SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 19, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1684 The People of the State of New York Index 8472/99
Respondent,

-against-

Jose Maurad,
Defendant-Appellant.

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Jose Maurad, appellant pro se.

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

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Judgment, Supreme Court, New York County (John Cataldo, J.), rendered January 31, 2001, convicting defendant, after a jury trial, of sodomy in the first degree (two counts) and endangering the welfare of a child, and sentencing him, as a violent felony offender, to an aggregate term of 23 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. There is no basis for disturbing the jury's determinations concerning credibility.

The prosecutor's comment on the demeanor and credibility of a defense witness was within the bounds of permissible advocacy. All of defendant's other challenges to the People's summation are

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

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would reject them.

The Decision and Order of this Court entered herein on September 30, 2003 is hereby recalled and vacated (*see* M-4778 decided simultaneously herewith).

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

ENTERED: November 19, 2015

CLERK

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

15860 The People of the State of New York, Respondent, Ind. 3306/11

-against-

Jennara Cobb,
Defendant-Appellant.

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Carter Ledyard & Milburn LLP, New York (Michael Shapiro of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx County, New York (Peter D. Coddington of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered December 18, 2014, convicting defendant, after a nonjury trial, of divulging an eavesdropping warrant, official misconduct, and obstructing governmental administration in the second degree, and sentencing her to a conditional discharge with the performance of 200 hours of community service, unanimously affirmed.

Penal Law § 250.20 states as follows: "A person is guilty of divulging an eavesdropping warrant when, possessing information concerning the existence or content of an eavesdropping warrant . . . , he discloses such information to another person . . ." The trial court, prior to rendering its verdict, explained that "knowledge, actual knowledge, is required[,]" and rejected the People's argument that mere rumor would be enough to satisfy the

requirements for the divulging count. On appeal, viewing the evidence in the light most favorable to the People, the evidence was sufficient for the trial court to conclude that defendant divulged information concerning the existence and content of an eavesdropping warrant (*see People v Gordon*, 23 NY3d 643, 649 [2014]), and we see no reason to set the verdict aside as against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Defendant, a New York City police officer, was assigned to the Internal Affairs Bureau (IAB) from August 2006 to July 2009. During that time, defendant was assigned to the "Barber Shop Operation." The operation was investigating a drug dealer who was selling drugs out of barbershops and a police officer who owned the barbershops, both of whom the police believed "were in a ring regarding the sale of marijuana." Defendant was directly involved in the investigation, as she participated in obtaining the initial wiretap, monitored the wiretap, signed a confidentiality letter, interviewed the dealer and others, and was a sounding board for the supervising detective of the investigation. One month after defendant left IAB, a wiretap "went up" on the officer who owned the barbershops. This wiretap led to information of ticket fixing between the target officer and other delegates of the Patrolman's Benevolent Association.

In December 2009, this information resulted in the expansion of the initial investigation to include subsequent wiretaps on delegates regarding ticket fixing. The common denominator between all these wiretaps was the target officer.

On February 4, 2010, defendant went to a bar with a police captain, who then invited another police officer, who was not the target on the prior wiretaps. This officer was known as "K-Mac." Despite defendant meeting K-Mac for the first time, upon his introduction as a delegate, defendant disclosed that there was an investigation involving corrupt cops fixing tickets for drug dealers. She noted that a delegate might be involved, and advised the officers to be careful on the phones. K-Mac, while driving home afterwards, called another delegate officer to meet at a different bar. K-Mac then told that delegate officer that he had just heard about corrupt cops fixing tickets, that a delegate might be involved, and that he should be careful on phones. The trial evidence showed that this information was repeated to a trustee, who subsequently told all the Bronx delegates at a side meeting that they should be careful on the phones, that they should stay off the phones, and that ticket fixing should be conducted face-to-face. The next day, IAB intercepted a call on one of their wiretaps, where two delegates informed one another that IAB was listening to their calls and

that all ticket fixing business by phone had to stop.

After hearing this conversation about avoiding phones, and other conversations on wiretaps about ways to attempt to circumvent any wiretaps, IAB knew it had a leak. By June 2010, the supervising detective began to suspect defendant was leaking information. In June 2010, defendant spoke to the supervising detective on the phone, and she brought up an incident at St. Barnabas Hospital and asked whether he had heard about it. He decided to plant information by acknowledging to defendant that he had heard of it, even though he had only heard about the melee by listening to wiretapped conversations. Three to four days later, he listened to an intercepted call between several delegates, who were previously connected to defendant. One of them said he saw K-Mac at a bar, and K-Mac spoke to the "girl from the four-eight" who said she thought a delegate's phone "is wired, tapped" because "the guy that she knows that works there" knew about St. Barnabas. The testimony at trial provided a sufficient basis for the court to have concluded that defendant was "the girl from the four-eight" since she was assigned to that precinct after she left IAB.

Defendant's arguments on appeal about the weight and sufficiency of the evidence were properly considered and rejected by the trial court, who was the trier of fact. Her principal

point on appeal is that she was merely repeating rumors, gossip, or speculation, and that she did not possess information regarding the existence or content of a wiretap. This issue was resolved against her by the trial court, and there is no basis to disturb its findings. The trial court's conclusions on the remaining counts were based on the same evidence as the divulging an eavesdropping warrant count, and also should be affirmed on appeal.

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

ENTERED: November 19, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Gische, JJ.

15954 The Carlyle, LLC, Index 652780/13
Plaintiff-Respondent,

-against-

Beekman Garage LLC, et al.,
Defendants-Appellants.

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Herrick, Feinstein LLP, New York (David Feuerstein of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 2, 2014, which, insofar appealed from, granted plaintiff's motion for partial summary judgment, denied defendant Quik Park 1633 Garage LLC (Quik Park 1633)'s cross motion for summary judgment, directed an assessment of damages against defendants, and directed plaintiff to file a note of issue and statement of readiness by August 1, 2014, unanimously modified, on the law, to deny so much of plaintiff's motion as sought to dismiss defendants' seventh affirmative defense, and otherwise affirmed, without costs.

The court properly found that the Beekman defendants failed to raise an issue of fact as to whether the garage was rendered partially unusable by casualty. If the repairs to the garage's facade had been necessitated by a casualty – for example, if an

earthquake had caused a crack in the facade, or if a violent storm had caused a cornice to fall off – defendants would have known about it. Because article 9 of the lease (fire and casualty) was inapplicable, the court properly found that article 4 applied.

The Beekman defendants' argument that they were partially evicted from the garage is unavailing. "To be an eviction, constructive or actual, there must be a wrongful act by the landlord" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). Plaintiff's installation of temporary scaffolding as part of its repairs to the garage's facade was not wrongful because it was authorized by the lease (*see e.g. Ernst v Straus*, 114 Appellant Div 19 [1st Dept 1906]; *Bijan Designer for Men v St. Regis Sheraton Corp.*, 142 Misc 2d 175 [Sup Ct, NY County 1989], *affd* 150 AD2d 244 [1st Dept 1989]). As was noted in *Bijan*, "tenants are well advised . . . to specify some limits to the exculpatory clause concerning repairs" (*id.* at 181).

Because the court properly granted plaintiff summary judgment on the first cause of action (for unpaid rent), it also properly granted plaintiff summary judgment on the second and fourth causes of action (for late fees and attorneys' fee, respectively). Plaintiff is entitled to such fees under articles 53(B) and 19 of the lease, respectively.

Except for the seventh affirmative defense, the motion court properly dismissed defendants' affirmative defenses. For example, because the lease says that the tenant will pay rent "without any set off or deduction whatsoever," the Beekman defendants' claim that plaintiff breached the lease was properly dismissed as an affirmative defense (*see Lincoln Plaza Tenants Corp. v MDS Props. Dev. Corp.*, 169 AD2d 509, 512 [1st Dept 1991]). However, the Beekman defendants may still maintain this claim as a counterclaim (*see id.*). The fifth, sixth, and eighth defenses were properly dismissed because they consist of bare legal conclusions (*see Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]).

The court's dismissal of plaintiff's claim for rent against Quik Park 1633, based on an absence of privity, precludes the striking of the seventh affirmative defense, in which it is claimed that Quik Park 1633 could not be liable for rent because it was not in privity with plaintiff.

However, while Quik Park 1633 cannot be liable for rent under the lease, the motion court properly denied dismissal of the use and occupancy claim against Quik Park 1633. A claim by a landlord against a nonlessee occupant for use and occupancy should not be foreclosed simply because there is a lease covering the premises. The obligations of the lessee arising under the

lease are distinct from the obligations of an occupant of premises toward the owner of those premises.

Notwithstanding the general rule that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), in the landlord-tenant context, the occupant of premises is liable to the owner of the property for use and occupancy irrespective of the existence of a lease in the name of another entity: "[t]he obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant[,] [but] [r]ather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties" (*Eighteen Assoc. v Nanjim Leasing Corp.*, 257 AD2d 559, 559 [2d Dept 1999] [internal quotation marks and citation omitted]).

Similarly, in *Gateway I Group, Inc. v Park Ave. Physicians, P.C.* (62 AD3d 141 [2d Dept 2009]), the Second Department allowed a landlord to bring claims for use and occupation against nonsignatories to the lease who allegedly used the premises. The

landlord had successfully evicted the lessee and obtained a judgment for unpaid rent; however, because the premises were used by other entities which were interconnected with the lessee but were not parties to the lease, the landlord commenced a second action to recover both the unpaid judgment and posteviction rent from those entities. While some causes of action relied on piercing the corporate veil and oral assignment of the lease to the related defendants, the landlord also sought recovery against the nonlessee occupants on a theory of quantum meruit. The Second Department rejected the argument that the express contract -- the lease -- precluded recovery on a quantum meruit basis. It explained that because there was no lease between the landlord and those other defendants, causes of action against them for unpaid rent on a quantum meruit basis were permissible (*id.* at 149).

We apply the equivalent reasoning here to allow plaintiff to seek an award of use and occupancy against the nonlessee occupant of the premises.

We have considered defendants' remaining arguments for affirmative relief and find them unavailing. For example, we note that defendants failed, in opposition to plaintiff's summary

judgment motion, to request leave to amend their affirmative defenses. We also agree with the motion court that the amount sought by defendants in their counterclaims cannot be more than plaintiff's damages.

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

ENTERED: November 19, 2015

CLERK

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

16177 Index 108672/11
101595/12

Gloria Stern,
Plaintiff,

-against-

Four Points by Sheraton Ann Arbor Hotel, et al.,
Defendants.

- - - - -

Gloria Stern,
Plaintiff-Appellant,

-against-

Z.L.C., Inc., doing business as Sheraton Inn Ann Arbor, et al.,
Defendants-Respondents.

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Sonn & Genis, Bronx (Robert J. Genis of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Gregory A. Cascino of counsel), for respondents.

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Order, Supreme Court, New York County (Anil Singh, J.), entered on or about September 5, 2013, which, to the extent appealed from as limited by the briefs, granted defendant ZLC Inc.'s motion to dismiss the complaint as against it pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff alleges that, while in New York, she reserved a room at the Sheraton Inn Ann Arbor in Ann Arbor, Michigan using an interactive website maintained by Starwood Hotels and Resorts

Worldwide, Inc. for Sheraton hotels. During her stay at the Sheraton Inn hotel, which was then owned by defendant ZLC, plaintiff tripped over a walkway in the hotel lobby and fractured her knee. In support of its motion to dismiss, defendant ZLC, a Michigan corporation, submitted evidence that, at the time of the accident, it used the trademark name "Sheraton" pursuant to a license agreement, but had no other hotels and no bank accounts, real estate or other contacts with New York.

Although ZLC's participation in the interactive website for Sheraton hotels may demonstrate that it transacted business in New York, the relationship between ZLC's website activities and plaintiff's negligence action arising from an allegedly defective condition of premises in Michigan is too remote to support the exercise of long-arm or specific jurisdiction under CPLR 302(a)(1) (*see Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 [2014]; *Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 914 [2d Dept 2014]). Long-arm jurisdiction also cannot be asserted under CPLR 302(a)(3), which applies when a tortious act committed outside the state causes injury within the state, because plaintiff's injury occurred in Michigan (*see Paterno*, 24 NY3d at 381; *Kramer v Hotel Los Monteros S.A.*, 57 AD2d 756 [1st Dept 1977], *lv denied* 43 NY2d 649 [1978]).

Since plaintiff has not shown that facts may exist to

support the exercise of personal jurisdiction over ZLC with respect to her claim arising from a trip-and-fall accident in Michigan, ZLC's motion to dismiss was properly granted without providing plaintiff an opportunity to engage in jurisdictional discovery (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467[1974]; *Mejia-Haffner v Killington, Ltd.*, 119 AD3d at 915).

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

ENTERED: November 19, 2015

CLERK

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

16178 In re Isaac A. F., etc.,

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

Crystal F., also known as Crystal A.F.,
Respondent-Appellant,

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

_____

Dora M. Lassinger, East Rockaway, for appellant.

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

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

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 8, 2014, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights and committed the custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed with respect to the fact-finding, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable portion of the order.

The finding of permanent neglect is supported by clear and convincing evidence that the agency made diligent efforts to

strengthen the parental relationship by, among other things, scheduling visitation and providing the mother with referrals for services, and that, despite those efforts, the mother failed to plan for the child's future during the relevant time period (*see* Social Services Law § 384-b[7][a]). Although the mother completed programs in parenting skills and anger management, she behaved disruptively and violently during scheduled visits, and she failed to complete a therapy program, obtain suitable housing, gain insight into the obstacles preventing the return of the child, or benefit from the programs she attended (*Matter of Isaiah Jaysean J. [Cierra Tassandra J.]*, 128 AD3d 438, 438-439 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]). Family Court properly relied on past findings of neglect and properly drew a negative inference from the mother's failure to testify at the fact-finding hearing or to present evidence to rebut the agency's case (*see Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 542-543 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]; *see also Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 536 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

No appeal lies from the dispositional portion of Family Court's order, as the record shows that the mother defaulted at the dispositional hearing by failing to appear without explanation (*see Matter of Natalie Maria D. [Miguel D.]*, 73 AD3d

536, 537 [1st Dept 2010]). Were we to review the dispositional portion of the order, we would find that a preponderance of the evidence shows that the child's best interests would be served by terminating the mother's parental rights and freeing the child for adoption by his foster mother's adult son, who has become a certified foster parent and wants to adopt the child (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Isaiah Jaysean J.*, 128 AD3d at 439; *see also Matter of Michael B.*, 80 NY2d 299, 318 [1992]).

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

ENTERED: November 19, 2015

CLERK

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

16179 The People of the State of New York, Ind. 1411/08
Respondent,

-against-

Quadaun James,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J. at hearing; Robert Sackett, J. at first trial, plea, sentencing and resentencing), rendered on or about December 4, 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 19, 2015

CLERK

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

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

16180 The People of the State of New York, Ind. 2477/08
Respondent,

-against-

Nathan Vasquez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Andrea L. Bible of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J.), rendered on or about February 4, 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 19, 2015

CLERK

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

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

16181 The People of the State of New York, Respondent, Ind. 3221/07 4743/08

-against-

Andrique Baron, Defendant-Appellant.

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Andrique Baron, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered July 31, 2009, as amended August 12, 2009, convicting defendant, after a jury trial, of computer trespass, commercial bribe receiving in the first degree (7 counts), computer tampering in the third degree (4 counts), falsifying business records in the first degree (14 counts), criminal possession of a forged instrument in the second degree (3 counts), violation of Education Law § 224(2) (5 counts) and attempted falsification of business records in the first degree, and sentencing him to an aggregate term of 2⅔ to 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the forged instrument convictions to third-degree criminal possession of a forged instrument, and otherwise affirmed.

Although defendant did not preserve his claim that the evidence was legally insufficient to support the convictions of criminal possession of a forged instrument in the second degree, we find, as the People concede, that a forged letter of recommendation is not a forged instrument under that statute (*see People v Sengupta*, 121 AD3d 575 [1st Dept 2014], *lv denied* 25 NY3d 1077 [2015]). Accordingly, we exercise our interest of justice jurisdiction to reduce those counts to third-degree possession.

Defendant's legal sufficiency claims as to the commercial bribe receiving and attempted falsification of business records counts are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also find that the verdict as to these counts was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). Regardless of whether any specific amount of economic loss could be attributed to a particular act of commercial bribe receiving, the testimony abundantly established that the economic loss suffered by the victim exceeded $250 for purposes of those counts. The evidence also supported the inference that defendant acted in concert to sell the forged academic transcript at issue (*see* Penal Law § 20.00). As to the attempt count, the evidence that defendant

received another person's personal information, and possessed a computer with access to a college's student information system and other supplies needed to forge a transcript for that person, established that defendant came "dangerously near commission of the completed crime" (*People v McGee*, 20 NY3d 513, 519 [2013]).

The court properly admitted out-of-court statements by defendant's intermediary concerning defendant's participation in the scheme to sell academic records, pursuant to the coconspirator exception to the hearsay rule. Contrary to defendant's argument, the evidence was sufficient to make out a prima facie case of conspiracy (*see People v Diaz*, 209 AD2d 1, 4-6 [1st Dept 1995], *lv denied* 85 NY2d 972 [1995]).

Defendant failed to preserve his constitutional challenge to the admission of hearsay, his challenge to the court's *Molineux* ruling, and his argument that the count of computer trespass was duplicitous, and we decline to review them in the interest of justice. As an alternative holding, we find that they are without merit, and that any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant's ineffective assistance of counsel claim is unreviewable since it involves matters not reflected in or fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709

[1988]). Although defendant made a CPL 440.10 motion that was denied, he failed to obtain permission from this Court to appeal; accordingly, the merits of the ineffectiveness claim are not properly before us (*see People v Polanco*, 121 AD3d 436, 437 [1st Dept 2014], *lv denied* 24 NY3d 1221 [2015]). In the alternative, insofar as the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: November 19, 2015

CLERK

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

16182 Raul Vega, Jr., et al., Index 100629/11
Plaintiffs-Appellants-Respondents,

-against-

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

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The Ruth E. Bernstein Law Firm, New York (Ruth E. Bernstein of counsel), for appellants-respondents.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 1, 2014, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on their Labor Law §§ 240(1) and 241(6) claims, and denied defendants' cross motion for summary judgment seeking to collaterally estop plaintiffs from raising an issue already decided by the Workers' Compensation Board, unanimously modified, on the law, to grant defendants' cross motion, and otherwise affirmed, without costs.

Plaintiff Raul Vega, a laborer employed on the reconstruction and renovation of the 96th Street IRT subway station, was injured when a coworker operating an excavator dropped concrete debris on him. The two workers were in the

process of transporting the debris to a nearby dumpster for disposal, when the excavator operator dropped the debris before Vega had safely left the dumping area. As a result, Vega sustained a crushed left index finger.

As to plaintiffs' Labor Law § 241(6) claim, we conclude that defendants raised an issue of fact as to whether Vega was comparatively negligent because of conflicting deposition testimony over whether Vega had given the excavator operator a signal to drop the concrete debris before plaintiff had safely left the dumpster area (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]; *Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 577 [1st Dept 2013]).

The court did not err in denying plaintiffs' motion for summary judgment on the Labor Law § 240(1) claim because plaintiffs did not "show that the object fell, while being hoisted or secured, *because of* the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). Here, "the hoisting . . . equipment did not malfunction during the hoisting maneuver but, rather, . . . served [its] core objective" and the concrete debris that fell on Vega was "purposefully released from the [excavator] by the operator at the designated location" (*Corey v Gorick Constr. Co.*, 271 AD2d 911, 913 [3d Dept 2000]).

However, the court erred in failing to collaterally estop plaintiffs from relitigating their allegation that Vega sustained complex regional pain syndrome, or reflex sympathetic dystrophy in the present case, because that very same issue was previously raised and conclusively decided in a Workers' Compensation Board proceeding, where plaintiffs had the full and fair opportunity to litigate the issue (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Ridge v Gold*, 115 AD3d 1263, 1264 [4th Dept 2014], *appeal dismissed* 23 NY3d 1010 [2014]; *cf. Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246 [2013]).

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

ENTERED: November 19, 2015

CLERK

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

16184 MG Hotel, LLC, Index 602262/07
Plaintiff-Appellant,

-against-

Bovis Lend Lease, LMB, Inc., et al.,
Defendants,

American Standard, Inc., doing
business as The Trane Company, et al.,
Defendants-Respondents.

_____

Goetz Fitzpatrick LLP, New York (Ellen August of counsel), for appellant.

K&L Gates LLP, New York (Patrick J. Perrone of counsel), for Trane U.S. Inc., sued herein as American Standard, Inc., d/b/a The Trane Company, American Standard Companies, Inc., d/b/a The Trane Company, and The Trane Company, respondent.

Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (Eric M. Eusanio of counsel), for Vigilant Insurance Company, respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about October 24, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Trane U.S. Inc., sued herein as American Standard, Inc., d/b/a The Trane Company, American Standard Companies, Inc., d/b/a The Trane Company, and The Trane Company, an Operating Division of American Standard, Inc. (Trane) for partial summary judgment dismissing plaintiff's breach of implied warranty claims and limiting plaintiff's damages to the purchase price of any

HVAC units that are proven, at trial, to be defective, and granted defendant Vigilant Insurance Company's motion for summary judgment dismissing plaintiff's complaint against it and awarding it the contract balance of $429,194, unanimously affirmed, without costs.

Plaintiff, as owner and developer, hired defendant Bovis Lend Lease LMB, Inc. (Bovis) as construction manager, and defendant Centrifugal/Mechanical (Centrifugal) as the HVAC contractor. Defendant Vigilant issued a performance bond covering Centrifugal's performance.

Centrifugal installed HVAC systems manufactured by Trane, which plaintiff had specifically selected. Following installation, numerous problems with the HVAC units arose, including units that would heat when they were supposed to cool and units that would "freeze-up" and simply not work at all. As a result of the unit failures, plaintiff commenced this action, and Trane and Vigilant each moved for summary judgment, which the motion court correctly granted.

The written warranty that Trane provided to plaintiff expressly provided plaintiff the limited remedy of reimbursement of the purchase price for any defective units, waived any liability for consequential and incidental damages, and waived the implied warranties of merchantability and fitness for a

particular purpose. The motion court, in granting Trane's motion for partial summary judgment, properly upheld these warranty provisions. The exclusive remedy provision does not fail of its essential purpose (*see* UCC 2-719[2]; *see also Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 404 [1968]), and the waiver of liability for consequential and incidental damages is not unconscionable (*see* UCC 2-719[3]; *Mom's Bagels of N.Y. v Sig Greenebaum Inc.*, 164 AD2d 820, 822 [1st Dept 1990], *appeal dismissed* 77 NY2d 902 [1991]). Further, the terms of Trane's express warranty are enforceable, notwithstanding the terms of the Centrifugal purchase order (*see* UCC 2-207; *Laidlaw Transp. v Helena Chem. Co.*, 255 AD2d 869, 870 [4th Dept 1998]).

Vigilant was entitled to summary judgment dismissing the breach of performance bond claim, as there is no evidence in the record supporting plaintiff's contention that Centrifugal defaulted under its contract with Bovis or that it caused or created the allegedly defective HVAC units (*see Levine v City of New York*, 101 AD3d 419, 420 [1st Dept 2012]). Plaintiff certified that Centrifugal's installation of the HVAC units was

done according to its specifications (*see e.g. John John, LLC v Exit 63 Dev., LLC.*, 35 AD3d 539 [2d Dept 2006]).

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 19, 2015

CLERK

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

16185-
16186 In re Brianna Money J., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

LaQueenia S., etc.,
Respondent-Appellant.

SCO Family of Services,
Petitioner-Respondent,

_____

Geoffrey Berman, Larchmont, for appellant.

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

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

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Orders, Family Court, New York County (Stewart Weinstein, J.), entered on or about November 12, 2014, which, to the extent appealed from as limited by the briefs, upon a fact-finding determination that respondent mother is presently and for the foreseeable future unable to care for the subject children by reason of mental retardation, terminated her parental rights to the children and committed their custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports Family Court's

finding that the mother, by reason of her mental retardation, is unable, at present and for the foreseeable future, to provide proper and adequate care for the children (*see* Social Services Law § 384-b[4][c], [6][b]; *Matter of Leomia Louise C.*, 41 AD3d 249, 249 [1st Dept 2007]). Although there is evidence of the mother's adequate adaptive skills in certain areas and a parental bond between the mother and the children, an expert psychologist opined that the mother's mental retardation significantly impacted her ability to provide even the most basic care for the children, and that the services she had received and the available interventions would not significantly impact or improve her parenting abilities.

Given the foregoing evidence and the evidence that the children have bonded with their foster mother, who provides for their needs and wants to adopt them, termination of the mother's parental rights is in the children's best interests (*Matter of Joyce T.*, 65 NY2d 39, 49-50 [1985]).

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

ENTERED: November 19, 2015

CLERK

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

16187- Index 150047/12
16188- 150389/10
16189 Jan Epperson, 20594/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

- - - - -

Alan Gaylor,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

William Gottlieb Realty Co., LLC,
et al.,
Defendants-Appellants.

- - - - -

Olga Perez,
Plaintiff-Appellant,

-against-

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

_____

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for Jan Epperson, Alan Gaylor and Olga Perez, appellants.

Steinberg & Cavaliere, LLP, White Plains (C. William Yanuck of counsel), for William Gottlieb Realty Co., LLC and 415-417 Bleecker Street, LLC, appellants.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Orders, Supreme Court, New York County (Margaret A. Chan, J.), entered February 6, 2014 and February 18, 2014, which granted the City's motions for summary judgment dismissing the respective complaints of plaintiffs Jan Epperson and Alan Gaylor, and denied plaintiffs' respective cross motions to preclude the City from contesting the issue of prior written notice and for summary judgment on that issue, or, in the alternative, compelling the Commissioner of Transportation or other City personnel to appear for a deposition, unanimously affirmed, without costs. Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 6, 2014, which denied plaintiff Olga Perez's motion for summary judgment based on the City's failure to comply with Administrative Code §§ 7-201(c)(3) and (4), or, in the alternative to compel the Commissioner of Transportation or other City personnel to appear for a deposition, and granted the City's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The City conceded in each case that it had not complied with Administrative Code §§ 7-201(c)(3) and (4) concerning maintaining an indexed book of all written notices which it received and acknowledgments it gave as to the existence of defective, unsafe conditions, and that the DOT did not provide written acknowledgment of notice of such conditions. The City asserts

that it converted to electronic databases which are a sufficient alternative system for determining whether prior written notice was received by it. Plaintiffs, and the landowner defendants in the Gaylor case, contend that the City's failure to comply with the strict mandates of the Administrative Code should relieve plaintiffs of the prior written notice provisions of Administrative Code § 7-201(c)(2).

The courts properly shifted the burden to the City to demonstrate the lack of prior written notice of the defective conditions that allegedly caused plaintiffs' injuries, given its admitted failure to comply with the Administrative Code provisions (*see Gorman v Town of Huntington,* 12 NY3d 275, 280 [2009]; *Caramanica v City of New Rochelle,* 268 AD2d 496, 497 [2d Dept 2000]; *Dufrane v Robideau,* 214 AD2d 913, 915 [3d Dept 1995]). The courts also properly declined to relieve plaintiffs of the statutory obligation to show prior written notice.

Plaintiff Epperson failed to present evidence sufficient to raise a triable issue of fact concerning whether the City caused or created the defective condition adjacent to the sewer grate by negligently re-paving the street. The opinion of plaintiff's expert that the street had been re-paved by the City was speculative, and, in any event, plaintiff presented nothing to show that the alleged re-paving created an immediately dangerous

condition (*see Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]). The City's failure to discover an improper re-paving by a third party would be similarly insufficient because actual or constructive notice of a defect does not satisfy the statutory notice requirement (*see Stoller v City of New York*, 126 AD3d 452, 452-453 [1st Dept 2015]).

Plaintiff Gaylor failed to present evidence sufficient to raise a triable issue of fact concerning whether the City caused or created the defective condition of the curb which allegedly caused his fall. The sole evidence presented was a public notice that the City was installing additional pedestrian ramps at unspecified corners pursuant to the settlement of a lawsuit. However, photographs of the scene show that the ramps are too far removed from the place where plaintiff fell, and, in any event, no evidence was presented as to when the ramps were installed.

Plaintiff Perez failed to present evidence sufficient to raise a triable issue of fact concerning whether the City caused or created the defective condition of the street by improperly patching potholes. She presented nothing to show that the alleged negligent patching created an immediately dangerous condition (*see Bielecki*, 14 AD3d 301).

The courts did not improvidently exercise their discretion in declining to direct additional depositions because each

plaintiff failed to make a detailed showing of the necessity for taking additional depositions or the substantial likelihood that those sought to be deposed possessed information necessary and material to the prosecution of the case (*see Alexopoulos v Metropolitan Transp. Auth.*, 37 AD3d 232, 233 [1st Dept 2007]).

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 19, 2015

CLERK

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

16190 The People of the State of New York, Ind. 3963/12
Respondent,

-against-

Rocio Lizardo, also known as
Rocia Lizardo,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about September 11, 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 19, 2015

CLERK

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

16191 Vladislav Doronin, Index 652184/14
Plaintiff-Appellant,

-against-

Omar Amanat, et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (James J. Stricker of counsel), for appellant.

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

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 3, 2014, which granted defendants' motion for a stay of the action pending the resolution of previously filed litigation in the United Kingdom, unanimously affirmed, without costs.

The motion court providently exercised its discretion in staying the present action (CPLR 2201). The parties in the pending litigation are the corporate vehicles representing the respective interests of the individual parties in the present action, both litigations involve defendants' alleged fraudulent conduct, and determination of the pending action may dispose of

the issues in this action (*see OneBeacon Am. Ins. Co. v Colgate-Palmolive Co.*, 96 AD3d 541 [1st Dept 2012]; *Belopolsky v Renew Data Corp.*, 41 AD3d 322 [1st Dept 2007]).

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

ENTERED: November 19, 2015

CLERK

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

16192 The People of the State of New York, Ind. 4012/12
Respondent,

-against-

Ghinna Palacios,
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.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel P. FitzGerald, J. at plea; Cassandra M. Mullen, J. at sentencing), rendered on or about July 12, 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 19, 2015

CLERK

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

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

16193 In re Sonya Duraku, Index 653545/13
Petitioner-Appellant,

-against-

Tishman Speyer Properties, L.P.,
Respondent-Respondent,

Service Employees International Union,
Local 32BJ, etc.,
Respondent.

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Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Allen B. Roberts of counsel), for Tishman Speyer Properties, L.P., respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 3, 2014, which denied the petition to vacate an arbitration award, dated July 15, 2013, denying petitioner's claims of, inter alia, sexual discrimination against respondent Tishman Speyer Properties, L.P., unanimously affirmed, without costs.

The arbitral award is not violative of public policy, irrational, or the product of partiality or bias (*see* CPLR 7511[b]; *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). Petitioner's argument is based on the arbitrator's factual

findings, which are "largely unreviewable" (*see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]). Petitioner failed to identify any evidence of partiality or bias on the part of the arbitrator (*see Kalfus v Kalfus*, 270 AD2d 41 [1st Dept 2000).

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

ENTERED: November 19, 2015

CLERK

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

16194 The People of the State of New York, Ind. 3131/12
Respondent,

-against-

Raymond Gordon,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered on or about May 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 19, 2015

CLERK

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

16195N Santiago Gough, Index 151139/12
Plaintiff-Respondent,

-against-

Panorama Windows, Ltd. et al.,
Defendants-Appellants.

_____

Faust, Goetz, Schenker & Blee, LLP, New York (Stephanie Tannenholtz of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (Albert K. Kim of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 12, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to vacate plaintiff's note of issue and to compel disclosure of plaintiff's methadone treatment records and cellular telephone records, unanimously affirmed, without costs.

The court providently exercised its discretion in denying defendants' motion (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). Defendants failed to show that plaintiff's methadone treatment records "relate to the injury sued upon" (*Del Terzo v Hospital for Special Surgery*, 95 AD3d 551, 553 [1st Dept 2012]). On appeal, plaintiff states that to the extent his bill of particulars (which is not included in the record on appeal) can be viewed as claiming mental injuries apart from physical

injuries, he withdraws those claims. In addition, defendants failed to submit any evidence of a causal link between plaintiff's methadone use and the motor vehicle accident at issue (*see Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012]). Nor did defendants show "that the interests of justice significantly outweigh the need for confidentiality" (Mental Hygiene Law § 33.13[c][1]; *Del Terzo*, 95 AD3d at 553).

Defendants' speculative assertions that plaintiff may have been using his cell phone at the time of the accident are insufficient to warrant disclosure of plaintiff's cell phone records (*Carpio v Leahy Mech. Corp.*, 30 AD3d 554, 555 [2d Dept 2006]; *see also Manley v New York City Hous. Auth.*, 190 AD2d 600, 600-601 [1st Dept 1993]).

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

ENTERED: November 19, 2015

CLERK