established that appellant's waiver of his *Miranda* rights was knowing, intelligent, and

voluntary, since, "in the presence of his mother," appellant "clearly and unequivocally stated that he understood each right, and gave no indication to the contrary" (*Matter of Lyndell C.*, 23 AD3d 306 [1st Dept 2005]). Evidence of appellant's difficulties with comprehension in school does not warrant a different conclusion, especially since the interrogating detective had appellant state and write that he understood each warning before proceeding to the next one. Regardless of whether the best practice would have been to read from a juvenile version of the *Miranda* warnings containing supplemental explanations of the standard phrasings, the detective's failure to do so did not render appellant's waiver involuntary under the circumstances. Furthermore, the voluntariness of the statement was not undermined by any coercive interrogation (*see Matter of Jimmy D.*, 15 NY3d 417, 424 [2010]). The detective's interrogation tactics, such as confronting appellant with incriminating evidence and expressing disbelief in appellant's initial account, were not improper. Appellant's contention that the room in which he was questioned failed to comply with Family Court Act § 305.2 is unpreserved, and we decline to review it in the interest of

justice. As an alternative holding, we find it unavailing (*see Matter of Trayvon J.*, 103 AD3d 413 [1st Dept 2013], *lv denied* 21 NY3d 862 [2013]).

Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The 12-month period of supervision was warranted by, among other things, appellant's underlying sexual conduct toward a very young child, his misbehavior in school, his struggles with acceptance of responsibility, and the recommendation of the Probation Department (*see e.g. Matter of Zion F.*, 92 AD3d 589 [1st Dept 2012]). In addition, a six-month adjournment in contemplation of dismissal would not have provided sufficient supervision, because appellant was in need of a therapy program that was scheduled to last for one year (*see Matter of Yonathan A.*, 70 AD3d 602 [1st Dept 2010]). We note that Family Court

expressed a willingness to seal or vacate the finding against appellant upon his successful completion of probation, which would foreclose any possibility that appellant might be required to register as a sex offender in another jurisdiction.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Richter, Clark, Kapnick, JJ.

14823-
14824 Abyssinian Development Corporation, et al., Plaintiffs-Respondents-Appellants,

-against-

David Bistricer, et al., Defendants-Appellants-Respondents.

Index 115576/08

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for appellants-respondents.

Windels Marx Lane & Mittendorf LLP, New York (Mel P. Barkan of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered October 10, 2013, after a nonjury trial, awarding plaintiffs sums of money as against defendant Clipper Equity Holdings, LLC, dismissing plaintiffs' claims against defendant Bistricer, and dismissing the counterclaim, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 9, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court's factual findings are based on a fair interpretation of the evidence, and its legal conclusions are correct. Neither delivery of the letter of intent nor the closing of the contract to purchase Starrett City was a condition

precedent to the enforceability of the parties' obligations under § 18 of the letter of intent (*see Schuler-Haas Elec. Co. v Aetna Cas. & Sur. Co.*, 40 NY2d 883 [1976]). Execution of the letter of intent by plaintiff organization was not unreasonably delayed, especially in light of the fact that defendants were still making efforts to obtain execution until just days before the letter was signed.

Amendment of the answer to assert the defense of illegal lobbying activity was properly denied for lack of merit.

Plaintiffs substantially performed under the letter of intent by "cooperating with" defendants and "actively supporting" their efforts to obtain community and governmental approval of the planned purchase.

Plaintiff law firm is entitled to recover its fees based on an account stated in light of the fact that defendants retained its itemized bill without objection for 4½ months from the date it was first rendered in August 2007 (*see Ellenbogen & Goldstein v Brandes*, 226 AD2d 237 [1st Dept 1996], *lv denied* 89 NY2d 806 [1997]). No equitable considerations warrant a departure from this conclusion.

The claim for legal fees was correctly dismissed as against defendant Bistricer, who is not personally liable for the fees.

His alleged oral promise to pay them is barred by the statute of frauds (General Obligations Law § 5-701[a][2]). It was not rendered enforceable by any new consideration flowing to him (*see DePetris & Bachrach, LLP v Srour*, 71 AD3d 460, 463 [1st Dept 2010]). Nor is there an exception under General Obligations Law § 5-701 for part performance (*see Gural v Drasner*, 114 AD3d 25 [1st Dept 2013], *lv dismissed* 24 NY3d 935 [2014]). In any event, the law firm's continued work was not unequivocally referable to Bistricer's alleged oral promise to be personally liable for the fees.

The trial court correctly dismissed the counterclaim for fraud based on its finding that the claimed representation was not made and on defendants' failure to prove by clear and convincing evidence that plaintiffs never intended to comply with their contractual obligations (*see Callisto Pharm., Inc. v Picker*, 74 AD3d 545 [1st Dept 2010]).

Plaintiffs' request for attorneys' fees was correctly denied since it was not even asserted in a wherefore or an ad damnum

clause (*see Vertical Computer Sys., Inc. v Ross Sys., Inc.*, 59 AD3d 205, 206 [1st Dept 2009]; *Fairchild Camera & Instrument Corp. v Barletta*, 31 AD2d 534 [1st Dept 1968]).

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

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14825 Malvin Omar Urena, Index 22611/13
Plaintiff-Appellant,

-against-

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

_____

Mitchell Dranow, Sea Cliff, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered July 23, 2014, which granted defendants' motion to renew their motion for summary judgment dismissing the complaint, and, upon renewal, granted the summary judgment motion as to the false arrest and false imprisonment claims, unanimously reversed, on the law, without costs, and the motion for summary judgment dismissing the false arrest and false imprisonment claims denied.

Plaintiff testified that, on the afternoon of May 7, 2013, he was standing in the courtyard of his apartment building, socializing with friends, when the police arrived, and Detective Smith arrested him without cause and without explanation. Plaintiff was later charged with obstructing governmental administration for allegedly interfering with a buy-and-bust

operation by shouting, "Police, police, police," when the police arrived. He was detained for more than 24 hours. The next morning, the District Attorney's Office declined to prosecute plaintiff, "due to lack of probable cause to arrest" him. The foregoing evidence presents an issue of fact whether the police had probable cause to arrest plaintiff (*see Hernandez v City of New York*, 100 AD3d 433, 433 [1st Dept 2012], *lv dismissed* 21 NY3d 1037 [2013]).

Plaintiff correctly argues that the warrant that had been issued for his arrest in December 2011 does not render his May 2013 arrest "privileged," so as to preclude his claims (*see Davis v City of Syracuse*, 66 NY2d 840 [1985]; *Saunsen v State of New York*, 81 AD2d 252 [2d Dept 1981]). A confinement is privileged when it is "based on an arrest warrant, valid on its face, issued by a court having jurisdiction" (*Saunsen*, 81 AD2d at 253 [internal quotation marks omitted]; *see Davis*, 66 NY2d at 842). Since the police were unaware of the warrant when they arrested plaintiff, the arrest cannot be found to have been based on the warrant.

We hold that the privilege to arrest afforded by the warrant arose when the police learned of its existence during the warrant check.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14826 The People of the State of New York, Ind. 3407/12
Respondent,

-against-

Tracy Diaz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kristin S. Bailey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered March 22, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no

basis for disturbing the jury's credibility determinations, including its evaluation of inconsistencies in testimony.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14827 Christopher Bent, Index 114565/09
Plaintiff-Respondent,

-against-

Sears, Roebuck, & Co., et al.,
Defendants-Appellants.

_____

Hodges Walsh Messemer & Moroknek LLP, White Plains (Paul E. Svensson of counsel), for appellants.

Certain & Zilberg, PLLC, New York (Gary Certain of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 28, 2014, which granted plaintiff's motion for an order striking defendants' answers for failure to comply with a prior order, same court (Jeffrey K. Oing, J.), entered on or about July 25, 2013, and entered a default judgment against them, unanimously affirmed, without costs.

The court properly struck defendants' answers in this products liability action. The sheer number of discovery orders, two as the result of motions on notice, evidenced substantial and gratuitous delay from which contumaciousness can be inferred (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). And even if defendants' interpretation of the prior order is correct, that the court found only that they had failed

to provide outstanding affidavits, the subsequently served affidavits were insufficient. In failing to provide any details of defendants' record retention policies, and in one case conceding the existence of hard copy documents that had gone unsearched, the affidavits fail their very purpose, to serve as proof that defendants complied with all discovery.

Given the foregoing, the motion court correctly concluded that defendants failed to comply with the terms of the July 25, 2013 order, which provided that defendants were required to comply with the exact terms of another prior discovery order or their answers would be stricken and default judgment entered against them (*see McKanic v Amigos del Museo del Barrio*, 74 AD3d 639, 640 [1st Dept 2010], *appeal dismissed* 16 NY3d 849 [2011]).

We have considered the remainder of defendants' contentions and find them unavailing.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14828- Index 600232/08
14828A James W. Holme,
Plaintiff-Respondent,

-against-

Global Minerals and
Metals Corp., et al.,
Defendants,

R. David Cambell,
Defendant-Appellant.

_____

Sher Tremonte LLP, New York (Michael Tremonte of counsel), for appellant.

Graubard Miller, New York (Edward H. Pomeranz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered March 5, 2014, to the extent appealed from as limited by the briefs, in favor of plaintiff in the total amount of $7,113,392.18 as against defendant Campbell, and bringing up for review orders, same court and Justice, entered on or about April 5, 2013 and November 26, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its fraudulent conveyance causes of action under Debtor and Creditor Law §§ 273 and 273-a with respect to loan repayments made to Campbell after February 27,

2001 (the fraudulent conveyance claims), and denied Campbell's cross motion for summary judgment dismissing the fraudulent conveyance claims as against him, unanimously affirmed, without costs. Appeals by defendant Global Minerals and Metals Corp. (Global NY) and the GMMC defendants, unanimously dismissed, without costs.

In this action, plaintiff seeks to collect on an unsatisfied judgment that he obtained against defendant Global NY in May 2006 in a separate action (the prior action). According to plaintiff, after the judgment was returned unsatisfied, he discovered that defendants Campbell and Shah[1] (together the individual defendants) had "stripped" Global NY of its assets and that the company had been defunct for several years. Plaintiff now seeks to hold defendants responsible for the judgment based on various theories of liability, including that certain payments from Global NY to the individual defendants were fraudulent under Debtor and Creditor Law §§ 273 and 273-a.

It is undisputed that the individual defendants began lending money to Global NY in 1998 and 1999, and that Global NY

[1] By order of this Court entered March 10, 2015, Shah's appeal from the judgment was withdrawn upon the parties' stipulation.

paid these loans back to the individual defendants after it had become a defendant in the prior action for money damages. Global NY's preferential repayment of these debts to the individual defendants, who were officers of Global NY, in derogation of the rights of plaintiff, a general creditor, lack "good faith" as a matter of law (*Matter of P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 [1st Dept 2002]; *American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 588 [2d Dept 2006]), and therefore constitute conveyances without "fair consideration" (Debtor and Creditor Law § 272). Accordingly, the motion court correctly determined that the conveyances violate Debtor and Creditor Law §§ 273 and 273-a.

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

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14829 Pedro Antonio Rivera, Index 7079/05
Plaintiff-Appellant,

-against-

EarlyBird Delivery Systems, LLC,
doing business as Urban Express,
Defendant-Respondent.

_____

Brian W. Raum, New York, for appellant.

Epstein Becker & Green, P.C., New York (Lori A. Medley of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 27, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, who was employed by defendant delivery company, failed to show that defendant discriminated against him when it terminated him for failing to comply with its dress code. Defendant provided plaintiff with a company uniform that included a messenger bag with the company logo, and repeatedly advised plaintiff that he could not use his own bag, a black bag with religious writing on the outside, while working. Plaintiff did not inform defendant that he needed his bag in order to "passively evangelize" or for any other religious reason, rather,

he insisted on carrying it without providing an explanation, despite defendant's policy that its messengers could only carry the bag with defendant's logo (*see Engstrom v Kinney Sys.*, 241 AD2d 420, 422 [1st Dept 1997], *lv denied* 91 NY2d 801 [1997]). Plaintiff's failure to inform defendant of his reason for carrying his personal bag is fatal to his claim (*see Ansonia Bd. of Educ. v Philbrook*, 479 US 60, 65-66 [1986]; *Chalmers v Tulon Co. of Richmond*, 101 F3d 1012, 1019 [4th Cir 1996], *cert denied* 522 US 813 [1997]).

Plaintiff also failed to demonstrate a claim of religious discrimination under *McDonnell Douglas Corp. v Green* (411 US 792 [1973]), since he failed to demonstrate that the policy of carrying only one messenger bag as part of defendant's requisite uniform applied only to him, and not all employees (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Moreover, even if plaintiff had established a prima facie case, defendant came forward with a legitimate, nonpretextual reason for

discharging plaintiff from employment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]).

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14830 The People of the State of New York, Ind. 745/13
Respondent,

-against-

Jose Narvaez,
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 (Rena K. Uviller, J.), rendered on or about May 22, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14831N Bradley C. Aldrich, et al., Index 602803/07
Plaintiffs-Respondents,

-against-

Northern Leasing Systems, Inc.,
et al.,
Defendants-Appellants,

John Does 1-50,
Defendants.

_____

Moses & Singer LLP, New York (Robert D. Lillienstein of counsel), for appellants.

Chittur & Associates, P.C., Ossining (Krishnan S. Chittur of counsel), for respondents.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 13, 2013, which granted plaintiffs' motion to amend the complaint, unanimously affirmed, without costs.

The motion court properly exercised its discretion in granting plaintiffs leave to amend the complaint to allege that defendants violated New York State's Fair Report Act (NYFCRA) (General Business Law §§ 380, *et seq.*) by failing to provide written notice as required by General Business Law § 380-b(b), but only on behalf of the three individually named plaintiffs and those members of the proposed class whose claims are not time-barred (*see Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 413-414

[1st Dept 2010]). The original complaint alleged that defendants never notified the named plaintiffs before accessing their credit reports and that their actions, as to the named plaintiffs and the proposed class, violated NYFCRA. The proposed amendment merely seeks to specifically plead the section of NYFCRA defendants are alleged to have violated. Thus, it relates back to the original complaint (*see* CPLR 203[f]; *Lawyers' Fund for Client Protection of the State of N.Y. v JP Morgan Chase Bank, N.A.*, 80 AD3d 1129, 1129-1131 [1st Dept 2011] *US Bank N.A. v Gestetner*, 103 AD3d 962, 965 [3d Dept 2013]). Moreover, defendants have submitted no evidence suggesting that they will be hindered in the preparation of their case or prevented from taking measures to support their position (*see Spitzer v Schussel*, 48 AD3d 233, 233-234 [1st Dept 2008]).

Defendants' argument that permitting this claim to be interposed on behalf of the proposed class will expose them to unlimited liability is unavailing since the court limited the claim to the three individually named plaintiffs and any putative class members whose claim is not time-barred. Lastly, defendants' argument that the amendment should have been denied because plaintiffs are not suitable representatives for the

proposed class is premature since the class has not yet been certified.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14832N WT Holdings Incorporated, Index 600925/09
Plaintiff-Appellant,

-against-

Argonaut Group, Inc.,
Defendant-Respondent.

_____

Chaffetz Lindsay LLP, New York (Steven C. Schwartz of counsel), for appellant.

K&L Gates LLP, New York (Peter N. Flocos of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 18, 2014, which denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, with costs.

We do not find that defendant would be prejudiced by an amendment to the complaint at this juncture (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364 [1st Dept 2007]). However, any amendment would be "palpably insufficient or clearly devoid of merit" (*Nineteen Eighty-Nine, LLC v Icahn Enters. L.P.*, 99 AD3d 546, 548 [1st Dept 2012] [internal quotation marks omitted], lv denied 20 NY3d 863 [2013]). The stock purchase agreement contains not only a general merger clause pursuant to which the SPA "supersedes" all prior oral statements, but also a

"No Additional Representation" clause that disclaims liability and responsibility for any extra-contractual representation, rendering the fraud claim not viable (*see Natoli v NYC Partnership Hous. Dev. Fund Co. Inc.*, 103 AD3d 611, 613 [2d Dept 2013]). We reject plaintiff's contention that the "No Additional Representation" provision is not sufficiently specific to bar the proposed fraudulent inducement claim.

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

ENTERED: APRIL 16, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14833 In re Darrell Blue, Ind. 5192/09
[M-894] Petitioner,

-against-

Hon. Ronald Zweibel, et al.,
Respondents.

_____

Kevin Canfield, New York, for petitioner.

Cyrus R. Vance, Jr., District Attorney, New York (Elizabeth N., Krasnow of counsel), for Cyrus R. Vance, Jr., respondent.

_____

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

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

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14834 Carlos Torres, Index 306975/09
Plaintiff-Appellant,

-against-

Visto Realty Corp.,
Defendant-Respondent.

_____

Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellant.

Law Office of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered April 4, 2014, which upon defendant's motion, vacated the portions of the judgment, same court and Justice, entered November 21, 2013, awarding plaintiff interest, costs, and disbursements, and attorneys' fees, if any, as calculated in the judgment, vacated all future interests, costs, disbursements, and attorneys' fees, if any, accrued after entry of the judgment, ordered that no further interest, costs, disbursements and attorneys' fees, if any, are to accrue, ordered plaintiff's counsel to provide a Satisfaction of Judgment to defendant's counsel and file an amended or modified judgment in the amount of $200,000 within 20 days, and ordered plaintiff to provide an affidavit that he is not and was not a Medicare recipient at the

time of the accident within 30 days, unanimously affirmed, without costs.

Contrary to plaintiff's contention, the court properly found that plaintiff did not satisfy his obligations under CPLR 5003-a, since he failed to provide defendant with the information relating to his Medicare status that defendant requires to comply with its reporting obligations under 42 USC § 1395y (*see Liss v Brigham Park Coop. Apts. Sec. No. 3*, 264 AD2d 717 [2d Dept 1999]; *Torres v Hirsch Park, LLC*, 91 AD3d 942 [2d Dept 2012]; 42 CFR 411.24[b]; 42 US § 1395y[b][8]; *see also Cely v O'Brien & Kreitzberg*, 45 AD3d 368 [1st Dept 2007]).

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14836 The People of the State of New York, Ind. 719/13
Respondent,

-against-

Karen Cooper,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered on or about July 1, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14838 Allyn Kurtz, Index 114023/11
Plaintiff-Respondent,

-against-

Supercuts, Inc., etc., et al.,
Defendants-Appellants.

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (John W. Bieder of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 14, 2014, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Supercuts, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff alleges that she was injured when she slipped and fell on a slippery substance that was on the floor of defendant's salon. Although defendant's shift manager testified that she inspected the accident location in the moments before plaintiff slipped and fell and observed that it was clean (*see Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519-520 [1st Dept 2010]), the record presents triable issues as to

whether defendant created or had constructive notice of the alleged defect. Plaintiff testified that she saw that the floor was "glossy" moments before she walked over the area, and that after she fell, she noticed that the floor had a sticky substance and hair on it, which conflicts with the shift manager's testimony that it was clean moments before the accident (*see Plantamura v Penske Truck Leasing*, 246 AD2d 347, 348-349 [1st Dept 1998]).

Contrary to defendant's contention, plaintiff was not obligated in opposing the motion to identify the substance that caused her fall and "such omission cannot be equated with the failure to identify the cause of her fall" (*Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). Plaintiff testified at her deposition that she slipped and fell because there was hair and a "non-water-like substance" on the salon's floor. Furthermore, plaintiff's opposing affidavit does not

conflict with her deposition testimony. Rather, the affidavit merely amplifies her testimony (*see e.g. Pagan v Metropolitan Transp. Auth.*, 105 AD3d 611 [1st Dept 2013]).

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14839 Forrest Branch, Index 306293/11
Plaintiff-Respondent,

-against-

SDC Discount Store, Inc.,
Defendant-Appellant.

_____

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

Chirico Law PLLC, Brooklyn (Vincent Chirico of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 29, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant operated a gift shop in premises it leased on the ground floor and in the basement of a building managed by plaintiff's employer. Plaintiff alleges that, while he was descending the staircase leading into the unlighted basement in order to inspect pipes located there, he lost his balance and fell off the unguarded side of the staircase.

Defendant demonstrated that the basement staircase was not an "interior staircase" and thus the lack of handrail or wall on the open side did not violate any applicable provisions of the

New York City Building Code (*see Katz v Blank Rome Tenzer Greenblatt*, 100 AD3d 407 [1st Dept 2012]). Defendant nonetheless had a common-law duty, as occupier of the premises, to maintain the staircase in a reasonably safe condition, in view of all the circumstances, including "the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks omitted]; *see Swerdlow v WSK Props. Corp.*, 5 AD3d 587 [2d Dept 2004]). Issues of fact exist as to whether defendant was negligent in maintaining the staircase without any handrail or guard of any kind on one side, under all the circumstances, including the testimony of defendant's owner that the staircase was never used by her, by anyone working for the store, or by its customers.

Plaintiff's testimony that he could see the first few steps as he descended, and then lost his balance, did not eliminate an issue of fact as to whether the alleged lack of lighting in the basement contributed to his fall as he continued down the staircase (*see Santiago v New York City Hous. Auth.*, 268 AD2d 203 [1st Dept 2000]; *see also Swerdlow* at 588). Defendant's claim that it lacked actual or constructive notice of the lack of lighting or of any dangerous conditions of the stairway is

unavailing, since its corporate officer did not deny responsibility for changing lightbulbs as needed, and acknowledged that she had seen the staircase before renting the premises and that it was accurately depicted in a photo taken soon after the accident.

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14842 The People of the State of New York, Ind. 4803/12
Respondent,

-against-

Jose Alamo,
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 (Michael R. Sonberg, J.), rendered on or about December 11, 2012, unanimously affirmed.

Application by defendant'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 defendant'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: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14843 In re Ricardo Javier, Index 100828/13
Petitioner-Appellant,

-against-

The New York City Department
of Buildings,
Respondent-Respondent.

_____

Casella & Casella, LLP, Staten Island (Ralph P. Casella of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered September 6, 2013, which denied the petition brought pursuant to CPLR article 78, seeking to vacate respondent's determination, dated August 29, 2012, denying petitioner's application for a master plumber license, and dismissed the proceeding, unanimously affirmed, without costs.

An article 78 proceeding must be brought "within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217[1]). Here the August 2, 2012 letter denying petitioner's application demonstrated that the agency had reached a definitive position and inflicted a concrete injury

(*see Matter of Best Payphones, Inc. v Department of Info Tech & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

Petitioner asserts that the statute of limitations did not commence to run with the August 2012 letter because the injury could have been prevented or significantly ameliorated by further administrative action or steps available to him. However, the only action available to petitioner was a request for reconsideration within sixty days, and he failed to make such a request within that time period. In any event, even if the statute of limitations did not begin to run until the sixty-day period to request reconsideration expired (i.e., 60 days from August 29, 2012), petitioner's article 78 petition filed on June 7, 2012 is still untimely.

Respondent's April 2013 letter in response to petitioner's counsel's untimely correspondence seeking reconsideration did not

extend the statute of limitations period (*see Matter of Baloy v Kelly*, 92 AD3d 521, 522 [1st Dept 2012]).

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

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14844-
14845 The People of the State of New York, Ind. 301/12
525/13
Respondent,

-against-

Alexander Davis,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Judith Lieb, J.), rendered September 27, 2013, convicting defendant, upon his pleas of guilty, of two counts of attempted robbery in the second degree, and sentencing him to an aggregate term of four years, unanimously affirmed.

Although we do not find that defendant made a valid waiver

of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14846 Town New Development Sales & Marketing LLC, et al., Plaintiffs-Respondents, Index 653281/13

-against-

Charles Reid Price, Defendant-Appellant.

_____

Cole Hansen Chester LLP, New York (Michael S. Cole of counsel), for appellant.

Matalon Shweky Elman PLLC, New York (Joseph L. Matalon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 29, 2014, which, inter alia, denied defendant's motion to amend his answer and to compel discovery, and granted plaintiff's cross motion to dismiss defendant's first counterclaim, unanimously affirmed, without costs.

Since the parties have a written, fully integrated agreement with a merger clause that covers defendant's compensation in detail, defendant cannot introduce parol evidence to prove a prior agreement with regard to his compensation (*see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). Accordingly, the motion court properly dismissed the first counterclaim and the proposed amendment to that counterclaim. It also follows that

defendant's motion to compel discovery in support of the first counterclaim was properly denied. In any event, the motion was defective, since it sought to compel the depositions of named employees of the corporate plaintiffs, without a showing that the corporate designee was not knowledgeable or did not possess all information (*see Defina v Brooklyn Union Gas Co.*, 217 AD2d 681 [2d Dept 1995]).

We have considered defendant's remaining contentions, including that the cross motion to dismiss was defective because it was not supported by an affidavit on personal knowledge, and find them unavailing.

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

ENTERED: APRIL 16, 2015

CLERK

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

14847 In re Lashawn L.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for presentment agency.

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Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about October 30, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the second degree, and placed her on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The record supports the inference that when appellant threw three textbooks at her teacher, hit her in the face with the top of a box, and

then threw a large, hard-edged eraser at her, appellant intended to cause physical injury, a natural and likely consequence of such acts (*see People v Getch*, 50 NY2d 456, 465 [1980]; *Matter of Mike R.*, 121 AD3d 433 [1st Dept 2014]).

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14849 Katan Group, LLC, individually and derivatively as a member of Refinery Management LLC, Plaintiff-Appellant, Index 652900/12

-against-

CPC Resources, Inc., et al., Defendants-Respondents,

Domino Mezz Holdings, LLC, et al., Defendants.

_____

MCShapiro Law Group PC, Great Neck (Mitchell C. Shapiro of counsel), for appellant.

Katsky Korins LLP, New York (Mark Walfish of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 17, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of CPC Resources, Inc. (CPCR), CPCR Opportunity Fund II, LLC, The Refinery LLC (Refinery), Rafael Cestero, Susan Pollack, Michael Lappin, and Refinery Management LLC to dismiss the claims against them in the verified amended complaint pursuant to CPLR 3211, unanimously affirmed, without costs.

Both this action and *Katan Group, LLC v CPC Resources, Inc.*, index No. 13071-12 (the Third Action), arise from the same

transaction -- the sale of certain property formerly owned by Refinery to defendant New DS Acquisitions LLC, an affiliate of defendant Two Trees Management Co. LLC. The Third Action was dismissed, and we affirmed (*see* 110 AD3d 462, 462-464 [1st Dept 2013]). Thus, the instant action is barred by res judicata (*see Matter of Hunter,* 4 NY3d 260, 269 [2005]; *O'Brien v City of Syracuse,* 54 NY2d 353, 357-358 [1981]). Having chosen to concentrate on a particular issue arising out of the Two Trees transaction in the Third Action, plaintiff "must accept the consequences of its . . . litigation strategy" (*Schwartzreich v E.P.C. Carting Co.,* 246 AD2d 439, 441 [1st Dept 1998]).

Contrary to plaintiff's contention, it could have brought -- and, indeed, did bring -- a breach of contract claim after CPCR caused Refinery to sign an agreement to sell the property; plaintiff did not have to wait for the closing (*see Ely-Cruikshank Co. v Bank of Montreal,* 81 NY2d 399, 402 [1993]). Similarly, plaintiff brought a breach of fiduciary duty claim in the Third Action based on the Two Trees transaction before the closing.

Plaintiff's reliance on *Xiao Yang Chen v Fischer* (6 NY3d 94 [2005]) is misplaced. The special considerations underlying *Xiao Yang Chen* do not apply to an action which "seeks money damages

arising only in connection with a commercial transaction" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 475 [1st Dept 2011]). Plaintiff's reliance on *Jefferson Towers v Public Serv. Mut. Co.* (195 AD2d 311 [1st Dept 1993]), is similarly misplaced since it involved a declaratory judgment action, an exception to the rule of res judicata (*id.* at 313).

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14850 The People of the State of New York, Ind. 3216/08
Respondent,

-against-

Ricardo Martinez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 4, 2011, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

In light of the overwhelming evidence of defendant's guilt, the admission of the detective's DDS report was harmless. At any rate the court's limiting instructions minimized any prejudice.

The court also properly exercised its discretion in receiving evidence that, on the night before the night of the homicide, defendant's accomplice made a remark that was relevant, under the circumstances of the case, to defendant's justification defense.

Defendant's challenge to a portion of the court's justification charge is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The charge, viewed as a whole, conveyed the correct standard of law as applied to the particular facts. We have considered and rejected defendant's claims that the alleged defect in the charge was a mode of proceedings error, and that counsel rendered ineffective assistance.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14851 The People of the State of New York, Ind. 2089/12
Respondent,

-against-

Mijay Palacios,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered on or about June 10, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14855N Julie Jackson, Index 310041/09
Plaintiff-Respondent, 304822/10
305159/10

-against-

City of New York, et al.,
Defendants,

Liberty Lines Transit, Inc., et al.,
Defendants-Appellants.

- - - - -

Boubacar Keita,
Plaintiff-Respondent,

-against-

Westchester County Department
of Transportation, et al.,
Defendants-Appellants.

- - - - -

Stavros Sola, etc.,
Plaintiff-Respondent,

-against-

The City of New York, et al.
Defendants.

The County of Westchester, et al.,
Defendants-Appellants.

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Lifflander & Reich LLP, New York (Kent B. Dolan of counsel), for appellants.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Steven C. Falkoff of counsel), for Julie Jackson, respondent.

Leav & Steinberg, LLP, New York (Kathleen E. Beatty of counsel), for Stavros Sola, respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 7, 2014, which denied defendants Liberty Lines Transit Inc., Ciro Matarazzo, Westchester County Department of Transportation, and the County of Westchester's motion to change venue, unanimously affirmed, without costs.

Defendants' motion to change venue from Bronx County to Westchester County was untimely, and thus properly denied. Where a demand to change venue claiming the designation of an improper county is opposed by a plaintiff, any subsequent motion to transfer venue must be made within 15 days after service of the demand, in the county designated by plaintiff (CPLR 511[b]). Here, after defendants' demand was opposed by two of the three plaintiffs in these joined actions, defendants improperly noticed their motion in Westchester County. After that motion was denied - approximately three months after service of the demand - defendants again moved to change venue, this time in Bronx County. However, that motion, "while made in the proper county . . . was brought more than 15 days after defendants filed their demand and the request for relief was thus untimely" (*Singh v Becher*, 249 AD2d 154, 154 [1st Dept 1998]).

Our ruling on the timeliness of defendants' motion to transfer venue obviates the need to determine whether Supreme

Court providently exercised its discretion by denying the motion on its merits. Were we to reach the issue, we would conclude that the court's exercise of discretion was provident (*accord Forteau v County of Westchester*, 196 AD2d 440 [1st Dept 1993]).

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

ENTERED: APRIL 16, 2015

CLERK

Acosta, J.P., Saxe, Moskowitz, Richter, Feinman, JJ.

14856N- Index 116840/04
14857N In re Jack J. Grynberg, et al.,
Petitioners-Respondents,

-against-

BP Exploration Operating Company Limited, et al.,
Respondents-Appellants.

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Sullivan & Cromwell LLP, New York (John L. Hardiman of counsel), for BP Exploration Operating Company Limited, appellant.

Emmet Marvin & Martin LLP, New York (Kenneth M. Bialo of counsel), for Statoil ASA, appellant.

Frankfurt Kurnit Klein & Selz, P.C., New York (Ronald C. Minkoff of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered April 8, 2014, to the extent appealed from, remanding the matter to a three-member arbitration panel pursuant to CPLR 7511(d), and order and judgment (one paper), same court and Justice, entered July 23, 2014, to the extent appealed from, consolidating respondents' arbitrations and disqualifying arbitrator Stephen A. Hochman from serving as an arbitrator at the consolidated proceeding or with respect to any other existing disputes between the parties arising under the applicable agreements, unanimously affirmed,

without costs.

In a prior appeal, this Court vacated the portion of arbitrator Hochman's award as to the claims between petitioners and respondent BP Exploration Operating Company Limited (BPX) on the issue of "signature payment bonuses," and remanded the matter to Hochman to consider and determine "the nature of the payment" made by BPX, stating, "Contrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy" (92 AD3d 547 [1st Dept 2012]). Upon remand, Hochman, despite indicating that he understood the order, refused to determine the nature of the signature bonus payments. Instead, he asserted his disagreement with this Court's legal conclusion and even with its authority. The arbitrator's explicit failure to follow the clear directive of this Court warrants vacatur of the new award and remand to a new arbitrator (*see Matter of Social Servs. Empls. Union Local 371 v City of N.Y. Admin. for Children's Servs.*, 100 AD3d 422 [1st Dept 2012]; *Sawtelle v Waddell & Reed, Inc.*, 21 AD3d 820 [1st Dept 2005], *lv dismissed* 6 NY3d 750 [2005]; *Sands Bros. & Co. v Generex Pharms.*, 298 AD2d 307 [1st Dept 2002], *lv denied* 6 NY3d 703 [2006]). As the parties' agreements provide for a three-member arbitration panel to hear their disputes should this

specifically named arbitrator be unable or unwilling to preside, Supreme Court properly remanded the matter for the parties to select the panel pursuant to the agreement (*see* CPLR 7511[d]).

The court properly granted petitioners' motion to consolidate the remanded BPX arbitration with the full arbitration of the Statoil ASA claims, since common questions of law and fact are involved, and separate arbitrations might result in inconsistent rulings (*see* CPLR 602[a]; *Matter of Kallas v Milberg Weiss LLP*, 61 AD3d 451, 452 [1st Dept 2009]). In opposition, Statoil did not meet its burden to show that consolidation would prejudice its substantial rights (*see Matter of Vigo S.S. Corp. [Marship Corp. of Monrovia]*, 26 NY2d 157 [1970], *cert denied* 400 US 819 [1970]; *Matter of Materials Int., Div. of Synthane Taylor Corp. [Manning Fabrics]*, 46 AD2d 627, 628 [1st Dept 1974]).

We have considered respondents' remaining arguments and find them unavailing.

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

ENTERED: APRIL 16, 2015

CLERK