SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 4, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

388 Karl Myiow, Index 117913/09
Plaintiff-Respondent,

-against-

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

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Braff, Harris, Sukoneck & Maloof, New York (Keith Harris of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 2, 2014, which granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), and order, same court and Justice, entered September 2, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' cross motion for summary judgment dismissing the Labor Law § 240(1) claim, affirmed, without costs.

On or about September 16, 2009, plaintiff, an employee of nonparty Brooklyn Welding Corp. was working at Harlem Hospital,

located at 506 Lenox Avenue in Manhattan. The hospital, owned by defendant The City of New York and operated by defendant New York City Health and Hospitals Corporation, was constructing a new patient pavilion. Defendant TDX Construction was the construction manager for the project. Defendant Metropolitan Steel Industries, Inc. was a prime contractor hired to fabricate and erect steel at the site. Brooklyn Welding was engaged in erecting steel at the site as part of a joint venture agreement with Metropolitan Steel.

Plaintiff was injured while in the process of preparing one of the steel beams that had been brought to the facility on a flatbed truck to be lifted off the truck by a crane and then hoisted for installation. While plaintiff was standing on the beams for the purpose of wrapping a steel rope (the "choke") around a beam for it to be hoisted, a piece of flat wooden skids (the "dunnage") separating the beams broke, causing plaintiff to fall off the truck to the ground below, sustaining injury.

Plaintiff testified that at the time of his accident, his responsibilities included preparing the steel for unloading at the site and assisting in hoisting the steel to the structure for installation. He was supervised by and reported to James Marquis and Cecil Kemp. Plaintiff had done this for over a dozen

shipments of steel to the site prior to his accident.

Plaintiff testified that on the day of his accident, the load of steel that contributed to his injury arrived on site at approximately 1:30 p.m. and Marquis, his foreman, instructed him on how to unload the beams. Plaintiff and his partner, Kaniehtakeron Martin, climbed onto the flatbed to assess how best to unload the beams since they were stacked closely together. Plaintiff described the beams as resting on the dunnage which separated them. The beams were stacked in order: beam, dunnage, beam. Plaintiff testified that because the beams were packed tightly together, he told his foreman, Marquis, that he would have to "shake out" the beams to get the chokers around them so the crane could hoist them off the truck and onto the ground prior to lifting them up onto the building.

Plaintiff and Martin made a "load" of beams, working from the outside of the truck in toward the center in order to prepare the beams for lifting. They used a "spreader hook" to stack the outer beams on top of the inner beams. Plaintiff did not have any problems getting the two outer beams "synced on top" of the two inner beams. Once Martin secured the choker around four of the beams, plaintiff secured his choker around his end of the beams. At that moment, the dunnage underneath the beams broke,

causing the beams and plaintiff to fall onto the ground.

Plaintiff testified that he was wearing a harness at the time of the incident, but it had not been tied off with a lanyard. Plaintiff stated that he typically wore the harness all day, but that no one told him or recommended to him that it be tied off while he was working on the flatbed truck prior to his accident.

Plaintiff moved for partial summary judgment on the issue of defendants' § 240(1) liability, arguing that he was "clearly entitled" to summary judgment, because he fell from a height of 13 to 14 feet from the trailer while standing atop a load of stacked steel beams. Plaintiff contended that defendants had failed to provide him with proper, adequate safety protection or devices, and that this proximately caused his accident.

Defendants cross-moved for summary judgment dismissing the § 240(1) claim. Defendants argued that plaintiff's accident did not fall under the protections of the statute because it was not an elevation-related hazard. Defendants contended that plaintiff was not using the flatbed trailer as a ladder, platform, or scaffold to work above him; he was simply unloading steel, and that is when the accident occurred. Defendants argued that New York law is clear that the unloading of a flatbed truck does not

present the type of "extraordinary elevation-related hazard" contemplated by § 240(1). Defendants further argued that plaintiff could not demonstrate that any of the safety devices enumerated in the statute would have prevented his fall.

The motion court granted plaintiff's motion for partial summary judgment on the issue of defendants' § 240(1) liability and denied defendants' cross motion. The court observed that because plaintiff was "working at an elevation, some sort of protective device should have been used." The court also noted that the list of devices included in the statute was not exhaustive and that what was relevant was that plaintiff was "up there some 13 or 14 feet above ground on an unstable surface" which was made more "unstable because the dunnage broke," causing plaintiff to fall.

The motion court correctly determined that defendants, other than Metropolitan Steel, were liable under Labor Law § 240(1) for plaintiff's injuries because they failed to provide plaintiff with an adequate safety device to prevent his fall from steel beams placed on a flatbed trailer. Here, as in *Naughton v City of New York* (94 AD3d 1 [1st Dept 2012]), defendants' contention that the accident is outside the scope of Labor Law § 240(1) is without merit, because plaintiff's fall from a height of 13 or 14

feet above the ground "constitutes precisely the type of elevation-related risk envisioned by the statute" (*id.* at 8). The fact that plaintiff did not ask for a specific safety device prior to the accident is not dispositive and is not a prerequisite for recovery under Labor Law § 240(1) (*id.*). Plaintiff has met his burden of showing that his fall resulted from the lack of a safety device and is, therefore, entitled to summary judgment on liability (*see Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579 [1st Dept 2012] [the plaintiff entitled to summary judgment where evidence showed that the plaintiff, who fell while unloading scaffolding material from the flatbed of a truck, was provided with a safety harness, but there was no place where the harness could be secured]).

Contrary to the dissent's view, *Berg v Albany Ladder Co., Inc.* (10 NY3d 902 [2008]) and *Toefer v Long Is. R.R.* (4 NY3d 399 [2005]) do not compel a different result in this case. In *Berg*, the plaintiff's claim was properly dismissed because there was evidence that the plaintiff's accident was caused by rolling trusses that were improperly moved by a forklift, not by the lack of a safety device, and the plaintiff failed to adduce proof sufficient to create a question of fact on this issue (10 NY3d at 904). In *Toefer*, the plaintiff's Labor Law § 240(1) claim was

based on an accident he had when he was working on a flatbed truck only four feet above the ground and was struck in the head and propelled backwards (4 NY3d at 405). Ultimately, the Court of Appeals held that the claim was not successful because it "did not present the kind of elevation-related risk that the statute contemplates" (*id.* at 408). Although "'[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240(1)'" (*id.* at 407, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]), here, it is clear that the elevation-related risks contemplated by the statute are present given the fact that plaintiff fell 13 or 14 feet to the ground and was provided with an inadequate safety harness.

The dissent points out that a plaintiff must present evidence as to which specific and identifiable safety device would have prevented his fall, a requirement that derives from *Ortiz v Varsity Holdings, LLC* (18 NY3d 335 [2011]), where the Court stated that "to prevail on summary judgment, plaintiff must establish that there is a safety device of the kind enumerated in section 240(1) that could have prevented his fall, because liability is contingent upon . . . the failure to use, or the inadequacy of such a device" (*id.* at 340 [internal quotation

marks omitted]). Here, as in *Phillip*, which was decided by this Court after *Ortiz*, plaintiff meets this burden by showing that he was provided with a safety harness, but that it proved to be inadequate because there was no location where the harness could be secured.

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

Because plaintiff failed to "adduce proof sufficient to create a question of fact regarding whether his fall resulted from the lack of a safety device," or identify any safety device that could have prevented the accident, his Labor Law § 240(1) claim should be dismissed (*Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]). Accordingly, I respectfully dissent.

According to plaintiff, an employee of nonparty Brooklyn Welding Corp., he was tasked with moving steel beams that had been brought to Harlem Hospital for construction of a new patient pavilion. Plaintiff was in the process of preparing one of the steel beams that had been brought to the facility on a flatbed truck to be lifted off the truck by a crane and then hoisted for installation. While plaintiff was standing on the beams for the purpose of wrapping a steel rope around a beam for it to be hoisted, a piece of flat wooden skids ("dunnage") separating the beams broke, causing plaintiff to fall off the truck to the ground below, sustaining injury.

Plaintiff had been part of a group of workers assisting in hoisting the steel to the structure. Prior to this incident, the workers had hoisted over a dozen shipments of steel to the site. On the day of the accident, after he examined the shipment, he

told his foreman that the beams had been stacked too tightly together.

Plaintiff and his partner, Kaniehtakeron Martin, climbed onto the flatbed to assess how best to unload the beams. Plaintiff described the beams as resting on the dunnage which separated them. The beams were stacked in order: beam, dunnage, beam. Plaintiff testified that because the beams were packed tightly together, he would have to "shake out" the beams to get the chokers (steel rope) around them so the crane could hoist them off the truck and onto the ground prior to lifting them up onto the building.

Martin made a "load" of beams, working from the outside of the truck in toward the center in order to prepare the beams for lifting. They used a "spreader hook" to stack the outer beams on top of the inner beams. Plaintiff did not have any problems getting the two outer beams "synced on top" of the two inner beams. Martin then secured the choker around four of the beams, and plaintiff then secured his choker around his end of the beams. At that moment, the dunnage underneath the beams broke, causing the beams and plaintiff to fall onto the ground.

Plaintiff testified that he was wearing a harness at the time of the incident, but it had not been tied off with a

lanyard. He stated that he typically wore the harness all day, but that no one told him or recommended to him that it be tied off while he was working on the flatbed truck prior to his accident. Nor had he ever tied himself off on any of the previous occasions when he was climbing on top of steel beams and unloading them. Martin also testified that he was provided with a safety harness but that he was not tied off with a lanyard. Martin added that the harness was of limited use as there was "nowhere to tie off [a harness] on the steel truck," and really "no way to tie off safely" at all, and that the harness was not required by OSHA rules in any event. Plaintiff echoed Martin's position when at his 50-h hearing he testified that it would have been "more dangerous" to tie off while working on the truck because then "you wouldn't be able to . . . get out of the way if something happened." At that hearing, plaintiff also testified that he was given all the safety equipment he needed or wanted.

Cecil Kemp, the head foreman for Brooklyn Welding for this project, was unaware if anyone inspected the dunnage separating the steel on arrival. He did not recall seeing any defects in the dunnage. According to Stephen Hynes, president and owner of Metropolitan Steel Industries, which was contracted to fabricate and erect steel at the site, the dunnage used to support and

separate the steel beams for shipment was inspected regularly and was taken out of use if it was damaged. It was his understanding that the accident occurred when plaintiff and Martin were creating "independent piles" of steel on the flatbed rather than proceeding with the unloading process in the way the steel was loaded when it arrived at the job site.

It is well settled, to make out a prima facie case under a Labor Law § 240(1) claim, "a worker must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device" (*Berg*, 10 NY3d at 904). "[T]o prevail on summary judgment, plaintiff must establish that there is a safety device of the kind enumerated in section 240(1) that could have prevented his fall, because 'liability is contingent upon . . . the failure to use, or the inadequacy of' such a device" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

In *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280 [2003]), the Court of Appeals instructed that in the absence of a statutory violation and any demonstration that the violation was a contributing cause of the fall, no prima facie violation of Labor Law § 240(1) is made out (*id.* at 289). Stated another way,

"[n]ot every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1)" (*Narducci*, 96 NY2d at 267). In the absence of a prima facie case, plaintiff is not entitled to summary judgment irrespective of the strength of defendants' opposition (CPLR 3212[b]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

In *Berg v Albany Ladder Co., Inc.*, the Court of Appeals affirmed the dismissal of a § 240(1) claim where the plaintiff was injured while working on a flatbed truck unloading steel trusses. In *Berg*, the plaintiff was standing atop several bundles of trusses about 10 feet off the ground when one of the bundles became unstable and began to roll over onto him and plaintiff climbed atop the bundle and rode it to the ground. The Court found that the § 240(1) claim was properly dismissed because "[a]lthough plaintiff assert[ed] that the height at which he worked created an elevation-related risk . . . he failed to adduce proof sufficient to create a question of fact regarding whether his fall resulted from the lack of a safety device" (*id.* at 904). Significantly, in the order on appeal to the Court of

Appeals, the Third Department had noted that the

> "accident was not caused by the lack of a ladder or other device necessary to get off the truck safely, but, instead, by trusses — located on the same elevation as plaintiff — rolling toward him, when apparently improperly moved by the forklift. Plaintiff acknowledged at his deposition that there was no particular safety device that would have prevented this accident and none has been identified on appeal" (*Berg*, 40 AD3d 1282, 1284 [3d Dept 2007]).

Thus, the Court dismissed the Labor Law § 240(1) claim, finding that plaintiff has failed to identify a safety device that could have prevented the accident and his injuries.

Other Departments have applied *Berg* to situations similar to this case. For example, in *Brownell v Blue Seal Feeds, Inc.* (89 AD3d 1425 [4th Dept 2011]), the Fourth Department affirmed the dismissal of a 240(1) claim where the plaintiff climbed onto a four-foot pile of rebar stacked on a truck in order to ascertain the best method for unloading the rebar. As the plaintiff was in the process of swinging his right leg over the top of the pile, the pile "shifted" or "snapped," striking his left foot. The momentum of the shifting rebar "threw [the plaintiff] off the truck" and onto the ground. The Fourth Department reasoned that "the fact that [the plaintiff] allegedly fell while he was 'standing on [a pile of rebar] rather than standing on the bed of

the truck does not move this case from one involving the ordinary dangers of a construction site to one involving the special risks protected by Labor Law § 240(1)'" (*id.* at 1426, quoting *Berg*, 40 AD3d at 1285). Further, the Fourth Department noted that "the rebar bundle did not fall while being hoisted or secured," and thus found that Labor Law § 240(1) does not apply (*Brownell* at 1427 [internal quotation marks omitted]).

Supreme Court, in granting plaintiff's motion for summary judgment, observed that because plaintiff was "working at an elevation, some sort of protective device should have been used," adding "I am not familiar with all of the protective devices that may be employed." However, at his deposition plaintiff did not point to any specific safety device that could have prevented his injuries or was required for his work, and he does not do so on appeal. Nor did Supreme Court identify what device would have prevented this accident.

While the circumstances presented constitute an elevation-related risk greater than merely falling from the bed of a trailer (*see Toefer v Long Is. R.R.*, 4 NY3d 399 [2005]), record evidence is required to establish the need for a protective device, a point made plain in *Berg* as well as in *Izrailev v Ficarra Furniture of Long Is.* (70 NY2d 813, 815

[1987]), in which the trial record contained "unrebutted proof" that the plaintiff's decedent should have been provided with various items necessary to perform electrical work on a malfunctioning sign. Here, the record on this issue is bare and contains no such unrebutted evidence, prompting plaintiff's resort to the conclusory assertion that the mere fact he fell establishes his entitlement to summary judgment. Here, plaintiff's injuries were caused by a "general hazard of the workplace, not one contemplated to be subject to Labor Law § 240(1)" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d at 269).

In short, pursuant to the Court of Appeals' holdings, for plaintiff to prevail in this matter, and to warrant denial of defendants' motion for summary judgment, plaintiff must present evidence that he should have been provided with a specific and identifiable safety device that could have prevented his injuries, and that the failure to do so was a contributing cause of the accident. Plaintiff failed to meet this burden.

The majority fails to convincingly address plaintiff's failure to identify a specific safety device or the controlling Court of Appeals' precedents requiring such a showing. Further, the majority does not even suggest any device that could have prevented the accident. As the majority recognizes, to prevail

on summary judgment on a Labor Law § 240(1) claim plaintiff must establish there is a safety device that could have prevented the accident. Contrary to the majority's claim, plaintiff did not meet this burden by merely showing that his safety harness could not be tied to the truck. The evidence was that there was no place to tie the harness safely and that it would have been more dangerous to tie off while working on the truck. Regardless, plaintiff must identify a safety device that could have prevented his fall (*Ortiz v Varsity Holdings, LLC*, 18 NY3d at 340). Here, plaintiff failed to identify such safety device and defendants' cross motion to dismiss plaintiff's Labor Law § 240(1) claim should have been granted.

Moreover, whether a violation of section 240(1) was a contributing cause of the accident is generally a jury question (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]), and "a directed verdict on the issue of liability is appropriately limited to those cases in which the only inference to be drawn from the evidence is that a failure to provide appropriate protective devices is the proximate cause of the plaintiff's injuries" (*Weber v 1111 Park Ave. Realty Corp.*, 253 AD2d 376, 377 [1st Dept 1998], citing *Zimmer* 65 NY2d at 524). Here, there is no evidence to support a finding that a failure to

provide a device was a proximate cause of plaintiff's injuries. Thus, at a minimum, plaintiff is not entitled to summary judgment (*see e.g. Ortiz* at 340 [denying the plaintiff's cross motion for summary judgment on his § 240(1) claim where there is any issue of fact as to whether there is an enumerated safety device that could have prevented his fall]).

Plaintiff relied on two cases from this Department for summary judgment on his Labor Law § 240(1) claim. In *Naughton v City of New York* (94 AD3d 1, 8-9 [1st Dept 2012]), we awarded summary judgment as to liability to a laborer who was injured when he fell approximately 15 feet to the ground while unloading bundles of curtain wall panels off a flatbed truck, reasoning that the failure to properly hoist a bundle of wall panels, which struck plaintiff, created Labor Law § 240(1) liability, and also that the plaintiff, who had asked for a ladder to reach the top of bundles which were 10 to 11 feet above the flatbed surface, had "established that the absence of a ladder was a proximate cause of the accident." Similarly, in *Phillip v 525 E. 80th St. Condominium* (93 AD3d 578, 579 [1st Dept 2012]), we awarded summary judgment to a worker who sustained an injury when he fell from atop a load of nine foot high scaffolding material on a flatbed truck, finding that "a safety device enumerated in Labor

Law § 240(1) could have prevented the fall" but no such devices were provided.

Relying on *Naughton* and *Phillip*, plaintiff argues that he was "clearly entitled" to summary judgment on his Labor Law § 240(1) claim because he fell from a height of 13 to 14 feet from a flatbed truck while standing atop a load of stacked steel beams, and adequate safety devices were not provided to him.

This Court's cited precedent cannot be reconciled with that of the Court of Appeals, which has made clear that merely because a worker falls does not mean that, under a principle of strict liability, recovery under the statute is available. Further, the two cases are clearly distinguishable from the present case on appeal. Yet, the majority does not confront or explain how our precedent fails to follow Court of Appeals precedent. Relatedly, it matters not that our decision in *Phillip* "was decided by this Court after *Ortiz*", as urged by the majority, since our decisions cannot and do not trump rulings of the Court of Appeals.

Naughton is readily distinguishable from this case. Indeed, in *Naughton* the plaintiff was struck by a bundle of wall panels which knocked him off the pile of bundles he was standing on and 15 feet down to the street below. Specifically, one of the tag lines on the load "got slack" causing the load to swing toward

the plaintiff. Thus, the plaintiff established that the hoist proved inadequate to shield him from harm, and we found that the plaintiff was entitled to summary judgment on his § 240(1) claim on that ground. No such concern with the hoist is raised in this case.

In addition, in *Naughton* we found that the plaintiff had established that the absence of a ladder was a proximate cause of his accident. The evidence in *Naughton* was that the plaintiff specifically asked his supervisor for a ladder but the request was denied. The plaintiff testified that when the bundle started swinging toward him, he retreated and that since there was no ladder, he had no way to get off the bundles. In this case, there is no such testimony regarding a ladder, and plaintiff in fact testified that he was given all the safety equipment he needed or wanted. Nor as a practical matter would a ladder have helped plaintiff climb down from the bundles when the dunnage suddenly and unexpectedly broke. Accordingly, plaintiff has not established that the absence of a ladder or other device was a proximate cause of the accident.

As for *Phillip*, our holding in that matter comes in a brief memorandum decision and sheds little light on how the accident occurred. Indeed, the plaintiff in *Phillip* had no recollection

of how he fell. However, in *Phillip* we held, without specificity, based on the evidence in that case, that a safety device enumerated in Labor Law § 240(1) could have prevented the fall. In contrast, plaintiff submitted no evidence in this case that a safety device could have prevented his fall and he and Martin specifically testified that tying off to the truck would have been more dangerous because "you wouldn't be able to . . . get out of the way if something happened." Again, plaintiff also testified that he was given all the safety equipment he needed or wanted. Therefore, this case is distinguishable from *Phillip* and plaintiff cannot be said to have met his burden in this case. To the extent the majority reads *Phillip* to mean that plaintiff met his burden by merely making a showing that there was no place to secure his safety harness, such a reading does not comport with Court of Appeals precedent.

Accordingly, I would deny plaintiff's motion for partial summary judgment on the issue of defendants' Labor Law § 240(1) liability and grant defendants' cross motion for summary judgment dismissing the claim.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

858 Brenda Pomerance, etc., Index 650129/11
Plaintiff-Respondent,

-against-

Brian Scott McGrath, et al.,
Defendants-Appellants.

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Kagan Lubic Lepper Finkelstein & Gold, LLP, New York (Jesse P. Schwartz of counsel), for appellants.

Law Office of Brenda Pomerance, New York (Brenda Pomerance of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 3, 2015, which, to the extent appealed from as limited by the briefs, held in abeyance plaintiff's motion and defendants' cross motion for summary judgment on the sole remaining thirteenth and fifteenth causes of action, to the extent plaintiff seeks to inspect and receive from the board of managers of the subject condominium association paper and/or electronic copies of certain records of the association, pending the outcome of a hearing on whether plaintiff seeks such records in good faith and for a proper purpose, and, in so doing, determined that plaintiff was entitled to inspect and receive paper and electronic copies of such records to the extent her demand for them was made in good faith and for a proper purpose,

and denied defendants' cross motion seeking dismissal of the thirteenth cause of action insofar as it seeks copies of the association's records, dismissal of the fifteenth cause of action concerning an alleged noise nuisance and the alleged right to inspect minutes of the monthly board meetings, and dismissal of both remaining causes of action to the extent asserted against the defendant board members in their individual capacities, unanimously modified, on the law, to grant plaintiff's motion for summary judgment to the extent she seeks the right to create, at her own expense during any future inspection, paper and electronic copies of the records subject to inspection, to vacate the direction that defendants provide any such paper and electronic copies to plaintiff, and to grant defendants summary judgment dismissing both remaining causes of action insofar as asserted against the defendant board members in their individual capacities, and otherwise affirmed, without costs.

"Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records, so long as the shareholders seek the inspection in good faith and for a valid purpose" (*Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014]). Statutory inspection rights complement, but do

not eliminate, common-law inspection rights, which potentially encompass a far greater range of records. While inspection rights permit shareholders to examine records that are relevant and necessary for a valid purpose, they do not grant shareholders a right to be involved in day to day management. Whether a shareholder asserts statutory or common-law inspection rights, the shareholder may be required to demonstrate good faith and a valid purpose, and inspection may be limited to the scope of records relevant and necessary for such purpose (*see Matter of Crane Co. v Anaconda* Co., 39 NY2d 14 [1976]; *Matter of Schulman v Dejonge & Co.*, 270 App Div 147, 149 [1st Dept 1945]; *Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014]).

Corporate shareholders' statutory inspection rights are governed by Business Corporation Law § 624, which grants shareholders, upon showing good faith and a valid purpose, the right to examine and make paper copies of a list of shareholders and records of shareholder meeting minutes, and requires a corporation to deliver an annual balance sheet to a shareholder, upon written request (Business Corporation Law § 624[b], [c], [e]). Corporate shareholders seeking to inspect more extensive records may proceed under their common-law inspection rights, and

courts may grant an in-person examination of the relevant records, or require the corporation to deliver records to the shareholder (*see Retirement Plan for Gen. Empls. of the City of N. Miami Beach*, 120 AD3d at 1055-1056; *Matter of Goldstein v Acropolis Gardens Realty* Corp., 116 AD3d 776 [2d Dept 2014]; *Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 919 [3d Dept 1991].

Condominium unit owners' inspection rights are not governed by Business Corporation Law § 624, as condominium associations, unlike cooperative apartment corporations, are generally unincorporated. Rather, Real Property Law § 339-w governs the statutory inspection rights of condominium unit owners, and grants unit owners the right to examine "records . . . of the receipts and expenditures arising from the operation of the property," as well as "the vouchers authorizing [such] payments," during "convenient hours of weekdays." Real Property Law § 339-w further provides: "A written report summarizing such receipts and expenditures shall be rendered by the board of managers to all unit owners at least once annually."

In a prior appeal in this case, plaintiff sought to inspect a list of unit owners and their contact information to assist her in campaigning for upcoming condominium board elections.

Although Real Property Law § 339-w, unlike Business Corporation Law § 624, does not grant unit owners a statutory right to examine a list of unit owners, we held that a condominium unit owner has the right to receive from the board a list of unit owners and their contact information (104 AD3d 440, 441-442 [1st Dept 2013]). In so holding, we observed that "the rationale that existed for a shareholder to examine a corporation's books and records at common law applies equally to a unit owner vis-à-vis a condominium" (*id.* at 441 [internal citation omitted]).

Plaintiff, based on her allegations that the board mismanaged the building, seeks a declaration that she is entitled to inspect all past, present, and future monthly financial reports, building invoices, redacted legal invoices, and board meeting minutes. While the parties agree that plaintiff has previously inspected records, they dispute the scope of plaintiff's inspection rights, and whether the board is obligated to deliver paper and electronic copies of records into plaintiff's possession. Consistent with our holding on the earlier appeal, we hold that plaintiff has a right, whether statutory or under the common law, to examine monthly financial reports, building invoices, minutes of board meetings, and appropriately redacted legal invoices, so long as she seeks to do

so in good faith and for a valid purpose. While the parties have informed us that plaintiff has already inspected the particular materials that were the subject of the order under review, in connection with future demands for inspection of similar materials, any issue defendants raise concerning the good faith and validity of the purpose of plaintiff's request shall be determined by the court after a hearing (*see Matter of Crane Co.*, 39 NY2d 14; *Matter of Schulman*, 270 App Div at 149-150; *Retirement Plan for Gen. Empls. of the City of N. Miami Beach*, 120 AD3d at 1055; *Matter of Liaros v Ted's Jumbo Red Hots, Inc.*, 96 AD3d 1464 [4th Dept 2012]).

The parties also dispute whether plaintiff is entitled to receive paper and electronic copies of records. As recognized by Business Corporation Law § 624, which explicitly grants the right to make paper copies while examining records, the right to examine would essentially be meaningless if the shareholder could not make copies to facilitate future recall of the examined records, and therefore the common-law right to inspect includes, as incident to the right to examine, the right to make paper copies during the inspection (*see Henry v Babcock & Wilcox Co.*, 196 NY 302, 306 [1909]; *Matter of Bondi v Business Educ. Forum*, 52 AD2d 1046, 1047 [4th Dept 1976]; *Matter of Raynor v Yardarm*

Club Hotel, 32 AD2d 788 [2d Dept 1969]; *Matter of Becker v Lunn*, 200 App Div 178, 180 [3d Dept 1922]).

Supreme Court, noting plaintiff's common-law right to make paper copies, and this Court's previous decision concerning plaintiff's demand for a list of unit owners, with contact information (104 AD3d 440), extended plaintiff's inspection rights to include the right to receive from defendants paper and, if the records are maintained in electronic form, electronic copies. Defendants argue on appeal that Supreme Court conflated plaintiff's right to examine records with a right to compel the board to deliver records into her possession. Defendants further assert that compelling the board to deliver paper and electronic copies to plaintiff will cause the board to lose complete control over confidential records. Defendants persuasively contend that monthly financial reports, and building or legal invoices, as opposed to a mere list of unit owners and their contact information, often contain confidential information, whose dissemination to the public at large could cause substantial harm.

Initially, we agree with defendants that Real Property Law § 339-w differentiates between a unit owner's right to examine records and a board's obligation to deliver records. Real

Property Law 339-w requires the board to deliver an annual report summarizing receipts and expenditures, while merely conferring on a unit owner the right to examine records and vouchers of receipts and expenditures during convenient hours of the weekday. While defendants thus have no obligation to create and deliver to plaintiff copies of the records in question (apart from the annual reports they are obligated to "render[]" to all unit owners pursuant to the statute), and they may require plaintiff to examine records in person at the management agent's office during convenient weekday hours, plaintiff has a well established right to make paper copies while examining. We see no reason to differentiate between allowing plaintiff, during her inspection, to make paper copies, on the one hand, and, on the other hand, allowing her to create electronic copies, as is now common.

While we appreciate defendants' confidentiality concerns, we believe that these are sufficiently accommodated by requiring plaintiff to sign a confidentiality agreement. Confidentiality agreements are a common business practice, and it is a minimal burden for a board to provide unit owners a confidentiality agreement to sign before allowing access to paper or electronic copies of confidential records. In this case, plaintiff has agreed to sign a confidentiality agreement.

In sum, although defendants are correct that the board does not have an obligation to mail or email to plaintiff copies of monthly financial reports, building invoices, redacted legal invoices, or board meeting minutes, plaintiff's right to examine these records at the managing agent's office, during convenient weekday hours, includes the right to create paper copies or electronic copies at her own expense during her inspection.

Supreme Court erred when it held that the thirteenth and fifteenth causes of action, concerning the board's alleged denial of plaintiff's inspection rights and its alleged failure to respond adequately to her noise complaints, stated legally sufficient causes of action against the board members in their individual capacities. While directors of a condominium board, acting in their capacity as board members, who cause the performance of an affirmative tortious act of malfeasance may be subject to personal liability, directors who are responsible for mere nonfeasance by the entity, without causing the commission of any affirmatively tortious acts, are not subject to personal liability for such nonfeasance (*see Pomerance v McGrath*, 124 AD3d 481, 482 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015] [analogizing violation of condominium bylaws to a breach of contract, which will not create personal liability]; *Peguero v*

601 Realty Corp., 58 AD3d 556, 559 [1st Dept 2009] [tortious nonfeasance or a mere failure to act will not subject corporate officers to personal liability]). Here, plaintiff merely alleges that the board did not honor her inspection rights and failed to respond adequately to her complaints of noise emanating from an adjacent apartment. These allegations amount only to mere nonfeasance for which the board members cannot be held individually liable. Plaintiff's conclusory allegation that the board ignored her noise complaints to retaliate against her for other disputes does not suffice to transform the claim into one for affirmative tortious misconduct. We note, however, that the claims will proceed against the board members in their official capacities.

We do not regard our decision on the immediately preceding appeal in this case (124 AD3d 481) as law of the case holding that the defendant board members are subject to liability individually on plaintiff's sole remaining thirteenth and fifteenth causes of action, concerning her inspection rights and noise complaints. In affirming Supreme Court to the extent it permitted the filing of an amended complaint asserting these causes of action, we said only that these claims "are a permissible repleading of causes of action in the original

complaint" (124 AD3d at 484), without addressing whether the claims properly lie against the board members in their individual capacities. In dismissing other causes of action at issue on that appeal, however, we expressly held (as previously noted) that violations of the bylaws do not subject board members to individual liability (*id.* at 482-483). Similarly, honoring plaintiff's inspection rights and enforcing bylaws against excessive noise are obligations of the condominium association itself, and of the board as a body. Mere failure of the board members to cause the association to discharge such obligations, while properly grounds for a claim against the board members in their official capacities, does not give rise to a cause of action against each of them in his or her individual capacity.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1367 The People of the State of New York, Ind. 2615/09
Respondent,

-against-

Reynold Samuels,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Albert Lorenzo, J.), entered March 9, 2015, which denied defendant's CPL 440.10 motion to vacate a May 11, 2010 judgment of conviction, unanimously reversed, on the law, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel.

A court considering a CPL 440.10 motion challenging the validity of a plea and raising the issue of ineffective assistance of counsel must be guided by certain principles. The "longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*Hill v Lockhart*, 474 US 52, 56 [1985] [internal quotation marks omitted]). "On a CPL 440.10 motion pursuant to [subdivision

(1)(h)], the burden is on the defendant to demonstrate that the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States" (*People v Gross*, 26 NY3d 689, 693 [2016] [internal quotation marks omitted]). Under the federal standard, a defendant must demonstrate that counsel's performance was deficient with the result that he or she was prejudiced in such a way as to deprive him or her of a fair trial, or that defendant would have gone to trial rather than take a plea had counsel's performance not been deficient (*Strickland v Washington*, 466 US 668, 687 [1984]; *Hill*, 474 US at 59; *People v McDonald*, 1 NY3d 109, 114 [2003], citing *Hill*). The New York State test to determine the issue of prejudice with respect to ineffective assistance of counsel claims "focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Caban*, 5 NY3d 143, 156 [2005] [quotation marks and citation omitted]). "A defendant advancing an ineffective assistance [of counsel] claim must 'demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings'" (*People v Hogan*, 26 NY3d 779, 785 [2016], quoting *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Rivera*, 71 NY2d 708, 709 [1988]). "A single error may qualify as

ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d at 152; *People v Calderon*, 66 AD3d 314, 320 [1st Dept 2009], *lv denied* 13 NY3d 858 [2009]).

Where a CPL 440.10 motion is made, a hearing to develop additional background facts is not "invariably necessary" (*People v Satterfield*, 66 NY2d 796, 799 [1985]). A court may deny the motion without a hearing if, among other things, "the motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30[4][b][1]). Denial of a CPL 440.10 motion is reviewed under an abuse of discretion standard (*People v Samandarov*, 13 NY3d 433 [2009]).

Based upon the foregoing principles, we find the motion court erred in denying defendant's motion without a hearing.

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[1]The record on appeal does not contain a signed and/or sworn statement from the defendant, but only an unsigned, unsworn writing. Since the motion court found that the writing submitted by defendant was "a sworn affidavit stating that he would not have [pled] guilty if he had known that he could be deported", the issue of its adequacy for purposes of CPL 440.30[1][a], [4][b] has been "decided in [defendant's] favor" and is thus beyond our review (*see People v LaFontaine*, 92 NY2d 470, 474 [1998]; CPL 470.15[1]). Neither party raised this *LaFontaine* claim in the motion court or in their briefs; rather, it was raised for the first time by defendant at oral argument.

In *Padilla v Kentucky* (559 US 356, 367 [2010]), which applies to this case, the Supreme Court held that, in connection with a plea, effective assistance requires that defense counsel advise a defendant of the immigration consequences of his plea. Apparently, such advice was not given here. Despite the Probation Department's concern over defendant's immigration status, there is no indication on this record that it was ever discussed with defendant. This failure meets the first prong of the *Strickland* test.

The issue before us thus turns on whether counsel's lack of advice on the deportation consequences of defendant's guilty plea resulted in sufficient prejudice to warrant the withdrawal of his guilty plea. In order to prevail, a defendant must demonstrate a "reasonable probability that, [had counsel properly advised him of the implication of his plea on his immigration status], he would not have pleaded guilty and would have insisted on going to trial" (*Hill v Lockhart*, 474 US at 59; *see also Padilla*, 559 US at 366; *People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied sub nom. Hernandez v New York*, __US__ , 134 S Ct 1900 [2014]; *People v McDonald*, 1 NY3d 109, 113-114 [2003]). As noted, defendant alleges that he would have gone to trial, despite its hazards and the potentially significant incarceration that a

conviction would entail, had he been advised he would be deported. Although to have done so would have meant the rejection of "the very beneficial deal" his counsel had negotiated, the motion court erred in finding that defendant's claim was not "credible," given the length of time defendant resided legally in the United States, and the other factors raised in his motion papers. Such credibility determinations should be made only after a hearing (*see e.g. People v Hernandez*, 22 NY3d 972).

Since "the prejudice component [of an ineffective assistance of counsel claim] focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Ozuna*, 7 NY3d 913, 915 [2006]), under the circumstances of this case, a hearing should be held on the issues raised in defendant's moving papers.

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

ENTERED: OCTOBER 4, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1676-
1677 Ind. 461/08

The People of the State of New York,
Respondent,

-against-

Bernard Gumbs, also known as Thomas Williams,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

David Marrero,
Defendant-Appellant.

_____

Green & Willstatter, White Plains (Richard Willstatter of counsel), for Bernard Gumbs, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for David Marrero, appellant.

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered March 8, 2013 and April 9, 2013, convicting defendants, after a jury trial, of murder in the second degree, and sentencing defendant Gumbs to a term of 20 years to life, and sentencing defendant Marrero to a term of 25 years to life, unanimously reversed, on the law, and the matter

remanded for a new trial as to both defendants.

Based on the evidence admitted at trial, we are satisfied that the evidence was legally sufficient to support the conviction and the verdict was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]). However, we reverse the judgments and order a new trial because the court erred in admitting, as dying declarations, the victim's statements implicating defendants, since they were his "mere expression of belief and suspici[ons]" that defendants were involved in his shooting rather than "statements of facts to which a living witness would have been permitted to testify, if placed upon the stand" (*People v Shaw*, 63 NY 36, 40 [1875]).

Although the dying declarant may accuse his or her killer in conclusory language, "[t]he declaration is kept out if the setting of the occasion satisfies the judge, or in reason ought to satisfy him [or her], that the speaker is giving expression to suspicion or conjecture, and not to known facts" (*Shepard v United States*, 290 US 96, 101 [1933]; *see also People v Liccione*, 63 AD2d 305, 319-320 [4th Dept 1978], *affd* 50 NY2d 850 [1980]). Here, it is undisputed that neither of these defendants shot the victim or was present at the shooting; their alleged roles were that of hiring the person who did the shooting, and providing the

murder weapon along with other assistance. Contrary to the People's argument, the question of what the victim was referring to when he implicated these defendants was not a proper jury question, nor did the lack of specificity merely go to the weight to be accorded this evidence.

The admission of the statements, which was over defendants' timely and specific objection, was not harmless. Although some facts that may have led the victim to suspect that defendants were involved in his murder were part of the trial evidence, there was nothing to prevent the jury from speculating that the victim was privy to other information, outside the record, connecting defendants to the crime. We also note that the jury, which issued several deadlock notes during its very lengthy deliberations, twice requested to hear the dying declaration evidence.

In light of the foregoing, we find it unnecessary to address any other issues relating to the admissibility of the dying declarations, or any of defendants' other arguments for reversal.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1774 The People of the State of New York, Ind. 3974/11
Respondent,

-against-

Sheree Jackson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J. at dismissal motion; Colleen D. Duffy, J. at jury trial and sentencing), rendered November 19, 2012, convicting defendant of offering a false instrument for filing in the first degree, falsely reporting an incident in the third degree, making a punishable false written statement, stalking in the fourth degree, and harassment in the second degree, and sentencing her to an aggregate term of five years' probation, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, since there were no errors in the grand jury presentation that rose to the level of impairing the integrity of the proceeding. While the prosecutor engaged in some excesses

when cross-examining defendant, this was not one of the "rare cases of prosecutorial misconduct" entitling a defendant to the "exceptional remedy of dismissal," because there is no "showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant" (*People v Thompson*, 22 NY3d 687, 699 [2014] [internal quotation marks omitted]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenge in question were not pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]), particularly because the prosecutor's proffered reasons were based on concerns about the prospective juror's demeanor, which

the court had the opportunity to observe (*see e.g. People v Hinds*, 93 AD3d 536, 536 [1st Dept 2012], *lv denied* 19 NY3d 979 [2012]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1775 Ira Mehlman, Index 157819/12
Plaintiff-Respondent,

-against-

Chain Cab Corp., et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Raphaelson & Levine Law Firm, P.C., New York (Benjamin Katz of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 10, 2016, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury to his right ankle, left ankle, or lumbar spine within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to dismiss the claims of left ankle and lumbar spine injuries, and otherwise affirmed, without costs.

Plaintiff alleged that he suffered a serious injury to his right ankle when defendants' taxi cab ran over his right foot, compressing it and thereby causing a tear of the posterior tibial tendon in the right ankle. He also claimed that the incident

exacerbated preexisting conditions in his left ankle and lumbar spine.

Defendants established their entitlement to judgment as a matter of law by submitting evidence showing that plaintiff did not sustain a serious injury to his right ankle. Defendants submitted, inter alia, the affirmed report of an orthopedic surgeon, who examined plaintiff and found only insignificant limitations in range of motion (*see Stephanie N. v Davis*, 126 AD3d 502 [1st Dept 2015]; *Camilo v Villa Liberty Corp.*, 118 AD3d 586 [1st Dept 2014]).

In opposition, plaintiff raised a triable issue of fact by submitting affirmed reports of the doctor who treated him after the accident and an orthopedic expert who examined him two years later, and a certified copy of the MRI report prepared at the hospital where he sought treatment (*see* CPLR 4518[c]). The orthopedist, upon examination, found significant limitations in range of motion, thereby disputing the findings of defendants' expert. The MRI report provided objective evidence of a tear in the posterior tibial tendon, but also showed that plaintiff had extensive preexisting degeneration in that tendon and throughout his ankle. Plaintiff's expert acknowledged the MRI findings of degeneration but opined, based on his examination of plaintiff,

review of medical records and the history provided, that the accident was the competent cause of plaintiff's injury since, inter alia, there was no evidence that any tear existed before the accident, but only degeneration consistent with plaintiff's age. Plaintiff's treating physician also opined that the condition was caused by the taxi accident. Inasmuch as defendants did not provide expert medical opinion on the issue of causation, the opinions proffered by plaintiff raise issues of fact as to whether his right ankle injury was causally related to the accident (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Chaston v Doucoure*, 125 AD3d 500 [1st Dept 2015]; *compare Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]).

However, dismissal of plaintiff's claims of serious injury to his left ankle and lumbar spine is warranted, since they are unsupported by any medical evidence.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1776 In re Melissa G.,
Petitioner-Appellant,

-against-

John W.,
Respondent-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

Carol L. Kahn, New York, attorney for the child.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about December 2, 2014, which, to the extent appealed from, after a hearing, supplemented the final order of custody entered on or about January 27, 2014, by awarding unsupervised visitation to the mother but only on specified conditions, unanimously affirmed, without costs.

Family Court's determination that unsupervised visitation with the mother, subject to conditions, is in the child's best interest, has a sound and substantial basis in the record (*see Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]), and should not be disturbed (*see Linda R. v Ari Z.*, 71 AD3d 465, 465-466 [1st Dept 2010]). Family Court properly

considered the testimony of the then 12-year-old child, who testified both in camera several times and in open court, as well as that of the mother, and concluded that the child would prefer to remain in New York with her father, with unsupervised visitation with her mother in Florida. The court was entitled to give weight to the wishes of this child, who has demonstrated insight and maturity throughout these proceedings (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]).

Requiring the mother to comply with the specified conditions in the visitation order was not unreasonable or inappropriate (*see Matter of John A. v Bridget M.*, 16 AD3d 324, 331 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]). The prior history of domestic violence (*Matter of Melissa Marie G. v John Christopher W.*, 57 AD3d 314 [1st Dept 2008]), was a factor to be considered in connection with the award of sole custody to the

father, and the custody order has already been reviewed and affirmed as being in the child's best interest (*Matter of John W. v Melissa G.*, 129 AD3d 468 [1st Dept 2015]). The mother has not appealed from the order dismissing her modification petition.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1777 Commissioners of the State Insurance Fund,
Plaintiff-Respondent,

-against-

NY Minute Management Corp., et al.,
Defendants-Appellants.

Index 402625/09

Schlam Stone & Dolan LLP, New York (Jonathan Mazer and Niall D. O'Murchadha of counsel), for appellants.

Jan Ira Gellis, P.C., New York (Jan Ira Gellis of counsel), for respondent.

Order, Supreme Court, New York County (Joan Madden, J.), entered April 27, 2015, which, to the extent appealed from, granted plaintiff Commissioners of the State Insurance Fund's (SIF) motion to renew, and upon renewal, vacated its prior order granting summary judgment dismissing the complaint in its entirety, granted summary judgment dismissing the complaint solely with respect to premium claims for defendants' drivers, and restored the remaining claims for premiums due for defendants' non-drivers to the mediation calendar, unanimously affirmed, without costs.

In this action for nonpayment of workers' compensation premiums, even if SIF was not reasonably justified in submitting

revised audit reports with its motion to renew, which it claims could only be generated after the court's finding on the initial motion for summary judgment that the drivers used by defendants were independent contractors, and thus not subject to defendants' workers' compensation policy with SIF, it was an appropriate exercise of the motion court's discretion to grant the motion to renew in the interest of justice (*see QBE Ins. Corp. v Hudson Specialty Ins. Co.*, 82 AD3d 595, 596 [1st Dept 2011]). Indeed, there is no dispute that defendants must pay premiums for their employees; the only dispute is the amount, which the motion court referred to mediation.

On this record, defendants' argument that SIF impermissibly asserted "new legal theories" on a motion for leave to renew is unavailing.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1778 The People of the State of New York Ind. 462/14
Respondent,

-against-

John McBride,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), and Kaye Scholer LLP, New York (Paul Q. Andrews of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered March 19, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

Defendant's claim that his attorney rendered ineffective assistance by failing to move to reopen a suppression hearing based on trial testimony is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this claim may not be

addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's failure to move to reopen the hearing was objectively unreasonable, that the motion would have been granted, or that a reopened hearing was likely to have resulted in suppression of defendant's statement (*see People v Carver*, 27 NY3d 418, 420-421 [2016]).

In his trial testimony, the arresting officer revealed that, at the time defendant made a statement without receiving *Miranda* warnings (that a hearing court had found to be noncustodial), the officer had asked defendant for identification, had formed an intent to prevent defendant from leaving, and subjectively considered defendant to be under arrest. However, since there was no evidence that the operation of the officer's mind was conveyed to defendant, this new evidence would have had little bearing on the issue of custody. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood

his situation" (*Berkemer v McCarty*, 468 US 420, 442 [1984]; *see also Stansbury v California*, 511 US 318, 325 [1994]; *United States v Mendenhall*, 446 US 544, 554 n 6 [1980]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1779 The People of the State of New York, Ind. 867/14
Respondent,

-against-

Michael Christy,
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 (Hope Korenstein 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 (Gregory Carro, J.), rendered June 4, 2014,

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

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

ENTERED: OCTOBER 4, 2016

CLERK

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

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1780 Natividad Rosario, Index 307989/09
Plaintiff-Respondent-Appellant,

-against-

Prana Nine Properties, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Meredith Drucker Nolen of counsel), for appellants-respondents.

Asta & Associates, P.C., New York (Michael J. Asta of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about September 23, 2015, which granted in part and denied in part defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion in its entirety, and as so modified, affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created nor had actual or constructive notice of the unsafe condition. Once that showing is made, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice of it (*see Kalish v HEI*

Hospitality, LLC, 114 AD3d 444, 445 [1st Dept 2014]).

A landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and does not commence until a reasonable time after the storm has ended (*Sherman v New York State Thruway Auth.,* 27 NY3d 1019, 1020-1021 [2016]; *Solazzo v New York Tr. Auth.,* 6 NY3d 734, 735 [2005]).

Here, plaintiff testified that ten or fifteen minutes before her first accident, she saw that it was snowing. Thus, any issue concerning whether defendants made reasonable efforts to remedy the wet condition on the steps of the entry vestibule was beside the point since they had no duty to correct the ongoing problem of pedestrians tracking water into the vestibule, until a reasonable time after the storm ended (*see Richardson v S.I.K. Assoc., L.P.,* 102 AD3d 554 [1st Dept 2013]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 107 [1st Dept 2000]).

With respect to plaintiff's second accident in the building, the court properly concluded that defendants demonstrated prima facie the absence of actual or constructive knowledge of urine on the second floor platform based on the testimony of the superintendent that he inspected daily, mopped three times a week, and swept the stairs every day. Plaintiff also testified

that she did not see the urine on the afternoon before her 6:30 p.m. or 7 p.m. accident, and was unaware of any complaints of a recurring moisture condition on the platform (*see Warner v Continuum Health Care Partners, Inc,* 99 AD3d 636, 637 [1st Dept 2012]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1781 The People of the State of New York, Ind. 1645/07
Respondent,

-against-

Paul Simmons,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of Counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered November 29, 2010, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1783 The People of the State of New York, Respondent, Ind. 3388/12

-against-

Norman Randall, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Karen M. Kalikow of Counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at suppression hearing; Laura A. Ward, J. at plea and sentencing), rendered January 14, 2013, convicting defendant of criminal possession of a weapon in the third degree and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. We conclude that an officer's removal of a knife from defendant's pocket was within the scope of lawful police conduct under the principle articulated in *People v Miranda* (19 NY3d 912 [2012]). When the officer saw defendant riding a bicycle unsafely and in violation of Vehicle and Traffic Law § 1231, the officer was entitled to stop defendant and order him off the bicycle,

regardless of whether the officer's initial intent was to give defendant an admonition instead of a ticket, and whether the officer also wished to investigate a suspicious handle protruding from defendant's pocket (*see People v Edwards*, 14 NY3d 741, 742 [2010]; *People v Robinson*, 97 NY2d 341, 349 [2001]). The officer had a reasonable basis for asking defendant whether the object in his pocket was a knife, especially since, before asking, the officer noticed that the handle appeared to be that of a knife, and also recognized several indicia that defendant was a gang member (*see People v O'Donnell*, 122 AD3d 475 [1st Dept 2014], *lv denied* 24 NY3d 1122 [2015]; *People v Terrance*, 101 AD3d 624 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]). When defendant acknowledged that the object was a knife, the officer lawfully retrieved it, regardless of whether he believed the knife to be legal or illegal (*see Miranda*, 19 NY3d at 914). Contrary to defendant's argument, at the time the officer acquired the knife,

he was still "engaged in a lawful encounter with defendant" (*id.*), that is, a single, rapidly unfolding encounter relating to the traffic violation as well as the officer's other observations.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1784 The People of the State of New York, Ind. 2874/09
Respondent,

-against-

Dionisio Crespo,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered November 5, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds and criminal sale of a controlled substance in the third degree, and sentencing him, as a second drug felony offender previously convicted of a violent felony, to concurrent terms of 9 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. Any inconsistencies in the undercover officer's testimony were minor. Although the police failed to recover the prerecorded money, "defendant had an opportunity to divest himself of [it] between

the transaction and his arrest" (*People v Butler*, 59 AD3d 358, 358 [1st Dept 2009], *lv denied* 12 NY3d 923 [2009]).

The court provided a meaningful response to a note from the deliberating jury (*see People v Almodovar*, 62 NY2d 126, 131 [1984]), and it properly declined to reinstruct the jury on the standard of reasonable doubt. The note, which described the jury as "locked," may be reasonably interpreted as seeking guidance in the face of a perceived deadlock rather than an instruction on reasonable doubt. Significantly, the jurors requested no such instruction even after the court's response to the note included a reminder to continue sending notes "if you need further clarification on anything."

Defendant failed to preserve his claim that the court's response to the jury note was coercive, his claim that an undercover officer's anonymous testimony violated the Confrontation Clause, his challenge to the prosecutor's summation, and his request to vacate the third-degree criminal sale of a controlled substance count as a noninclusory concurrent count of the criminal sale of a controlled substance in or near school grounds count pursuant to CPL 300.40(3)(a). We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Therefore, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. Alternatively, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1787 In re Kaylynn M.,

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

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

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

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 7, 2015, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion when it denied appellant's motion to convert the juvenile delinquency petition into a person in need of supervision petition (*see e.g. Matter of Diana P.*, 49 AD3d 390 [1st Dept 2008]). The record demonstrates that the underlying incident had a violent component, that appellant had a history of arrests, juvenile

delinquency adjudications and noncompliance with supervision, that she used drugs and alcohol, that she was frequently truant, and that she often broke curfew. These factors outweighed some recent improvement in appellant's behavior during the pendency of the case. Furthermore, a juvenile delinquency adjudication was necessary to ensure appellant's compliance with treatment. "[T]he irony is presented that while the court may direct the PINS youth not to abscond, the statutory authority constraining the court essentially precludes an effective remedy should the youth abscond" (*Matter of Edwin G.*, 296 AD2d 7, 11 [1st Dept 2002]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1788 The People of the State of New York, Respondent, Ind. 4084/08

-against-

Jose Reyes, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 20, 2010, as amended December 1, 2010, convicting defendant, after a jury trial, of sexual abuse in the first degree and two counts of endangering the welfare of a child, and sentencing him to an aggregate term of three years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations regarding either of the two victims.

The court properly permitted a victim who was eight years old at the time of the trial to give sworn testimony. The

child's responses to the court's questions at a hearing established that she sufficiently understood the difference between truth and falsity, the significance of a promise to tell the truth, and the wrongfulness and consequences of lying (*see People v Nisoff*, 36 NY2d 560, 565–566 [1975]; *People v Cordero*, 257 AD2d 372 [1st Dept 1999], *lv denied* 93 NY2d 968 [1999]). The court's thorough inquiry employed both leading and nonleading questions, and even if some of the child's responses exhibited difficulty in understanding the questions, those responses did not cast doubt on her swearability, when the colloquy is viewed as a whole.

The court properly admitted evidence of the then-six-year-old victim's disclosure of the incident to her mother, made about 12 hours after the crime. This qualified under the prompt outcry exception to the hearsay rule (*see People v McDaniel*, 81 NY2d 10, 17 [1993]), given the child's age and the surrounding circumstances.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of

justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1791 In re Tiffany T.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order, Family Court, Bronx County (Peter Passidomo, J.), entered on or about April 29, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of petit larceny, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v*

Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The record supports the conclusion that appellant acquired the victim's bicycle by stealing it, and not by "finding" it in a trash pile.

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

ENTERED: OCTOBER 4, 2016

CLERK

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

1792 Richard Altman, Index 155942/14
Plaintiff-Respondent,

-against-

285 West Fourth LLC,
Defendant-Appellant.

- - - - -

Rent Stabilization Association of N.Y.C., Inc., Community Housing Improvement Program, Inc. and Real Estate Board of New York,
Amici Curiae.

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Amsterdam & Lewinter, LLP, New York (Joseph P. Mitchell of counsel), for appellant.

Lawrence W. Rader, New York, for respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for amici curiae.

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Judgment, Supreme Court, New York County (Michael L. Katz, J.), entered February 23, 2016, inter alia, awarding plaintiff damages for rent overcharges, including treble damages and prejudgment interest, and setting the legal rent at $1,829.49 until the apartment is properly registered, unanimously affirmed, with costs.

In determining the legal regulated rent for plaintiff's apartment, Supreme Court properly disregarded the rent charged four years before the filing of the complaint and looked to the

last rent registered with the Division of Housing and Community Renewal (DHCR) ($1,829.49), since the unreliability of the apartment's rental history within the four-year limitations period was caused by defendant's failure to file annual rent registrations (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]; *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439 [1st Dept 2016]; *Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 684 [1st Dept 2011]).

Defendant failed to rebut the presumption of wilfulness arising from the fact of the overcharge (*see Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 107 [1st Dept [2007]). It submitted no affidavit by a person with knowledge justifying the rent increase (*see Matter of Mangano v New York State Div. of Hous. & Community Renewal*, 30 AD3d 267, 268 [1st Dept 2006]). Nor does the parties' 2005 so-ordered stipulation establish that the overcharge was not willful (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 532 [1st Dept 2010]). Supreme Court properly awarded plaintiff prejudgment interest on the treble damages award (*see Mohassel v Fenwick*, 5 NY3d 44 [2005]).

In support of its claim that plaintiff is not entitled to

the portion of damages awarded for the overcharge for May 2014, defendant submitted no evidence establishing that plaintiff never paid rent for that month.

Supreme Court properly fixed the legal rent for the apartment at $1,829.49 until such time as defendant tenders a rent-stabilized lease to plaintiff and registers the apartment with DHCR (*see Jazilek*, 72 AD3d at 531). The court properly fixed the initial legal regulated rent at that time at $2,195.39, which reflects the allowed 20% vacancy increase (*see id.*). Defendant is not entitled to longevity increases or any increases allowed by law for the period in which the apartment was illegally removed from rent stabilization (*id.*).

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1793 The People of the State of New York, Respondent, Ind. 1989/12

-against-

Shatima Turner, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Paul Wiener of Counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.) rendered January 24, 2013, convicting defendant, upon her plea of guilty, of driving while intoxicated, and sentencing her to a conditional discharge for a period of three years, with a $1000 fine and community service, unanimously affirmed.

The court properly denied defendant's suppression motion. Regardless of what predicate is required for the police to

administer a portable breath test to a lawfully stopped motorist (*see People v Brockum*, 88 AD2d 697 [3d Dept 1982]), here defendant's pattern of behavior amply provided the police with probable cause to believe that she was intoxicated.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1794 In re Jahnel B., and Others,

Children Under the Age of Eighteen Years, etc.,

Carlene Elizabeth B.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

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Law Office of Bruce A. Young, New York (Bruce A. Young of counsel), for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about December 12, 2014, to the extent it determined, after a hearing, that respondent mother abandoned and permanently neglected the subject children, unanimously affirmed, without costs. Appeal from so much of the aforementioned order as terminated the mother's parental rights after a dispositional hearing, unanimously dismissed, without costs, as nonappealable.

The finding of abandonment was supported by clear and convincing evidence, including petitioner agency's case record

and the testimony of its caseworker, which, at best, showed only "sporadic and minimal attempts" by the mother to visit and communicate with the children or the agency (*Matter of Latoya P.*, 305 AD2d 263, 264 [2003], *lv denied* 100 NY2d 508 [2003]; *see* Social Services Law § 384-b[4][b],[5][a]), or otherwise inquire about the children's care and well-being during the relevant time period.

In addition, petitioner demonstrated, by clear and convincing evidence, that the children were "permanently neglected" within the meaning of Social Services Law § 384-b(7)(a). We reject appellant's contention that petitioner failed to make diligent efforts to strengthen and encourage the parent-child relationship (*see* § 384-b[7][f]). To the contrary, petitioner formulated a service plan which included individual and group counseling, substance abuse and domestic violence counseling, submission to mental health evaluations, maintaining a stable household and income, as well as regular visitation with the children (*see Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 562-563 [1st Dept 2012]; *Matter of Marah B. [Lee D.]*, 95 AD3d 604, 605 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]).

Notwithstanding the agency's diligent efforts, the mother continuously failed to cooperate with the agency and comply with

the service plan, and, thus, failed to plan for the children's future (*see Matter of Aisha Latisha J.*, 182 AD2d 498 [1st Dept 1992], *lv denied* 80 NY2d 759 [1992]). Specifically, the mother failed to regularly attend or benefit from her programs, failed to appear for many of the scheduled visits with the children and failed to engage with the children when she did attend (*see Matter of Toshea C.J.*, 62 AD3d 587 [1st Dept 2009]).

Since the dispositional determination was entered on the mother's default - she did not appear and her attorney did not participate in those proceedings - we dismiss the portion of the appeal addressing that determination (*see Matter of Amber Megan D.*, 54 AD3d 338 [2d Dept 2008]).

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

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1795 The People of the State of New York, Ind. 6056/94
Respondent,

-against-

Viscount Washington,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about March 24, 2015, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The undisputed serious physical injury inflicted by defendant automatically resulted in an override to risk level three (*see People v Howard*, 27 NY3d 337, 342 [2016]). The court properly exercised its discretion when it declined to grant a

downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, and the record does not establish any basis for a downward departure, given the egregiousness of the underlying crime.

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1796 The People of the State of New York, Ind. 3198/14
Respondent,

-against-

Yeritza Agosto,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Laura Boyd of Counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura Ward, J.), rendered October 6, 2014, convicting defendant, upon his plea of guilty, of Grand Larceny in the Fourth Degree, and sentencing him to an aggregate term of five years probation, unanimously affirmed.

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

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

ENTERED: OCTOBER 4, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1797N Madden International, Ltd., Index 650209/15
Plaintiff-Respondent,

-against-

Lew Footwear Holdings Pty Ltd.,
Defendant-Appellant.

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Dontzin Nagy & Fleissig LLP, New York (Matthew S. Dontzin of counsel), for appellant.

Hargraves, McConnell & Costigan, P.C., New York (Daniel A. Hargraves of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 15, 2016, which granted plaintiff's motion for a preliminary injunction, unanimously affirmed, without costs.

Notwithstanding that the parties' agreement contained a choice of law clause providing that the agreement "shall be governed by and construed in accordance" with New York contract law "without regard to conflict of laws provisions" and a forum selection clause providing that "any and all actions or proceedings arising out of or relating to" the agreement "shall be exclusively heard only in ... state or federal court" in certain counties in New York, defendant commenced an action against plaintiff in Australia. The Australian court denied

plaintiff's ensuing motion to dismiss or stay the action.

Defendant argues that plaintiff's motion before Supreme Court to enjoin it from further prosecution of the proceeding pending in the Australian court should have been denied as contrary to principles of international comity. We find that the court exercised its discretion providently (*see Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 390 [2008]), in light of New York's long-standing public policy of enforcing forum selection clauses in international agreements (*see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Banco Nacional De Mexico, S.A., Integrante Del Grupo Financiero Banamex v Societe Generale*, 34 AD3d 124, 130 [1st Dept 2006]).

Plaintiff also demonstrated a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (*see Nobu Next*

Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]).

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

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1798 The People of the State of New York, Ind. 627/99
Respondent, 824/00

-against-

Jose De Los Dios,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered May 27, 2014, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed.

The appeal is dismissed pursuant to the fugitive disentitlement doctrine because defendant absconded from parole supervision while his appeal was pending and has not returned (*see People v Tavares*, 10 NY3d 227 [2008]; *People v Law*, 12 AD3d

192 [1st Dept 2004]). Were we not dismissing the appeal, we would affirm, finding that the court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1799-
1800 Index 153589/13

Charles Cronin, et al.,
Plaintiffs-Respondents,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for appellant.

Arye, Lustig & Sassower, P.C., New York (D. Carl Lustig III of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 23, 2015, which granted plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim, and order, same court, Justice and entry date, which denied defendant's motion for summary judgment dismissing plaintiffs' complaint, unanimously affirmed, without costs.

Plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law on the issue of liability with respect to their Labor Law § 240(1) cause of action, by submitting evidence that defendant owner failed to provide plaintiff worker with an adequate safety device to perform his assigned task and that this failure proximately caused his

injuries (*see Felker v Corning Inc.*, 90 NY2d 219, 224 [1997]; *see also Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588 [1st Dept 2013]).

In opposition, defendant failed to raise a triable issue of fact. Defendant's argument that plaintiff was the sole proximate cause of his injuries because he failed to use one of the A-frame ladders kept in his employer's van, is unavailing. Defendant failed to rebut plaintiff's testimony that he used defendant's straight ladder, which did not have rubber footings, because the work space would not have allowed for the A-frame ladder to be opened (*see Keenan*, 106 AD3d at 588-589). Defendant's argument that the A-frame ladder could have fit in the space is unsupported by evidentiary facts or an expert opinion (*see Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008]). Nor is there any evidence showing that plaintiff was told not to use the defendant's ladder or that he knew he should not do so (*Phillips v Powercrat Corp.*, 126 AD3d 590, 591 [1st Dept 2015]; *Keenan*, 106 AD3d at 589). That plaintiff fell only three feet does not render Labor Law § 240(1) inapplicable (*see Brown v VJB Constr. Corp.*, 50 AD3d 373, 376 [1st Dept 2008]).

We do not reach defendant's unpreserved arguments that plaintiffs' motion was fatally defective because it did not

contain a copy of the notice of claim and because the complaint was missing a page (*see Al Fayed v Barak*, 39 AD3d 371, 371-372 [1st Dept 2007]; *see also Marcel v Chief Energy Corp.*, 38 AD3d 502, 503 [2d Dept 2007]).

Given the grant of partial summary judgment on plaintiffs' Labor Law § 240(1) claim, defendant's arguments regarding plaintiffs' claims for common-law negligence and Labor Law §§ 200 and 241(6) are academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1801 In re Christopher E. C.,
Petitioner-Appellant,

-against-

Ivana K. S.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Larry Bachner, Jamaica, for respondent.

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Court Attorney-Referee), entered on or about October 14, 2014, which, to the extent appealed from, as limited by the briefs, granted respondent mother's application for relocation with the child to Florida, unanimously affirmed, without costs.

The court's determination has a sound and substantial basis in the record, and there is no reason to disturb the court's findings (*see Matter of William G. v Saline G.*, 132 AD3d 440 [1st Dept 2015]). The court considered all of the relevant factors and properly concluded that the proposed relocation would serve the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]). Respondent mother has demonstrated by clear and convincing evidence that a move to Florida would improve the quality of the six-year old child's life (*see Matter*

of Kevin McK. v Elizabeth A.E., 111 AD3d 124, 130-131 [1st Dept 2013]). The mother also established that she would continue to foster a relationship between the petitioner father and the child (*see Matthew W. v Meagan R.*, 68 AD3d 468 [1st Dept 2009]; *see e.g. Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295, 296 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). Although the relocation will have an impact upon the father's ability to spend time with his child, the visitation schedule set by the court will allow for the father and the child to continue to have a meaningful relationship (*see Matter of Carmen G. v Rogelio D.*, 100 AD3d 568 [1st Dept 2012]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1802 Wanda Soler, Index 103189/10
Plaintiff-Appellant,

-against-

Jersey Boring & Drilling Co., Inc.,
Defendant-Respondent,

The City of New York,
Defendant.

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for respondent.

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Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered June 5, 2015, dismissing the complaint, upon defendant Jersey Boring & Drilling Co., Inc.'s motion to set aside the jury verdict of liability in plaintiff's favor and against it and dismiss the complaint, unanimously reversed, on the law, without costs, and the complaint and the verdict reinstated.

The evidence presented at trial was sufficient to support the conclusion that defendant drilled the hole into which plaintiff fell (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743 [1986]). Although plaintiff concedes that the locations of

the two documented holes drilled by defendant do not match the location of the accident, the jury could reasonably have concluded that the third, aborted, hole, whose location was not documented, is the hole into which plaintiff fell. The hole was apparently man-made, and defendant had the only permit to drill holes in the road during the relevant period. While two witnesses testified that the subject hole was too close to the curb and too far from the other holes to have been drilled by defendant, the jury could properly have chosen not to credit this testimony due to prior inconsistent statements by one witness, a lack of personal knowledge on the part of the other, and a photograph showing work being performed near the curb. Moreover, the jury may also have drawn an adverse inference from the facts that none of defendant's own documents were produced at trial and that additional photos of defendant's work existed but were not produced (*see Seward Park Hous. Corp. v Cohen*, 287 AD2d 157, 168 [1st Dept 2001]). Contrary to defendant's assertions, evidence of satisfactory Department of Transportation inspections is not dispositive in view of the testimony elicited by plaintiff indicating that there could have been a car blocking the defect at the time of inspection.

The trial evidence was also sufficient to support the conclusion that defendant backfilled the subject hole negligently. At any rate, defendant effectively conceded this point by failing to address it in its appellate brief.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1803 & M-4321 The People of the State of New York, Respondent,

Ind. 446/11

-against-

Amaury Jiminez,
Defendant-Appellant.

_____

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

Amaury Jiminez, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered August 22, 2013, convicting defendant, after a jury trial, of burglary in the second degree (three counts) and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 22 years to life, unanimously affirmed.

Since defendant either "failed to identify the specific legal and factual impediments" to the exclusions asserted by the People (*People v Beasley*, 16 NY3d 289, 292 [2011], or attempted to do so only in a postverdict motion, which had no preservation effect (*see People v Padro*, 75 NY2d 820 [1990]), his speedy trial arguments are entirely unpreserved, and we decline to review them

in the interest of justice. As an alternative holding, we find no violation of defendant's right to a speedy trial.

The court properly denied defendant's request for the assignment of new counsel for purposes of postverdict proceedings and sentencing. Defendant received a sufficient opportunity to be heard, and he failed to make any serious complaint requiring further inquiry (*see People v Porto*, 16 NY3d 93, 100-101 [2010]; *People v Linares*, 2 NY3d 507, 510-511 [2004]).

Defendant's pro se challenge to the sufficiency of the evidence is without merit. Defendant's remaining pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also reject defendant's pro se ineffective assistance of counsel claims relating to the issues we have found to be unpreserved (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

Defendant's challenge to the legality of the use of his 2004 conviction for third-degree weapon possession as a violent predicate felony is unavailing (*see People v Smith[McGhee]*, 27 NY3d 652, 670 [2016]). We perceive no basis for reducing the

sentence.

We have considered all other claims, including those raised in the defendant's pro se reply brief, and find them unavailing.

M-4321 - *People v Jiminez*

Motion to extend the time to file a pro se reply brief granted to the extent that the brief is accepted.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1804 The People of the State of New York, Ind. 544/13
Respondent,

-against-

Adamou Arbi,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about August 14, 2014, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and the court lacked discretion to do otherwise (*see People v*

Bullock, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We decline to revisit our holding in *Bullock*. Defendant's due process argument is unpreserved and without merit.

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

ENTERED: OCTOBER 4, 2016

CLERK

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

1806-
1807 The People of the State of New York, Respondent,

Ind. 5730/10
2156/11

-against-

Esmerlin Meran,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Lewis Bart Stone, J.), rendered December 12, 2012, convicting defendant, after a jury trial, of tampering with physical evidence, and upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of 1⅓ to 4 years, unanimously affirmed.

Defendant did not make a valid waiver of his right to appeal either his trial or plea convictions, since the colloquy with defendant was inadequate and the written waivers failed to overcome this inadequacy. However, we find no basis for reversal of either conviction.

The verdict convicting defendant of evidence tampering was

not against the weight of the evidence. After the codefendant cleaned a knife with which he stabbed one of the victims, defendant's acts of taking the knife, hiding it behind his leg and discarding it inside a restaurant supported the inference that he and intended to prevent the police from discovering the knife and using it in a criminal proceeding (*see People v Hafeez*, 100 NY2d 253, 259 [2003]; *People v Wilkins*, 111 AD3d 451, 451 [1st Dept 2013] *lv denied* 23 NY3d 1044 [2014]).

We find, based on our in camera review of sealed materials, that there was probable cause for the issuance of a search warrant. We decline to revisit this Court's prior order, which denied defendant's motion to unseal these materials.

Defendant claims that the trial court erred in excusing a sworn juror, allegedly without an adequate inquiry, based on the juror's scheduled surgery. However, the only relief defendant requests is dismissal of the indictment rather than a new trial, and he expressly requests this Court to affirm his conviction if it does not grant a dismissal. Since we do not find that

dismissal of this felony charge would be appropriate, we affirm on this basis (*see e.g. People v Teron*, 139 AD3d 450 [1st Dept 450]). In any event, defendant's claim is both unpreserved and unavailing.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1808-
1809 In re Carl E. Person,
Petitioner-Appellant,

-against-

New York City Department of Transportation,
Respondent-Respondent.

Index 100484/15

Carl E. Person, New York, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for respondent.

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered October 29, 2015, denying the petition for, inter alia, a declaration that respondent's alleged congestion-related activities violated the State Environmental Quality Review Act (SEQRA), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Judgment, same court and Justice, entered April 28, 2016, to the extent appealed from, denying petitioner's motion for leave to amend, unanimously affirmed, without costs.

The article 78 court correctly determined that petitioner lacks standing to sue under SEQRA. Petitioner's allegation that respondent's congestion-related initiatives have caused him to

spend additional time stuck in vehicular traffic does not establish the requisite environmental injury (*see Matter of Association for Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 8-9 [2014]; *Matter of Widewaters Rte. 11 Potsdam Co., LLC v Town of Potsdam*, 51 AD3d 1292 [3d Dept 2008]). Nor do the alleged other consequences of increased time stuck in traffic, such as lost recreational time, constitute environmental injuries (*see e.g. Matter of Turner v County of Erie*, 136 AD3d 1297 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]). The allegations that the alleged increased congestion will result in greater risk of adverse health consequences (through additional air pollution), delayed ambulance times, and delayed access to toilet facilities (while sitting in traffic) are purely speculative and therefore insufficient to establish injury for the purposes of standing (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207 [2004]; *Matter of Rent Stabilization Assn. of N.Y.C., Inc. v Miller*, 15 AD3d 194 [1st Dept 2005], *lv denied* 4 NY3d 709 [2005]).

Nor has petitioner adequately alleged that his injury is different from that suffered by the public at large (*see Matter of Shelter Is. Assn. v Zoning Bd. of Appeals of Town of Shelter Is.*, 57 AD3d 907, 909 [2d Dept 2008], *lv denied in part,*

dismissed in part 12 NY3d 797 [2009]). His main complaint is simply more time spent in traffic, which, if true, would affect countless other New Yorkers.

We note that the petition is also untimely. Even crediting petitioner's allegations that respondent's congestion-related initiatives were part of a secret plan to increase congestion in Manhattan so as to make congestion pricing politically palatable, the initiatives themselves were made public in 2008, and, as petitioner acknowledges, many of them underwent environmental review between May 2012 and July 2014. Petitioner had "timely knowledge [of respondent's activities] sufficient to have placed [him] under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations" (*see Rite Aid Corp. v Grass*, 48 AD3d 363, 364-365 [1st Dept 2008]). However, he did not commence this proceeding until 2015, long after the four-month statute of limitations had expired (*see* CPLR 217[1]).

The court properly rejected petitioner's proposed amendments

(*see Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

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

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1810 The People of the State of New York, Ind. 2893/11
Respondent,

-against-

Darron Gladden,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia Dimango, J.), rendered September 6, 2013, convicting defendant, upon his plea of guilty, of Assault int the First Degree, and sentencing him to an aggregate term of eight-and-one-half years, unanimously affirmed.

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

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1812 In re Rhina M.M.,
Petitioner-Respondent,

-against-

Sandy M.M.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about February 2, 2016, which, after a fact-finding hearing, granted the petition and issued a two-year order of protection in favor of petitioner, unanimously affirmed, without costs.

A fair preponderance of the evidence supports the finding that respondent committed the family offenses of attempted assault in the third degree (Penal Law §§ 110.00/120.00) and harassment in the second degree (Penal Law § 240.26) (*see* Family Court Act § 832; *Matter of Marisela N. v Lacy M.S.*, 101 AD3d 425 [1st Dept 2012]). The court credited the testimony of petitioner's friend, an eyewitness, that respondent had threatened petitioner, her sister, with a knife in 2010, and referred to an email from respondent where she admitted that she

threw keys at petitioner. Furthermore, petitioner's testimony, which the court also credited, demonstrated a longstanding pattern of assault and harassment by respondent arising from disputes concerning their joint ownership of a building.

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

ENTERED: OCTOBER 4, 2016

CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, JJ.

1813- Index 650157/09
1813A Michael Korsinsky,
Plaintiff-Appellant,

-against-

Jon Winkelreid, et al.,
Defendants-Respondents,

The Goldman Sachs Group, Inc.,
Nominal Defendant-Respondent.

_____

Levi & Korsinsky LLP, New York, (Nicholas I. Porritt of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr. of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 12, 2014, dismissing the second amended complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 13, 2014, which granted defendants' motion to dismiss the second amended complaint; and from order, same court and Justice, entered December 2, 2014, which denied plaintiff's motion for leave to file a third amended complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this purported derivative action challenging the valuation of the nominal defendant's compensatory stock options,

the motion court properly dismissed the second amended complaint for failure to allege particularized facts evincing the futility of a demand on the nominal defendant's board of directors (*see Wood v Baum*, 953 A2d 136, 140 [Del 2008]). The demand futility requirement needed to be measured in terms of the 2013 board in existence at the time of the second amended complaint, rather than the 2009 board in existence when the original complaint was filed. The second amended pleading does not relate back to 2009 for demand futility purposes, because the original pleading was not "validly in litigation" — that is, it would not have survived a motion to dismiss (*Braddock v Zimmerman*, 906 A2d 776, 779, 786 [Del 2006]), given the original plaintiff's sale of his shares in the nominal defendant in July 2009 and his resulting inability to satisfy the continuous share ownership requirement governing derivative actions.

Assessing demand futility in terms of the 2013 board, the motion court correctly determined that plaintiff had failed to allege particularized facts demonstrating that the board's directors were interested and/or lacked independence (*Wood*, 953 A2d at 140). In particular, plaintiff failed to allege in nonconclusory fashion that the amounts of the options received by certain director defendants were material in the context of their

economic circumstances (*see Central Laborers' Pension Fund v Blankfein*, 34 Misc 3d 456, 469-470 [Sup Ct, New York County 2011] [citing *Orman v Cullman*, 794 A2d 5, 23 (Del Ch 2002)], *affd* 111 AD3d 40 [1st Dept 2013]).

Nor were the allegations regarding the board's approval of the challenged options sufficient to raise doubts as to whether the approval was a valid exercise of business judgment (*see Wood*, 953 A2d at 140). In view of the exculpatory clause in the nominal defendant's certificate of incorporation, no director faced a substantial likelihood of liability for approving the options (*see Wietschner v Dimon*, 139 AD3d 461, 462 [1st Dept 2016]). Unlike the fraudulent backdating of options at issue in *Ryan v Gifford* (918 A2d 341, 355-356 [Del Ch 2007]), the awarding of options in amounts based on the board's discretionary valuations was a valid exercise of business judgment untainted by bad faith.

The motion court properly denied leave to file a third amended complaint. The proposed allegations of demand futility do not cure the deficiencies of the second amended complaint (*see Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]). Further, the purportedly direct claims that plaintiff sought to add are merely retooled derivative claims (*see Tooley v*

Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1039 [Del 2004]), and therefore do not dispense with the need for a demand (*see Wood*, 953 A2d at 140).

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: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1814 The People of the State of New York, Ind. 4705/11
Respondent,

-against-

Manuel Pinero,
Defendant-Appellant.

_____

Han & Associates, P.C., New York (Jin Han of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered December 3, 2014, as amended January 28, 2015, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the credibility determinations. It is undisputed that the victim died as a result of being stabbed during an intense physical fight with defendant. That defendant intentionally stabbed the victim was abundantly established by the eyewitness testimony of two disinterested bystanders who saw the victim falling to the ground immediately after defendant made

a punching motion. In addition, the People's expert credibly testified that the victim's four stab wounds could have been caused by a person wielding a knife while standing in front of the victim, but would have been extremely unlikely to have been inflicted by the victim himself.

The court properly exercised its discretion in admitting the victim's statement that he had been stabbed pursuant to the present sense impression exception to the hearsay rule. The statement was spontaneously made, substantially contemporaneously with the stabbing, according to the trial testimony of the witnesses, and its reliability was adequately supported by corroborating evidence (*People v Vasquez [People v Adkinson]*, 88 NY2d 561, 580 [1996]).

Defendant's contention that the court should have submitted criminally negligent homicide as a lesser included offense of second-degree murder is unpreserved, since defendant requested that charge on a different theory from the one he advances on appeal (*see People v Lynn*, 27 AD3d 381, 382 [1st Dept 2006], *lv denied* 7 NY3d 791 [2006]). We decline to review it in the interest of justice. In any event, since the court submitted manslaughter in the first degree as a lesser included offense of murder in the second degree, defendant's murder conviction

"forecloses [his] challenge to the court's refusal to charge the remote lesser included offense[]" (*People v Boettcher*, 69 NY2d 174, 180 [1987]) of criminally negligent homicide.

Defendant's contention that the People failed to make a prima facie showing of discrimination in support of their reverse *Batson* claim is moot, since defense counsel stated what he thought were race- and gender-neutral reasons for striking the panelists at issue (*see Hernandez v New York*, 500 US 352, 359 [1991]; *People v Hecker*, 15 NY3d 625, 652 [2010], *cert denied sub nom Black v New York*, 563 US 947 [2011]). Defendant's challenge to the grant of the People's reverse *Batson* claim as to an alternate juror is moot, since no alternates participated in the deliberation (*see People v White*, 297 AD2d 587 [1st Dept 2002], *lv denied* 99 NY2d 565 [2002]). Defendant's arguments concerning the procedures by which the court adjudicated the reverse *Batson* claim are unpreserved, since defense counsel did not specifically raise them at trial (*see People v James*, 99 NY2d 264, 272 [2002]; *People v Bruzzley*, 105 AD3d 576 [1st Dept 2013], *lv denied* 21 NY3d 1002 [2013]). Were we to review them, we would find them unavailing.

Defendant's contention that a prospective juror was excused without any basis is unpreserved. We reject defendant's

contention that this was a mode of proceedings error not requiring preservation (*see People v Casanova*, 62 AD3d 88 [1st Dept 2009], *lv denied* 12 NY3d 852 [2009]; *see also People v Hopkins*, 76 NY2d 872, 873 [1990]; *cf. People v Ahmed*, 66 NY2d 307, 310 [1985]). We decline to review it in the interest of justice. As an alternative holding, we find that defendant fails to rebut the presumption of regularity (*see People v Glass*, 43 NY2d 283, 287 [1977]; *People v Garcia*, 203 AD2d 72 [1st Dept 1994], *lv denied* 83 NY2d 910 [1994]).

Defendant's contention that the court interfered with his right to counsel by barring his counsel from visiting his holding cell at the end of a Friday is unpreserved (*see People v Narayan*, 54 NY2d 106 [1981]), and we decline to review it in the interest of justice.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1815 The People of the State of New York, Ind. 1611/11
Respondent,

-against-

Gregory Thompson,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Lori Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered February 28, 2013, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 23 years, affirmed.

The court properly declined to impose any sanction for the loss, due to the flooding of a police storage facility in Hurricane Sandy, of a knife that defendant claims to be exculpatory material under *Brady v Maryland* (373 US 83 [1963]). The loss of evidence as the result of a natural disaster cannot be attributed to the People (*People v Daly*, 140 AD3d 593, 594 [1st Dept 2016]; *People v Austin*, 134 AD3d 559 [1st Dept 2015], *lv granted* 2016 NY Slip Op 63709[U]). In any event, defendant has not established that the knife, as a piece of physical

evidence, was exculpatory. Although there was an issue as to whether this knife, which was found in defendant's room, could have caused any of the numerous stab wounds sustained by the victim, photographs of the knife, which clearly demonstrated its dimensions, were admitted at trial, and defendant has not shown that the knife itself would have had any additional value. Moreover, there was overwhelming evidence of guilt, including a detailed confession, as well as DNA evidence showing that the knife at issue was at least one of the weapons used against the victim, and there is no reasonable possibility that the physical availability of the knife at trial would have resulted in a more favorable verdict.

Defendant did not preserve his claim that he was entitled to a mistrial or the striking of certain testimony based on his detrimental reliance on the prosecutor's pretrial disclosure, which proved inaccurate, that the medical examiner's testimony would be entirely exculpatory on the issue of whether any of the wounds were compatible with the knife recovered from defendant's room. Although defendant took issue with the medical examiner's testimony on other specific grounds, he did not raise the particular ground asserted here. We decline to review defendant's unpreserved claim in the interest of justice. As an

alternative holding, we find that although the prosecutor erred in belatedly disclosing that the medical examiner's testimony would be less exculpatory than had been previously represented, the error was harmless in light of the overwhelming evidence of guilt.

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

All concur except Gische, J. who concurs in a separate memorandum as follows:

GISCHE J. (concurring)

I join with the majority's analysis with respect to those issues concerning the prosecutor's inaccurate pretrial disclosure regarding the medical examiner's testimony. I write separately, concurring in the result only, on the issues regarding the loss of evidence under the control of the People. I reject the broad conclusion that, as a matter of law, the loss of evidence during Hurricane Sandy cannot ever be attributed to the People (*People v Austin*, 134 AD3d 559, 563–569 [1st Dept 2015] [Gische, J., dissenting], *lv granted* 2016 NY Slip Op 63709[U] (1st Dept [Gische, J.]). Nonetheless I agree with the majority that the requested remedy of a mistrial was not available under the circumstances of this case (*People v Kelly*, 62 NY2d 516, 521 [1984]). Moreover, the remedy of an adverse jury instruction was never requested (*People v Handy*, 20 NY3d 663, 669 [2013]). Additionally, even apart from the lost knife and sweatshirt, there was overwhelming evidence of defendant's guilt.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1816 The People of the State of New York, Ind. 66254C/04
Respondent,

-against-

Vincent Brunson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Nancy E. Little of Counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on January 8, 2014, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure from the presumptive override to level three for a prior felony sex crime conviction (*see People v Gillotti*, 23 NY3d 841 [2014]). The egregiousness of the

underlying sex crime against a child, as well as that of the predicate crime, likewise against a child, outweighed the mitigating factors cited by defendant.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1819 Dolly Balleram, Index 307144/12
Plaintiff-Appellant,

-against-

11P, LLC,
Defendant-Respondent.

_____

Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 10, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's expert failed to identify any applicable statute or rule that requires a landowner to install a handrail or grab-bar in the bathroom of an apartment (*see Lunan v Mormile*, 290 AD2d 249 [1st Dept 2002]). Defendant did not breach its common-law duty of care by declining plaintiff's requests for a

handrail, since the bathtub was in good working order and not alleged to be defective or hazardous for ordinary use (*Rivera v Nelson Realty, LLC*, 7 NY3d 530, 535 [2006]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1820 The People of the State of New York, Ind. 5267/13
Respondent,

-against-

Linda Tes,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth Isaacs of Counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered on or about February 19, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1821N 276-43 Gourmet Grocery, Inc., doing business as Lucky Star Café,
Plaintiff-Respondent,

-against-

250 West 43 Owner LLC, et al.,
Defendants-Appellants.

Index 157468/15

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellants.

Wagner Berkow LLP, New York (Ian Brandt of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about March 3, 2016, which granted plaintiff tenant's motion for a *Yellowstone* injunction, unanimously modified, on the law and in the exercise of discretion, to condition the continuance of the injunction on plaintiff's moving, within 30 days after service of a copy of this order with notice of entry, to amend the complaint to add a claim with respect to article 6 of the lease, and otherwise affirmed, without costs.

The four requirements for a *Yellowstone* injunction are set forth in *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.* (93 NY2d 508, 514 [1999]). Contrary to defendants'

claim, there is no fifth requirement that the tenant's complaint contain a claim for a declaration of rights with respect to the lease violations mentioned in the landlord's notice to cure. We note that, in the case at bar, defendants' first counterclaim deals with one of the two grounds mentioned in the notice to cure (article 43 of the lease). However, none of the pleadings deals with the other ground mentioned in the notice to cure (article 6 of the lease). Since the purpose of a *Yellowstone* injunction is to stay "the cure period before it expire[s] to preserve the lease" until resolution of the dispute on the merits (*Graubard*, 93 NY2d at 514), we exercise our discretion (*see e.g. 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420 [1st Dept 1995]) to condition the continuance of the injunction upon plaintiff's moving, within the time period indicated, to amend the complaint to add a claim with respect to article 6. We note that plaintiff has evinced a willingness to amend its complaint.

Defendants' contention that plaintiff's unclean hands bar it from obtaining the equitable relief of an injunction is preserved

but unavailing, since defendants made no showing that they had been injured by plaintiff's allegedly obtaining a liquor license under false pretenses (*see National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]).

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

ENTERED: OCTOBER 4, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1612 Leonid Lebedev, Index 650369/14
Plaintiff-Respondent,

-against-

Leonard Blavatnik, et al.,
Defendants-Appellants.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen Broome of counsel), for appellants.

Steptoe & Johnson LLP, New York (Michael C. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 2, 2015, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter
Marcy L. Kahn, JJ.

1612
Index 650369/14

_____x

Leonid Lebedev,
Plaintiff-Respondent,

-against-

Leonard Blavatnik, et al.,
Defendants-Appellants.
_____x

Defendants appeal from the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered December 2, 2015, which, to the extent appealed from, denied defendants' motion to dismiss the first three causes of action in the amended complaint on statute of limitations grounds.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Stephen Broome, Richard I. Werder, Jr., David Elsberg and Ron Hazgiz of counsel), for Leonard Blavatnik, appellant.

White & Case LLP, New York (Paul B. Carberry, Owen C. Pell and Isaac S. Glassman of counsel), for Viktor Vekselberg, appellant.

Steptoe & Johnson LLP, New York (Michael C. Miller, Evan Glassman and Charles Michael of counsel), and Dewey Pegno & Kramarsky LLP, New York (Thomas E. L. Dewey, Keara Bergin and Tamara Bock of counsel), for respondent.

SAXE, J.

On this appeal, defendants challenge the denial of their CPLR 3211 motion insofar as it sought to dismiss plaintiff's first, second and third causes of action as barred by the statute of limitations. Since for purposes of this analysis we must accept as true the allegations of the complaint (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the factual assertions that follow are derived from the complaint.

In 1997, Russia privatized a state-owned oil and gas company, Tyumen Oil Company (TNK), and defendants led an investment group that successfully bid on a 40% share of TNK. As part of this arrangement, they were required to pay $25 million in cash and to acquire a production company related to TNK, Nizhnevartovskneftgaz OAO (NNG). Defendants approached plaintiff, who already indirectly owned 1.8% of TNK and 10.5% of NNG, and the parties agreed to create a joint venture that they would own in equal shares and through which they would obtain control of TNK. Pursuant to that agreement, plaintiff would provide $25 million in cash, as well as his equity interest in TNK and NNG, as well as expertise in operating an oil and gas company.

In 2001, the parties met in New York to formally document the terms of their joint venture, and created a written draft

investment agreement. The 2001 Agreement provided that plaintiff would own 15% of "the aggregate share of the Parties in the Oil Business," which was defined as the ownership position held by the parties' joint venture company, Oil and Gas Industrial Partners Ltd. (OGIP), in various affiliates of TNK. Plaintiff was also "entitled to receive 15% (fifteen percent) of the net income earned by OGIP."

While this written agreement was signed by plaintiff and defendant Viktor Vekselberg, defendant Leonard Blavatnik did not sign the agreement because he was unexpectedly called out of town. However, Vekselberg assured plaintiff that Blavatnik would honor the agreement, and plaintiff alleges that Blavatnik thereafter acted in accordance with the 2001 Agreement. One of those acts was to cause OGIP to issue a $200 million promissory note, as security for future dividend payments, to a company nominated by plaintiff; another was the payment in 2002 and 2003 of over $13 million in dividends on OGIP's behalf from a holding company owned by Blavatnik.

Sometime in 2002, defendants commenced negotiations with British Petroleum (BP) about a potential joint venture combining TNK's operations in Russia with that of BP. By early 2003, defendants announced a consortium with TNK's other owners, and declared their intent to enter into a joint venture agreement

between the consortium and BP (TNK-BP). Plaintiff was to have a 7.5% share of the consortium, and, since a memorandum of understanding established that the consortium and BP would each own half of the joint venture, plaintiff would own a 3.75% stake in this proposed TNK-BP joint venture.

After the memorandum of understanding was signed, defendants informed plaintiff that they had concealed his ownership interest in the consortium from BP, "out of concern that BP would refuse to proceed with a joint venture if [p]laintiff was identified as one of the partners."[1] At this point, they offered to buy out plaintiff's stake in the joint venture, which was independently valued at around $1.4-1.5 billion. However, according to plaintiff, defendants refused to pay him the value of his stake, and he refused defendants' initial offer, which was to pay him "cash equal to his share (7.5%) of the cash and stock BP had agreed to pay TNK's shareholders as part of the consideration to form the TNK-BP joint venture (equal roughly to $525 million), and provide a $100 million line of credit."

Ultimately, plaintiff says, rather than sell his stake in the joint venture outright, he agreed to conceal his ownership

[1] Specifically, defendants were concerned about negative press surrounding a criminal investigation into one of plaintiff's former business associates. Ultimately, plaintiff was cleared of any wrongdoing.

status in the joint venture and "forego his dividends, in exchange for payments reflecting his share of the BP 'additional consideration' to TNK's shareholders . . . and an additional amount in purported consideration for future dividends that [plaintiff] would otherwise have been entitled to receive from the joint venture." These terms were reflected in a draft "swap agreement" (the 2003 Agreement), not between plaintiff and defendants but between their nominees, namely, defendants' affiliate, Rochester Resources Ltd., and plaintiff's nominee, Coral Petroleum Ltd. Under this 2003 Agreement, Rochester Resources would issue a series of notes equaling $600 million to an escrow agent, and in exchange, Coral Petroleum would surrender the promissory note it had received pursuant to the 2001 Agreement. Pursuant to the 2003 Agreement, plaintiff remained silent about his ownership stake to avoid scuttling the BP deal.

In March 2013, a large Russian State-owned oil company — Rosneft — purchased the TNK-BP joint venture for a total of $55 billion in cash along with the transfer of 19.75% of Rosneft's stock to BP. As a result of the deal, defendants received payment of about $13.8 billion. Plaintiff expected to receive about $2 billion — i.e., 15% of defendants' proceeds from the Rosneft sale — but received nothing.

On October 13, 2014, plaintiff commenced this action,

asserting causes of action for breach of contract, breach of joint venture, and breach of fiduciary duty with respect to the 2001 Agreement or, in the alternative, fraud. He alleges that defendants breached the 2001 Agreement, the parties' joint venture, and their fiduciary duty by retaining all proceeds from the Rosneft sale. He also alleges that defendants breached their fiduciary duties by coercing him to designate a nominee under the 2003 Agreement, and by engaging in fraud. Plaintiff seeks to recover $2 billion, representing his percentage of the profits from the Rosneft sale.

In the portion of the order now challenged on appeal,[2] the motion court denied defendants' motion to dismiss plaintiff's causes of action for breach of their joint venture agreement and the 2001 Agreement, and for breach of defendants' fiduciary duty. It held that although there was no written investment agreement signed by both defendants — since Blavatnik never signed the 2001 Agreement — plaintiff sufficiently pleaded the existence of a valid oral agreement by alleging that the parties agreed to the central terms of the unsigned investment agreement. It further held that the oral agreement was not void under the statute of

[2] Plaintiff does not challenge the portion of the order dismissing plaintiff's fraud claim on the ground that it accrued in 2003.

frauds because it was capable of being performed within one year, and because the statute of frauds is generally inapplicable to joint ventures. It also rejected defendants' argument that plaintiff's breach of contract and breach of joint venture claims were time barred, reasoning that the claimed breach of the 2001 Agreement was defendants' failure to pay plaintiff his percentage share of the 2013 Rosneft sale proceeds.

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). To meet its burden, "the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1041 [2d Dept 2009]). The breach of contract and joint venture claims "accrue[] at the time of the breach," even in the event that the damages do not accrue until a later date (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). A breach of fiduciary duty claim accrues where the fiduciary openly repudiates his or her obligation — i.e., once damages are sustained (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]). The statute of limitations on a breach of contract or joint venture cause of action is six years

(*see* CPLR 213[2]; *Eskenazi v Schapiro*, 27 AD3d 312, 315 [1st Dept 2006]). The statute of limitations on a breach of fiduciary duty claim is three years where (as here) money damages are sought (*see IDT Corp.*, 12 NY3d at 139; *see also* CPLR 213[1], 214[4]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]).

This action was commenced within both limitations periods, because defendants "had a recurring obligation to pay plaintiff his . . . share of the profits generated by" the joint venture. (*Knobel v Shaw*, 90 AD3d 493, 494 [1st Dept 2011] [internal quotation marks omitted]; *see also Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611 [1979]). A new claim accrued when the obligation to do so was allegedly breached in 2013.

Defendants' reliance on *Welwart v Dataware Elecs. Corp.* (277 AD2d 372 [2d Dept 2000]) is misplaced. There, the basis of the plaintiff's claim was that the defendants had breached a 1981 agreement to issue to him shares of common stock in a closely-held corporation with which he was then employed; relatedly, he claimed a right to the dividends issued on those shares of stock that he said he had been promised. Thus, the right of the plaintiff in *Welwart* to claim payment of dividends was dependent on the issuance of shares of stock in his name, so it was the earlier failure to issue shares that constituted the accrual of the breach claim.

Here, in contrast, plaintiff's claimed rights to payment are not tied to or dependent on issuance of any physical document attesting to his investment in the venture; the damages as alleged are not, as defendants argue, the result of a failure to issue, in plaintiff's name, shares in the joint venture in 2001. His claimed right to payment from the proceeds of the 2013 sale is based on his investment and the resultant ownership interest, and that right to payment accrued at the time of the 2013 sale, not at the time plaintiff made his original investment.

Defendants remain free to attempt to establish that, as they claim, plaintiff does not possess the ownership interest or related rights he claims. But, the alleged investment agreement, and the ownership rights that it allegedly created, are not dependent as a matter of law on the issuance, or the failure to issue, a document establishing his ownership stake, as was the case in *Welwart*. The challenged claims relating to the sale to Rosneft accrued not in 2001, or 2003, but in 2013, and are therefore timely.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered December 2, 2015, which, to the

extent appealed from, denied defendants' motion to dismiss the first three causes of action in the amended complaint on statute of limitations grounds, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 4, 2016

CLERK