SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 14, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Richter, Manzanet-Daniels, Kapnick, JJ.

14472 S.T.A. Parking Corp., Index 108091/08
Plaintiff-Respondent,

-against-

Lancer Insurance Company,
Defendant-Appellant.

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Law Offices of Curtis, Vasile P.C., Merrick (Roy W. Vasile of counsel), for appellant.

Baritz & Colman LLP, New York (Aaron P. Taishoff of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Arthur F. Engoron, J.), entered July 18, 2013, awarding plaintiff the principal sum of $196,372.33, and bringing up for review an order, same court (Ira Gammerman, J.H.O.), entered November 29, 2012, which, after a hearing, determined that plaintiff is entitled to recover said amount as legal fees as against defendant, with interest and costs, unanimously reversed, on the law, without costs, the award of attorneys' fees vacated and the matter remanded for a new hearing.

On a prior appeal, this Court affirmed an order, entered December 27, 2011, which, to the extent appealed from, declared that a policy issued by defendant Lancer did not provide coverage to plaintiff STA in certain underlying property damage actions against it (110 AD3d 512 [1st Dept 2013], *lv denied* 23 NY3d 902 [2014]). Lancer did not appeal from the portion of the December 27, 2011 order which held that, pursuant to the law of the case established by an earlier order issued in March 2010 (from which an appeal was noticed but eventually withdrawn), Lancer was obligated to provide a defense for STA in those actions until the date the issue of coverage was determined. While an appeal from a final judgment may bring up for review any intermediate nonfinal order that necessarily affects the final judgment and has not previously been reviewed by the appellate court (*see* CPLR 5501[a][1]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 41-42 [2012]), Lancer's failure to include the prior orders, or any of the papers submitted with respect to the underlying motions, in the appellate record renders meaningful review of those orders impossible (*see* CPLR 5526; *UBS Sec. LLC v Red Zone LLC*, 77 AD3d 575, 579 [1st Dept 2010], *lv denied* 17 NY3d 706 [2011]).

Thus, the only issue presented by this appeal is the

propriety of Supreme Court's determination of the amount of attorneys' fees incurred in plaintiff's defense up to the date of the coverage determination. After a very abbreviated hearing before the JHO, plaintiff's counsel was awarded attorneys' fees of $196,372.33, the exact amount that was sought, to the penny. We find that a new hearing is required to develop the record as to the reasonableness of the attorneys' fees charged by plaintiff's counsel (*see e.g. Matter of Freeman*, 34 NY2d 1, 9 [1974] [in determining what constitutes reasonable attorneys' fees, the court should consider, among other things, the time, labor and skill required, the difficulties involved in the matter, the lawyer's experience, ability and reputation, the amount involved and the results obtained]; *Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005] ["the court always has the authority and responsibility to determine that the claim for fees is reasonable"]).

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

ENTERED: MAY 14, 2015

CLERK

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

14631 Glenn J. Mendoza, M.D., Index 650771/12
Plaintiff-Appellant,

-against-

Akerman Senterfitt LLP, et al.,
Defendants-Respondents.

_____

Zetlin & De Chiara LLP, New York (Loryn P. Riggiola of counsel), for appellant.

Akerman LLP, New York (Martin Domb of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered October 23, 2013, which, to the extent appealed from, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) with prejudice, unanimously affirmed, without costs.

Plaintiff is a doctor specializing in pediatric, prenatal, and neonatal medicine. In April 2000, he joined nonparty Children's and Women's Physicians of Westchester, LLP (CWPW). He signed both an Amended and Restated Partnership Agreement dated, January 29, 1999, and an employment agreement that was subsequently amended in April 2002.

During the negotiations between CWPW and plaintiff, CWPW was represented by defendant Eric W. Olson's prior law firm, and

plaintiff was represented by independent counsel.

CWPW's partnership agreement states, among other things, "The Partners acknowledge that the Law Firm is representing the Partnership with respect to this Partnership Agreement; and . . . EACH PARTNER HAS BEEN ADVISED TO RETAIN INDEPENDENT COUNSEL to advise him" (emphasis in original). The employment agreement contains a similar provision. The partnership and employment agreements also state that no partner or employee shall practice medicine "except as an employee of the Partnership."

On October 25, 2010, nonparty Dr. Leonard Newman, CWPW's president, sent an email to CWPW's managing partners, including plaintiff. Newman's email forwarded an email from defendant Olson, now a member of defendant Akerman Senterfitt LLP, regarding certain amendments to the partnership agreement:

> "I am forwarding to each of you the recommendation of our attorney, Eric Olson . . . in the development of a tiered structure for Managing Partners . . . .
>
> "Please review the explanation listed below from Eric Olson. Questions can be directed to Mr. Olson [at his office].
>
> ". . . You can come to [an office at CWPW's principal place of business] to review the documents. However, due to the confidential nature of the documents, we need to limit their distribution beyond the Chairman's Office. Please stop by before November 15th."

Olson's email stated, "This e-mail intends to summarize the

two major changes to CWPW's Partnership Agreement" – namely, "Implementation of a Tiered Managing Partner Structure" and "Entities as Partners" [to meet requirements in the agreement]. In addition to "the two major changes" that Olsen mentioned, the amendment also amended, as relevant here, the grounds for removal of managing partners and the grounds for dissociation of a partner.

On March 8, 2011, Olson sent plaintiff a notice that CWPW intended to terminate his employment based on breaches of the employment agreement – specifically, because of his "pranic healing" practice. Thereafter, plaintiff commenced the instant action asserting causes of action for aiding and abetting CWPW's breach of its fiduciary duty to plaintiff, breach of defendants' fiduciary duties to plaintiff, fraud, negligent misrepresentation, tortious interference with contract and/or prospective economic advantage, and legal malpractice. Plaintiff's allegations are based on his contention that defendants drafted certain amendments, not mentioned in the email, to expedite and facilitate his termination from the partnership. Defendants moved to dismiss the complaint under CPLR 3211(a)(1) and (a)(7).

Contrary to plaintiff's argument, the court applied the

correct standards on this motion to dismiss and did not effectively convert the motion into one for summary judgment (*see Zyskind v FaceCake Mktg. Tech., Inc.*, 110 AD3d 444 [1st Dept 2013]). The court properly deemed the above emails that were described and quoted in the complaint itself to be documentary evidence (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014]).

The claim for breach of fiduciary duty was correctly dismissed since defendants, who represented nonparty CWPW, did not owe a fiduciary duty to plaintiff, then a partner of CWPW (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]). Because defendants did not owe plaintiff a fiduciary duty, so much of the third cause of action as alleges fraudulent concealment was correctly dismissed (*see e.g. SNS Bank v Citibank*, 7 AD3d 352, 356 [1st Dept 2004]).

So much of the third cause of action as alleges fraudulent misrepresentation was correctly dismissed because defendants' email did not constitute a misrepresentation of fact (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178-179 [2011]; *Fortress Credit Corp. v Dechert LLP*, 89 AD3d 615, 617 [1st Dept 2011], *lv denied* 19 NY3d 805 [2012]). Nor did plaintiff show justifiable reliance. Whether the two major changes created by

the 2010 amendments to CWPW's partnership agreement were the two items mentioned in defendants' email was not a matter "peculiarly within [defendants'] knowledge" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278 [2011] [internal quotation marks omitted]). Plaintiff could have ascertained the truth "by the exercise of ordinary intelligence" (*id.* [internal quotation marks omitted]), viz., by reviewing the amendments at CWPW's office (*see Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]; *Vulcan Power Co. v Munson*, 89 AD3d 494 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]).

The claim for negligent misrepresentation was correctly dismissed because, even if an opinion or matter of judgment such as "the two major changes" could be incorrect, plaintiff, as indicated, did not reasonably rely on it (*see Mandarin*, 16 NY3d at 180).

The legal malpractice claim was correctly dismissed because, as plaintiff acknowledged in his opening brief on appeal, defendants were CWPW's attorneys, not his (*see Waggoner v Caruso*, 68 AD3d 1, 5 [1st Dept 2009], *affd* 14 NY3d 874 [2010]). Nor can plaintiff maintain a malpractice claim based on the fraud exception to the privity rule, since, as indicated, his fraud

claim is not viable (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 595 [2005]; *Griffith v Medical Quadrangle*, 5 AD3d 151, 152 [1st Dept 2004]).

The claim of aiding and abetting CWPW's breach of its fiduciary duty to plaintiff fails because defendants' actions (e.g. conducting an investigation and drafting amendments to a partnership agreement) were "completely within the scope of [their] duties as . . . attorney[s]" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 606 [1st Dept 2010]).

Having failed to make any specific arguments about his tortious interference claim in his appellate briefs, plaintiff has abandoned his appeal from the dismissal of that claim (*see e.g. Schneider v Jarmain*, 85 AD3d 581 [1st Dept 2011]).

The court properly denied plaintiff's request, at oral argument, for leave to amend. Since plaintiff failed to submit a proposed amended pleading, the motion court could not – nor can we – judge whether the proposed amendment would have merit or be sufficient (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). Even on appeal, plaintiff does not explain how an amended complaint would cure any defects (*see Cusack v Greenberg Traurig LLP,* 109 AD3d 747, 749 [1st Dept 2013]). On

the contrary, he contends that his original complaint is more than sufficient.

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

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

ENTERED: MAY 14, 2015

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14582 Ofori O., etc., et al., Index 113626/11
Plaintiffs-Appellants,

-against-

Roman Catholic Church of All Saints,
Defendant-Respondent.

_____

The Dweck Law Firm, New York (Jack S. Dweck of counsel), and Charles Kirschner, New York, for appellants.

Leahey & Johnson, P.C., New York (Peter J. Johnson, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 20, 2014, which granted the motion of defendant Roman Catholic Church of All Saints (the School), dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

In this action for personal injuries allegedly sustained by the infant plaintiff when a free-standing basketball hoop in defendant's gymnasium fell on top of him, dismissal of the

complaint was not warranted. The record presents triable issues of fact including whether defendants were negligent in permitting a broken basketball hoop to remain in the gymnasium where classes, such as plaintiff's, were held (*see Llauger v Archdiocese of N.Y.*, 82 AD3d 656 [1st Dept 2011]).

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

ENTERED: MAY 14, 2015

CLERK

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

14998 Nicholas J. Barone, etc., Index 651758/13
Plaintiff-Appellant,

-against-

Christopher K. Sowers, et al.,
Defendants-Respondents,

John and Jane Does I-V, et al.,
Defendants.

_____

The Basil Law Group, P.C., New York (Robert J. Basil of counsel), for appellant.

Law Office Of Leonard W. Stewart, P.C., Brooklyn (Leonard W. Stewart of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 19, 2014, which, inter alia, granted defendants Christopher K. Sowers and 899 Fulton, LLC's motion to dismiss the complaint, unanimously affirmed, without costs.

Supreme Court properly dismissed the complaint, since plaintiff failed to make a presuit demand or adequately allege that demand was excused (*see Wandel v Eisenberg*, 60 AD3d 77, 82 [1st Dept 2009]). Pursuant to Business Corporation Law § 626(c), a plaintiff shareholder must "set forth in the complaint - with particularity - an attempt to secure the initiation of such action by the board or the reasons for not making such effort"

(*Bansbach v Zinn*, 1 NY3d 1, 8 [2003] [internal quotation marks omitted]). Demand is excused due to futility when a complaint alleges with particularity that: (1) "a majority of the board of directors is interested in the challenged transaction"; or (2) "the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances"; or (3) "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" (*Marx v Akers*, 88 NY2d 189, 200-201 [1996]). The demand requirement of Business Corporation Law § 626(c) also applies to members of New York limited liability companies (*see Najjar Group, LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013]).

The complaint alleges only that since Sowers owns 80% of the LLC, it would be futile for plaintiff to make a demand upon him to consent to the filing of an action on the LLC's behalf. However, this Court has made clear that Business Corporation Law § 626(c) "does not differentiate between minority and majority shareholders for demand purposes" (*see Ocelot Capital Mgt., LLC v Hershkovitz*, 90 AD3d 464, 466 [1st Dept 2011]). We note that Sowers' alleged concealment of financial information does not warrant a finding that demand was futile, since "[a]

corporation's refusal to provide information to its shareholders is not on the [] list of circumstances where demand is excused" (*Wyatt v Inner City Broadcasting Corp.*, 118 AD3d 517, 517 [1st Dept 2014]).

We further note that plaintiff was not entitled to dissolution of the LLC, pursuant to New York Limited Liability Company Law § 702, since the stated purpose and business of the LLC was to "acquire, improve, own, manage, sell, dispose of, and otherwise realize on the value of" the premises, and the allegations in the complaint do not show that Sowers is "unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" (*Doyle v Icon, LLC*, 103 AD3d 440, 440 [1st Dept 2013]; *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]).

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

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

ENTERED: MAY 14, 2015

CLERK

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

15084 The People of the State of New York, Ind. 5442/12
Respondent,

-against-

Colin Ward,
Defendant-Appellant.

_____

Law Office of Paul P. Martin, New York (Jane S. Meyers of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered February 28, 2014, convicting defendant, after a nonjury trial, of burglary in the second degree and petit larceny, and sentencing him to an aggregate term of 3½ years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no reason to disturb the court's credibility findings.

To the extent the People's should have ascertained and disclosed the full extent of their witness's criminal history before the witness began his testimony, defendant has not

established that he was prejudiced (*see e.g. People v Thomas*, 115 AD3d 496 [1st Dept 2014], *lv denied* 23 NY3d 969 [2014]). The witness revealed the impeachment material at issue while he was still on the witness stand, and defendant was able to make full use of the belatedly revealed material on cross-examination. Furthermore, defendant rejected the court's offer of a lengthy continuance for further investigation and preparation.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MAY 14, 2015

CLERK

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

15086 In re Isaac Ansimeon F.,
etc.,

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

Mark P.,
Respondent-Appellant,

Graham-Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 7, 2014, which, upon a fact-finding determination that respondent father's consent is not required for the subject child's adoption, that petitioner agency was excused from providing diligent efforts to reunite the father with the child, and that the father had permanently neglected the child, terminated the father's parental rights to the subject child, and committed the child's custody and guardianship to petitioner agency and the Commissioner of Social

Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that the father's consent to adoption is not required under Domestic Relations Law § 111(1)(d). The father's admission that, after his incarceration, he failed to provide financial support for the child is fatal to his claim (*see Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [1st Dept 2010]). The father's incarceration did not excuse him of his obligations (*id.* at 689).

The finding of permanent neglect is also supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The Family Court properly excused the agency from its duty to make diligent efforts to reunite the father and child, as such efforts would be detrimental to the best interests of the child given that the father's earliest possible release date from prison is 2019, when the child will be 20 years old (*see* § 384-b[7][a]; *see also Matter of Marino S.*, 100 NY2d 361, 372 [2003], *cert denied* 540 US 1059 [2003]). In addition, the father did not provide a realistic and feasible plan for the child's future, as his sole plan was for the child to remain in foster care until his release from prison (*see Matter of Sasha R.*, 246 AD2d 1, 7 [1st Dept 1998]).

A preponderance of the evidence demonstrates that it is in the child's best interests to terminate the father's parental rights and free the child for adoption, despite the 16-year-old child's indecision about whether he wants to be adopted (*see Matter of Teshana Tracey T. [Janet T.]*, 71 AD3d 1032, 1034 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010]).

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

ENTERED: MAY 14, 2015

CLERK

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

15087 D&R Global Selections, S.L., Index 603732/07
Plaintiff-Respondent,

-against-

Bodega Olegario Falcon Pineiro,
Defendant-Appellant.

_____

Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for appellant.

Zara Law Offices, New York (Robert M. Zara of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about August 26, 2013, which granted plaintiff's motion to reargue and, upon reargument, denied defendant's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

As defendant neither is incorporated in New York State nor has its principal place of business here, New York courts may not exercise jurisdiction over it under CPLR 301 (*Daimler AG v Bauman*, __ US __, 134 SCt 746 (2014), *Magdalena v Lins*, 123 AD3d 600 [1st Dept 2014]). Therefore, the courts have no subject matter jurisdiction over this action pursuant to Business

Corporation Law § 1314(b)(5) (*see ABKCO Indus. v Lennon*, 52 AD2d 435, 440 [1st Dept 1976]).

Nor is there subject matter jurisdiction under Business Corporation Law § 1314(b)(4), which depends on personal jurisdiction under CPLR 302. CPLR 302 authorizes the exercise of personal jurisdiction over a nondomiciliary "if the cause of action at issue arose out of the transaction of business within the State" (*McGowan v Smith*, 52 NY2d 268, 271 [1981]). We find that defendant's visits to New York to promote its wine constitute the transaction of business here (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 455 [1965], *cert denied* 382 US 905 [1965]). However, there is no substantial nexus between plaintiff's claim for unpaid commissions in connection with the sales of that wine, pursuant to an agreement made and performed wholly in Spain, and those promotional activities (*see McGowan*, 52 NY2d at 268).

Defendant's request for sanctions was not raised before the motion court and was resolved against him on his pre-appeal motion before this Court. Were we to reach the merits again on this appeal, we would again deny the request.

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

ENTERED: MAY 14, 2015

CLERK

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

15088 Michaela Martens, et al., Index 107297/10
Plaintiffs-Respondents,

-against-

St. Luke's-Roosevelt Hospital Center, et al.,
Defendants,

Sophia Wu, M.D.,
Defendant-Appellant.

_____

Martin Clearwater & Bell LLP, New York (Iryna S. Krauchanka and Robert T. Whittaker of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered June 2, 2014, which denied defendant Sophia Wu, M.D.'s motion for partial summary judgment dismissing a portion of plaintiffs' medical malpractice claim on statute of limitations grounds, unanimously affirmed, without costs.

In this action, plaintiffs allege that, during doctor's appointments spanning June 16, 2002 to September 21, 2009, defendant misdiagnosed a cancerous tumor as fibroids. In opposition to defendant's prima facie showing that plaintiffs' malpractice claim is time-barred to the extent it is based on treatment rendered prior to December 4, 2007, plaintiffs raised a

triable issue of fact as to whether the statute of limitations is tolled by the continuous treatment doctrine (CPLR 214-a; *Massie v Crawford*, 78 NY2d 516, 519 [1991]). Defendant and plaintiff Michaela Martens agreed in June 2002 to monitor plaintiff's fibroids in lieu of removing them, so as not to disrupt plaintiff's fertility. Further, defendant directed plaintiff to return for follow-up visits generally within a year, or sooner if she had fibroid-related symptoms. Defendant inquired about plaintiff's fibroids at each visit, ordered ultrasounds specifically for the fibroids, and monitored them through physical exams and in ultrasounds. When plaintiff ultimately sought surgery to remove the fibroids, she returned and consulted with defendant. Given the foregoing, there is at least a triable issue of fact whether defendant's monitoring of plaintiff amounted to continuous treatment (*Oksman v City of New York*, 271 AD2d 213, 215 [1st Dept 2000]; *Cherise v Braff*, 50 AD3d 724, 726 [2d Dept 2008]).

Although plaintiff did not consistently return for follow-ups each year, the gaps in treatment alone do not require

dismissal of plaintiff's claim (*see Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]), especially since there is evidence that the gaps were due to plaintiff's demanding work and travel schedule.

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

ENTERED: MAY 14, 2015

CLERK

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

15089 Marilyn Hopeman, Index 313120/10
Plaintiff-Appellant,

-against-

Albert A. Hopeman III,
Defendant-Respondent.

_____

Marilyn Hopeman, appellant pro se.

Barton LLP, New York (Orrit Hershkovitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marilyn T. Sugarman, Referee), entered on or about April 17, 2013, which granted defendant husband Albert A. Hopeman's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff failed to demonstrate that the court could exercise personal jurisdiction over defendant under CPLR 301 or 302(b), since there was no evidence that he had established "physical presence in the State and an intention to make the State a permanent home" (*Antone v Gen. Motors Corp., Buick Motor Div.*, 64 NY2d 20, 28 [1984]; *see also Matter of Ranftle*, 108 AD3d 437, 441 [1st Dept 2013], *affd* 22 NY3d 1146 [2014], *cert denied* __ US __, 135 S Ct 270 [2014]).

Defendant, a United States citizen, relocated to Shanghai China in 1987. The parties met in Shanghai in 1996 and were married in Hong Kong in 1998. Prior to the marriage, plaintiff, a Chinese citizen, moved to the United States to attend graduate school in Denver, Colorado. In 2000, following her graduation, plaintiff relocated with defendant's assistance to New York in order to obtain three years of work experience before returning to Shanghai. However, plaintiff never returned to Shanghai, and in 2009, defendant ceased providing financial support for her.

The evidence adduced at the hearing established that between 2000 and 2006, defendant spent 91 days in the New York apartment that he had leased for plaintiff, that he kept only a few personal belongings there, and that he had not been there since January 2006, approximately five years prior to the commencement of the instant divorce action. Supreme Court properly found that the limited time that defendant spent in the New York apartment with plaintiff during the course of the marriage was insufficient to find that it was the parties' marital domicile (*see Senhart v Senhart*, 4 Misc 3d 862, 870 [Sup Ct, Kings County 2004], *affd* 18 AD3d 642 [2d Dept 2005]; *see also Klette v Klette*, 167 AD2d 197, 199 [1st Dept 1990]).

We note that defendant lived and worked in China at all

times during the marriage; he has never filed any New York State income tax returns, and did not have a New York driver's license, own property in New York, vote in New York, perform jury duty, or have any bank accounts in New York. Even if the New York apartment were regarded as one of the parties' marital residences, "New York has long recognized that 'residence' and 'domicile' are not interchangeable" and "while a person can have but one domicile he can have more than one residence" (*Antone*, 64 NY2d at 28; *Senhart*, 4 Misc3d at 870).

Plaintiff's claim of abandonment is not supported by the record, and her remaining contentions are either unpreserved or unavailing.

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

ENTERED: MAY 14, 2015

CLERK

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

15091 The People of the State of New York, Ind. 4512/02
Respondent,

-against-

Steven Darbasie,
Defendant-Appellant.

_____

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

Steve Darbasie, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Brenda Soloff, J.), rendered June 12, 2003, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree, and sentencing him to a term of six years to life, unanimously affirmed.

The court properly denied summarily defendant's motion to controvert a search warrant. Defendant was not entitled to a *Franks/Alfinito* hearing (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]), because he failed to make the necessary "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the

warrant affidavit" (*Franks*, 438 US at 155-156). Defendant only challenged the veracity of the information provided to the police officer affiant by an undercover detective, and not that of the affiant himself (*see People v Slaughter*, 37 NY2d 596, 600 [1975]; *People v Solimine*, 18 NY2d 477 [1966]).

We perceive no basis for reducing the sentence.

We have considered and rejected the arguments raised in defendant's supplemental pro se brief.

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

ENTERED: MAY 14, 2015

CLERK

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

15093 In re Carol H.,
Petitioner-Appellant,

-against-

Shewanna H., et al.,
Respondents-Respondents.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for Shewanna H., respondent.

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

_____

Order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about May 27, 2014, which dismissed the petition by the subject children's maternal grandmother for custody of the children, and denied petitioner's motion for leave to amend the petition, unanimously affirmed, without costs.

Petitioner, who has no relationship with the children and has not seen them for more than four years, failed to meet her heavy burden of establishing "extraordinary circumstances" in support of her custody application (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]; *Matter of Jumper v Hemphill*, 75 AD3d 507 [2d Dept 2010], *lv denied* 15 NY3d 712 [2010]). The petition fails to allege facts sufficient to make out

extraordinary circumstances; thus, Family Court was not required to hold a hearing on the issue (*Matter of Stephon M. [William W.]*, 84 AD3d 497 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]).

The proposed amended petition does not cure the defects of the petition. Although it alleges that petitioner witnessed evidence of the unfitness of the children's mother "years ago," it does not allege that she took steps to gain custody at that time or even that she tried to see the children on a regular basis.

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

ENTERED: MAY 14, 2015

CLERK

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

15095 Waldemar Strojek, Index 107383/11
Plaintiff-Respondent, 591016/11
590917/12
-against- 590123/13

33 East 70th Street Corp.,
Defendant-Appellant.

[And Third-Party Actions]

_____

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for appellant.

Block, O'Toole & Murphy, LLP, New York (David L. Scher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 9, 2014, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability in this action where he sustained injuries when, while performing asbestos removal work in a building owned by defendant, he fell from a baker's scaffold. Plaintiff's testimony that he was standing on the scaffold working, and then woke up on the ground with the scaffold tipped over near him, established a prima facie

violation of the statute and that such violation proximately caused his injuries (*see Zengotita v JFK Intl. Air Term., LLC*, 67 AD3d 426 [1st Dept 2009]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]). That plaintiff could not remember how he fell does not bar summary judgment (*see Augustyn v City of New York*, 95 AD3d 683 [1st Dept 2012]). Nor does the fact that he was the only witness raise an issue as to his credibility where, as here, his proof was not inconsistent or contradictory as to how the accident occurred, or with any other evidence (*see Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 466 [1st Dept 2013]; *Weber v Baccarat, Inc.*, 70 AD3d 487, 488 [1st Dept 2010]).

In opposition, defendant failed to raise a triable issue of fact. The affidavit of its expert does not raise a triable issue as to the ceiling height and whether plaintiff could stand straight up as he claimed, since the expert's measurements were based on his inspection of the premises almost three years after the accident and asbestos removal work (*see Santiago v Burlington Coat Factory*, 112 AD3d 514, 515 [1st Dept 2013]). Furthermore, defendant submitted evidence acknowledging that it had erected storage crates in the room since the accident, and the expert did not provide measurements of the exact area where plaintiff fell. The expert's conclusion that the scaffold tipped over because

plaintiff was trying to move it while remaining on it and by using the wall or ceiling as leverage, is speculative and unsupported by the evidence (*see Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521 [1st Dept 2012]).

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

ENTERED: MAY 14, 2015

CLERK

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

15096 The People of the State of New York, Ind. 8213/99
Respondent,

-against-

Anthony Woods,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Anthony Woods, appellant pro se.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about August 17, 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: MAY 14, 2015

CLERK

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

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

15098 Sterling National Bank, Index 654357/13
Plaintiff-Appellant,

-against-

Deetown Entertainment, Inc.,
Defendant-Respondent.

_____

Amos Weinberg, Great Neck, for appellant.

Siegel & Reiner, LLP, New York (Richard H. DelValle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 19, 2014, which denied plaintiff's motion for summary judgment on its account stated cause of action, unanimously affirmed, without costs.

Plaintiff seeks summary judgment on an account stated claim based on its verified complaint alleging that an oral agreement was entered into between its assignor, Procare USA, LLC, and defendant Deetown, which acted through a fictional or nonexistent entity, Gramercy Medical Solutions. Although defendant's verified answer did not assert specific denials to any of the enumerated account items alleged in the complaint (CPLR 3016[f]), summary judgment was properly denied because defendant denied each of the allegations concerning the existence of a business

relationship between Deetown and Procare with respect to the unpaid items (*see Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34 [1st Dept 2004]; *Green v Harris Beach & Wilcox*, 202 AD2d 993 [4th Dept 1994]). Further, while plaintiff submitted a copy of a federal tax form 1099 issued to Procare by Deetown, which indicates that a business relationship did exist between those parties for some transactions, that form, by itself, does not establish that Deetown also undertook responsibility for payment of invoices addressed by Procare to Gramercy Medical Solutions.

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

ENTERED: MAY 14, 2015

CLERK

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

15101 The People of the State of New York, Ind. 6230/06
Respondent,

-against-

Yaindahi Milanes,
Defendant-Appellant.

_____

Jorge Guttlein & Associates, New York (Jorge Guttlein of counsel), for appellant.

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

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Order, Supreme Court, New York County (Larry R. Stephen, J.), entered March 22, 2012, as amended October 7, 2014, which denied defendant's CPL 440.10/440.20 motion to vacate a judgment of conviction rendered January 4, 2007 and set aside the sentence, unanimously affirmed.

Defendant's claim under *Padilla v Kentucky* (559 US 356 [2010]) is unavailing, because that decision has no retroactive application to this case (*People v Baret*, 23 NY3d 777 [2014]).

There is no basis for setting aside defendant's sentence. While the plea minutes establish that defendant pleaded guilty to attempted third-degree criminal possession of a controlled

substance, court records mistakenly indicated that the plea was to fourth-degree possession. Defendant received his promised sentence of probation, which was lawful under either of these class C felonies, and the motion court granted the only remedy necessary, which was a correction of the error in the records.

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

ENTERED: MAY 14, 2015

CLERK

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

15102N- Index 768000/08E
15103N In re Steam Pipe Explosion at 102536/08
41st Street and Lexington Avenue 590495/08

- - - - -

Marjorie Kane Talenti, also known as Margo Kane,
Plaintiff,

-against-

Consolidated Edison, Inc., et al.,
Defendants-Respondents,

The City of New York,
Defendant,

Team Industrial Services, Inc.,
Defendant-Appellant.

- - - - -

Consolidated Edison Company of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Team Industrial Services, Inc.,
Third-Party Defendant-Appellant,

The City of New York,
Third-Party Defendant.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Timothy R. Capowski of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Frances E. Bivens of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.),

entered December 24, 2014, which granted defendant Team Industrial Services, Inc.'s (TIS) motion to compel inspection of a confidential settlement agreement between plaintiff and defendant Consolidated Edison, Inc. (ConEd) to the extent of directing ConEd to produce the settlement agreement for in camera inspection by the court, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered January 22, 2015, which, following the court's in camera inspection of the subject settlement agreement, denied TIS's motion for production of such agreement upon finding the agreement contained no information material or necessary to its defense, unanimously affirmed, without costs.

TIS failed to demonstrate that disclosure of the subject confidential settlement agreement, pre-verdict, is material and necessary to its defense (*see* CPLR 3101; *Matter of New York County Data Entry Worker Prod. Liability Litig.*, 222 AD2d 381 [1st Dept 1995]; *see also Allstate Insurance Company v Belt Parkway Imaging, P.C.*, 70 AD3d 530 [1st Dept 2010]). TIS's reliance on statutory provisions, including General Obligations Law 15-108(a), CPLR 4533-b and 4545, in support of its argument that the confidential agreement should be produced pre-verdict is unavailing. These provisions are either inapplicable to a damage

award (*see* CPLR 4545), or are relevant only once a damage verdict in plaintiff's favor has been reached (*see* General Obligations Law § 15-108[a]; CPLR 4533-b; *Matter of Data Entry Worker Prod. Liability Litig.*, 222 AD2d at 382).

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

ENTERED: MAY 14, 2015

CLERK

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

15104N Dr. Kenneth E. Mc Culloch, doing business as McCulloch Orthopedic Surgical Services,
Plaintiff-Appellant,

-against-

Group Health Incorporated, also known as EmblemHealth, also known as GHI,
Defendant-Respondent.

Index 155939/13

_____

McCulloch Law Firm, New York (Kenneth J. McCulloch of counsel), for appellant.

Carlos G. Manalansan, New York, for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered November 20, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel the production of documents, unanimously modified, on the law and the facts, to compel the production of documents relevant to plaintiff's request number 16 insofar as it seeks reimbursement schedules of allowable charges for non-participating providers such as plaintiff, and otherwise affirmed, without costs.

This is an action to recover $14,722 in unpaid medical bills upon the theory of promissory estoppel. Plaintiff's requests 12 through 15 pertain to materials furnished to GHI employees instructing them to respond to benefit plan inquiries by other

physicians; payments made to other physicians; complaints by other physicians regarding payments; and documents related to reimbursement rates for in-network physicians. The motion court properly denied the motion to compel with respect to these requests, as these issues are not "in controversy" and would "hardly aid in the resolution of the question of [promissory estoppel]" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

Request number 16, i.e., documents related to the calculation of the reimbursement rates for the various Current Procedural Terminology codes that were used by plaintiff on his billings to GHI, however, is relevant to the actual injury sustained by plaintiff. Thus, defendant must produce the relevant schedules of allowed charges for the surgical procedures that plaintiff performed on his patient.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15105- Ind. 1348/06
15105A & The People of the State of New York,
M-1675 Respondent,

-against-

Albert Javier,
Defendant-Appellant.

_____

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at severance motion; Bonnie G. Wittner, J. at jury trial and sentencing), rendered January 16, 2007, as amended January 25, 2011, convicting defendant of criminal sale of a controlled substance in the first degree (four counts), criminal sale of a controlled substance in the second degree (three counts) and conspiracy in the second degree, and sentencing him to an aggregate term of 30 years, unanimously modified, on the law, to the extent of remanding for resentencing in accordance with this decision. Order, same court and Justice, entered on or about February 27, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's argument that the evidence was legally insufficient as to three of the drug sale counts because the corroboration requirement of CPL 60.22 was not satisfied 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]). With regard to the sales at issue, there is no basis for finding that the police informant could be viewed as an accomplice (*see People v Cona*, 49 NY2d 26, 35-36 [1979]). To the extent defendant is raising any other challenges to the sufficiency and weight of the evidence, we find them to be without merit.

Defendant's Confrontation Clause claim regarding lab reports that were received in evidence without objection is waived and unpreserved, and we decline to review it in the interest of justice; subsequent developments in the law do not excuse defendant's lack of objection (*People v Reynolds*, 25 NY2d 489, 495 [1969]). Defendant's claims regarding his severance motion and the court's handling of issues involving jurors are similar to arguments this Court rejected on a codefendant's appeal (*People v Council*, 98 AD3d 917 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013), and we reach the same conclusions here.

However, defendant's January 25, 2011 Drug Law Reform Act resentencing on his drug sale convictions was improper with regard to the court's direction that certain sentences that had been concurrent would become consecutive, and vice versa (*see People v Norris*, 20 NY3d 1068 [2013]). We remand the matter to the trial court for imposition, after compliance with any DRLA procedural requirements that may be applicable, of a sentence that comports with *Norris*.

M-1675 - *People v Javier*

Motion to file pro se supplemental brief denied.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15106 Carlos Coronado, Index 300748/11
Plaintiff-Appellant,

-against-

3479 Associates LLC,
Defendant-Respondent,

Raul A. Jovel,
Defendant.

_____

Peña & Kahn, PLLC, Bronx (Diane W. Bando of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP (Lindsay R. Kaplow of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered November 29, 2013, which, insofar as appealed from as limited by the briefs, granted the motion of defendant 3479 Associates LLC for summary judgment dismissing plaintiff's claims for negligent retention and supervision, unanimously affirmed, without costs.

The court properly dismissed plaintiff's claims that defendant was negligent in retaining and supervising defendant Raul A. Jovel, the superintendent of defendant's apartment building, who allegedly assaulted plaintiff tenant. Plaintiff's prior complaints that Jovel had used hostile language in

aggressively rebuffing plaintiff's request to fix the heating did not establish that defendant knew or should have known of Jovel's "propensity for the sort of conduct which caused the injury" (*Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]; *see Nouel v 325 Wadsworth Realty LLC*, 112 AD3d 493 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]). Plaintiff's reliance on his testimony that Jovel had previously brandished a large, metal keychain in a threatening manner, and that Jovel struck plaintiff's nose with the keychain during the subject incident, is unavailing in the absence of any evidence that defendant knew or should have known of Jovel's alleged prior conduct.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15107 In re Liliana C.,
Petitioner-Respondent,

-against-

Jose M.C.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

Ira Treuhaft, New York, for respondent.

Jay A. Maller, New York, attorney for the child.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about June 13, 2014, which, insofar as appealed from as limited by the briefs, after a hearing, granted petitioner mother's application for sole legal and physical custody of the subject child Ashley C., with visitation to respondent father, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for the court's determination that it was in the best interests of the child to award custody of her to the mother, consistent with the child's request. The father testified that the mother and he were unable to communicate or cooperate with each other, so joint

custody was not a feasible option (*see Braiman v Brahman,* 44 NY2d 584, 589-590 [1978]; *see also Bliss v Ach,* 56 NY2d 995, 998 [1987]). The father had moved out of state during the course of the proceedings, and an award of sole custody to him would have required uprooting the child from her home, sibling, friends and school, where she was doing well. Moreover, there is no support for the father's claim of gender bias on the part of the Referee (*see Seborovski v Kirshtein,* 117 AD3d 627 [1st Dept 2014]).

We have considered the father's remaining arguments, including his claim that he was afforded ineffective assistance of counsel, and find them unavailing.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15108 The City of New York, Index 450830/13
Plaintiff,

-against-

Gandhi Engineering, Inc.,
Defendant.

- - - - -

Gandhi Engineering, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Unicorn Construction Enterprises, Inc.,
Third-Party Defendant-Appellant.

_____

Sesti Law Firm PC, White Plains (Robert A. Sesti of counsel), for appellant.

Winget, Spadafora & Schwartzberg, LLP, New York (Anthony Green of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about October 28, 2014, which, to the extent appealed from, denied third-party defendant Unicorn Construction Enterprises, Inc.'s motion for summary judgment dismissing defendant/third-party plaintiff Gandhi Engineering, Inc.'s contractual indemnification claim against it, unanimously reversed, on the law, without costs, the motion granted and the third-party complaint dismissed. The Clerk is directed to enter judgment accordingly.

Unicorn entered into a contract with the City of New York to perform certain work on the 149th Street bridge over the Long Island Railroad tracks in Queens. Gandhi Engineering was the City of New York's contracted resident engineer on the bridge rehabilitation project, and claims to be a third-party beneficiary of Unicorn's contract with the City. The issue centers on whether Gandhi was an "Other Contractor" within the meaning of Unicorn's contract with the City, which Unicorn must indemnify for any damages arising from its acts or omissions. The indemnification provision relied on by Gandhi Engineering is found in paragraph 12.5.1 of Unicorn's contract. However, Article 12 of the contract, titled "Coordination With Other Contractors," clearly distinguishes between "Other Contractors" and the "Engineer," whose responsibility it is to coordinate the work of Unicorn with "Other Contractors." Accordingly, paragraph 12.5.1, when read in the context of Article 12, does not include

Gandhi Engineering as an "Other Contractor" whom Unicorn must indemnify, and Gandhi Engineering is not a third-party beneficiary of Unicorn's contract with the City.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15109 Starlite Media LLC, Index 114163/10
Plaintiff-Appellant,

-against-

Suzanne Pope,
Defendant-Respondent.

_____

Cullen and Dykman, Garden City (Kevin P. McDonough of counsel), for appellant.

Law Office of William B. Baier, Bohemia (William B. Baier of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 15, 2014, which, to the extent appealed from, denied plaintiff's cross motion for summary judgment dismissing defendant's counterclaim for unpaid commissions, unanimously affirmed, without costs.

It is true that plaintiff established that draws carried over from year to year and that defendant failed to raise a triable question of fact as to this issue. However, even if defendant's draw carried over, plaintiff could still owe her money, as admitted in the affidavit of one of its witnesses, if she was entitled to commissions on business that came in on her accounts after plaintiff terminated her. Plaintiff submitted evidence of industry custom, but defendant denied this at her

deposition, creating an issue of fact (*see generally Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013] [on summary judgment motion, "(t)he evidence will be construed in the light most favorable to the one moved against"]).

Plaintiff's argument that its cross motion should have been granted due to deficiencies in defendant's opposition, is unavailing (*see* CPLR 2001).

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15113 The People of the State of New York, Ind. 3769/07
Respondent,

-against-

Charles Nelson,
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 (Karen Schlossberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered December 12, 2011, as amended December 15, 2011, convicting defendant, upon his plea of guilty, of identity theft in the second degree and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and reducing the sentence to a term of one to three years, and otherwise affirmed.

Although defendant failed to preserve his claim that his New Jersey convictions do not qualify as predicate New York felonies, the case falls within the "narrow exception to the preservation rule permitting appellate review when a sentence's illegality is

readily discernible from the . . . record" (*People v Santiago*, 22 NY3d 900, 903 [2013]; *see also People v Samms*, 95 NY2d 52, 57 [2000]). The People do not dispute that defendant's New Jersey forgery conviction cannot serve as the basis for his second felony offender adjudication. As for defendant's New Jersey conspiracy conviction, it plainly fails to qualify as the equivalent of a New York felony, because in New York the crime underlying a felony conspiracy must be at least a class C felony Penal Law § 105.10), whereas New Jersey merely requires proof of a conspiracy to commit any "crime" (NJ Stat Ann § 2C:5-2[a]). The New Jersey statute thus includes conduct that could be either a felony or a misdemeanor in New York. Contrary to the People's contentions, this is readily discernible from the record, and does not require that this Court review the New Jersey accusatory instrument to discern whether the underlying crime was in fact a felony or misdemeanor. Such a review is permissible only when the foreign statute criminalizes specific, discrete acts, which

is not the case here (*see People v Muniz*, 74 NY2d 464, 467-469 [1989]).

We find it appropriate to modify the sentence rather than remanding for further proceedings.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15114 Marcus Otero, et al., Index 303702/07
Plaintiffs-Appellants,

-against-

Eial Faierman, M.D., et al.,
Defendants-Respondents,

Center for Orthopaedic Surgery, LLP,
doing business as Center for
Orthopaedic Surgery & Sports Medicine,
Defendant.

_____

Suckle Schlesinger PLLC, New York (Howard A. Suckle of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Milan P. Spisek of counsel), for Eial Faierman, M.D., respondent.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for Louis C. Rose, M.D. and Throgs Neck Multi Care, P.C., respondents.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza of counsel), for Sandeep Gupta, M.D. and Throgs Neck Urgent Medical Care, P.C., respondents.

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered October 16, 2013, dismissing plaintiffs' complaint as against defendants-respondents pursuant to an order, same court and Justice, entered September 17, 2013, which had granted defendants-respondents' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without

costs.

In this action, plaintiffs allege, among other things, that defendant doctors failed to diagnose an infection in plaintiff Marcus Otero's right knee. Defendants made a prima facie showing that they did not depart from good and accepted medical practice. Defendants submitted evidence, including testimony from experts in infectious diseases, showing that the infection was not present while plaintiff sought treatment from them, and that plaintiff did not exhibit the symptomology of an infection during such treatment, but rather exhibited the symptoms of a mechanical injury caused by a fall reported by plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]).

In opposition, plaintiff failed to submit evidence sufficient to raise a triable issue of fact (*see Alvarez*, 68 NY2d at 325). Plaintiff's expert's opinion was conclusory and unsupported by competent evidence (*see id.*; *see also Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]). In particular, plaintiff's expert failed to address that plaintiff had no symptomology that would indicate an infection, as opposed to a mechanical issue, such as a fever, pain to the skin on light touch, or a change in skin color. In addition, the expert failed to support his assertion that the infection was

present at the time of plaintiff's treatment with defendants (*id.*).

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

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Gische, JJ.

15117- Index 301377/11
15117A Hilton O. Suarez, et al.,
Plaintiffs-Respondents,

-against-

JPMorgan Chase Bank,
Defendant-Respondent-Appellant,

Goodsons Tremont, LLC,
Defendant,

McGuire's Service Corp.,
Defendant-Appellant-Respondent.

_____

Frenkel Lambert Weiss Weisman & Gordon, LLP, Bay Shore (Lawrence Lambert of counsel), for appellant-respondent.

White, Fleischner & Fino, LLP, New York (Walter Williamson of counsel), for respondent-appellant.

Zalman Schnurman & Miner PC, New York (Marc H. Miner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 27, 2014, which, to the extent appealed from as limited by the briefs, upon renewal, denied defendant McGuire's Service Corp.'s (McGuire's) motion for summary judgment and reinstated the complaint as against it, and otherwise adhered to the prior order, same court and Justice, entered July 15, 2013, denying defendant JP Morgan Chase Bank's (JPMC) motion for summary judgment seeking dismissal of the complaint as against it

and judgment on its cross claims for indemnification against McGuire's, unanimously affirmed, without costs. Appeal from the July 15, 2013 order, unanimously dismissed, without costs, as academic.

In this action for personal injuries allegedly sustained by plaintiff Hilton O. Suarez when he slipped and fell on ice in the parking lot of JPMC's bank branch located on East Tremont Avenue in the Bronx, there are questions of fact precluding an award of summary judgment to defendant McGuire's, the snow removal contractor. Specifically, there is an issue of fact as to whether McGuire's entirely displaced JPMC's obligation to maintain the premises safely (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Although the snow removal contract uses broad language suggesting that McGuire's "entirely absorb[ed]" JPMC's duty, there is evidence in the record that JPMC retained control over the snow removal services by directing

McGuire to stop using sand on the icy parking lot and to remove piles of snow from the premises (*Espinal*, 88 NY2d at 140-141).

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

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15121-
15122 In re Commissioner of Social
Services of the City of New York,
on behalf of Melvenia H.,
Petitioner-Respondent,

-against-

Juan H. M.,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

_____

Appeal from order, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 27, 2012, which granted petitioner's objection to the reduction of respondent's arrears to $100, vacated the September 20, 2012 support order, and reinstated the arrears in the amount of $1,104, unanimously dismissed, without costs. Order, same court and Judge, entered on or about June 4, 2013, which denied respondent's motion to vacate an order of support entered on or about January 10, 2011, on default, unanimously affirmed, without costs.

Respondent's June 20, 2013 notice of appeal from the December 27, 2012 order is untimely, and no explanation has been

offered for the untimeliness (*see* CPLR 5513; *Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642 [1st Dept 2013]).

As to the June 4, 2013 order, respondent failed to demonstrate both a reasonable excuse for his default and a meritorious defense (*see* CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Corp.*, 67 NY2d 138, 141 [1986]). Respondent proffered as an excuse that he was not served with notice of entry of the January 10, 2011 order. However, the court's files indicate that the order was mailed to him at the Rikers Island address that he had provided at the previous court appearance. In any event, respondent failed to demonstrate a meritorious defense to petitioner's claim that he was not entitled to an adjustment of the child support arrears that had accrued before the May 2012 filing of his petition for modification. The law is well settled that child support arrears cannot be modified retroactively (*see Matter of Dox v Tynon*, 90 NY2d 166, 173-174 [1997]). "There is no exception for arrears accrued during a

period of incarceration" (*Matter of Zaid S. v Yolanda N.A.A.*, 24 AD3d 118 [1st Dept 2005]).

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: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15123 Gentry T. Beach, et al., Index 603611/08
Plaintiffs-Appellants,

-against-

Touradji Capital Management, LP,
et al.,
Defendants-Respondents.

_____

Liddle & Robinson, L.L.P., New York (David I. Greenberger of counsel), for appellants.

O'Brien LLP, New York (Sean R. O'Brien of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 3, 2014, which granted defendants' motion for summary judgment dismissing plaintiffs' second cause of action alleging violations of article 6 of the Labor Law, unanimously affirmed, without costs.

The fact that the Labor Law claim was previously reinstated by this Court after having been dismissed by Supreme Court on a pre-answer motion to dismiss (85 AD3d 674 [1st Dept 2011]), does not preclude our review of it on this motion for summary judgment (*Moses v Savedoff*, 96 AD3d 466, 468 [1st Dept 2012] ["the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion"]).

Dismissal of the Labor Law claim was warranted since plaintiffs' unpaid extra compensation does not constitute "wages" under Labor Law § 190(1). Such compensation depended on factors other than their personal productivity, including the efforts of defendant Paul Touradji and a team of analysts (*see Truelove v Northeast Capital & Advisory*, 95 NY2d 220 [2000]; *Guiry v Goldman, Sachs & Co.*, 31 AD3d 70, 73 [1st Dept 2006]).

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15124 Herb Mauthner, Index 302289/09
Plaintiff-Respondent,

-against-

Dena Ray Mauthner,
Defendant-Appellant.

_____

Dobrish Michaels Gross, LLP, New York (David Elbaum of counsel), for appellant.

Goldweber Epstein LLP, New York (Aimee L. Davis of counsel), for respondent.

_____

Judgment of divorce, Supreme Court, New York County (Matthew F. Cooper, J.), entered January 24, 2013, to the extent appealed from as limited by the briefs, distributing the E-Trade account and Fidelity retirement accounts based upon their values at the date of the commencement of the action, unanimously affirmed, without costs.

In distributing the parties' assets, Supreme Court properly determined that the E-Trade account and Fidelity retirement accounts should be valued as of the date of the commencement of this action (see Domestic Relations Law § 236[B][4][b]; *McSparron v McSparron*, 87 NY2d 275, 287-288 [1995]). While passive assets are generally valued close to the date of trial, there are no strict rules mandating the use of particular valuation dates, and

the court's determination is reasonable in the circumstances (*see Greenwald v Greenwald*, 164 AD2d 706, 713 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]; Domestic Relations Law § 236[B][5]). Defendant's income is higher than plaintiff's, she was awarded the entirety of her UBS brokerage account of more than $1.6 million, and she shared in the money given to the parties by plaintiff's parents.

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15125 Bestin Realty, S.A., Index 602705/08
Plaintiff-Respondent,

-against-

SCI Claridge,
Defendant-Appellant.

_____

Law Offices of Lawrence H. Schoenbach, PLLC, New York (Lawrence H. Schoenbach of counsel), for appellant.

Teitler & Teitler, LLP, New York (Nicholas W. Lobenthal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 23, 2013, which denied defendant's motion to vacate a default judgment entered against it, unanimously affirmed, without costs.

The court properly denied defendant's motion to vacate the default judgment pursuant to CPLR 5015(a)(3), because defendant failed to show that plaintiff committed fraud in procuring the judgment. Rather, defendant attempted to show that there was fraud in the underlying transaction (*see Nichols v Curtis*, 104

AD3d 526, 529 [1st Dept 2013]; *Jericho Group, Ltd. v Midtown Dev., L.P.*, 47 AD3d 463 [1st Dept 2008], *lv dismissed* 11 NY3d 801 [2008]).

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15126 The People of the State of New York, Ind. 2943/12
Respondent,

-against-

Ronald Watkins,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about January 11, 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: MAY 14, 2015

CLERK

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

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15127N Bon LLC, Index 159575/14
Plaintiff-Appellant,

-against-

Fook Luk Realty Inc.,
Defendant-Respondent.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Barry J. Yellen, New York, for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 6, 2014, which denied plaintiff tenant's motion for a preliminary injunction seeking to compel defendant landlord to remove obstacles to obtaining a certificate of occupancy by constructing a second means of egress for the building's upper floors, and to consolidate the Civil Court non-payment proceeding with this action, unanimously affirmed, without costs.

Although the lease does not require defendant to obtain a certificate of occupancy or create a second means of egress, it states that the premises are to be used by plaintiff as a "[r]estaurant/bar with right to have a cabaret when cabaret license[] is issued." Plaintiff, seeking to compel defendant to

cure these deficiencies so as to enable the lawful operation of a cabaret, relies on the principle that, "'when premises are leased for an expressed purpose, everything necessary to the use and enjoyment of the demised premises for such expressed purpose must be implied where it is not expressed in the lease'" (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 256 [1st Dept 2009], quoting *Gans v Hughes*, 14 NYS 930, 931 [Brooklyn City Ct 1891]). While that is accurate as a general statement of the law, we agree with the motion court that, under the particular circumstances of this case, and as the record now stands, defendant is apparently "unable to create a second means of egress for the upper floors." Therefore plaintiff has not shown a likelihood of success on the merits at this stage.

Finally, in a commercial lease such as this, where the tenant has contractually agreed not to interpose counterclaims in

a summary proceeding, this provision of the lease may not be circumvented by consolidating the summary proceeding with a Supreme Court action for damages (*see 107-48 Queens Blvd. Holding Corp. v ABC Brokerage Inc.*, 238 AD2d 557, 557 [2d Dept 1997]).

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15128N 1995 Birchall Avenue LLC, Index 380198/14
Plaintiff-Appellant,

-against-

Lekhram Boodhoo, et al.,
Defendants-Respondents,

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

_____

Warner & Scheuerman, New York (Karl E. Scheuerman of counsel), for appellant.

Warren S. Hecht, Forest Hills, for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about August 14, 2014, which, inter alia, denied plaintiff's motion seeking the appointment of a temporary receiver, unanimously affirmed, without costs.

The court properly denied plaintiff's motion for the appointment of a temporary receiver pursuant to CPLR 6401. Plaintiff failed to make a clear evidentiary showing warranting the drastic remedy of appointment of a receiver (*see Moran v Moran*, 77 AD3d 443, 445 [1st Dept 2010]). Plaintiff's argument that it was it was not required to make the showing of necessity mandated by CPLR 6401(a) because the mortgage should be construed

under Real Property Law § 254(10) to authorize the appointment of a receiver, was not properly raised below (*see Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

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

ENTERED: MAY 14, 2015

CLERK

Friedman, J.P., Saxe, Richter, Manzanet-Daniels, JJ.

15129 In re Calvin B. Brooks, Ind. 1184/14
[M-1266] Petitioner,

-against-

Hon. Charles H. Solomon, etc.,
et al.,
Respondents.

_____

Calvin B. Brooks, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Charles H. Solomon, respondent.

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

_____

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

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

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

ENTERED: MAY 14, 2015

CLERK