SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 2, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7177 The People of the State of New York, Respondent, Ind. 3537/09

-against-

Marcos Aguirre,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 19, 2010, convicting defendant, after a nonjury trial, of criminal possession of marijuana in the second degree, and sentencing him to five years' probation, unanimously affirmed.

We find the trial court properly denied defendant's CPL 330.30(3) motion to set aside the verdict based on newly discovered evidence.

Defendant was convicted of having possessed, in his apartment, more than one pound of marijuana. At trial, defendant

testified that he had no knowledge of the marijuana, but that the marijuana belonged to an individual to whom he had rented a bedroom in his apartment. In support of his CPL 330.30(3) motion, defendant submitted affidavits from five individuals, which, according to defendant, established that it was the subtenant who actually possessed the marijuana.

The trial court correctly ruled that two of these affidavits provided no support for the motion because defendant failed to establish that they constituted evidence "discovered since the trial" (CPL 330.30[3]; *see People v Wainright*, 285 AD2d 358, 360 [1st Dept 2001]). The court found that defendant provided no explanation as to why these two individuals who had been known by defendant for many years and according to defendant were aware he rented the room to the alleged subtenant, could not have, with due diligence, been called at trial.

The court also correctly ruled that the other three affidavits, which reported alleged posttrial admissions of guilt by the alleged subtenant, were hearsay and would have been inadmissible at a new trial. Defendant's argument that the inculpatory statements reported in these affidavits would have been admissible under the declarations against penal interest exception to the hearsay rule is unavailing, because defendant failed to demonstrate that the alleged subtenant would be

unavailable to testify at a new trial or if called to testify would invoke his Fifth Amendment privilege. Demonstration of unavailability is "a prerequisite to the admission of a declaration against penal interest" (*People v Sanchez*, 95 AD3d 241, 247 [1st Dept 2012], *affd* 21 NY3d 216 [2013]).

In light of the foregoing, we also conclude that defendant did not establish his entitlement to an evidentiary hearing on the motion (*see People v Samandarov*, 13 NY3d 433, 437-438 [2009]).

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7178 In re Elizabeth H. also known as Elizabeth S.,

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

Ylein S.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Emily Olshansky, J.), entered on or about May 23, 2017, which, inter alia, upon findings that respondent mother suffers from a mental illness and that she permanently neglected the subject child, terminated her parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness. . ., to provide proper and adequate

care" for her child (Social Services Law 384-b[4][c]; *see Matter of Thaddueus Jacob C. [Tanya K.M.]*, 104 AD3d 558 [1st Dept 2013]). Such evidence included a report and testimony from a court-appointed psychologist who, after examining the mother and reviewing medical and other records, opined that she suffers from bipolar disorder and alcohol use disorder and that, as a result, if the child were returned to her care, she would be at risk of becoming neglected (*see* Social Services Law § 384-b[6][a]; *Matter of Savannah Love Joy F. [Andrea D.]*, 110 AD3d 529 [1st Dept 2013], *lv denied* 22 NY3d 858 [2014]). The expert's opinion was based, among other things, on the mother's long history of mental illness, her noncompliance with psychiatric treatment, and the pervasive nature of her deficits (*see Matter of Brianna Monique F. [Monique F.]*, 129 AD3d 638 [1st Dept 2015]), and the mother did not offer evidence in rebuttal.

Furthermore, the finding of permanent neglect was supported by clear and convincing evidence. The record shows that the agency engaged in diligent efforts to encourage and strengthen the parental relationship by making necessary referrals to mental health services and drug treatment programs, as well as arranging consistent visitation, but the mother failed to take advantage of these referrals and programs, and failed to visit consistently with the child (*see e.g. Matter of Angelicah U. [Reggie U.]*, 155

AD3d 455 [1st Dept 2017], *lv denied* 31 NY3d 997 [2018]).

Contrary to the mother's argument, the court reasonably exercised it discretion in limiting cross-examination where her counsel was repeatedly warned of extensive, duplicative and generalized line of questions. The extensive record further shows that counsel was afforded a full and fair opportunity to cross-examine the agency's expert witness (*see Matter of Muldavin v Muldavin*, 248 AD2d 209 [1st Dept 1998]).

The mother's remaining arguments are unavailing.

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7179 Steve Fernandez, Index 21656/16E
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Respondent,

Eric J. Feliciano,
Defendant-Appellant.

_____

Keane & Bernheimer, PLLC, Valhalla (Connor Fallon of counsel), for appellant.

Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for Steve Fernandez, respondent.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for The City of New York, respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about June 9, 2017, which denied defendant Feliciano's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Plaintiff, a New York City police officer, alleges that he sustained serious injuries to his left foot and ankle as the result of a motor vehicle incident in which he was involved while on duty. Specifically, he testified that the police cruiser which he was driving was struck head-on by a vehicle driven by defendant Feliciano, an alleged drunk driver, as the latter was attempting to enter the Major Deegan Expressway. Plaintiff

further testified that another police car arrived shortly after, and, as he was attempting to enter that patrol cruiser in order to pursue defendant, the patrol car ran over his left foot, which sustained a fracture. Plaintiff commenced this action against the City and Feliciano, asserting a cause of action pursuant to General Municipal Law § 205-e.

Plaintiff does not dispute that, although he is suing under General Municipal Law § 205-e, he is required to demonstrate that he sustained a serious injury in order to recover against Feliciano "for personal injuries arising out of negligence in the use or operation of a motor vehicle" (Insurance Law § 5104[a]; *see Village of Suffern v Baels*, 215 AD2d 751, 752 [2d Dept 1995]). For purposes of his motion, defendant Feliciano does not dispute plaintiff's allegations that he violated statutes, including Vehicle & Traffic Law § 1129(a), and that plaintiff's foot fracture is a "serious injury" within the meaning of Insurance Law § 5102. However, Feliciano argues that plaintiff cannot recover against him because there is a lack of a causal relationship between the incident involving Feliciano's vehicle and plaintiff's serious injury.

In order to prevail on his General Municipal Law § 205-e claim, plaintiff is required to show that plaintiff's injuries were caused "directly or indirectly" by Feliciano's statutory

violation (General Municipal Law § 205-e[1]). Whereas "direct causation" requires that the defendant's conduct be a "substantial causative factor," an "'indirect cause' is simply a factor that - though not a primary cause - plays a part in producing the result" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 80 [2003]). Plaintiff's testimony that his injury occurred while he was acting as a police officer and chasing Feliciano, who had violated a traffic law, raises an issue of fact as to whether Feliciano indirectly caused plaintiff's injuries, which precludes summary judgment dismissing plaintiff's claims against him (*see Aldrich v Sampier* 2 AD3d 1101 [3d Dept 2003]; *see also Klein v Man Sui*, 132 AD3d 1358 [4th Dept 2015]).

We do not address whether plaintiff will be able to demonstrate proximate or direct causation, since that issue is not distinctly addressed by the parties on appeal.

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7180 Swig Equities, LLC, Index 152931/17
Plaintiff-Appellant,

-against-

Bernard M. Kruger, MD,
Defendant-Respondent,

John Does 1-10,
Defendants.

_____

Russ & Russ, P.C., Massapequa (Jay Edmond Russ of counsel), for appellant.

Bernard M. Kruger, respondent pro se.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered December 5, 2017, which, inter alia, granted defendant Bernard M. Kruger, MD's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff alleges that defendant converted certain photographs transferred to him by plaintiff's principal, Kent Swig, in 2011, two years after Swig defaulted on a short-term loan extended by plaintiff and plaintiff obtained a judgment against him. The factual allegation that defendant had orally promised to safeguard the photographs as a personal favor to Swig is inherently incredible in the face of the undisputed facts, and the motion court was not required to accept it (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]; *Herman v*

Greenberg, 221 AD2d 251 [1st Dept 1995]). The court reasonably accepted defendant's explanation for Swig's transfer of the photographs to him in 2011 that they constituted partial payment toward, or collateral for, the 2009 judgment. Accordingly, this action is barred by the Release and Indemnity executed by Swig on June 9, 2016, on behalf of plaintiff, in which Swig expressly released defendant from all claims arising out of or relating to any judgment between the parties (*see Long v O'Neill*, 126 AD3d 404, 406-407 [1st Dept 2015]).

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7181 The People of the State of New York, Respondent, Ind. 1775/14

-against-

Felicita Figueroa, Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Denise M. Fabiano of counsel), for appellant.

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered January 8, 2015, 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 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7182-
7182A Rosemarie A. Herman, etc., et al., Index 652700/12
654067/12
Plaintiffs-Appellants,

-against-

36 Gramercy Park Realty Associates, LLC, et al.,
Defendants-Respondents,

ABC Company #1, etc., et al.,
Defendants.

- - - - -

36 Gramercy Park Realty Associates, LLC, et al.,
Plaintiffs-Respondents,

-against-

Rosemarie A. Herman, etc.,
Defendant-Appellant.

_____

Jaspan Schlesinger LLP, Garden City (Steven Schlesinger of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for respondents.

_____

Judgments, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 1, 2018, which, insofar appealed from as limited by the briefs, granted judgment against plaintiffs in index no. 652700/12 and defendant in index no. 654067/12 (Rosemarie) in favor of defendants in index no. 652700/12 and plaintiffs in index no. 654067/12 (the Mann Parties) on Rosemarie's quiet title claim, unanimously affirmed, without

costs.

Even if Rosemarie's quiet title claim is not barred by election of remedies or collateral estoppel, it is barred by judicial estoppel. That doctrine "prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed" (*Becerril v City of N.Y. Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013], *lv denied* 23 NY3d 905 [2014]).

In a prior action against her brother, J. Maurice Herman (Maurice), Rosemarie took the position that he had sold her interests in five property-owning limited liability companies – including the LLC that owned the property located at 36 Gramercy Park East – to the Mann Parties in 2002; therefore, she demanded half of his profits from that transaction. The court in that action found that Maurice had sold the LLCs and required him to disgorge half of his profits (*see Herman v Herman*, 2017 NY Slip Op 31034[U], *6 & 11 [Sup Ct, NY County], *affd* 162 AD3d 459 [1st Dept 2018]). Thus, Rosemarie secured a ruling in her favor, based on her position that Maurice had sold her interests in the LLCs.

Now, in index no. 652700/12, Rosemarie seeks to quiet title to 36 Gramercy. To quiet title, she must "claim[] an estate or interest in real property" (RPAPL 1501[1]). However, if Rosemarie's interests in the property-owning LLCs were sold in 2002, she can no longer claim an interest in 36 Gramercy.

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7183- Index 650631/15
7184- Case 1314/18
7185 Brett Butler, et al., 1315/18
Plaintiffs-Respondents, 1316/18

-against-

Knights Collision Experts, Inc., et al.,
Defendants-Appellants.

_____

Margolin & Pierce, LLP, New York (Errol F. Margolin of counsel), for appellants.

Pedowitz & Meister, LLP, New York (Robert A. Meister of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered December 12, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for discovery sanctions to the extent of deeming all liability issues resolved in their favor, unanimously reversed, on the law and the facts, without costs, and the motion denied. Order, same court and Justice, entered January 9, 2018, which denied as academic defendants' motion for partial summary judgment, unanimously reversed, on the law, without costs, and the matter remanded to the motion court for a determination of the motion on the merits. Appeal from order, same court and Justice, entered February 7, 2018, which denied defendants' motion to renew, unanimously

dismissed, without costs, as academic.

Plaintiffs failed to establish that defendants' conduct during discovery was willful, contumacious or in bad faith (*see Lee v 13th St. Entertainment LLC*, 161 AD3d 631 [1st Dept 2018]; *Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999). At the time the motion was made, defendants were in violation of a single court order. Moreover, the court improvidently exercised its discretion in imposing the sanction nine months after plaintiffs brought their motion, when discovery had been completed and the note of issue filed.

In light of this determination, the denial of defendants' motion for summary judgment must be reversed and the motion remanded for a determination on the merits.

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7186 Nelson Narvaez, Index 301183/07
Plaintiff-Respondent,

-against-

Ricky Wadsworth, et al.,
Defendants,

Arai Helmet Americas, Inc.,
et al.,
Defendants-Appellants.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

The Adam Law Office, P.C., New York (Richard Adam of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about March 14, 2018, which, insofar as appealed from as limited by the briefs, denied defendants Arai Helmet Americas, Inc., Arai Helmet, Ltd., Inc. Arai Helmet Ltd., and Western Power Sports, Inc.'s (defendants) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff was injured in a motorcycle accident, in which the helmet he was wearing, allegedly manufactured and distributed by defendants, came loose from and failed to protect his head. The helmet's chin strap consisted of a long strap on one side of the helmet that was joined with a short strap on the other side. On

the short strap were two D-rings through which the long strap could be threaded. Above the D-rings was the receiving half of a snap fastener, which, together with the "mating" half on the long strap, could be used to fasten the long strap to the short strap. Plaintiff had attempted to secure the helmet to his head using only the snap fastener. The motion court correctly declined to dismiss his claims against defendants for strict products liability and negligence, based on theories of design defect and failure to warn, and breach of the implied warranties of fitness and merchantability.

The court providently exercised its discretion in considering plaintiff's untimely opposition to defendants' motion, since defendants were able to submit a reply, and their assertions of prejudice are vague and unpersuasive (*see Serradilla v Lords Corp.*, 117 AD3d 648, 649 [1st Dept 2014]).

The court correctly rejected defendants' contention that the danger of failing to secure the helmet with the D-rings was open and obvious as a matter of law and that therefore it did not render the helmet unfit for its intended use and they had no duty to warn of the danger or to design the helmet differently. That a danger is open and obvious does not preclude a design defect claim (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 384-385 [1976]). Defendants similarly failed to establish

that the design of the chin strap did not breach their warranties of fitness and merchantability (*see Denny v Ford Motor Co.*, 87 NY2d 248, 257-258 [1995]).

While there is no duty to warn of a hazard that is open and obvious and "readily apparent as a matter of common sense" (*Liriano v Hobart Corp.*, 92 NY2d 232, 242 [1998]), the record presents issues of fact as to whether the danger of failing to use the D-rings and using only the snap fastener to secure the helmet is open and obvious (*cf. Fisher v Flanigan*, 89 AD3d 1398, 1399-1400 [4th Dept 2011] [danger of standing and moving about in a moving motor home is open and obvious], *lv denied* 19 NY3d 803 [2012]; *Cwiklinski v Sears, Roebuck & Co., Inc.*, 70 AD3d 1477, 1479 [4th Dept 2010] [danger of placing hands near unguarded saw blade is open and obvious]; *Felle v W.W. Grainger, Inc.*, 302 AD2d 971, 972-973 [4th Dept 2003] [danger of placing face in close proximity to unguarded, rapidly rotating split or hinged sanding wheel is open and obvious]; *McMurry v Inmont Corp.*, 264 AD2d 470 [2d Dept 1999] [danger of placing hand near moving parts of industrial machine is open and obvious]; *Pigliavento v Tyler Equip. Corp.*, 248 AD2d 840, 842 [3d Dept 1998] [danger of falling from unguarded platform edge is open and obvious], *lv dismissed in part, denied in part* 92 NY2d 868 [1998]).

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

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7187-
7188 The People of the State of New York,
Respondent,

-against-

Daniel Giler,
Defendant-Appellant.

Ind. 1938/14
5598/14

_____

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

_____

Judgments, Supreme Court, New York County (Laura A. Ward, J.), rendered July 27, 2015, 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 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7189 The People of the State of New York, Ind. 1996/12
Respondent,

-against-

Patrick Sharper,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Mogulescu, J.), rendered January 25, 2016,

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.

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

ENTERED: OCTOBER 2, 2018

CLERK

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

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7190 Anthony T. Rinaldi, LLC doing business as The Rinaldi Group, LLC, Plaintiff-Respondent, Index 450691/16

-against-

Anchorage Construction Corp., et al., Defendants,

North American Specialty Insurance Company, Defendant-Appellant.

- - - - -

Red Apple 81 Fleet Place Development, LLC, Intervenor Plaintiff-Respondent.

_____

Gottesman, Wolgel, Flynn, Weinberg & Lee, P.C., New York (Lawrence L. Flynn of counsel), for appellant.

Baron Samson LLP, New York (Andrew Samson of counsel), for Anthony T. Rinaldi, LLC, respondent.

Greenberg Traurig, LLP, New York (Robert C. Epstein of counsel), for Red Apple 81 Fleet Place Development, LLC, respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about March 3, 2017, which, to the extent appealed as limited by the briefs, denied, with leave to renew upon completion of discovery, defendant-appellant North American Specialty Insurance Company's (NAS) motion for summary judgment dismissing the action against it as time-barred, or in the alternative, for dismissal of the action on the same ground pursuant to CPLR 3211(a)(1), (5) and (7), unanimously affirmed,

with costs.

In this action to collect on a surety bond posted by a subcontractor that defaulted on its performance, evidence submitted by plaintiff general contractor and intervenor project owner in the form of affidavits from individuals having personal knowledge of specific conversations with NAS representatives regarding - NAS's alleged desire to avoid litigation threatened by plaintiff on account of, inter alia, alleged delays by NAS in investigating the bond claim; that NAS agreed to move quickly on such claim provided plaintiff supplied additional requested documentation; and that NAS would also forego enforcement of the bond's contractual one-year limitations period, which was soon to expire, provided plaintiff and the intervenor continued to cooperate in the ongoing investigation - afforded sufficient evidence at this pre-discovery stage to find that plaintiff's waiver and estoppel defenses precluded a grant of summary judgment to NAS on the basis of the expired contractual

limitations period (*see generally Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443 [1958]).

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

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7191-
7192 In re Jamya C., and Another,

Dependent Children Under the Age of Eighteen Years, etc.

Jermaine F.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for respondent.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about September 14, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 18, 2017, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). There was testimony from the mother that the father had engaged

in domestic violence against her in the presence of the children, outside their school, thus subjecting the children to actual or imminent danger of injury or impairment to their emotional and mental condition (*see Matter of Serenity H. [Tasha S.]*, 132 AD3d 508 [1st Dept 2015]*; Matter of Madison M. [Nathan M.]*, 123 AD3d 616 [1st Dept 2014]). There exists no basis to disturb the court's evaluation of the evidence, including its credibility determinations (*see Matter of Irene O.*, 38 NY2d 776 [1975]; *Matter of Moises G. [Luis G.]*, 135 AD3d 527 [1st Dept 2016]).

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

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7194 The People of the State of New York, Respondent, Ind. 6688/93 SCI 4272/95

-against-

Adolf Gutt, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 19, 2016, resentencing defendant, as a second violent felony offender, to a term of 5 to 10 years, on a conviction of attempted first-degree criminal use of a firearm, but not on a conviction of second-degree manslaughter, unanimously affirmed.

In June 1995, defendant was convicted, upon his pleas of guilty, of second-degree manslaughter under an indictment, and attempted first-degree criminal use of a firearm under a superior court information. He was sentenced, as a second felony offender, to concurrent terms of 5 to 10 years. However, he should have been adjudicated a second violent felony offender on the firearm use conviction (a violent felony), because the predicate felony offense was also a violent felony.

In 2016, defendant (who has since become a persistent violent felony offender), made a CPL 440.20 motion to vacate his 1995 sentences. The People responded by agreeing to vacatur of the firearm use sentence, and resentencing as a second violent felony offender. The court resentenced defendant accordingly, and, without any objection from defense counsel, it left the manslaughter sentence intact.

On the manslaughter conviction, defendant was not a second violent offender, because second-degree manslaughter is not a violent felony. Accordingly, there was nothing illegal about his sentence as a second felony offender. Nevertheless, defendant now argues that the manslaughter sentence should likewise be vacated as "part and parcel" of a defective plea bargain arrangement.

Defendant's sentence of 5 to 10 years on the manslaughter conviction was permissible regardless of whether he was sentenced as a second felony offender or as a second violent felony offender. The only error in sentencing was on the firearm use conviction. Moreover, this was an error in defendant's favor, in that his predicate felony adjudication was less serious than the one he should have received. Accordingly, defendant was not adversely affected by any error in sentencing. We therefore lack

jurisdiction to hear his present arguments (*see* CPL 470.15[1]; *People v McNeil*, ___ AD3d ___, 2018 NY Slip Op 05970 [1st Dept 2018]; *People v Francis*, ___ AD3d ___, 2018 NY Slip Op 05971 [1st Dept 2018]).

We have considered all other issues raised and find them unavailing.

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7195 The People of the State of New York, SCI 1766/16
Respondent,

-against-

Zaquyon Combs,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven Hornstein, J. at plea and sentence), rendered July 18, 2016, unanimously affirmed.

Although we find that defendant did not make 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 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7196 The People of the State of New York, Ind. 1104/13
Respondent,

-against-

Richard Lorenzo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Dominic Massaro, J.), rendered April 21, 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.

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

ENTERED: OCTOBER 2, 2018

CLERK

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

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7197 The People of the State of New York, Respondent, Ind. 4066N/16

-against-

Iman Sharif, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Kevin McGrath, J.), rendered December 8, 2016, 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 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7198 The People of the State of New York, Respondent, Ind. 2735/13

-against-

Jose Fernandez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered December 20, 2013, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 2, 2018

CLERK

Manzanet-Daniels, J.P., Tom, Webber, Oing, JJ.

7199N Hyuncheol Hwang, Index 652288/17
Plaintiff-Respondent, Case 1020/18

-against-

Mirae Asset Securities (USA) Inc.
(formerly known as Daewoo Securities
[America] Inc.), et al.,
Defendants-Appellants.

_____

Barton LLP, New York (Randall L. Rasey of counsel), for appellants.

Law Office of Ethan A. Brecher, LLC, New York (Ethan A. Brecher of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 1, 2018, which granted plaintiff's motion to stay arbitration, and denied defendant Mirae Asset Securities (USA) Inc.'s cross motion to compel arbitration, unanimously reversed, on the law, without costs, the motion to stay arbitration denied, and the motion to compel arbitration granted.

After he and defendant Mirae Asset Securities (USA) Inc. had entered into an employment agreement which contained a forum selection clause, plaintiff executed a "Uniform Application for Securities Industry Registration or Transfer" (Form U-4), which contains an arbitration provision. We find that the Form U-4 supersedes the employment agreement and therefore that the parties' dispute must be arbitrated.

This dispute is governed by state contract law principles (*see Credit Suisse First Boston Corp. v Pitofsky*, 4 NY3d 149, 158 n 2 [2005]). The first principle is that "a subsequent contract regarding the same matter will supersede the prior contract" (*see Applied Energetics, Inc. v NewOak Capital Mkts., LLC*, 645 F3d 522, 526 [2d Cir 2011]). The determination whether a subsequent agreement is superseding is fact-driven (*see Blumenfeld Dev. Group, Ltd v Forest City Ratner Cos., LLC*, 50 Misc 3d 1221[A], 2016 NY Slip Op 50188[U], *6 [Sup Ct, Nassau County 2016], analyzing cases). Plaintiff's execution of a valid U-4 Form constituted an agreement to limit his contractual remedies when he signed the U-4 Form (*see Kanuth v Prescott, Ball & Turben, Inc.*, 1988 WL 90392, *3 [D DC 1988]). The U-4 Form encompasses the same employment-related disputes as were addressed in the employment agreement. Thus, the forum selection clause was

effectively extinguished (*see Globe Food Servs. Corp. v Consolidated Edison Co. of N.Y.*, 184 AD2d 278, 279 [1st Dept 1992]).

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7200 The People of the State of New York, Respondent,

-against-

Joel Lucca, Defendant-Appellant.

Ind. 1600/13

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

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

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered April 19, 2016, convicting defendant, after a jury trial, of five counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

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 challenges in question, which were based on concerns that the panelists might have unfavorable attitudes toward law enforcement, were not pretextual. This finding is entitled to great deference (*see People v Hecker*, 15 NY3d 625, 656-657 [2010]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500

US 352 [1991]). Defendant failed to preserve his claim of disparate treatment by the prosecutor of similarly situated panelists (*see People v Cunningham*, 21 AD3d 746, 748-749 [1st Dept 2005], *lv dismissed* 6 NY3d 775 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find that it is not supported by the record.

Defendant did not preserve his claim that counterfeit spectator tickets fall outside the scope of Penal Law 170.10(1), and we decline to review it in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7201 Laura Lemle, Index 652579/17
Plaintiff-Respondent,

-against-

Regen, Benz & MacKenzie,
C.P.A's, P.C., et al.,
Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Peter J. Larkin of counsel), for appellants.

Herrick Feinstein LLP, New York (Ross L. Hirsch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 4, 2017, which denied defendants' motion to dismiss the complaint as time-barred, unanimously affirmed, with costs.

Plaintiff brought this action in May 2017, alleging accounting malpractice in connection with defendants' preparation of her personal income tax returns for 2012. Her claim accrued in October 2013, when she filed the tax returns (*see Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]; CPLR 214). However, because the statute of limitations was tolled pursuant to the continuous representation doctrine, the claim is not time-barred (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1 [2007]).

On plaintiff's 2012 tax returns, defendants characterized a

certain set of transactions relating to interests in real estate as a "sale." In December 2015 (within the statutory limitations period), plaintiff received a letter from the New York State Department of Taxation and Finance (DTF) informing her that her 2013 tax return, also prepared by defendants, was going to be audited, and seeking an explanation of why she continued to claim expenses incurred in connection with the real estate that her 2012 return listed as "sold." Plaintiff forwarded the letter to defendants, and defendants prepared and submitted a response to DTF. Ultimately, DTF assessed millions of dollars in additional taxes against plaintiff as a result of the 2012 characterization.

Without any new engagement by plaintiff, defendants undertook to respond to DTF's audit letter, defending or at least explaining the treatment given the properties on the 2012 return. This service is sufficiently related to the specific subject matter of the alleged malpractice – the characterization of the transaction as a sale in 2012 – to support application of the continuous representation doctrine (*compare Ackerman v Price Waterhouse*, 252 AD2d 179, 205 [1st Dept 1998] [defendants' defense of repeated use of improper accounting method in subsequent audit supported application of continuous representation doctrine], *with Williamson*, 9 NY3d at 10-11 [no continuous representation where defendants never engaged in

corrective or remedial services in connection with particular problems that gave rise to malpractice claims]). By contrast, the otherwise broad and continuous range of services that defendants provided to plaintiff over the years that did not concern the specific subject matter of the alleged malpractice is insufficient to support application of the doctrine.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7202 In re N.D., and Others,

Children Under the Age of Eighteen Years, etc.,

G.D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children N.D., A.D. and G.D.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counel), attorney for the children R.D, A.D. and G.D.

_____

Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about August 2, 2017, to the extent it brings up for review a fact-finding determination, after a hearing, that respondent sexually abused the child R. D. and derivatively neglected the other subject children, unanimously affirmed, without costs.

The determination that respondent sexually abused the child R. is supported by a preponderance of the evidence (*see* Family

Court Act 1046[b][i]; 1012[e][iii][A]; *Matter of Marelyn Dalys C.-G. [Marcial C.]*, 113 AD3d 569 [1st Dept 2014]). R.'s testimony at the fact-finding hearing is competent evidence that respondent sexually abused her (*Marelyn Dalys C.-G.*, 113 AD3d 569). The court found R. credible despite peripheral inconsistencies in her testimony, and we see no reason to disturb that finding. Moreover, the caseworker testified that R.'s accounts of the sexual abuse were consistent (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]).

The determination that, by sexually abusing R., respondent derivatively neglected the other children is supported by a preponderance of the evidence, which demonstrates that respondent's understanding of his parental obligations is so defective as to create a substantial risk of harm to any child in his care (*see Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556 [1st Dept 2012]; *Ashley M.V.*, 106 AD3d at 660).

Respondent argues that he was denied a fair trial because the court improperly restricted his testimony about prior Family Court matters, including a custody case that he claims motivated the allegations of sexual abuse. However, the record shows that the court fully considered the information to which respondent refers, and declined to credit his argument. We find that the

court's evidentiary rulings were provident exercises of discretion (*see People v Carroll*, 95 NY2d 375, 385 [2000]).

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

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7203 In re 92 Cooper Assoc., LLC, Index 570427/17
Petitioner-Respondent-Appellant, 66968/14

-against

Peggy Roughton-Hester also known as Peggy Maloof,
Respondent-Appellant-Respondent.

_____

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (William Gribben of counsel), for appellant-respondent.

Sperber Denenberg & Kahan, PC, New York (Eric Kahan of counsel), for respondent-appellant.

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Order of the Appellate Term of the Supreme Court, First Department, entered December 4, 2017, which reversed a judgment of the Civil Court, New York County (Jean Schneider, J.), entered on or about November 7, 2016, after a nonjury trial, awarding possession of the subject rent-stabilized apartment to petitioner landlord in this nonprimary residence holdover proceeding, and directed a new trial, unanimously reversed, on the law, without costs and the judgment of possession awarded in favor of petitioner landlord reinstated. The clerk is directed to enter judgment accordingly.

The trial court's determination that respondent did not utilize the subject apartment as a primary residence was based on a fair interpretation of the evidence, including respondent's

testimony that she spent only 139 and 161 days in the apartment in 2012 and 2013, respectively, and used a Pennsylvania address on her tax returns and voter registration records. Although other records listed the apartment as respondent's address, the trial court properly concluded that she did not maintain a substantial physical nexus with the apartment during the relevant period. Since the trial court's findings were supported by a fair interpretation of the evidence, Appellate Term and this Court may not substitute their own views of the trial evidence (*see 409-411 Sixth St., LLC v Mogi*, 22 NY3d 875 [2013]; *Matter of Houston St. Mgt. Co. v La Croix*, 158 AD3d 554 [1st Dept 2018]; *Matter of 135 W. 13 LLC v Stollerman*, 151 AD3d 598 [1st Dept 2017]).

In the context of a housing dispute over a tenant's statutory rights of occupancy, no single factor "shall be" dispositive of the issue of primary residence, including the place of residence identified on a tax return (9 NYCRR 2520.6[u][1]). It is but one factor to be considered in resolving the dispute and determining that issue (*Matter of Brookford, LLC v New York State Div. of Hous. & Community Renewal*, – NY3d – [2018], 2018 NY Slip Op 04381; *compare Mahoney-Buntzman v Buntzman*, 12 NY3d 415 [2009])

Notwithstanding the trial court's use of the word

"dispositive" in its decision, it is evident from the four corners of the trial court's order that respondent's tax returns and voter registration records were not, in fact, the sole factors it considered in deciding that respondent does not maintain the apartment as her primary residence.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7204 The People of the State of New York, Respondent, Ind. 2243/13

-against-

Gabriel Santiago, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Benjamin S. Beller of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered January 28, 2015, as amended February 17, 2015, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony offense, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). During a lawful traffic stop, the police saw defendant place in his waistband a clear sandwich bag containing four smaller plastic bags of a white substance. Based on his training and experience, an officer reasonably believed that the four smaller

bags contained cocaine. At this point, the officers had probable cause to arrest defendant. Bags of white powder have long been recognized as indicative of the presence of drugs (*see e.g. People v Ricciardi*, 149 AD2d 742 [2d Dept 1989]), and the fact that some white powdery substances are legal does not undermine probable cause (*see generally Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]).

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7205-
7205A The People of the State of New York,
Respondent,

Ind. 4900/13
SCI 4686/13

-against-

Kim Dollar,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

_____

Judgments, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered June 9, 2016, convicting defendant, upon her pleas of guilty, of criminal possession of stolen property in the fourth degree and grand larceny in the fourth degree, and sentencing her to consecutive terms of two to four years, unanimously modified, as a matter of discretion in the interest

of justice, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7206 Dana Nahigian, Index 805122/12
Plaintiff-Appellant,

-against-

Michael G. Kaplitt, et al.,
Defendants-Respondents.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Aaronson, Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered July 6, 2017, which, in this medical malpractice action, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by submitting, inter alia, an affidavit from a board certified neurosurgeon who opined that defendant Kaplitt was not negligent in the performing of spinal surgery on plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff's expert, who opined, without further explanation, that the procedure should have been performed via laminectomy, rather than laminotomy, failed to rebut this showing (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Foster-Sturrup v Long*, 95 AD3d 726 [1st Dept 2012]). Furthermore, the statements of

plaintiff's expert with respect to causation, which were without reference to specific facts in the record, and contradicted by plaintiff's medical records, amounted to conjecture (*see Callistro v Bebbington*, 94 AD3d 408, 410-411 [1st Dept 2012], *affd* 20 NY3d 945 [2012]).

Dismissal of the complaint as against defendant hospital is further warranted because Kaplitt was not an employee of the hospital and was retained by plaintiff herself (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Pratt v Haber*, 105 AD3d 429 [1st Dept 2013].

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7207 JFURTI, LLC, Index 653823/16
Plaintiff-Appellant,

-against-

First Capital Real Estate Advisors, L.P., et al.,
Defendants-Respondents.

_____

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., New York (Narges M. Kakalia of counsel), for appellant.

Sher Tremonte LLP, New York (Erica A. Wolff of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 9, 2016, which denied plaintiff's motion for summary judgment in lieu of complaint with respect to a settlement agreement and a guaranty, and granted defendants summary judgment dismissing plaintiff's claim, unanimously modified, on the law, to reinstate plaintiff's claim, convert it to an action on summons and complaint, grant partial summary judgment on the issue of defendants' liability for failure to make an indemnification payment required by the settlement agreement and default on the note secured by the guaranty, and the matter remanded for further proceedings as to damages and otherwise affirmed, without costs.

Pursuant to a settlement agreement dated June 2, 2016,

defendants agreed, among other things, to indemnify plaintiff and its principal, Jacob Frydman, for a judgment of about $1.3 million that had been entered against Frydman in another action (*see 8430984 Canada, Inc. v United Realty Advisors*, 148 AD3d 428 [1st Dept 2017] [the Canada Judgment]). The indemnity provided that defendants and others would reimburse plaintiff and Frydman for any sums paid "against, in reduction of, to acquire or otherwise with the respect to the Canada Judgment, whether voluntarily or involuntarily, whether as payment of, reduction of, satisfaction of, by execution, by purchase of, or otherwise with respect to, the Canada Judgment" and for all "reasonable costs incurred . . . in connection with the Canada Judgment" within thirty days of a demand, time being of the essence.

Contemporaneously with execution of the settlement agreement, a First Capital entity related to defendants executed a note in favor of plaintiff in the amount of approximately $16 million, and defendants executed a guaranty of the note. The note provides that any failure to make an indemnification payment required by the settlement agreement would constitute an event of default under the note, permitting acceleration of the note and imposition of a penalty interest rate.

When Frydman appealed from the Canada Judgment, JFURTI posted a cash bond in the full amount of the judgment to stay

execution pending appeal. On the same day, JFURTI demanded that defendants indemnify it for the amount of the bond posted and legal fees paid in connection with the appeal from the judgment. Defendants indemnified plaintiff for the amount of its legal fees, but took the position that the cash bond was not a payment to the judgment creditor that triggered their indemnification obligations.

Thereafter, plaintiff commenced two actions pursuant to CPLR 3213, seeking summary judgment on the settlement agreement and on defendants' guaranty of the note. The motion court found that plaintiff was not entitled to summary judgment under the language of the indemnification provision of the settlement agreement, and dismissed both actions.

Contrary to defendants' position, we find that the broad indemnification provision unambiguously applied and required them to indemnify JFURTI for the cost of the bond posted in connection with the Canada Judgment. It is well-settled that "'[w]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations'" (*112 W. 34th St. Assoc., LLC v 112-1400 Trade Props. LLC*, 95 AD3d 529, 531 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]). Courts may not

excise terms, nor distort the ordinary meaning of those used (*see Ashwood Capital Inc. v OTG Mgt, Inc.*, 99 AD3d 1, 8 [1st Dept 2012]; *Lend Lease US Constr. LMB. Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56-57 [1st Dept 2015], *affd* 28 NY3d 675 [2017]). "That one party to the agreement may attach a particular, subjective meaning to a term that differs from the term's plain meaning does not render the term ambiguous" (*id.* at 56).

Applying these well-settled rules of construction, the indemnity, by its plain meaning, provides that all sums "otherwise" not itemized that are paid by JFURTI in connection with the Canada Judgment, as well as "all costs" paid in connection with the Canada Judgment, are covered by the indemnity. The cash undertaking was an amount "otherwise" paid by JFURTI in connection with the Canada Judgment and a cost incurred in connection with that Judgment, and therefore triggered defendants' indemnification obligation. Having admittedly failed to reimburse plaintiff for posting of the $1.3 million undertaking within thirty days of its demand, an event of default occurred within the meaning of the note, triggering the guaranty.

On the issue of the applicability of CPLR 3213, the documents herein are not "instruments for the payment of money only," as contemplated by the statute, because they contain

obligations beyond just the payment of money and require that payment be made in the future for an unidentified amount (*see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). Moreover, the guaranty does not qualify because it is a guaranty for both payments and performance (*Dresdner Bank AG. [N.Y. Branch] v Morse/Diesel, Inc.*, 115 AD2d 64, 68 [1st Dept 1986]). However, when a "plaintiff has mistaken his remedy and CPLR 3213 is in fact not available, the action typically should not be dismissed but simply converted to ordinary form as the statute provides," unless the court orders otherwise (*Weissman*, 88 NY2d at 445; CPLR 3213). If the claims can be decided on the merits, the court can grant summary judgment accordingly (*id.* at 445).

Accordingly, we grant summary judgment in plaintiff's favor to the extent indicated, and the matter is remanded for further proceedings concerning the amount of damages incurred in connection with the failure to indemnify and the amount due

pursuant to the guaranty of the note.

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

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7208 Alan Newton, Claim 115443
Claimant-Appellant-Respondent,

-against-

The State of New York,
Defendant-Respondent-Appellant.

_____

Law Office of John F. Schutty, P.C., New York (John F. Schutty of counsel), for appellant-respondent.

Barbara D. Underwood, Attorney General, New York (Mark S. Grube of counsel), for respondent-appellant.

_____

Judgment, Court of Claims (David A. Weinstein, J.), entered on or about December 20, 2017, and bringing up for review an order, same court and judge, entered December 11, 2017, which, after a nonjury trial on damages pursuant to Court of Claims Act § 8-b, awarded claimant $1.2 million for past pain and suffering and $250,000 for lost future earnings, unanimously modified, on the law, to award plaintiff $104,000 for future medical expenses and to remand the matter for a determination on the issue of damages for plaintiff's post-incarceration pain and suffering, and otherwise affirmed, without costs.

At the outset, we note that as defendant appealed not from the judgment, but from the December 11, 2017 order, we deem the appeal from the order to be an appeal from the judgment (*see* CPLR 5520[c]). Claimant was convicted in two separate prosecutions

within a two-week period in 1985 for which he received consecutive sentences. He was exonerated of the second conviction in 2006 after completing the first sentence and 12 years of the second. He prevailed in a federal 42 USC § 1983 action against New York City based on its delay of 12 years in providing the DNA evidence that exonerated him; he subsequently brought this action against the State to recover damages for unjust conviction and incarceration.

Contrary to the State's contention, the damages sought by claimant in this action are not duplicative of the jury award obtained in the federal court action. The damages sought here are distinct from those recovered in the prior action, which were limited to past pain and suffering for the last 12 years of the wrongful incarceration (*cf. Carter v State of New York*, 154 AD2d 642 [2d Dept 1989]).

Claimant has demonstrated entitlement to damages for his post-incarceration and future pain and suffering, including psychological injuries. The testimony of claimant's psychiatrist sufficiently showed that the psychological injuries could be attributed, in part, to the extended incarceration on the present conviction beyond the six-year term that he had served immediately prior on another unrelated conviction. Also, we find it difficult to believe that claimant's psychological injuries

all resulted from the first six years, especially where he had been incarcerated a total of twenty-two years. Further, the State has not submitted any proof confining the cause of claimant's symptoms to the first six years.

Claimant relies on *Gristwood v State of New York* (39 Misc 3d 1226[A] [Ct Cl 2013], *affd* 119 AD3d 1414 [4th Dept 2014]) in seeking $1.92 million for post-incarceration and future pain and suffering. However, *Gristwood* involves only one term of incarceration, and is also factually dissimilar in other respects. As *Gristwood* is not a comparable case for purposes of determining post-incarceration and future pain and suffering, and a fair compensation could not be determined from the present record, we remand the matter for a determination of an apt award for such damages. Nevertheless, given the undisputed fact that claimant suffers from psychological injuries, we award claimant future medical expenses of $104,000, the anticipated expenses projected by his psychiatrist for future psychotherapeutic counseling (*see Gristwood*, 39 Misc 3d 1226[A]).

Claimant failed to prove lost earnings by a "reasonable certainty" (*Man-Kit Lei v City Univ. of N.Y.*, 33 AD3d 467, 468 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007]), as his experts' analyses were based on assumptions unsupported by the record. Further, the testimony of claimant's vocational rehabilitation

expert that the prior conviction would have no effect on claimant's employability is incredible, as well as inconsistent with his conclusion that the present wrongful conviction affected his employability. However, in light of the concession of the State's economist that claimant would have sustained $250,000 in lost earnings if he completed an associate's degree before his release on the other conviction, which had in fact come to pass, we find the award proper.

Claimant contends that the testimony of the State's economist is inadmissible because the methodology he used to arrive at the "theory" that the prior conviction reduced claimant's employability and earnings capacity has not been shown to be generally accepted in the relevant community under *Frye v United States* (293 F 1013 [1926]). This argument is unpreserved (*see Matter of State of New York v David S.*, 136 AD3d 445, 446 [1st Dept 2016]). In any event, a *Frye* analysis is inapplicable because the theory is not "scientific" (*see People v Brooks*, 31 NY3d 939, 941 [2018]; *Wahl v American Honda Motor Co.*, 181 Misc 2d 396, 398-399 [Sup Ct, Suffolk County 1999]). Further, even if it is scientific, the challenge against it does not implicate a *Frye* analysis, but rather, "the admissibility question applied to all evidence — whether there is a proper foundation — to determine whether the accepted methods were appropriately

employed in a particular case" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]).

The $1.2 million award for past pain and suffering does not deviate materially from what would be reasonable compensation (*see Gristwood*, 119 AD3d 1414; *Gonzalez v State* of New York, 26 Misc 3d 1212[A] [Ct Cl 2009]).

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7209 The People of the State of New York, Respondent, Ind. 5269/13

-against-

Jeffrey Boateng, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered July 8, 2014, as amended July 21, 2018, convicting defendant, after a jury trial, of petit larceny, and sentencing him to a term of one year, unanimously affirmed.

The court providently exercised its discretion in declining to impose any sanction for the People's loss of a recording of a 911 call. The record supports the court's finding that the recording was not *Rosario* material (*see* CPL 240.45; *People v Rosario*, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]), because it was "made by an unknown non-witness on behalf of the non-English-speaking complainant" and "the record does not support defendant's contention that the unknown non-witness was actually translating the complainant's words" (*People v Pabon*, 213 AD2d 289 [1st Dept 1995], *lv denied* 86 NY2d 739 [1995]). In

any event, even if the recording could be viewed as *Rosario* material, there was no ground for a sanction, because the loss was inadvertent and defendant made no showing of prejudice, in light of the availability of the Sprint report (*see e.g. People v Diaz*, 47 AD3d 500, 500-01 [1st Dept 2008], *lv denied* 10 NY3d 861 [2008]).

The court also providently exercised its discretion in precluding defendant from eliciting his hearsay postarrest statement. Defendant's door-opening theories of admissibility are unpersuasive (*see People v Massie*, 2 NY3d 179, 180-81 [2004]. Defendant did not establish a need to correct any allegedly misleading impression by eliciting hearsay, rather than by cross-examining the People's witnesses or otherwise relying on admissible evidence.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7210 The People of the State of New York, Ind. 2477/12
Respondent,

-against-

Jahson Holmes,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered May 3, 2013,

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

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

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

ENTERED: OCTOBER 2, 2018

CLERK

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

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7211 In re George A.,
Petitioner-Respondent,

-against-

Josephine D.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Jennifer Burtt, Referee), entered on or about June 9, 2017, which awarded petitioner father sole physical and legal custody of the subject children, and modified a prior visitation order by limiting respondent mother's access to monthly supervised visitation and monthly telephone calls, unanimously affirmed, without costs.

Family Court Act § 1046(a)(iv) permits a child's out-of-court statements regarding abuse or neglect to be admissible as evidence in a custody and visitation proceeding if properly corroborated (*see Matter of Mildred S.G v Mark G.*, 62 AD3d 460, 462 [1st Dept 2009]). Family Court has "considerable discretion" to determine whether a child's out-of-court statements describing neglect have been corroborated (*Matter of Christina F.*, 74 NY2d

532, 536 [1989]). Here, the children's in camera interviews corroborated the father's testimony, cross-corroborated each other's statements regarding the mother's emotional and physical mistreatment, and revealed the children's preferences for custody and visitation. Contrary to the mother's contentions, the children's in camera statements were properly obtained in a confidential setting, at which only their attorney was present, without implicating the mother's due process rights (*see Matter of Heasley v Morse*, 144 AD3d 1405, 1407-1408 [3d Dept 2016]; *see generally Matter of Lincoln v Lincoln*, 24 NY2d 270, 271-272 [1969]).

The Family Court's determination to limit the mother's access to supervised visitation has a sound basis in the record, and we accord great deference to the referee's finding that the mother was not credible (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). In addition to evidence that the mother blatantly violated the prior order of visitation and subjected the children to badgering, threats, and other emotional and physical maltreatment during unsupervised visitation, the Family Court properly gave weight to the desire of the children - at the time 11 and 15 years old - to reside with the father, and only have minimal supervised visits and telephone contact with the mother (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept

2014]).

We have considered the remaining arguments, including the mother's claim that she had ineffective assistance of counsel, and find them unavailing.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7213 1625 Market Corp., Index 650016/14
Plaintiff-Respondent,

-against-

49 Farm Market, Inc.,
Defendant-Appellant.

_____

Matthew Jeon, P.C., New York (Matthew Jeon of counsel), for appellant.

Cole Schotz P.C., New York (Eric S. Latzer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 28, 2016, which, to the extent appealed from as limited by the briefs, denied defendant's motion pursuant to CPLR 5015(a)(1) to vacate an order entered on default, unanimously affirmed, without costs.

Defendant failed to demonstrate a meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). The record establishes that defendant elected not to perform under the parties' agreement in advance of the closing date, regardless of whether plaintiff would fulfill its contractual obligations prior to closing.

Defendant's anticipatory repudiation defense is unsupported by proof of a definite and final communication by plaintiff of its intention not to perform (*see Jacobs Private Equity, LLC v*

450 Park LLC, 22 AD3d 347 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006]).

Defendant's argument, raised for the first time on appeal, that plaintiff's counsel violated Rules of Professional Conduct (22 NYCRR 1200.0) rule 4.2(a) ("Communication with person represented by counsel") does not pose a pure question of law, and will not be considered (*see Gonzalez v New York City Health & Hosps. Corp.*, 29 AD3d 369, 370 [1st Dept 2006]).

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 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7214 The People of the State of New York, Ind. 1693N/16
Respondent,

-against-

Juan Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered February 21, 2017, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to five years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to three years' probation, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7215 The People of the State of New York, Respondent,

SCI 3532/14

-against-

John White,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert Mandelbaum, J. at plea; Larry R.C. Stephen, J. at sentencing), entered February 19, 2015, convicting defendant, upon his plea of guilty, of criminal mischief in the third degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses review of his claims relating to the court's imposition of a jail sentence after he violated the terms of his plea agreement. The combination of the court's oral colloquy with defendant concerning the waiver and the thorough written waiver that defendant signed after consulting with his attorney met or exceeded the requirements for a valid waiver (*see People v Bryant*, 28 NY3d 1094 [2016]). We have considered and rejected defendant's remaining arguments concerning the waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, and regardless of whether the waiver applied to postplea sentencing enhancement issues, we find that, after sufficient inquiry, the court properly determined that defendant had violated his plea agreement and had thus forfeited the opportunity for a more lenient disposition (*see People v Valencia*, 3 NY3d 714 [2004]).

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7218 The People of the State of New York, Respondent, Ind. 248/16

-against-

Andre Cruz, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 19, 2016, 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 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7220 The People of the State of New York, Respondent, Ind. 1211/14

-against-

Wamisho D., Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 7, 2016, 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 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7221-
7222N Farah A. Thompkins,
Plaintiff-Appellant,

-against-

Belkis V. Ortiz,
Defendant-Respondent.

Index 16188/06

Sheryl R. Menkes, New York, for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about June 23, 2017, which denied plaintiff's motion to restore the case to the trial calendar, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered on or about August 30, 2017, which denied plaintiff's motion for leave to renew and reargue, unanimously dismissed, without costs, as academic.

Plaintiff challenges the applicability of CPLR 3404, on which the motion court apparently relied in denying her motion to restore the case to the calendar, for the first time on appeal. Since it is a legal argument that appears on the face of the record and could not have been avoided if brought to defendant's attention at the proper juncture, we will review it (*see Chateau*

d'If Corp. v City of New York, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

The order that marked the case off the calendar directed plaintiff to provide additional discovery. It thus effectively vacated the note of issue and returned the case to pre-note of issue status (*see Matos v City of New York*, 154 AD3d 532 [1st Dept 2017]). As CPLR 3404 does not apply to cases in which either no note of issue has been filed or the note of issue has been vacated (*Turner v City of New York*, 147 AD3d 597 [1st Dept 2017]), it does not apply to this case.

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

ENTERED: OCTOBER 2, 2018

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7223 In re Damen Everett, Ind. 2364/16
[M-2458] Petitioner, OP 151/18

-against-

Hon. Armando Montano, JSC,
etc., et al.,
Respondents.

_____

Damen Everett, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Angel M. Guardiola, II of counsel), for Hon. Armando Montano, respondent.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for District Attorney, respondent.

_____

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

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

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

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

ENTERED: OCTOBER 2, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Barbara R. Kapnick
Marcy L. Kahn
Cynthia S. Kern
Anil C. Singh, JJ.

6394
Index 159031/15

_____x

Repwest Insurance Co.,
Plaintiff-Respondent,

-against-

Country-Wide Insurance Co.,
Defendant-Appellant.
_____x

Defendant appeals from the order of the Supreme Court, New York County (Debra A. James, J.), entered September 7, 2017, which granted plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213, and denied defendant's cross motion to dismiss.

Jaffe & Koumourdas, LLP, New York (Thomas Torto of counsel), Jason Levine, New York, for appellant.

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Gary R. Greenman and Kevin F. Pinter of counsel), for respondent.

SINGH, J.

On this appeal we are asked to consider an issue that we have never directly addressed: whether an automobile liability policy's territory of coverage clause that covers any accident within the United States and the occurrence of the accident in the forum state are sufficient to confer personal jurisdiction over the primary insurer of the offending vehicle. We find that the connection is not sufficient to comport with federal due process, and that this renders the foreign judgment unenforceable.

This action arises out of a vehicular accident that occurred in North Carolina. On February 29, 2012, nonparty Alexa Ancrum, a New York resident, entered into a rental agreement with U-Haul of Huntspoint (U-Haul), located in the Bronx. The rental agreement states that the policy is excess or secondary to any other insurance coverage of Ms. Ancrum. U-Haul's excess liability insurer is plaintiff Repwest Insurance Co. (Repwest), a company incorporated under the laws of Arizona with its principal place of business in Phoenix, Arizona.

Defendant Country-Wide Insurance Co. (Countrywide) issued Ms. Ancrum a personal automobile insurance policy with liability limits of $25,000 per person/$50,000 per accident. The policy's territory of coverage clause insures against loss from liability

imposed by law upon the insured for any accident "within the State of New York, or elsewhere in the United States in North America. . ." Countrywide is incorporated under the laws of Delaware with its principal place of business in New York City.

On March 2, 2012, Ms. Ancrum rear-ended a vehicle occupied by nonparties Ernesto Rodriguez and Anthony Wade, in Rowan County, North Carolina.

Repwest settled with Mr. Rodriguez on his property damage claim. Upon Repwest's demand, Countrywide reimbursed Repwest the sum of $1,509.18 as settlement of the property damage arising out of the accident. Mr. Rodriguez and Mr. Wade also claimed bodily injury. In November 2012, Repwest paid $25,000 to Mr. Rodriguez and $16,000 to Mr. Wade in full settlement for bodily injury. The two released Repwest from all claims.

Thereafter, Repwest demanded payment from Countrywide on equitable subrogation grounds. Repwest had settled the bodily injury claims under its excess liability coverage and maintained that it was entitled to reimbursement from Countrywide, the primary liability carrier.

When Countrywide failed to make the payment, Repwest commenced an action in North Carolina against Countrywide, alleging equitable subrogation seeking the principal sum of $41,000. In its complaint, Repwest asserted that North Carolina

had jurisdiction over the parties as the accident occurred within the state. Countrywide was properly served with the complaint in New York on February 25, 2015. On June 8, 2015, the North Carolina court entered a default judgment against Countrywide for the amount demanded in the complaint.

On August 20, 2015, Repwest brought this action in New York County by filing a summons and motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, to domesticate the North Carolina default judgment against Countrywide. In its supporting affirmation, Repwest argued that North Carolina's default judgment should be domesticated and enforced in New York under the precept of full faith and credit. Countrywide cross-moved to dismiss on the ground that North Carolina lacked personal jurisdiction.

Supreme Court granted Repwest's motion holding that the North Carolina court properly exercised personal jurisdiction over Countrywide as the insurer of a "New York State resident motorist should have reasonably anticipated that it would have to defend itself in an action where its insured is involved in a motor vehicle accident in a sister state."

We disagree. Although collateral attack on the merits of a sister state's judgment is not permissible, a party may nevertheless challenge the basis of the judgment court's personal

jurisdiction (*see All Terrain Props. v Hoy*, 265 AD2d 87, 91 [1st Dept 2000]). The challenge to personal jurisdiction requires a two-part analysis: (1) whether the sister state's long-arm statute has been complied with, and (2) whether that court's exercise of jurisdiction comports with federal constitutional principles of due process (*JDC Fin. Co. I v Patton*, 284 AD2d 164, 166 [1st Dept 2001]).

Since Countrywide does not dispute that North Carolina's long-arm statute (NC Gen Stat Ann § 1-75.4[10][b]) has been satisfied, we turn to whether North Carolina's exercise of personal jurisdiction over Countrywide comports with federal due process. "Federal due process requires first that a defendant have minimum contacts with the forum state such that the defendant should reasonably anticipate being haled into court there, and second, that the prospect of having to defend a suit in [the forum state] comports with traditional notions of fair play and substantial justice" *(D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 300 [2017] [internal citations and quotation marks omitted]; *see also JDC Fin. Co. I v Patton*, 284 at 166 [internal citations and quotation marks omitted] [The "constitutional touchstone [is] whether the defendant purposefully established minimum contacts in the forum state"]; *International Shoe Co. v Washington*, 326 US 310, 316

[1945] [finding that these minimum contacts are such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice]).

A nondomiciliary defendant may reasonably foresee the prospect of defending a suit in the forum state "if it purposefully avails itself of the privilege of conducting activities within the forum [s]tate" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000] [internal citations and quotation marks omitted]; *Rushaid v Pictet & Cie*, 28 NY3d 316, 331 [2016] [same]; *Deutsche Bank Sec., Inc, v Montana Bd. of Invs.*, 21 AD3d 90, 94 [1st Dept 2005]["it is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"] [internal citations and quotation marks omitted], affd 7 NY3d 65 [2006], cert denied 549 US 1095 [2006]).

We start our analysis with courts in other jurisdictions that have addressed whether an automobile insurance policy's territory of coverage clause provides a sufficient connection between an insurer and the situs of the accident. In *OMI Holdings, Inc. v Royal Ins. Co. of Canada* (149 F3d 1086, 1095 [10th Cir 1998]), the Tenth Circuit held that "sole reliance on the territory of coverage clause creates contacts which are

qualitatively low on the due process scale." Further, in considering whether the exercise of jurisdiction violates fair play and substantial justice, the court assessed the burden on the foreign insurance company to litigate in the forum state, the forum state's interest in adjudicating the dispute, the plaintiff's interest in convenient and effective relief, the interstate judicial system's interest in obtaining an efficient resolution, and the shared interests of several states in furthering fundamental substantive social policies. In considering these factors, the Tenth Circuit held that litigating in the forum state would be unreasonable and inconsistent with the notions of fair play and substantial justice.

In *Erie Ins. Exch. v Larose* (202 So 3d 148 [Fla. 2d DCA 2016]), the Florida Court of Appeals found that a Pennsylvania insurer that issued a policy to a Wisconsin corporation to cover vehicles principally garaged in Wisconsin did not have sufficient minimum contacts in Florida based on an accident that occurred in Florida. The court stated that "[e]ven if an insurer might foresee that one of its insureds might travel to Florida, the unilateral activity of that insured, without more, is insufficient to create personal jurisdiction over a nonresident defendant" (*id.* at 155). Further, the court held that "the mere provision of coverage for accidents nationwide is not enough,

standing alone, to confer jurisdiction over a nonresident defendant insurer that has not otherwise taken steps to purposefully avail itself of a particular forum" (*id.*). Since the Pennsylvania insurer was not licensed in Florida, did no business in Florida, had no office in Florida and never sought to do business in Florida, the court held that the insurer did not purposely avail itself of conducting any business in Florida.

Repwest, citing to other cases, contends that minimum contacts have been established (*see Rossman v State Farm Mut. Auto. Ins. Co.*, 832 F2d 282, 286 [4th Cir 1987] [where the Fourth Circuit found that by issuing a policy with a territory of coverage clause that included Virginia, an Illinois automobile liability insurer created sufficient minimum contacts to support the exercise of personal jurisdiction because the insurer could anticipate the risk that its policyholders would travel to different states and become involved in accidents and litigation there]; *Farmers Ins. Exch. v Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 [9th Cir. 1990] [the Ninth Circuit, adopting *Rossman*, reversed, finding that "litigation requiring the presence of the insurer [in foreign states] is not only foreseeable, but it was purposefully contracted by the insurer"]).

There is a split in authority as to whether the existence of

a territory of coverage clause constitutes sufficient contact with the forum state to support specific jurisdiction. For example, while the Ninth Circuit in *Farmers Ins. Exch.* held that an insurer had shown purposeful availment, the court in *King v American Family Mut. Ins.* (632 F3d 570 [9th Cir 2011] and *Hunt v Erie Ins. Group* (728 F2d 1244 [9th Cir 1984]) held otherwise.

We disagree with *Rossman* and *Farmers* to the extent that they hold that the territory clause of a foreign insurer's policy and the situs of the accident provides sufficient contact with the forum state.

We find that minimum contacts has not been established on this record. Countrywide did not purposefully avail itself of conducting activities within North Carolina. It is undisputed that Countrywide has never been licensed or authorized to do business in any capacity in North Carolina. At all times relevant to this suit, Countrywide has only been licensed to issue insurance policies within New York State. Countrywide has never maintained an office or employees in North Carolina. It is a company incorporated under the laws of Delaware, with its principal place of business in New York. Countrywide has never conducted or solicited business in or from North Carolina. There is a qualitative distinction between contracting to cover an insured under a territory of coverage clause and the insurer of

the policy being amenable to being haled into court anywhere in the United States in a dispute with another insurer. Countrywide cannot reasonably foresee being haled into court in a state where it did not purposefully direct its activities (*see D&R Global Selections, S.L.*, 29 NY3d at 300).

Moreover, conferring jurisdiction also violates fair play and substantial justice. Since Countrywide has no connection with North Carolina, it would be a burden for the insurer to litigate the subrogation claim with Repwest in that state. Repwest, while authorized to do business in North Carolina, is an Arizona corporation with its principal place of business in Phoenix.

In contrast to *Rossman* and *Farmers* where the underlying automobile accidents involved residents of the forum state who brought litigation within the state, here, neither Ms. Ancrum, Mr. Rodriguez or Mr. Wade had any connection with North Carolina. Ms. Ancrum was a New York resident, while Mr. Rodriguez and Mr. Wade were Maryland residents. Notably, Mr. Rodriguez and Mr. Wade received reimbursements from Repwest, without resorting to litigation in North Carolina. On this record, we find that North Carolina does not have a compelling interest to adjudicate a dispute between foreign insurers over equitable subrogation.

For the foregoing reasons, the North Carolina judgment is

not entitled to full faith and credit. Contrary to Repwest's contention, there is nothing in the record to indicate that a hearing on jurisdiction is warranted.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered September 7, 2017, which granted plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213, and denied defendant's cross motion to dismiss, should be reversed, on the law, without costs, the motion denied, and the cross motion granted. The Clerk is directed to enter judgment accordingly.

All concur.

Order Supreme Court, New York County (Debra A. James, J.), entered September 7, 2017, reversed, on the law, without costs, the motion denied, and the cross motion granted.

Opinion by Singh, J. All concur.

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

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

ENTERED: OCTOBER 2, 2018

CLERK