CORRECTED ORDER - OCTOBER 15, 2018

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 11, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7276-
7277 The People of the State of New York,
Respondent,

Ind. 2587/15

-against-

Christopher Wong,
Defendant-Appellant.

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Gotlin & Jaffe, New York (Daniel J. Gotlin of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 5, 2017, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of five years, and order (same court and Justice), entered on or about April 26, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed. **The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).**

Defendant's argument that the evidence was legally

insufficient to prove serious physical injury is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample medical testimony and other evidence to support the conclusion that the victim's injury, a shattered kneecap, met the definition of serious physical injury (Penal Law § 10.00 [10]), which does not require permanent injury (*People v Wilkins*, 138 AD3d 581 [1st Dept 2016], *lv denied* 27 NY3d 1141 [2016]). Among other things, there was evidence that at the time of the trial the victim was still unable to run without pain.

When the jury asked for a definition of the word "protracted" contained in the first-degree assault instruction, the court providently exercised its discretion, and provided a meaningful response, by giving the jury a dictionary definition of the word that conveyed its "usual and commonly understood meaning" (*People v Aragon*, 28 NY3d 125, 128 [2016]). Moreover, the only alternative response proposed by defendant was addressed to the evidence and was unresponsive to the note.

The court properly denied defendant's CPL 440.10 motion, made on the ground of newly discovered evidence. Even assuming that the medical evidence pertaining to the victim discovered by the defense met the other requirements of CPL 440.10(g),

defendant failed to demonstrate any probability that the evidence would probably change the result (*see e.g. People v Velazquez*, 143 AD3d 126, 131 [1st Dept 2016], *lv denied* 28 NY3d 1189 [2017][citation omitted]). The medical records at issue do not undermine the conclusion that the victim sustained serious physical injury, and they actually provide further support for that conclusion. Defendant's argument that the records cast doubt on the victim's credibility regarding the seriousness of his injury is unpersuasive.

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7278 Adriana G., an infant under the age of Fourteen years, etc., et al., Plaintiffs-Respondents, Index 155371/15

-against-

Kipp Washington Heights Middle School, et al., Defendants-Appellants.

Mauro Lilling Naparty LLP, Woodbury (Matthew W. Naparty of counsel), for appellants.

Joshua Annenberg, New York, for respondents.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 18, 2017, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Infant plaintiff, a student at defendant charter school, which is operated by defendants, sustained injuries that resulted in her right ring finger being amputated after it became caught in a playground fence during recess on property that is owned by nonparty City of New York and maintained by nonparty New York City Department of Education.

Defendants failed to demonstrate their entitlement to summary judgment as they have failed to show that they did not

have a common-law duty to maintain the fence in a reasonably safe condition. "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*see Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). Although there is no evidence that defendants' special use of the playground caused a chain link in the fence to become sharp, the record suggests that defendants' employees were in possession of, occupied, and controlled access to the playground where the fence is located when the accident occurred (*see Milewski v Washington Mut., Inc.*, 88 AD3d 853, 855 [2d Dept 2011]). Additionally, defendants failed to provide a lease agreement establishing that they did not have a duty to maintain the playground fence which, they allege, was in a common area and not part of their demised premises (*cf. Vivas v VNO Bruckner Plaza LLC*, 113 AD3d 401, 402 [1st Dept 2014]). It is irrelevant that other schools also occupied the premises and were also allowed to use the playground (*see Williams v Esor Realty Co.*, 117 AD3d 480 [1st Dept 2014]).

Furthermore, defendants failed to show that the accident location was in a reasonably safe condition when the accident happened. Defendants submitted an expert professional engineer's affidavit averring that the fence was in compliance with the New

York City School Construction Authority's (NYCSCA) standards (*see Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428-429 [1st Dept 2017]; *Griffith v ETH NEP, L.P.*, 140 AD3d 451 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]). However, plaintiffs raised a triable issue of fact because they submitted an expert affidavit from a certified playground safety inspector stating that the fence violated NYCSA's standards because her inspection revealed that it had sharp edges, and infant plaintiff's affidavit averring that the sharp edges on the top of the fence were present when the accident happened (*see Berr v Grant*, 149 AD3d 536, 537 [1st Dept 2017]; *Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311, 312 [1st Dept 2008]).

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7279 In re Dianna P.,
Petitioner-Respondent,

-against-

Damon B.-D.,
Respondent-Appellant.

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Leslie S. Lowenstein, Woodmere, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

Law and Mediation Office of Helene Bernstein, PLLC, Brooklyn (Helene Bernstein of counsel), attorney for the child.

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Order, Family Court, New York County (Stephanie Schwartz, Referee), entered on or about August 29, 2017, which granted the petition to relocate with the parties' child to Georgia, and awarded petitioner sole legal and physical custody of the child, unanimously affirmed, without costs.

The record supports the court's determination that permitting petitioner to relocate with the child to Georgia and awarding her sole legal and physical custody of him is in the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739, 740-741 [1996]). Petitioner "demonstrated that the move would enhance the child's life economically, socially, and educationally" (*Matter of Aruty v Mormando*, 70 AD3d 683, 683 [2d

Dept 2010], citing *Matter of Tropea*, 87 NY2d at 740-741; *see also Aziz v Aziz*, 8 AD3d 596 [2d Dept 2004], *lv dismissed* 7 NY3d 739 [2006]).

Petitioner is the sole source of financial support for the child, since respondent has failed to pay child support for several years. While she has been unable, despite an ongoing job search, to find full-time work in her field and has been unable to make ends meet for herself and the child, petitioner has obtained a full-time position in Georgia as a sous-chef, with an enhanced opportunity to pursue private clients (*see Matter of Melissa Marie G. v John Christopher W.*, 73 AD3d 658 [1st Dept 2010]; *see also Matter of Kevin McK. v Elizabeth A.E.*, 111 AD3d 124 [1st Dept 2013]).

Petitioner's testimony shows that she is better able than respondent to provide a consistent and stable home environment for the child; she has primarily cared for the child since birth and has attended to all his educational and medical needs (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Parrish P. v Camille G.*, 140 AD3d 586 [1st Dept 2016]). In Atlanta, where she intends to live, she also has a support system within her extended family (*see Melissa Marie G.*, 73 AD3d 658). Moreover, the school that the child would attend offers the

extra-curricular arts programs that he is interested in and a nearby after-school program.

We note that the attorney for the child has consistently supported the relocation.

Contrary to respondent's contention, the court properly considered the potential impact of the relocation on respondent's relationship with the child. While the relocation will result in the loss of respondent's weekend parenting time, the visitation schedule set by the court will allow respondent to continue to have a meaningful relationship with the child.

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 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7280 Cecy Thomas, Administratrix of the Estate of Thomas Santos,
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Index 156815/14

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

The Law Offices of Jeffrey F. Levine, New York (Jeffrey F. Levine of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 22, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established, through an expert report and meteorological records, that on January 5, 2014, a freezing rain storm occurred before the decedent's alleged accident and ended after or shortly before the accident, implicating the storm-in-progress doctrine (*see generally Colon v 36 Rivington St., Inc.*, 107 AD3d 508 [1st Dept 2013]). However, defendant failed to establish the condition of the walkway on which the decedent fell before the storm began. The meteorological records show that a

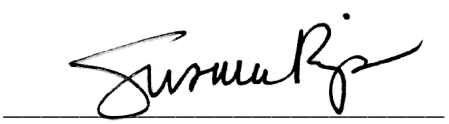
snow storm had occurred on January 2 and 3, causing between six and seven inches of snow to fall. They also show that the snow melted and re-froze on January 4. Thus, defendant failed to eliminate the issues of fact whether there was ice on the walkway before the freezing rain storm began and whether it had been there long enough for defendant to discover and remedy the situation (*see Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]; *Bojovic v Lydig Bejing Kitchen, Inc.*, 91 AD3d 517, 518 [1st Dept 2012]).

We agree with defendant that the decedent's own testimony appears to contradict itself on numerous occasions, and strains credulity on others. However, we do not find the testimony incredible as a matter of law, and leave it to the trier of fact to evaluate.

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

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

ENTERED: OCTOBER 11, 2018



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Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7281 Benedicta Brito, Index 306267/14
Plaintiff-Appellant,

-against-

Rafael Gomez, et al.,
Defendants-Respondents.

_____

Elefterakis, Elefterakis & Panek, New York (Oliver R. Tobias of counsel), for appellant.

Lewis, Brisbois & Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about August 16, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff failed to establish entitlement to judgment as a matter of law in this action for personal injuries sustained in a motor vehicle collision. The deposition testimony submitted in support of plaintiff's motion contains conflicting accounts as to her whereabouts at the time of the collision. Plaintiff testified that she was sitting inside her vehicle with the driver's side door open when defendant Gomez, operating a school bus owned by defendant Don Thomas Bus, Inc., struck her open door. However, Gomez and defendants' bus matron both testified

that plaintiff was standing on the sidewalk, away from her vehicle, when the collision occurred. These conflicting accounts raise triable issues regarding whether, and how, the collision caused plaintiff's claimed injuries (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 116-117 [1st Dept 2016]).

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

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7282-
7282A The People of the State of New York,
Respondent,

-against-

Jamar Ali,
Defendant-Appellant.

Ind. 1831/15

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered July 21, 2016, as amended August 17, 2016, convicting defendant, upon his plea of guilty, of criminal sexual act in the third degree, and sentencing him, as a second felony offender, to a term of two years, with eight years' postrelease supervision, unanimously affirmed. Order, same court and Justice, entered on or about May 4, 2017, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, we perceive no basis for reducing the period of postrelease supervision.

As to defendant's civil appeal from his sex offender adjudication, we conclude that the court providently exercised its discretion in declining to grant defendant's request for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, or that outweighed the seriousness of the underlying offense, which defendant committed against a teenager who was more than 20 years younger than himself.

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7283 The People of the State of New York, Ind. 685/14
Respondent,

-against-

Davian Brewer,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

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Order, Supreme Court, New York County, (Roger S. Hayes, J.), entered on or about March 25, 2016, which adjudicated defendant a level three offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining

to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]), especially in light of the seriousness of defendant's crime against a child and defendant's criminal history.

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7284 Tower 111, LLC, et al., Index 653626/16
Plaintiffs-Respondents,

-against-

Mt. Hawley Insurance Company,
Defendant-Appellant.

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Kenney Shelton Liptak Nowak LLP, Buffalo (Timothy E. Delahunt of counsel), for appellant.

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Jennifer G. Schecter, J.), entered April 25, 2018, which granted plaintiffs' motion for summary judgment, denied defendant insurer's cross motion for summary judgment, and declared that the subject insurance policy provided coverage to plaintiff in connection with the underlying personal injury action, unanimously affirmed, with costs.

Construction of the building at issue was completed in June 2011. After construction of the building was finished, plaintiff Tower 111, LLC (Tower) decided to dismantle and relocate three elevator-machine-room walls on the first floor of the building so that the space would be suitable for a prospective tenant. The plaintiff in the underlying personal injury action was injured

while removing the elevator-machine-room walls in October 2012, more than a year after construction of the building was complete.

The sole issue on appeal is whether defendant's policy's designated work exclusion applies to the underlying personal injury action. The language at issue states that there is no coverage for:

> "Claims arising out of construction recently completed or that might still be ongoing from finishing the construction of the building. Does not include non-structural build-out work for tenants on premises."

The motion court properly found that Tower was entitled to coverage from defendant because the unambiguous exclusion is inapplicable to the claims made in the underlying personal injury action. The designated work exclusion does not apply because the undisputed facts establish that the removal of the elevator-machine-room walls did not "aris[e] out of construction recently completed or...still [] ongoing from finishing the construction of the building." To the contrary, the elevator-machine-room walls were being removed and relocated to make space for a prospective tenant over one year after the construction of the building had already been completed.

To the extent movant relies on the second sentence of the exclusion, which relates to non-structural build-out work, such

language is not applicable because it provides only an exception to the exclusion and is relevant only if the claims arise out of "recently completed" or "ongoing" construction work, which they do not.

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7285 Steven Madsen, et al., Index 157038/15
Plaintiffs-Appellants,

-against-

Catamount Ski Resort, et al.,
Defendants-Respondents.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellants.

Roemer Wallens Gold & Mineaux LLP, Albany (Matthew J. Kelly of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 12, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiffs seek to recover for personal injuries sustained by their infant daughter in a skiing accident at defendants' ski resort. Plaintiffs claim that defendants were negligent in failing to pad the metal snow machine pole with which the infant collided. The motion court dismissed the complaint on the ground that plaintiff assumed the risks associated with the sport of skiing.

Such risks include the risk of injury resulting from "other persons using the facilities" and from "man-made objects that are

incidental to the provision or maintenance of a ski facility," such as snowmaking equipment (General Obligations Law § 18-101; *see also id.* § 18-106). However, an individual "will not be deemed to have assumed ... unreasonably increased risks" (*Morgan v State of New York*, 90 NY2d 471, 485 [1997]).

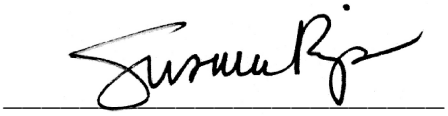
If, as plaintiffs maintain, the unpadded pole was located on the ski trail or in an area where skiing was permitted, then defendants could be found to have failed to maintain their property in a reasonably safe condition. General Obligations Law § 18-107 provides that, "[u]nless otherwise specifically provided in this article, the duties of skiers, passengers, and ski operators shall be governed by common law" (*Dailey v Labrador Dev. Corp.*, 136 AD3d 1380, 1381 [4th Dept 2016]). The common law applies where, as here, plaintiffs are alleging inadequate padding of defendant's snowmaking pole, a condition not specifically addressed by the statute (*id.*). On the record before us, we cannot conclude, as a matter of law, that the pole was off-trail and that the pole did not need to be padded. Thus, defendants are not entitled to summary judgment.

Nor are defendants entitled to summary judgment on the ground that the failure to pad the pole did not cause the subject collision, because that failure may have caused or enhanced the

infant's injuries (*see Stuart-Bullock v State of New York*, 33 NY2d 418, 421 [1974]; *see also Joyce v Rumsey Realty Corp.*, 17 NY2d 118 [1966]).

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

ENTERED: OCTOBER 11, 2018



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Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7286 The People of the State of New York, Ind. 2833/14
Respondent,

-against-

Gary Allen,
Defendant-Appellant.

_____

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

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

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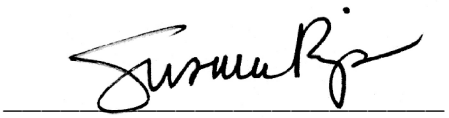
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert E. Torres, J. at plea; Margaret Clancy, J. at sentencing), rendered April 5, 2016,

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 11, 2018



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

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7287-
7287A In re Caron C.G.G., and Another,

Children Under Twenty-one Years
of Age, etc.,

Alicia G.,
Respondent-Appellant,

Jasmine D.,
Petitioner-Respondent,

Administration for Children Services,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for Jasmine D., respondent.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for Administration for Children Services, respondent.

Larry S. Bachner, New York, attorney for the child Caron C.G.G.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child Dashanti R.G.

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Orders appointing kinship guardian, Family Court, New York County (Tamara Schwartz, Referee), entered on or about June 14, 2017, which, after a hearing, granted the guardianship petitions filed by the maternal aunt, Jasmine D., concerning subject children Caron C.G.G. (DOB 1/17/08) and Dashanti R.G. (DOB

3/19/02), unanimously affirmed, without costs.

Family Court properly found that petitioner met her burden to demonstrate the requisite extraordinary circumstances to obtain guardianship of the children over the mother's objections (*see* Family Ct Act § 1055-b; *Matter of Daphne OO. v Frederick QQ.*, 88 AD3d 1167 [3d Dept 2011]). At the time of the hearing, the mother had already been separated from the children for over seven years who, during that time, had consistently lived with and been cared for by their aunt. Although the mother was incarcerated for the first three of those years, she had only intermittent, sporadic contact with the children even after her release, for reasons not adequately explained. In contrast, the aunt, consistently since July 2010, has assumed full responsibility for the children's daily care. These circumstances constitute "extraordinary circumstances" that justify the award of guardianship over the mother's objection (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 549 [1976]; *Matter of Jaylanisa M.A. [Christopher A.]*, 157 AD3d 497 [1st Dept 2018]; *Roberta P. v Vanessa J.P.*, 140 AD3d 457 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Colon v Delgado,* 106 AD3d 414 [1st Dept 2013]).

We further find that a fair preponderance of the evidence

showed that the award of guardianship was in the children's best interests (*see* Family Ct Act § 1055-b[a][ii]; *Matter of Joseph S. v Michelle R.F.*, 3 AD3d 446 [1st Dept 2004]; *see also Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]; *Matter of Bennett*, 40 NY2d at 546-547). Moreover, having had the ability to view the witnesses and hear the testimony, the court's findings on this issue should be accorded great deference on appeal (*Matter of Celenia M. v Faustino M.*, 77 AD3d 486 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

By the time of the hearing, Caron had been living with the aunt for most of his life, and Dashanti had been living with the aunt for nearly half of hers. This stability, and the evidence that the aunt has been meeting the children's needs, weighs in the aunt's favor, and the mother acknowledged that the aunt loves the children and cares about them (*see Matter of Joseph S. v Michelle R.F.*, 3 AD3d 446 [1st Dept 2004]). Dashanti's wish to continue living with her aunt, even if not determinative, was also entitled to some weight, given her age (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]).

The attorneys for the children met the requirements of SSL § 458-b and their general obligations to advocate zealously on their clients' behalf (*see* 22 NYCRR 7.2). The court was apprised

of Dashanti's position throughout the proceedings, and the mother presents no grounds to doubt that Dashanti's position differed from what was consistently conveyed. Caron's position, that he was "okay" continuing to live with his aunt as long as his mother could continue to visit him, was also relayed to the court, and incorporated in the orders under review, which provide for the mother's liberal visitation with the children.

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

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7288 Ward Capital Management LLC, Index 25380/15E
Plaintiff-Appellant,

-against-

New Pelham Parkway North LLC,
et al.,
Defendants-Respondents,

Weisberg & Weisberg, etc.,
Defendant.

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Itkowitz, PLLC, New York (Jay B. Itkowitz of counsel), for appellant.

Barnes & Barnes, P.C., Melville (Leo K. Barnes, Jr. of counsel), for respondents.

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Order, Supreme Court, Bronx County (Ruben Franco, J.), entered January 22, 2018, which granted defendants' motion for summary judgment dismissing the complaint and granted their counterclaims to retain plaintiff's $1 million down payment, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law. They submitted evidence that the contract of sale between the parties for the sale of four real estate properties clearly stated that "time is of the essence" as to the closing date and that, through an amendment to that

contract, the parties scheduled the closing for October 18, 2013. Defendants also provided evidence that all parties appeared at the proposed closing on that date, defendants were ready, willing and able to close, and plaintiff did not have the liquid cash to pay the purchase price (*see Hossain v Selechnik*, 107 AD3d 549, 549 [1st Dept 2013]). Since the real estate contract provided that the time of closing is of the essence, performance on the specified date was a material element and plaintiff's failure to perform on that date constituted material breach (*Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 508 [1st Dept 2014]; *Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 137-138 [1st Dept 2012]).

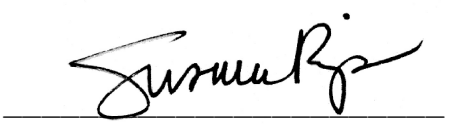
In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff asserted that it had lawful excuses for its failure to close, since defendants provided a false representation in the sale contract regarding threatened litigation related to two of the properties, there was cloudy title due to a pending foreclosure action, and a third party failed to provide final documentation regarding a $10 million loan to plaintiff to cover part of the purchase price.

First, the sale contract explicitly stated that if a representation was false and had a materially adverse effect on

the market value of the property, defendants could monetarily solve the problem and plaintiff would still be required to close. Second, while there was a pending foreclosure action concerning two of the four properties that were the subject of the sale, the plaintiff bank in that action was well aware that the outstanding mortgage amounts, related costs, and attorneys' fees would be paid off in connection with the closing and the bank provided pay-off statements to effectuate the payments. Moreover, the title insurance company agreed to provide insurance without any exceptions. Third, plaintiff warranted in the sale contract that it did not need outside financing to fund the purchase price, plaintiff's obligations thereunder were not contingent on any loan from any third party, and defendants were relying on this representation as a material inducement to enter into the sale contract. In light of this language, the lack of final documentation regarding a $10 million loan to plaintiff was not a lawful excuse.

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

ENTERED: OCTOBER 11, 2018



CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7289 The People of the State of New York, Ind. 3255/14
Respondent,

-against-

Elizabeth Reina,
Defendant-Appellant.

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

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

_____

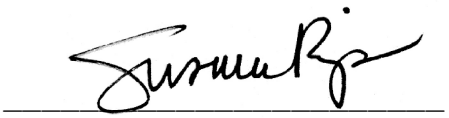
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James Burke, J. at plea; Abraham Clott, J. at sentencing), rendered March 30, 2016,

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 11, 2018



CLERK

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

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7293 The People of the State of New York, Ind. 3794/15
Respondent,

-against-

Heriberto Lopez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 26, 2016, convicting defendant, upon his plea of guilty, 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, to a term of six years, to be followed by two years of postrelease supervision, unanimously affirmed.

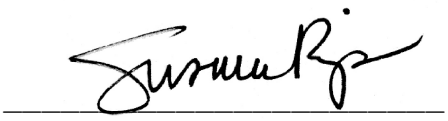
The court providently exercised its discretion (*see People v Frederick*, 45 NY2d 520 [1978]) in denying defendant's motion, made with the aid of new counsel, to withdraw his plea on the ground that plea counsel rendered ineffective assistance. Defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714

[1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not established that there was anything deficient about counsel's efforts to obtain a more lenient disposition, or that, before advising her client to plead guilty, counsel needed to ascertain whether a surveillance videotape existed.

We perceive no basis for reducing the period of postrelease supervision.

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

ENTERED: OCTOBER 11, 2018



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Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7294 In re Mark Warren Moody, Index 100678/16
Petitioner-Appellant,

-against-

New York State Board of Elections,
et al.,
Respondents-Respondents.

_____

Mark Warren Moody, appellant pro se.

Barbara D. Underwood, Attorney General, New York (Judith N. Vale of counsel), for State respondents.

Zachary W. Carter, Corporation Counsel, New York (Qian Julie Wang of counsel), for Municipal respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 8, 2018 (transferred to this Court from the New York Court of Appeals by order entered March 23, 2017), which denied the petition seeking a judgment declaring that New York's closed primary election regime, established pursuant to Election Law § 5-304, by requiring voters to choose a party affiliation in advance of the primary, violates the New York State Constitution, and dismissed the proceeding brought pursuant to Election Law article 16, unanimously affirmed, without costs.

It is settled law that New York's primary election enrollment deadline, which, as pertinent on this appeal, requires

that registered voters change their party affiliation at least 25 days prior to the general election preceding the primary in which they intend to vote (*see* Election Law § 5-304[3]), is rationally related to the legitimate state interests in protecting the viability of the political party system by "inhibit[ing] party raiding" (*Rosario v Rockefeller*, 410 US 752, 758-762 [1972]; *accord Neale v Hayduk*, 35 NY2d 182, 187 [1974], *appeal dismissed* 420 US 915 [1975]; *see California Dem. Party v Jones*, 530 US 567, 574 [2000]; *Matter of Walsh v Katz*, 17 NY3d 336, 343 [2011]).

The New York Constitution's voter franchise protection provisions (*see* NY Const Art I, § 1; Art II, § 1) do not require that any heightened scrutiny, beyond that afforded under the U.S. Constitution, be applied to the primary deadline provision. Thus, while the disenfranchisement protections of Article I, § 1, do extend to primary elections, the state nonetheless retains "plenary power ... to promulgate reasonable regulations for the conduct of elections" (*Matter of Davis v Board of Elections of City of N.Y.*, 5 NY2d 66, 69 [1958]; *see Cox v Katz*, 30 AD2d 432, 436 [1st Dept 1968], *affd* 22 NY2d 903 [1968]; *Dorfman v Berman*, 186 Misc 2d 415, 418 [Sup Ct, Albany County 2000]). Likewise, Article II, § 1, "was not intended to regulate the mode of elections, but rather the qualification of voters" (*Matter of*

Schulz v Horseheads Cent. School Dist. Bd. of Educ., 222 AD2d 819, 820 [3d Dept 1995], *appeal dismissed* 87 NY2d 967 [1996]; *see Matter of Blaikie v Power*, 13 NY2d 134, 140 [1963], *appeal dismissed* 375 US 439 [1964]), and thus does not curtail the Legislature's otherwise "broad authority ... to establish rules regulating the manner of conducting both special and general elections" (*Eber v Board of Elections of County of Westchester*, 80 Misc 2d 334, 336 [Sup Ct, Westchester County 1974], *appeal dismissed* 35 NY2d 848 [1974]).

Section 5-304(3)'s reference to the "general election" is not unconstitutionally vague with respect to the primary enrollment deadline for presidential primaries. The Election Law directs that "[t]he general election shall be held annually on the Tuesday next succeeding the first Monday in November" (Election Law § 8-100[1][c]). Viewed as a whole, the Election

Law gives persons of ordinary intelligence fair notice of what they must do to meet the primary enrollment deadline, and likewise provides "officials with clear standards for enforcement" (*People v Stuart*, 100 NY2d 412, 420 [2003]).

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7295-
7295A The People of the State of New York, Respondent,

SCID 30216/16
30217/16

-against-

Monserrate Rodriguez,
Defendant-Appellant.

_____

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

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

_____

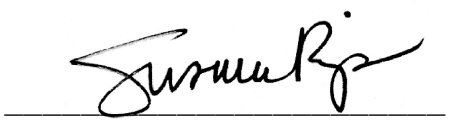
Orders, Supreme Court, New York County (Felicia A. Mennin, J.), entered on or about March 30, 2017, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately accounted for in the risk assessment instrument, and were in any event outweighed by the seriousness of the underlying crimes, as well as defendant's extensive criminal record and pattern of sexual recidivism against children, which this Court

noted on defendant's appeal from another sex offender adjudication (122 AD3d 538 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: OCTOBER 11, 2018



CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7296 The People of the State of New York, Ind. 2811/13
Respondent,

-against-

Guillermo Melendez,
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.

_____

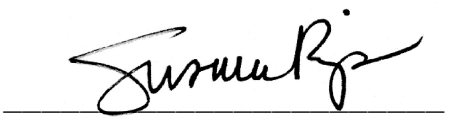
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered July 25, 2014,

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 11, 2018



CLERK

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

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7297 The People of the State of New York, Dkt. 55141/11
Respondent,

-against-

Nyheem Newton,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered March 8, 2012, unanimously affirmed.

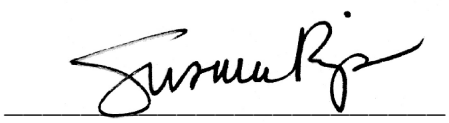
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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 11, 2018



CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7298 The People of the State of New York, Ind. 4162/14
Respondent,

-against-

Joseph Smith,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 7, 2015, unanimously affirmed.

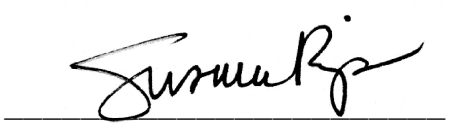
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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 11, 2018



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Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7299N Svetlana Safonova, etc., Index 150642/16
Plaintiff-Respondent,

-against-

Home Care Services for Independent Living, Inc.,
Defendant-Appellant.

_____

FordHarrison LLP, New York (Philip K. Davidoff of counsel), for appellant.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 19, 2017, which denied defendant's motion to compel arbitration and stay this action, unanimously reversed, on the law, without costs, the motion to compel granted, and the parties are directed to proceed in accordance with the alternative dispute resolution provision in the December 2015 memorandum of understanding.

Plaintiff is bound by the arbitration provision in the collective bargaining agreement because the agreement was entered into while she was still employed, even though it was not ratified until after she resigned. "[A] union ratification vote is not always required for provisions in a [collective bargaining

agreement] to be considered validly formed" (*Granite Rock Co. v Int'l Bhd. of Teamsters*, 561 US 287, 296 n 4 [2010]). Here, ratification was not a condition precedent to formation of the memorandum of agreement (MOA). While the MOA was "subject to ratification by the Union and its membership and by the Board of Directors of the Employer," the ratification provision does not provide that the MOA would become effective only upon ratification by the Union (*cf. Adams v Suozzi*, 340 F Supp 2d 279, 283 [ED NY 2004], *affd on other grounds by* 344 F3d 220 [2d Cir 2005] [holding that ratification was a condition precedent to contract formation where MOA stated that it "shall be inoperative as to any union which fails to ratify within 45 days"]).

Plaintiff's contention that she is not bound by the MOA because her resignation was effective December 1, 2015 is without merit. Although plaintiff did not perform work between December 1, 2015 and December 17, 2015, the date she submitted her resignation, she was still employed by defendant until the later date.

We reject plaintiff's contention that her claims that had accrued prior to December 1, 2015 were not covered by the clause (*see Lai Chan v Chinese Am. Planning Council Home Attendant Program, Inc.*, 180 F Supp 3d 236, 241 [SD NY 2016]).

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

ENTERED: OCTOBER 11, 2018

CLERK

Sweeny, J.P., Tom, Gesmer, Kern, Moulton, JJ.

7300-
7301 In re Cory Reid, Ind. 4445/17
[M-3802 & Petitioner, O.P. 156/18
M-3405] O.P. 158/18

-against-

Hon. Laura A. Ward, etc.,
Respondent.

- - - - -

In re Cory Reid,
Petitioner,

-against-

Hon. Laura A. Ward, etc.,
Respondent.

_____

Cory Reid, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

_____

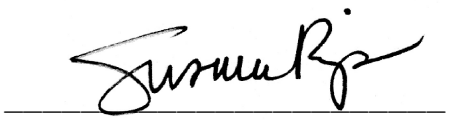
The above-named petitioner having presented applications to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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

It is unanimously ordered that the applications be and the same hereby are denied and the petitions dismissed, without costs or disbursements.

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7302 The People of the State of New York, Ind. 3142/11
Respondent,

-against-

Cornel Anderson,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (David Billingsley of counsel), for appellant.

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

_____

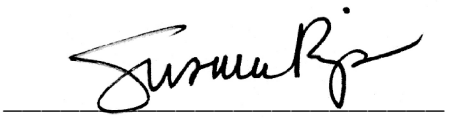
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Lieb, J.), rendered February 20, 2013,

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 11, 2018



CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7303 State Farm Mutual Automobile Insurance Company, et al.,
Plaintiffs-Respondents,

-against-

Stracar Medical Services, P.C.,
Defendant-Appellant.

Index 153079/15

_____

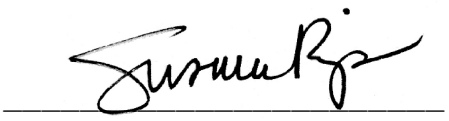
An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about March 6, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 5, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7304 In re A'riana D.N., also known as Ariana N.,

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

Ashley N.,
Respondent-Appellant,

The Children's Aid Society, etc.,
Petitioner-Respondent,

Commissioner of the Administration for Children's Services,
Petitioner.

_____

Steven N. Feinman, White Plains, for appellant.

Rosin Steinhagen Mendel, The Children's Aid Society, New York (John Cappiello of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about June 12, 2017, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children Services for the purpose of adoption, unanimously affirmed, without costs.

The determination that it was in the child's best interests

to terminate the mother's parental rights and free her for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The mother did not demonstrate that she was close to completing her service plan or had a realistic plan to provide the child with an adequate and stable home (*see Matter of Malachi P. [Georgette P.]*, 142 AD3d 883, 884 [1st Dept 2016]).

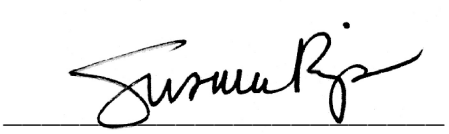
Rather, the record showed that the mother failed to sufficiently engage in services, including required mental health evaluation and services, and domestic violence survivor services. She also failed to secure employment and housing, and lacked the capacity to guarantee the child's safety and welfare, especially in light of the child's special needs. The mother had taken insufficient steps to ameliorate the conditions that led to the child's placement in foster care, and her inconsistent efforts toward compliance with her service plan do not warrant a suspended judgment (*see Matter of Maryline A.*, 22 AD3d 227 [1st Dept 2005]*; Matter of Desmond Sinclair G.*, 202 AD2d 156, 158 [1st Dept 1994]). Furthermore, the record shows that the child has

been residing with the foster parents for several years, and that they have met her special needs and she is thriving in their care (*see Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [1st Dept 2011]).

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

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7305 Mireya Pena DeSuero, Index 300633/14
Plaintiff-Respondent,

-against-

1386 Associates, LLC, et al.,
Defendants-Appellants.

_____

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

Pollack, Pollack, Isaac & DeCicco (Jillian Rosen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about March 26, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell on a slippery liquid on the interior stairs of an apartment building owned by defendant 1386 Associates, LLC, and managed by defendant SDG Management Corp. Plaintiff testified that when she began to slip, she reached for the stairs' handrail, but it was loose, and she fell.

Defendants met their prima facie burden of showing that they neither created, nor had actual or constructive notice of, the alleged liquid on the stairway (*Luna v CEC Entertainment, Inc.*,

159 AD3d 445, 445 [1st Dept 2018]). However, they failed to meet their burden with respect to plaintiff's alternative theory of liability, the allegedly defective handrail, given the superintendent's deposition testimony that he had previously repaired the handrail in the area where plaintiff fell by securing it with a clamp, but that one of the four screws needed to install the clamp was broken (*DiPini v 381 E. 160 Equities LLC*, 121 AD3d 465, 465 [1st Dept 2014]).

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 11, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7306 Yu Yan Zheng, Index 152370/15
Plaintiff-Appellant,

-against-

Fu Jian Hong Guan American Unity Association, Inc., et al.,
Defendants-Respondents.

_____

Lurie, Ilchert, MacDonnell & Ryan, LLP, New York (Dennis A. Breen of counsel), for appellant.

Litchfield Cavo, LLP, New York (John V. Barbieri of counsel), for Fu Jian Hong Guan American Unity Association, Inc., respondent.

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

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered September 15, 2017, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

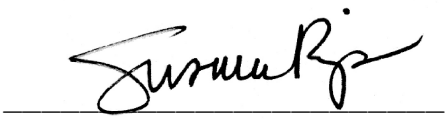
Plaintiff does not dispute that defendants' obligation to clear the subject steps of snow and ice was suspended through the time of her accident under the storm in progress doctrine (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-36 [1st Dept 2005], *affd* 6 NY3d 734, 735 [2005]; *Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618, 619 [1st Dept 2013]). Moreover, defendant Fu Jian demonstrated that it reasonably maintained the premises

since there were non-skid strips on the stairs.

In opposition, plaintiff failed to raise an issue of fact as to whether defendants acted reasonably in maintaining the steps. In fact, plaintiff did not testify that her fall was caused by anything other than snow and ice.

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7307 The People of the State of New York, Ind. 5583/03
Respondent,

-against-

Oscar Santos,
Defendant-Appellant.

_____

Wilens & Baker, New York (Daniel S. Kratka of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered March 28, 2017, which, after a hearing upon remand from this Court, denied defendant's CPL 440.10 motion to vacate a judgment, unanimously affirmed.

In a prior decision (145 AD3d 461 [1st Dept 2016]), we remanded the matter for a hearing to resolve factual issues whether defendant was deprived of effective assistance of counsel under *People v McDonald* (1 NY3d 109 [2003]) by way of erroneous and prejudicial immigration advice. Upon remand, defendant failed to establish that the advice he actually received regarding the deportation consequences of his plea, including both legal and practical considerations, was affirmatively erroneous. We find no basis for disturbing the court's

credibility determinations, and its consequent findings of fact regarding the immigration advice rendered by counsel.

In light of the above, we need not decide whether defendant established that the allegedly erroneous advice was prejudicial.

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

ENTERED: OCTOBER 11, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7308 Thomas Genova, etc., 301797/12
Plaintiff-Appellant,

-against-

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

_____

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 8, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the negligence cause of action, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff is the trustee of the bankruptcy estate of Thomas Slockbower, an officer of the New York City Police Department (NYPD). Plaintiff seeks damages in connection with injuries Slockbower sustained when he fell after he exited a van in the parking lot of an NYPD training facility and stepped onto an uneven, depressed asphalt area surrounding a sewer drain. Plaintiff claims that defendants were negligent in creating or failing to repair the depressed sewer grate.

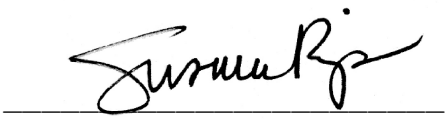
The negligence cause of action is not barred by the firefighters' rule, because the risk of injury was not increased by Slockbower's performance of his official duties (*see Wadler v City of New York*, 14 NY3d 192, 194-195 [2010]). Slockbower had parked the van in order to direct traffic, but was not actually doing so when he fell (*see Tighe v City of Yonkers*, 284 AD2d 325 [2d Dept 2001]; *Olson v City of New York*, 233 AD2d 488 [2d Dept 1996]; *Siciliano v City of NY*, 2007 NY Slip Op 51630[U], *3 [Sup Ct, Richmond County 2007]). Although Slockbower admitted that he did not see the depressed sewer grate because he was "[l]ooking to see if there were any cars going by," and not at the ground, it is clear from the context of this statement that he was not looking at the cars for the purpose of directing traffic, but in order to exit the van safely.

Defendants established prima facie that they neither caused nor had actual notice of the depressed sewer grate. However, they failed to establish as a matter of law that they had no constructive notice of it (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]). They submitted no evidence of any prior inspections (*see Savio v St. Raymond Cemetery*, 160 AD3d 602 [1st Dept 2018]; *Niu v Sasha Realty LLC*, 151 AD3d 488, 489 [1st Dept 2017]). Moreover, they submitted photographs of the grate

taken within weeks after the accident that Slockbower testified fairly and accurately depicted the site as it appeared on the day of the accident (*see DeGiacomo v Westchester County Healthcare Corp.*, 295 AD2d 395 [2d Dept 2002]). Because the nature of the defect, as depicted in the photographs, is not latent, and the defect would not have developed overnight, constructive notice may be inferred from its existence (*see Johnson v 675 Coster St. Hous. Dev. Fund*, 161 AD3d 635 [1st Dept 2018]).

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7309 The People of the State of New York, Ind. 1708/14
Respondent,

-against-

Efrain Nieves,
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.

_____

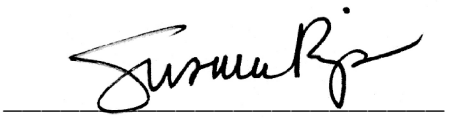
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered March 22, 2016,

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 11, 2018



CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7310 In re Leslie Clark, et al., Index 100310/17
Petitioners-Appellants,

-against-

New York State Liquor Authority,
Respondent-Respondent,

When We Were Young LLC,
Respondent.

_____

Kathryn B. Quinn, New York, for appellants.

Christopher R. Riano, New York State Liquor Authority, Albany (Kayla R. Seger of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered January 2, 2018, denying the petition to annul the determination of respondent New York State Liquor Authority (the Authority), dated February 16, 2016, which conditionally approved respondent When We Were Young LLC's application for a liquor license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This article 78 proceeding was commenced in March 2017, nearly a year after the Authority's issuance of written reasons for its conditional approval of the subject liquor license, in March 2016, and is therefore untimely (*see* CPLR 217[1]). Contrary to petitioners' contention, the conditional approval was

final and binding; petitioners were aggrieved by the Authority's finding, over their opposition, that issuance of the liquor license was in the public interest, and there was no further administrative recourse available to them and no further necessary nonministerial action by the Authority (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; *Matter of Allstate Ins. Co. v Stewart*, 36 AD2d 811 [1st Dept 1971], *affd* 29 NY2d 925 [1972]; *Matter of Metropolitan Package Store Assn. v Duffy*, 143 AD2d 832, 833 [2d Dept 1988], *lv denied* 73 NY2d 705 [1989]).

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

ENTERED: OCTOBER 11, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7311 Marcio B. Membreno Gallo, Index 21600/14E
Plaintiff-Respondent,

-against-

A.W. Arciere, Inc., et al.,
Defendants-Appellants.

_____

Koster, Brady & Nagler, New York (Louis E. Valvo of counsel), for appellants.

Mallilo & Grossman, Flushing (Joanna Lambridis of counsel), for respondent.

_____

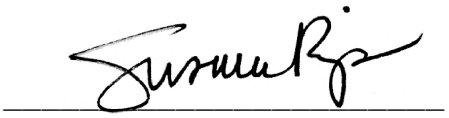
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 6, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint is warranted in this action where plaintiff was injured when he slipped and fell on an icy patch on the sidewalk in front of defendants' market. Defendant submitted evidence showing that it did not create or have actual or constructive notice of the icy patch. Defendants' employee stated that she shoveled the sidewalk the night before the accident and salted the area and that there was no ice on the sidewalk when she left work that night. The employee also stated

she did not see snow or ice when she arrived at work about 15 minutes before the accident. Plaintiff does not contradict this statement, and, in any event, provided no evidence as to how long the hazardous condition was present on the sidewalk in front of the market so as to raise a factual issue as to notice (*see Roman v Met-Paca II Assoc., L.P.,* 85 AD3d 509, 510 [1st Dept 2011]). Furthermore defendants' employee provided that she also salted the area upon arriving at work as a precaution, and no evidence was presented to suggest that her conduct somehow created the hazardous condition (*see Killeen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205 [1st Dept 2006]).

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7312-
7312A The People of the State of New York,
Respondent,

-against-

Jesus Reyes also known as
Jesus Reyes Figueroa,
Defendant-Appellant.

Ind. 1743/14
2634/15

_____

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

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

_____

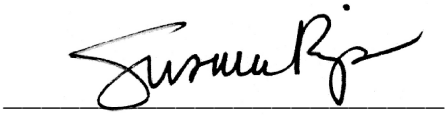
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Richard L. Price, J. at plea; Judith Lieb, J. at sentencing), rendered January 14, 2016,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: OCTOBER 11, 2018



CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7313 In re Belkis N.,
Petitioner-Appellant,

-against-

Gilberto N.,
Respondent-Respondent.

_____

Beth E. Goldman, New York Legal Assistance Group, New York (Ione K. Curva of counsel), for appellant.

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

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 30, 2017, which, after a hearing, dismissed the petition seeking an order of protection against respondent, unanimously affirmed, without costs.

Petitioner failed to establish by a preponderance of the evidence that respondent committed acts warranting an order of protection in her favor, particularly in light of the court's finding that none of the testimony was credible (*see* Family Court Act § 832; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). The record shows that petitioner, while represented by counsel, withdrew a prior family offense petition after she and respondent had agreed that they would go their separate ways. It also shows that there were no incidents between petitioner and respondent after the date that petitioner vacated the premises.

Given the fact that the root of the family disturbance had dissipated on its own, Family Court providently exercised its discretion in finding that an order of protection was not warranted. We reject petitioner's suggestion that this Court should substitute its own findings for that of the Family Court, because it cannot be said that Family Court's determination could not be reached under any fair interpretation of the evidence (*see Yoba v Yoba*, 183 AD2d 418 [1st Dept 1992]).

Furthermore, petitioner's contention that the Family Court was biased against her is unpreserved, and we decline to review in the interest of justice. In any event, the record fails to support her claim.

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

ENTERED: OCTOBER 11, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7315- Index 652625/16
7316-
7317-
7318 Commercial Tenant Services, Inc.,
Plaintiff-Appellant,

-against-

Barclay's Services Corporation,
Defendant-Respondent.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for appellant.

O'Brien LLP, New York (Sean R. O'Brien of counsel), for respondent.

_____

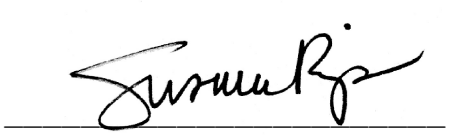
Appeals from orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about November 29, 2017, on or about March 19, 2018, and on or about June 29, 2018, unanimously dismissed, without costs.

While there is no impediment to plaintiff's raising before the trial court the arguments it presses on appeal concerning whether it must demonstrate that it was the procuring cause to

prevail on its claim for fees, there is no basis for an appeal here. Plaintiff does not seek to disturb the motion court's dispositive rulings but asks us essentially to "reverse" certain statements made by the court in dicta.

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7319 The People of the State of New York, Respondent, Ind. 3915/03 4441/12

-against-

Joaquin Encarnacion-Diaz, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Anthony J. Ferrara, J.), entered on or about July 7, 2017, which adjudicated defendant a level three sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in granting an upward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). In 2003, defendant was arrested for his first sex offense, involving his six-year-old niece, but he fled to Puerto Rico, and was returned on a warrant in 2011. By then he had returned to New York, and was arrested for the commission of additional sex offenses in 2011, involving his girlfriend's 10 and 11-year-old daughters. He was subsequently convicted in 2013, upon his pleas

of guilty, of one count of sexual abuse in the first degree under the 2003 indictment, and two counts of sexual abuse under the 2012 indictment.

The risk assessment instrument relating to defendant's conviction under the 2012 indictment did not adequately assess defendant's risk of reoffense because it overlooked defendant's criminal history and pattern of abuse of young girls. The instrument did not factor in, or score points for, his commission of the sex offense in 2003, notwithstanding that his offenses were all covered by a comprehensive disposition in 2013. Thus, the People proved by clear and convincing evidence that defendant had a criminal history that increased his risk of reoffense toward children, and this alone warranted an upward departure.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: OCTOBER 11, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7320 The People of the State of New York, SCID 99072/16
Respondent,

-against-

Roberto Caraballo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about February 24, 2017, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence, including reliable hearsay (*see People v Mingo*, 12 NY3d 563, 571 [2009]), demonstrated that the victim was "physically helpless" at the time of the underlying offense, justifying the assessment of 20 points under risk factor six (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]). Under the circumstances, the fact that defendant was ultimately not charged under this theory did not show that the victim's statement had been discredited (*see People v Epstein*, 89

AD3d 570, 571 [1st Dept 2011]).

In any event, regardless of whether defendant's correct point score is 95 or 75 points, he remains a level two offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), particularly in light of the egregiousness of defendant's conduct and his significant criminal history.

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

ENTERED: OCTOBER 11, 2018

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7321 The People of the State of New York, Ind. 3224/13
Respondent,

-against-

Lorenzo McDonald,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

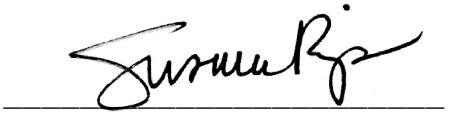
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered September 22, 2016,

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 11, 2018



CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7322-
7323 The People of the State of New York,
Respondent,

-against-

Anthony DeJesus,
Defendant-Appellant.

Ind. 1841/12

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

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

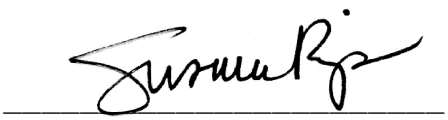
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered May 26, 2015, as amended November 14, 2017,

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 11, 2018



CLERK

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

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7324 The People of the State of New York, SCI 1713/15
Respondent,

-against-

Monique Cruse,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered June 1, 2016, unanimously affirmed.

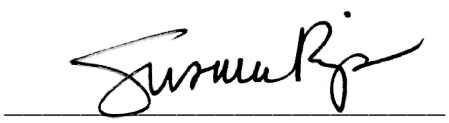
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7325 The People of the State of New York, Ind. 2440/11
Respondent,

-against-

Clifford Bostic,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 1, 2011, unanimously affirmed.

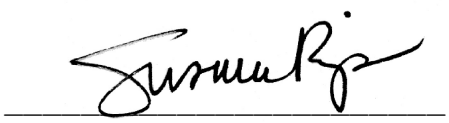
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7326- Index 158541/13
7327-
7328-
7329-
7330N Peter Arnold, et al.,
Plaintiffs-Respondents,

-against-

4-6 Bleecker Street LLC,
Defendant-Respondent-Appellant,

316 Bowery Realty Corp., et al.,
Defendants-Appellants-Respondents.

_____

Rosenberg & Estis, P.C., New York (Bradley S. Silverbush and Nithin Jayadeva of counsel), for appellants-respondents.

Akin Gump Strauss Hauer & Feld, LLP, New York (Sean E. O'Donnell of counsel), for respondent-appellant.

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for Peter Arnold and Michael Schiller, respondents.

Newman Ferrara LLP, New York (Jarred I. Kassenoff of counsel), for Eli Lazarus and Sean Rocha, respondents.

_____

Appeal from amended order, Supreme Court, New York County (Joan A. Madden, J.), entered November 18, 2015, which granted defendant 4-6 Bleecker Street LLC's (4-6 Bleecker) motion to join Walsam 316 LLC, Walsam 316 Bowery LLC, and Walsam Bleecker LLC together with Lawber Bowery LLC and 316 Bowery Next Door Generation LLC (collectively, the Walsam defendants) as defendants to an action for rent overcharges and directed

plaintiffs to file and serve a supplemental summons and amended complaint on defendants 4-6 Bleecker, 316 Bowery Realty Corp (316 BR-Corp) and the Walsam defendants, unanimously dismissed, without costs, as abandoned. Appeal from order and judgment (one paper), same court and Justice, entered January 13, 2016, which denied defendant 316 BR-Corp's motion for summary judgment dismissing the complaint, granted plaintiffs' cross motion for summary judgment insofar as it awarded summary judgment on their first cause of action seeking a declaration that their apartments were subject to the protections of the rent stabilization law, granted partial summary judgment to plaintiffs as to liability on their rent overcharge claims, and adjudged and declared that plaintiffs' apartments were subject to the protections of the rent stabilization law, unanimously dismissed, without costs, for failure to timely appeal therefrom. Order, same court and Justice, entered September 23, 2016, which, to the extent appealable, denied defendants-appellants' motion to renew the court's judgment, entered January 13, 2016, unanimously affirmed, without costs.

Order, same court and Justice, entered June 1, 2017, which, insofar as appealed from as limited by the briefs, denied defendant 4-6 Bleecker's motion for summary judgment on its

fourth and fifth cross claims against defendants-appellants, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 28, 2017, which granted that branch of defendant 4-6 Bleecker's motion to amend its cross claims, unanimously dismissed, without costs, as abandoned.

In this action alleging fraudulent deregulation of rent-stabilized apartments, seeking damages for rent overcharges, treble damages and legal fees, defendants 316 BR-Corp and the Walsam defendants failed to show that new facts, unavailable at the time of the motion court's decision on the parties' summary judgment motions, or a change in the controlling law warranted an exercise of discretion by the court to grant renewal of the court's January 13, 2016 order and judgment (*see* CPLR 2221[e][2]; *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013]). The Walsam defendants, which purchased the property from 316 BR-Corp during the pendency of this action, are successors-in-interest to the property and collaterally estopped from re-litigating the plaintiffs' showing of entitlement to rent overcharges and treble damages (*see generally* CPLR 1018; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 [1979]). The Walsam defendants' argument that they were denied due process when the court decided the dispositive motion before they were joined to

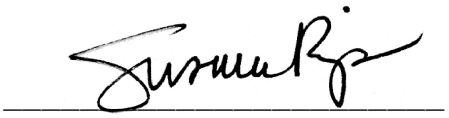
the action is unavailing, as those defendants were aware of the pending action, shared the same counsel as 316 BR-Corp, and elected not to intervene despite negotiations to stipulate to their joinder and opportunity to respond to the dispositive motions.

Defendant 4-6 Bleecker's motion for partial summary judgment on its fourth and fifth cross claims for a declaration that 316 BR-Corp indemnify it for any damages associated with rent overcharges and for related attorney fees expended was premature.

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

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

ENTERED: OCTOBER 11, 2018



CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Oing, JJ.

7331 In re John Walden, Ind. 3190/15
[M-4234] Petitioner, O.P. 159/18

-against-

Hon. Arlene Goldberg, etc., et al.,
Respondents.

_____

John Walden, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Arlene Goldberg, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for Shilpa Kalra, respondent.

_____

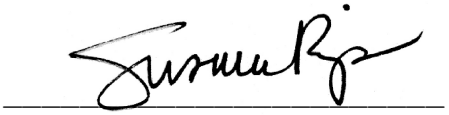
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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 11, 2018



CLERK