SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 19, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15705 & M-4395 — Index 651553/10

Phillip Gootee,
Plaintiff-Respondent,

-against-

Global Credit Services, LLC,
Defendant-Appellant.

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Gordon & Rees, LLP, New York (Bran C. Noonan of counsel), for appellant.

Brown, Gruttadaro, Gaujean & Prato, LLC, White Plains (Neil B. Connelly of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 25, 2014, which granted plaintiff's motion for summary judgment with respect to liability for breach of contract and dismissing defendant's counterclaim, referred the issue of damages to a special referee or judicial hearing officer to hear and report, and denied defendant's motion for summary judgment on its counterclaim, modified, on the law, to deny plaintiff's motion for summary judgment, and otherwise affirmed, without

costs.

By letter agreement dated September 26, 2008, defendant hired plaintiff to be its president (the employment agreement). The terms of employment provided, inter alia, that plaintiff was to receive: an annual salary "[p]ayable at the gross rate of $275,000 per year"; a bonus of 3% on new "ARMZ" contracts paid monthly; medical and other insurance benefits; a housing allowance of $25,000 "to be paid in 24 equal payments per year"; 375,000 shares of Class B stock, to vest 125,000 units per year; a $50,000 loan, forgivable on specified terms (the Forgivable Loan); a $250,000 separation payment, subject to reduction on specified terms; and 25 vacation days per year. The employment agreement also provided that plaintiff would be subject to the confidentiality and nonsolicitation provisions set forth in an agreement annexed thereto.

The employment agreement did not state a fixed duration for plaintiff's employment or that he could only be terminated for cause. Nor did it expressly state that plaintiff was an "at-will employee." However, it contained a provision that prohibited modification of "any provision" thereof without "a writing signed by the party against whom enforcement is sought" (the no oral modification clause).

In conformity with the no oral modification clause, on September 16, 2009, the parties executed a "First Amendment" to the employment agreement, which reduced plaintiff's salary to $150,000 and increased his ARMZ bonus from 3% to 7.5%. The housing allowance was changed to $4,000 per month, payable on the first day of each month. A "Retention Loan" of $90,000 was added, which, along with the Forgivable Loan, would be forgiven over a three-year period in three equal installments beginning on January 1, 2011, provided that plaintiff was employed by defendant on the anniversary dates. The separation payment was deleted.

Plaintiff was removed as president in February 2010. For the next six months, he continued to attend conferences and trade shows on defendant's behalf and was paid a reduced salary and benefits. After efforts to negotiate a written consulting agreement to supersede the employment agreement failed, in July 2010, plaintiff wrote defendant a letter that included a notice to cure alleging that defendant had breached the employment agreement. In August 2010, defendant drafted a revised consulting agreement, which plaintiff rejected. After defendant stopped paying him, plaintiff commenced this action asserting claims for breach of contract based on the failure to pay the

salary, bonus, housing allowance, insurance premiums, and stock allegedly due under the employment agreement.

While the employment agreement does not state a fixed duration, plaintiff alleges in his complaint that "[i]t was agreed by the parties that the contract was to run no less than five (5) years." Defendant denies liability on the ground that it had the right to alter the terms of plaintiff's employment because it was "at will," and asserts counterclaims for the repayment of the Forgivable and Retention loans.

Supreme Court granted plaintiff summary judgment on liability and referred the issue of damages to a special referee or JHO to hear and report. It denied defendant summary judgment on its counterclaim. While finding that the employment agreement was unambiguous and created an "at-will employment ... terminable at any time by either the Plaintiff or the Defendant," the court held that "it[] still is governed by [its] terms," which "provide[] [for] no modification, amendment, extension, discharge, termination or waiver of any provision ... unless the same shall be in writing, signed by the party against enforcement is sought." Thus, although it rejected plaintiff's argument that the no oral modification clause provided "a duration of time," the court held that when defendant removed plaintiff as president

in February 2010 and altered his salary and benefits without a signed writing, it violated the no oral modification clause and breached the employment agreement. The court stated further: "With respect to damages, I had asked Plaintiff's Counsel how far out we are going because if it's infinite, he has a problem. He says there is age 67 is where he goes or where the damages go to, so that's where we are at and I believe he represents the Plaintiff is 67 so that's where we are at in terms of figuring out the damages."

"[A]bsent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (*Sabetay v Sterling Drug*, 69 NY2d 329, 333 [1987]; *Rooney v Tyson*, 91 NY2d 685, 689 [1998]). The presumption can be rebutted by evidence of a limitation on the employer's right to discharge the employee at will (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 [1982]; *Talansky v American Jewish Historical Soc.*, 8 AD3d 150 [2004]).

The inclusion of the no oral modification clause in the employment agreement does not, in and of itself, suffice to rebut the at-will presumption. While the clause precluded the modification of "any provision" of the agreement without a writing signed by the party against whom enforcement was sought,

there is no express provision in the agreement that precluded defendant from terminating plaintiff without cause. However, as Supreme Court found, the no oral modification clause is an enforceable contract term even if the employment was at will (*see JCS Controls, Inc. v Stacey*, 57 AD3d 1372, 1373 [4th Dept 2008] ["terms set forth in the . . . employment agreement, which was signed by plaintiff's president, are binding on plaintiff despite defendant's status as an at-will employee"]; *see also Israel v Chabra*, 12 NY3d 158, 163 [2009] [General Obligations Law § 15-301(1) "indicates that where a contract contains a 'no oral modification' clause, that clause will be enforceable"]).

General Obligations Law § 15-301(1) provides that "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." Although a no oral modification clause does not take precedence over other contract terms, "Section 15-301(1) places this type of clause on the same footing as any other term in a contract" (*Israel v Chabra*, 12 NY3d at 167). "[W]hen a 'no oral modification' clause purportedly conflicts with another clause in a contract, every attempt should be made

to harmonize the two provisions using common-law tools of contract interpretation" (*id.*). Here, consistent with the no oral modification clause, the parties, through their course of conduct, confirmed the need for "a writing signed by the party against whom enforcement is sought" in order to effect any change or modification to the express provisions of the agreement, such as those relating to plaintiff's duties and compensation (*see Firtell v Update, Inc.*, 17 Misc 3d 1101[A], 2007 NY Slip Op 51786[U] [Sup Ct, NY County 2007]). This course of conduct includes the execution of the written amendment to the employment agreement in September 2009 and the commencement of negotiations to draft a new agreement to supercede the employment agreement when plaintiff's duties changed in February 2010.

Nevertheless, while the court correctly found that the no oral modification clause was enforceable and barred defendant from unilaterally altering the terms of plaintiff's employment agreement without a writing, issues of fact exist that preclude the granting of summary judgment in plaintiff's favor. These include whether or not defendant terminated plaintiff's employment or merely modified it when it removed plaintiff as president in February 2010, whether plaintiff waived the no oral modification clause by partially performing an alleged oral

agreement to become a consultant at a reduced salary *(see Rose v Spa Realty Assoc.*, 42 NY2d 338 [1977]), and, if plaintiff was not terminated and did not waive the clause, the period for which he is entitled to damages.

The dissent would go further and grant defendant summary judgment dismissing the complaint and on its counterclaim for the repayment of the loans, based on its belief that the record establishes as a matter of law that defendant exercised its right to terminate plaintiff's at-will employment no later than February 2010, when it changed plaintiff's title, duties and compensation, and plaintiff chose to remain in its employ. However, none of the cases cited by the dissent in support of its position appear to discuss the effect of a no oral modification clause on an employer's right to alter the terms of employment.

The dissent agrees that the no oral modification clause is enforceable but finds that its application is limited to preventing defendant from "unilaterally reducing [plaintiff]'s compensation while requiring him to perform substantially the same job." However, no such limitation is contained in the clause, which provides: "No modification, amendment, extension, discharge, termination or waiver of *any provision* of this letter agreement shall in any event be effective unless the same shall

be in a writing signed by the party against whom enforcement is sought and then such waiver shall be effective only in the specific instance, and for the purpose, for which given" (emphasis added).

By this unambiguous language, defendant gave up any right it had to modify plaintiff's duties, compensation and benefits, without a writing signed by plaintiff.

Contrary to the dissent, the record does not establish that defendant "validly" terminated, rather than modified, the employment agreement in February 2010. Although the record reflects that plaintiff's duties and compensation changed at that time, plaintiff asserts that it was his belief that the employment agreement allowed defendant to change his title and responsibilities. Plaintiff also asserts that when defendant's majority owner told him he could only afford to pay him $4,500 per month and had to reduce his benefits, he accepted the changes to avoid a confrontation but did not waive his rights to enforce the employment agreement by doing so, believing that defendant's changes to the employment agreement were a breach of contract.

The first proposed consulting agreement drafted by defendant in June 2010 supports plaintiff's contention that the employment agreement had yet to be terminated at that point in time and that

the parties were negotiating a new written agreement to effectuate the change in plaintiff's duties and compensation, as required by the no oral modification clause. In particular, the draft states in the first "Whereas" clause that "[t]he Consultant [i.e., plaintiff] and the Company *desire to end* Consultant's employment relationship with the Company." Paragraph 1 provides that: "except as may be set forth herein, the terms, conditions, rights and obligations set forth in the [original 2008 agreement and 2009 amendment] are superseded, of no force and effect, null and void *as of the date this Consulting Agreement is executed*. Consultant and the Company further agree that the following terms and conditions shall take effect immediately upon execution of this Consulting Agreement and will govern the relationship between Consultant and the Company, *notwithstanding the continued applicability of Employment Agreement Exhibit C to such relationship as set forth below*" (emphasis added).

The dissent contends that these statements are "merely legal conclusions . . . which do not change the facts of record establishing that [defendant] terminated the letter agreement in February 2010." However, by this language, defendant made statements of fact, acknowledging that the employment agreement had yet to be terminated and would remain in effect until a

consulting agreement was executed and that certain provisions of the employment agreement would survive even after a consulting agreement was executed.

The dissent's reliance on an email defendant sent to plaintiff on August 30, 2010 as proof that the employment relationship between the parties was terminated in February 2010 is misplaced. The record shows that when plaintiff rejected defendant's June 2010 draft consulting agreement in July 2010, he wrote defendant a letter in which he asserted that defendant had breached the employment agreement and that he had told defendant in February 2010 that he "would not waive any [of its] provisions." As to the purported breaches, plaintiff identified the reduction of his salary from $150,000 to $54,000 per year without his consent, defendant's failure to pay the ARMZ bonuses, medical and insurance coverage, and the housing allowance, and defendant's failure to issue the 375,000 shares of stock, of which 125,000 shares were fully vested.

After waiting over a month, defendant sent plaintiff a revised consulting agreement dated August 24, 2010, in which it changed its position, now stating that "[t]he Consultant and the Company ended Consultant's employment relationship as President of the Company in February 2010," that "[t]he parties ... reached

agreement upon [the terms of the consulting agreement] in February 2010 and have been operating under these terms ... since February 2010," and that "except as may be set forth herein, the terms, conditions, rights and obligations set forth in the [original 2008 contract and 2009 amendment] are superseded, of no force and effect, null and void as of January 1, 2010 in accordance with the agreement reached between [the parties] in February 2010." On August 30, 2010, defendant sent plaintiff the follow-up email relied on by the dissent, in which it reiterated its revised position that the employment relationship had terminated in February 2010. However, plaintiff disputed defendant's assertions and rejected the revised offer, stating: "To be very clear on this point, I have never conceded any of my rights under my employment contract. Last February, Andy told me that 'all the budget could afford to pay me was $4,500 per month'. He also told me that my duties and title were being changed by the Board, and that going forward my title would be 'Director of Industry Affairs.' I certainly did not agree to the drastic reduction in salary and benefits Andy was unilaterally implementing, however, I did agree that I wanted to avoid a confrontation if at all possible. Andy and I agreed that we both wanted a long term relationship. He said he hoped it would be at

least five years. Since that time, I have been attempting, albeit unsuccessfully, to reach an agreement with [defendant] that would avoid a confrontation and provide for our continuing relationship." Plaintiff further stated that "it seems to me the real question for us to decide by tomorrow is whether or not we wish to move forward together. If yes, then we should try to reach an acceptable settlement of my existing contract and the terms of the new contract. If no, and [defendant] simply intends to terminate our relationship, it must address the obligations it has incurred under my existing employment contract."

Furthermore, when plaintiff was asked at his deposition if defendant had ended its employment relationship with him as president in February 2010, as stated in the August 30, 2010 email, plaintiff replied, inter alia, that: "[i]t did not end my employment relationship, but assigned different duties to me"; that "[t]he portion that made reference that it ended my employment relationship is not correct. They did change my duties, but they did not end my employment relationship"; and that "the wording of that sentence is inappropriate and inaccurate. The correct statement would be, the company changed your responsibilities and duties as of February 2010. It is not accurate that the company ended my employment relationship as of

February 2010." Plaintiff further testified that while negotiations commenced in February 2010, he did not agree to any terms of his continued employment as either an employee or consultant at that time.

On the other hand, the employment agreement states that plaintiff will be responsible for the overall management and supervision of the Company "as well as such other duties and responsibilities as may from time to time be assigned by the Managers of the Company." However, plaintiff was removed as president, and, rather than assuming additional duties, he took over a completely different role, acting as a consultant. Defendant asserts that this terminated the employment relationship and created a new consulting relationship and that the first time that plaintiff objected to the new arrangement was six months after it went into effect. Furthermore, plaintiff acknowledged that he reached some kind of understanding with defendant, stating in his July 2010 letter: "Our discussions also resulted in a change in my title from President to Director of Industry Affairs. In that role, you felt that I would best serve the company by representing it at various conventions, seminars, and trade association conferences, both as a speaker and attendee, a role I have actively pursued. Per our agreement, I

am fulfilling my duties from my home, and you and I envisioned and hoped we would have a five year relationship."

Thus, it cannot be determined as a matter of law that defendant fired and then rehired plaintiff in February 2010, as the dissent asserts. Rather, issues of fact exist as to if and when defendant terminated the employment agreement and entered into a new relationship to which plaintiff agreed.

The dissent posits that the finding of an issue of fact contradicts our own recognition that plaintiff was an at-will employee. However, the dissent itself states that "[g]iven that the letter agreement was terminable at will, the next question that arises is, when was it terminated?" While the dissent believes that termination occurred when plaintiff went from president to part-time consultant, the fact that we disagree with that conclusion, and find an issue of fact in that regard, in no way contradicts our finding that the employment relationship was at will.

Contrary to the dissent, it cannot be said that plaintiff's performance of his new duties from February 2010 onward is, as a matter of law, unequivocably referable to his acceptance of defendant's modifications of his rights under the employment agreement and therefore a waiver of the no oral modification

clause (*see Rose v Spa Realty Assoc.*, 42 NY2d at 343-344). "[I]n order to be unequivocally referable, conduct must be inconsistent with any other explanation" (*Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 [1st Dept 2003]). In other words, "the actions alone must be 'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement" (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]). Given plaintiff's protests and the conflicting evidence as to if and when the agreement was terminated, it cannot be determined as a matter of law whether or not plaintiff's performance of his modified duties from February 2010 onward was unequivocally referable to a new oral agreement (*compare Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2d Dept 2010] ["By remaining in the defendant's employ under the new compensation terms, the plaintiff is deemed to have accepted them regardless of her failure to sign the notice advising her of the new terms"] [internal citations omitted], *with Tierney v Capricorn Invs.*, 189 AD2d 629, 631 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993] ["Plaintiff's performance here, however, would be equally consistent with his desire to continue to earn his compensation under the written Employment Agreement, as with the alleged oral modification"]).

Even if defendant had breached the employment agreement, issues of fact would exist as to the period for which plaintiff is entitled to damages, and the court erred when it held that plaintiff had established his entitlement, as a matter of law, to damages until he reached age 67. Although plaintiff's subjective belief may have been that this would be his last job, there is nothing in the agreement to support the conclusion that defendant agreed to keep plaintiff on for as long as plaintiff wanted the job. Furthermore, although plaintiff contends that the agreed-upon term was five years, various clauses in the employment agreement appear to be tied to lesser time periods.

Finally, until it is determined whether defendant breached the employment agreement, and whether that breach prevented plaintiff from being employed by defendant as of January 1, 2011, 2012, and 2013, it cannot be determined whether either party is entitled to summary judgment with respect to the loans.

All concur except Friedman, J.P. and Saxe, J. who dissent in part in a memorandum by Friedman, J.P. as follows:

FRIEDMAN, J.P. (dissenting in part)

Although I concur with the majority insofar as it modifies the order appealed from to deny plaintiff Philip Gootee's motion for summary judgment, I would go further and grant the motion by defendant Global Credit Services, LLC (GCS) for summary judgment dismissing the complaint and granting it judgment on its counterclaim for repayment of certain loans. In my view, and as I hope will be made clear in the discussion below, there is an inherent contradiction in the majority's position. The majority correctly holds that the written agreement under which Gootee was originally hired as president of GCS in 2008 was terminable by either party at will. At the same time, however, the majority somehow finds that an issue of fact exists as to whether that written agreement was terminated in February 2010, thus ignoring the uncontroverted evidence that the parties ceased to operate under the terms of that written agreement from that point forward, with Gootee accepting his demotion from president to part-time consultant. These undisputed facts establish, in my view, that the 2008 written agreement was validly terminated in February 2010. Because Gootee cannot recover from GCS for breach of an agreement that had already been terminated at the time of the alleged breaches, GCS should be granted summary judgment

dismissing the complaint.

As the majority correctly notes, the relationship between the parties, under their September 2008 letter agreement, as amended in writing in September 2009 (collectively, the letter agreement), was one of employment at will, since the letter agreement specified neither a fixed term for Gootee's employment as GCS's president nor an event to trigger its termination. Neither did the letter agreement require that GCS have cause to terminate Gootee. Further, the at-will character of GCS's employment of Gootee was not changed by the provision of the letter agreement requiring that any "modification, amendment, extension, discharge, termination or waiver of any provision of this letter agreement . . . be in a writing signed by the party against whom enforcement is sought[.]"[1] By its terms, this provision (the no-oral-modification clause) applies only to changes to "*any provision* of this letter agreement" (emphasis added), not to a termination of the letter agreement altogether.

[1]The provision states in full: "No modification, amendment, extension, discharge, termination or waiver of any provision of this letter agreement shall in any event be effective unless the same shall be in a writing signed by the party against whom enforcement is sought and then such waiver shall be effective only in the specific instance, and for the purpose, for which given."

Since the letter agreement elsewhere recognizes GCS's right to terminate Gootee without cause, Gootee's theory that the no-oral-modification clause limited GCS's ability to terminate him would create a contradiction between the terms of the contract.[2] Moreover, under his interpretation of the letter agreement, Gootee, so long as he did not give GCS cause to discharge him, could require the company to continue to employ him as its president indefinitely. Case law enjoins us to avoid an interpretation of a contract that would yield such a commercially unreasonable result, placing one party at the mercy of the other (*see ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 503 [1st Dept 2012]).[3]

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[2]The letter agreement recognizes that GCS would be entitled to terminate Gootee without cause in section 15, which provides, in pertinent part, that Gootee will not be bound by certain post-employment non-competition obligations during periods in which his base salary is not paid "if [his] employment is terminated by the Company without Cause[.]"

[3]In his moving affidavit, Gootee confirms that he takes the position that the letter agreement entitled him to continue as president of GCS for as long as he wished and remained capable of performing. Gootee states: "I would not have signed the [letter agreement] without such assurances [that GCS would fulfill its obligations], including the assurance that I would not be terminated without just cause, *and could thereby count on being the president of GCS until I chose to retire*. Since I was 62 at the time [the letter agreement was executed], the GCS position would be my last job until [Gootee's planned] retirement at 67" (emphasis added). Gootee has not offered any theory under which

Given that the letter agreement was terminable at will, the next question that arises is, when was it terminated? In my view, the record establishes, as a matter of law, that GCS exercised its right to terminate the letter agreement no later than February 2010, when (as Gootee admits) it completely changed his title and duties and commensurately changed his compensation. Under the letter agreement, GCS had originally hired Gootee as its president, making him "responsible for the overall management and supervision of the Company." As acknowledged by the majority, however, by February 2010, GCS had completely changed Gootee's role by (as the majority states) "remov[ing] [him] as president."

In an email it sent to Gootee in August 2010, GCS stated succinctly: "As you are aware, the company ended your employment relationship as president of the company in February 2010." Gootee himself admits in his affidavit that GCS "removed [him] as president" and assigned him an entirely different, and lesser, set of responsibilities in early 2010. Similarly, Gootee

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the letter agreement could be construed to require GCS to continue to employ him as president for some reasonable period of time, ascertainable by reference to objective circumstances, rather than for a period of time dictated by Gootee's subjective, unilateral desires.

testified at his deposition that "[m]y title and responsibilities changed" in February 2010. In a July 2010 letter to GCS, Gootee acknowledged that

> "[o]ur discussions . . . resulted in a change in my title from President to Director of Industry Affairs. In that role, [GCS] felt that I would best serve the company by representing it at various conventions, seminars, and trade association conferences, both as a speaker and attendee, a role that I have actively pursued."[4]

As Director of Industry Affairs, Gootee also "continued [his] efforts to acquire new business for the company" (as stated in his July 2010 letter), but there is no dispute that the position he filled from February 2010 onward was one entirely different from the presidential office for which he had been originally hired under the letter agreement.[5]

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[4]Underscoring his newly subordinate role, Gootee acknowledged at his deposition that he required the new president's approval to attend a conference. GCS also removed him from its board of managers.

[5]While the letter agreement provides that GCS had the right, in its discretion, to assign Gootee "other duties and responsibilities" than those of the president, this is not what the company did in February 2010. As noted, at that time, GCS relieved Gootee of substantially all of his responsibilities under the letter agreement and assigned him an entirely different, and lesser, set of responsibilities. I would agree that, if Gootee's role had remained essentially the same, the letter agreement could not be deemed to have been terminated, and changes in his compensation package would have had to be made in a manner consistent with the no-oral-modification clause.

In essence, GCS exercised its right to terminate the at-will letter agreement, unilaterally and without cause, in February 2010. Again, since the no-oral-modification clause of the letter agreement does not apply to a termination of the agreement as a whole, it is of no moment that GCS did not deliver a written notice of termination to Gootee at that time.[6] Thereafter, Gootee continued to work for GCS in a lesser role for several months more, although the parties never signed a new contract. During that period, GCS paid Gootee substantially reduced compensation that it believed to be warranted by his substantially reduced responsibilities, but it is undisputed that Gootee accepted the reduced compensation, to which he raised no written protest until the following July. Whether or not Gootee raised an earlier oral protest to the reduction of his compensation, the record establishes that GCS had made it plain to Gootee in February 2010 that it no longer intended to operate

[6]Of course, if the no-oral-modification clause did apply to a termination of the letter agreement, a written notice of termination would have been effective against Gootee only if he had signed it. This underscores Gootee's unreasonable position that the letter agreement afforded him the right to open-ended employment as president of GCS, terminable by the company only for cause.

under the letter agreement.[7] Accordingly, in my view, the question of whether Gootee waived the no-oral-modification clause, which the majority believes to warrant a trial, simply does not arise.

Seeking some support in the record for the position that the letter agreement continued in effect after February 2010, the majority fastens on Gootee's deposition testimony to the effect that his removal from the presidency was consistent with GCS's right under the letter agreement, as he understood it, to change his title and responsibilities.[8] Read in context, it is plain that Gootee based this testimony on a misreading of the letter agreement.[9] In any event, Gootee subsequently abandoned this

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[7]Gootee makes only vague claims to have protested GCS's changes to his employment status before his letter of July 21, 2010. In his affidavit, he asserts that he "brought up the subject of [the letter agreement]" when he was demoted, but does not provide details. In his letter of July 21, 2010, Gootee stated that, when GCS advised him of the changes, "I told you that I would not waive any provisions of my employment agreement, but that I also wanted to avoid a confrontation if at all possible."

[8]Gootee's specific testimony on this point was that GCS "had the right to change[] my responsibilities, but they did not have a right to reduce my salary or eliminate my housing allowance."

[9]The letter agreement requires Gootee to carry out the duties of the president of GCS "as well as such other duties and responsibilities as may from time to time be assigned by the Managers of the Company." This provision permits the assignment

position in his affidavit and in his brief on this appeal, in both of which he expressly condemns his removal from the office of president as a breach of the letter agreement.[10] Indeed, as Gootee notes in his appellate brief, the letter agreement defines "a material diminution in title or responsibility" as an event giving Gootee "Good Reason" to terminate the letter agreement without thereafter being bound by its post-employment non-competition provisions during periods in which he is not paid his base salary.

In sum, GCS did not simply cut Gootee's pay in February 2010, it also completely changed his status and role within the

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of duties in addition to those of the president but does not contemplate a demotion from president to a position of lesser status and responsibility.

[10]In his affidavit, Gootee states that "GCS breached its Employment Contract with me *when it stripped me of my title as president of GCS* and drastically reduced my compensation" (emphasis added). A few paragraphs later, he states that "GCS cut my pay and *removed me as president of the company, all in violation of my Employment Contract*" (emphasis added). Gootee's appellate brief makes a number of statements to the same effect: (1) "GCS breached the Written Employment Contract by removing Mr. Gootee as the President of GCS and substantially reducing his salary" (page 2); (2) "the actions taken by GCS in removing Mr. Gootee as company president, reducing his responsibilities, slashing his compensation; and failing to issue 375,000 shares of GCS stock were material breaches of the Written Employment Contract" (pages 8-9); (3) "GCS's removal of Mr. Gootee as president, [and] the substantial reduction in his compensation . . . were breaches of the Written Employment Contract" (page 9).

company, demoting him from president, a full-time leadership position in which he had been "responsible for the overall management and supervision of the Company" (as provided by the letter agreement), to a consultant who represented the company at trade conferences on a part-time basis.[11] GCS thereby effectively terminated the letter agreement — something that, as the majority recognizes, it had the right to do at will, without obtaining Gootee's written consent. While Gootee was free to respond to GCS's action by leaving the company's employ without being bound by the letter agreement's non-competition restrictions unless he continued to receive his base salary, he chose instead to continue to work for GCS as a consultant at reduced compensation, without making any written objection for

[11]This is confirmed in an email that GCS sent to Gootee on or about August 30, 2010, which states: "As you are aware, the company ended your employment relationship as president of the company in February 2010." That Gootee made unsupported assertions to the contrary in his communications to GCS, or at his deposition in this matter, does not change the fact that, as of February 2010, the parties ceased to operate under the letter agreement with respect to either one's rights or obligations. Gootee no longer served as GCS's full-time president but as a part-time consultant representing the company at trade conferences, and GCS no longer compensated Gootee as president but at a level commensurate with his new, and lesser, responsibilities. The letter agreement was terminated, but the parties entered into a new, and entirely different, employment relationship, albeit one for which no written agreement was executed.

six months.[12]

Gootee's assertion in his letter of July 21, 2010, that, when he was demoted the previous February, he had "told [GCS] that [he] would not waive any provisions of . . . [the letter] agreement, but that [he] also wanted to avoid a confrontation if at all possible," is legally unavailing, even if true. This is because, upon Gootee's demotion, the letter agreement had been terminated, and he had no continuing right to be compensated in accordance with it. Stated otherwise, the rights Gootee claimed in his July 2010 letter that he had "not waive[d]" the previous February no longer existed at that time. Thus, the factual question that the majority believes should be determined at trial

[12]The majority erroneously views certain language in a draft consulting agreement that GCS sent to Gootee in July 2010 as evidence that the letter agreement remained in force after February 2010. The majority's error is in viewing the statements in that document to which it draws attention as admissions of fact probative of whether the letter agreement had already been terminated. Those statements, to the extent they appear to indicate that the letter agreement remained in force after February 2010, are merely legal conclusions concerning the parties' relationship to each other — not, contrary to the majority, "statements of fact" concerning the conduct of either party — which do not change the facts of record establishing that GCS terminated the letter agreement in February 2010. Certainly, if a pleading contained a statement to the effect that a certain agreement was in effect at a certain time, the opposing party could properly plead in response that such a statement is a legal conclusion to which no answer is required.

— "whether [Gootee] waived the no oral modification clause" — is illusory. Whatever Gootee said to GCS at the time of his demotion, he had no rights under the letter agreement to waive once GCS had terminated the letter agreement. A right that no longer exists cannot be waived.[13]

As previously noted, I agree that the no-oral-modification clause prevented GCS from unilaterally reducing Gootee's compensation while requiring him to perform substantially the same job. However, this bench is unanimous in finding that the letter agreement was terminable at will by either party. In my view, GCS exercised its right to terminate the letter agreement at will by removing Gootee from the presidency in February 2010. At that point, GCS gave Gootee the option of continuing in its employ in a completely different, part-time position, involving far less responsibility and time commitment, at a commensurately reduced rate of pay. The change in both position and compensation constituted, as a matter of law, a new hiring (*see Hanlon v Macfadden Publs.*, 302 NY 502, 505-506 [1951]; *Waldman v*

[13]Contrary to the majority's view, neither is there any triable issue as to whether GCS terminated the letter agreement. For the reasons I have already discussed, the record establishes as a matter of law that GCS terminated the letter agreement unilaterally, as it was entitled to do, in February 2010.

Englishtown Sportswear, 92 AD2d 833, 836 [1st Dept 1983]). Gootee, by choosing to remain in GCS's employ in the new position, necessarily also accepted the reduced compensation package that went with that position (*see Jennings v Huntington Crescent Club*, 120 AD3d 1394 [2d Dept 2014]; *Minovici v Belkin BV*, 109 AD3d 520, 523 [2d Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2d Dept 2010]).[14]

The majority states: "By th[e] unambiguous language [of the no-oral-modification clause], [GCS] gave up any right it had to modify [Gootee's] duties, compensation and benefits, without a writing signed by [Gootee]." This begs the question of whether GCS's complete discharge of Gootee from the duties as president for which he had been hired under the letter agreement, and offer to him of an entirely different set of lesser duties, for which he would receive commensurately lesser compensation, constituted a "modification" of the terms of the letter agreement or,

[14]The majority states that "none of the cases cited by the dissent in support of its position appear to discuss the effect of a no oral modification clause on an employer's right to alter the terms of employment." This misconceives the issue presented by this appeal, which is whether a no-oral-modification clause in an employment agreement has any effect on the employer's right to discharge the employee at will from the position for which he was hired by the written agreement and to rehire the same employee for a different position at different compensation. The majority cites no authority addressing that issue.

alternatively, an exercise of GCS's right — which this bench recognizes unanimously — to terminate that contract at will, coupled with an offer to rehire Gootee for a new position, at lesser compensation, that he was free either to accept or to reject. Again, the facts established by the record — which are essentially undisputed — constitute, in my view, a termination and rehiring as a matter of law.

The implication of the majority's decision is that GCS's rehiring of Gootee as a part-time consultant may or may not have retroactively deprived GCS of its right to terminate at will Gootee's employment in his previous position as president. The facts on which the majority believes that this determination should depend are not at all clear from the majority's decision. The parties' sole factual dispute appears to be whether Gootee made an oral protest upon his demotion and the reduction of his compensation in February 2010. Whether or not Gootee made such a protest, GCS's discharge of him as its president and his acceptance of the new position, and the reduced pay that went with it, should be deemed to constitute a termination and rehiring as a matter of law.

The majority's view that the radical transformation of the parties' relationship in February 2010 may rationally be

construed as something other than a termination and rehiring elevates form over substance. Indeed, as previously noted, the majority's creation of the spurious triable issue of whether, in February 2010, the letter agreement was terminated or, alternatively, modified, essentially contradicts the majority's own acknowledgment that Gootee's employment under the letter agreement was terminable at will by either party. Having rightly rejected the absurd position advanced by Gootee as the cornerstone of his lawsuit — that the letter agreement required GCS to retain him as its president indefinitely, absent cause for termination — the majority creates an alternative basis for Gootee's claims, completely inconsistent with the at-will status the majority has just held to have existed as a matter of law, and sends the matter to trial on a record devoid of any material factual dispute. I would hold, consistently with the at-will nature of Gootee's employment under the letter agreement, that the undisputed facts establish that he was terminated as president and rehired as something else, leaving no basis for his claims in this action. No matter how the majority may try, it cannot avoid the fact that its finding of some issue of fact contradicts its own recognition that Gootee was an at-will employee. In this regard, it may be asked: If Gootee's going

from president of the company to a part-time consultant does not bespeak a new relationship between the parties, what would?

Finally, even if the letter agreement could be deemed to have continued in effect after February 2010, I believe that Gootee's performance of his new, reduced role for several months thereafter is, as a matter of law, unequivocally referable to his acceptance of GCS's modifications of his rights under the letter agreement — including the reduction of his compensation package — and therefore would have constituted a waiver of the requirements of the no-oral-modifications clause (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]; *Barber v Deutsche Bank Sec., Inc.*, 103 AD3d 512, 513 [1st Dept 2013]). Whether or not he attempted to reserve orally his perceived rights under the letter agreement, Gootee's acceptance of his demotion and performance of his diminished responsibilities under a lesser title, from February 2010 until the following August (and without any written protest until July of that year), cannot reasonably be squared with the expectation that he would continue to receive the much higher compensation the letter agreement set for him as president of the company.[15]

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[15]This Court's decision in *Tierney v Capricorn Invs.* (189 AD2d 629 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993]), which

For the foregoing reasons, I would reverse the order appealed from, deny Gootee's motion for summary judgment as to liability, and grant GCS summary judgment dismissing Gootee's complaint and on its counterclaim. I respectfully dissent to the extent the majority does otherwise.

M-4395 ***Phillip Gootee v Global Credit Services, LLC***

Motion for stay pending appeal denied as moot.

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

ENTERED: MAY 19, 2016

CLERK

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the majority cites in support of its finding of a triable issue concerning waiver, is not to the contrary. *Tierney* rejected a claim by an employee that, notwithstanding his written employment agreement's no-oral-modification clause, he was entitled to a bonus, pursuant to an alleged oral agreement, for work on a particular transaction. In so doing, we noted that the employee's work on the transaction, which was within the scope of his duties under the written employment agreement, was "equally consistent with his desire to continue to earn his compensation under the written Employment Agreement, as with the alleged oral modification" (189 AD2d at 631). In this case, by contrast, GCS replaced Gootee's duties as president under the letter agreement with an entirely different, and lesser, set of duties. Any expectation by Gootee that he would continue to be compensated at the presidential rate set by the letter agreement for the lesser services he performed from February 2010 onward would have been entirely unreasonable.

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

16071 Zachary Royce, et al., Index 116959/09
Plaintiffs-Appellants, 591083/10
590132/11
-against- 590924/11

DIG EH Hotels, LLC doing business
as The Essex House, et al.,
Defendants-Respondents.
- - - - - -
DIG EH Hotels, LLC conducting business
as The Essex House,
Third-Party Plaintiff,

-against-

Imagination Group, Ltd.,
Third-Party Defendant-Respondent.
- - - - - -
DIG EH Hotels, LLC conducting business
as The Essex House,
Second Third-Party
Plaintiff,

-against-

Imagination,
Second Third-Party Defendant.
- - - - - -
The Imagination Group, Ltd. sued
herein as Imagination Group, Ltd.,
Fourth-Party Plaintiff,

-against-

PLS Staging,
Fourth-Party Defendant-Respondent.

Pazer, Epstein & Jaffe, P.C., New York (Matthew J. Fein of counsel), for appellants.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for DIG EH Hotels, LLC, respondent.

Savona, D'Erasmo & Hyer, LLC, New York (Raymond M. D'Erasmo of counsel), for the Imagination Group, Ltd., respondent.

Nicoletti Gonson Spinner, LLP, New York (Kevin M. Ryan of counsel), for PLS Staging, respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 3, 2014, which, insofar as appealed from as limited by the briefs, granted defendants', third-party defendant's, and fourth-party defendant's motions for summary judgment dismissing the Labor Law § 240(1) and loss of consortium claims, and denied plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim and for leave to amend the complaint to add Imagination Group as a defendant, unanimously affirmed, without costs.

While the work that the injured plaintiff was doing immediately before his accident should not be viewed in isolation in determining whether he has a potentially viable claim under Labor Law § 240(1) (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]), the motion court correctly found that the his work was outside the scope of activity protected by that statute. Plaintiff, a lighting engineer, fell off a ladder while attempting to replace a gel that altered the color of one light

on a temporary lighting stand secured to the floor by sandbags. The work performed by plaintiff and his employer entailed moving audiovisual, staging and lighting equipment into a hotel ballroom, assembling, setting up, and positioning the equipment as necessary for its use in an event, and removing it after the event ended. There is no evidence that any of this work "altered" or caused a substantial, or indeed any, physical change to the building (*compare Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005] [Labor Law § 240(1) claim dismissed where plaintiff's application of a new ad to a billboard changed the billboard's appearance but not its structure], *with Saint v Syracuse Supply Co.*, 25 NY3d 117 [2015] [Labor Law § 240(1) claim reinstated where plaintiff's removal and installation of a billboard ad required him to attach extensions that changed the dimensions of the billboard frame]; *see also Joblon v Solow*, 91 NY2d 457, 465 [1998] ["'altering' within the meaning of Labor Law § 240(1) requires making a *significant* physical change to the configuration or composition of the building or structure"]; *Panico v Advanstar Communications, Inc.*, 92 AD3d 656 [2d Dept 2012] [dismissing Labor Law § 240(1) claim by a plaintiff who fell from a ladder while hanging a light on a ticket booth erected for a convention center show, where there was no

significant physical change to the building or structure], *lv denied* 19 NY3d 806 [2012]; *Adair v Bestek Light. & Staging Corp.*, 298 AD2d 153 [1st Dept 2002]).

The court properly denied plaintiff's motion for leave to amend the complaint to add Imagination Group as a defendant pursuant to the relation-back doctrine (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615 [1st Dept 2014]). Plaintiff failed to establish that Imagination Group and defendant are united in interest, since the two entities would have different defenses to the Labor Law § 200 and common-law negligence claims (*see Raymond v Melohn Props., Inc.*, 47 AD3d 504, 505 [1st Dept 2008]). Nor did plaintiff establish that Imagination Group knew or should have known that it too would have been sued but for a mistake on plaintiff's part as to the identity of the proper parties (*see Buran*, 87 NY2d at 178). Plaintiff was aware of Imagination Group's involvement in this action long before the statute of limitations expired, and yet failed to join it as a defendant within the limitations period.

In view of the dismissal of the Labor Law § 240(1) claim and the abandonment of the other substantive claims, the loss of consortium claim must also be dismissed.

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

ENTERED: MAY 19, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

977 In re Tylynn M.A., and Others,

Children Under the Age of
Eighteen Years, etc.,

Cardinal McCloskey Community Services,
Petitioner-Appellant,

Nivia A.,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Saul Zipkin, Bronx, for respondent.

Larry S. Bachner, Jamaica, attorney for the children.

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about March 6, 2015, which granted respondent mother's motion to dismiss the permanent neglect petition against her for petitioner agency's failure to make out a prima facie case, unanimously affirmed, without costs.

The agency failed to establish a prima facie showing of permanent neglect with clear and convincing evidence (*see* Social Services Law §384-b[3][g][i]; [7][a]; *see generally Matter of Leon RR*, 48 NY2d 117, 124-126 [1979]; *Matter of Winstoniya D.* [*Tammi G.*], 123 AD3d 705, 706-707 [2d Dept 2014]). The record demonstrates that the mother was undergoing drug treatment and

was engaged at Odyssey House. The record further shows that the mother had been involved with drug treatment programs and had completed multiple courses. The mother kept in contact with the agency and she completed a parenting course. In addition, she spoke with the agency about her concerns about the children and was receptive to advice from the agency. Even when the mother was incarcerated, she called the children most nights and asked them about their day, and had some visits with them at the jail facility. When she was released, she attended her visits with the children, who were happy to see their mother. As the trial court noted, the record shows that the mother was a "present parent," and she was engaged in services.

Although the agency focuses on the absence of proof that the mother completed a domestic violence program, the testimony was insufficient to show that the mother did not complete such a program. The caseworker had no independent recollection whether the mother had completed this program and the document she used to refresh her recollection is not in the record. Moreover, a fair reading of the caseworker's testimony is that she did not offer any definitive testimony on this point one way or the other. The court as trier of fact, was clearly not persuaded

that the agency established a prima facie case that the mother permanently neglected the children, and we see no reason to set aside the court's finding.

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

ENTERED: MAY 19, 2016

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Kahn, JJ.

978-
978A Index 100809/14

In re Michelle Lynn McGuirk,
Petitioner-Appellant,

-against-

New York State Division
of Human Rights, et al.,
Respondents-Respondents,

Swiss Reinsurance America Corp., et al.,
Respondents.

_____

Michelle L. McGuirk, appellant pro se.

Caroline J. Downey, Bronx (Toni Ann Hollifield of counsel), for New York State Division of Human Rights and Robert J. Tuosto, respondents.

Seyfarth Shaw LLP, New York (Christopher H. Lowe of counsel), for Swiss Re Financial Services Corp., respondent.

_____

Final order of respondent New York State Division of Human Rights (DHR), dated June 3, 2014, which dismissed petitioner's complaint alleging discrimination under the Human Rights Law (the proceeding having been transferred to this Court pursuant to Executive Law § 298, by order of Supreme Court, New York County [Alice Schlesinger, J.], entered November 21, 2014), unanimously confirmed, without costs, the petition denied and the proceeding dismissed. Appeal from order, same court and Justice, entered on or about September 30, 2014, which declined to sign petitioner's

order to show cause for a temporary restraining order, unanimously dismissed, without costs, as taken from a nonappealable order.

The determination of the Division of Human Rights dismissing petitioner's complaint, following an administrative hearing, is supported by substantial evidence (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]). Petitioner failed to meet her prima facie burden of establishing discrimination by a preponderance of the evidence, as she did not demonstrate that her termination from her employment occurred under circumstances giving rise to an inference of discrimination (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Moreover, petitioner's former employer, Swiss Re Financial Services Corp., "clearly set[] forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons" to support its decision to terminate petitioner's employment (*id.* at 629).

Petitioner has failed to establish that the administrative hearing was not fair. New York law grants an administrative law judge (ALJ) administering a hearing the "powers to control the presentation of evidence and the conduct of the hearing," including by "foreclos[ing] the presentation of evidence that is

cumulative, argumentative, or beyond the scope of the case" (9 NYCRR § 465.12[f][3]). The ALJ properly exercised his discretion in denying petitioner's request to amend the complaint (9 NYCRR § 465.4[a]).

We dismiss the appeal from the order declining to sign the order to show cause, since it is not an appealable order (*see McKanic v Amigos del Museo del Barrio,* 74 AD3d 639 [2010], *appeal dismissed* 16 NY3d 849 [2011]).

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

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1170-
1170A The People of the State of New York, Respondent,

Ind. 2153/12
4953/12

-against-

Rafael Nevaro,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 17, 2013, convicting defendant, after a jury trial, of kidnapping in the second degree, coercion in the first degree, criminal possession of a weapon in the third degree, endangering the welfare of a child (two counts), bribing a witness, tampering with a witness in the fourth degree and criminal contempt in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously modified, on the law, to the extent of vacating the kidnapping conviction, and dismissing that count of the indictment, and otherwise affirmed.

The kidnapping conviction was not supported by legally sufficient evidence. Since there was no evidence that defendant threatened to use deadly physical force against the victim if she tried to leave her apartment, he did not abduct her within the meaning of the statute (*see Matter of Luis V.*, 216 AD2d 15 [1st Dept 1995], *lv denied* 87 NY2d 803 [1995]). In context and under the circumstances, defendant's threat to set fire to the apartment if the victim left him there can only be understood as one to damage her property, in her absence and without endangering her safety. Although defendant separately threatened to kill the victim's son if she failed to pay him money, that threat was not related to the confinement of the victim in the apartment.

However, we reject defendant's remaining challenges to the sufficiency and weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. The coercion charge was established by evidence that defendant compelled the victim to remain in the apartment by threatening to damage her property if she left, and the People's case was not limited to a different theory. The witness-bribing charge was established by evidence supporting an inference that defendant had "at least a unilateral perception or

belief" (*People v Bac Tran*, 80 NY2d 170, 178 [1992]) that he was making an offer that would result in the victim being influenced not to testify.

The court appropriately exercised its discretion in admitting evidence of defendant's prior act of domestic violence against the victim. The evidence at issue was interconnected with the charged crimes, tended to place the People's case in a believable context, and was responsive to claims made by defendant in his opening statement and cross-examination (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1st Dept 1991], *affd* 79 NY2d 673 [1992]). The probative value of this evidence outweighed its prejudicial effect, which was minimized by the court's limiting instructions.

We perceive no basis for reducing the remaining sentences.

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1171 In re Sammie Adamson, Index 101339/14
Petitioner,

-against-

New York City Department of Housing
Preservation and Development,
Respondent.

_____

Ropes & Gray, LLP, New York (John N. McClain, III of counsel), for petitioner.

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

_____

Determination of respondent, dated October 24, 2014, which terminated petitioner's Section 8 subsidy on the ground that he misrepresented his family composition, unanimously modified, on the law, to vacate the penalty of termination, and to remand the matter to respondent for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered April 17, 2015), otherwise disposed of by confirming the remainder of the determination, without costs.

The finding that petitioner misrepresented the composition of his household is supported by substantial evidence, which included petitioner's testimony (*see generally 300 Gramatan Ave.*

Assoc. v State Div. of Human Rights, 45 NY2d 176, 180-181 [1978]). However, the penalty of termination of petitioner's Section 8 subsidy is disproportionate to the offense under the circumstances. Although petitioner acknowledged that his granddaughter did not reside with him at least 51% of the time, his granddaughter did stay with him weekends and when her terminally ill mother was in the hospital. Petitioner is 71 years old, has decreased mobility, has household income that is insufficient to cover his unsubsidized rent, had no prior incidents, and there was no evidence of an intent to defraud respondent (*see e.g. Matter of Bauman v New York State Div. of Hous. & Community Renewal*, 101 AD3d 633 [1st Dept 2012]]; *Matter of Chierchia v New York City Hous. Auth.*, 92 AD3d 587 [1st Dept 2012]; *Matter of Williams v Donovan*, 60 AD3d 594 [1st Dept 2009]; *Matter of Gray v Donovan*, 58 AD3d 488 [1st Dept 2009).

On remand, respondent should calculate the amount of excess subsidy received by petitioner, if any (*see Williams* at 595).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1172-
1173 In re Zoey A.,

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

Felicia A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 28, 2014, which found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, entered on or about April 15, 2014, which, inter alia, placed the child with the Commissioner of Social Services until the completion of the next permanency hearing, unanimously dismissed, without costs, as moot.

Any challenge to the order of disposition is moot as the terms of the order have expired, and the mother's parental rights

have since been terminated (*see e.g. Matter of Erica D. [Maria D.]*, 77 AD3d 505 [1st Dept 2010]).

A preponderance of the evidence supports the finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness and resistance to treatment (*see* Family Ct Act §§ 1046[b][i]; 1012[f][i][B]). The record shows, inter alia, that the mother exhibited bizarre behavior while caring for the then-infant child, including handling her roughly, failing to support the child's head and neck, failing to attend to her hygienic needs, and leaving her unattended. Furthermore, the mother refused to acknowledge her severe, symptomatic mental illness, or comply with any treatment regimen (*see Matter of Karma C. [Tenequa A.]*, 122 AD3d 415 [1st Dept 2014]; *Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417, 419-420 [1st Dept 2012]).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1174 Skylar Poree, Index 105187/11
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Law Office of Certain & Zilberg, PLLC, New York (Michael Zilberg of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 13, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff was injured when he attempted to extinguish a fire in a Christmas tree in his apartment by grabbing the burning tree with his arms. The record demonstrates that defendant satisfied its statutory duty under Administrative Code of City of NY § 27-2045(a)(1) to provide a functional smoke detector in the apartment when occupancy was commenced, and that under Administrative Code § 27-2045(b)(1), (2), the obligation to maintain the smoke detector was on the tenant.

Plaintiff's argument that defendant breached a duty to him by negligently performing its annual inspection of his apartment and failing to note that the smoke detector was no longer operational, is unavailing. Liability under this theory may be imposed only if defendant's conduct placed plaintiff in a more vulnerable position than he would have been in had defendant done nothing *(see Heard v City of New York*, 82 NY2d 66, 72 [1993]; *Piazza v Regeis Care Ctr., L.L.C.*, 47 AD3d 551, 553 [1st Dept 2008]). Here, plaintiff provided no evidence that he relied on defendant's inspection of his apartment to ensure the functionality of the smoke detector, and plaintiff's mother testified that inspectors hardly ever tested the smoke detectors. Accordingly, there could be no reliance on defendant to ensure that the smoke detector was operational.

Furthermore, any negligence by defendant was not a proximate cause of plaintiff's injuries. Plaintiff acknowledged that he had time to exit the apartment without injury, but elected to try

to extinguish the flames by grabbing and shaking the burning tree (*see Alloway v 715 Riverside Dr.*, 298 AD2d 148, 149 [1st Dept 2002]; *Acevedo v Audubon Mgt.*, 280 AD2d 91, 96 [1st Dept 2001].

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1175N Timothy Hogue, et al., Index 152217/15
Plaintiffs-Appellants,

-against-

Kenilworth Apartments, Inc.,
Defendant-Respondent,

Stephen Presser, et al.,
Defendants.

_____

Rosen Livingston & Cholst LLP, New York (Alan M. Goldberg of counsel), for appellants.

Cantor, Epstein & Mazzola, LLP, New York (Gary S. Ehrlich of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 7, 2015, which denied defendant cooperative's motion for a preliminary injunction, unanimously dismissed, with costs, as moot.

The individual defendants moved to dismiss this appeal as against them as moot based on the motion court's October 23, 2015 order dismissing the action as against them, and this Court granted that motion (M-5696). However, the cooperative defendant failed to join in the motion and the appeal as to it continued (*id.*). Although the parties do not raise the issue, we now dismiss the appeal as against the cooperative defendant as moot

(*see People ex rel. Allen v Warden, GMDC, N.Y. State Div. of Parole*, 61 AD3d 541, 542 [1st Dept 2009]), given the cooperative's removal of the items and performance of the hallway renovations that plaintiffs' unsuccessful application for injunctive relief had sought to prevent. None of the exceptions to the mootness doctrine apply here (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1176-
1177-
1178 Index 651180/14

In re Richard Vento, et al.,
Petitioners-Appellants,

-against-

Alliance Holding Companies, LTD, et al.,
Respondents-Respondents,

Waterberry Ltd., et al.,
Respondents.

_____

Feuerstein & Smith, LLP, Buffalo (Katri L. Linnamaa of counsel), for appellants.

David P. Stich, New York, for respondents.

_____

Appeal from orders, Supreme Court, New York County (Carol Edmead, J.), entered November 17, 2014 and December 16, 2014, which, inter alia, vacated an order, entered November 14, 2014, same court and Justice, directing entry of judgment on the award, and an order, entered March 5, 2015, which granted petitioner's motion to renew and reargue and adhered to its earlier determination, and granted respondents' motion to renew and reargue, and upon renewal and reargument, dismissed the petition, unanimously dismissed, without costs, as moot.

Contrary to petitioners' assertion, it is necessary to

obtain jurisdiction over the person of respondents for a special proceeding to confirm an arbitration award to be valid (*see Matter of Star Boxing, Inc. v DaimlerChrysler Motors Corp.*, 17 AD3d 372 [2nd Dept 2005] [failure to properly serve notice of petition required dismissal for lack of jurisdiction over respondent]; *Pacnav S.A. v Effie Bus. Corp.*, 29 Misc 3d 1129, 1132 [Sup Ct, NY Cty 2010] [regardless of status of arbitration proceeding, absent jurisdictional basis, court could not grant attachment]).

In the arbitration agreement before us, respondents preserved all objections to jurisdiction, but not in a jurisdiction where their assets could be found. Because the evidence showed that no assets of respondents were in New York, the agreement provided no basis for personal jurisdiction here. Moreover, because none of the transactions at issue, which involved the sale of properties in the Bahamas through an auction house in New York, were substantially related to the causes of action in the arbitration, those transactions could not give rise to long arm jurisdiction (*see Johnson v Ward*, 4 NY3d 516, 519 [2005]). Nor could the possible use of a wire transfer by third parties that might pass through a bank in New York give rise to personal jurisdiction over respondents, without more (*cf. Licci v*

Lebanese Can. Bank, SAL, 20 NY3d 327, 340 [2012]). There was no basis for a hearing on the disposition of the assets at issue, by which it appears petitioners were attempting to find evidence of contempt. It is undisputed that no restraints were in place when the dispositions at issue were made.

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

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1179-
1180 Index 154107/14

Rujiao Oyang,
Plaintiff-Appellant,

-against-

NYU Hospital Center, et al.,
Defendants-Respondents.

_____

Law Office of Aihong You, New York (Aihong You of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for NYU Hospital Center, James P. Levine, M.D. and NYU Plastic Surgery Associates LLP, respondents.

Rawle & Henderson, LLP, Mineola (James Modzelewski of counsel), for Manhattan Maxillofacial Surgery, P.L.L.C. and David L. Hirsch, D.D.S., M.D., respondents.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered November 26, 2014, which, to the extent appealed from, granted defendants' CPLR 3211 motion to dismiss the complaint, and denied in part plaintiff's cross motion to amend the complaint, and order, same court and Justice, entered February 19, 2015, which, to the extent appealable, denied plaintiff leave to renew the November 26, 2014 order, unanimously affirmed, without costs.

The motion court correctly granted defendants' motion to dismiss the complaint (*see e.g. Fownes Bros. & Co., Inc. v*

JPMorgan Chase & Co., 92 AD3d 582 [1st Dept 2012]), denied plaintiff's cross motion to amend the complaint (*see e.g. Bag Bag v Alcobi*, 129 AD3d 649 [1st Dept 2015]) and denied plaintiff's motion to renew the order on the motion to dismiss (CPLR 2221[e][2] and [3]). Plaintiff's claims and proposed claims of lack of informed consent, negligence, breach of an oral contract, and promissory estoppel are legally insufficient or are defeated by documentary evidence. In the absence of a viable claim against the individual defendants, no claim for vicarious liability lies.

To the extent plaintiff purports to appeal from the denial of reargument, no appeal lies (*Fruchtman v City of New York*, 129 AD3d 500 [1st Dept 2013]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1181 The People of the State of New York, Ind. 1970/09
Respondent,

-against-

Umar Alfair, etc.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered February 13, 2013, as amended July 22, 2013, convicting defendant, upon her plea of guilty, of attempted criminal possession of a forged instrument in the second degree, and sentencing her, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Although defendant, who was arrested for a federal drug felony one week after the end of a two-year period in which she was required to "stay out of trouble" (and was subsequently convicted), was in technical compliance with her plea agreement, the court properly exercised its discretion when it declined to adhere to its conditional promise to replace the plea with a misdemeanor disposition, and instead gave defendant the

opportunity to withdraw her plea. "[P]roper sentencing criteria counseled imposition of a different sanction than that agreed to originally," and defendant was "not entitled to specific performance of the original sentencing representations" (*People v Schultz*, 73 NY2d 757, 758 [1988]; *cf. People v McConnell*, 49 NY2d 340 [1980]).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1183 Liberty Community Associates, LP, Index 156532/14
Plaintiff-Respondent,

-against-

Joseph DeClemente,
Defendant-Appellant.

_____

Law Office of Thomas R. Ashley, Brooklyn (Thomas S. Mirigliano of counsel), for appellant.

Ganfer & Shore, LLP, New York (William D. McCracken of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Debra A. James, J.), entered on or about April 20, 2015, which, among other things, granted plaintiff's motion for discovery sanctions to the extent of striking defendant's answer, directed entry of judgment in plaintiff's favor in the sum of $55,000, plus interest, and denied defendant's cross motion to dismiss the complaint on the ground of forum non conveniens, unanimously dismissed, with costs.

Because defendant failed to respond to plaintiff's motion for discovery sanctions, the part of the order striking defendant's answer as a discovery sanction and granting judgment in plaintiff's favor, thereby disposing of the case, was entered on defendant's default, and is not appealable (*see* CPLR 5511;

Figiel v Met Food, 48 AD3d 330 [1st Dept 2008]).

Given the foregoing determination, defendant's appeal from the denial of his cross motion to dismiss the action on forum non conveniens grounds is moot.

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1184 11th St. Assocs. LLC, Index 652302/10
Plaintiff-Appellant,

-against-

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

_____

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered October 17, 2013, which, insofar as appealed from, denied plaintiff's motion for summary judgment on the fourth, sixth, seventh, and eighth causes of action, and granted defendants' cross motion for summary judgment dismissing the tenth cause of action, unanimously modified, on the law, to deny defendants' cross motion except as to the part of the tenth cause of action seeking to recover sums in excess of the amounts stated in the notice of claim, and otherwise affirmed, without costs.

Plaintiff's failure to update its October 2010 notice of claim to reflect the subsequent accrual of additional unpaid nightly room rates incurred on behalf of the clients named in the notice of claim and the later filed complaint is fatal to its

claim for those additional payments (Administrative Code of City of NY § 7-201[a]; *Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532 [2005]; *see also Schiavone Constr. Co., Inc. v City of New York*, 106 AD3d 427 [1st Dept 2013]).

Since this issue turns entirely on the construction of Administrative Code § 7-201(a), and, as such, is "a pure question of law," it is not amenable to application of the doctrine of collateral estoppel (*American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 [1997]; *Matter of Held v New York State Workers' Compensation Bd.*, 58 AD3d 971, 972-973 [3d Dept 2009]).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1186 In re Corey S.,

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

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

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

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about March 27, 2015, 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 robbery in the second degree and criminal possession of stolen property in the fifth degree, and placed him on probation for 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 (2007). There is no basis for disturbing the court's determinations concerning credibility and

identification. A forcible taking was established by evidence that appellant and his companions made express and implied threats of violence for the purpose of causing the victim to acquiesce in the removal of property from his person.

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1187 Steven Hines, Index 159194/12
Plaintiff,

-against-

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

Academy Express LLC, etc., et al.,
Defendants-Appellants.

_____

Mintzer Sarowitz Zeris Ledva & Meyers, LLP, New York (Kevin L. Kelly of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about October 20, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Academy Express LLC (Academy) and Damon Bassano for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff, while a passenger on a bus owned by defendant Transit Authority, was injured when that bus collided with another bus owned by Academy, and driven by Bassano. The rear right side of the Transit Authority bus collided with the front

driver's corner of the Academy bus when the Transit Authority bus changed lanes from the left to the right lane, in which the Academy bus was proceeding.

Bassano testified, without contradiction, that there was approximately one second, from when he first saw the Transit Authority bus passing him, until impact. Under such circumstances, he had no time to anticipate the Transit Authority bus cutting him off, and his actions were not negligent as a matter of law, under such emergency conditions (*see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]*; Ward v Cox*, 38 AD3d 313 [1st Dept 2007]). "[C]ourts have repeatedly rejected, as a basis for imposing liability, speculation concerning the possible accident-avoidance measures of a defendant faced with an emergency" (*Caban v Vega*, 226 AD2d 109, 111 [1st Dept 1996]).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1188 Samson Lift Technologies, LLC, Index 653586/11
Plaintiff-Appellant-Respondent,

-against-

Jerr-Dan Corporation, also known as Jerrdan Corporation,
Defendant-Respondent-Appellant,

Oshkosh Corporation,
Defendant-Respondent.

_____

Zeichner Ellman & Krause LLP, New York (Peter Janovsky of counsel), for appellant-respondent.

Godfrey & Kahn, S.C., Milwaukee, WI (Anthony Baish of the bar of the State of Wisconsin admitted pro hac vice, of counsel), for respondent-appellant/respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about March 11, 2015, which, to the extent appealed from, denied plaintiff's motion for summary judgment as to the issue of liability on its breach of contract cause of action, denied defendant Jerr-Dan Corporation's motion for summary judgment finding that plaintiff suffered no damages as a result of the alleged breach of contract, and granted defendant Oshkosh Corporation's motion for summary judgment dismissing the causes of action for fraud and promissory estoppel, unanimously affirmed, with costs.

An issue of fact as to whether defendant Jerr-Dan breached the "reasonable commercial efforts" clause in section 8.2 of its amended license agreement with plaintiff precludes summary judgment in plaintiff's favor (*see Holland Am. Cruises, N.V. v Carver Fed. Sav. & Loan Assn.*, 60 AD2d 545, 545 [1st Dept 1977]; *see also Jones v Community Bank of Sullivan County*, 306 AD2d 679, 680-81 [3d Dept 2003). Plaintiff argues that Jerr-Dan breached the agreement by omitting plaintiff's patented side-loading vehicle retriever (SLVR) from "Covered Products" status in Jerr-Dan's distributor agreements and from dealer incentive programs and matters involving commissions based on sales and profit margins and by unfairly treating the pricing of the SLVR. However, Jerr-Dan's stated justifications for these omissions and other treatment of the SLVR raise issues of fact as to whether any of the challenged conduct, individually or in the aggregate, constitutes a breach of Jerr-Dan's obligation under the amended license agreement to use "reasonable commercial efforts."

Nor did Jerr-Dan establish its entitlement to a summary finding that plaintiff suffered no damages as a result of the alleged breach of contract since the primary damages calculation by Glenn Pomerantz, plaintiff's expert, indicated lost profits of $24,265,851 resulting from the difference between Jerr-Dan and

plaintiff's actual sales of SLVRs between 2005 and 2016 and their projected sales absent the alleged breach. Contrary to defendants' assertion, Pomerantz's calculation is not speculative (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). It is based, in part, on sections 3.3 and 3.4 of the amended license agreement, which required Jerr-Dan to achieve "Exclusivity Targets" of 350 units for the first two years combined and 350 units yearly for each year thereafter, "a stable foundation for a reasonable estimate of damages" (*see Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 89 [1st Dept 2012] [internal quotation marks omitted]). We reject defendants' characterization of the Exclusivity Targets as an unreliable assessment of potential SLVR sales in light of Jerr-Dan's acknowledgment in the amended license agreement that the agreed-upon Exclusivity Targets "reflect realistic projections of market potential as of the time of the execution of this Agreement." The record establishes that the issue of future sales was not only contemplated by the parties in the amended license agreement, but was fully considered, analyzed, and negotiated by sophisticated business professionals during their extended contract negotiations (*see also Ashland Mgt. v Janien*, 82 NY2d 395, 406 [1993]).

Plaintiff failed to prove an injury in connection with its

causes of action for fraud and promissory estoppel arising from Oshkosh's purported inducement of it to amend the licensing agreement (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Sabre Intl. Sec., Ltd v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 439 [1st Dept 2012]).

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

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1189 The People of the State of New York, Ind. 5684/13
Respondent,

-against-

Phillip Hunter,
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 (Jessica Olive 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 (Larry Stephen, J.), rendered March 12, 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: MAY 19, 2016

CLERK

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

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1190 Cruz Peralta-Santos, Index 152344/13
Plaintiff-Respondent,

-against-

350 West 49th Street
Corp., et al.,
Defendants-Appellants.

_____

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

Pellegrini & Associates, LLC, New York (Joseph Sturcken of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 5, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he fell down the stairs in defendants' building. Defendants submitted, inter alia, plaintiff's deposition testimony where he stated that while climbing the subject stairs, he suddenly felt dizzy and weak, heard the "noise of a paper," and remembered nothing else until he later awoke in the hospital.

He was twice asked whether he knew, or ever learned, what caused him to fall, and each time answered that he did not. Nowhere else in his testimony did plaintiff identify the cause of his fall (*see Lee v Ana Dev. Corp.*, 110 AD3d 479 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. His affidavit, where he claimed that he slipped and fell on paper restaurant menus strewn on defendants' stairs, was inadmissable, as plaintiff testified he neither spoke, read nor wrote in English, yet his affidavit was unaccompanied by a translator's affidavit attesting to its accuracy, as required by CPLR 2101(b) (*see Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]*; Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011]). Furthermore, even if admissible, the affidavit raised only feigned issues of fact, as it contradicted plaintiff's deposition testimony, and was tailored to avoid the consequences of such testimony (*see e.g. Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1191-
1192-
1192A

Ind. 2293/08
6067/09

The People of the State of New York,
Respondent,

-against-

Ronald Tackman,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Richard D. Carruthers, J.), rendered July 21, 2011, as amended August 15, 2011, convicting defendant, after a jury trial, of robbery in the second degree (five counts) and attempted robbery in the second degree, and sentencing him to an aggregate term of 25 years to life, and also convicting defendant, upon his plea of guilty, of escape in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a consecutive aggregate term of three to six years, unanimously affirmed. Order, same court (Daniel P. FitzGerald, J.), entered on or about October 24, 2014, which denied defendant's CPL 440.10 motion to vacate the abovementioned

judgments of conviction after trial, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that he was prejudiced by the fact that, in connection with a motion to suppress statements, his counsel did not argue that defendant had invoked his right to remain silent and did not exploit evidence presented at a Queens County hearing that would support such a claim. There is no reasonable probability that any such effort would have led to suppression, because the record indicates that, under all the circumstances, defendant's right to remain silent was scrupulously honored (*see Michigan v Mosley*, 423 US 96, 104 [1975]). Even if the Queens testimony is viewed most favorably to defendant, and even if it is assumed that defendant initially invoked his right of silence in a conversation with a Manhattan detective, defendant has not shown that a Queens detective's later questioning was unlawful and that it rendered defendant's ultimate confession to the Manhattan detective inadmissible (*see e.g. People v Logan*, 19 AD3d 939, 941-942 [3d Dept 2005], *lv denied* 5 NY3d 830 [2005]; *People v Cicciarelli*, 145 AD2d 938, 938-939 [4th Dept 1988], *lv denied* 73 NY2d 975 [1989]). Thus, defendant did not meet his

burden of establishing prejudice, and there was no factual issue requiring a hearing on the CPL 440.10 motion.

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. We do not find that any lack of preservation should be excused on the ground of ineffective assistance. As an alternative holding, we find no basis for reversal. The challenged portions of the prosecutor's summation generally constituted permissible comments on the evidence, constituting fair responses to defense counsel's summation arguments, and there was nothing so egregious as to warrant a new 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 court's *Sandoval* ruling, permitting questioning about defendant's escape conviction, did not violate the rule against impeachment regarding nonfinal convictions (*see People v Cantave*,

21 NY3d 374, 379-381 [2013]), because the escape conviction was related to the robbery charges and the underlying facts of the escape were, in any event, probative of consciousness of guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1193 Yani Crucen, Index 300627/15
Plaintiff-Respondent,

-against-

Pepsi-Cola Bottling Company of
New York, Inc.,
Defendant-Appellant.

_____

The Law Offices of Christopher P. DiGiulio, P.C., New York (Christopher P. DiGiulio of counsel), for appellant.

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 18, 2015, which, in this action for personal injuries, denied defendant's motion to change venue from Bronx County to Westchester County pursuant to CPLR 510(1), unanimously reversed, on the law, without costs, and the motion granted.

In support of its motion, defendant, a foreign corporation, submitted a certified copy of its application for authority to do business filed with the Secretary of State in which it stated that its principal place of business "is to be located" in New York County. Defendant's designation of New York County as its principal place of business in the application for authority is controlling for venue purposes (*see Johanson v J.B. Hunt Transp.*,

Inc., 15 AD3d 268 [1st Dept 2005]; *Kochany v Chrysler Corp.*, 67 AD2d 637 [1st Dept 1979]; CPLR 503[c]). Contrary to plaintiff's arguments, even if defendant does not actually have an office in New York County, and although it has notified the Department of State to forward process to an address in Bronx County, the designation made by defendant in its application for authority still controls for venue purposes (*see Job v Subaru Leasing Corp.*, 30 AD3d 159 [1st Dept 2006]; *Nadle v L.O. Realty Corp.*, 286 AD2d 130 [1st Dept 2001]).

Defendant's choice of Westchester County, where plaintiff resides and where the accident took place, as the place for trial is proper.

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

ENTERED: MAY 19, 2016

CLERK

Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1195N Imovegreen, LLC, et al., Index 300372/13
Plaintiffs-Appellants,

-against-

Frantic, LLC, et al.,
Defendants-Respondents.

_____

Law Offices of Steven Mauner, P.C., West Islip (Steven Mauner of counsel), for appellants.

Law Offices of Jacob Zelmanovitz, Brooklyn (Jacob Zelmanovitz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 1, 2015, which, upon defendants' motion to vacate a default judgment entered against them and to lift related restraints on their bank accounts, among other things, stayed any efforts to execute upon the default judgment, and directed defendants to post a bond in the amount of $25,000, and, upon proof of the filing of such bond, to settle an order on notice vacating the default judgment and lifting the related restraints, unanimously reversed, on the law, the facts, and in the exercise of discretion, with costs, defendants' motion denied, and the court-ordered stay vacated.

Although "certain law office failures may constitute reasonable excuses" (*Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]), a claim of law office failure should be rejected if the conduct is part of a pattern of "persistent and willful inaction" (*Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455, [1st Dept 2010]), "dilatory behavior" (*Perez v New York City Hous. Auth.*, 47 AD3d 505, 506 [1st Dept 2008]) or "willful default and neglect" (*Santiago v N.Y.C. Health & Hosps. Corp.*, 10 AD3d 393, 394 [2d Dept 2004]). This is such a case. Defendants' alleged law office failure is not excusable, as the record shows that defense counsel was fully aware of his obligations and intentionally and repeatedly failed to attend to them (*Forum Ins. Co. v Judd*, 191 AD2d 230, 230 [1st Dept 1993]; CPLR 2005).

Among other things, defense counsel failed to appear for a preliminary conference, failed to respond to discovery demands, failed to oppose plaintiff's separate motions to compel and to strike defendants' pleadings and failed to appear for an inquest, ignoring numerous emails, phone calls and voice messages from plaintiffs' counsel and the court clerk in the process. While defense counsel seeks to place the blame for this pattern of default and neglect on an associate, defense counsel himself

requested the adjournment of the motion to strike in April of 2014, and his purported associate was not involved with or even mentioned in that request.

Further, plaintiffs' counsel's inquiry into defense counsel's affidavit of engagement in support of that request for an adjournment revealed that defense counsel made an affirmative misrepresentation to the court, because he was not still actually engaged in the matter he claimed to be involved with. Despite the court's accommodations in granting the adjournment, and defense counsel's irrefutable knowledge of plaintiff's motion to strike his pleadings, he failed to appear at the rescheduled hearing date or any future court appearances, including the inquest. It was not until defendant's bank accounts were frozen after the default judgment was entered that defense counsel attempted to vacate the default. Plaintiff was prejudiced by defense counsel's actions, including that they pursued their legal rights for two and a half years and incurred legal expenses while defendants abused the court system, and they may now be unable to locate several witnesses as a result of the delay.

In addition, defendants' conclusory assertion that plaintiffs had breached the parties' contract is insufficient to show a meritorious defense (*James v Hoffman*, 158 AD2d 398, 398 [1st Dept 1990]; *see generally Goncalves v Stuyvesant Dev. Assoc.*, 232 AD2d 275, 276 [1st Dept 1996]).

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

ENTERED: MAY 19, 2016

CLERK

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

1196 The People of the State of New York, Ind. 1991N/12
Respondent,

-against-

Abraham Danclair,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered June 27, 2013, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motions to controvert the search warrant that led to the recovery of drugs and weapons from the single-family private dwelling where defendant lived.

The warrant described the premises to be searched with sufficient particularity, and since there was only one dwelling unit, there is no merit to defendant's argument that the warrant was required to specify the part of the house to be searched (*see People v Cook*, 108 AD3d 1107 [4th Dept 2013], *lv denied* 21 NY3d

1073 [2013]). Regardless of the fact that a 1962 certificate of occupancy permitted the location to be configured as a two-family house, and regardless of how it might have been configured at some point in the past, the warrant affidavit and the testimony presented at a hearing on one of defendant's motions to controvert established that the house was configured as a single-family dwelling. Among other things, there was a single front door and a single kitchen.

The warrant was supported by probable cause, based on information provided by two informants. As to each informant, both prongs of the test derived from *Aguilar v Texas* (378 US 108 [1964]) and *Spinelli v United States* (393 US 410 [1969]) were satisfied, and defendant's arguments to the contrary are unavailing.

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

ENTERED: MAY 19, 2016

CLERK

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

1197 Edward Pepitone, Index 109977/10
Plaintiff-Appellant,

-against-

Consolidated Edison Company
of New York, et al.,
Defendants,

Time Warner Entertainment,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Beth S. Gereg of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Richard E. Schmedake of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 8, 2014, which granted the motion of defendant Time Warner Entertainment for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion denied.

The motion was improperly granted in this action where plaintiff was injured when cable lying in the roadway became entangled in his car as he was driving, causing the car to become airborne. Similar cable was hanging from a utility pole near the scene and Time Warner's employee testified that Time Warner owned some of the cable on the pole. The employee also said that Time

Warner did not regularly inspect its cable, but only responded to complaints or reports of problems, of which there were none at the location near the time of the accident. Furthermore, an employee of a telephone company identified the cable that caused the accident as belonging to Time Warner, and plaintiff's coworker testified that he saw the cable hanging down near the accident scene during the two-month period before the accident. Accordingly, factual issues exist as to whether Time Warner owned the cable and whether it had constructive notice of the dangerous condition (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

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

ENTERED: MAY 19, 2016

CLERK

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

1198-
1199-
1199A In re Ivania L.V., and Another,

Children Under the Age of
Eighteen Years, etc.,

Liz C.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 11, 2014, which, to the extent it brings up for review fact-finding orders, same court and Judge, entered on or about August 6, 2014 and November 10, 2014, found that respondent mother neglected her son and derivatively neglected her daughter, unanimously affirmed, without costs. Appeal from fact-finding orders, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The mother does not challenge the Family Court's finding that she educationally neglected her son, and we find that a preponderance of the evidence supports the court's finding that she also neglected him by failing to provide him with adequate food, clothing, and shelter (*see e.g. Matter of Shawntay S. [Stephanie R.]*, 114 AD3d 502 [1st Dept 2014]; *Matter of Amondie T. [Karen S.]*, 107 AD3d 498 [1st Dept 2013]).

The mother's neglect of her son, both educationally and based on his lack of food, clothing and shelter, as well as her failure to plan for his future, demonstrated a fundamental defect in her understanding of her parental duties, sufficient to support a finding of derivative neglect with respect to her daughter (*Matter of Justine N. [Patricia M.]*, 136 AD3d 452 [1st Dept 2016]; *Matter of Jason G. [Pamela G.]*, 126 AD3d 489 [1st Dept 2015]; *Matter of Danny R.*, 60 AD3d 450 [1st Dept 2009]).

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

ENTERED: MAY 19, 2016

CLERK

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

1201 Mae Rhymes, etc., Index 309692/09
Plaintiff-Respondent,

-against-

Hemant K. Patel, M.D.,
Defendant,

Harmeet Singh, M.D., et al.,
Defendants-Appellants.

_____

Martin Clearwater & Bell, LLP, New York (Barbara D. Goldberg of counsel), for Harmeet Singh, M.D., appellant.

Lewis Johs Avallone Aviles, LLP, New York (Theresa Scotto-Lavino of counsel), for Vinod G. Bhagat, M.D. and Hemant K. Patel, M.D., P.C., appellants.

Finz & Finz, P.C., Mineola (Ameer Benno of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about February 20, 2015, which, to the extent appealed from as limited by the briefs, denied the motions of defendants Hemant K. Patel M.D., P.C. and Vinod G. Bhagat M.D., and of defendant Harmeet Singh M.D. for summary judgment dismissing the complaint in its entirety, unanimously affirmed, without costs.

From 2000 to 2009, plaintiff's decedent, Bevia Rhymes, sought treatment with defendants Drs. Patel, Bhagat, and Singh,

all of whom who were, at one time, employees of defendant Hemant K. Patel M.D., P.C., (the Patel PC). Decedent had smoked one pack of cigarettes a day for 25 years, quitting in 2000. During her treatment with defendants, decedent was diagnosed with, inter alia, chronic obstructive pulmonary disorder (COPD).

In August 2009, decedent was admitted to Montefiore Medical Center and diagnosed with lung cancer; she passed away in April 2010, whereupon plaintiff brought this medical malpractice action against the three physician defendants and the Patel PC alleging, inter alia, that they failed to order a chest X ray to detect cancer.

All defendants moved for summary judgment dismissing the complaint. In opposition, plaintiff submitted an expert's affirmation alleging that defendants negligently failed to order a chest CT scan, and abandoned the allegation that defendants failed to order an X ray.

Defendants Bhagat, Patel and the Patel PC established prima facie entitlement to summary judgment by submitting an affirmation of a medical expert establishing that they had rendered acceptable treatment to decedent. Their expert affirmed that decedent, who had COPD, was diagnosed properly, and treated accordingly, by defendants. Defendant Singh also established

prima facie entitlement to summary judgment through the affirmation of a medical expert, who opined that he treated decedent appropriately. While decedent had made "isolated complaints" of shortness of breath during her treatment with the other physicians at the Patel PC, these symptoms were not accompanied by other signs or symptoms attributable to lung cancer, such as chest pain, coughing, fever or syncope.

In opposition, however, plaintiff raised an issue of fact by asserting that had defendants, consistent with the standard of care, ordered a chest CT scan of decedent, her cancer may have been detected and operable during the period defendants were treating her. Contrary to defendants' assertions, these allegations were not new theories, as the failure to order proper testing was already alleged in plaintiff's bill of particulars (*see Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233 [1st Dept 2000]; *Contreras v Adeyemi*, 39 Misc 3d 1202(A), *11-12 [Sup Ct, Kings County 2011], *affd in part* 102 AD3d 720 [2nd Dept 2013]).

The Patel PC's claim that it was not vicariously liable for the acts or omissions of Dr. Singh on November 9, 2007 is unavailing, as there remain issues of fact as to whether the PC is liable under the theory of ostensible agency (*see Warden v*

Orlandi, 4 AD3d 239, 241-242 [1st Dept 2004]). There is no evidence that decedent specifically returned to the PC for treatment by one specific physician. Although Dr. Singh may only be responsible for decedent's November 9, 2007 visit with him, a question of fact exists as to whether the PC is vicariously liable for any of Singh's acts and omissions on that date (*see Hill v St. Clare's Hosp.*, 107 AD2d 557, 558 [1st Dept 1985], *mod* 67 NY2d 72 [1986]).

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

ENTERED: MAY 19, 2016

CLERK

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

1202 The People of the State of New York, Ind. 4769/12
Respondent,

-against-

Derrick Coleman,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Laura Ward, J.), rendered March 24, 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: MAY 19, 2016

CLERK

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

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

1203 Robert J. Penotti, Index 107133/11
Plaintiff-Appellant,

-against-

Xinos Construction Corp.,
Defendant-Respondent.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for appellant.

Babchik & Young, LLP, White Plains (Jordan Sklar of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 20, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Summary judgment was improperly granted in this action where plaintiff was injured when he walked into a pipe of a sidewalk shed erected outside of the store he was planning to enter. The record presents triable issues regarding whether the sidewalk shed pipe was an open, obvious, and not inherently dangerous condition (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]). At the time, plaintiff was following one of defendant's employees, who tried to guide him through the work

site. Plaintiff testified that he did not keep his eyes forward at all times as he walked through the site because he was concerned about tripping over construction debris, tools, and supplies that were strewn on the ground. Based on the alleged condition of the work site at the time leading up to the accident, and viewed in the light most favorable to plaintiff, there are questions of fact as to whether plaintiff's attention was distracted by the debris left by defendant on the ground at the work site, a potentially unsafe and dangerous condition, thereby causing plaintiff to collide with the pipe (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [1st Dept 2011]; *Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 762 [2d Dept 2011]).

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

ENTERED: MAY 19, 2016

CLERK

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

1204 Aspen American Insurance Company as subrogee of Ventrex LLC,
Plaintiff-Appellant,

-against-

Sanghamitra Kodukula,
Defendant,

Flat Rate Movers, Ltd.,
Defendant-Respondent.

Index 160606/14

_____

Methfessel & Werbel, New York (Fredric Paul Gallin of counsel), for appellant.

A. Smith Law Group, LLP, New York (Andrea J. Smith of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 24, 2015, which granted plaintiff's motion for leave to reargue the court's prior order, entered April 28, 2015, only to the extent that it required that plaintiff proceed by cross motion for leave to replead and submit an amended complaint, and upon reargument, vacated the requirement and otherwise adhered to its prior order, unanimously dismissed, without costs, as academic.

The motion court dismissed plaintiff's claims as against Flat Rate for failure to state a cause of action, and thus plaintiff was free to commence a new action for the identical

relief (*see* CPLR 205[a]). Inasmuch as plaintiff has commenced a new action against Flat Rate, dismissal of the appeal, based on the court's denial of plaintiff's motion for leave to replead, is warranted.

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

ENTERED: MAY 19, 2016

CLERK

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

1206 The People of the State of New York, Ind. 2953/02
Respondent,

-against-

L.A. Lewis,
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 (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered August 23, 2011, resentencing defendant, as a second violent felony offender, to an aggregate term of 13 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]; *see also People v Brinson*, 21 NY3d 490 [2013]).

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

ENTERED: MAY 19, 2016

CLERK

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

1207 In re Sonia S.,
Petitioner-Respondent,

-against-

Pedro Antonio S.,
Respondent-Appellant.

_____

Siskopoulos Law Firm, LLP, New York (Alexandra Siskopoulos of counsel), for appellant.

John R. Eyerman, New York, for respondent.

_____

Order of protection, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 9, 2014, upon a fact-finding determination that respondent committed the family offense of menacing in the third degree, unanimously affirmed, without costs.

The allegations that respondent forced petitioner to have sex with him did not divest the Family Court of subject matter jurisdiction in the instant case, as the Family Court was authorized to consider whether the conduct in question amounted to any sexual offense enumerated in Family Court Act § 812(1), although the Family Court found such allegations were not proven. Moreover, cases such as *Matter of Hamm-Jones v Jones* (267 AD2d 904, 905-906 [3d Dept 1999]), which dismissed similar petitions

for lack of subject matter jurisdiction, pre-date the addition, effective December 15, 2009, of sexual offenses to the Family Court Act (L 2009, ch 476 § 4).

Contrary to respondent's assertions, there is support in the record for the Family Court's determination that the parties were involved in an "intimate relationship" to render the underlying offense a family offense (*see* Family Ct Act § 812[1][e]). Petitioner testified that they were involved from roughly 1995 until 2011, and her testimony was corroborated to some extent by her daughter, who lived with petitioner when respondent visited. While there are issues of credibility as to both parties, there appears to be no basis to disturb the Family Court's determination to credit petitioner's description of the nature of their relationship over respondent's (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541 [1st Dept 2008]).

A fair preponderance of the evidence supports Family Court's finding that respondent committed the offense of menacing in the third degree (*see* Family Ct Act § 832; PL § 120.15). Petitioner testified that while they were outside on a street, respondent stated that he was going to kill her, and gestured with his

finger across his neck, as if to cut his head off (*see Matter of Akheem B.*, 308 AD2d 402, 403 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004]; *Matter of Denzel F.*, 44 AD3d 389, 390 [1st Dept 2007]). Moreover, the Family Court was entitled to credit this portion of petitioner's testimony notwithstanding that it rejected her testimony of the alleged sexual assaults (*see Matter of Hasan C.*, 59 AD3d 617 [2d Dept 2009]; *Peter G.*, 51 AD3d 541).

Finally, respondent was not denied his right to a fair trial by the court's rulings limiting the evidence regarding conduct of which petitioner was acquitted after a criminal trial (US Const, 6th & 14th Amends.; NY Const, art I § 6). That evidence related to an alleged incident on June 14, 2012, and the court ruled in respondent's favor regarding that allegation. To the extent respondent argues that evidence was relevant to petitioner's violent or aggressive conduct, and to prove petitioner filed the instant family offense petition to retaliate for her criminal prosecution, that evidence was presented.

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

ENTERED: MAY 19, 2016

CLERK

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

1212 The People of the State of New York, Respondent,

-against-

Dwayne Taylor, Defendant-Appellant.

Ind. 1879/10

_____

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

Darcel D. Clark, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered September 11, 2013, convicting defendant, upon his plea of guilty, of assault in the first degree and attempted conspiracy in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 18 years, unanimously affirmed.

The court properly adjudicated defendant a second violent felony offender, because, as we have repeatedly held in cases presenting the same issue, a conviction of criminal possession of a weapon in the third degree pursuant to former Penal Law § 265.02(4) qualifies as a violent felony (*see e.g. People v McGhee*, 125 AD3d 537 [1st Dept 2015], *lv granted* 26 NY3d 968 [2015]; *People v Thomas*, 122 AD3d 489 [1st Dept 2014], *lv denied* 24 NY3d 1123 [2015]).

Although we find that defendant did not make a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]), we perceive no basis for reducing the sentence.

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

ENTERED: MAY 19, 2016

CLERK

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

1213 Jia Wang, Index 104059/11
Plaintiff-Appellant,

-against-

Chih Shien Kang also known as
Ed Kang, et al.,
Defendants-Respondents.

_____

Jia Wang, appellant pro se.

Donald Eng, New York, for respondents.

_____

Order, Supreme Court, New York County (Richard Braun, J.), entered May 1, 2015, which, insofar as appealed from, denied plaintiff's motion to vacate the note of issue or, in the alternative, for a jury trial, unanimously affirmed, without costs.

Plaintiff brought this motion to vacate the note of issue on the basis that the case was not ready for trial some 15 months after the note of issue was filed, and, thus, the motion was untimely (*see Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]). Furthermore, plaintiff's speculative and unsubstantiated claims of defendants' forgery, spoliation, and obstructing discovery fail to meet the "stringent" standard of showing "unusual and unanticipated circumstances" subsequent to

the filing of the note of issue that would otherwise justify granting the relief sought (*id.* [internal quotation marks omitted]).

Plaintiff failed to file a jury demand within 15 days of the filing of the note of issue, and has not provided an excuse for her failure to do so. As a result, she waived any right she may have had to a jury trial (*see* CPLR 4102[a]; *Med Part v Kingsbridge Hgts. Care Ctr., Inc.*, 22 AD3d 260, 261 [1st Dept 2005]).

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

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

ENTERED: MAY 19, 2016

CLERK

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

1215N U.S. Bank National Association as Trustee for WAMU Mortgage Pass Through Certificate for Wmalt Series 2007-2 Trust, Plaintiff-Respondent, Index 380626/12

-against-

Jacobo Martinez, et al., Defendants,

Wanys Martinez, Defendant-Appellant.

_____

McCallion & Associates LLP, New York (Kenneth F. McCallion of counsel), for appellant.

Fein, Such & Crane, LLP, Syracuse (John A. Cirando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered January 28, 2015, which denied defendant Wanys Martinez's motion to vacate her default in answering the complaint and for leave to extend her time to file an answer to the complaint, unanimously affirmed, with costs.

The motion court properly found that jurisdiction, in this mortgage foreclosure action, had been obtained over defendant Wanys Martinez and thus she had not established entitlement to vacatur pursuant to CPLR 5015(a)(4). Defendant's conclusory denial of service failed to rebut the presumption of service

created by the process server's properly executed affidavit (*see Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]), which reflects that service was effectuated by delivering the summons and complaint "to a person of suitable age and discretion at [defendant's] actual ... dwelling place or usual place of abode," followed by the requisite mailing (CPLR 308[2]). Defendant admitted that, at the time of service, the subject property was still her "legal address" and that she had only "taken up temporary residence elsewhere," at an unspecified location, which claim was not substantiated with any documentary evidence. As defendant "never established a permanent alternative 'actual dwelling' or 'usual place of abode'" and admitted that she still received mail at the property, service was properly made thereat (*CC Home Lenders v Cioffi*, 294 AD2d 325 [2d Dept 2002]). Indeed, defendant identified no other address at which she could have been served.

Defendant's belief that her then estranged husband would not have accepted service of process on her behalf is insufficient to rebut the presumption of service created by the process server's claim as to what her husband actually did (*see Granite Mgt. & Disposition v Sun*, 221 AD2d 186 [1st Dept 1995]).

The motion court did not improvidently exercise its discretion in finding that defendant did not establish a reasonable excuse for delay and meritorious defense to this action (*see* CPLR 5015(a)(1); *Carroll v Nostra Realty Corp.*, 54 AD3d 623 [1st Dept 2008] [citation omitted], *lv dismissed* 12 NY3d 792 [2009]). Defendant's unsuccessful claim that she was not properly served with process and conclusory denial of receipt of certain mailings are insufficient to overcome the presumption of delivery created by the affidavits of service reflecting such mailings and do not constitute a reasonable excuse for delay or a meritorious defense (*see 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511, 512 [1st Dept 2013]; *Burr v Eveready Ins. Co.*, 253 AD2d 650, 651 [1st Dept 1998], *appeal dismissed* 92 NY2d 1041 [1999]; *Citimortgage, Inc. v Bustamante*, 107 AD3d 752, 753 [2d Dept 2013]).

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

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

ENTERED: MAY 19, 2016

CLERK

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

1217N- Index 114515/11
1217NA The Board of Managers of
the Lore Condominium,
Plaintiff-Appellant,

-against-

Steven Gaetano, et al.,
Defendants-Respondents.

_____

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Steven D. Sladkus of counsel), for appellant.

Bartels & Feureisen, LLP, White Plains (David Feureisen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 5, 2015, which denied plaintiff's motion to vacate an order, same court and Justice, entered December 24, 2013, which had sua sponte marked the case off the calendar, unanimously reversed, on the law, without costs, the motion to vacate granted, and the case placed back on the court's pre-note of issue calendar. Appeal from order entered December 24, 2013, unanimously dismissed, without costs, as academic.

The motion court erred when it effectively dismissed the complaint pursuant to CPLR 3216(a) on the basis that plaintiff failed to file a note of issue and certificate of readiness by October 18, 2013, as required by both a preliminary conference

order and a so-ordered stipulation entered into by the parties. A condition precedent to dismissal pursuant to CPLR 3216(a) was not satisfied, since a written demand pursuant to CPLR 3216(b)(3) was never served upon plaintiff. Although court orders signed by the parties may constitute a written demand under CPLR 3216(b)(3) (*see Basile v Chhabra*, 24 AD3d 149, 150 [1st Dept 2005]), the preliminary conference order does not qualify as such because it was unsigned by the parties (*see id.*), and it did not give plaintiff the required 90 days to serve and file the note of issue, or state that plaintiff's failure to timely do so would serve as a basis for a motion to dismiss (*see* CPLR 3216[b][3]; *Mehta v Chugh*, 99 AD3d 439, 439 [1st Dept 2012]). The stipulation, while signed by both parties, also fails to qualify as a written demand, because it does not contain the requisite statutory language (*see id.*).

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

ENTERED: MAY 19, 2016

CLERK

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

1218 [M-4034] & M-5447 In re Lidya Radin, etc., Petitioner, Index 570444/11 Dkt. 48859/09

-against-

Hon. Richard B. Lowe, III, et al., Respondents.

_____

Lidya Radin, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg of counsel), for Hon. Richard B. Lowe, III and Eric T. Schneiderman, respondents.

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

_____

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

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

It is unanimously ordered that the application be and the

same hereby is denied and the petition dismissed, without costs or disbursements.

M-5447 ***Radin v Lowe***

Motion by proposed intervenor to intervene and for related relief denied.

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

ENTERED: MAY 19, 2016

CLERK

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

15935 The People of the State of New York, Respondent, Ind. 4382/09 5747/09

-against-

Dan Evans, Defendant-Appellant.

_____

Glenn A. Garber, P.C., New York (Glenn A. Garber of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 22, 2011, as amended July 19, 2011, reversed, on the law, and the matter remanded for a new trial in accordance herewith.

Opinion by Kapnick, J. All concur except Tom, J.P. and Andrias, J. who dissent in an Opinion by Tom, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Karla Moskowitz
Barbara R. Kapnick, JJ.

15935
Ind. 5747/09 and 4382/09

_____x

The People of the State of New York,
Respondent,

-against-

Dan Evans,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered June 22, 2011, as amended July 19, 2011, convicting him, after a jury trial, of murder in the second degree, attempted murder in the second degree, assault in the first and second degrees, attempted assault in the first degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree, and imposing sentence.

Glenn A. Garber, P.C., New York (Glenn A. Garber of counsel), for appellant.

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

KAPNICK, J.

On this appeal, defendant principally argues that the trial court improvidently exercised its discretion in denying his motion to introduce expert testimony on the subject of false confessions. By indictment No. 5747/09, defendant was charged with second degree murder, and second and third degree criminal possession of a weapon, relating to an August 16, 2006 incident in which he allegedly shot at one person, but instead hit and killed an innocent female bystander, in the street in upper Manhattan (the 2006 homicide). By indictment No. 4382/09, defendant was charged with second degree attempted murder, first degree attempted assault, first and second degree assault, second degree criminal possession of a weapon and first degree reckless endangerment, relating to a June 15, 2009 incident at the East River Houses, a housing complex in upper Manhattan, in which he allegedly was shooting at one person but hit and injured two bystanders (the 2009 incident). The indictments were joined upon motion by the People, which defendant also claims was error. Additionally, he contends that it was error for the court to deny his motion to suppress a lineup identification.

In June 2010, defense counsel requested that the court appoint Dr. Sandford Drob as an expert to conduct the psychological evaluation of defendant in regard to the

confessions he provided to the police. The court initially denied defendant's request, but permitted him to make a more detailed application. In July 2010, defense counsel filed a supplemental affirmation stating that he was seeking the assignment of Dr. Drob to evaluate defendant regarding both his ability to waive his *Miranda* rights and his susceptibility to making a false confession. Counsel stated that he intended Dr. Drob to testify at trial about his assessment of defendant and generally on the subject of false confessions, including social scientific testimony about the phenomenon and causes of false confessions and tests like the Gudjonnson Suggestibility Scales (GSS), which measure a person's vulnerability to suggestion.

In response, the People objected to expert testimony on the general subject of false confessions and defendant's susceptibility to making a false confession, but did not object to assignment of an expert to evaluate defendant's ability to waive his *Miranda* warnings and/or to testify as to defendant's possible cognitive deficits.

On July 15, 2010, the court denied defendant's request for an expert on the "general subject of false confessions" and on the subject of "susceptibility to providing false confessions," but granted the application for appointment of an expert to conduct a psychiatric evaluation of defendant.

Dr. Drob subsequently interviewed and evaluated defendant and issued a Forensic Psychological Evaluation on October 4, 2010, concluding:

> "Mr. Evans exhibits traits that would render him vulnerable to producing a false confession. These traits include borderline intellectual functioning, cognitive, social and emotional immaturity, severe deficits in reality testing and deficits in the capacity to understand the actions and intentions of others, deficits in his capacity to cope with interpersonal stress, anxiety, depression, dependency, passivity and a desire to please others, and a concomitant tendency to rely on others for direction and support."

In April 2011, defense counsel again requested leave to introduce expert testimony at trial on the issues of the general phenomenon of false confessions and defendant's susceptibility to making a false confession. Defense counsel also moved to assign Dr. Maria Hartwig as a false confession expert, or alternatively, for a *Frye* hearing on the admissibility of that expert testimony. Defense counsel proposed that if Professor Hartwig were permitted to testify, Dr. Drob's testimony would be limited to the tests he performed on defendant, the results he obtained and his opinion about defendant's susceptibility to making involuntary and/or unreliable confessions, without his opining as to whether defendant's confessions were false. Alternatively, counsel proposed, if Dr. Hartwig was not assigned, Dr. Drob should be

permitted to testify as an expert on false confessions.

The People opposed the motion, noting that five New York courts had previously held *Frye* hearings on this subject and found that the science of false confessions was not generally accepted within the scientific community. The People maintained that there was no basis for Dr. Drob to conclude that particular traits that defendant possessed would make him more susceptible to making a false confession.

On June 2, 2011, prior to jury selection, the court ruled that it would not permit Dr. Drob to testify about the phenomenon of false confessions.

At trial, Dr. Drob was permitted to testify as to the testing he had performed on defendant, including the GSS tests, showing that defendant had limited cognitive ability and borderline intellectual functioning. He testified that the tests demonstrated that defendant was very suggestible and relatedly that he was willing to fabricate when pressed for information that he did not possess. He opined that defendant had a strong desire to please others, especially authority figures. Further, when asked to summarize his findings, he testified:

> "I would also say that in general based upon all of the information that because of his low IQ, because of his passivity, his dependence, because of his poor reality testing, his poor social relatedness and also

> his difficulty coping with stress, that this is an individual who would be more so than other people vulnerable to manipulation by other individuals."

When defense counsel asked Dr. Drob how defendant would be affected if he was placed in a room in isolation with only his interrogators who repeatedly said to him that they knew he was lying, the court sustained the People's objection.

"'[T]he admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court,' which should be guided by 'whether the proffered expert testimony would aid a lay jury in reaching a verdict'" (*People v Bedessie*, 19 NY3d 147, 156 [2012], quoting *People v Lee*, 96 NY2d 157, 162 [2001]). Here, the court permitted defendant's expert to testify on certain matters relating to defendant's mental condition and his intellectual capacity, but did not allow any expert testimony on the general phenomenon of false confessions or how defendant's specific individual personality traits may have contributed to a false confession. Unlike the case in *Bedessie*, where the Court held that the expert's proffer was not "relevant to the defendant and [the] interrogation before the court" (*Bedessie*, 19 NY3d at 161), here we find that defendant meets this threshold requirement.

First, there is no dispute that Dr. Drob concluded that defendant exhibited traits such as,

> "borderline intellectual functioning, cognitive, social and emotional immaturity, severe deficits in reality testing and deficits in the capacity to understand the actions and intentions of others, deficits in his capacity to cope with interpersonal stress, anxiety, depression, dependency, passivity and a desire to please others, and a concomitant tendency to rely on others for direction and support."

There can also be no dispute that these particular mental conditions and personality traits are ones that research studies have linked to false confessions, and that the Court of Appeals has recognized this link (*Bedessie*, 19 NY3d at 159 ["Research in the area of false confessions purports to show that certain types of defendants are more likely to be coerced into giving a false confession - e.g., individuals who are highly compliant or intellectually impaired . . . or who are for some other reason psychologically or mentally fragile."]).

Second, certain conditions of the interrogation suggest that defendant could have been induced to confess falsely to the crimes at issue. The defense urges that the detectives' interrogation employed a variety of techniques that scientific research has shown to be highly correlated with eliciting false confessions. As was the case in *People v Days* (131 AD3d 972 [2d

Dept 2015], *lv denied* 26 NY3d 1108 [2016]), defendant here was subjected to a lengthy interrogation, from around 11:00 a.m. until his final videotaped statement shortly before midnight. Moreover, as in *Days*, the evidence here suggests that the interrogating detectives utilized rapport-building techniques to gain defendant's trust and posed a number of suggestive or leading questions during the interrogation. Further, "the fact that no one had videotaped the [many] hours of the interrogation that had been conducted before the confession was made raises significant concerns" (*id*. at 981).[1]

Finally, this is a case, especially with respect to the 2006 homicide, that turns on the accuracy of defendant's confessions. There was no physical evidence connecting defendant to the 2006 homicide, and, although there was testimony from various witnesses describing the scene of the homicide, as well as

[1] The dissent's attempt to distinguish *People v Days* from the instant case because there was virtually no corroborating evidence in that case, does not render the case inapposite. The Court of Appeals has not issued a bright line rule that false confession experts may only testify in cases where the only evidence of guilt is the defendant's confession. Instead, the Court of Appeals has instructed that expert testimony on false confessions is permissible when it is relevant to the particular defendant and interrogation at hand, which must be judged on a case by case basis (*Bedessie*, 19 NY3d at 161). *People v Days* is instructive, especially in reviewing the interrogation conditions, which even the dissent concedes, bear resemblance to the conditions in the instant case.

testimony from a cab driver who was acquainted with defendant from the neighborhood, and drove defendant to the vicinity where the crime took place, this evidence was not overwhelming. Contrary to the dissent's broad assertion that there was sufficient evidence corroborating defendant's confession, the testimony in fact only corroborated defendant's description of the scene; there were no witnesses or any other evidence, however, to corroborate defendant's confession to firing the gun. One witness testified that upon approaching his apartment building on 117th Street, he noticed a group of men using a laptop on the hood of a car, and after arriving at his third floor apartment he heard three or four gunshots. Two other witnesses, who were with the victim at the time of the shooting, described the scene of the shooting, including the fact that a group of Hispanic men using a laptop were gathered around a car. However, both witnesses testified that they did not see the shooter. A fourth witness testified that she did see the shooter, but could not describe him other than saying he was a young man wearing a black shirt and black hat.

There can be no dispute that the relevant inquiry here is whether the confession was corroborated by overwhelming evidence, thereby undermining the usefulness of expert testimony on the issue of false confessions. Despite the dissent's assertion

otherwise, this standard is not met by simply reasoning that "if defendant confessed to one crime that he actually committed, there is no reason to suspect that his confession to the August 2006 crime . . . was not equally reliable." While this may be an argument that the People could make to the jury at trial in support of the reliability of the confession, it does not refute the fact that the confession was a central component of the People's case, and thus does not undermine the usefulness of expert testimony on the issue of false confessions (*see Days*, 131 AD3d at 981).

Moreover, the dissent's assertion that reversal here is not warranted in light of the overwhelming evidence corroborating the confession, blatantly disregards the standard we are tasked to apply, as defined by *Bedessie*, which asks us to examine whether the proffered expert testimony is warranted based on the nature of the interrogation, the applicability of the science of false confessions to the defendant and the extent to which the People's case relied on the confession. All three factors must be considered and weighed to determine the admissibility of the expert testimony on false confessions. It is not for this Court to ponder the veracity of the confession by comparing the details given in the confession with the details contained in the witnesses' testimony. Only the factfinder can engage in that

analysis and make the inferences that the dissent suggests should be made, and the jury is free to consider the details of defendant's confession, along with the details described by the witnesses and decide whether the People met their burden of proof.

We agree with the dissent that identification testimony is not an absolute requirement for a conviction; certainly there are many ways in which the People may decide to prove their case. Further, we appreciate that the witnesses in the 2006 case may not have been able to identify the shooter due to the fast paced and hectic nature of the events, which resulted in the tragic and unfortunate death of an innocent bystander. However, these realities, despite the dissent's reasoning otherwise, do not have any legal bearing on the disposition of this appeal. While the dissent maintains that we've taken a "myopic view of the evidence" to reach our conclusion, we submit that the only reasonable view of the evidence supports the notion that without independent physical or testimonial evidence linking defendant to the crime, the People relied heavily on defendant's confession to secure a conviction. In light of this, and after considering the other two factors, we find that the jury is entitled to the benefit of hearing expert testimony on false confessions so that the jurors may consider it alongside the other evidence.

In addition, although the People assert that defendant's confession in the 2009 incident was sufficiently corroborated by eyewitness testimony, and they did not need to rely on it to meet their burden, the confession still undoubtedly played a central role in the People's case. While we agree with the dissent that there was also physical evidence in the 2009 case, namely the cartridge cases from two different guns that were recovered at the scene, we disagree that the cases are direct evidence of defendant's guilt, or otherwise corroborate defendant's confession. Likewise, the fact that defendant suffered a gunshot wound and that he appears in surveillance video is evidence that he was at the scene, but not that he was the shooter. The People's direct evidence that he was the shooter, other than his confession, came from eyewitness testimony of William Smith, the 11-year-old victim and bystander, who testified that defendant fired a gun, causing Smith to run toward his apartment, at which time he was shot in the ankle. While the corroborating evidence in the 2009 incident is certainly stronger than that in the 2006 case, it, again, does not undermine the usefulness of expert testimony on the issue of false confessions (*see Days*, 131 AD3d at 981) and is not dispositive of the issue at hand, especially here, where defendant was tried for both the 2009 incident and the 2006 homicide in a consolidated trial.

Based on the foregoing, defendant meets the standard set out by the Court of Appeals — that the proposed expert's testimony is "relevant to the defendant and [the] interrogation before the court" (*Bedessie*, 19 NY3d at 161; *cf. People v Roman*, 125 AD3d 515 [1st Dept 2015], *lv denied* 26 NY3d 1091 [2015] [where the trial court properly denied the defendant's motion to present expert testimony on false confessions when his motion papers contained no expert affidavit and the case did not turn on the accuracy of the defendant's confession]).

The dissent's reliance on *Roman*, for the notion that "there is no reasonable possibility that the proposed testimony would have resulted in a more favorable verdict" is misplaced (125 AD3d at 516). In *Roman*, the defendant testified at trial and his allegedly false confession was "generally exculpatory with respect to the issue of intent" (*id.*). Although the dissent is correct that Dr. Drob was permitted to testify about defendant's personality traits and that he was susceptible to manipulation, it cannot be said that the proffered expert testimony linking those traits to the phenomenon of false confessions would not have had a reasonable possibility of resulting in a more favorable verdict.

To the extent the denial was based on the People's argument that the science of false confessions is not generally accepted within the scientific community, the Court of Appeals has now made clear that the "phenomenon of false confessions is genuine [and] has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom" (*Bedessie*, 19 NY3d at 156).[2] As observed by the New York State Bar Association Task Force on Wrongful Convictions, "Both social science research and anecdotal evidence of wrongful convictions have demonstrated that false confessions do occur" (Final Report of the New York State Bar Association's Task Force on Wrongful Convictions at 112 [April 2009], https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663 [accessed April 29, 2016]). Moreover, "[e]xpert testimony on false confessions may be a defendant's strongest piece of evidence when challenging the state's case" (Chojnacki, Cicchini and White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 Ariz St LJ 1, *11 [2008]). As the Court of Appeals found, "[T]here is no doubt that experts in such disciplines as psychiatry and psychology or the social

[2] The Court of Appeals has also made clear that the fact that this type of expert testimony may be within the understanding of the average juror is not an adequate basis for rejecting it (*Bedessie*, 19 NY3d at 157).

sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions" (*Beddesie*, at 161). Indeed, there are "factors or circumstances correlated by psychologists with false confessions" (*id*. at 158). Therefore, "expert evidence on [the] factors that the scientific community has determined may contribute to a false confession[,]" (*id*. at 156) is warranted in the proper case. Although the trial court did not have the benefit of the *Bedessie* decision at the time of its ruling, it cannot now be said that expert testimony that is relevant to the defendant and the interrogation before the court may be precluded because the science of false confessions is not generally accepted in the scientific community.

Accordingly, the court improvidently exercised its discretion in denying defendant's motion to present expert testimony on false confessions to assist the jury in connecting the unique factors present in defendant's interrogation with the scientific research linking those factors with false and unreliable confessions, and a new trial is warranted. While we are certainly mindful of the fact that a trial court is vested with the discretion to determine the admissibility and limits of expert testimony, here, the court summarily rejected defendant's

motion to introduce expert testimony on the issue of false confessions, solely on the grounds that the science of false confessions was not generally accepted within the scientific community, without undertaking any analysis or otherwise weighing the relevant legal issues.

As to defendant's remaining arguments, the court properly granted the People's motion to consolidate the indictments relating to the two incidents (*see* CPL 200.20[2][b],[c]). The court also properly found that the lineup relating to the attempted murder incident was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). We need not reach defendant's argument regarding the excessiveness of his sentence.

Accordingly, the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered June 22, 2011, as amended July 19, 2011, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, assault in the first and second degrees, attempted assault in the first degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a

weapon in the third degree, and sentencing him to an aggregate term of 40 years to life, should be reversed, on the law, and the matter remanded for a new trial in accordance herewith.

All concur except Tom, J.P. and Andrias, J. who dissent in an Opinion by Tom, J.P.

TOM, J.P. (dissenting)

Substantial evidence corroborating defendant's confession to each of the two shootings removes any doubt regarding its reliability and obviates any legitimate concern that defendant gave a confession to a crime he did not commit. Also, because defendant's psychiatric expert was permitted to testify as to defendant's vulnerability to be manipulated by another person, especially one of authority, the trial court providently exercised its discretion in denying defendant's request to introduce expert testimony on the phenomenon of false confessions. Therefore, I respectfully dissent.

Defendant sought treatment for a bullet wound to the leg at the emergency room of Harlem Hospital on the afternoon of June 15, 2009. This information was reported to Detective Robert Mooney, who had been investigating the August 16, 2006 shooting death of a young female, Lesenia Figueroa on 117th Street in Harlem. Mooney had come to suspect that defendant was involved in the victim's death, although the basis for the detective's suspicion has not been explained.

At the hospital, defendant told Detective Mooney that he was on the basketball court at the East River Houses when two people began shooting at each other. Everyone started running and so did defendant. Realizing that he had been shot, defendant took a

cab to Harlem Hospital. Two other people also sustained gunshot wounds. Seventy-seven-year-old Pedro Morales was shot in the hip and 11-year-old William Smith was hit in the ankle.

On June 15, 2009, at about 2:43 p.m., security cameras at the New Metro North Housing Complex captured images of Marcel Baker walking through the lobby of 1952/1954 First Avenue. He was accompanied by a second man who was black and wore a red jacket with white lettering on the front and back, blue jeans and white sneakers. Exterior surveillance cameras showed the two men walking towards First Avenue.

A police officer responding to a report of shots fired at the housing complex spoke with young William Smith, who described his assailant as a heavy-set, black male wearing a red jacket. His hair was "nappy" or in corn rows. Smith later identified defendant from a photo array.

On August 21, 2009, following defendant's release from the hospital, three detectives went to his apartment arriving at about 11:00 a.m. Defendant voluntarily accompanied them to the 23rd Precinct, where he was brought into an interview room and offered something to eat and drink, which he declined. When asked about the shooting, defendant essentially repeated the statement he had made to Detective Mooney at Harlem Hospital adding that he ran to First Avenue, where he encountered a woman

he knew, and she accompanied him to the hospital. A detective explained that the investigation of the incident had revealed that defendant was one of the shooters and read defendant his *Miranda* warnings.

Defendant waived his *Miranda* rights and, according to Detective Vito Ragolia, stated, "I'm going to be honest with you. I'm going to tell you what happened." Thereupon, defendant recounted that, after arguing with his girlfriend, he went outside to cool off. He met his friend Marcel, and they went to the East River basketball courts to smoke marijuana. A man defendant identified as "Peanut" approached them in a very agitated state and asked defendant if he had any marijuana. When told he had none, Peanut walked away. Defendant related that when he saw Peanut, wearing a black hoody, dark clothes and gloves, re-enter the basketball courts and raise his hand, he retrieved a gun from a nearby garbage can. Defendant explained that the garbage can was used by neighborhood drug dealers to secrete weapons, a fact that he asserted was "common knowledge." Defendant then began firing at Peanut. Afterwards, he ran toward First Avenue and realized he had been shot. He met a girl known as Re-Re, who hailed a cab to take them to Harlem Hospital. During his statement, defendant was not confrontational and did not give any of the detectives a reason to raise his voice.

Detective Ragolia expressed disbelief that drug dealers would hide a weapon in an area where small children play and told defendant that he wanted to take his statement. Defendant expressed his preference that the detective write the statement for him as he gave it. Defendant signed the statement, after which the detectives asked defendant if he needed anything and informed him that they would be taking a break, leaving the interview room at about 2:45 p.m. At some point during the afternoon, defendant was given two brownies and a bottle of water.

Detective Ragolia resumed the interview at about 3:45 p.m. and concluded between 5:00 and 5:30 p.m. He was accompanied by Detective Mooney, who told defendant that witnesses had described him removing a gun from his waistband and firing first. Defendant then admitted that he had taken a pistol from a pocket in his jeans and, when Peanut returned to the basketball courts with a gun, decided not to wait for him to fire a shot but shot first, discharging his weapon several times before throwing it into the bushes. Detective Mooney wrote down the statement from memory, asking for clarification when necessary. When told that the police had searched the entire area and found no weapon, defendant said that he had disposed of the gun in the garbage chute of a building he ran into before hailing the cab to go to

the hospital. After defendant read and signed each page of his statement, the detective asked if defendant would be willing to meet with the prosecutors assigned to the case.

The meeting with prosecutors began at about 6:10 p.m. Defendant gave a videotaped statement repeating in substance what he had just related to Detective Mooney. Defendant stated that he was wearing a red jacket, white tee shirt and blue jeans and that Peanut was dressed in black. He described how he took his gun from his jeans and Peanut produced his gun from the pouch of his hoody. The videotaped statement ended at 6:42 p.m.

At this juncture, Detective Mooney informed defendant that he was under arrest and that a lineup would be conducted for witnesses to the shooting. He explained that defendant "had a much bigger problem regarding the homicide of a young girl killed on 117th Street three years earlier," meaning the 2006 Figueroa homicide, and that people who had picked him out of a photo array would also be present at the lineup. He told defendant to relax for a few minutes while he attended to some paperwork. But before he could open the door, defendant stated, "I didn't mean to kill her."

When Detective Mooney again entered the interview room, he carried with him files concerning unrelated investigations, which contained photographs of people from the neighborhood including

some depicting Joshua Mirabel and Angel Garcia. The detective asked defendant if he could identify any of these people, and defendant demonstrated that he was familiar with most of them. Detective Mooney then stated that the only way he was going to find out what happened in the Figueroa shooting was if defendant told him.

Defendant explained that two nights prior to the 2006 shooting, he was on the east end of 100th Street when Angel Garcia and two men drove up. The men got out, guns drawn, and Garcia put a gun in defendant's mouth while the other two took his shoes, belt, money and cell phone. The following night, Josh Mirabel and some friends were at the playground by defendant's apartment building when Mirabel's phone rang indicating a call coming from defendant's stolen cell phone. Shortly thereafter, Angel Garcia approached, drew a pistol and opened fire, striking Mirabel in the shoulder.

The next night, defendant discussed these events with Mirabel's brother, "Fach," while smoking marijuana. They hired a cab driver who lived in the Metro North Houses (the New Metro North Housing Complex), known as "Little Arab," to drive them around. They directed him to 117th Street, where defendant saw Garcia and others, including some women, gathered around a laptop that was resting on the hood of a car. According to defendant,

they retrieved a gun from a mailbox at the Isaacs Houses on 92nd Street and First Avenue and returned to the scene, where defendant got out and approached Garcia and his companions. Garcia ran off, at which time defendant fired five or six shots before returning to the cab, instructing the driver to continue to drive around while defendant and Fach continued to smoke. Defendant ultimately left the gun with Fach, who disposed of it. Defendant said that he had not intended to kill Figueroa and only learned that someone had been killed by reading the newspaper.

Detective Mooney reduced defendant's statement to writing and gave it to him to review and sign. Defendant then consented to again give a videotaped statement to a prosecutor. In that statement, which began at approximately 11:15 p.m., defendant repeated what he had told the detective, adding that he had intended to threaten Garcia with the gun as Garcia had threatened him, but when Garcia and his friends ran away, defendant began shooting. The interview was concluded at 11:47 p.m. Defendant was detained in a holding cell at the precinct house overnight.

On August 22, 2009, the following morning, William Smith, accompanied by his mother, arrived to view two lineups concerning the shooting of June 15, 2009. He identified defendant in the first lineup as the shooter wearing the red jacket and Tyrone Howard, a/k/a Peanut, in the second lineup as the shooter wearing

the black jacket.

William Smith lived at the East River Housing Complex, just north of the New Metro North Housing Complex, which was close to the school he attended. Smith had seen Tyrone Howard at his apartment complex and had observed defendant in front of his school on several occasions. On the night he was shot, Smith saw Howard, followed by defendant, walk past him toward the park at the rear of the East River complex. When Howard reached the end of one basketball court, defendant, positioned at the other end of the court, pulled a gun, which Smith recognized as a nine millimeter, from the back of his waistband, opening fire in his direction and shooting at Howard. As he ran toward his apartment, Smith realized he had been shot in the ankle. He heard about 17 shots in all, after which he saw defendant run toward 434 East 105th Street.

At that time, Tamara Sepulveda looked out her living room window and saw defendant, whom she identified in court, approaching the apartment building. He appeared to be trying to run but was hampered by a leg injury. Defendant entered the building and reappeared a few minutes later dressed in different clothing, which she could not describe.

When Smith arrived at his apartment building, he was unable to enter and began shouting for someone to open the door. He was

heard by Monique Burns, who called 911. She looked out her window observing a man wearing a hooded sweatshirt and blue jeans and holding a gun, which he put in his pocket as he walked to the back of the building.

Officers, from the evidence collection unit, recovered 13 cartridge cases from the basketball courts, all nine millimeter. Four were found at the south entrance where Smith had been sitting with a friend. Three were found near the basketball hoop by the fence at one end of the court together with two on the walkway. Four more cases were recovered from the opposite end of the basketball court. Examination revealed that the cases came from two different weapons. One gun had ejected the nine cases recovered from the end of the basketball court near the fence, and the second gun had ejected the four cases found at the other end of the court. This confirms Smith's observation of defendant and Howard firing shots from opposite ends of the basketball court.

Defendant was indicted in connection with both the 2009 shooting and the 2006 shooting resulting in the death of Lesenia Figueroa. The indictments were consolidated over defendant's objection, and a jury found him guilty of murder in the second degree, attempted murder in the second degree, assault in the first degree, attempted assault in the first degree, assault in

the second degree, two counts of criminal possession of a weapon in the second degree and one count of criminal possession of a weapon in the third degree. He was sentenced to an aggregate prison term of 40 years to life.

With regard to the shooting of Lesenia Figueroa, the jury heard testimony from Sushil Kumar Sharma, who from his work as a cab driver in the neighborhood was acquainted with defendant, Joshua Mirabel and his brother, Fach. On the night of Figueroa's death, Sharma drove defendant and Fach to 116th Street and First Avenue near the location of the shooting and killing of the young female victim, where he waited. He did not hear any shots, but about five minutes later they returned, and he drove them back to the new Metro North Housing Complex.

Two other witnesses, Louis Picardo and John Martinez, described a group of Hispanic men gathered around a laptop placed on the hood of a car. That night, Eric Garrison on his way home also observed a group of men using a laptop on the hood of a car. At about 8:45 p.m., Lesenia Figueroa stopped to greet Picardo and Martinez on her way to a local bodega on First Avenue. After making a purchase, she returned to where they were seated and sat down with them. When the men heard shooting, they stood up to run away, and Picardo took Figueroa by the hand in an attempt to take her with him. Kajina West, who had just walked out of the

bodega, saw Figueroa trying to get up. She observed a man standing in the street shooting toward a group of Hispanic men in white shirts running away. She also saw the shooter wearing a black shirt and black hat. Four nine millimeter cartridge cases were recovered from the vicinity, all from the same gun. Figueroa had sustained a fatal bullet wound to the back of her head.

Defendant's primary contention on appeal is that the trial court improperly refused to allow expert testimony on the subject of false confessions. He relies on *People v Bedessie* (19 NY3d 147, 149 [2012]), in which the Court of Appeals endorsed the use of such testimony "in a proper case."

While the trial court did not permit the use of expert testimony concerning false confessions, it did allow a psychiatric evaluation of defendant by his proposed expert, Dr. Sanford Drob.[1] At trial, Dr. Drob testified that the tests he administered to defendant revealed limited cognitive ability and borderline intellectual functioning. Further, the tests demonstrated that defendant was very suggestible and willing to confabulate when pressed for information that he did not possess.

[1] Defendant supplemented his application with a request that Dr. Maria Hartwig be appointed as an expert on false confessions and their etiology, which the court denied.

Dr. Drob opined that defendant had a strong desire to please others, particularly authority figures. He concluded that

> "based upon all of the information that because of his low IQ, because of his passivity, his dependence, because of his poor reality testing, his poor social relatedness and also his difficulty coping with stress, that this is an individual who would be more so than other people vulnerable to manipulation by other individuals."

On summation, defense counsel argued that the police manipulated a confession from defendant, who was "borderline mentally retarded." The court instructed the jury that the People were required to prove, beyond a reasonable doubt, that defendant's statements were voluntarily made, providing instruction on how the jury should assess voluntariness in light of possible coercive police activity and defendant's intelligence and mental condition.

There is no merit to defendant's assertion that expert testimony concerning the personality traits and other factors and circumstances that psychiatrists correlate with false confessions was required here. As the majority recognizes, "'[T]he admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court'" (*People v Bedessie*, 19 NY3d at 156, quoting *People v Lee*, 96 NY2d 157, 162 [2001]). Given the substantial evidence corroborating the confession, as well as

the fact that the jury heard evidence from defendant's medical expert on defendant's susceptibility to manipulation and limited cognitive ability, it cannot be said that the court improvidently exercised its discretion. Stated another way, I "decline to second-guess the court's exercise of discretion as this is not a case that turns on the accuracy of defendant's confession with little or no other evidence connecting him to the crimes of which he was convicted" (*People v Roman*, 125 AD3d 515, 516 [1st Dept 2015], *lv denied* 26 NY3d 1091 [2015]).

There is ample evidence corroborating defendant's confession to the June 15, 2009 shootout with Tyrone Howard. The jury was free to credit the testimony of the People's eyewitness, William Smith, who as a neighborhood resident was familiar with both shooters and had observed defendant in the neighborhood on numerous occasions. In addition, security footage showed Marcel Baker and defendant, dressed in his distinctive attire, walking together in the direction of the basketball courts prior to the shooting. Smith saw defendant following Howard into the basketball courts immediately before gunfire erupted and saw defendant firing gunshots toward him and at Howard. Shell casings verified the relative positions of the two shooters. Tamara Sepulveda saw defendant with an apparent leg wound enter her building and emerge wearing different attire, and Monique

Burns saw a man wearing a hooded sweatshirt put a gun into his pocket as he passed her apartment building. Finally, defendant was treated at Harlem Hospital for a gunshot wound to the leg. The inescapable conclusion is that defendant confessed to a crime for which there is ample evidence establishing his culpability (*see Bedessie*, 19 NY3d at 157). Contrary to the majority's characterization that defendant's confession concerning the 2009 shooting was not supported by overwhelming evidence, the defendant's confession was corroborated not only by multiple witnesses who identified defendant as the shooter but also by physical evidence, including cartridge cases and defendant's own gunshot wound, as well as by video footage. This is clearly overwhelming evidence connecting defendant to the shooting incident in 2009. Moreover, if defendant confessed to one crime that he actually committed, there is no reason to suspect that his confession to the August 2006 crime resulting in the death of Lesenia Figueroa, also corroborated by ample evidence, was not equally reliable.

Further, there was ample evidence corroborating defendant's confession to the August 2006 fatal shooting. The cab driver, who knows defendant from the neighborhood, drove defendant to the crime scene area, waited for a short time (approximately five minutes) for his return, and then immediately drove him away.

Defendant's confession in which he described the shooting in detail was corroborated by the testimony of four eyewitnesses. Defendant confessed to detective Mooney that after he departed from Sharma's cab he approached Garcia, the intended target, who was with others gathered around a laptop on the hood of a car. He then fired five or six shots at Garcia and his companions as they fled. Defendant told the detective that Figueroa, an innocent bystander, was not the intended target and that, "I didn't mean to kill her." The details concerning the shooting and accidental killing of Figueroa as described by defendant were corroborated by the testimony of eyewitnesses Garrison, Picardo, Martinez and West who gave the exact detailed description of sequence of events leading up to the shooting that night.

The majority attempts to minimize the evidence corroborating defendant's confession to the 2006 crime by focusing on the fact that none of the witnesses were able to identify defendant as the shooter. This ignores that this was a very fast moving event during which the witnesses were trying to escape with their lives and could not take the time to stop and look at the shooter carefully. It was unfortunate that Figueroa could not escape fast enough. Indeed, Martinez and Pichardo stated that they started running the moment they heard gunfire, and West, who was able to describe only the shooter's attire and complexion,

explained that she was forced to quickly run into a store because a bullet had just ricocheted off a nearby lamp post. In any event, identification testimony is not an absolute requirement, and defendant's confession was corroborated in detail by testimony of eyewitnesses such that a jury could and did reasonably decide that defendant was the shooter in the 2006 crime. In other words, if defendant was not the shooter, one wonders how he was able to relate such specific details about the shooting in his confession.

The majority's conclusion that the corroborated testimony of eyewitnesses and physical evidence do not support defendant's confession and his conviction, is based on a myopic view of the evidence. Simply, if defendant was not the shooter, how did he know his intended target (Garcia) was with a group of men gathered around a laptop on the hood of a car that night? That exact description of the scene was given by Garrison, who testified that it was "peculiar" that the men were outside of the car because it was hot "summer weather" and "most people" would sit in their cars and put on the air conditioning while using their laptops. If defendant was not involved, how did he learn that the shooter fired at the group of men as they ran off as witnesses observed? And how did he know Figueroa was not the intended target but an innocent bystander who was mistakenly shot

and killed as corroborated by the testimony of Picardo, Martinez and West?

Defendant also confessed to firing around five or six shots in the 2006 crime. Garrison, Pichardo, Martinez and West all testified to hearing four or more gunshots; Pichardo thought it was four gunshots, Martinez thought it was four or five, and West thought it was five or six. Crime scene detectives also determined that four cartridge cases recovered at the scene had all been fired from the same gun. In sum, very specific details about the crime contained in defendant's confession were corroborated by both physical evidence and the witnesses' testimony.

The majority charges that discussing the detailed evidence corroborating defendant's confession and concluding that reversal is not warranted based on such evidence "disregards the standard we are tasked to apply." However, in considering the factors outlined in *Bedessie*, the majority gives little or no consideration to the evidentiary corroboration of a confession, a factor discussed in *Bedessie* and one which this Court focused on in *Roman*. Contrary to the majority's suggestion, the point of discussing the substantial corroborating evidence in this case is not for this Court to make a determination about whether defendant is guilty or about the "veracity of the confession."

Rather, as was the case in *Bedessie* and *Roman,* the fact that defendant's confession was corroborated by substantial evidence distinguishes this matter from those in which there is "little or no other evidence connecting [a defendant] to the crimes of which he was convicted" (*Roman*, 125 Ad3d at 516). The substantial corroborating evidence and psychiatric testimony of defendant's vulnerability to manipulation support the conclusion that this was not a "proper case" requiring the use of expert testimony on the subject of false confessions.

Moreover, the trial court's ruling to permit Dr. Drob to testify to his findings including defendant's limited cognitive and borderline intellectual functionings and his susceptibility to manipulation by other individuals was more than adequate proof to give the issue to the jury of whether defendant gave false confessions. Thus the trial court's denial of defendant's application to offer an expert witness on false confession was properly denied.

Bedessie made clear that expert testimony on the science of false confessions may be helpful to the jury and appropriate where it is "relevant to the defendant and interrogation before the court" (*id.* at 161). However, *Bedessie* does not mandate such expert testimony in every case involving confessions, and did not remove a trial court's ability to exercise its discretion

regarding the admission of expert testimony. Although the trial court summarily rejected the request to introduce a general confessions expert on the belief that the science of false confessions was not generally accepted within the scientific community, because the confession was corroborated by significant evidence and because Dr. Drob was permitted to testify about defendant's susceptibility to manipulation, the trial court did not abuse its discretion.

Crucially, the question of the validity of defendant's confessions was squarely presented to the jury (*id.* at 158). The court permitted Dr. Drob to testify that defendant was "more so than other people vulnerable to manipulation by other individuals," which is the practical limit of an expert's testimony without usurping the function of the jury to assess the evidentiary value of the confession. Thus, "there is no reasonable possibility that the proposed testimony would have resulted in a more favorable verdict" (*People v Roman*, 125 AD3d at 516).[2] The testimony that defendant would have apparently

[2]The majority claims that reliance on *Roman* for this proposition is misplaced. They are mistaken. As the majority recognizes, Dr. Drob testified about defendant's personality traits and susceptibility to manipulation. Combined with the fact that substantial evidence corroborates defendant's confession, it is unlikely that the additional proposed testimony would have resulted in a more favorable verdict.

preferred to introduce was an expert opinion that his particular statements to police were unreliable, but such testimony clearly exceeds the limits of expert opinion and is not permissible (*Bedessie*, 19 NY3d at 161).

If expert testimony regarding false confessions were to be required in cases such as this, given the substantial corroborating proof concerning the 2006 and 2009 shootings, it would be tantamount to requiring expert testimony in every case where a defendant admits to involvement in a crime and would open up the floodgates of a new dimension of litigation concerning confessions, an untenable result.

The majority's reliance on *People v Days* (131 AD3d 972 [2d Dept 2015], *lv denied* 26 NY3d 1108 [2016]) is inapposite. While there are some similarities between *Days* and this matter, including a lengthy interrogation faced by the defendant and the centrality of the confessions to the cases, the evidence in *Days* included neither physical evidence nor eyewitness testimony connecting the defendant to the crime. In contrast, such evidence was amply presented in this case to link defendant to the two crimes. Further, there is no indication that the trial court in *Days* permitted any psychiatric or psychological evidence regarding the defendant's intelligence or suggestibility to be presented to the jury. Again, the jury in this matter heard

detailed testimony from Dr. Drob on those very points. In addition, although the majority raises a concern about the failure to videotape the interrogation conducted before the confession, "the neglect to record [an interview] is not a factor or circumstance that might induce a false confession" (*Bedessie*, 19 NY3d at 158). Finally, contrary to the majority's implication, I am not suggesting that there is a bright-line rule regarding the permissibility of false confession experts; I am instead suggesting that whether expert testimony is permissible should be judged on a case by case basis, and that the trial court providently exercised its discretion in this particular matter.

Accordingly, I would affirm the judgment of conviction.

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

ENTERED: May 19, 20165

CLERK