SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 12, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Renwick, Feinman, JJ.

11248-
11248A & M-4053 — Index 113925/11

Sergey Ishin,
Plaintiff-Appellant,

-against-

QRT Management, LLC, et al.,
Defendants,

Michael Aksman, et al.,
Defendants-Respondents.

_____

Vladimir Matsiborchuk, New York, for appellant.

Litman, Asche & Gioiella, LLP, New York (Richard M. Asche of counsel), for Michael Aksman, respondent.

Goldberg & Fliegel, LLP, New York (Kenneth A. Goldberg of counsel), for Jon Bartner, respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 17, 2012, which granted defendant Jon Bartner's motion to dismiss the complaint as against him, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 17, 2012, which, to the extent appealed from, denied plaintiff's motion for a default judgment

against defendant Michael Aksman, and granted Aksman's cross motion to extend his time to answer, unanimously dismissed, without costs.

Plaintiff alleges that he was lured away from a higher paying job as an IT specialist to work for defendant QRT Management LLC as a computer programmer handling financial transactions, pursuant to a fixed two-year employment contract that provided for $120,000 in annual base salary and an annual guaranteed bonus of $60,000, and that he was terminated prematurely, following which QRT Management LLC failed to pay him the contracted-for prorated portion of his guaranteed bonus.

The employment agreement and the termination letter, which identify QRT Management LLC as plaintiff's employer and the obligor on his claim for his guaranteed earned bonus, conclusively refute plaintiff's claim that defendant Bartner owed him a duty based in contract (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Bartner was not a party to the employment agreement, and plaintiff does not allege that he either assumed a duty owed by QRT Management LLC to plaintiff or acted in other than his corporate capacity, such as for personal gain, when he allegedly participated in breaching the contract (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [1st Dept 2002]; *M. Paladino, Inc. v Lucchese & Son Contr. Corp.*,

247 AD2d 515 [2d Dept 1998]). Nor does the employment agreement provide for a fixed term of employment; it states that the guaranteed bonus will be paid "only so long as the individual is employed" (*see Talansky v American Jewish Historical Socy.*, 8 AD3d 150 [1st Dept 2004]).

Plaintiff's claim that he is entitled to recover unpaid compensation pursuant to article 6 of the Labor Law fails because, as a professional who earned in excess of $900 a week, he is not covered by the statute (Labor Law § 190[7]).

Plaintiff's submissions in support of his motion for leave to amend the complaint fail to establish merit in the additional causes of action for quantum meruit, unjust enrichment and violation of the Delaware Wage Payment and Collection Act (19 Del Code § 1101 *et seq.*) (*see Hynes v Start El.*, 2 AD3d 178, 181-182 [1st Dept 2003]). The proposed quantum meruit claim is not supported by the requisite allegations that Bartner expressly consented, or otherwise assumed an obligation, to pay plaintiff (*see M. Paladino*, 247 AD2d at 515-516). The proposed quantum meruit and unjust enrichment claims fail to state a cause of action in the absence of allegations establishing either that Bartner stood to gain personally from the services plaintiff rendered or that he acted in other than his corporate capacity (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st

Dept 2011], *affd* 19 NY3d 511 [2012]). Further, there are no allegations that would support piercing the corporate veil (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]).

The proposed cause of action under the Delaware Wage Payment and Collection Act fails for lack of allegations establishing that plaintiff was an "employee" within the meaning of the Act, i.e., that he was a "person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein" (19 Del Code § 1101[a][3]).

M-4053 *Sergey Ishin v QRT Management, LLC*

Motion for severance denied as academic, the claim against defendant Aksman having been discharged by a bankruptcy decree and discharge order of March 7, 2014.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

15746 The People of the State of New York, Respondent, Ind. 1800N/11

-against-

Apina Graves, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 13, 2013, convicting defendant, after a jury trial, of five counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of four years, unanimously reversed, on the law, and the matter remanded for a new trial.

The People failed to show there was an overriding interest that was likely to be prejudiced by the undercover police officer's open-court testimony. Thus, the trial court erred in partially closing the courtroom, infringing upon defendant's right to a public trial (*see People v Echevarria*, 21 NY3d 1, 12-13 [2013], cert denied — US —, 134 SCt 823 [2013]; *People v Martinez*, 82 NY2d 436, 443 [1993]). At the *Hinton* hearing, the

officer acknowledged that although he was still engaged in undercover narcotics work, he had been assigned to the Bronx for over a year and was no longer working in Brooklyn, where the charged sales had occurred. The undercover officer noted there was a possibility he could return to Brooklyn, but conceded that it was based on mere "[t]alks" among his workplace "[p]eers." He testified that this was the only case he had in Manhattan, and that he never had seen any of his unapprehended subjects in the Manhattan courthouse except for defendant.

The sparse *Hinton* hearing testimony in this case does not suffice to establish the requisite nexus between the undercover officer's safety concerns and his testifying in open court in Manhattan (*see Echevarria*, 21 NY3d at 13). Here, the testimony only established that the undercover generally feared for his safety, and did not contain enough specificity to show an ongoing connection either to the area where defendant was arrested or the courthouse where the trial occurred (*see Echevarria*, 21 NY3d at 12; *Martinez*, 82 NY2d at 443-444).

The undercover failed to identify any specific threats from defendant or his family, or to establish that "associates of defendant or targets of investigation" were likely to be present in the courtroom (*see People v Ramos*, 90 NY2d 490, 498 [1997], cert denied, 522 US 1002 [1997], quoting *Martinez*, 82 NY2d at

443). Finally, the People's brief mentions that this case was being prosecuted by Special Narcotics which has citywide jurisdiction, but the testimony at the *Hinton* hearing did not develop this issue or explain how it would affect the officer's safety concerns.[1]

In light of this disposition, we decline to reach defendant's other arguments.

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

ENTERED: NOVEMBER 12, 2015

CLERK

[1]On the retrial, the court can conduct a new *Hinton* hearing based on the circumstances and the officer's work assignments at the time of the retrial.

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

16053 Modou Jallow, Index 156160/12
Plaintiff-Appellant,

-against-

Luis Siri, et al.,
Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about August 12, 2014, which granted defendants' motion for summary judgment dismissing the complaint based on the lack of a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants made a prima facie showing of a lack of a "permanent consequential" or "significant" limitation of use of plaintiff's left knee and lumbar spine (Insurance Law § 5102[d]), by submitting their orthopedist's report finding full range of motion in those body parts (*see Clementson v Price*, 107 AD3d 533, 533 [1st Dept 2013]), and by submitting the affirmed report of their radiologist who opined that the MRIs of those parts showed only degenerative conditions (*see id.*).

Plaintiff in turn raised a triable issue of fact as to whether he sustained a serious injuries of the left knee and lumbar spine sufficient to defeat the motion (*see Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]; *Malloy v Matute*, 79 AD3d 584, 584-585 [1st Dept 2010]; *Morris v Ilya Cab Corp.*, 61 AD3d 434 [1st Dept 2009]). Plaintiff, a 24-year-old male, had no history of injury to the knee or back prior to the accident on May 2, 2012. A July 25, 2012 MRI of plaintiff's spine revealed a herniation at the level of L5-S1. A July 2, 2012 MRI of plaintiff's knee revealed a "tear of the undersurface of the posterior horn of the medial meniscus," a "high grade partial tear of the anterior cruciate ligament," and "partial tears of the . . . lateral collateral ligaments." Plaintiff underwent arthroscopic surgery four months after the accident to repair the medial meniscal tear (*see Malloy*, 79 AD3d at 584-585).

Plaintiff's treating physiatrist and expert, Dr. Goldenberg, and his expert orthopedic surgeon, Dr. McMahon, opined that plaintiff's injuries were traumatically induced as a result of the accident, directly controverting defendants' experts' opinions that plaintiff's injuries were degenerative in origin and/or resolved.

Dr. Goldenberg opined that "[t]he fact that [plaintiff] continues to suffer from pain and limitation in motion after

lengthy physical therapy indicates that his injuries and limitations are permanent." Dr. McMahon concurred that "[t]he fact that [the plaintiff] remains symptomatic to the point where he continues taking oral analgesics and wears a left knee brace, even after receiving ongoing physical therapy for a year, supports my opinion that his injuries are permanent." By ascribing plaintiff's lumbar spine and left knee injuries to a different, yet equally plausible cause, the affirmations of plaintiff's experts suffice to raise an issue of triable fact (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]; *Biascochea v Boves*, 93 AD3d 548 [1st Dept 2012]; *Williams v Perez*, 92 AD3d 528 [1st Dept 2012]; *Grant v United Pavers Co., Inc.*, 91 AD3d 499 [1st Dept 2012]).

The affirmed reports of plaintiff's experts were admissible concerning the injuries to the left knee and lumbar spine, even though relying in part on unsworn contemporaneous MRI reports (*see Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]; *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288, 288 [1st Dept 2008]). The MRI reports may be considered for the further reason that they were reviewed by defendants' experts in preparing their reports and submitted by defendants in support of their motion (*see Johnson v KS Transp. Inc.*, 115 AD3d 425 [1st Dept 2014]).

We have considered and rejected defendants' further arguments. We note that where a plaintiff has raised a triable issue of fact as to whether certain injuries constitute "serious injury" under the statute, he is also entitled to seek damages for other injuries caused by the accident that might not otherwise satisfy the statutory threshold (*see Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]; *Caines*, 105 AD3d at 404).

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16088 Taylor Fauntleroy, Index 112461/11
Plaintiff-Appellant,

-against-

EMM Group Holdings LLC,
Defendant,

Darin Hill, et al.,
Defendants-Respondents.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant.

Cascone & Kluepfel, LLP, Garden City (James F. Desmond Jr. of counsel), for Darin Hill, respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Gregg Scharaga of counsel), for Sutol Operating Company LLC, respondent.

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Geoffrey H. Pforr of counsel), for All Season Protection of NY LLC, respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 11, 2014, which granted the motions of defendants Darin Hill, All Season Protection of NY LLC d/b/a All Season Protection Services, Inc. (All Season), and Sutol Operating Company LLC (Sutol) for summary judgment dismissing plaintiff's complaint against them, unanimously reversed, on the law, without costs, and the motions denied.

Defendants' motions for summary judgment should have been

denied in this action alleging that plaintiff sustained personal injuries in an altercation with defendant Hill, a security guard employed by defendant All Season, at a nightclub operated by defendant Sutol. Hill's self-defense claim was not established as a matter of law. Issues of fact are presented regarding whether Hill was justified in punching plaintiff in the face in view of what occurred immediately preceding the punch, and as to whether Hill's response was excessive. The rule that "[d]etached reflection cannot be demanded" (*Dupre v Maryland Mgt. Corp.*, 283 App Div 701, 701 [1st Dept 1954] [internal quotation marks omitted]) does not preclude a possible finding that Hill's conduct was unjustified or excessive.

An employer may be vicariously liable for its employees' negligent or intentional tortious conduct (*see RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 164 [2004]; *Riviello v Waldron*, 47 NY2d 297, 304 [1979]), so long as the employees' acts were committed in furtherance of the employer's business (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *Adams v New York City Tr. Auth.*, 88 NY2d 116, 119 [1996]). When businesses hire security guards or bouncers to maintain order, the physical force used by those bouncers may be within the scope of their employment (*see Babikian v Nikki Midtown, LLC*, 60 AD3d 470, 471 [1st Dept 2009]). Here, plaintiff's claims against

Sutol and All Season based on respondeat superior should not have been dismissed at this juncture, as the evidence shows that Hill was acting within the scope of his employment when he punched plaintiff.

Sutol's contract with All Season does not necessarily protect it against liability. In *Vargas v Beer Garden, Inc.* (15 AD3d 277, 278 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005]), on which Sutol relies, the claim against the nightclub for an assault by a security guard was dismissed *at the close of evidence at trial*, on the ground that the evidence failed to establish that the nightclub exercised sufficient control over the security guards on its premises to render it their special employer. Here, the deposition testimony that the nightclub's managers exerted "full control" over the security guards creates an issue that must await trial, regarding whether Sutol exercised the requisite degree of control over the security guards to be liable for Hill's actions.

Determination of plaintiff's remaining claim for negligent training should similarly await the presentation of evidence at trial.

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16102-
16103 The People of the State of New York, Ind. 1037/12
Respondent,

-against-

Jermaine Daniels,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Jill Konviser, J.), rendered on or about October 23, 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: NOVEMBER 12, 2015

CLERK

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

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16104- Index 302305/11
16105-
16105A Melvin L.J. Arzuaga, Jr.,
Plaintiff-Appellant,

-against-

Marin Tejada,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Law Offices of Nancy L. Isserlis, Long Island City (Robert E. Giovinazzi of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 2, 2015, dismissing plaintiff's complaint, unanimously affirmed. Appeals from order, same court (Laura G. Douglas, J.), entered June 2, 2014, which granted defendant's motion for summary judgment dismissing the complaint based upon plaintiff's failure to comply with a self-executing preclusion order, and denied plaintiff's cross motion to, among other things, vacate the preclusion order, and order, same court (Alison Y. Tuitt, J.), entered October 17, 2014, which granted defendant's motion for summary judgment dismissing the complaint based on the preclusive effect of a prior order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court (Douglas, J.), correctly denied plaintiff's cross motion to vacate the self-executing preclusion order, as plaintiff failed to provide a reasonable excuse for his failure to appear at defendant's five separately scheduled medical examinations (IMEs), two of which occurred after the issuance of the preclusion order in July 2013 (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). Plaintiff's claimed lack of knowledge of the scheduled medical examinations is unreasonable, especially since he failed to indicate any efforts he made to stay in contact with his counsel from "the beginning of 2013" until November 2013, despite the existence of two court orders, issued in 2011 and 2012, directing that he appear for his medical examination. Plaintiff does not deny that he was aware of those orders. His counsel also failed to confirm his assertions that he had no contact with his counsel, or that they mailed medical examination notices to plaintiff's mother's address.

Plaintiff also failed to show the existence of a meritorious claim (*see Gibbs*, 16 NY3d at 80). Plaintiff failed to submit an affidavit of merit, and the only evidence he submitted as proof of defendant's liability was a police accident report containing his hearsay statement as to how the accident happened. This is insufficient to demonstrate a meritorious cause of action (*see Raposo v Robinson*, 106 AD3d 593, 593 [1st Dept 2013]).

Given plaintiff's failure to satisfy the two-prong test for vacating a preclusion order (*see Gibbs*, 16 NY3d at 80), the motion court (Douglas, J.), correctly granted defendant's motion for summary judgment dismissing the complaint. As the court noted, the preclusion of any testimony as to plaintiff's medical condition rendered him unable to establish a prima facie case (*see Samuels v Montefiore Med. Ctr.*, 49 AD3d 268, 268 [1st Dept 2008]).

In light of this holding, it is unnecessary to determine whether the motion court (Tuitt, J.), correctly granted defendant's motion for summary judgment based on the preclusive effect of a prior order of the Kings County Supreme Court.

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, J.J.

16106 In re Kougne T.,
Petitioner-Respondent,

-against-

Mamadou D.,
Respondent-Appellant,

_____

Carol L. Kahn, New York, for appellant.

Anne Reiniger, New York, for respondent.

Andrew J. Baer, New York, attorney for the children.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about October 28, 2014, which, after a hearing, awarded sole custody of the subject children to petitioner mother with visitation to respondent father, unanimously affirmed, without costs.

The determination that it was in the children's best interests to award full custody to the mother, with visitation the father, has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Ernestine L. v New York City Admin. For Children's Servs.*, 71 AD3d 510 [1st Dept 2010]). The Referee correctly considered, among other things, the mother's role as primary caretaker, the father's lack of participation in the children's educational and medical care,

his history of domestic violence against the mother, his lack of suitable housing, and his failure to take advantage of previous court-ordered visitation (*see Matter of Xiomara M. v Robert M.*, 102 AD3d 581 [1st Dept 2013]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16107 Xiong Ping Tang, et al., Index 112983/11
Plaintiffs-Appellants,

-against-

Jonathan Marks,
Defendant-Respondent.

_____

Goldberger & Dubin, P.C., New York (Renee M. Levine of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini, LLP, New York (Noah Nunberg of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about June 25, 2014, which granted defendant's motion for summary judgment and dismissed plaintiffs' complaint, deemed an appeal from judgment, same court and Justice, entered August 8, 2014, and so considered, said judgment unanimously affirmed, without costs.

Defendant Marks, an attorney, represented plaintiffs in an underlying federal court action in which plaintiffs were found strictly liable under the Lanham Act, and in which the federal court entered a $400,000 judgment against them. Plaintiffs subsequently brought a legal malpractice and breach of contract action against Marks, claiming that, but for Marks's negligence, plaintiffs would have faced a lower judgment.

To sustain a cause of action for legal malpractice, a

plaintiff must show "(1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). "In order to establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, she would have *prevailed* in the underlying matter or would not have sustained *any* ascertainable damages" (*id.* [emphasis added]). "[S]peculation on future events [is] insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any such loss" (*id.* at 734-735).

Here, as plaintiffs were admittedly strictly liable in the underlying federal action, they are unable to show that they would have prevailed and that they would not have sustained any ascertainable damages.

Plaintiffs' cause of action for breach of contract was properly dismissed as duplicative of the legal malpractice claim, since it arose out of the same set of facts as the alleged legal malpractice and did not involve distinct, additional damages (*Lusk v Weinstein*, 85 AD3d 445, 446 [1st Dept 2011], *lv denied* 17

NY3d 709 [2011]).

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

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16108 Vincent Joseph Melapioni, Jr., Index 111974/11
Plaintiff-Appellant,

—against—

Lisa Melapioni, now known
as Lisa Astorino,
Defendant-Respondent.

_____

Meyers Tersigni Feldman & Gray LLP, New York (Anthony L. Tersigni of counsel), for appellant.

Crawford Bringslid Vander Neut, LLP, Staten Island (Allyn J. Crawford of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered April 15, 2014, which, after a nonjury trial, dismissed the complaint with prejudice, unanimously affirmed, without costs.

The trial court correctly found that plaintiff failed to satisfy his burden of proof as to misappropriation and conversion and an accounting. Plaintiff argues that defendant, his mother, should have borne the burden of proving that she did not make an irrevocable gift to him of two bonds she received in connection with her 1993 divorce from his father, when plaintiff was three years old. He contends that the burden of proof was properly defendant's by virtue of the fiduciary relationship between parent and child. However, plaintiff failed to establish, as he

alleged in the complaint, that defendant "was entrusted with bonds that were deposited in a custodial account for [his] benefit" (*see Stevens v St. Joseph's Hosp.*, 52 AD2d 722, 722-723 [4th Dept 1976] ["The basis for an equitable action for accounting is the existence of a fiduciary or trust relationship respecting the subject matter of the controversy"]).

There is no basis for disturbing the trial court's determination, especially since its findings of fact were based, in large part, on an assessment of the witnesses' credibility (*see Watts v State of New York*, 25 AD3d 324 [1st Dept 2006]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16110 The People of the State of New York, Respondent, Ind. 5221/12

-against-

Richard C., Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about October 23, 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: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16112-
16113 Sealink Funding Limited,
Plaintiff-Appellant,

-against-

Morgan Stanley, et al.,
Defendants-Respondents.

- - - - -

Sealink Funding Limited,
Plaintiff-Appellant,

-against-

UBS AG, UBS Americas Inc., et al.,
Defendants-Respondents.

Index 650196/12
653102/12

Bernstein Litowitz Berger & Grossman LLP, San Diego, CA (Timothy A. DeLange of the Bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for Morgan Stanley, Morgan Stanley & Co., Inc., Morgan Stanley ABS Capital I Inc., Morgan Stanley Capital I Inc., Morgan Stanley Mortgage Capital Inc., and Morgan Stanley Mortgage Capital Holdings LLC, respondents.

Skadden, ARPS, Slate, Meagher & Flom LLP, New York (Christopher Malloy of counsel), for USB AG, UBS Americans Inc., USB Realty Securities LLC and Mortgage Asset Securitization Transactions, Inc., respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 18, 2014, and order, same court (Charles E. Ramos, J.), entered July 14, 2014, which granted defendants' respective motions to dismiss the complaints, unanimously affirmed, with costs.

These fraud actions, commenced by the assignee of certain residential mortgage-backed securities (RMBS) certificates, were correctly dismissed for lack of standing. The initial purchasers of the RMBS certificates (Phase 1) were certain Irish special purpose vehicles (Irish SPVs); they purchased approximately $507 million worth of RMBS that the Morgan Stanley defendants (Morgan Stanley) underwrote between 2005 and 2007, and about $158 million in RMBS certificates that the UBS defendants (UBS) underwrote in 2006 and 2007. The Irish SPVs then assigned the certificates to certain Cayman Islands SPVs (Phase 2), before the Cayman SPVs assigned them to plaintiff in June 2008 (Phase 3).

The Sale and Purchase Agreements (SPAs), dated June 7, 2008, applicable to the assignment of the Cayman SPVs to plaintiff provide that "[t]he Seller with full title guarantee and as beneficial owner hereby agrees to sell, and the Purchaser hereby agrees to purchase, each Asset at a price equal to the relevant Asset Purchase Price, on the terms and subject to the conditions of this Agreement." "Asset" is defined as "each of the assets listed in Schedule 1"; Schedule 1 to each of the SPAs lists the RMBS certificates at issue. The Master Definitions Schedule, in the Master Framework executed the same day as the SPAs, provides that "Asset has the meaning given to it in Clause 1 (*Definitions*) of each [SPA]." Under "Principles of Interpretation and

Construction," the Master Framework provides that "'assets' includes present and future properties, revenues and rights of every description." The issue is whether, under English law, the foregoing provisions effectively transferred tort claims to plaintiff.

There is no express assignment of tort claims in the SPAs. Contrary to plaintiff's contention, the above-cited language, "present and future properties, revenues and rights of every description," reveals no identifiable intention to include tort claims (*see Tailby v Official Receiver*, [1888] 12 App Cas 523, 525 [HL]). Moreover, UBS's legal expert, Bankim Thanki, Q.C., opined that "[s]ave perhaps in the most exceptional circumstances, an English court is very unlikely to find [that] an equitable assignment of a cause of action associated with an asset has taken place where there is a contract governing the transfer of that asset, and yet no words of that contract refer to 'claims', 'legal rights of action' or 'sums of money recoverable' or some similar language." Indeed, it is not credible that these sophisticated parties, represented by counsel, intended to transfer legal claims without expressly mentioning that intent in any of the hundreds of pages of their agreements (*see Allied Carpets Group Plc v MacFarlane*, [2002] EWHC 1155 [TCC] [Queens Bench], ¶35; *cf. Commonwealth of*

Pennsylvania Public School Employees' Retirement Sys. v Morgan Stanley & Co., 25 NY3d 543 [2015]). That the right to bring tort claims had been expressly conveyed in the 2004 Master Framework related to Phase 2 (the Irish SPVs' transfer of the certificates to the Cayman SPVs) supports our conclusion that the omission of such claims from the Phase 3 SPAs was intentional.

Nor is the Master Framework's broad language ambiguous as to the assignment of the tort claims. First of all, plaintiff's argument on this point is not preserved because it is raised for the first time on appeal. In any event, the provision of the Master Framework at issue, the other relevant provisions of the Master Framework, and the SPAs, read together, clearly indicate that the only assets being transferred are the certificates themselves (*see Procter & Gamble Co. v Svenska Cellulosa Aktiebolaget SCA*, [2012] EWCA (Civ) 1413, ¶ 22 ["the Agreement, considered as a whole, is not reasonably capable of being given two possible meanings"]).

Despite plaintiff's argument that we should view the case in light of the "commercial context" of the transaction and "business common sense," we do not find an implied assignment of legal claims. Taking into account business common sense does not "mean that one can rewrite the language which the parties have used in order to make the contract conform to business common

sense" (*Rainy Sky S.A. v Kookmin Bank*, [2011] UKSC 50, [2011] 1 WLR 2900). Further, in the above-cited *Procter & Gamble*, [2012] EWCA (Civ) 1413, at ¶ 22), a unanimous panel of the English Court of Appeal squarely rejected the "commercial context" argument of plaintiff's expert. It is reasonable to conclude that, because the parties' unambiguous Phase 3 agreements do not expressly transfer legal claims to plaintiff, the parties did not intend to transfer legal claims to plaintiff (*see Attorney General of Belize v Belize Telecom Ltd.*, [2009] UKPC 10, [2009] 1 WLR 1988).

We reject plaintiff's argument that an assignment can be implied on the ground that the possibility of suing defendants was foreseeable. Plaintiff cites an unrelated case indicating that investors were not yet on notice, for statute of limitations purposes, of RMBS fraud claims against Morgan Stanley in July 2008, one month after the Phase 3 assignment from the Cayman SPVs to plaintiff in this action (*Allstate Ins. Co. v Morgan Stanley*, 2013 NY Slip Op 31130[U] [Sup Ct New York County 2013], *affd* 117 Ad3d 546 [1st Dept 2014]). However, notice of a claim for New York statute of limitations purposes is not the same as an awareness that one might seek to pursue claims at some future time, which is all that foreseeability under English law requires. Plaintiff itself alleges that the Phase 3 transfers were part of a "bad bank" strategy intended to isolate the

"toxic" RMBS at issue and that it is a "special purpose vehicle that was established to receive, hold, and manage toxic RMBS assets, including the Certificates." Thus, plaintiff cannot credibly argue that it did not foresee that it might want to pursue claims in connection with the "toxic" certificates it purchased.

For the reasons underlying our rejection of the implied assignment arguments, we will not infer an assignment of legal claims based on the parties' conduct. *Coulter v Chief Constable of Dorset Police* ([2004] 1 WLR 1425 [Chancery Division]), and *Ifejika v Ifejika* ([2010] EWCA (Civ) 563), upon which plaintiff places much reliance, are factually distinguishable. *Coulter* concerned the equitable assignment of a judgment debt from a former chief constable of the Dorset police to the then-current chief constable. In that case, the court held that the debt was assigned to the chief constable's successor even without a written contractual assignment because the former chief held the payment of the debt in trust for his successor. Thus, *Coulter* is sui generis and not relevant to the situation presented here. In *Ifejika*, which involved a design infringement dispute between brothers over a contact lens cleaning device, the court found only the possibility of an equitable assignment absent a written agreement; however, although the court allowed the matter to go

to trial, it did not determine if there had actually been an equitable assignment. By contrast, this case presents written agreements drafted by counsel in a highly complex transaction between sophisticated parties. Likewise, there exists a previous 2004 Master Framework that did expressly transfer legal claims.

We also find that legal claims were not transferred in Phase 2. Those transfers were effectuated pursuant to trade tickets or sales confirmations or both, which make no reference to the assignment of tort claims. We have already rejected plaintiff's "commercial context" and "business common sense" arguments.

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: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16115 The People of the State of New York, Ind. 2726/13
Respondent,

-against-

Leonardo Medina,
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 (Malancha Chanda 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 (Michael Obus, J.), rendered on or about April 22, 2014,

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

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16116 In re Blue Star Properties, Inc., Index 101626/13
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Jerome Corbett,
Intervenor-Respondent-Respondent.

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Gary R. Connor, New York (Maria I. Doti of counsel), for New York State Division of Housing and Community Renewal, respondent.

Manhattan Legal Services, New York (Rosalind Black of counsel), for Jerome Corbett, respondent.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered October 28, 2014, which denied the petition seeking to annul and vacate the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated October 11, 2013, which found that intervenor-respondent Jerome Corbett was entitled to succeed to the rent-controlled apartment formerly occupied by his aunt, and dismissed this article 78 proceeding, unanimously affirmed, without costs.

Respondent agency's determination that Jerome Corbett

established entitlement to succeed to a rent-controlled apartment lease to his late aunt, Retha Harris, as a nontraditional family member, is supported by a rational basis and not arbitrary and capricious (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

Corbett established entitlement to succeed to his late aunt's rent-controlled tenancy as a nontraditional family member (*see* 9 NYCRR 2204.6[d][3][i]; *WSC Riverside Dr. Owners LLC v Williams*, 125 AD3d 458 [1st Dept 2015], *lv dismissed* 25 NY3d 1221 [2015]). Corbett lived with his aunt, Retha Harris, for 25 years, had an intimate relationship with her that more closely resembled the bond between a mother and her adult child, was her primary caregiver, attending to all her needs, including bathing and dressing her, giving her insulin injections, and taking her to the doctor.

It is undisputed that Corbett established five of the eight factors to be considered in determining the existence of an "emotional and financial commitment and interdependence" with his aunt (9 NYCRR 2204.6[d][3][i]). Petitioner does not deny that Corbett has shown, via his testimony and that of family members and friends, a long-standing relationship, and that he and his aunt engaged in family-type activities, held themselves out as family members, regularly performed family functions together,

and engaged in other behavior evidencing the intent to create a long-term emotionally-committed relationship (*id.*).

We find that Corbett also established two additional factors, that he and his aunt shared household expenses and relied upon each other for the same, and that they intermingled finances. The uncontroverted testimony establishes that Corbett regularly paid the telephone and cable bills, purchased groceries and furniture for the household, performed repairs for the apartment, and, during the more than one-year period when Corbett's aunt had no income, took care of most of the household expenses (*cf. Fort Wash. Holdings, LLC v Abbott,* 36 Misc3d 11 [App Term, 1st Dept 2012], *affd* 119 AD3d 492 [1st Dept 2014]).

Corbett's failure to establish the final factor, the formalization of legal obligations (9 NYCRR 2204.6[d][3][i][e]) is not determinative (*see* 9 NYCRR 2204.6 [d][3][i]; *WSC Riverside Dr. Owners LLC,* 125 AD3d at 459). "[T]he presence or absence of one or more of [the factors] is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should . . . control" (*Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 213 [1989]; *see also RHM Estates v Hampshire*, 18 AD3d 326 [1st Dept 2005]).

Moreover, DHCR's interpretation of the regulations which it administers is entitled to deference (*see Matter of Gaines v New*

York State Div. of Hous. & Community Renewal, 90 NY2d 545, 548-549 [1997]) and the hearing officer's credibility findings are entitled to great weight (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The hearing officer's 15-page report reflects that she considered the totality of the circumstances, including the overwhelming emotional and family-like bond, and the witnesses' demeanor while testifying, in determining credibility issues and the existence of financial interdependence. The hearing officer's expression of compassion in reaching her conclusions should not be confused with bias (*see generally Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 418-421 [1st Dept 2013]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Andrias, Moskowitz, JJ.

16117- Index 40000/88
16118- 190441/12
16119 In re New York City Asbestos Litigation

- - - - -

Mary Anne McCloskey, etc.,
Plaintiff-Respondent.

-against-

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

Cleaver-Brooks, Inc.,
Defendant-Appellant.

_____

Pillsbury Winthrop Shaw Pittman, LLP, New York (David G. Keyko of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Jerry Kristal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered June 13, 2014, which denied defendant Cleaver-Brooks, Inc.'s (defendant) motion to vacate a recommendation of the Special Master, dated November 9, 2013, directing it to produce certain documents, and for a protective order, and confirmed the recommendation, unanimously affirmed, without costs. Order, same court and Justice, entered December 19, 2014, which, insofar as appealed from as limited by the briefs, upon defendant's motion for clarification, directed defendant to produce all its commercial files, all other relevant documents

and records, and its index card database, and denied its applications for a confidentiality order and cost sharing, unanimously modified, on the law and the facts and in the exercise of discretion, to require production of all documents that reference or otherwise mention asbestos or asbestos-containing products, components or parts used on, in or in conjunction with or as replacement parts for its boilers, and to grant defendant's application for a confidentiality order, and otherwise affirmed, without costs.

The June 13, 2014 order properly required defendant to produce all documents that reference or otherwise mention asbestos or asbestos-containing products, components or parts used on, in or in conjunction with or as replacement parts for its boilers, as plaintiffs had expressly requested.

The December 19, 2014 order, which directs defendant to produce the entirety of its commercial files and "all other relevant documents and records, *including but not limited to* commercial records, boiler drawings, designs and specifications, correspondence, and installation and maintenance reports," is overbroad. As plaintiff counsel stated in related New York City Asbestos Litigation (NYCAL), diagrams of, for example, "metal screws," "a hinge," "electronic wiring," or any other "part having nothing to do with any issue in these cases" are not

relevant. Accordingly, we modify the December 19, 2014 order to require defendant to produce all documents that reference or otherwise mention asbestos or asbestos-containing products, components or parts used on, in or in conjunction with or as replacement parts for all boilers it manufactured or sold.

Defendant made the "minimal" showing in support of its application for a confidentiality order (*see Jackson v Dow Chem. Co.*, 214 AD2d 827, 828 [3d Dept 1995]), and plaintiffs failed to show that such an order would in any way hinder discovery. We thus remand to Supreme Court for an appropriate order to protect trade secrets or other confidential documents, and to limit, as appropriate, the dissemination of any such confidential documents within the NYCAL litigation.

Supreme Court properly denied defendant's request to produce a sampling of responsive documents. While the scope of documents to be reviewed may be vast, that is a function of the litigation and defendant's no-duty defense pursuant to *Berkowitz v A.C.&S., Inc.* (288 AD2d 148 [1st Dept 2001]).

We reject defendant's contention that the electronic database, which defendant acknowledges is a duplicate of documents it uses in the regular course of business, is privileged. Nevertheless, because the responsive documents to which plaintiffs are entitled are limited to those that reference

asbestos or asbestos-containing products, plaintiffs are not entitled to the more expansive database. Similarly, plaintiffs are not entitled to defendant's compilation of index cards identifying each job site and location and the boiler unit number for the boiler installed at the job site. However, to the extent defendant provides plaintiff with direct access to its files and records for plaintiff to search for responsive documents, and the index cards are necessary to facilitate that search, Supreme Court may, in its discretion, enter an appropriate order.

Defendant may renew its application for cost sharing at such time after the commencement of production as the magnitude and equities of the task have become clearer (*see U.S. Bank, N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58 [1st Dept 2012]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16120 The People of the State of New York, Respondent, Ind. 5313/10

-against-

Christian Llorems, Defendant-Appellant.

_____

Stephen N. Preziosi, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered August 13, 2012, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 11 years, unanimously affirmed.

Defendant's guilty plea forecloses review of his statutory speedy trial claim (*see People v O'Brien*, 56 NY2d 1009 [1982]). Although a constitutional speedy trial claim survives a guilty plea, defendant's motion made only a perfunctory reference to the constitutional right to a speedy trial, and relied exclusively on CPL 30.30. Accordingly, defendant did not preserve his constitutional claim (*see People v Hazel*, 298 AD2d 216 [1st Dept 2002], *lv denied* 99 NY2d 559 [2002]) and we decline to review it in the interest of justice. As an alternative holding, we find,

after considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), that defendant was not deprived of a speedy trial.

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16121-
16122 In re Jared S.,

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

_____

Law Office Of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Amanda Sue Nichols of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about January 6, 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 petit larceny and criminal possession of stolen property in the fifth degree, and placed him with the Close to Home program for a period of up to 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and not against the weight of the evidence. Appellant's arguments relating to the victim's credibility and the issue of the date on which the incident occurred are substantially similar

to arguments this Court rejected on a companion appeal (*Matter of Christopher S.*, 129 AD3d 426 [1st Dept 2015]), and there is no reason to reach a different result here.

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16123 In re Michael Rieser, Index 103424/12
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

_____

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

Michael Rieser, respondent pro se.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered July 25, 2013, which granted the petition seeking to annul respondent Department of Education's (DOE) determination, dated April 18, 2012, discontinuing petitioner's probationary employment, and to expunge the unsatisfactory rating of petitioner's performance as a probationary teacher, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

Petitioner failed to preserve his argument regarding the composition of the Chancellor's Committee, as he did not raise it at the administrative hearing (*see Matter of Seitelman v Lavine*, 36 NY2d 165, 170 [1975]). In any event, a substantial right of petitioner was not violated, since the Committee ruled

unanimously in his favor (*see Steinberg v Board of Educ. of the City School Dist. of the City of N.Y.*, 69 AD3d 449, 449-450 [1st Dept 2010]).

Petitioner failed to show that DOE's determination to discontinue his probationary employment was made in bad faith, for a constitutionally impermissible purpose, or in violation of the law (*see Kahn v New York City Dept. of Educ.*, 18 NY3d 457, 471 [2012]). Nor did he show that his unsatisfactory rating was arbitrary and capricious (*see Matter of Storman v New York City Dept. of Educ.*, 95 AD3d 776, 777-778 [1st Dept 2012], *appeal dismissed* 19 NY3d 1023 [2012]). DOE's determination and petitioner's rating were rationally supported by, among other things, witness statements and the principal's letter describing his investigation and finding that petitioner had used corporal punishment on a special education student (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Matter of Murnane v Department*

of Educ. of the City of N.Y., 82 AD3d 576, 576 [1st Dept 2011]). There is no indication that the principal or DOE made their decisions in bad faith (*see id.*).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16124 The People of the State of New York, Ind. 1482/13
Respondent,

-against-

Wilson Ramirez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia 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 (Richard D. Carruthers, J.), rendered on or about September 25, 2013,

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

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16125 Nyala C., an Infant Under the Age of Fourteen Years, etc., Plaintiff-Appellant, Index 305013/12

-against-

Miniventures Child Care Development Center, Inc., et al., Defendants-Respondents.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellant.

Steven F. Goldstein, LLP, Carle Place (Steven F. Goldstein of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 24, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Dismissal of the complaint was not warranted, in this action for personal injuries allegedly sustained by the then four-year-old infant plaintiff when she fell off a jungle gym ladder. Triable issues of fact exist as to whether defendants' employee, who was watching the infant plaintiff prior to the accident, negligently supervised the child. The infant plaintiff testified that she had asked the employee to help her before she fell and that the employee had assisted her with "one or two steps," before allowing her to descend the ladder's remaining steps on

her own while the employee looked on. However, the employee and another employee testified that the infant plaintiff had never asked for assistance, which was why neither of them helped the child climb down the ladder. Such conflicting testimony as to how the accident happened precludes granting defendants' motion for summary judgment (*see Peuplie v Longwood Cent. School Dist.*, 49 AD3d 837, 839 [2d Dept 2008]; *see also DeRosa v Valentino*, 14 AD3d 448 [1st Dept 2005]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16126 The People of the State of New York, Respondent, Ind. 4138/10

-against-

Devin Bottom, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered on or about March 3, 2011, 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: NOVEMBER 12, 2015

CLERK

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

16127- Index 651230/14
16127A- 650293/14
16127B-
16127C In re Steven G. Shapiro, et al.,
Petitioners-Appellants,

-against-

Daniel B. Hayes,
Respondent-Respondent.

- - - - -

In re Steven G. Shapiro, et al.,
Petitioners-Appellants,

-against-

Daniel B. Hayes,
Respondent-Respondent.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery of counsel), for appellants.

Zeichner Ellman & Krause LLP, New York (Yoav M. Griver of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 26, 2015, which, insofar appealed from as limited by the briefs, denied petitioners' motion to enforce a settlement, and granted respondent's motions to compel arbitration, enjoin petitioners from litigating in California without prior leave of court, and sanction them, unanimously affirmed, with costs.

The IAS Court did not abuse its discretion (*see Citibank v*

Rathjen, 202 AD2d 235 [1st Dept 1994], *appeal dismissed* 84 NY2d 850 [1994]) in declining to enforce what petitioners contend was a settlement, made in open court on July 18, 2014. On that date, the court made it very clear that a future written agreement would be the final settlement. "[A]t best, [the in-court settlement] was an agreement to agree to the amplified terms of a future writing" (*Matter of Galasso,* 35 NY2d 319, 321 [1974] [internal quotation marks omitted]).

It was not an improvident exercise of discretion (*see Paramount Pictures, Inc. v Blumenthal,* 256 App Div 756, 760 [1st Dept 1939], *appeal dismissed* 281 NY 682 [1939]) for the court to enjoin petitioners from litigating in California without prior leave of court. The California action was "not brought in good faith" (*E. B. Latham & Co. v Mayflower Indus.,* 278 App Div 90, 94 [1st Dept 1951]) and "was instituted for the purpose of vexing or harassing" respondent (*id.*). First, the California action seeks a declaration that respondent is not entitled to receive any payment in connection with Davis Shapiro Lewis Grabel Leven Graderson & Blake LLP (formerly known as Davis, Shapiro, Lewis, Montone & Hayes, LLP)'s sale of 60% of its interest in Prodege, LLC. However, whether respondent is entitled to such payment is governed by Davis Shapiro's partnership agreement, and that agreement says any disputes arising out of or relating to that

agreement shall be settled by arbitration, not in court. Second, the California action alleges that respondent did not originate all of the firm's interest in Prodege. However, arbitrators have already found that the firm's interest in Prodege was an "originated asset" (as such term is defined in the partnership agreement) brought to the firm by respondent.

The court did not improvidently exercise its discretion (*see e.g. Costantini v Costantini*, 44 AD3d 509 [1st Dept 2007]) by sanctioning petitioners. As the court noted, petitioners – who are New York lawyers – knew from another action that New York lawyers could not issue subpoenas in California and that they had to give respondent notice that they were issuing subpoenas. Furthermore, the California action that they instituted is vexatious, as noted above.

We have considered petitioners' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16128 The People of the State of New York, Respondent, Ind. 1097/08

-against-

Israel Feliciano, Defendant-Appellant.

_____

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

Israel Feliciano, appellant pro se.

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

_____

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered November 10, 2010, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to concurrent terms of 23 years to life, unanimously affirmed.

The court correctly determined that when, on cross-examination, defendant volunteered that he had "[n]ever been in trouble," this opened the door to a modification of the court's *Sandoval* ruling (*see People v Fardan*, 82 NY2d 82 NY2d 638, 646 [1993]). The record does not support defendant's assertion that the prosecutor's cross-examination trapped defendant into opening the door to a previously precluded inquiry. Furthermore, the modified *Sandoval* ruling was narrowly limited; the jury only

learned that defendant had some unspecified, and apparently minor, conflict with the law.

Defendant's challenges to the prosecutor's summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find that the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The challenged remarks generally constituted permissible comment on the evidence, and the prosecutor's improper references to defendant as a "liar" were not so egregious as to require reversal.

We have considered and rejected defendant's ineffective assistance of counsel argument, and his pro se claims.

We do not find defendant's sentence to be excessive.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16129-
16130 Index 109382/10

Jesus Acosta,
Plaintiff-Appellant,

-against-

Gouverneur Court Limited Partnership,
Defendant-Respondent,

New York SMSA Limited Partnership,
Defendant.

_____

Marder, Eskesen & Nass, New York (Clifford D. Gabel of counsel), for appellant.

Rutherford & Christie, LLP, New York (Adam C. Giuzik of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul J Wooten, J.), entered May 28, 2014, which, to the extent appealed from as limited by the briefs, granted defendant Gouverneur Court Limited Partnership's (defendant) motion for summary judgment dismissing the common-law negligence claim asserted against it, unanimously affirmed, without costs.

Plaintiff alleges that he fell in the boiler room of the building where he worked as a maintenance worker when he attempted to back out of a tight area next to the boiler and his pants got caught on a brace or bracket supporting a pipe. Defendant, the owner of the building, established its entitlement to summary judgment by submitting photographic and testimonial

evidence showing that the brace or bracket was not a defective condition, but was open and obvious, and not inherently dangerous (*see Villanti v BJ's Wholesale Club, Inc.*, 106 AD3d 556 [1st Dept 2013]; *Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475 [1st Dept 2007]). The condition, as shown in the photographs, was "plainly observable and did not pose any danger to someone making reasonable use of his or her senses" (*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 543 [1st Dept 2013] [internal quotation marks omitted]).

In opposition, plaintiff failed to raise a triable issue of fact. Although he did not see the brace or bracket when he was backing up, it was not hidden or obscured from view and thus did not constitute a trap or snare (*see Villanti* at 557). Contrary to plaintiff's arguments, defendant was not required to present expert testimony to meet its initial burden, and the issue of notice is irrelevant since there was no defective or dangerous condition in the boiler room.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16131 In re Celina S.,
Petitioner-Respondent,

-against-

Donald S.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Willkie Farr & Gallagher LLP, New York (Wesley R. Powell of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about July 7, 2014, which, after a trial, granted petitioner mother Cilena S.'s petition for sole legal and physical custody of the subject child, denied respondent father's cross petition for custody, and awarded him visitation as provided in the order, unanimously affirmed, without costs.

A sound and substantial basis in the record supports the Family Court's determination, made after a full evidentiary hearing, that the child's best interests are served by awarding sole legal and physical custody to the mother (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; Domestic Relations Law § 70). The record established that while both parties cared for the child prior to their separation, the mother was the child's

primary caretaker. She made all of the childcare arrangements for the child, and she pursued her suspicion that the child suffered from speech delays, despite the father's and the first pediatrician's dismissal of her concerns (*see Matter of Virginia C. v Donald C.*, 114 AD3d 1032, 1034 [3d Dept 2014]). The mother attended to all of the child's medical needs, took him to his doctors' appointments, and enrolled him in a school that provided the requisite speech therapy (*see Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012]), whereas the father had no involvement in the child's education.

The mother provided the more stable home environment for the child (*see Matter of Castro v Santiago*, 176 AD2d 520 [1st Dept 1991]). In contrast, the father has a history of aggressive behavior and excessive alcohol consumption, including two convictions of driving under the influence. He is unwilling to address his mental health issues, which affect his ability to provide a stable home environment for the child.

The evidence also established that the mother is more likely to foster a continued relationship with the child and the father (*see Matter of Matthew W. v Meagan R.*, 68 AD3d 468 [1st Dept 2009]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]), given her appreciation of the importance of the child having a relationship

with his father, and her acknowledgment of the child's strong relationship with the father's extended family.

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: NOVEMBER 12, 2015

CLERK

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

16132-
16132A The People of the State of New York, Respondent,

SCI. 2017/13
2018/13

-against-

Suzette Dann,
Defendant-Appellant.

_____

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

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Judgments, Supreme Court, Bronx County (George Villegas, J. at plea; Albert Lorenzo, J. at sentencing), rendered on or about December 18, 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: NOVEMBER 12, 2015

CLERK

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

16133 Evida Green, Index 302928/12
Plaintiff-Respondent,

-against-

Karen Jones,
Defendant-Appellant,

Awilda Jimenez, et al.,
Defendants.

_____

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for appellant.

Robert A. Flaster, P.C., New York (Craig A. Ginsberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered October 6, 2014, which, insofar as appealed from as limited by the briefs, denied defendant Karen Jones's motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to plaintiff's claimed left shoulder and lumbar spine injuries, and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff did not suffer any serious injury to her left shoulder or lumbar spine as a result of the motor vehicle accident at issue by submitting the affirmed report of a radiologist who opined that the MRI of the

left shoulder revealed only degenerative conditions unrelated to any acute trauma, and that the MRI of the lumbar spine revealed degenerative disc disease and osteophyte formation — none of which could have occurred in the time between the accident and the relevant MRIs (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]). Defendant also submitted plaintiff's own medical records, including radiography reports prepared at the hospital after the accident, which included findings of degeneration and no findings of traumatic injury (see *Alvarez*, 120 AD3d at 1044).

In opposition, plaintiff failed to raise a triable issue of fact as to whether her left shoulder and lumbar spine conditions were causally related to the accident because none of her medical experts addressed or explained the finding of preexisting degeneration present in plaintiff's own medical records. They failed to demonstrate why degeneration was not the cause of the injuries to plaintiff's left shoulder and lumbar spine (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez*, 120 AD3d at 1044).

As to plaintiff's alleged cervical spine injury, however, defendant failed to satisfy her prima facie burden. Defendant's orthopedist did not demonstrate prima facie that plaintiff did

not suffer significant or permanent limitations in use of her cervical spine by comparing his measurements to standards for normal range of motion (*see Zhijian Yang v Alston*, 73 AD3d 562 [1st Dept 2010]). Defendant's radiologist acknowledged that the MRI films showed herniated and bulging discs, so that there was objective evidence of injury, but opined that these conditions were degenerative in origin and preexisted the accident, so that there was no causal relation between plaintiff's cervical condition and the accident. However, defendant's orthopedic expert opined to a reasonable degree of medical certainty, following examination of plaintiff and review of various medical records, including an MRI report making a new finding of myelomalacia, that plaintiff experienced or may have experienced exacerbation or aggravation of her preexisting cervical spine condition as a result of the accident (*see Matos v Urena*, 128 AD3d 435, 436 [1st Dept 2015]; *Susino v Panzer*, 127 AD3d 523, 524 [1st Dept 2015]). The dispute between defendant's experts itself raises issues of fact as to whether plaintiff suffered a cervical

spine injury caused by the accident, and, thus, the burden of proof never shifted to plaintiff with respect to that alleged injury.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16134 William Diaz, et al., Index 22576/13E
Plaintiffs-Appellants,

-against-

New York State Catholic Health Plan, Inc., doing business as Fidelis Care New York, et al.,
Defendants-Respondents.

_____

Sheldon Karasik, P.C., New York (Sheldon Karasik of counsel), for appellants.

Gordon & Rees LLP, New York (Kuuku Minnah-Donkoh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered May 19, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss all the retaliation claims under the New York City Human Rights Law (City HRL) and the retaliation claims of all plaintiffs but Llyaseni Martinez under Labor Law § 740, unanimously affirmed, without costs.

Plaintiffs Elsa Martinez's and Anna Moscoso's detailed retaliation claims under the City HRL fail to allege facts establishing "the requisite causal nexus between the protected activity and the adverse action" (*Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544, 545 [1st Dept 2014]). The remaining plaintiffs' generalized claims for retaliation under

the City HRL fail to allege facts establishing "when the alleged retaliatory incidents occurred or how those incidents were causally connected to any protected activity" (*see Whitfield-Ortiz v Department of Educ. of City of N.Y.*, 116 AD3d 580, 581 [1st Dept 2014]).

The allegations that plaintiff Cynthia Rodriguez reported an assault and battery by a supervisor fail to state a claim under Labor Law § 740, the "Whistleblower" Law. Assault and battery by a supervisor is not "an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud" (Labor Law § 740[2][a]).

Plaintiffs assert a claim for retaliation under Labor Law § 215 for the first time on appeal, and we decline to consider it. Were we to consider this claim, we would find that it is insufficiently pleaded.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16135- Ind. 4157/11
16136 The People of the State of New York, 34/12
Respondent,

-against-

Nathaniel Jackson,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 15, 2012, as amended October 25, 2012, convicting defendant, after a jury trial, of aggravated sexual abuse in the first degree, criminal sexual act in the first degree (two counts), strangulation in the second degree (two counts), assault in the second and third degrees, criminal sexual act in the third degree (two counts), rape in the third degree (five counts), endangering the welfare of a child, tampering with a witness in the fourth degree (four counts), and criminal contempt in the second degree (three counts), and sentencing him to an aggregate term of 40 years, unanimously affirmed.

The court properly exercised its discretion in admitting

evidence of uncharged crimes. The victim's testimony about defendant's uncharged sex offenses and other violent acts was admissible to provide context for the abusive relationship between defendant and the victim, "to make it comprehensible and to enhance its credibility" (*People v Steinberg*, 170 AD2d 50, 73 [1st Dept 1991], *affd* 79 NY2d 673 [1992]; *see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Budhoo*, 46 AD3d 406 [1st Dept 2007], *lv denied* 10 NY3d 838 [2008]). That testimony was also probative of defendant's use of forcible compulsion as to some of the charged sex offenses (*see People v Cook*, 93 NY2d 840 [1999]). Defendant's statement to the victim, shortly after subjecting her to an extensive series of severely violent acts, to the effect that he would have continued to use further violence against one of his partners but was being relatively nice to the victim, after which the victim invited defendant to bed and went to sleep next to him, was similarly admissible "to explain the relationship between defendant and the victim and place the events in question in a believable context" (*People v Archbold*, 40 AD3d 403 [1st Dept 2007], *lv denied* 9 NY3d 872 [2007]). The probative value of the evidence at issue was outweighed any potential for undue prejudice, which was minimized by the court's limiting instructions. Defendant's argument that he was unduly prejudiced by testimony that he engaged in sexual activity

simultaneously with the 16-year-old victim and a 15-year-old girl, in violation of the court's ruling, is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing, since the victim gave no such testimony.

Contrary to defendant's contention, the court properly exercised its discretion in permitting a well-qualified expert in domestic violence, who had no personal knowledge of and expressed no opinion about the facts of this case, to testify in general terms about the dynamics of domestic violence. The expert's focus on typical behavior of victims of domestic violence was a proper aid to the jury in understanding the victim's behavior in this case (*see People v Rodriguez*, 115 AD3d 580, 581 [1st Dept 2014], *lv denied* 23 NY3d 967 [2014]).

The court's *Sandoval* ruling was also a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The People had "a suitable good faith basis" (*People v Mendez*, 279 AD2d 434, 435 [1st Dept 2001], *lv denied* 96 NY2d 832 [2001]) for inquiring about domestic incident reports against defendant. Furthermore, the acts reported were highly probative of credibility, and the similarity of those allegations to the charges in the instant case did not render their admission an improper exercise of discretion. Defendant's assertion that the court permitted one

such report setting forth allegations that ultimately led to an acquittal is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it as unsupported by any record evidence.

Defendant failed to preserve any of his constitutional challenges to the above-discussed rulings, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits, both for the foregoing reasons and because "defendant is essentially raising state-law issues that are not of constitutional dimension" (*People v Hill*, 121 AD3d 469, 469 [1st Dept 2014], *lv denied* 25 NY3d 1165 [2015]).

The court properly exercised its discretion in denying defense counsel's request for a missing witness charge, in light of the request's untimeliness (*see People v Gonzalez*, 68 NY2d 424, 428 [1986]; *People v Williams*, 294 AD2d 133, 133 [1st Dept 2002], *lv denied* 98 NY2d 703 [2002]), which exacerbated the apparent logistical difficulty of producing the witness, and also in light of the scant materiality of any testimony she might have provided, and the potential for jury confusion or undue prejudice.

To the extent that any of the court's evidentiary rulings could be viewed as improper, we find any error harmless in light

of the overwhelming evidence of guilt.

Defendant unpersuasively argues that the court's comments exhibited a bias against defense counsel, depriving him of his right to a fair trial. After defense counsel "persistently failed to obey proper evidentiary rulings" under the Rape Shield Law, the "trial court was justified, indeed obligated, to assume aggressive control of the proceedings to ensure a fair trial" (*People v Gonzalez*, 38 NY2d 208, 210 [1975]). Assuming for the sake of argument that some of the court's comments "would better have been left unsaid," a "review of the record as a whole" shows that "the jury was not prevented from arriving at an impartial judgment on the merits" (*People v Moulton*, 43 NY2d 944, 946 [1978]). Moreover, defendant relies extensively on comments that were either outside the hearing of the jury, or where the record is inconclusive as to the jury's ability to hear the comments.

We have considered defendant's remaining contentions and

find them to be unavailing.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16137 The People of the State of New York, Ind. 2684/12
Respondent,

-against-

Mario Gulindo,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Maxwell Wiley, J.), rendered on or about August 7, 2013,

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

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

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

16140-
16141 In re Kaylene H. and Others,

Children Under the Age of Eighteen Years, etc.,

Brenda P.H.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about August 18, 2014, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding order, same court and Judge, entered on or about June 30, 2014, which found that respondent Brenda P.H. severely abused one of her daughters and derivatively severely abused the four other subject children, unanimously modified, on the law, to vacate the finding of derivative severe abuse as to the subject children Crystal H. and Jewel H., and otherwise affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal

from the order of disposition.

Petitioner satisfied its burden of making an initial prima facie showing of severe abuse (*see Matter of Philip M.*, 82 NY2d 238, 244 [1993]). Petitioner introduced medical testimony establishing that the subject child, Zylah P., had sustained a fractured femur and fractured vertebrae which required spinal surgery, that was "of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child" (Family Court Act § 1046[a][ii]; *see Matter of Vivienne Bobbi-Hadiya S. [Makena Asanta Malika McK.]*, 126 AD3d 545, 546 [1st Dept 2015], *lv denied* 25 NY3d 1064 [2015]). The mother proffered explanations for these injuries which were implausible or otherwise unreasonable.

Having determined that Zylah was severely abused, Family Court's findings of derivative abuse as to the mother's other two daughters, Kaylene H. and Amaya A., was proper, as her actions demonstrated that she had a fundamental defect in her understanding of her parental obligations (*see Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied sub nom. Marino S. v Angel Guardian Children & Family Servs.*, 540 US 1059 [2003]; *and see Matter of Brandon M. (Luis M.)*, 94 AD3d 520 [1st Dept 2012]).

However, since severe abuse requires acts committed by a

parent (*Matter of Tiarra D. [Philip C.]*, 124 AD3d 973 [3rd Dept 2015]; Social Services Law § 384-b [8][a][i]), and the mother was not the biological parent of either Jewel H. or Crystal H., the findings of derivative severe abuse must be vacated as the Administration for Children's Services admits on appeal (*see Matter of Brett DD. [Kevin DD.]*, 127 AD3d 1306, 1307-1308 [3rd Dept 2015], *lv denied* 25 NY3d 908 [2015]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16144 The People of the State of New York, Ind. 1935/10
Respondent,

-against-

Orlando Thomas,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Ann Donnelly, J.), rendered August 30, 2012, convicting defendant, upon his plea of guilty, of attempted second-degree robbery, and sentencing him to an aggregate term of three years of incarceration along with three-years post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

16145-
16146-
16147

Index 771000/10
110069/08
590943/08
590956/08
500013/13

In re 91st Street
Crane Collapse Litigation

- - - - -

Guiseppe Calabro,
Plaintiff-Respondent,

-against-

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

DeMatteis Construction, et al.,
Defendants-Appellants.

- - - - -

1765 First Associates, LLC
Third Party Plaintiff,

DeMatteis Construction, et al.,
Third-Party Plaintiffs-
Appellants-Respondents,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-
Respondent-Appellant.

[And Other Third-Party Actions]

- - - - -

In re 91st Street
Crane Collapse Litigation

- - - - -

Guiseppe Calabro
Plaintiff-Respondent,

-against-

Mattone Group Construction Co.,
Ltd., et al.,
Defendants,

1765 First Associates, LLC,
Defendant-Appellant.

- - - - -

1765 First Associates, LLC,
Third Party Plaintiff-Appellant,

DeMatteis Construction, et al.,
Third-Party Plaintiffs,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-Respondent,

[And Other Third-Party Actions]

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, New York (Timothy R. Capowski of counsel), for DeMatteis Construction and Leon D. DeMatteis Construction Corporation, appellants/appellants-respondents.

Nicoletti Hornig & Sweeney, New York (Barbara A. Sheehan of counsel), for 1765 First Associates, LLC, appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Raymond F. Slattery of counsel), for Sorbara Construction Corp., respondent-respondent/appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Issac of counsel), for Guiseppe Calabro, respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 5, 2014, which, to the extent appealed from, denied the motion of defendants/third-party plaintiffs DeMatteis Construction and Leon D. DeMatteis Construction Corporation, (collectively DeMatteis) for summary judgment dismissing plaintiff's claims pursuant to common-law negligence and Labor

Law §§ 200, 240(1) and 241(6), and all cross claims asserted against it, and for summary judgment on their claim for contractual indemnity against third-party defendant Sorbara Construction Corp. (Sorbara), and denied Sorbara's motion for summary judgment dismissing DeMatteis's contractual indemnity claim against it, unanimously modified, on the law, to the extent of dismissing the claims pursuant to common-law negligence, Labor Law § 200, and § 240(1), and Labor Law § 241(6), except as predicated on an alleged violation of 12 NYCRR 23-1.7(e)(2), and otherwise affirmed, without costs. Order, same court and Justice, entered March 12, 2014, which denied the motion of defendant/third-party plaintiff 1765 First Associates, LLC (1765 First) for summary judgment dismissing plaintiff's claims pursuant to common-law negligence and Labor Law §§ 200, 240(1), and 241(6), and for summary judgment on its contractual indemnity claim against Sorbara, unanimously modified, on the law, to the extent of dismissing the claims pursuant to common-law negligence, Labor Law § 200 and § 240(1), and Labor Law § 241(6) except as predicated on an alleged violation of 12 NYCRR 23-1.7(e)(2), and otherwise affirmed, without costs.

Plaintiff's common-law negligence and Labor Law § 200 claims are dismissed since neither DeMatteis nor 1765 First exercised supervision or control over the subject work (*see Mutadir v 80-90*

Maiden Lane Del LLC, 110 AD3d 641, 643 [1st Dept 2013]). There is also no evidence that either was on notice of the tool on the floor of the Sobara shanty.

As for plaintiff's claim pursuant to Labor Law § 240(1), the facts of this accident do not invoke the special protections of the statute (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 653-654 [1st Dept 2012]). Plaintiff, who heard loud bangs and got up to run out of his work shanty, which was inside the first floor of the partially constructed building, tripped and fell over a tool. He then continued outside, running towards the crane to see what had occurred. Under these facts, plaintiff's injury is so attenuated that it cannot be reasonably connected to the crane's collapse.

Plaintiff does, however, have a viable cause of action pursuant to Labor Law § 241(6) as premised on an alleged violation of 12 NYCRR 23-1.7(e)(2), which, inter alia, requires that "working areas" be kept free from scattered tools (*see Harkin v City of New York*, 69 AD3d 901 [2d Dept 2010]). 12 NYCRR 23-1.7(e)(1) is inapplicable as plaintiff fell within a work shanty, not a passageway (*see e.g. Zieris v City of New York*, 93 AD3d 479 [1st Dept 2012]; *O'Sullivan v IDI Constr. Co.*, 28 AD3d 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]). Any violations of those provisions of the Industrial Code concerning crane

maintenance and inspection are inapplicable, since the crane collapse was not a proximate cause of plaintiff's injuries, in that he was injured when he tripped and fell over a tool on the floor. Further, the statutes are either inapplicable to the facts or there is insufficient evidence in the record showing that they were violated and that the alleged violation caused the event. The record indicates that the crane collapsed due to a latent manufacturing defect in one of its components, with no evidence that the collapse was caused by inadequate maintenance or inspection of the crane.

The court was correct in declining to grant summary judgment to either DeMatteis or 1765 First on their claims for contractual indemnity against Sorbara. The clause at issue provides that Sorbara will indemnify DeMatteis and 1765 First for losses that occur "by reason of the acts or omissions [of Sorbara] or anyone directly or indirectly employed by [Sorbara] in connection with the Work." Sorbara is correct that the record shows that the crane collapse did not occur because of an act or omission on its part. Sorbara leased the crane from defendant New York Crane & Equipment Corp.; that fact alone does not trigger the indemnification clause. Nor, contrary to DeMatteis's assertion, was New York Crane an indirect employee of Sorbara. Furthermore, insufficient evidence was adduced as to whether the crane was

either misused by the Sorbara operator or improperly maintained by Sorbara's employees. However, Sorbara's cross motion to dismiss the claim was also properly denied, since questions of fact remain as to whether plaintiff's fall on the tool was caused by an act or omission of Sorbara or its employees, a finding that would trigger the clause.

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: NOVEMBER 12, 2015

CLERK

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

16148 The People of the State of New York, Ind. 4213/12
Respondent,

-against-

Justin Wooten,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler 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 (Michael J. Obus, J. at plea and sentencing), rendered on or about March 28, 2013,

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

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

ENTERED: NOVEMBER 12, 2015

CLERK

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

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

16149 Jessica Dorfman, Index 600929/04
Plaintiff-Appellant,

-against-

American Education Services, et al.,
Defendants,

American Student Assistance,
Defendant-Respondent.

_____

Thomas Torto, New York, for appellant.

Pitaro & Pitaro, Flushing (Vincent D. Pitaro of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 13, 2014, which, among other things, denied plaintiff's motion to reject the Referee's report, and granted defendant American Student Assistance's (ASA) cross motion to confirm the report, unanimously affirmed, without costs.

Plaintiff's argument on appeal, challenging the award of attorneys' fees to ASA based on the provisions of promissory notes admittedly signed by plaintiff, is improper, as this Court previously affirmed the award (*see* 104 AD3d 474 [1st Dept 2013]). The sole issue before the Referee was the appropriate amount of such fees, which amount plaintiff does not challenge on appeal.

In any event, even though ASA did not assert a counterclaim,

under the terms of the promissory notes, ASA was entitled to attorneys' fees incurred in defending this action, as it was clearly enforcing the terms of the notes (*see Cumberland Farms, Inc. v Lexico Enterprises, Inc.*, 2012 WL 526716, *4, 2012 US Dist LEXIS 19890, *10 [ED NY, Feb. 16, 2012, No. 10-CV-4658 (ADS)(AKT)]).

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: NOVEMBER 12, 2015

CLERK

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

16151 The People of the State of New York, Respondent, Ind. 2172/13

-against-

Milton Lanza, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about October 24, 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: NOVEMBER 12, 2015

CLERK

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

16152N Minsun Kim, Index 100386/15
Petitioner-Respondent,

-against-

Korean American Association of Greater New York, Inc., etc., et al.,
Respondents-Appellants.

_____

Steptoe & Johnson LLP, New York (John D. Lovi of counsel), for appellants.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered July 8, 2015, which, to the extent appealed from, granted petitioner's motion to disqualify certain of respondents' attorneys of record, Hojin Seo and DeRyook & Aju Law Firm, unanimously reversed, on the law, without costs, and the motion to disqualify denied.

Petitioner failed to show that subject counsel's representation of petitioner's personal interests on prior real estate matters was substantially related to the election issues raised in the instant CPLR article 78 proceeding (*see Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636 [1998]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9[a]). Indeed, petitioner concedes there is no relationship between the real estate matters and the election issues. Moreover, petitioner's allegations offer no basis to conclude that a reasonable

probability exists that counsel might use confidences or secrets gained from their former attorney-client relationship in the article 78 proceeding (*id.*). To the extent petitioner sought disqualification on the ground that counsel might be called to testify regarding his Korean-to-English translations of certain documents deemed relevant to the article 78 proceeding, such contention is unavailing. Counsel's testimony was not necessary since a certified translator could be called to testify regarding the proper translation of the documents (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]; *Greene v Luckman*, 212 AD2d 479 [1st Dept 1995]).

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

ENTERED: NOVEMBER 12, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14207 John Rashad Franklin also known as DJ Rashad Hayes, Plaintiff-Respondent, Index 155454/13

-against-

The Daily Holdings, Inc. etc., et al., Defendants-Appellants.

_____

Davis Wright Tremaine LLP, New York (Laura R. Handman of counsel), for appellants.

McLaughlin & Stern LLP, New York (Neil B. Solomon of counsel), for respondent.

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Order Supreme Court, New York County (Milton A. Tingling, J.), entered May 16, 2014, modified, on the law, to the extent of dismissing the first cause of action with leave to replead special damages, dismissing the second cause of action only to the extent it is based on the allegedly fabricated quotations, and dismissing the complaint against defendant News Corporation, and otherwise affirmed, without costs.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Dianne T. Renwick
Karla Moskowitz
Paul G. Feinman
Barbara R. Kapnick, JJ.

14207
Index 155454/13

_____x

John Rashad Franklin also known
as DJ Rashad Hayes,
Plaintiff-Respondent,

-against-

The Daily Holdings, Inc.
etc., et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered May 16, 2014, which denied their motion to dismiss the complaint.

Davis Wright Tremaine LLP, New York (Laura R. Handman and Deborah A. Adler of counsel), for appellants.

McLaughlin & Stern LLP, New York (Neil B. Solomon of counsel), for respondent.

KAPNICK, J.

This action arises from an internet news article alleged to be defamatory. Plaintiff is a DJ who, in 2012, occasionally worked at the downtown Manhattan nightclub WIP. Defendant, The Daily Holdings, Inc. "TDH" f/k/a News DP Holdings (the Daily), operated an iPad-only subscription based newspaper from 2010 to December of 2012. The Daily was a wholly owned subsidiary of defendant News Corporation (News Corp.).

On or about June 13, 2012, rappers Chris Brown and Drake and their entourages were allegedly involved in a fight at WIP over Brown's ex-girlfriend, singer Rihanna. According to plaintiff, two friends of his, identified by their Twitter handles as @BiggDoobs and @dj_trustory, who knew that he DJ'ed at WIP, tweeted him about the fight. In response, plaintiff posted to his Twitter account, "I was gonna start shooting in the air but I decided against it. Too much violence in the hip hop community." Plaintiff had 800 Twitter followers and his account was public.

On June 15, 2012 the Daily posted a news article about the altercation, titled "Ri-Ri's Rumble," which included the following statements:

> "'So we're sitting in there. Me, a couple of others, Chris,' eyewitness DJ Rashad Hayes said. 'Drake comes in and keeps eyeballing the table.'

> "Perhaps to show he didn't care that Drake had hooked up with his ex — or to flaunt the fact that he's rekindled his romance with her — Brown sent a bottle to Drake's table. Drake sent it back with a note, a witness told the New York Post. It read, 'I'm f***ing the love of your life [Rihanna], deal with it.'
>
> "And then things erupted. As rappers Maino and Meek Mill looked on, Brown and Drake's entourages threw bottles and fists throughout the club. 'I was gonna start shooting in the air but I decided against it,' Hayes said." (Boldface omitted.)

According to plaintiff, he posted a demand for a retraction in the Comments section of the article and on the Daily's "Contact the Daily" section of its site.

By summons and verified complaint dated February 14, 2014, plaintiff alleges that defendants, in publishing "Ri-Ri's Rumble," defamed him. Specifically, plaintiff alleges that defendants falsely identified him as a witness who made the statement: "So we're sitting in there. Me, a couple of others, Chris . . . Drake comes in and keeps eyeballing the table," when he never made any such statement to anyone. Plaintiff further alleges that the article implied that he had stated, "I was gonna start shooting in the air but I decided against it" to a reporter in seriousness, when that statement was only a tweet he made in jest. Further, plaintiff alleges that he was not at WIP on the night of the fight and that by failing to publish his full tweet,

the Daily changed it from one eschewing violence, to one that made it look as if plaintiff were a "gun-toting psychopath with an itchy trigger finger."

Plaintiff alleges that his career was on a sharp trajectory upward, and that he was on the cusp of breaking out as a prominent national and New York City DJ, but the article devastated his career. According to plaintiff, he was banned from WIP immediately after the article was published, and negotiations for various career opportunities ended. The complaint contains two causes of action — libel and libel per se.

By notice of motion dated March 6, 2014, defendants moved pursuant to CPLR 3211(a)(7) for dismissal of the complaint. Defendants argued that the published statements are not capable, as a matter of law, of a defamatory meaning. Defendants also argued that plaintiff admitted in his complaint to posting the relevant tweet, rendering it nonactionable and the entire article substantially true. Lastly, defendant News Corp. argued that it could not be liable, since there was no claim that it had any involvement in the publication of the article, nor did plaintiff plead facts sufficient to create parent/subsidiary liability.

Plaintiff argued in opposition that the Daily's misidentification of him as an eyewitness, its creation of a fabricated quote confirming that misidentification, and its

publishing the tweet out of context, created the reasonable conclusion that plaintiff carried a loaded gun, intending to shoot it in a crowded club where he worked, and imputed characteristics to him incompatible with his being a DJ. Further, plaintiff argued that the article gave the false impression that he would speak with the press about the goings-on at trendy clubs and private parties, attended by celebrities and wealthy professionals, where he works. Regarding substantial truth, plaintiff argued that it is an affirmative defense to be raised in an answer, and thus an inappropriate basis for a motion to dismiss.

As to News Corp., plaintiff argued that he was not alleging liability merely because it was the parent corporation of the Daily, but because the Daily was the alter ego and/or agent of News Corp. Specifically, plaintiff argued that News Corp. CEO Rupert Murdoch was the creator of the Daily and took the stage at the Daily's launch party. Plaintiff further alleged that News Corp. spent $30 million to launch the Daily, News Corp. sent the invitations to the launch party, and News Corp.'s spokesman was quoted with respect to a lawsuit over the rights to the name "the Daily."

By order dated May 14, 2014, the motion court denied defendants' motion, noting that it must accept plaintiff's

allegations in the complaint as true, and finding that "plaintiff's complaint [wa]s pled with sufficient specificity to form cognizant causes of action." The court did not specifically address defendants' claims of substantial truth, or News Corp.'s claim that it could not be held liable as the mere parent corporation of the Daily.

Discussion

"Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks omitted]). "To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication" (Restatement [Second] of Torts § 558).

Alleged Defamatory Statements

There are two allegedly defamatory statements within the article. The first, which plaintiff maintains is a fabricated

quotation, is, "'So we're sitting in there. Me, a couple of others, Chris,' eyewitness DJ Rashad Hayes said. 'Drake comes in and keeps eyeballing the table'" (boldface omitted). The second statement, which is partially quoted from plaintiff's Twitter feed, is as follows: "And then things erupted. As rappers Maino and Meek Mill looked on, Brown and Drake's entourages threw bottles and fists throughout the club.[1] 'I was gonna start shooting in the air but I decided against it,' Hayes said (boldface omitted).

The parties largely focus on whether or not the statements are capable of a defamatory meaning and whether the second statement meets the falsity requirement, given that the Daily used words that were originally published via plaintiff's public Twitter account.

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[1] We note that although these alleged fabricated quotations are not actionable here due to a failure to plead special damages (*see infra*), "[a]n inaccurate quotation may constitute a libel of the person purportedly being quoted in two ways: by attributing to the plaintiff a statement that he or she should not have made, or by placing in the plaintiff's mouth a false and defamatory statement about him- or herself" (Robert D. Sack, Sack on Defamation § 2:4.12 at 2-62 [4th ed 2015], citing *Masson v New Yorker Magazine, Inc.*, 501 US 496, 511-512 [1991]; *see also Ben-Oliel v Press Publ. Co.*, 251 NY 250, 255 [1929] ["In order to constitute a libel, it is not necessary for the defendant in its paper to directly attack the plaintiff as an ignorant imposter. The same result is accomplished by putting in her mouth or attaching to her pen words which make self-revelation of such a fact."]).

"[A] threshold issue for resolution by the court is whether the statement alleged to have caused plaintiff an injury is reasonably susceptible to the defamatory meaning imputed to it" (*Agnant v Shakur*, 30 F Supp 2d 420, 423-424 [SD NY 1998] [applying New York law] [internal quotation marks omitted]). "The court's threshold inquiry is guided by both the meaning of the words as they would commonly be understood and the context in which they appear" (*id.* at 424).

With respect to the first alleged defamatory statement ("'So we're sitting in there. Me, a couple of others, Chris,' eyewitness DJ Rashad Hayes said. 'Drake comes in and keeps eyeballing the table.'" [boldface omitted]) and the allegedly fabricated portion of the second statement ("And then things erupted. As rappers Maino and Meek Mill looked on, Brown and Drake's entourages threw bottles and fists throughout the club." [boldface omitted]), neither the language, nor the implication that plaintiff was a witness to the incident, are libelous on their face, meaning that the complained of words are not commonly understood to subject a person to public contempt or ridicule. Stated another way, the import of this statement is innocent on its face since it merely conveys that plaintiff was sitting at a table observing his surroundings; even if false, this statement is not defamatory. The only way plaintiff alleges that these

statements are susceptible to a defamatory meaning is by reference to extrinsic facts. No reasonable juror could interpret the alleged defamatory statements in the manner urged by plaintiff without knowing that employers expect DJs not to publicly discuss or give interviews about the happenings at trendy clubs and private parties where they work (*see e.g. Agnant*, 30 F Supp 2d at 426). The need for extrinsic facts to render the statement defamatory conclusively dictates that it cannot be libel per se (second cause of action) (*id.* ["It is well established in New York . . . that statements cannot be libelous *per se* 'if reference to extrinsic facts is necessary to give them a defamatory import.'"], quoting *Aronson v Wiersma*, 65 NY2d 592, 594-595 [1985]).

To make out his first cause of action for libel based on the first allegedly defamatory statement and the allegedly fabricated portion of the second statement, plaintiff is required to plead special damages (*Agnant*, 30 F Supp 2d at 426; *see also Rall v Hellman*, 284 AD2d 113, 114 [1st Dept 2001]). "Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation" (*Agnant*, 30 F Supp 2d at 426 [internal quotation marks omitted]; *see also Drug Research Corp. v Curtis Publ. Co.*,

7 NY2d 435, 440-441 [1960] [holding that allegations of special damage must be "fully and accurately stated" and round figures, with no attempt at itemization, do not state special damages]). Here, although plaintiff states the ways in which he believes his career was damaged as a result of the article, he fails to state more than a round figure of $3,000,000 when alleging his damages, which is insufficient to state special damages. However, in exercising our discretion, this Court grants plaintiff the right to replead his complaint with respect to special damages.[2]

With respect to the nonfabricated portion of the second alleged defamatory statement, which reads, "'I was gonna start shooting in the air but I decided against it,'" there is no dispute that this is a quote from plaintiff's public Twitter account. This Court also finds that this particular statement, if false, would be capable of a defamatory meaning (the first element of a defamation claim). The question then becomes whether plaintiff can adequately allege that the statement is "false" when it is an accurate quote from his public Twitter account and was initially published by him, before the Daily

[2] Since the first cause of action for libel also includes allegations regarding the nonfabricated portion of the second alleged defamatory statement (a/k/a the statement quoted from Twitter), plaintiff may also replead special damages as to this statement as well.

article was posted. Defendants argue that because this statement is a direct quote from plaintiff via Twitter, it is not actionable because it cannot meet the falsity element of a defamation cause of action. Defendants also argue that since they accurately quoted plaintiff's own statement from his public Twitter account, he is responsible for any harm to his reputation that flowed from his statement. Plaintiff argues that the way his statement from Twitter was used in the article implied that he was actually in the club and was contemplating shooting a loaded firearm, which he claims is false. Plaintiff also complains that the article left out the second portion of his tweet, which stated that there was "[t]oo much violence in the hip hop community."

To satisfy the falsity element of a defamation claim, plaintiff must allege that the complained of statement is "substantially false." "If an allegedly defamatory statement is 'substantially true,' a claim of libel is 'legally insufficient and . . . should [be] dismissed'" (*Biro v Condé Nast*, 883 F Supp 2d 441, 458 [SD NY 2012] [ellipsis and alteration in original], quoting *Guccione v Hustler Magazine, Inc.*, 800 F2d 298, 301 [2d Cir 1986] [applying New York law], *cert denied* 479 US 1091 [1987]). "[A] statement is substantially true if the statement would not 'have a different effect on the mind of the reader from

that which the pleaded truth would have produced'" (*Biro*, 883 F Supp 2d at 458 [alteration added], quoting *Jewell v NYP Holdings, Inc.*, 23 F Supp 2d 348, 366 [SD NY 1998], quoting *Fleckenstein v Friedman*, 266 NY 19, 23 [1934]). Indeed, it is well settled in New York "that an alleged libel is not actionable if the published statement could have produced no worse an effect on the mind of a reader than the truth pertinent to the allegation" (*Guccione*, 800 F2d at 302, citing *Fleckenstein*, 266 NY at 23; *see also Fulani v New York Times Co.*, 260 AD2d 215 [1st Dept 1999]).

Courts typically compare the complained of language with the alleged truth to determine whether the truth would have a different effect on the mind of the average reader. Although it is conceded that defendant accurately quoted plaintiff's own words from Twitter, that does not necessarily mean that the statement could not have produced a worse effect on the mind of a reader than the truth as alleged by plaintiff. A reader could read the alleged defamatory statement in the context of the rest of the article and think that plaintiff was actually present in the club, prepared to shoot a firearm; whereas, a reader of plaintiff's isolated statement on Twitter may not have the same impression. In this unique case, the context of the two versions of the same statement is crucial.

It is true that courts across the country have extended the

"truth defense" to include an "own words" defense (*see e.g.*, *Thomas v Pearl*, 998 F2d 447, 452 [7th Cir 1993] [holding that "(a) party's accurate quoting of another's statement cannot defame the speaker's reputation since the speaker is himself responsible for whatever harm the words might cause. . . . The fact that a statement is true, or in this case accurately quoted, is an absolute defense to a defamation action."]; *Van Buskirk v Cable News Network, Inc.*, 284 F3d 977, 981-982 [9th Cir 2002] [applying the "own words" defense despite "contextual discrepancies" between the plaintiff's own words and the defendants' quotation of those words]; *Johnson v Overnite Transp. Co.*, 19 F3d 392, 392 n1 [8th Cir 1994] [recognizing the "general rule that a defamation claim arises only from a communication by someone other than the person defamed"]; *Smith v School Dist. of Philadelphia*, 112 F Supp 2d 417, 429 [ED Pa 2000] [noting that "(g)enerally, a plaintiff can not (sic) be defamed by the use of his own words"]). Although defendants cite to *Thomas v Pearl* (998 F2d 447) in their brief, the parties failed to specifically address whether the "own words" defense should be adopted by this Court; and we are aware of no authority, in either New York State jurisprudence or in the Second Circuit, which either expressly accepts or rejects the "own words" defense. We are aware of only one case in the State, albeit a federal district court case, that

even mentions the defense: *Fine v ESPN* (11 F Supp 3d 209, 224 [ND NY 2014]), in a section titled "'Own Words' Defense," states that it cannot reach the issue because the records needed to compare the plaintiff's and the defendant's words were not properly before the court on a motion to dismiss. This highlights, however, the importance of a court's need to compare the two statements as they appear in the actual writings before applying the "own words" defense to dismiss a defamation claim. This is also evident from the fact that the "own words" defense derives from the "truth defense." Even if we were to adopt the "own words" defense, we find that it would not apply here where a comparison of the two statements reveals the potential for them to have different effects on the mind of the reader.

Liability of Defendant News Corp.

Defendant News Corp. argues that plaintiff failed to plead a cause of action against it, since News Corp. cannot be held liable for statements of its subsidiary. In response, plaintiff argues that his claim is actually one based upon piercing the corporate veil.

"[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which

resulted in plaintiff's injury" (*James v Loran Realty Corp.*, 85 AD3d 619 [1st Dept 2011], *affd* 20 NY3d 918 [2012] [internal quotation marks omitted] [alteration in original]). Moreover, "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]).

Here, other than stating that the Daily "was the alter ego, instrumentality and/or agent of News Corporation," the complaint does not allege News Corp.'s "complete domination" of the Daily, or that the purpose of any such domination was to commit a wrong against plaintiff. Accordingly, the complaint's conclusory statement is insufficient (*see Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 153 [1st Dept 2013], *revd on other grounds* 23 NY3d 528 [2014]; *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]). Even considering the additional facts cited by plaintiff on appeal, such as Rupert Murdoch serving as CEO for both companies and appearing at the Daily's launch party, plaintiff's allegations are still wholly insufficient to support a claim of alter ego liability.

Accordingly, the order of Supreme Court, New York County

(Milton A. Tingling, J.), entered May 16, 2014, which denied defendants' motion to dismiss the complaint, should be modified, on the law, to the extent of dismissing the first cause of action with leave to replead special damages, dismissing the second cause of action only to the extent it is based on the allegedly fabricated quotations, and dismissing the complaint against defendant News Corporation, and otherwise affirmed, without costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: NOVEMBER 12, 2015

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