SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 3, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Manzanet-Daniels, Kapnick, JJ.

16154 Sonero Pichardo, etc., Index 306975/11
Plaintiff-Respondent,

-against-

St. Barnabas Nursing Home, Inc.,
et al.,
Defendants-Appellants.

_____

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about March 3, 2015, which denied the motion of defendants St. Barnabas Nursing Home, Inc. and St. Barnabas Hospital for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's decedent was admitted to St. Barnabas Hospital on February 10, 2009, complaining of abdominal pain and vomiting. Decedent, 81 years old at the time, suffered from multiple conditions including dementia, gastroenteritis, and heart disease. She was diagnosed with acute pancreatitis, anemia,

hypoalbuminemia, pneumonia, and acute respiratory failure, and placed on a ventilator. During the hospital admission, decedent developed a stage II sacral ulcer measuring 11 by 10 centimeters.

Decedent was transferred to St. Barnabas Nursing Home on March 6, 2009, but had to be readmitted three days later. Upon readmission, she was found to have, inter alia, a perforated stomach, an inflamed gallbladder, peritonitis and pancreatitis. She remained in the hospital until April 27, 2009. The sacral sore was treated with Multi-dex gel and the dressing changed every two days. During the admission, the sore decreased in size to 3.5 by 2 centimeters.

Plaintiff's decedent was transferred back to the nursing home on April 27, 2009. The transfer sheet indicated that the same treatment for the ulcer was to be followed, i.e., Multi-dex gel with dressing change every two days.

By June 4, 2009, the size of the sacral ulcer had increased to 6 by 10 centimeters with eschar, or dead tissue, indicating to plaintiff's expert that the sore had progressed to a more advanced stage.

Decedent was transferred back to the hospital on July 14, 2009 in septic shock with an elevated temperature and low blood pressure. The transfer sheet indicated that the sacral ulcer was still stage II. However, the hospital's note described it as an

stage IV exuding ulcer. The chart noted two additional ulcers on the left and right buttocks that had not been documented in the nursing home's chart.

Plaintiff's decedent was readmitted to the nursing home on August 31, 2009. She remained incontinent and ventilator-dependent, ultimately dying on June 17, 2013.

Plaintiff commenced this action alleging medical malpractice, negligence, and violation of Public Health Law § 2801-d, premised upon defendants' failure to prevent and to halt the progression of decedent's pressure ulcers.

Defendants moved for summary judgment dismissing the complaint, asserting that decedent's ulcers were unavoidable based on her co-morbidities and deteriorating health. Defendants' expert geriatrician, Dr. Levine, opined that decedent's skin ulcers were a consequence of hypoperfusion to the organs resulting from longstanding complications and illnesses, including dementia, hypertension, hypercholesterolemia, gastroenteritis, and heart disease, among others. Dr. Levine opined that "the synergistic effect of her multiple comorbidities" together with acute illness caused a state of "systemic inflammation" and multiple organ failure. Because of her immobile condition, decedent was not amenable to the usual range of turning and positioning. Tube feedings necessitated

that her head be elevated, causing increased pressure and shear forces to the sacral area. Dr. Levine opined that whenever a person with severe preexisting illnesses experiences acute illness necessitating prolonged intensive care and artificial life support, the risks for further adverse outcomes like worsening wounds, ventilator associated pneumonia and sepsis is increased, even with the best of care.

Plaintiff opposed the motion, relying, inter alia, on the affidavit of Dr. Khimani, his expert geriatrician. Dr. Khimani opined that the hospital's departures from good and accepted medical and nursing practices caused decedent to develop a stage 2 sacral pressure ulcer during the hospital admission commencing February 9, 2009. Dr. Khimani noted that decedent was not turned and positioned every two hours to avoid skin breakdown; thus, it could not be said that the sacral ulcer was "unavoidable." He noted that while patients on ventilators pose "more of a challenge in off-loading pressure," pillows, wedges and other devices may be used as positioning aids. The fact that the ulcer improved during the hospital admission commencing March 9, 2009, in Dr. Khimani's view, also belied defendant's claim that formation of ulcers was unavoidable.

Dr. Khimani opined that the nursing home's departures from good and accepted medical practice resulted in significant

deterioration of the sacral bedsore and formation of additional bedsores. He opined that the nursing home should have continued the hospital's treatment protocol of changing the dressing every two days, explaining that changing the dressing daily peeled away developing skin and hindered healing. He opined that it was a departure not to provide passive range of motion in the lower extremities, noting that passive ROM therapy helps to improve circulation and thereby promote wound healing. He opined that it was a departure not to change the staging of the ulcer or the treatment plan after the ulcer had increased in size to 6 by 10 centimeters and had eschar.

Dr. Khimani noted that upon decedent's admission to the hospital on July 14, 2009, the sacral ulcer was described as a stage IV draining ulcer necessitating surgical debridement. He noted that hospital staff failed to document that decedent was receiving the necessary daily treatment to heal the ulcer and prevent it from worsening.

Dr. Khimani took issue with Dr. Levine's opinion that the skin ulcers were unavoidable, stating "it [wa]s clear" from the hospital and nursing home records that the standards with respect to skin care were not met, noting the lack of assessment and documentation regarding positioning, turning, etc. While decedent's co-morbidities increased the risk of developing skin

ulcers, Dr. Khimani opined that her illnesses alone had not caused the ulcers.

In reply, Dr. Levine opined that the frequency of dressing change would not have led to wound deterioration, asserting that Covaderm and Multi-dex gel are inert polymers with no pharmacological effect upon the wound. He disagreed with Dr. Khimani's opinion that the development of eschar renders a sore stage 4, explaining that a sore with eschar is unstageable because the base of the wound cannot be visualized. He maintained that decedent was turned and positioned[1] and that staff performed passive range of motion, although he did not discuss the frequency of any such treatments.

The motion court denied defendants' motion for summary judgment, finding questions of fact with respect to whether defendants had properly treated decedent; whether they had allowed the ulcers to develop, or failed to properly treat them;

---

[1]The nursing home records attached to Dr. Levine's reply affidavit indicate that decedent was turned and positioned every two hours during the nursing home admission from April 27, 2009 through July 14, 2009. The records for the first hospital admission (February 9 through March 6, 2009), indicate that a turning and positioning protocol was in place once decedent was transferred to the floor, on February 26, 2009, but does not indicate the frequency of any such turning or positioning. Turning and positioning sheets were not kept during decedent's stay in the ICU (February 9 through February 26, 2009). Dr. Levine maintained, however, that ICU nurses would have turned and positioned decedent as part of their duties.

and whether the ulcers were avoidable based on decedent's co-morbidities.

As an initial matter, we find that both defendants' and plaintiff's experts were competent to render their opinions. As a specialist in geriatrics, Dr. Khimani treated injuries of the elderly, including skin ulcers (*see Hranek v United Methodist Homes of Wyo. Conference*, 27 AD3d 879, 880 [3d Dept 2006]). Plaintiff failed to preserve his objection to Dr. Levine's qualifications by raising it before the motion court. Dr. Levine, as a specialist in geriatrics and wound care, was in any event qualified to render an opinion as to the standard of care for skin ulcers.

Defendants established a prima facie case of entitlement to summary judgment via medical records and the affirmation of Dr. Levine, who explained that decedent's treatment was in accordance with good and accepted medical practice and was not a proximate cause of her injury, explaining that given her co-morbidities the formation and worsening of skin ulcers was unavoidable (*see Negron v St. Barnabas Nursing Home*, 105 AD3d 501 [1st Dept 2013]).

In opposition, plaintiff raised a triable issue of fact with respect to whether defendants departed from good and accepted medical practice. Dr. Khimani asserted that defendants' failure

to turn and position decedent every two hours and to perform passive range of motion exercises contributed to the formation and worsening of the skin ulcers, taking direct issue with Dr. Levine's conclusion that formation of skin ulcers was "unavoidable" given decedent's co-morbidities. He also opined that the nursing home's failure to adhere to the hospital's wound care plan resulted in the worsening of the sacral sore, and that the failure to adjust the treatment plan when the sore increased in size and developed eschar was a departure. While decedent's co-morbidities played an obvious role in her decline, it cannot be said that formation and worsening of skin ulcers was unavoidable as a matter of law. The affirmation of plaintiff's expert, while "sparse," was based on a review of the medical records and adequately sets forth the claim by factual references to decedent's care and treatment (*see Bell v Ellis Hosp.*, 50 AD3d 1240 [3d Dept 2008]).

Dr. Levine opined that defendant nursing home was "in compliance with applicable statutory regulations," but did not opine as to the specific regulations set forth in plaintiff's

bill of particulars (*compare Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011]). In any event, plaintiff in opposition raises triable questions of fact as to whether defendant nursing home violated Public Health Law § 2801-d(1).

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

ENTERED: DECEMBER 3, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15864 The People of the State of New York, Respondent, Ind. 4155/11

-against-

John A. Flores, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Appeal from judgment of resentence, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 6, 2014, resentencing defendant to a term of nine years, held in abeyance, and the matter remanded for resentencing.

On a prior appeal (116 AD3d 644 [1st Dept 2014]), this Court ordered a plenary resentencing proceeding, to include consideration of whether to grant youthful offender treatment. The court at resentencing determined that defendant was not entitled to a youthful offender adjudication, and stated that, as a result of the former determination, it was without authority to consider a reduction in sentencing. Accordingly, the court reimposed the nine-year sentence for defendant's conviction, upon a guilty plea, of attempted assault in the first degree.

Defendant's waiver of his right to appeal was invalid, where

the court failed to adequately ensure defendant's understanding that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty (*see People v Lopez*, 6 NY3d 248, 256 [2006]). The court's statement that defendant was "waiving [his] right to appeal *any legal issues* connected with the case, including the sentence" (emphasis added) was incorrect, insofar as a defendant cannot waive certain rights, such as the right to challenge the legality of a sentence or raise a speedy trial claim (*People v Seaberg*, 74 NY2d 1, 9 [1989]). The court's further statement that the "right of appeal is waived by [defendant], the rights I just mentioned are automatically waived by a plea" was insufficient to explain that the right to appeal is not included with those automatically waived by a guilty plea, since the court had "just mentioned" that right. Moreover, defendant's execution of a written waiver "does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v Pressley*, 116 AD3d 794, 795 [2d Dept 2014], *lv denied* 23 NY3d 967 [2014] [internal quotation marks omitted]; *see also People v Oquendo*, 105 AD3d 447, 448 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]).

We decline to substitute our judgment for that of the sentencing court, which determined that defendant was not an

"eligible youth" for a youthful offender adjudication based on a lack of "mitigating circumstances that bear directly upon the manner in which the crime was committed" and where defendant's participation in the crime was not "relatively minor" (CPL 720.10[3]). Indeed, defendant carried a gun to an encounter with known gang members, displayed the gun, handed the gun to a codefendant who fired shots into the air while being pursued by the gang members, and, upon taking the gun back from the codefendant, fired a shot that struck one of the pursuers.

However, the matter should be remanded for a new sentencing proceeding because the "record indicates possible harm," such as the court's reservation regarding the fairness of the sentence to be imposed, emanating from the court's erroneous belief that it lacked authority to reduce the sentence as a result of its determination that defendant was not entitled to a youthful offender finding (*see People v Diaz*, 304 AD2d 468, 468 [1st Dept 2003], *lv denied* 100 NY2d 561 [2003]; *see also People v Farrar*, 52 NY2d 302, 308 [1981]).[1] At the resentencing hearing, the

[1] As this Court did not previously consider whether the sentence was excessive (*see* 116 AD3d at 645), the court at resentencing retained its discretion to reduce the sentence and, upon declining to grant youthful offender status, should not have "treated the duty of resentencing as a ministerial function" (*People v Desulma*, 26 AD3d 443 [2d Dept 2006]; *see also Farrar*, 52 NY2d at 308; *People v Bibbs*, 17 AD3d 170 [1st Dept 2005]).

court stated that "since I don't find it appropriate to grant youthful offender treatment under the circumstances[,] . . . I don't believe that this is appropriate or lawful for me to reduce the sentence." Defense counsel stated that, as was discussed off the record, the court did have "the authority . . . to impose the sentence that it believes is appropriate in this case" instead of a sentence it considered excessive. The court responded, "All right. So I think we made the record" and reimposed the nine-year prison sentence. This exchange, referring to the off-the-record discussion had among counsel and the court, suggests that the court might have reduced defendant's sentence had it believed that it retained the authority to do so.

The record is ambiguous as to whether the court believed that the nine-year sentence was excessive. The record contains evidence of mitigating factors upon which the court might have based a sentence reduction, such as the severe abuse defendant suffered as a child, his history of mental illness and impairment (e.g. his inability to spell simple words such as "face" and engage in simple mathematics such as "3 x 5" at pre-sentencing examination), and the progress defendant has made during his incarceration (e.g. working toward obtaining a GED and becoming a facilitator in an anti-violence program).

Therefore, "the record indicates possible harm flowing from

the court's error" (*Diaz*, 304 AD2d at 468), and the matter should be remanded for resentencing. Although the court did not find any mitigating circumstances bearing directly on the manner in which defendant committed the crime, it may have considered these other mitigating factors in determining whether a sentence reduction was warranted. However, we express no opinion on whether defendant is deserving of such a reduction. The court need not reconsider the youthful offender determination, but it should determine explicitly whether defendant's sentence should

be reduced upon resentencing.[2] We hold the appeal in abeyance pending that determination.

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

ENTERED: DECEMBER 3, 2015

CLERK

[2] "The court, however, should entertain an application by the People to withdraw consent to the plea if a sanction less severe than that negotiated is to be imposed" (*Farrar*, 52 NY2d at 308). This, of course, is simply the "counterpart of [a] defendant's right to withdraw the plea in the event the court, in the exercise of its discretion, determines that the sentence agreed upon is inappropriate and indicates an intention to increase the severity of the punishment" (*id.* at n). "Absent defendant's showing of . . . prejudice [that would prevent the restoration to status quo ante] or other circumstances militating against vacatur, . . . relief to the People would be proper" (*id.* at 308).

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16048-
16048A

Index 310736/08
302447/09

Diane Coleman, etc.,

Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

- - - - -

Dorothy Lemon,
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants,

Diane Coleman, etc.,
Defendant-Respondent.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Kramer & Pollack, LLP, Mineola (Joshua D. Pollack of counsel), and Churbuck Calabria Jones & Materazo, P.C., Hicksville (Robert B. Churbuck of counsel), for Diane Coleman, respondent.

Frank & Seskin, LLP, New York (Scott Howard Seskin of counsel), for Dorothy Lemon, respondent.

_____

Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about July 21, 2014, after a jury trial, against defendants New York City Transit Authority (NYCTA) and Annie M. Canty on liability, awarding plaintiff Diane Coleman, as administratrix of the goods, chattels and credits which were of Dorothy Dunnigan, $1.25 million for past pain and suffering, as

reduced by stipulation, plus interest, costs and disbursements, unanimously modified, on the facts, to vacate the damages award and remand the matter for a new trial on damages, unless said plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of the award for past pain and suffering to $1 million, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Judgment, same court and Justice, entered on or about October 17, 2014, after the same jury trial, against defendants NYCTA and Canty on liability, awarding plaintiff Dorothy Lemon, as reduced by stipulation, $1.5 million for past pain and suffering, $2 million for future pain and suffering over a period of 10 years, $97,600 for past lost earnings, and $728,000 for future lost earnings over a period of 35 years, plus interest, costs and disbursements, unanimously modified, on the facts, to vacate the future lost earnings award and remand the matter for a new trial on such damages, unless said plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of the award for future lost earnings to $520,000 over a period of 25 years, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The trial court was correct in redacting from plaintiff Lemon's hospital record a social worker's statement, which included the information that the vehicle driver "made an illegal left turn . . ." First, it is not clear whether the statement was made by Lemon. Even assuming it was, the statement was not made for purposes of diagnosis and treatment (*see Williams v Alexander*, 309 NY 283, 287-288 [1955]; *see also Preldakaj v Alps Realty of NY Corp.*, 69 AD3d 455, 456 [1st Dept 2010]). Additionally, the statement is not admissible against Lemon as a party's admission against interest, as the statement itself was not against Lemon's interest, but at best, against Dunnigan's interest, the driver at the time of the accident (*see generally Garmon v Mordente*, 32 AD2d 532, 532-533 [2d Dept 1969]). Moreover, the statement itself does not relate to a matter of fact, because the word "illegal" is a conclusion of law.

The trial court providently exercised its discretion in precluding testimony from defendants' biomechanical and accident reconstruction experts because defendants served their disclosures only days before the scheduled trial date. We see no reason to disturb the trial court's exercise of discretion in precluding this testimony (*see LaFurge v Cohen*, 61 AD3d 426, 426 [1st Dept 2009], *lv denied* 13 NY3d 701 [2009]), whether applying a "good cause" standard (*Peguero v 601 Realty Corp.*, 58 AD3d 556,

564 [1st Dept 2009]) or a "willful or prejudicial" standard (*see Banks v City of New York*, 92 AD3d 591, 591 [1st Dept 2012]). We also see no reason to disturb the trial court's exercise of discretion in precluding testimony regarding a seatbelt defense (*cf. Banks*, 92 AD3d at 591 [even though economist's report was exchanged on eve of trial, this Court refused to disturb Supreme Court's exercise of discretion permitting economist's testimony regarding lost wages, which was pleaded in the bill of particulars]).

The damages award to Coleman for Dunnigan's past pain and suffering for head and other injuries, encompassing a period of two years and eleven months, even as reduced, deviates from what would be reasonable compensation under the circumstances, given her age and health at the time of the accident (*see* CPLR 5501[c]; *Singh v Gladys Towncars Inc.*, 42 AD3d 313 [1st Dept 2007]; *Hernandez v Vavra*, 62 AD3d 616, 617 [1st Dept 2009], *lv denied* 13 NY3d 714 [2009]).

The awards to Lemon for past and future pain and suffering do not deviate materially from reasonable compensation, given that she suffered, among other things, permanent injury to her right leg, a broken right femur requiring surgery, a meniscus tear requiring arthroscopic surgery, a head laceration resulting in headaches and dizziness, a lower back injury including a

bulging disc, and depression (*see e.g. Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 268, 275 [1st Dept 2007]; *Louis v Kimmelman*, 8 AD3d 206, 207 [1st Dept 2004]).

The award to Lemon for past lost earnings of $97,600, based on a full-time salary, was supported by the evidence adduced at trial and is not excessive. However, the award to Lemon for future lost earnings of $728,000, based on a full-time salary, was speculative, as there was no basis for the jury to conclude that Lemon, around 45 or 46 years old at the time of trial, would work for the remainder of her life (*Stewart v New York City Tr. Auth.*, 82 AD3d 438, 441 [1st Dept 2011], *lv denied* 17 NY3d 712 [2011]). Rather, a future work life of 25 years would have been reasonable. Because Lemon offered no evidence at trial regarding inflation or growth, there is no basis to grant Lemon's request for a 4% increase of the future lost earnings award.

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

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16058 In re Donna Marie C.,
Petitioner,

-against-

Kuni C.,
Respondent-Appellant,

William F. O'Hern,
Intervenor-Respondent.

_____

Kuni C., appellant pro se.

William O'Hern, New York, respondent pro se.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about December 11, 2014, which, after a hearing, granted the motion of intervenor-respondent, the attorney for the children, directing respondent-appellant father to pay $9,840 as his share of the legal services the attorney for the children provided to the children during the underlying custody proceeding, unanimously affirmed, without costs.

In August 2012, the mother filed a petition in Family Court seeking custody of the parties' children, then ages 4 and 6. Given the serious allegations of parental unfitness by each of the parties, the Family Court referee appointed an attorney for the children, William O'Hern, Esq. In its October 4, 2012 order of appointment, the court directed that each parent pay attorney

O'Hern an initial sum of $3,750, against which his hourly fee of $300 would be deducted. The court also ordered, based upon the parties' initial financial disclosures, that the children's legal fees would be paid equally, 50% by the father and 50% by the mother. Although the order of appointment directs the initial sum be paid within 10 days, it does not direct periodic billing[1].

As the parties' disputes over the children intensified, the court appointed a forensic psychologist to evaluate the family, also at the expense of the parents, allocated 70% to the father, and 30% to the mother. Ongoing motion practice involving the children continued. A particular source of friction was the children's nanny, whom the father wanted to fire. Attorney O'Hern brought a motion restraining him from doing so, given the children's attachment to her. When the mother sought an order of protection against the father, based upon his alleged interference with her visitation, O'Hern opposed that motion and cross-moved for the appointment of a parenting coordinator; he also sought the reapportionment of the children's legal fees.

---

[1]The form order utilized by the Unified Court System for privately paid "law guardians" (Order Appointing Law Guardian-UCS 880), contains the following decretal language: "ORDERED that no less often than every 60 days from the date of this order of appointment the Law Guardian shall send to counsel for the parties bills for compensation and the reimbursement of disbursements." Family Court used an abbreviated version of this order which did not contain this particular language.

His cross motion was granted, a parenting coordinator was appointed, and the children's legal fees were reapportioned in the same manner as the forensic evaluator's fees (70% father, mother 30%). The father, who was at that time represented by counsel, raised no objections to that cross motion; nor did he complain that he had not received any periodic bills from the children's attorney.

In January 2014, the parties settled their custody dispute by entering into a stipulation of settlement. In March 2014, O'Hern sent the parties an itemized invoice for the 14 month period that he had represented the children. The bill was for a total of 54 hours, at his court-set hourly rate of $300. Applying credits for the payments that each parent had already made, the father's share of the bill was $9,840.00. He refused to pay and O'Hern moved to enforce payment. After conducting a testimonial hearing, lasting two days, Family Court held that O'Hern was entitled to collect the full amount he billed the father for legal services on the children's behalf.

On appeal, the father, now self-represented, claims that no legal fees are warranted because the attorney for the children was biased against him and otherwise did not comply with billing and other requirements of the Court Rules (22 NYCRR 1400.2).

As the attorney for the children, O'Hern was obligated to

"zealously advocate the child[ren]'s position." The fact that he sometimes supported or opposed relief sought by a particular parent is not evidence of bias (22 NYCRR 7.2[d]; Family Court Act § 241; *see Matter of Fargnoli v Faber*, 105 AD2d 523, 524 [3d 1984] *appeal dismissed* 65 NY2d 631 [1985]). There is nothing in the record supporting a conclusion that O'Hern had a personal, unreasonable prejudgment of any of the issues affecting his clients which interfered with his representation of them (*see Pedreira v Pedreira*, 34 AD3d 225 [1st Dept 2006]; *Carballeira v Shumway*, 273 AD2d 753, 756 [3d Dept 2000] *lv denied* 95 NY2d 764 [2000]). Clearly, the court had the authority to appoint an Attorney for the Children and to require the parents to pay the fees (*Stefaniak v NFN Zulkharnain*, 119 AD3d 1418 [4th Dept 2014]; *Matter of Plovnick v Klinger*, 10 AD3d 84, 89 [2d Dept 2004]). A parent's disagreement with positions taken by the attorney for a child is not in itself a basis to avoid the obligation to pay for the child's legal fees.

Nor do we believe it was an abuse of discretion for the Family Court to conclude that O'Hern was entitled to compensation

for the reasonable value of his services, even in the absence of perfect compliance with 22 NYCRR 1400.2[2] (*see Moyal v Moyal*, 85 AD3d 614 [1st Dept 2011]). Although there was only one itemized bill, and not one bill sent every 60 days, the court not only set the hourly amount that could be charged, it also conducted a testimonial hearing concerning the reasonableness of the fees. The same referee presided over the matter for its duration, thereby giving the fees that were ultimately awarded the high level of scrutiny required. We decline to disturb that award.

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

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

ENTERED: DECEMBER 3, 2015

CLERK

[2]Not argued and not decided here is whether, and if so, how and to what extent 22 NYCRR 1400.2 applies to a privately paid Attorney for the Child appointed pursuant to court order.

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

16264 The People of the State of New York, Respondent, Ind. 6093/10

-against-

Marc Barker, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered April 25, 2012, convicting defendant, after a jury trial, of assault in the first and second degrees and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously modified, on the law, to the extent of vacating the second violent felony offender adjudication as to the weapon possession conviction only and remanding for resentencing on that count, and otherwise affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The record

supports the conclusion that the victim's facial scars were seriously disfiguring under the standard set forth in *People v McKinnon* (15 NY3d 311, 315-316 [2010]), thereby satisfying the element of serious physical injury. We have considered and rejected defendants ineffective assistance of counsel claim relating to this issue.

As the People concede, defendant may not be sentenced as a second violent felony offender on his weapon conviction (Penal Law § 265.02[1]), which is not enumerated as a violent felony.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16265 Juan Medina, Index 23259/12
Plaintiff-Appellant,

-against-

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

_____

Asher & Associates P.C., New York (Robert J. Poblete of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered March 20, 2014, which, insofar as appealed from as limited by the briefs, denied plaintiff's cross motion for leave to amend the summons and complaint to substitute Police Officer Patrice Barolette for a "John/Jane Doe" defendant, unanimously reversed, on the law and the facts, without costs, the cross motion granted, and the complaint reinstated.

The court improvidently exercised its discretion in denying plaintiff's cross motion to substitute an identified defendant in the summons and complaint (*see* CPLR 305[c], 1024 and 3025). There was no evidence of any prejudice or surprise to the proposed defendant resulting from the substitution, and defendant City of New York stated that it had no substantive objection to plaintiff's cross motion to the extent it sought leave to

substitute Officer Barolette for a "John/Jane Doe" defendant (*see A.N. Frieda Diamonds, Inc. v Kaminski*, 122 AD3d 517 [1st Dept 2014]; *National Refund & Util. Servs., Inc. v Plummer Realty Corp.*, 22 AD3d 430 [1st Dept 2005]). Since the limited proposed amendments were clearly described in the moving papers, plaintiff's failure to submit proposed amended pleadings with his original moving papers (CPLR 3025[b]), was a technical defect, which the court should have overlooked (*see* CPLR 2001), particularly after plaintiff provided those documents with his reply.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16266-
16267 In re Tenaj D.,

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about October 16, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 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 determinations concerning identification and credibility. The victim's observations of appellant during

the incident, as well as on other occasions, were sufficient to support the conclusion that the victim was able to make a reliable identification of appellant as the person who took her cell phone.

Appellant's missing witness argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that a missing witness inference is unwarranted (*see generally People v Gonzalez*, 68 NY2d 424 [1986]), and would, in any event, not affect the result.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16268 The People of the State of New York, Ind. 1760/04
Respondent,

-against-

Lynette Caban,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 20, 2012, convicting defendant, after a jury trial, of criminally negligent homicide, and sentencing her to a term of one to three 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]). The evidence was essentially the same as the evidence introduced at defendant's first trial, as described in our prior decision (51 AD3d 455 [1st Dept 2008], *revd on other grounds* 14 NY3d 369 [2010]), in which, among other things, we rejected defendant's challenges to the sufficiency and weight of the evidence. After considering defendant's present arguments, we find no reason to reach a different conclusion regarding the evidence presented at the retrial.

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks generally constituted fair comment on the evidence, and reasonable inferences to be drawn therefrom, in response to defense arguments, and that the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16269 In re John McClave, Index 100095/14
Petitioner-Appellant,

-against-

The Port Authority of New York
and New Jersey, et al.,
Respondents-Respondents.

_____

Kaufman & Company PLLC, New York (Eugene R. Scheiman and Christiane McKnight of counsel) for appellant.

The Port Authority Law Department, New York (Megan Lee and Karla Denalli of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered July 18, 2014, denying the petition seeking to annul the determination of respondent The Port Authority of New York and New Jersey, dated September 24, 2013, which terminated petitioner's employment as a police captain, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination to terminate petitioner's employment based on his arrests, on separate dates, for driving while intoxicated and assault, and his subsequent guilty pleas for driving while intoxicated and breach of the peace, was not arbitrary and capricious, or in violation of lawful procedure (*see Matter of Pell v Board of Educ. of Union Free School Dist.*

No.1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231, 240 [1974]), and the penalty does not shock the conscience (*id.* at 240). It is for the agency, not the court to determine the seriousness of petitioner's conduct and its effect on the atmosphere of the Port Authority (*see Matter of Malverty v Waterfront Commn. of N.Y. Harbor*, 133 AD2d 558, 561 [1st Dept 1987], *affd* 71 NY2d 977 [1988]).

Contrary to petitioner's contention, the Port Authority substantially followed its own procedures in executing disciplinary policies against him (*see Matter of Hanchard v Facilities Dev. Corp.*, 85 NY2d 638, 640 [1995]). The proper procedure was AI 20-1.11, which applies to "unclassified professional and managerial employees," such as petitioner, and other than the reference to AI 20-1.10 in the June 11, 2012 memorandum, petitioner's disciplinary proceeding was conducted in accordance with this regulation. It was not impermissible for the Inspector General to recommend petitioner's continued suspension without pay, even if he did so pursuant to AI 20-1.10, because suspension without pay was permissible under either section.

Equally unavailing is petitioner's contention that the Port Authority ignored its own precedent and treated him differently than seventeen other Port Authority police officers, as only two

of these officers were in commanding positions, and only one - who received two DUIs, hit multiple police vehicles, and assaulted another police officer - was permitted to retire with a "meaningful" pension and benefits. Petitioner, however, was made the same offer, i.e., to retire or be removed from his position. While petitioner disputes the use of his past violations in the final determination, it is petitioner who raised this issue during the administrative hearing.

Petitioner's argument that the Port Authority ignored its own rules in its investigation was improperly raised for the first time in reply (*see McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562 [1st Dept 2014]).

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16270 Ajet Delaj, et al., Index 302593/10
Plaintiffs-Respondents,

-against-

Bronx Park East Housing, Inc.,
Defendant-Appellant.

_____

Law Offices of Richard G. Monaco, P.C., Bronx (Richard G. Monaco of counsel), for appellant.

The Price law Firm, LLC, New York (Heather Ticotin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 9, 2015, which denied defendant's motion to, among other things, renew plaintiffs' motion for summary judgment on their rent overcharge complaint, unanimously affirmed, with costs.

The motion court properly denied defendant landlord's third motion to renew, as it failed to show that non-payment of rent was unknown or incapable of discovery at the time plaintiffs moved for summary judgment (*see Martin v Triborough Bridge & Tunnel Auth.*, 182 AD2d 545, 545 [1st Dept 1992], amdg 180 AD2d 596 [1st Dept 1992]). Further, defendant improperly submitted a

rent ledger for the first time in its reply papers (*see Rhodes v City of New York*, 88 AD3d 614, 615 [1st Dept 2011]). We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16271-
16272 The People of the State of New York, Respondent,

-against-

Melvin Holloway,
Defendant-Appellant.

Ind. 1501/13
Sci. 2025/13

_____

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

Robert T. Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, Bronx County (George Villegas, J.), rendered on or about November 25, 2013,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: DECEMBER 3, 2015

CLERK

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

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

16273-
16274-
16275 The People of the State of New York,
Respondent,

-against-

Pedro Tavares,
Defendant-Appellant.

Ind. 2886/09

Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Edgar Walker, J.), rendered March 15, 2011, as amended June 2, 2011, convicting defendant, after a jury trial, of two counts each of criminal sale of a controlled substance in the first and second degrees, and sentencing him to concurrent terms of 12 years, unanimously affirmed.

The evidence provided reasonable assurances of the identity and unchanged condition of the illegal substances recovered (*see People v Julian*, 41 NY2d 340, 343 [1977]), including proof of police control over the drugs (*see People v Cortijo*, 251 AD2d 256 [1st Dept 1998], *lv denied* 92 NY2d 948 [1998]). The discrepancy regarding the color of the heroin raised factual issues that were properly resolved by the jury (*see People v Ciriaco*, 11 AD3d 324

[1st Dept 2004], *lv denied* 4 NY3d 742 [2004]; *People v Epps*, 8 AD3d 85 [1st Dept 2004], *lv denied* 3 NY3d 673 [2004]). The jury could have reasonably rejected the inference that the drugs tested by chemists and produced in court were not the same items that were recovered by the police in this case; the jury could have instead concluded that the color discrepancy was the product of mistake, including faulty observation, recollection or recording.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16276 Warren Atkins, Index 307301/11
Plaintiff-Respondent,

-against-

Flat Rate Movers, Ltd.,
Defendant-Appellant.

_____

Clausen Miller P.C., New York (Kimbley A. Kearney of counsel), for appellant.

Lynn, Gartner, Dunne & Covello, LLP, Mineola (Kenneth L. Gartner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 13, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The alleged defamatory statements by defendant's employees are shielded by the common interest privilege, which covers statements made in the context of plaintiff's job, regarding his alleged job-related misconduct *(see Liberman v Gelstein*, 80 NY2d 429, 437 [1992]; *Present v Avon Prods.*, 253 AD2d 183, 187 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]). Any shortcomings in defendant's investigation here was insufficient to establish malice, to defeat the common interest privilege (*see Bulow v Women In Need, Inc.*, 89 AD3d 525, 526 [1st Dept 2011]).

Moreover, the statements by plaintiff's foreman and a coworker, if defamatory, were not within the scope of their duties or in furtherance of defendant's business, and defendant is therefore not vicariously liable for them (*see N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 37 [1st Dept 2001], *mod on other grounds* 97 NY2d 247 [2002]). Furthermore, any publication of the alleged defamatory statements to the Department of Labor were privileged (*see Phillip v Sterling Home Care, Inc.*, 103 AD3d 786, 787 [2d Dept 2013], *lv denied* 21 NY3d 854 [2013]*; Seymour v New York State Elec. & Gas Corp.*, 215 AD2d 971, 972-973 [3d Dept 1995]).

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16277 Hi-Tech Bridging, Inc., et al., Index 600668/08
Plaintiffs-Appellants,

-against-

125th Street Equities, Inc.,
Defendant-Respondent.

_____

Thomas J. Romans, Bronx, for appellants.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Stephen J. Gillespie of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered May 21, 2014, which, among other things, granted defendant's motion to dismiss the second amended complaint as against it, and denied plaintiffs' cross motion for leave to file an amended complaint and a new notice of pendency, unanimously affirmed, without costs.

Plaintiffs seek to foreclose on mechanic's liens. The notice of pendency filed in this action, however, has expired, and plaintiffs did not seek to extend the notice before its expiration. An expired notice of pendency is a nullity and may not be revived (*Matter of Sakow*, 97 NY2d 436, 442 [2002]). Because the liens at issue terminated upon the expiration of the notice (*see* Lien Law § 17), the motion court correctly dismissed the complaint against defendant and correctly determined that

plaintiffs' cross motion is "devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]).

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

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16278 The People of the State of New York, Ind. 138/12
Respondent,

-against-

Jaquan Smith,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about September 20, 2012,

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

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

ENTERED: DECEMBER 3, 2015

CLERK

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

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

16280 In re Nevaeh Karen B., etc.,

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

Tamara B.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Karen Lupuloff, J.), entered on or about June 13, 2014, which, upon a fact-finding determination that respondent permanently neglected the subject child, terminated her parental rights, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Family Court correctly found that reasonable efforts by petitioner to return the child to respondent's home were no longer required (Family Court Act § 1039-b[a]). Petitioner demonstrated that respondent's parental rights to three of the

child's older siblings had been involuntarily terminated (*id.* § 1039-b[b][6]), and respondent failed to show that providing reasonable efforts would be in the child's best interests, not contrary to the child's health and safety, and would likely result in reunification of respondent and the child in the foreseeable future (*id.* § 1039-b).

The determination of permanent neglect is supported by clear and convincing evidence that respondent failed to plan for the child's future during the relevant period (*see* Social Services Law § 384-b[7][a]). Respondent demonstrated a complete lack of insight into her parenting deficiencies and her inability to provide the child with a safe and appropriate home (*see Matter of Jennifer S.*, 61 AD3d 613 [1st Dept 2009]). Moreover, she failed to take steps to correct the conditions that led to the removal of the child from the home, including failing to complete her individual counseling program and missing visitation with the child (*see Matter of Ikem B.*, 73 AD2d 359, 365 [1st Dept 1980]; *see also Matter of Tailer Q. [Melody Q.]*, 86 AD3d 673 [3d Dept 2011]).

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

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16281 The People of the State of New York, Ind. 5240/12
Respondent,

-against-

Delvin Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Richard D. Carruthers, J.), rendered on or about May 1, 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: DECEMBER 3, 2015

CLERK

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

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

16282 The People of the State of New York, Respondent, Ind. 4632/11

-against-

Derek Richardson, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 23, 2012, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Although defendant was in custody and had not yet received *Miranda* warnings, his inquiry about why he was being charged with a felony was "immediately met by a brief and relatively innocuous answer by the police officer," not constituting interrogation or its functional equivalent (*People v Rivers*, 56 NY2d 476, 480

[1982]; *compare People v Lanahan*, 55 NY2d 711 [1981] [detailed recital of evidence held equivalent to interrogation]). Under these circumstances, defendant's inculpatory statement was self-generated and spontaneous.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16284 Rosa Frankel, Index 152230/13
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Douglas Herbert, Brooklyn, for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about November 24, 2014, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion to amend the notice of claim pursuant to General Municipal Law § 50-e(6), unanimously reversed, on the law, without costs, the motion granted, and the cross motion denied. The Clerk is directed to enter judgment accordingly.

Defendant demonstrated that the notice of claim was insufficient to comply with the requirements of General Municipal Law § 50-e(2), because it failed to give notice of plaintiff's present contention that the accident involving a slip on a staircase was caused by a missing portion of a handrail, instead of by water and/or liquid and debris (*see O'Brien v City of*

Syracuse, 54 NY2d 353, 358 [1981]; *Carrasquillo v New York City Dept. of Educ.*, 104 AD3d 516 [1st Dept 2013]; *Pezhman v City of New York*, 47 AD3d 493 [1st Dept 2008]; *Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]). Plaintiff may not amend the notice of claim pursuant to General Municipal Law § 50-e(6), because the allegation that the accident was caused by a portion of missing handrail is a new theory of liability, which is not within the purview of this provision (*see Fleming v City of New York*, 89 AD3d 405 [1st Dept 2011]).

Plaintiff may not seek leave to file a late notice of claim asserting a new theory of liability, because the one-year-and-90-day statute of limitations has expired (*see* Public Authorities Law § 1212[2]; General Municipal Law § 50-e[5]; *Islam v City of New York*, 111 AD3d 493, 494 [1st Dept 2013]).

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16285 The People of the State of New York, Ind. 1565/04
Respondent,

-against-

Anthony Ortega,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Eduardo Padro, J.), entered on or about on June 19, 2014, which adjudicated defendant a level two sexually violent felony offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the guidelines, or did not

warrant a downward departure under the totality of the circumstances. In particular, defendant has not established that his age (47 at the time of the hearing) indicates a low risk of reoffense.

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16286 The People of the State of New York, Respondent, Ind. 10120/90

-against-

Anthony Albert, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Max Sayah, J.), rendered on or about February 6, 1992, 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: DECEMBER 3, 2015

CLERK

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

16287- Index 650205/11
16288- 590354/13
16289N Rosemarie A. Herman, etc., et al., 590355/13
Plaintiffs-Respondents,

-against-

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

J. Maurice Herman, etc., et al.,
Defendants.

- - - - -

Julian Maurice Herman,
Third-Party Plaintiff-Appellant,

-against-

Joseph Esmail, et al.,
Third-Party Defendants.

[And Another Third-Party Action]

_____

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

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

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 15, 2015, and two separate orders same court and Justice, entered July 13, 2015, which, to the extent appealed from as limited by the parties' briefs, struck defendant/third-party plaintiff Julian Maurice Herman's answer, counterclaims, cross claims and third-party claims, and granted a

default judgment against him, unanimously affirmed, with costs.

Our review of the extensive record of discovery disputes and motion practice supports a finding that defendant/third-party plaintiff Julian Maurice Herman's (Maurice) repeated noncompliance with the court's many discovery orders was "dilatory, evasive, obstructive and ultimately contumacious" (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]). It prejudiced plaintiffs "by impeding [their] ability to obtain true discovery and by forcing [them] to spend enormous amounts of money and time to prove [their] case" (*id.* at 323), and was an unnecessary drain on limited court resources. Maurice's misconduct was not isolated, and he made little or no good faith attempt to correct it (*id.*). A lesser sanction would not have deterred Maurice's continued discovery violations (*id.*).

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

ENTERED: DECEMBER 3, 2015

CLERK

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

16290 In re Daniel Mallo, Ind. 201/14
[M-4585] Petitioner,

-against-

Cyrus R. Vance, Jr.,
etc., et al.,
Respondents.

Raiser & Kenniff, P.C., New York (Thomas A. Kenniff of counsel), for petitioner.

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

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Daniel P. Fitzgerald, 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: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16294 In re Stephen T. Sgueglia, Index 101407/13
Petitioner-Appellant,

-against-

Raymond Kelly, etc.,
Respondent-Respondent.

_____

The Law Offices of John S. Chambers, New York (John S. Chambers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered July 25, 2014, denying the petition seeking, among other things, to compel respondent Police Commissioner to grant petitioner permission to travel outside of New York City with his licensed handgun, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's current rules regarding a handgun premises license, which, as pertinent here, permits premises licensees with hunting authorizations to take their handguns outside of New York City for hunting purposes, but precludes other premises licensees from transporting their handguns outside of the City (*see* 38 RCNY 5-23[a]), is rational and not arbitrary or capricious (*see Matter of Sanchez v Kelly*, 34 AD3d 252 [1st Dept

2006], *lv denied* 8 NY3d 805 [2007]; *Matter of Murad v City of New York*, 12 AD3d 193 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]; *de Illy v Kelly*, 6 AD3d 217, 218 [1st Dept 2004]). Nor do the challenged rules violate petitioner's equal protection rights, as the rules are rationally related to legitimate interests of the New York City Police Department, including public safety and crime prevention (*see D'Amico v Crosson*, 93 NY2d 29, 31-32 [1999]; *see also Murad*, 12 AD3d at 194).

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

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16295 In re Aboubacar Diawara, Index 402502/12
Petitioner,

-against-

ALJ Hashim Rahman, et al.,
Respondents.

_____

Aboubacar Diawara, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

_____

Determination of the Office of Administrative Trials and Hearings (OATH) Taxi and Limousine Tribunal, dated July 3, 2012, finding that petitioner violated several provisions of the rules of the Taxi and Limousine Commission (TLC) governing taxi drivers and imposing a fine of $1,250.00, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paul Wooten, J.], entered December 20, 2013), dismissed, without costs.

The determination is supported by substantial evidence, including the testimony of the complaining witness, whom the hearing officer found credible (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]).

Petitioner's various arguments that he was denied due

process at the administrative hearing, and that the hearing was otherwise improper, are, for the most part, not properly before the court as they were not raised at the administrative level (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]), and, in any event, are meritless.

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16296 In re Isabella City Carting Corp, et al., Petitioners-Appellants, Index 260003/14

-against-

The New York City Business Integrity Commission, Respondent-Respondent.

Ballon Stoll Bader & Nadler, P.C., New York (Evan E. Richards of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Order and judgment (one paper), Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 16, 2014, which denied petitioners' application for a preliminary injunction against respondent's revocation of petitioner Isabella Carting Corp.'s trade waste license, and dismissed the petition brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner Isabella Carting Corp. lacked "good character, honesty and integrity" (Administrative Code of City of NY § 16-509[a]) was not arbitrary and capricious, made in violation of lawful procedure, or an abuse of discretion (CPLR 7803[3]). The penalty of revocation of petitioner's license does not shock the judicial conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]). We have

considered petitioners' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16297 The People of the State of New York, Ind. 1943/12
Respondent,

-against-

Eric Saldana,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Rena K. Uviller, J.), rendered on or about January 30, 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: DECEMBER 3, 2015

CLERK

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

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16298-
16299 The People of the State of New York,
Respondent,

-against-

Jason Riley,
Defendant-Appellant.

Ind. 6165/08

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Jones Day, New York (Vanessa A. Nadal of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 2, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, and order, same court and Justice, entered on or about December 23, 2013, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant failed to preserve his contention that he was deprived of his constitutional rights to compulsory process and due process by the court's failure to enforce a subpoena duces tecum seeking information about an alleged eyewitness or eyewitnesses (*see People v Lane*, 7 NY3d 888, 889 [2006]). As an

alternative holding, we reject it on the merits and find that the court properly declined to enforce the subpoena, which counsel improperly sought to use to locate potential witnesses (*see Matter of Terry D.*, 81 NY2d 1042 [1993]), notwithstanding that it purported to ask for documents.

Defendant's challenge to the admission of a recording of a phone call between him and another person is unpreserved. Contrary to defendant's argument, the issue was not preserved by the court's sua sponte expression of concerns about the call, in the absence of any objection to the court's curative measures or claim that they were inadequate. We decline to review this argument in the interest of justice. As an alternative holding, we find that the court properly exercised its discretion in admitting the call, since any prejudice that might have resulted from defendant's persistent use of offensive language did not substantially outweigh the probative value of, among other things, the incriminating statements he made during the call. In any event, we find that any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly denied defendant's CPL 440.10 motion to vacate the judgment (*see generally People v Samandarov*, 13 NY3d 433, 439-440 [2009). Defendant has not rebutted the presumption

(*see People v Rivera*, 71 NY2d 705, 709 [1988]) that he received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Contrary to defendant's argument that his counsel was ineffective in failing to introduce three phone calls he made to family members while incarcerated, these calls had little probative value and had the potential to harm defendant's case. Thus, defendant has not shown a reasonable probability that introducing the calls would have been beneficial (*see People v Carmichael*, 118 AD3d 603 [1st Dept 2014], *lv denied* 24 NY3d 1042 [2014]). It does not avail defendant to suggest that his trial counsel was unfamiliar with the calls at issue when discussing the matter years after trial, since the record, "[v]iewed objectively, . . . reveal[s] the existence of a trial strategy that might well have been pursued by a reasonably competent attorney" (*People v Satterfield*, 66 NY2d 796, 799

1985]). Furthermore, defendant did not provide any information from trial counsel in the form of an affidavit.

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16300 Jian-Guo Yu, et al., Index 116885/05
Plaintiffs, 590639/10

-against-

Greenway Mews Realty L.L.C., et al.,
Defendants.

- - - - -

Greenway Mews Realty L.L.C.,
Third-Party Plaintiff-Respondent,

Little Rest Twelve, Inc.,
Third-Party Plaintiff,

-against-

UAD Group,
Third-Party Defendant-Appellant.

_____

Clausen Miller P.C., New York (Melinda S. Kollross of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 16, 2015, which, among other things, granted third-party plaintiff Greenway's motion for summary judgment against third-party defendant UAD Group, unanimously affirmed, with costs.

There is no question that UAD was the actual party responsible for plaintiff Yu's injury, and that UAD was contractually required to indemnify third-party plaintiff Little

Rest for, among other things, any "losses and expenses, including . . . attorneys' fees." Little Rest assigned to Greenway its right to contractual indemnity from UAD. Accordingly, the motion court correctly determined that UAD must pay to Greenway the settlement amount Greenway paid to plaintiff, plus interest, as well as the attorneys' fees Greenway incurred in defending Little Rest in the first-party action. UAD's assertion that it has no obligation to pay unless and until Little Rest itself makes a payment toward the settlement amount or Greenway's attorneys' fees, is unavailing.

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

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16301 Gregory Velez, Index 402672/12
Plaintiff-Respondent,

-against-

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

_____

Cerussi & Spring, P.C., White Plains (Christa D'Angelica of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered February 4, 2015, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims and the Labor Law § 241(6) claim as predicated upon 12 NYCRR 23-130, unanimously affirmed, without costs.

The motion court properly declined to dismiss the Labor Law § 200 and common-law negligence claims in this action where plaintiff alleges that he was injured when he tripped over a drain cover on the roof of the worksite because of inadequate illumination. Although defendants argue that they cannot be held liable for any lack of illumination because they did not create that condition or have notice of it, defendant failed to demonstrate that they lacked constructive notice of the alleged

condition by offering evidence as to the time that the area where plaintiff fell was last inspected (*see Jahn v SH Entertainment, LLC*, 117 AD3d 473 [1st Dept 2014]).

Dismissal of the Labor Law § 241(6) claim was properly denied, since plaintiff's testimony regarding the lighting conditions of the rear area of the roof raises a triable issue as to whether the work area was adequately illuminated (*see Green v New York City Hous. Auth.*, 7 AD3d 287 [1st Dept 2004]; 12 NYCRR 23-130). Although defendants' witnesses deny that there was inadequate lighting of the roof top in their affidavits, there is no evidence that any of them were present at the worksite on the evening of plaintiff's accident. In any event, the conflicting versions of the lighting conditions merely raise issues of credibility that cannot be resolved on a motion for summary judgment (*see e.g. Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014]).

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

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16302 The People of the State of New York, Ind. 2418/13
Respondent,

-against-

Antoine Carter,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (E. Deronn Bowen of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered on or about October 21, 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: DECEMBER 3, 2015

CLERK

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

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16303 Orbco Advisors LLC, Index 653825/13
Plaintiff-Appellant,

-against-

400 Fifth Realty LLC, et al.,
Defendants-Respondents.

_____

Edward B. Safran, New York, for appellant.

Greenberg Traurig, LLP, New York (Daniel R. Milstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 15, 2015, which denied plaintiff's motion to disqualify defendants' counsel, unanimously affirmed, with costs.

The court providently exercised its discretion by denying plaintiff's motion at this early stage of the litigation (*see e.g. Dishi v Federal Ins. Co.*, 112 AD3d 484 [1st Dept 2013]). Plaintiff did not meet its "heavy burden" (*id.* at 484 [internal quotation marks omitted]) of showing that the testimony of the subject attorneys would be both necessary and prejudicial to defendants (*see Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469, 470 [1st Dept 2013]; *see also* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7). Rather, the record reflects that the attorneys' testimony would be cumulative, and "[a] witness whose testimony is, at best, cumulative is not a

necessary witness" (*Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 153 [1st Dept 1994], *affd* 87 NY2d 826 [1995]; *see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 446 [1987]). Should discovery reveal otherwise, plaintiff may renew its motion, at which point defendants may not argue that plaintiff is merely seeking a tactical advantage (*cf. Stilwell Value Partners IV, L.P. v Cavanaugh*, 123 AD3d 641, 642 [1st Dept 2014]).

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16304 The People of the State of New York, Ind. 6141/11
Respondent,

-against-

Christian Waller, also known
as Christopher Waller,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 19, 2012, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a term of one to three years, unanimously affirmed.

Defendant did not preserve his challenge to his plea allocution, which does not come within the narrow exception to the preservation requirement *(see People v Peque*, 22 NY3d 168, 182 [2013]; *see also People v Toxey*, 86 NY2d 725 [1995]), and we decline to review it in the interest of justice. As an alternate holding, we find that the plea was knowing, intelligent and voluntary. In his allocution, defendant expressly admitted to all the elements of burglary, and said nothing that cast doubt on

his guilt. Accordingly, the plea court had no obligation to elaborate on the concept of unlawful entry or remaining in premises generally open to the public.

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16306 In re Brenda B.,

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

_____

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

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

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about June 10, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree and criminal possession of a weapon in the fourth degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The petition and accompanying deposition were legally sufficient. The detailed factual allegations supported reasonable inferences that the victim sustained a physical injury, and that the injury was inflicted by means of an object that constituted a dangerous instrument (*see Matter of Shaquille M.*, 94 AD3d 445 [1st Dept 2012]).

The fact-finding determination 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]). There is no basis for disturbing the court's credibility determinations. The victim's testimony, along with corroborating evidence including a videotape, established the physical injury and dangerous instrument elements.

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16308 The People of the State of New York, Ind. 937/13
Respondent,

-against-

Joseph Giacona,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Rena K. Uviller, J.), rendered on or about September 3, 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: DECEMBER 3, 2015

CLERK

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

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16311 The People of the State of New York, Respondent, Ind. 6947/87

-against-

Ronald Dorsey, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered July 9, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law article 6-C), unanimously affirmed, without costs.

Even assuming defendant's correct point score to be 115, rather than 125 as the court determined, we conclude that the court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]).

The mitigating factors cited by defendant are outweighed by his criminal record and prison disciplinary history, which demonstrate a continuing risk of sexual recidivism, notwithstanding his age.

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16312-
16312A

Index 651609/14

In re Proceeding for Judicial Dissolution under § 1104 of the Business Corporation Law

David Klein,
Petitioner-Appellant,

-against-

The Klein Law Group, P.C.,
Respondent,

Susan Klein,
Respondent-Respondent.

_____

Biancone & Wilinsky, LLP, New York (Louis Biancone of counsel), for appellant.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Lawrence K. Marks, J.), entered March 10, 2015, which, respectively, denied the petition for judicial dissolution of respondent law firm, and granted the motion to deny the petition and denied the remaining issues as moot, unanimously affirmed, without costs.

"The ultimate remedy of dissolution and forced sale of corporate assets should only be applied as a last resort" (*Matter of Yoet Ngor Ng*, 174 AD2d 523, 526 [1st Dept 1991]). Accordingly, the motion court providently exercised its discretion when it denied the petition for dissolution of the

subject corporation (Business Corporation Law § 1111 [a]). The areas of dissension, as alleged in the petition and affidavits, do not impede the ability of the firm to function effectively (*see Molod v Berkowitz*, 233 AD2d 149, 149 [1st Dept 1996], *appeal dismissed* 89 NY2d 1029 [1997]). Nor did the motion court abuse its discretion when it dismissed the petition at the pleading stage, as "[a] hearing is only required where there is some contested issue determinative of the validity of the application" (*Matter of Gordon & Weiss*, 32 AD2d 279, 280 [1st Dept 1969]).

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

ENTERED: DECEMBER 3, 2015

CLERK

Friedman, J.P., Renwick, Saxe, Kapnick, JJ.

16313 The People of the State of New York, Respondent, Ind. 4140/10

-against-

Roy James, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about October 29, 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: DECEMBER 3, 2015

CLERK

Mazzarelli, J.P., Friedman, Renwick, Kapnick, JJ.

16314N The State of New York, ex rel. John T. Murray,
Plaintiff-Appellant,

-against-

Mary Kennedy Baumslag, etc.,
Defendant-Respondent.

Index 102550/12

_____

John T. Murray, New York, appellant pro se.

Paul M. Chazan, New York, for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 15, 2014, which denied plaintiff relator's motion for a subpoena to produce certain records, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, and the motion granted.

In a complaint made to the director of the Office of Internal Audit and Management Services (Internal Audit) of nonparty City University of New York (CUNY), plaintiff alleged that Gilbert Baumslag (defendant's decedent), a former professor at CUNY, had used public education monies for improper purposes. Internal Audit performed an investigation, which resulted in a report with recommendations. A redacted version of the report (i.e., omitting several recommendations) was provided to plaintiff.

In this action, brought on behalf of the State under the New York False Claims Act (State Finance Law § 187 *et seq*.) to recover the allegedly falsely procured and misspent funds, plaintiff seeks production of the unredacted version of the report, as well as investigators' notes of their interviews with CUNY and CUNY City College of New York professors, including Baumslag, named in the report. He contends that the redacted material is relevant because it identifies the actions recommended by the report and taken by CUNY on the basis of the results of the investigation. For example, the director of Internal Audit testified that the recommendations may have included asking Baumslag for "reimbursement of expenses."

In a letter response to plaintiff's motion, CUNY asserted that the material sought was work product. This conclusory statement is insufficient to invoke the work-product privilege (*see Matter of Alpert [79 Realty Corp.]*, 214 AD2d 316, 317-318 [1st Dept 1995]). While the director of Internal Audit testified that he is an attorney, he is not an attorney for CUNY, and the report, which he wrote with a CUNY examiner who is not an attorney, contains nothing that reflects "legal research, analysis, conclusions, legal theory or strategy" (*see Hoffman v Ro-San Manor*, 73 AD2d 207, 211 [1st Dept 1980]). The investigators' notes are not protected by the work-product

privilege since there is no evidence that the investigators conducted their interviews with Baumslag and other professors allegedly involved in the improper spending in anticipation of litigation (CPLR 3101[d][2]; *see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-377 [1991]).

CUNY also stated that the material sought was in any event not relevant. However, it failed to establish that the discovery sought is "utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (*see Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014] [internal quotation marks omitted]).

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

ENTERED: DECEMBER 3, 2015

CLERK

Gonzalez, P.J., Sweeny, Renwick, Saxe, Feinman, JJ.

15615 Anthony Oddo, Index 300305/11
Plaintiff-Respondent,

-against-

Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.,
Defendant-Appellant.

_____

Marshall Conway & Bradley, P.C., New York (Jeffrey A. Marshall of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 25, 2014, affirmed, without costs.

Opinion by Sweeny, J. All concur except Saxe, J. who dissents in an Opinion.

Order filed.

Corrected Order - December 9, 2015

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John W. Sweeny, Jr.
Dianne T. Renwick
David B. Saxe
Paul G. Feinman, JJ.

15615
Index 300305/11

_____x

Anthony Oddo,
Plaintiff-Respondent,

-against-

Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, Bronx County (Norma Ruiz, J.), entered February 25, 2014, which denied its motion for summary judgment dismissing the complaint.

Marshall Conway & Bradley, P.C., New York (Jeffrey A. Marshall and Amy S. Weissman of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio, **Blake** G. Goldfarb and Judith F. Stempler of counsel), for respondent.

SWEENY, J.

The issue before us is whether a residential substance abuse treatment facility owes a duty of care to a third party against whom one of its residents commits a violent act after his termination from its program. Under the facts of this case, we conclude that it does and that there are material questions of fact as to whether defendant properly discharged that duty. At approximately 10:00 p.m. on July 17, 2010, plaintiff was stabbed in the right shoulder by nonparty Sean Velentzas. Shortly before the incident, Velentzas had been a patient living in a drug treatment facility operated by Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc. (JCAP or Queens Village). He had been sent to the facility under the TASC[1] program as an alternative to incarceration for charges stemming from allegations that he had robbed a cab driver at gunpoint.

After the completion of discovery, defendant moved for summary judgment dismissing plaintiff's complaint on the ground that it owed plaintiff no duty since Velentzas was properly

[1]TASC (Treatment Alternatives for Safer Communities) is an alternative-to-incarceration program which, with the consent of the District Attorney and the court, contracts with agencies such as JCAP to provide substance abuse and mental health treatment services to criminal defendants in lieu of going to prison.

discharged from its facility for violations of its policy against violence and alcohol use.

Ricky Cottingham, the Acting Clinical Program Director of Queens Village, testified at his deposition that he never worked with Velentzas directly, and did not know when Velentzas began treating at the facility or whether he had been referred by a criminal court. He acknowledged that Queens Village accepts referrals from the criminal courts. Cottingham explained that the program is considered as an alternative to incarceration and that a resident's sentencing does not take place until he or she actually completes the program. He also testified that participants at Queens Village are not free to leave the facility at any time but must obtain staff approval to do so. Residents are allowed to leave the facility to attend medical and court appointments or to go on nature walks or trips, but, on those occasions, the resident is escorted by a facility employee. However, Cottingham also testified that "no one can physically control anyone entering or leaving the building" and that a resident can leave the program against clinical advice. When a resident is discharged from the program for violating a rule, or leaves against clinical advice, the entity that referred him or her to Queens Village is contacted. If the agency is a probation or parole agency, someone from the agency comes to pick up the

discharged resident. If it was a TASC referral, the typical procedure is for the resident to report to TASC the next business day following his or her dismissal from the program.

Defendant also submitted an affidavit by Cottingham in support of its motion. In the affidavit, Cottingham stated that he was not working on July 17, 2010, the date of the incident, but was informed by his employees as to what occurred on that date. He was advised that at approximately 9:30 p.m., Velentzas was told by Queens Village staff that he was being dismissed from the program because he had violated a "cardinal rule" by pushing another resident to the ground. Velentzas was also questioned about having consumed alcohol and, although he refused to take a Breathalyzer test, he admitted drinking alcohol. Since these incidents occurred during a weekend, defendant's employees began to fill out the necessary paperwork to transfer Velentzas to Faith Mission Crisis Center, an intermediary facility, where, according to Cottingham, he would "be held until he could report to TASC." However, during this process, Velentzas "became enraged and was acting out of control." Queens Village employees followed facility protocol and called 911. When the police arrived, Velentzas was, in Cottingham's words, "escorted . . . off the premises." The incident report prepared by Queens Village staff and submitted in support of its motion for summary

judgment also stated that Valentzas "was escorted by police officers off the property." There is no indication in the record on appeal that Velentzas was ever taken into custody by the police, or that Queens Village staff advised the police that he needed to be held or taken to Faith Mission pending notification to TASC. Velentzas was released by the police shortly after his removal from Queens Village property. His attack on plaintiff took place approximately a half-hour after he was escorted off the premises.

Significantly, in his affidavit, Cottingham stated that Queens Village "was under the impression that Mr. Velentzas would be taken to the police station until such time as his probation officer and TASC officer were notified of the situation." He further stated that "[a]t no time did [Queens Village] release Mr. Velentzas into the general public, nor did [it] have intention of same." In its motion, Queens Village took the position that it owed no duty of care to plaintiff and that, while its employees did not advise the police that Velentzas should be taken to Faith Mission or held until TASC could be advised of his dismissal from the program, in light of the fact that it is "a treatment facility where individuals reside in lieu of going to prison, there is no doubt that the New York City Police Department is aware of the potential behavior of such

residents." Finally, Queens Village maintained that it did not release Velentzas into the general public but rather released him into police custody.

The motion court denied defendant's motion. It found that defendant did not present "a scintilla of evidence that Velentzas was ever in police custody," and that "[n]o one with personal knowledge of the facts proffered any sworn testimony" or any documentary evidence such as a police report in support of defendant's contention that Velentzas was taken into custody by the police. Finally, the court concluded that, from all the facts presented, defendant "had the necessary authority, or ability, to exercise such control over Valentzas' [sic] conduct so as to give rise to the duty on their part to protect a member of the general public."

The dissent posits that, in this case, since the facility had the right to discharge its residents for rule violations, it had no duty to protect the general public from a discharged resident's subsequent violent acts. In the alternative, to the extent such a duty existed, the dissent contends that it was properly discharged when Velentzas was turned over to the police. For the following reasons, we do not agree.

For a party to prevail on a cause of action for common-law negligence, "it must be shown that the defendant owes a duty to

the plaintiff" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]). The question of whether someone owes a duty of care to reasonably avoid injury to another is a question of law (*see Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]). Generally, the common law does not impose a duty to control the conduct of third persons to prevent them from causing injury to others; rather, liability for the negligent acts of third persons "arises when the defendant has authority to control the actions of such third persons" (*Ramsammy v City of New York*, 216 AD2d 234, 236 [1st Dept 1995], *lv dismissed in part, denied in part* 87 NY2d 894 [1995], quoting *Purdy*, 72 NY2d at 8).

With respect to mental health care providers, New York has "no bright line-rule" regarding whether those individuals or facilities "treating a patient on a voluntary basis owe[] a duty of care to the general public. Instead, the courts have examined the issue on a case-by-case basis [internal citation omitted]" and the existence of such a duty turns on the facts of a particular case (*Fox v Marshall*, 88 AD3d 131, 136 [2d Dept 2011]; *Rivera v New York City Health & Hosps. Corp.*, 191 Fed Supp 2d, 412, 419 [SD NY 2002]).

Applying these principles to the facts of this case, we find that the motion court correctly denied Queens Village's motion, because Queens Village failed to meet its initial burden of

establishing, as a matter of law, that it owed no duty of care to plaintiff (*Fox v Marshall*, 88 AD3d at 135).

The key factor in determining whether a defendant will be liable for the negligent acts of third persons is whether the defendant has sufficient authority to control the actions of such third persons (*Purdy*, 72 NY2d at 8). Such authority, at a minimum, requires "an existing relationship between the defendant and the third person over whom 'charge' is asserted" (*D'Amico v Christie*, 71 NY2d 76, 89 [1987]).

There is no question that Queens Village had "an existing relationship" and sufficient authority to control Velentzas's actions. The dissent correctly observes that residents of this facility "are not prisoners." However, that degree of authority or control is not required to meet the standard of authority set forth in the case law on this issue (*see D'Amico v Christie*, 71 NY2d 76*)*. Cottingham testified unequivocally that residents were not free to leave the facility without permission and without an escort. While a resident could leave against clinical advice, the result would be a termination of the program, notification to the referring agency and criminal court that sent the resident to Queens Village, and the resident's return to the criminal justice system. Notably, before the police were called, Queens Village employees were preparing paperwork to have Velentzas transferred

to a interim facility where he was, in Cottingham's words, to be "held until TASC could be notified." This certainly indicates the type of control Queens Village had over him by virtue of his referral from a criminal court and is sufficient to meet the requirement of authority or control with respect to establishing a duty of care on the part of defendant.

More importantly, in his affidavit Cottingham tacitly, if not explicitly, recognized Queens Village's duty of care by acknowledging that there was no intention on the part of Queens Village to release Velentzas into the general public. Cottingham asserted, rather, that Velentzas was released into police "custody." The dissent mischaracterizes our reference to this "statement of intent." This acknowledgment does not, as the dissent contends, "create[]" a duty of care; it merely indicates that defendant was aware that it had such a duty.

In its motion, defendant submitted no affidavits or depositions from anyone with direct knowledge as to what transpired when Velentzas was advised that he was terminated from the program, or what information was communicated to the police concerning his status vis-a-vis his pending criminal case. No documentary or other evidence was submitted to support defendant's allegations that Velentzas was, in fact, taken into custody, or that the police had any obligation to either hold

Velentzas "[at] the police station", as Cottingham stated, or transport him to Faith Mission, other than a passing, unsupported reference in defendant's counsel's reply affirmation that, since defendant's facility houses individuals for treatment in lieu of prison, "there is no doubt that the New York City Police Department is aware of the potential behavior of such residents." Even assuming that statement is correct, Queens Village submitted nothing in support of its contention that the police could have, and should have, held Velentzas until TASC was notified. As noted, Cottingham testified and the incident report completed by Queens Village employees state specifically that Velentzas was "escorted" off the facility property, a far different situation than being taken into police "custody."

It is axiomatic that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). Contrary to the conclusion of our dissenting colleague, we find that Queens Village did not meet its burden of demonstrating that it had no duty of care.

The dissent argues that cases such as *Purdy*, *Eiseman*, *Pulka*, *D'Amico*, and *Ramsammy* fail to support our conclusion that in this case, Queens Village owed a duty of care to plaintiff or to members of the general public. While it is true that in those cases the courts found no duty existed on the part of the defendants for the actions of the third parties, the principles as to when and under what circumstances such liability may arise are certainly applicable here. Indeed, in each of those cases, the court utilized the same legal principles as we cite herein and applied them to the particular facts of the case. In this case, our analysis turns, as did the analysis in those cases, on the specific facts on the record before the court.

For example, the critical element of control of the third party by the defendant, clearly present in this case, is notably absent in each of the above-cited cases. We note that in *Fox* (88 AD3d at 137), the element of control was established because the third party therein "appeared to need a facility-issued pass" to leave the facility, not unlike the situation here. While it is true that *Fox* was decided in the context of a CPLR 3211(a)(7) motion rather than a summary judgment motion, that fact does not negate the well established principle of law concerning the need to demonstrate control by the defendant over the third party to establish a duty to others.

Moreover, unlike the dissent, we cannot say, on this record, that even if there were a duty owed by Queens Village, it was extinguished when Velentzas was turned over to the police. The dissent conflates our observations on this issue with defendant's argument on appeal that it discharged any duty it may have had by turning Velentzas over to police "custody." We take no issue with the dissent's observation that "[a] private drug treatment facility simply cannot control what the police do." We make no suggestion that it had any obligation, as the dissent posits, to ensure that the police kept Velentzas in custody. We simply observe that, based on the evidence submitted, there is no proof, documentary or otherwise, from anyone present at the time of the incident that the police ever took Velentzas into "custody," thereby extinguishing any further duty on defendant's part. At this stage of the proceedings, the record presents a material question of fact on this issue.

Since defendant failed to meet its initial burden to show that it owed plaintiff no duty of care (*see Fox v Marshall*, 88 AD3d at 135), we need not reach the issue of the sufficiency of plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion for summary judgment was therefore correctly denied.

Accordingly, the order of the Supreme Court, Bronx County (Norma Ruiz, J.), entered February 25, 2014, which denied defendant's motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur except Saxe, J. who dissents in an Opinion.

SAXE, J. (dissenting)

A residential drug treatment facility, as an alternative to incarceration, may discharge its residents at any time for rule violations. Residents there are not prisoners, and may simply leave the facility at will -- although if they leave without permission they may lose the privilege of receiving an alternative to incarceration. It is through this lens that the circumstances of this appeal must be understood. From these two essential facts, it follows as a rule of law and a statement of common sense that these facilities cannot properly be saddled with a duty to protect the general public from a discharged resident on the theory that he may possibly become violent toward some unknown third party after leaving the facility. Moreover, even if any such duty existed in law, it would be fulfilled when that resident was turned over to police custody; the facility has neither the right nor the obligation to ensure that the police thereafter prevent the resident's release.

On July 17, 2010, at approximately 10:00 p.m., plaintiff, Anthony Oddo, was punched and stabbed in the shoulder by Sean Velentzas, the son of the woman he was then dating. Just a few weeks earlier, Velentzas had been admitted, as an alternative to incarceration under the TASC (Treatment Alternatives for Safer Communities) program, to a residential drug treatment facility

run by defendant, Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc. However, on the day of the incident, he had been expelled from the facility for pushing another resident to the ground and consuming alcoholic beverages on the premises in violation of facility rules.

Because Velentzas's discharge involved a physical assault, defendant's employees began to fill out paperwork to transfer Velentzas to Faith Mission, a program used as an intermediary location where a discharged resident can be held until TASC can be notified. However, when Velentzas became enraged and began acting out while the paperwork was being completed, the police were called to the facility, and Velentzas was escorted off the premises by the police. The police released Velentzas shortly after escorting him out of defendant's facility, and he made his way to his grandmother's residence, where his attack on plaintiff took place.

Plaintiff's theory of liability is that the facility negligently discharged Velentzas in a manner that failed to ensure that he would remain in custody, even though it knew or should have known that he was prone to violent conduct.

Defendant moved for summary judgment dismissing the complaint on the ground that it owed no duty to plaintiff, as a member of the general public. I would grant that motion.

In support of the motion, defendant's Acting Clinical Program Director explained that when a patient is discharged for violating a rule, the entity that made the reference is contacted. Some agencies, such as probation or parole, send someone to pick up the discharged resident. However, he explained, other referring agencies do not arrange for a pick-up of the discharged person; the individual is simply instructed to report to the agency the following business day. In particular, residents who had been referred by TASC would be instructed to report to TASC the next business day following dismissal from the program. Further support for the motion is provided by a notice given to defendant's program by Queens TASC that indicates that it is possible for a participant to simply leave, against clinical advice, and confirms TASC's expectation that the program's obligation is limited to notifying TASC if a resident is discharged: "Any change by way of the client leaving against clinical advice or being discharged for any reason, should be brought to the attention of TASC immediately via telephone followed by written confirmation. TASC will in turn notify all criminal justice agencies involved."

The majority holds that because Velentzas was residing at the facility as an alternative to incarceration, and because defendant's employees knew that Velentzas could be violent, they

had a duty to instruct the police that Velentzas must not be released into the general public, and to ensure that he was taken to the Faith Mission Crisis Center. The majority takes issue with the facility's offered proof regarding exactly what was communicated to the police, indicating that defendant had the burden to prove that it ensured that Velentzas was taken into custody and held until he could be turned over to Faith Mission, and failed to make that showing. But, the facility was under no such obligation.

The majority's analysis relies on the distinction between the police taking a person "into custody," as opposed to removing him from the site where he was causing trouble and then releasing him rather than arresting and booking him. The majority holds that it was the duty of the defendant facility to ensure that its discharged resident be taken into and remain in custody until such time as he could be turned over to the Faith Mission program to be held until TASC could take custody of him.

However, the police were summoned through a 911 call, a measure any such facility is entitled — and perhaps well advised — to take if a resident threatens or engages in aggression towards others. Once the police arrive in response to such an emergency call, it is they who have the sole discretion regarding how to handle the individual whose conduct prompted the call. A

private drug treatment facility simply cannot control what the police do. It has no authority to instruct the police as to how to handle its discharged resident. It lacks any power to ensure that the police take an unruly discharged former resident into custody or hold him until another facility claims him.

Yet, the majority goes even further than imposing on the defendant facility an obligation to instruct the police as to how to handle a resident whose conduct prompted a 911 call; the obligation it imposes logically survives past the removal of that resident by the police, so that no matter how the police handle that resident initially, if the police later decide to release him, the facility will still be liable for any harm he does. The unreasonableness of such an obligation should be apparent, since the responding officers have a number of options, from deciding not to arrest the individual at all, to arresting him but releasing him, to arresting him, booking him, and leaving it to the arraignment court to decide how to handle him. The observation that the police did not take Velentzas into custody does not justify holding the defendant facility liable; once the police took Velentzas, he was under their control and authority, and the facility had no further duty or ability to control him.

Indeed, a rule that a drug treatment facility has an obligation to instruct the police that a discharged resident must

remain in custody, and may not be released to the public, cannot succeed at its intended impact; it would be, in effect, an illusory obligation. The facility cannot ensure that a discharged resident will be taken into or retained in custody, since the police have no obligation to abide by the instructions of a private facility.

Even if defendant facility gave the respondent officers the exact instructions the majority requires, the police would not be liable to an injured third party for failing to abide by such instructions, absent a special relationship with the injured individual (*see De Long v County of Erie*, 60 NY2d 296 [1983]). Therefore, the only practical value of creating such a legal duty is not really to protect the public, but simply to provide injured third parties with an entity that can be sued. That is the true impact of the majority's ruling here.

The majority attempts to buttress its assertion that the facility has a duty to prevent a discharged resident's release by referring to a statement by the facility's Acting Clinical Program Director that it had no intention to release Velentzas into the general public. This is wrong; a private drug treatment facility does not have a duty to protect the general public from its discharged residents and such a duty cannot be created by such a statement of intent.

Plaintiff also offers the expert opinion of a psychiatrist, who asserts that defendant deviated from the applicable standard of care by releasing Velentzas, failing to conduct a proper clinical assessment of Velentzas prior to his discharge to determine his risk to others, and allowing the police to merely escort Velentzas off the premises without advising them of the need to detain him or transfer him to a facility with "a higher level of residential care and containment."

However, the cases offered by plaintiff and those cited by the majority in support of holding defendant liable are inapposite, and the psychiatric opinion offered by plaintiff is neither applicable nor relevant in this context.

"In the ordinary circumstance, common law in the State of New York does not impose a duty to control the conduct of third persons to prevent them from causing injury to others; liability for the negligent acts of third persons generally arises when the defendant has authority to control the actions of such third persons" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]). The Court held in *Purdy* that the defendant, a health-related residential facility, could not be liable to an individual who was injured when struck by a car driven by a resident of the facility who was prone to fainting spells and blackouts and whose crash was caused by a blackout. The Court

observed that the patient was a voluntary resident who was entitled to leave the facility unaccompanied; there was no statute or rule that gave the facility the authority to prevent her from leaving the premises or to control her conduct while she was off the premises so as to prohibit or prevent her from operating a motor vehicle, even knowing or having reason to know that because of her medical condition, she might black out at the wheel.

In *Eiseman v State of New York* (70 NY2d 175, 183 [1987]), where the claimants were the victims of a released former prison inmate, it was undisputed that the former inmate's release could not form the basis for a claim of negligence by the State, since his release from prison was required by law. The only issue was whether the failure by the prison physician to include the former inmate's medical and psychiatric history on a college admission medical form constituted grounds for liability on the part of the State. In dismissing that claim, the Court expressed particular concern with the potential for "limitless liability to an indeterminate class of persons conceivably injured by any negligence in that act" (*id.* at 188). It concluded that "the physician plainly owed a duty of care to his patient and to persons he knew or reasonably should have known were relying on him for this service to his patient. The physician did not,

however, undertake a duty to the community at large" (*id.*).

A number of cases acknowledge the existence of a rule that a duty to control others may arise where "'[the] relationship between the defendant and the person who threatens the harm to the third person may be such as to require the defendant to attempt to control the other's conduct'" (*Pulka v Edelman*, 40 NY2d 781, 783 [1976], quoting Harper & Kime, Duty to Control the Conduct of Another, 43 Yale LJ 886, 887-888; see *D'Amico v Christie*, 71 NY2d 76, 85 [1987]). Importantly, however, as the Court pointed out in *D'Amico*, that duty to control the conduct of a third person, even where applicable, may be imposed only where the defendant has the opportunity to control that person, that is, while the third person is on its premises (*id.*).

That is why, in *D'Amico*, the Court explained that while there may be liability for injuries caused by an intoxicated guest that occur on a defendant's property or in an area under a defendant's control, where the defendant had the opportunity to supervise the intoxicated guest, a non-commercial host who fails to prevent a picnic participant from driving away after consuming a large number of alcoholic beverages will not be held liable for the damage caused by the intoxicated driver (*id.* at 85-86). Similarly, in *Henry v Vann*, a companion case to *D'Amico v Christie*, where the plaintiffs' decedents died as a result of a

collision with an automobile driven by an intoxicated individual shortly after his employer fired him and ordered him off the work site in that condition, the Court of Appeals dismissed the claim against the employer, because the employer owed no duty to the users of the public highway, and did not assume a duty of supervision or control when it directed the intoxicated employee to leave the premises (71 NY2d at 87).

In *Avins v Federation Empl. & Guidance Serv., Inc.* (67 AD3d 505 [1st Dept 2009]), this Court held that the defendant could not be held liable for a vicious knife attack against a 10-month-old infant committed by an individual with a history of mental illness who resided in an apartment operated by the defendant to provide housing and support services to individuals with a history of mental illness. We explained that while the defendant might owe a duty to other residents of its facility to protect them from foreseeable violent conduct of a resident, such duty would not extend to members of the community at large (*id.* at 507, citing *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001], and *Waters v New York City Hous. Auth.*, 69 NY2d 225, 228-231 [1987]).

Despite the foregoing limitations on the duty of establishments to protect the general public from dangerous people who had previously been within their confines, plaintiff,

and the majority, impose on defendant a duty to ensure that when Velentzas left its premises, he remained in involuntary custody.

But, defendant's facility was entitled to discharge Velentzas; indeed, a violent incident required his discharge. Defendant's program is not a prison; from the notice provided to defendant's program by Queens TASC, it even appears that a participant can decide to leave against clinical advice. Indeed, defendant's incident report stated that Velentzas said he was leaving against clinical advice. The program's responsibilities do not include a duty to ensure that the general public is protected from any residents who are discharged or who leave against clinical advice.

The cases relied on by the majority do not support the imposition of a duty owed to the general public under these circumstances. For instance, *Ramsammy v City of New York* (216 AD2d 234 [1st Dept 1995], *lv dismissed in part, denied in part* 87 NY2d 894 [1995]), illustrates the absence of a duty owed to the general public. There, a security guard woke an intoxicated driver sleeping in a car, and directed him to drive away although the guard knew the driver was intoxicated; the driver then struck and killed a pedestrian. The action was dismissed against the security company, based on the lack of a duty. The only claim that was allowed to proceed in *Ramsammy* was against the property

owner, on the ground that it created a pedestrian mall that experts had assessed as unsafe.

As to *Fox v Marshall* (88 AD3d 131 [2d Dept 2011]), its ruling does not support the imposition on defendant of a duty to protect the general public. In *Fox*, a heinous murder was committed by a mentally ill resident of a mental health care facility while he was temporarily released pursuant to a temporary pass issued by facility staff; the Second Department relied on the liberal pleading requirements of CPLR 3211 to hold that although the resident's confinement was voluntary, his need for a pass to be allowed out -- unlike the patient in *Purdy*, he apparently was not free to come and go as he pleased -- provided sufficient support to avoid dismissal of a cause of action in negligence against the operator of the mental health facility for letting the resident out (*id.* at 137-138). Here, however, we are not judging the allegations of the complaint alone. We are presented with a summary judgment motion; in the face of defendant's showing that it violated no applicable duty, plaintiff was required to present any evidence that would establish such a violation of duty. Plaintiff offered no such showing.

Plaintiff's submission of an affirmation by a psychiatric expert claiming failure to abide by the required standard of

care, in effect, relies on case law concerning medical malpractice claims against mental health facilities for decisions to allow the release of patients without a proper assessment of the danger they posed (*see e.g. Laura I.M. v Hillside Children's Ctr.*, 45 AD3d 260 [1st Dept 2007]). However, the duty owed by a medical facility to exercise professional judgment regarding its patients' physical or psychiatric illnesses does not apply to defendant, a facility that provides substance abusers with counseling and the opportunity for drug-free living. The duty owed by medical professionals has no applicability here.

Finally, even assuming that defendant facility had some duty to protect the public from a discharged resident, or at least from this particular discharged resident, any such duty was extinguished when he was turned over to the police. More than

that, the facility had neither the right nor the obligation to do.

In my view, defendant is therefore entitled to summary judgment dismissing the complaint.

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

ENTERED: DECEMBER 3, 2015

CLERK