SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 3, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Manzanet-Daniels, Gische, Gesmer, JJ.

698N US Bank National Association, etc., Index 382638/09
Plaintiff-Respondent,

-against-

Gauntlet Brown,
Defendant-Appellant,

Bank of Commerce, et al.,
Defendants.

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Petroff Law Firm, P.C., Brooklyn (James Tierney of counsel), for appellant.

Hogan Lovells US LLP, New York (David Dunn of counsel), for respondent.

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Appeal from the decision, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 30, 2014, which granted plaintiff's motion for an order appointing a referee to ascertain the amount due to it, unanimously dismissed, without costs, as taken from a nonappealable paper.

The motion court's decision directed the parties to submit an order on notice. The record does not contain the settled

order that the motion court directed to implement its decision. No appeal lies from a decision (*see* CPLR 5512[a]; *Gunn v Palmieri*, 86 NY2d 830 [1995], or from an appealed paper directing the settlement of an order (*see Murray Hill Manor Co. v Destination Paradise*, 266 AD2d 132 [1999]).

Since the issues raised herein are not properly before us, the appeal must be dismissed (*see Rodriguez v Chapman-Perry*, 63 AD3d 645, 646 [2009]).

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, Kahn, JJ.

718 In re Leslie Taylor, Index 100383/14
Petitioner-Appellant,

-against-

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

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Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered September 25, 2014, insofar as appealed from as limited by the briefs, denying the petition to annul a determination of respondents, dated December 6, 2013, which denied petitioner's appeal of an unsatisfactory performance rating (U-Rating) for the 2012-2013 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, and the matter remanded to respondents for further proceedings.

Petitioner was hired as a probationary special education teacher. During the first two years of her three-year probationary period, she had an exemplary record, receiving satisfactory ratings and several letters of commendation. In her

third year, on November 20, 2012, petitioner participated in an annual review meeting concerning a special education student in her fourth-grade class (the Annual Review). At the meeting, petitioner opposed the position taken by the school's special education coordinator and sided with the student's mother, who had asked that her son be removed from the "Alternate Assessment" program favored by Principal Jennifer Jones-Rogers.

The very next day, November 21, 2012, the principal conducted the first formal observation of petitioner for the 2012-2013 school year. On November 26, 2012, after a post-observation conference, the principal issued an observation report that found petitioner's math lesson unsatisfactory because: (1) "[she] did not model for children what [she] expected them to do"; (2) "[her] [l]esson did not address the problem [she] presented for students to solve"; (3) "[she] did not incorporate rigor in [her] lesson effectively"; and (4) "[she] did not include accountable talk structures in [her] lesson." The report advised petitioner that a "log of support" would be put in place for her "to grow [her] practice and move toward attaining satisfactory performance." Petitioner submitted a written rebuttal in which she stated that she had conducted the lesson in the exact manner that the principal had outlined in

their pre-observation conference and that the post-observation conference focused more on the principal's dissatisfaction with the position petitioner had taken at the Annual Review than on the math lesson in question.

On February 21, 2013, Assistant Principal (AP) Scott Wolfson conducted a formal observation of another of petitioner's math lessons. The post-observation conference was not held until April 16, 2013, at which time petitioner was given an observation report that rated the lesson unsatisfactory because: (1) "[w]hile the children within your group were able to solve the problems that [she] presented to them, it was evident that their solutions indicated algorithmic solution strategies rather than a deeper conceptual understanding of the problems"; (2) "[she] failed to provide opportunities for [her] students to discuss their mathematical thinking with each other"; and (3) the questions that she posed "[did] not serve to develop children's conceptual understanding of mathematics, which should be our goal." The report advised petitioner that "[a]s a result of this lesson, we will continue to implement a log of assistance in order to support you in our mutual goal of attaining a satisfactory rating."

Petitioner submitted a rebuttal stating that "[t]he fact

that my [special education] students were able to solve the word problems with algorithmic solution was a huge accomplishment for my students who entered the fourth grade far below grade level" and that "Mr. Wolfson wanted to concentrate on the fact [that] the students struggled with conceptualizing their understanding of mathematics, which was not the goal for my lesson plan for that day." Petitioner added that "Mr. Wolfson and I also planned my lesson together two days before and [he] never mentioned that he wanted to observe how the students conceptualize math."

Meanwhile, on April 10, 2013, petitioner received a "Summons to Disciplinary Conference" from Principal Jones-Rogers. On April 18, 2013, after a conference was held, the principal and the AP issued a letter advising petitioner that: (1) "[she] failed to suggest appropriate modifications to [her] students' IEP's to support their academic needs"; (2) "[i]n the case of [E.G.], [she] failed to provide [E's] parents with a promotion in doubt letter"; and (3) "[she was] negligent in [her] attention to the records and reports required of [her] in [her] capacity as special education teacher."

On April 22, 2013, petitioner received an overall U-Rating for the 2012-2013 school year, even though her performance was rated satisfactory in 14 of the 22 categories considered. The

rating form contained a signature by the principal, dated January 19, 2013, recommending "[petitioner's] discontinuance of probationary service." It also contained a signature by the district superintendent, dated January 22, 2013, adopting the recommendation. On April 24, 2013, petitioner received a revised U-Rating that changed the date of the principal's and district superintendent's signatures to April 22, 2013.

The Department of Education discontinued petitioner's probationary employment as of May 29, 2013, a month before the school year ended. In June 2013, petitioner sought to review her personnel file and discovered that all of her satisfactory written formal and informal observations from the 2010-11 and 2011-12 school years were missing. On October 8, 2013, Principal Jones-Rogers resigned.[1]

An administrative appeal hearing was conducted on December 3, 2013. Principal Jones-Rogers did not appear. At the hearing, petitioner contended that the principal had engineered the two unsatisfactory lesson observations, the disciplinary letter, and

[1]Two months before her resignation, parents, teachers, students and a state senator had held a rally to protest Principal Jones-Rogers' policies, which allegedly included retaliating against teachers who disagreed with her and cramming students into special education classes without parental consent.

the unsatisfactory 2012-2013 annual rating, which led to her termination, to retaliate against her because she opposed the principal's special education policies and had sided with the mother at the Annual Review. As to the disciplinary letter, petitioner maintained that she did not have the authority to unilaterally make the changes to the Individualized Education Plans (IEP[s]) that the principal and the AP faulted her for not making. She also complained that it was not until April that the principal and the AP sent a memo telling her that she had to revise E.G.'s IEP, by which time the deadline to add modified promotional criteria had passed.

Stephanie Flummery, the chapter leader at the school, testified on petitioner's behalf. Ms. Flummery stated that one of her duties was to discuss, with the administration, teachers who faced unsatisfactory reviews and that before November 2012 petitioner had never been criticized. In November 2012, petitioner contacted Ms. Flummery because the principal had told her that she needed to rethink her profession after petitioner had not agreed to force a parent to maintain her son on an alternate assessment. Before that, petitioner had always been "a shiny star" [sic] to the principal. After the second observation by the AP, petitioner told her that the principal had fired her.

A meeting was then held at which the principal promised that she would "leave [petitioner] alone" and would not discontinue her. However, the principal went back on her word.

After the hearing, by letter dated December 6, 2013, the district superintendent affirmed the discontinuance of petitioner's probationary service.

The record demonstrates deficiencies in the performance review process resulting in petitioner's unsatisfactory rating (U-Rating) for the 2012-2013 school year that were not merely technical but undermined the integrity and fairness of the process (*see Matter of Gumbs v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 125 AD3d 484 [1st Dept 2015]; *Matter of Brown v City of New York*, 111 AD3d 426 [1st Dept 2013]). Petitioner was not given an adequate opportunity to improve her performance, and the observation reports did not suffice to alert her that her year-end rating was at risk.

Petitioner's account of the post-observation conference held on November 26, 2012, where the principal allegedly focused on the Annual Review, rather than perceived flaws in petitioner's lesson, was not refuted at the hearing and, when viewed alongside the other evidence presented, raises a factual issue as to whether the principal engineered the U-Rating to force petitioner

from her job for refusing to go along with her policy of steering children into special education classes despite parental wishes to the contrary. While the November 26, 2012 observation report stated an intent to assist petitioner in obtaining a satisfactory performance level, certain of the meetings reflected in the support log were not specific to petitioner. A meeting with the math consultant did not address how to develop plans for children with special needs, and the special education coaching sessions listed were optional. At the hearing, AP Wilson acknowledged that petitioner had asked him to model a mathematics lesson and that he did not do it. Further, when asked if he had discussed the comments made by the principal at the November 26 post-observation conference at his December 3, 2012 meeting with petitioner, the AP said he did not recall discussing them.

Although the second observed lesson took place on February 21, 2013, the post-observation conference did not take place until April 16, 2013, almost two months later and only days before petitioner received the unsatisfactory U-Rating. There is nothing in the record that would demonstrate that petitioner received any professional development support after February 28, 2013, the last entry in the support log. The long delay in providing feedback, together with the absence of any remediation

after February 28, 2013 and the rapid sequence of events in April 2013, establishes that petitioner was not given an opportunity to remedy the alleged defects and implement the multiple recommendations (*see Matter of Brown*, 111 AD3d at 427).

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

ENTERED: MAY 3, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

761 James Polsky, et al., Index 107108/11
Plaintiffs-Respondents,

-against-

145 Hudson Street Associates, L.P., et al.,
Defendants-Appellants,

Rogers Marvel Architects PLLC, et al.,
Defendants.

_____

Henry H. Korn, PLLC, New York (Henry H. Korn of counsel), for appellants.

Mandel Bhandari LLP, New York (Robert Glunt of counsel), for respondents.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered October 28, 2015, which denied defendants-appellants' motion for summary judgment dismissing plaintiffs' remaining breach of contract claim, unanimously affirmed, with costs.

Issues of fact exist regarding whether defendants breached the parties' Purchase Agreement and the Offering Plan (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The Offering Plan, which was incorporated into the Purchase Agreement, stated that plaintiffs' apartment would be configured as shown in attached floor plans. The attached plans contained two

entrances, and did not contain a mechanical room. A reasonable jury could conclude that defendants had breached the contract by conveying to plaintiffs an apartment that required the addition of a mechanical room, thereby prohibiting two entrances. Factual issues also exist regarding whether the addition and prohibition constituted "Permitted Encumbrances," as defined in the Purchase Agreement, and, if they did, whether they were required to be applied to plaintiffs' individual unit.

Defendants' reliance upon the merger doctrine is unavailing. The merger doctrine in real estate transactions provides that "once the deed is delivered, its terms are all that survive and the purchaser is barred from prosecuting any claims arising out of the contract" (*TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 85 [1st Dept 2015]). An exception to this rule exists, however, where "the parties clearly intended that the particular provision of the contract supporting the claim would survive the delivery of the deed" (*id.*). Here, an issue of fact exists as to whether the exception applies based on the Purchase Agreement, which provides that "nothing herein contained shall excuse [defendants] from performing those obligations (if any) in the [Offering] Plan to be performed subsequent to the closing." At the very least, this language creates an ambiguity regarding

whether defendants' obligation to deliver the apartment in accordance with the representations in the Offering Plan survived closing and the delivery of the deed (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008]).

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: MAY 3, 2016

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

764 James Randall, Index 115766/08
Plaintiff, 590106/11

-against-

Two Bridges Associates Limited Partnership, et al.,
Defendants-Respondents.

- - - - -

Two Bridges Associates Limited Partnership,
Third-Party Plaintiff-Respondent,

-against-

Two Bridges Townhouse Condominium,
Third-Party Defendant-Respondent,

David Cheverie,
Nonparty Appellant.

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Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Michael L. Mangini of counsel), for Two Bridges Associates Limited Partnership, respondent.

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

Mintzer, Sarowitz, Zeris, Ledva & Meyers L.L.P., New York (Leslie D. McMillan of counsel), for Two Bridges Townhouse Condominium, respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.),

entered September 8, 2014, which, to the extent appealed from as

limited by the briefs, denied plaintiff's counsel's motion to lift the stay of the action, restore the action to the trial calendar, and amend the caption, and granted defendants' separate cross motions to dismiss the complaint, unanimously reversed, on the law and the facts, without costs, plaintiff's counsel's motion granted and defendants' cross motions denied.

The argument that defendants' cross motions were procedurally defective was not preserved (*Rose v Frankel*, 83 AD3d 607, 607-608 [1st Dept 2011]). In any event, the motion court erred in granting the cross motions based on the failure to move to substitute Sonya Randall (decedent's wife and administrator of his estate) as plaintiff within a reasonable time after decedent's death in 2010 (*see* CPLR 1021). Although decedent's counsel did not comply with Supreme Court's (Wright, J.) order, entered March 9, 2011, which directed him to advise the court of his progress in getting an administrator appointed for the estate or make a motion to vacate the stay of the action and amend the caption by June 30, 2011, defendant Two Bridges Associates Limited Partnership never argued that it was prejudiced by the delay. Defendant City only claimed it was prejudiced due to the passage of time, which, standing alone, is an insufficient basis for finding prejudice (*see Morales v Solomon Mgt. Co., LLC*, 38

AD3d 381, 382 [1st Dept 2007]). Further, the attorney for decedent has shown that the action, involving decedent's trip and fall on a public walkway between 275 and 295 Cherry Street, has potential merit (*cf. Riedel v Kapoor*, 123 AD3d 996, 997 [2d Dept 2014] [dismissal was proper, where the plaintiff failed to submit an affidavit of merit and the defendants were prejudiced by the plaintiff's delay]). Two Bridges Associates stated in its answer that it owned the land and structures at 275 Cherry Street, and the City stated in its answer that it may have owned the walkway.

Accordingly, despite the inordinate delay, given the absence of prejudice and the potential merit of the action, the motion should be granted and defendants' cross motions should be denied.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1001 The People of the State of New York, Ind. 3410/12
Respondent,

-against-

Rafael Moreno,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Simpson Thacher & Bartlett LLP, New York (Kristina N. Green of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 7, 2013, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

The court correctly determined that testimony offered by defendant constituted alibi testimony, and providently exercised its discretion in precluding it for failure to comply with the notice requirement of CPL 250.20(1). The People's theory was that defendant was on a fire escape, entered an apartment through a window, exited back onto the fire escape, and ran out of an alleyway down the street. Defendant's proposed witness would

testify that defendant was never on the fire escape, and that at the time, defendant was nearby on the street smoking marijuana, i.e., that "at the time of the commission of the crime charged he was at some place . . . other than the scene of the crime" (*id.*).

Moreover, since defense counsel first advised the court and the People of the alibi testimony during trial, after the People rested, without any showing of good cause for the delay, the court properly exercised its discretion in precluding that testimony (*see e.g. People v Ortiz*, 41 AD3d 114 [1st Dept 2007], *lv denied* 9 NY3d 879 [2007]). The record suggests that one of defendant's relatives belatedly told defense counsel about the potential witness, and we find that the "emergence of the alibi witness at the eleventh hour indicated that her proposed testimony was a product of recent fabrication . . . and warrants a finding of willful conduct on the part of defendant, personally" (*People v Walker*, 294 AD2d 218, 219 [1st Dept 2002], *lv denied* 98 NY2d 772 [2002]; *see also People v Batchilly*, 33 AD3d 360, 360-61 [1st Dept], *lv denied* 7 NY3d 900 [2006]). The court's determination met the constitutional standards for alibi preclusion (*see Taylor v Illinois*, 484 US 400, 414-417 [1988]; *Noble v Kelly*, 246 F3d 93, 99 [2d Cir 2001], *cert denied* 534 US 886 [2001]). In any event, any error in excluding the testimony

was harmless (*see e.g. People v Brown*, 306 AD2d 12, 13 [1st Dept 2003], *lv denied* 100 NY2d 592 [2003]).

Defendant's challenges to the jury charge are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1002 In re Angela Carone, Index 100617/14
Petitioner,

-against-

New York City Environmental Control Board, et al.,
Respondents.

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Cohen, Hochman & Allen, New York (Lindsay Garroway of counsel), for petitioner.

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

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Determination of respondent Environmental Control Board (ECB), dated February 27, 2014, which found petitioner in violation of Administrative Code of City of NY §§ 28-210.1, 28-202.1, and 28-105.1, and imposed civil penalties totaling $49,000, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Joan B. Lobis, J.], entered January 12, 2015), dismissed, without costs.

ECB's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Contrary to petitioner's statements that the subject cellar was used only as a

"recreational space" by her family, and not as a separate dwelling unit where anyone ever slept, petitioner failed to refute the charge that the cellar was arranged as a fourth dwelling unit in violation of the Certificate of Occupancy, which provides for only two residential units. In particular, the design or arrangement of the cellar, which had a full bathroom, a kitchen with a gas stove, a dining area, and a living area with a couch and television, irrespective of its actual use, established that an illegal dwelling unit had been created (*see N.Y.C. v Major Thomas*, ECB Appeal No. 1200222 [May 31, 2012]; *see also Matter of Aparicio v Environmental Control Bd. of City of N.Y.*, 83 AD3d 1054 [2d Dept 2011], *lv denied* 18 NY3d 805 [2012]).

As to the Notices of Violation at issue here, an inspector from respondent Department of Buildings made one attempt at personally serving the notices at the premises where the violation occurred, before availing himself of the "affix and mail" method of service prescribed in New York City Charter § 1049-a(d)(2)(b). The inspector's one attempt at personal service satisfies the "reasonable attempt" requirement set forth in section 1049-a(d)(2)(b) (*Matter of Mestecky v City of New York*, 133 AD3d 431, 432 [1st Dept 2015]). Although petitioner claimed that she was home on the day of service and did not hear the

doorbell ring, the ALJ found the inspector's testimony to be more credible than petitioner's. The inspector testified that he rang all four doorbells at the premises, but the only response was from a woman who identified herself as a tenant who told the inspector that petitioner was not present. There is no basis to disturb these credibility findings (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Furthermore, petitioner, as trustee of the living trust in her name that holds title to the premises, is an owner of the premises and, therefore, a properly named party (*see* Administrative Code § 28-101.5).

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1003-
1004-
1005-
1006 In re Essence T. W., and Others,

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

Destinee R. W.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

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Orders of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about October 17, 2014, to the extent they bring up for review the fact-finding determination that respondent permanently neglected the subject children, unanimously affirmed, without costs, and appeals therefrom otherwise dismissed, without costs, as taken from nonappealable orders.

The finding of permanent neglect is supported by clear and convincing evidence that, during the statutorily relevant period,

despite petitioner agency's diligent efforts, respondent failed to address meaningfully the problems leading to the children's placement, and thus failed to plan for their future (*see* Social Services Law § 384-b[7][a], [3][g][i]; *Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). Petitioner's referrals of respondent to counseling programs and parenting classes, arranging for visitation, and directing random drug screens constituted the diligent efforts required by the statute (*see* Social Services Law § 384-b[7][f]); petitioner was not a guarantor of respondent's success in overcoming her predicament (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]). The finding of permanent neglect is also supported by clear and convincing evidence that, despite petitioner's diligent scheduling efforts, respondent failed to maintain regular contact with the children (*see* Social Services Law § 384-b[7][a]).

We reject respondent's contention that petitioner failed to make diligent efforts to help her tackle the problems identified in her mental health evaluation, and thus failed to strengthen and encourage the parent-child relationship (*see* Social Services Law § 384-b[7][f]; *Matter of Imani Elizabeth W.*, 56 AD3d 318 [1st Dept 2008]). Petitioner worked with respondent to include individual therapy in her service plan, and, although it reminded

her to keep her appointments, respondent failed to attend them.

No appeal lies from the dispositional portions of the orders, since those portions were entered on default (see CPLR 5511; *Matter of Monique Twana C.*, 246 AD2d 351 [1st Dept 1998]). In any event, a preponderance of the evidence at the dispositional hearing established that the best interests of the children would be served by terminating respondent's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have bonded with their foster mother, who has met all their needs and wishes to adopt them (*see Matter of Emily Jane Star R. [Evelyn R.]*, 117 AD3d 646 [1st Dept 2014]).

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1007 Xiomara Betances, Index 305916/12
Plaintiff-Appellant,

-against-

185-189 Audubon Realty, LLC,
Defendant-Respondent.

_____

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

Pillinger Miller Tarallo, LLP, Elmsford (Douglas A. Gingold of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about December 1, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff alleges that she was injured when, while descending the staircase in defendant's building, she slipped and fell on a plastic bag that was on the staircase. There is no testimony that defendant created the condition by depositing the plastic bag on the stairwell. On the issue of actual or constructive notice, where the hazardous condition is transitory, a defendant may establish its entitlement to summary judgment by demonstrating that the condition could have arisen shortly before

the accident (*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]*; Brooks-Torrence v Twin Parks Southwest*, 133 AD3d 536 [1st Dept 2015]). Here, plaintiff testified that she did not see the plastic bag or any other debris on the staircase when she arrived at defendant's building, only seeing the bag after she fell.

Furthermore, to the extent plaintiff argues that dim lighting in the staircase caused or contributed to her accident, the motion court correctly concluded that plaintiff did not, in her testimony, expressly link her accident to the alleged lack of lighting in the stairs.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1010-
1011 Evgeny "Gene" Freidman, etc.,
Plaintiff-Appellant,

-against-

The New York City Taxi and Limousine Commission, et al.,
Defendants-Respondents.

- - - - - -

In re Greater New York Taxi Association,
Petitioner-Appellant,

-against-

The New York City Taxi and Limousine Commission, etc.,
Respondent-Respondent.

Index 653966/13
100519/14

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Fox Rothschild LLP, New York (Matthew S. Olesh of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Max McCann [653966/13] and Scott Shorr [100519/14] of counsel), for municipal respondents.

Murtha Cullina LLP, White Plains (David P. Friedman of counsel), for Transportation General, Inc., respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered July 1, 2014, which denied the CPLR article 78 petition seeking to, among other things, annul the determination of respondent New York City Taxi and Limousine Commission (TLC), dated March 31, 2014, requiring all medallion owners to pay a

Taxi Accessibility Fee of $260 per medallion for the third year of the Accessible Dispatch program; and order, same court (Melvin L. Schweitzer, J.), entered August 11, 2014, which denied plaintiff's motion for class certification, and granted the cross motion of the TLC defendants and the cross motion of defendant Transportation General, Inc. d/b/a Metro Taxi Inc. (Metro) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In the article 78 proceeding, TLC's determination to set the Accessibility Fee for the third year of a wheelchair-accessible program at $260 was not arbitrary and capricious (*see generally Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). While that fee was a dramatic increase from the previous year's fee of $54, it was based on reasonable projections of the program's third-year costs. TLC reasonably disregarded a prospective 30-cent surcharge, and its response to a Freedom of Information Law request did not reveal that it had breached any contractual obligations to audit or maintain information provided by Metro, its contractor.

Plaintiff lacks standing to enforce a contract between defendants TLC and Metro (TLC-Metro contract), because the contract expressly and unequivocally "negates any intent to

permit enforcement by third parties" such as plaintiff (*Specialists Entertainment, Inc. v Moore*, 115 AD3d 424, 425 [1st Dept 2014]; *see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-787 [2006]). Unlike the contracts in the cases cited by plaintiff (*see Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421 [1st Dept 2011]; *Board of Mgrs. of Alfred Condominium v Carol Mgt.*, 214 AD2d 380, 382 [1st Dept 1995], *lv dismissed* 87 NY2d 942 [1996]), the TLC-Metro contract does not contain conflicting clauses regarding third-party beneficiaries. Given the foregoing determination, plaintiff's motion for class certification is academic (*Matter of Cannalonga v Doar*, 51 AD3d 552, 553 [1st Dept 2008], *lv dismissed in part and denied in part* 11 NY3d 861 [2008]).

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

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1013 The People of the State of New York, Ind. 581/14
Respondent,

-against-

Allen Ambrister,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 June 10, 2014,

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

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

ENTERED: MAY 3, 2016

CLERK

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

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1014-
1015 Yahaira Hernandez, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Dr. Arden Kaisman,
Defendant-Appellant-Respondent.

- - - - -

[And a Third-Party Action]

Index 104989/07

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Serrins Fisher LLP, New York (Alan Serrins of counsel), for appellant-respondent.

The Law Office of Fred Lichtmacher P.C., New York (Fred Lichtmacher of counsel), for respondents-appellants.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered June 3, 2015, insofar as appealed from, awarding plaintiffs attorneys' fees in the amount of $264,612.50 and disbursements in the amount of $12,000, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 4, 2015, deemed an appeal from the judgment (CPLR 5520[c]).

The trial court providently exercised its discretion in determining the amount of attorneys' fees and costs to be awarded plaintiffs, the prevailing parties in this action for gender-based employment discrimination under the New York City Human Rights Law (Administrative Code of City of NY § 8-502[g]; *see*

McGrath v Toys "R" Us, Inc., 3 NY3d 421, 430 [2004] ["calculation of an appropriate fee award is a discretionary procedure best left in the hands of trial courts who have a superior understanding of the litigation"] [internal quotation marks omitted]).

Contrary to defendant's contentions, the fee award set by the court, which is substantially less than the amount requested, is not unreasonably high. The court was not required to reduce fees further to reflect a relative "lack of success"; the unsuccessful claims "involve[d] a common core of facts or were based on related legal theories, so that [m]uch of counsel's time w[as] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis" (*LeBlanc-Sternberg v Fletcher*, 143 F3d 748, 762 [2d Cir 1998] [internal quotation marks omitted]). There is also no per se rule against awarding fees in excess of damages recovered; indeed, fees may even be appropriate where a party recovers only nominal damages - at least where, as here, the litigation served a significant public purpose (*McGrath*, 3 NY3d 421). The instant case enabled the courts to clarify the standard applicable to hostile work environment claims under the City HRL. The hourly rates are within the range of rates awarded to other lawyers of

similar experience practicing in New York, and the number of hours worked is likewise not unreasonable, particularly in the context of a litigation that lasted eight years and involved two dispositive motions, discovery, a prior appeal, and a two-week trial. Lead counsel's time sheets provide "sufficient detail to permit intelligent review of the necessity or reasonableness of the time expenditures recorded therein" (*Matter of Rourke v New York State Dept. of Correctional Servs.*, 245 AD2d 870, 870 [3d Dept 1997]; *see also Rozell v Ross-Holst*, 576 F Supp 2d 527, 540 [SD NY 2008] [vague time entries sufficiently clear "when viewed in the context of other work performed around the same time"]).

Contrary to plaintiffs' contentions, the trial court did not set the fee award unreasonably low. Other courts have similarly discounted senior attorney hours where, as here, they made up a "disproportionate" amount of the time spent on the matter (*see Rozell*, 576 F Supp 2d at 541), and have similarly discounted trial time where, as here, multiple lawyers were present at trial (*see Luciano v Olsten Corp.*, 109 F3d 111, 117 [2d Cir 1997]; *Zhao Hui Chen v Jin Holding Group Inc.*, 2012 WL 279719, *3, 2012 US Dist LEXIS 11570, *8-9 [SD NY Jan. 31, 2012]). Although a court may award costs even in the absence of receipts, the court was entitled to discount those costs it believed to be unreasonable

or unsubstantiated in light of the lack of documentation (*see Adorno v Port Auth. of N.Y. & N.J.*, 685 F Supp 2d 507, 518 [SD NY 2010]).

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

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1018-
1019 The People of the State of New York,
Respondent,

-against-

Nolber Quinones,
Defendant-Appellant.

Ind. 5603/10

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 7, 2011, convicting defendant, after a nonjury trial, of rape in the second degree and endangering the welfare of a child, and sentencing him, as a second violent felony offender, to an aggregate term of 6 years to be followed by 15 years' postrelease supervision, unanimously affirmed.

Defendant's ineffective assistance claims include matters outside, or not fully explained by the record. Although defendant raised these claims in an unsuccessful CPL 440.10 motion, his motion for leave to appeal to this Court was denied. Accordingly, while defendant's claims are cognizable on direct

appeal, our review is limited to the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]). To the extent defendant "request[s] that the bench for this appeal entertain a leave application [that application] is procedurally improper because CPL 460.15 specifically provides that such an application can only be made to an individual justice, and can only be made once" (*People v Wilkov*, 77 AD3d 512, 513 [1st Dept 2010], *lv denied* 16 NY3d 746 [2011]).

Based on the limited review permitted by the existing record, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant's principal claims are refuted by the record, including, among other things, a colloquy between defendant and the court at the time defendant waived a jury trial. In particular, regardless of whether counsel misadvised defendant of his predicate offender status and true sentencing exposure, the record shows that the court gave defendant timely and accurate advice on this subject, and defendant nevertheless proceeded to trial. Defendant has not shown that the outcome of the plea process would have been different with different advice from counsel (*see Lafler v Cooper*, 566 US __, __, 132 S Ct 1376,

1384-1385 [2012]). We have considered and rejected defendant's remaining ineffective assistance of counsel claims.

We perceive no basis for reducing the sentence, including he term of postrelease supervision.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1020-
1021-
1022 Index 650447/14

GSO Coastline Credit Partners LP,
et al.,
Plaintiffs-Appellants,

Centerbridge Credit Partners Master LP,
et al.,
Plaintiffs,

-against-

Global A&T Electronics Ltd., et al.,
Defendants-Respondents.

- - - - -

Commercial Finance Association,
Amicus Curiae.

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Lowenstein Sandler LLP, New York (Thomas E. Redburn, Jr. and Michael J. Hampson of counsel), for appellants.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Paul M. O'Connor, III of counsel), for Global A&T Electronics Ltd., Global A&T Finco Ltd., United Test and Assembly Center Ltd., UTAC Cayman Ltd., UTAC Hong Kong Limited, UTAC (Taiwan) Corporation, UTAC Thai Limited and UTAC Thai Holdings Limited, respondents.

Susman Godfrey L.L.P., Houston, TX (Mary Kathryn Sammons of the bar of the State of Texas, admitted pro hac vice, of counsel), for Newbridge Asia GenPar IV Advisors, Inc. and TPG Asia GenPar V Advisors, Inc., respondents.

Baker & McKenzie LLP, New York (David F. Heroy of counsel), for Affinity Fund III General Partner Limited and Costa Esmeralda Investments Limited, respondents.

Otterbourg P.C., New York (Jonathan N. Helfat of counsel), for Commercial Finance Association, amicus curiae.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered on or about July 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the second, third, fourth, fifth, seventh, eighth, tenth, eleventh, twelfth and thirteenth causes of action, unanimously modified, on the law, to deny the motions as to the second, third, fourth, fifth, seventh, eighth, tenth and eleventh causes of action, and otherwise affirmed, without costs.

Plaintiffs are purchasers of senior secured notes (Senior Notes) issued in February 2013 by defendant Global A&T Electronics Ltd. (GATE). The Senior Notes are secured by first-priority liens on certain assets of GATE and its subsidiaries (the Collateral). The securitization and payment priority of the Senior Notes, relative to notes held by GATE's junior debt holders, is set forth in an Intercreditor Agreement (ICA) and an Indenture. Under sections 1.1 ("Second Priority Agreement") and 2.1 of the ICA, there is a clear prohibition against the replacement, refinancing or repayment of second-priority secured obligations with first-priority secured obligations. Any such replacement debt is, by definition, a second-priority obligation relative to the Senior Notes held by plaintiffs.

In September 2013, without notice to, or consent of, the

senior note holders, GATE consummated a debt exchange that allegedly allowed GATE's junior debt holders, including one of its two controlling shareholders, to "leapfrog" up GATE's debt priority structure by swapping their second-priority secured interests for first-priority secured notes (the Additional Notes) that purportedly rank pari passu with plaintiffs' Senior Notes.

The complaint states a cause of action for breach of sections 2.2 and 3.2 of the ICA, which, respectively, prohibit the alteration of the priority scheme set forth in section 2.1 of the ICA and any actions the purpose or effect of which is to make any lien securing second-priority obligations pari passu with, or senior to, the liens securing the first-priority obligations, including the Senior Notes.

The complaint states a cause of action for breach of section 4.12 of the Indenture, since GATE placed a new lien on the Collateral securing the Senior Notes, and the new lien is not a "Permitted Lien" under subsection 17 of the definition of that term in the indenture, because any new liens are subject to the priority scheme set forth in the ICA. Indeed, section 9.1 of the ICA provides that, in the event of a conflict between the terms of the ICA and the Indenture, the ICA controls. Nor is the new lien a "Permitted Lien" under subsection 11 of the definition of

that term in the Indenture, which expressly provides that any such lien remains subject to the priority scheme under the ICA. Because the lien placed on the Collateral was not a Permitted Lien, plaintiffs have also alleged a breach of section 4.18(b) of the Indenture.

The complaint states a cause of action for breach of section 4.16 of the Indenture. Based on the express terms of section 9.3(b) of the ICA, GATE's second amendment to the ICA, effectuating the issuance of the Additional Notes that purport to rank pari passu with the Senior Notes, was subject to the provisions of the ICA, including the provisions governing the priority scheme. Because the second amendment to the ICA did not conform with, and sought to circumvent, the terms of the ICA concerning the priority scheme, GATE lacked the authority to enter into it.

Moreover, the second amendment to the ICA was not permitted under section 4.16(b)(i),(ii) or (v) of the Indenture since there is no inconsistency or ambiguity in the ICA, section 4.16(b)(ii) expressly provides that any increased indebtedness is subject to the terms of the ICA, which includes the priority scheme, and any additional notes secured by the Collateral are still subject to the priority scheme.

The complaint states a cause of action for breach of section 4.11 of the Indenture by alleging that GATE could have executed the debt exchange under more favorable terms in an arm's-length transaction.

As the complaint states a cause of action for breach of the Indenture, the cause of action for declaratory relief should be reinstated.

The controlling shareholder defendants may not rely on the economic interest defense to the cause of action for tortious interference with contract since, in bringing about the debt exchange, they were not acting to protect their legal or financial stake in GATE (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Rather, they were acting to protect the interests of defendant Costa Esmeralda Investments Limited, which is an affiliate of one of the controlling shareholders. As plaintiffs point out, rather than positively affecting GATE, the debt exchange caused a credit rating agency to downgrade the Senior Notes.

The complaint fails to state causes of action for fraudulent

inducement and fraud since the representations on which plaintiffs rely are nonactionable statements of either intent or belief (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [1st Dept 2008]).

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1023 In re Maria Rocio Auqui for the Appointment of a Guardian of

Jose Verdugo,
An Alleged Incapacitated Person.

- - - - -

Maria Rocio Auqui, etc.,
Petitioner-Appellant,

-against-

Peachtree Funding Northeast, LLC,
Respondent-Respondent.

- - - - -

[And a Third-Party Action]

Index 500137/09

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Law Offices of Annette G. Hasapidis, Mt. Kisco (Annette G. Hasapidis of counsel), for appellant.

Yankwitt LLP, White Plains (Kathy S. Marks of counsel), for respondent.

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Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered May 31, 2013, which denied the petition to void certain agreements between the alleged incapacitated person and respondent, pursuant to Mental Hygiene Law § 81.29(d), unanimously reversed, on the law, without costs, and the petition granted. The Clerk is directed to enter judgment accordingly.

Given the undisputed medical evidence that the alleged incapacitated person (AIP) had suffered from a mental defect as a result of his 2003 accident, when he was hit on the head by a

piece of plywood falling from the 50th floor of a building, the burden of proof on the issue of his competence to enter into the challenged agreements shifted to respondent, as the advocate of competency (*see Matter of Kaminester v Foldes*, 51 AD3d 528 [1st Dept 2008], *lv dismissed in part, denied in part* 11 NY3d 781 [2008]). In light of the ambiguous nature of the testimony of Dr. Kuhn, respondent's sole witness on this issue, respondent failed to meet its burden of showing by clear and convincing evidence that the AIP was able to act in a reasonable manner in connection with the transaction (*see Ortelere v Teachers' Retirement Bd. of City of N.Y.*, 25 NY2d 196, 204 [1969], citing Restatement, 2d, Contracts; *Kaminester*, 51 AD3d at 529; *Morales v State of New York*, 183 Misc 2d 839, 848 [Ct Cl 2000], *affd* 282 AD2d 245 [1st Dept 2001]). That the court evaluator and an occupational therapist interviewed the AIP before and after the period when he executed the agreements does not render the

evidence they gave irrelevant (*see Belda v Doerfler*, No 14-CV-941 [AJN], 2015 WL 5737320, *9, 2015 US Dist LEXIS 133483, *27 [SD NY Sept. 30, 2015]). Their observations were probative of the AIP's mental condition between the times they observed him.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1024-
1025 Ind. 312/13

The People of the State of New York,
Respondent,

-against-

Kyle Harleston,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel) and Brooklyn Law School, Criminal Appeals Clinic, Brooklyn (Sean Anderson of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J. at CPL 190.50 motion; James Burke, J. at jury trial and sentencing), rendered March 5, 2014, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously modified, on the law, to the extent of remanding for resentencing, and otherwise affirmed. Order, same court (James Burke, J.), entered on or about April 1, 2015, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly exercised its discretion in declining to preclude recorded phone calls made by defendant, notwithstanding

that the prosecution did not advise the defense of their existence until the morning of opening statements. There is no basis for disturbing the court's credibility determination that, up until that moment, the prosecutor only intended to use these recordings for possible impeachment. Accordingly, there was no violation of CPL 240.20(g), which only requires disclosure of recordings intended to be used on the direct case (*see People v Muller*, 72 AD3d 1329, 1335-1336 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]). In any event, defendant has not demonstrated that he was prejudiced by the timing of the disclosure. Since the recordings did not constitute identification evidence, we reject defendant's claim that the prosecutor contradicted her prior representation that there were no identifying witnesses. Defendant's constitutional argument regarding the delayed disclosure is without merit.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The element of display of what appeared to be a firearm was satisfied by evidence supporting the conclusion that the victim, who specifically described the hard object wielded by defendant as a pistol, perceived this object to be a firearm even though he did not see it and only felt it (*see People v Baskerville*, 60 NY2d 374, 381

[1983]; *People v Groves*, 282 AD2d 278 [1st Dept 2001], *lv denied* 96 NY2d 901 [2001]; *People v Garcia*, 278 AD2d 147 [1st Dept 2000], *lv denied* 96 NY2d 759 [2001]).

To the extent the record permits review, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's failure to request a circumstantial evidence charge fell below an objective standard of reasonableness, or that the absence of such a charge deprived defendant of a fair trial or affected the outcome of the case.

Defendant's arguments concerning his attorney's failure to effectuate defendant's desire to testify before the grand jury, which were the subject of his CPL 190.50 and 440.10 motions, are unavailing (*see People v Hogan*, __ NY3d __, 2016 NY Slip Op 01207, *5-*7 [2016]).

Under all the circumstances, including the fact that this was a conviction after trial rather than a negotiated plea, there should be a new sentencing proceeding. Defendant was not produced for a probation interview, and the presentence report accordingly contains no social history. There is no indication in the record that defendant intentionally avoided the interview.

Counsel brought the lack of an interview to the court's attention on the day of sentencing, and requested an adjournment for that purpose. Defendant's opportunity to make a statement at sentencing was not a sufficient substitute for an interview in this case, and his choice not to make such a statement does not warrant a different conclusion.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1026 In re Bruckner Realty LLC, Index 570004/15
Petitioner-Appellant,

-against-

Jeannette Cruz,
Respondent-Respondent.

_____

Sontag & Hyman, P.C., Roslyn Heights (Marc H. Hyman of counsel), for appellant.

Jeannette Cruz, respondent pro se.

_____

Order of the Appellate Term, Supreme Court, First Department, entered on or about March 16, 2015, which modified an order of Civil Court, Bronx County (Joseph E. Capella, J.), entered September 4, 2014, to deny the parts of petitioner's summary judgment motion that sought to dismiss respondent's second and third "affirmative defenses" and first and second "defenses" and for summary judgment of possession, unanimously affirmed, without costs.

Since petitioner's first summary judgment motion was made after respondent's deemed general denial, whereas its second such motion was made after her answer, the second motion was not barred by the rule against successive summary judgment motions (*see e.g. Healthcare I.Q., LLC v Tsai Chung Chao*, 118 AD3d 98,

102-103 [1st Dept 2014]).

On the merits, petitioner failed to establish its prima facie case. The fact that the subject building has 142 dwelling units but space for only 56 cars is not determinative (*see Missionary Sisters of Sacred Heart v Meer*, 131 AD2d 393 [1st Dept 1987]). To the extent *Matter of 110-15 71st Rd. Assoc., LLC v Division of Hous. & Community Renewal* (54 AD3d 679, 681 [2d Dept 2008], *lv denied* 12 NY3d 712 [2009]) is to the contrary, we decline to follow it. In this Department, the test of whether a service is a required ancillary service is "whether [it] was provided primarily for the use of the tenants, not whether [it] was used primarily by the tenants" (*Matter of 501 E. 87th St. Realty Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 22 AD3d 294, 295 [1st Dept 2005] [internal quotation marks omitted]).

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1027 The People of the State of New York, Ind. 3853/12
Respondent,

-against-

Buddy Winston,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer 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 (Laura Ward, J.), rendered October 27, 2014,

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

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

ENTERED: MAY 3, 2016

CLERK

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

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1028 In re Marsha Pels, Index 100447/14
Petitioner,

-against-

New York City Environmental
Control Board, et al.,
Respondents.

_____

Robert M. Petrucci, New York, for petitioner.

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

_____

Determination of respondent New York City Environmental Control Board (ECB), dated December 19, 2013, which reinstated a violation against petitioner for obstructing the sprinkler system in her loft unit in violation of the New York City Fire Code, and assessed a mitigated $475 fine, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered on or about October 6, 2014), dismissed, without costs.

ECB's finding that petitioner erected a free-standing structure with a temporary ceiling that obstructed the sprinkler system in violation of the Fire Code is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of*

Human Rights, 45 NY2d 176, 180-181 [1978]).

Article 7-C of the Multiple Dwelling Law (Loft Law) does not preempt enforcement of the Fire Code violation under the circumstances presented (*see DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95 [2001]). An analysis of the Loft Law and its legislative findings reveals that the New York State Legislature did not "clearly evince[] a desire to preempt an entire field thereby precluding any further local regulation" such that implied preemption would apply (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97 [1987]. Furthermore, petitioner's express preemption arguments fail, as no section of the Loft Law expressly prohibits enforcement of fire safety regulations against tenants who affirmatively create new fire hazards.

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1029 The People of the State of New York, Ind. 3425/14
Respondent,

-against-

Luis Navia,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 14, 2014, unanimously affirmed.

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

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

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

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

ENTERED: MAY 3, 2016

CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1030N Koya Abe, Index 105985/10
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

_____

Jennifer L. Unruh, Astoria, for appellant

DLA Piper LLP (US), New York (Brian S. Kaplan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 4, 2015, which denied plaintiff's motion to compel disclosure and for in camera review of documents withheld by the defendants as privileged, to strike defendants' answers, and for sanctions, and granted defendants' cross motion to the extent of ordering the return of privileged documents related to defendant Cathleen Dawe that were inadvertently produced to plaintiff, unanimously affirmed, with costs.

The motion court did not abuse its discretion in denying plaintiff's motion to compel defendants to disclose and produce documents listed in their privilege logs, for an in camera review, and other related relief (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]).

Pursuant to a stipulation and order of reference to determine, the JHO determined that all the documents, which were forwarded on a disk, were privileged if they were between Cathleen Dawe, NYU Associate General Counsel, and NYU employees, or if between employees and copied to Dawe. "The law of the case doctrine is a rule of comity and convenience which states that ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case" (*Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1st Dept 1987]). Thus, where the motion court directed that certain issues be determined by a referee, such as the March 20, 2012 stipulation and order of reference to determine in this case, the motion court properly found that the JHO's determinations were the law of the case (*see Shandell v Katz*, 159 AD2d 389, 390 [1st Dept 1990] [citation omitted].

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1032 The People of the State of New York, Ind. 5532/10
Respondent,

-against-

Michael Linton,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Cahill Gordon & Reindel LLP, New York (Will A. Page of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered October 6, 2011, as amended November 10, 2011, convicting defendant, after a jury trial, of criminal possession of stolen property in the fourth and fifth degrees, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion, made after a police witness revealed uncharged crime evidence that the court had precluded. The court sustained defense counsel's objection, struck the response, recalled the witness to give clarifying testimony favorable to defendant and twice provided curative instructions which the jury

is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). These curative actions were sufficient to prevent any possible prejudice (*see People v Santiago*, 52 NY2d 865 [1981]).

The court also properly exercised its discretion in permitting a police witness to provide background evidence, based on his experience, concerning "lush workers" and police lush worker operations (*see People v Bright*, 111 AD3d 575 [1st Dept 2013], *lv denied* 22 NY3d 1137 [2014]). This testimony tended to explain the actions of both defendant and the police surveillance team throughout the course of events, and it was not unduly prejudicial.

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1033 In re Carlos Fernandez, Index 260702/11
Petitioner-Respondent,

-against-

New York City Transit Authority,
Respondent-Appellant.

_____

New York City Transit Authority, Brooklyn (Kavita K. Bhatt of counsel), for appellant-respondent.

Martin Druyan and Associates, New York (Martin Druyan of counsel), for petitioner-respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about January 22, 2015, which, on remand, granted petitioner's petition to the extent of restoring him, upon his successful completion of a medical examination, to his position as a bus operator, with full benefits and accrued vacation running from the date of his reinstatement, unanimously reversed, on the law and the facts, without costs, and the matter remitted to the original Arbitrator for further proceedings consistent with this decision.

On a prior appeal in this CPLR article 75 proceeding, this Court vacated the arbitration award sustaining respondent New York City Transit Authority's (NYCTA) decision to terminate petitioner's employment, and remanded the matter for imposition

of a lesser penalty (*Matter of Fernandez v New York City Tr. Auth.*, 120 AD3d 407 [1st Dept 2014]). On remand, Supreme Court usurped the Arbitrator's authority when it imposed a lesser penalty, since the matter should have been remitted to the Arbitrator for a rehearing and new determination as to the appropriate lesser penalty (CPLR 7511(d); *see Matter of Board of Educ. of E. Hampton Union Free School Dist. v Yusko*, 269 AD2d 445, 446 [2d Dept 2000]). The matter should be remitted to the original Arbitrator, because there has been no showing that the original Arbitrator is biased or otherwise incapable of carrying out his duties (*see Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 117 [1st Dept 2003]).

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

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1034 In re Daquan S.,

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

_____

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

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

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 31, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, it committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in denying appellant's request for an adjournment in contemplation of dismissal, and in instead adjudicating him a juvenile delinquent and placing him on probation. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Although this was appellant's first arrest,

he was the main assailant in a violent attack that resulted in injuries to the victim. In addition, defendant demonstrated behavioral problems at school and at home. These factors warranted a one-year period of supervision by the probation department, and we find no basis for reducing that term.

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1035 John C. Barone, Index 805159/12
Plaintiff-Respondent,

-against-

Dello Russo Laser Vision Medical Care, PLLC,
Defendant,

Laser Eye Practice of New York, PLLC, et al.,
Defendants-Appellants.

_____

Marulli, Lindenbaum & Tomaszewski, LLP, New York (Richard O. Mannarino of counsel), for appellants.

Law Offices of Marius C. Wesser, P.C., New York (Marius C. Wesser of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 24, 2015, which denied the motion of defendants Laser Eye Practice of New York, PLLC and Jeffrey Dello Russo, M.D. for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this medical malpractice action stemming from Lasik eye surgery, Dr. Jeffrey Dello Russo satisfied his burden on summary judgment by submitting evidence that he had no further

involvement with plaintiff after having performed initial corneal topographies, the performance and analysis of which plaintiff concedes did not deviate from accepted medical practice (*see Kristal R. v Nichter*, 115 AD3d 409, 411 [1st Dept 2014]). In opposition, plaintiff failed to raise an issue of fact as to whether Dr. Jeffrey Dello Russo had any involvement with the subsequent topography performed on plaintiff, rendering his expert's conclusion that Dr. Jeffrey Dello Russo should have known plaintiff was a poor candidate for Lasik surgery as unsupported by the record (*Feaster-Lewis v Rotenberg*, 93 AD3d 421, 422 [1st Dept 2012], *lv denied* 19 NY3d 803 [2012]); *see Bacani v Rosenberg*, 74 AD3d 500, 502 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]).

In that no malpractice has been shown against Dr. Jeffrey Dello Russo, there can be no vicarious liability to impute to defendant Laser Eye Practice of New York (*see Lopez v Master*, 58 AD3d 425 [1st Dept 2009]).

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1038 Shelby Sullivan, Index 154868/14
Plaintiff-Appellant,

-against-

MERS, Inc., etc., et al.,
Defendants-Respondents,

468 West 146 Corp., also known as
468 West 146 Street Corp., et al.,
Defendants.

_____

Law Offices of Vincent S. Wong, New York (Vincent S. Wong of counsel), for appellant.

Bryan Cave LLP, New York (Suzanne M. Berger of counsel), for MERS, Inc., respondent.

Miller, Rosado & Algios, LLP, Garden City (Neil A. Miller of counsel), for Baron Associates, LLC, respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 15, 2015, which, insofar as appealed from as limited by the briefs, granted the cross motions of defendant Baron Associates LLC (Baron) and defendant MERS, Inc. (MERS) to dismiss the claims for fraud, conspiracy to commit fraud, unjust enrichment, prima facie tort, breach of fiduciary duty, and negligent underwriting as asserted against them, unanimously affirmed, with costs.

The court properly dismissed the fraud claims against Baron

and MERS, as plaintiff has not alleged that they made any material misrepresentations upon which he relied (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Plaintiff has also failed to state a viable claim for conspiracy to commit fraud, since his allegations that they acted as part of a common scheme or plan to defraud him of his interest in the subject property are conclusory (*see Agostini v Sobol*, 304 AD2d 395 [1st Dept 2003]). While he has alleged facts showing that other defendants had engaged in a fraudulent scheme, the allegations with respect to Baron and MERS were only that they issued mortgages to those defendants, and that they sought to foreclose on the property after those purchasers defaulted on the loans.

The court properly dismissed the unjust enrichment claims, since plaintiff has not alleged any relationship between himself and Baron or MERS (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516-517 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

The claims for prima facie tort fail, as plaintiff has not alleged facts showing that Baron or MERS acted with "disinterested malevolence" or intent to inflict harm on him (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [internal quotation marks omitted]).

The claims for breach of fiduciary relationship were properly dismissed. Plaintiff has not alleged any relationship wherein Baron and MERS were under a duty to act for or give advice for plaintiff's benefit (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561 [2009]). Indeed, plaintiff has not alleged any "direct contact or any relationship – contractual or otherwise" – between himself and Baron or MERS (*id.*).

Plaintiff's claims for negligent underwriting are unavailing, as mortgage lenders owe no duty to property owners to prevent their properties from being the subject of fraudulent real estate transactions (*see Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359 [1st Dept 1995]; *Money Store/Empire State v Lenke*, 151 AD2d 256, 257 [1st Dept 1989]; *see also Mathurin v Lost & Found Recovery LLC*, 65 AD3d 617 [2d Dept 2009]).

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1039-
1040 Index 654310/13

117-119 Leasing Corp.,
Plaintiff-Respondent-Appellant,

-against-

Reliable Wool Stock, LLC,
Defendant-Appellant-Respondent,

Soho Sanctuary Ltd.,
Additional Defendant-Respondent-Appellant.

_____

Certilman Balin Adler & Hyman LLP, East Meadow (Anthony W. Cummings of counsel), for appellant-respondent.

Law Office of Jeffrey H. Roth, New York (Jeffrey H. Roth of counsel), for 117-119 Leasing Corp., respondent-appellant.

Holland & Knight LLP, New York (Robert S. Bernstein of counsel), for Soho Sanctuary Ltd., respondent-appellant.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 27, 2015, which granted plaintiff tenant's application for *Yellowstone* relief except as to its alleged failure to comply with the insurance requirements of the lease, unanimously affirmed, with costs, as to the relief granted, and appeal therefrom otherwise dismissed, without costs, as academic. Order, same court (Robert D. Kalish, J.), entered August 13, 2015, which, to the extent appealed from, denied defendant owner Reliable Wool Stock, LLC's motion to dismiss additional defendant

Soho Sanctuary LLC as a party, unanimously affirmed, without costs.

The motion court properly treated the notice of termination as a notice to cure, and properly deemed the period between service of the notice and the termination date set forth therein as the cure period for the alleged defaults, since the lease incorporated by reference the end date of the period set forth in the termination notice as the date by which the lease would be terminated unless the defaults had been remedied (*see Barsyl Supermarkets, Inc. v Avenue P Assoc., LLC*, 86 AD3d 545, 546-547 [2d Dept 2011]).

The application for relief was timely, since it was brought before the expiration of the cure period (*see 166 Enters. Corp. v IG Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011]).

The alleged defaults for which relief was granted were curable (*see Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]). The motion court correctly determined that the tenant's failure to obtain insurance was not curable (*see Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 ASD3d 528 [1st Dept 2009]) and that this alleged default

was not waived (*see Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69-70 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]).

The motion court providently exercised its discretion in declining to drop subtenant Soho Sanctuary LLC as a party defendant (*see* CPLR 1003). Although Soho was not a necessary party, because it was not in contractual privity with the owner (*see Asherson v Schuman*, 106 AD2d 340 [1st Dept 1984]), it was a proper party, because termination of the lease would terminate its subtenancy (*see 64 B Venture v American Realty Co.*, 179 AD2d 374, 376 [1st Dept 1992], *lv denied* 79 NY2d 757 [1992]; *World of Food v New York World's Fair 1964-1965 Corp.*, 22 AD2d 278, 280 [1st Dept 1964]; *380 Yorktown Food Corp. v 380 Downing Dr., LLC*, 107 AD3d 786, 788 [2d Dept 2013], *lv denied* 22 NY3d 860 [2014]).

In view of the foregoing, it is unnecessary to address the parties' other arguments for affirmative relief.

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1041 The People of the State of New York, Ind. 163/12
Respondent,

-against-

Christopher Heath,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel) and Jones Day, New York (Nidhi Yadava of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Rena Uviller, J. at suppression motion; Lewis Bart Stone, J. at jury trial and sentencing), rendered October 25, 2012, as amended December 19, 2012, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second drug felony offender previously convicted of a violent felony, to a term of 8 years, unanimously affirmed.

Since there is no evidence that any unrecorded discussion constituted a *Sandoval* hearing, the record fails to support defendant's claim that a *Sandoval* hearing occurred off the record and in his absence (*see People v Jones*, 213 AD2d 250 [1st Dept 1995], *lv denied* 86 NY2d 796 [1995]; *see also People v Kinchen*,

60 NY2d 772 [1983]). To the extent the record permits review, it reflects defense counsel's agreement that no *Sandoval* ruling would be necessary unless defendant wished to testify, and that defendant did not wish to do so.

The court properly declined to give a missing witness charge as to two "ghost" officers in the buy-and-bust team. The request for the charge was untimely, because it was made after the close of all evidence (*see e.g. People v Rosario*, 191 AD2d 243 [1st Dept 1993], *lv denied* 81 NY2d 1019 [1993]). Moreover, defendant failed to show that the officers' testimony would have been material and noncumulative (*see People v Tavarez*, 288 AD2d 120, 120-121 [1st Dept 2001], *lv denied* 97 NY2d 709 [2002]), and the record indicates that one of the officers was unavailable.

The court properly denied defendant's request for a *Mapp/Dunaway* hearing. Defendant's conclusory denial of "illegal, criminal or suspicious activity at any time" was insufficient to establish his entitlement to a hearing, in the absence of any denial that he participated in the alleged drug transaction, or any other allegation negating probable cause (*see People v Mendoza*, 82 NY2d 415, 426 [1996]).

Defendant's claims regarding the court's identification charge and an allegedly inattentive juror are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1042 In re Erica R. [Anon.],
Petitioner-Respondent,

-against-

LaQueenia S. [Anon.],
Respondent-Appellant.

_____

Michael F. Dailey, Bronx, for appellant.

Aleza Ross, Patchogue, for respondent.

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

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about August 15, 2014, which, upon a finding that respondent had committed the family offenses of attempted assault in the third degree and disorderly conduct, directed her to, among other things, stay away from petitioner for a period of two years, unanimously affirmed, without costs.

Family Court properly determined that it had subject matter jurisdiction in this family offense proceeding, based on the intimate, familial relationship between the parties (*see* Family Ct Act § 812[1][e]). Petitioner is the foster mother of respondent's child and the sister of the child's father, and the parties had frequent communication and interaction over the years.

A fair preponderance of the evidence established that respondent had committed the family offenses of attempted assault in the third degree and disorderly conduct (Family Ct Act §§ 812[1]; 832; *see* Penal Law §§ 110.00/120.00[1], [2]; 240.20). Petitioner testified that respondent lunged at her and threw a punch in her direction from less than a foot away during a supervised visitation with the child, and that respondent called and threatened petitioner the following day. Although respondent denied that she intended to hit petitioner during the visitation, she admitted that she was angry at petitioner, that they directed obscene language at each other, and that she was escorted from the premises by the police. Family Court credited petitioner's testimony over respondent's, and its credibility determination is entitled to deference (*see Matter of Marcela H-A. v Azouhouni A.*, 132 AD3d 566, 567 [1st Dept 2015]).

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1043 Carmen O., an Infant, by Her Mother and Natural Guardian, Gloria O., et al., Plaintiffs-Respondents,

-against-

Stephen James, et al., Defendants-Appellants.

Index 350323/12

Lynch Rowin LLP, New York (Marc Rowin of counsel), for Stephen James and Sears Roebuck and Co., appellants.

Russo & Toner, LLP, New York (Alexandra L. Alvarez of counsel), for Marion Cabrera and Marion Rivera, appellants.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 22, 2015, which denied defendants' motions for summary judgment dismissing plaintiffs' complaint, unanimously affirmed, without costs.

Issues of fact exist as to whether defendant drivers used reasonable care to avoid hitting the infant plaintiff (plaintiff), then 15 years old, who was crossing a roadway outside the crosswalk and had stopped in the middle of the road before being hit by defendants (*see* Vehicle and Traffic Law §§ 1146[a], 1180[a]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Romeo*

v DeGennaro, 255 AD2d 208, 208 [1st Dept 1998]). While plaintiff may bear some responsibility, defendants have not established, as a matter of law, that plaintiff was the sole proximate cause of her injuries, and thus there is an issue of comparative negligence for the jury (*Charleston v City of New York*, 100 AD3d 471, 472 [1st Dept 2012]).

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

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1044 LAIG, Index 160103/14
Plaintiff-Appellant,

-against-

Medanito S.A.,
Defendant-Respondent.

_____

White and Williams LLP, New York (Andrew I. Hamelsky of counsel), for appellant.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Zeb Landsman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 24, 2015, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

In this action alleging breach of a non-circumvention provision in the parties' confidentiality agreement connected with an investment opportunity, plaintiff's conclusory allegation that it remained ready, willing and able to close on the purchase of the investment business on the scheduled closing date was factually insufficient in light of unrefuted documentary evidence that plaintiff's sources for the financing it required to make the purchase had abandoned the deal within 10 days of the scheduled closing (*see Leon v Martinez*, 84 NY2d 83 [1994]). The

documentary evidence conclusively demonstrates that plaintiff has no cause of action for breach of the non-circumvention clause based on defendant's unilateral purchase of the investment entity without first securing plaintiff's formal decision as to whether or not it would participate, and, by reasonable inference, meet its purchase obligation at the impending closing.

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: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1045 Advanced Automatic Sprinkler Co., Inc., Plaintiff-Appellant, Index 650321/11

-against-

Seaboard Surety Company, Defendant-Respondent.

_____

Mastropietro Law Group, PLLC, New York (Eric W. Gentino of counsel), for appellant.

Tunstead & Schechter, Jericho (Michael D. Ganz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 5, 2014, which granted defendant's motion for summary judgment dismissing the cause of action for delay damages, unanimously affirmed, with costs.

Plaintiff presented no evidence that any material delay in the construction project was attributable to the nonparty prime contractor for whose benefit defendant issued a payment bond (*see Triangle Sheet Metal Works v Merritt & Co.*, 79 NY2d 801 [1991]).

In any event, the subcontract contains a "no damages for delay" clause, and plaintiff failed to meet its heavy burden of establishing an exception to the rule that such a clause will be enforced (*see LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91

AD3d 485 [1st Dept 2012]). As the motion court found, the delays that plaintiff seeks to impute to the prime contractor constitute, at most, "inept administration" or "poor planning," and do not, as plaintiff contends, evince bad faith on the prime contractor's part (*see id.*). Nor, contrary to plaintiff's contention, were the delays uncontemplated, and, in any event, under the contract, plaintiff assumed the risk for all delay damages, "whether contemplated or uncontemplated."

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

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1046 The People of the State of New York, Ind. 4283/12
Respondent,

-against-

Robert Williams,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered May 21, 2013, as amended July 10, 2013, convicting defendant, upon his plea of guilty, of attempted sexual abuse in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of two years and two to four years, unanimously affirmed.

The sentencing court properly found that it had no discretion to defer defendant's mandatory surcharge (*see People v Jones* 26 NY3d 730 [2016]).

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1047 City of New York, et al., Index 451145/12
Plaintiffs-Respondents,

-against-

100 West 88th Street Housing Development Fund Corporation, et al.,
Defendants-Appellants.

_____

Law Offices of C. Jaye Berger, New York (C. Jaye Berger of counsel), for 100 West 88th Street Housing Development Fund Corporation, appellant.

Solomon & Bernstein, New York (Gloria Goldenberg of counsel), for 67 West 87th Street Housing Development Fund Corporation, appellant.

Jonathan Bobrow Altschuler, P.C., New York (Jonathan B. Altschuler of counsel), for 72 West 88th Street Housing Development Fund Corporation, appellant.

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

Andrea Shapiro, PLLC, New York (Andrea Shapiro of counsel), for 133 West 89th Street Housing Development Fund Corporation, 135 West 89th Street Housing Development Fund Corporation, 63 West 87th Street Housing Development Fund Corporation, 59 West 87th Street Housing Development Fund Corporation, 103-109 West 88th Street Housing Development Fund Corporation and 65 West 87th Street Housing Development Fund Corporation, respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 27, 2015, which, insofar as appealed from, granted plaintiffs' motions for summary judgment on the issue of

liability for breach of contract and for discovery as to defendant 67 West 87th Street Housing Development Fund Corporation's finances, unanimously modified, on the law, to deny plaintiffs' motions as to liability, and otherwise affirmed, without costs.

The City of New York and six Housing Development Fund Corporations (HDFCs; together, plaintiff HDFCs), each of which owns at least one residential building that was converted from City ownership to cooperative ownership pursuant to Private Housing Finance Law article XI, through the City's Tenant Interim Lease Program, seek to enforce a Replacement Reserve Agreement (the RRA) against defendants, HDFCs whose converted buildings contain commercial rental space. The RRA requires defendants to contribute a portion of their commercial rental income – as much as 80% of that income beginning in the sixth year of the 30-year term of the RRA – to a replacement reserve account for the benefit of all the HDFCs.

Plaintiff HDFCs, defendants, and another, nonparty, HDFC are residential cooperatives on the Upper West Side that were part of a group of 14 City-owned apartment buildings that were jointly managed and renovated through the City's Department of Housing Preservation and Development's (HPD) Mutual Housing Association

and were converted to residential cooperatives between 2003 and 2004. The HDFCs were required by HPD to execute the RRA as a condition of closing on the purchases of their respective buildings.

Summary judgment in plaintiffs' favor on the breach of contract cause of action is precluded by issues of fact. The Subscription Agreement and other conversion materials provided to the tenants did not refer to the RRA. Given the effect that the loss of a substantial portion of their commercial rental income would surely have on defendants' finances, a trier of fact could find that this was a material omission, i.e., that there was "a substantial likelihood that, under all the circumstances, the omitted fact would have assumed *actual significance* in the deliberations of the reasonable [tenant]" (*State of New York v Rachmani Corp.*, 71 NY2d 718, 726 [1988] [internal quotation marks omitted]; *see also 2 Fifth Ave. Tenants Assn. v Abrams*, 183 AD2d 577 [1st Dept 1992]).

Defendants' argument that HPD did not have the authority to condition the sales on execution of the RRA, however, is unsupported. General Municipal Law § 695 allows a municipality to dispose of real property, under the Urban Development Action Area Act, where, inter alia, "all . . . essential terms and

conditions of such sale . . . [are] included in the notice published by the agency" (*id.* § 695[b][2]). While the RRA may have been a material term to the tenants of the affected buildings, it was not an "essential term[] and condition[]" that had to be disclosed to obtain municipal approval for the sale (*see id.* § 694).

Nor does the RRA violate the statutory prohibition against allowing the income of an HDFC to inure to the benefit of others (Private Housing Finance Law § 573[3][b]). A portion of defendants' commercial rental income to be paid into a reserve account, in satisfaction of a contractual obligation entered into as a condition of closing, would constitute a corporate expense.

Plaintiffs did not, by their inaction, waive their right to enforce the RRA (*see Courtney-Clarke v Rizzoli Intl. Publs.*, 251 AD2d 13 [1st Dept 1998]).

The motion court providently exercised its discretion in compelling financial disclosure.

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1048 The People of the State of New York, Ind. 1404/13
Respondent,

-against-

Desmond Dent,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 22, 2013,

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

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

ENTERED: MAY 3, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1049 The People of the State of New York, Ind. 1194/14
Respondent,

-against-

Thomas Perez-Cervantes,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (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 (Michael J. Obus, J.), rendered October 9, 2014,

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

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

ENTERED: MAY 3, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1050 Altagracia Grullon, Index 301355/10
Plaintiff-Respondent,

-against-

Queens Ballpark Company, L.L.C.,
et al.,
Defendants-Appellants.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carla Varriale of counsel), for appellants.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 1, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when, while leaving Citifield, she tripped over an unevenness in the concrete on an exit ramp. Defendant Queens Ballpark Company admits that it created the condition as part of the construction process, but asserts that it was de minimis and could not have caused plaintiff's fall. Plaintiff's testimony is that the unevenness in the concrete was at least two inches and caused her fall. Under these circumstances, defendants' motion was properly denied

because, as the motion court concluded, credibility determinations are not properly made on a motion for summary judgment (*see Dauman Displays v Masturzo*, 168 AD2d 204 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Defendant Sterling Mets, L.P.'s argument that it neither owned, maintained, or controlled the premises is a fact-based argument that cannot be raised for the first time on appeal (*see Start El., Inc. v New York City Hous. Auth.*, 106 AD3d 450 [1st Dept 2013]).

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: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1051 The People of the State of New York, Ind. 2937/14
Respondent,

-against-

Steve Tabon,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered December 2, 2014, unanimously affirmed.

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

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

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

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1052N Eric L. Sawyer, Index 158034/13
Plaintiff-Respondent,

-against-

Michael F. Parrish, on behalf of
and as Administrator of the Estate
of Karl M. Parish, Deceased,
Defendant-Appellant.

_____

Osborn Law, P.C., New York (Daniel A. Osborn of counsel), for appellant.

LucasHanschke, P.C., New York (Peter Hanschke of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered October 7, 2014, which found that reasonable attorneys' fees to plaintiff for plaintiff's efforts in pursuing payment under a promissory note following defendant's default, and pursuing attorneys' fees to which plaintiff was entitled pursuant to the provisions of the note, was $18,000, unanimously affirmed, without costs.

Defendant failed to preserve any objection to the award of attorneys fees by his acquiescence in the off-the-record hearing held by Supreme Court.

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Moskowitz, Kahn, JJ.

1053N- Index 114083/11
1054N Robert Jackson, et al.,
Plaintiffs-Respondents,

-against-

Hunter Roberts Construction Group, L.L.C., et al.,
Defendants-Appellants.

_____

London Fischer LLP, New York (Scott M. Shapiro of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 24, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to strike defendants' answer, unanimously reversed, on the facts, without costs, and the motion denied. Order, same court and Justice, entered July 17, 2015, which denied defendants' motion to vacate the note of issue or to compel discovery, unanimously reversed, on the facts, without costs, and the motion to vacate the note of issue granted.

The motion court improvidently exercised its discretion in striking the answer. Plaintiffs' motion was procedurally deficient, since it was not supported by an affirmation of good

faith (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7). Nor did the record show that "any further attempt to resolve the dispute nonjudicially would have been futile" (*Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 458 [1st Dept 2014] [internal quotation marks omitted]). Plaintiffs failed to identify any recent meaningful attempts to resolve the parties' discovery disputes before raising them for the first time in their motion.

Moreover, plaintiffs failed to "conclusively demonstrate[] that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks omitted]). Defendants have complied with many of their discovery obligations, and their failure to submit to depositions cannot be said to have been in bad faith, in light of their belief that plaintiffs had failed to comply with their own outstanding discovery obligations (*see*

DaimlerChrysler Ins. Co. v Seck, 82 AD3d 581, 582 [1st Dept 2011] [unilateral discovery sanction inappropriate where "delays in discovery were caused by both parties' actions"]).

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

ENTERED: MAY 3, 2016

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

310 Sara Myers, et al., Index 151162/15
Plaintiffs-Appellants,

-against-

Eric Schneiderman, etc.,
Defendant-Respondent,

Janet DiFiore, etc., et al.,
Defendants.

- - - - -

New York Catholic Conference,
Not Dead Yet, Adapt, Association
of Programs for Rural Independent
Living, Autistic Self Advocacy
Network, Center for Disability
Rights, Disability Rights Center, Disability
Rights Education and Defense Fund, National
Counsel on Independent Living, New York
Association on Independent Living, Regional
Center for Independent Living and United
Spinal Association,
Amici Curiae.

_____

Debevoise & Plimpton LLP, New York (Edwin G. Schallert of counsel), and Disability Rights Legal Center, Los Angeles, CA (Kathryn L. Tucker of the bar of the State of Washington, admitted pro hac vice, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Anisha S. Dasgupta of counsel), for respondent.

Edward T. Mechmann, New York, for New York Catholic Conference, amicus curiae.

Michael Gilberg, Granite Springs, for Not Dead Yet, Adapt, Association of Programs for Rural Independent Living, Autistic Self Advocacy Network, Center for Disability Rights, Disability Rights Center, Disability Rights Education and Defense Fund, National Council on Independent Living, New York Association on Independent Living, Regional Center for Independent Living and United Spinal Association, amici curiae.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 19, 2015, modified, on the law, to declare in defendant New York State Attorney General's favor, and, as so modified, affirmed, without costs.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

310
Index 151162/15

_____x

Sara Myers, et al.,
Plaintiffs-Appellants,

-against-

Eric Schneiderman, etc.,
Defendant-Respondent,

Janet DiFiore, etc., et al.,
Defendants.

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New York Catholic Conference, Not Dead Yet, Adapt, Association of Programs for Rural Independent Living, Autistic Self Advocacy Network, Center for Disability Rights, Disability Rights Center, Disability Rights Education and Defense Fund, National Counsel on Independent Living, New York Association on Independent Living, Regional Center for Independent Living and United Spinal Association,
Amici Curiae.

_____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered October 19, 2015, which granted defendant New York State Attorney General's pre-answer motion to dismiss the complaint.

Debevoise & Plimpton LLP, New York (Edwin G. Schallert, Jared I. Kagan, Xiyun Yang and Lucila I. M. Hemmingsen of counsel), and Disability Rights Legal Center, Los Angeles, CA (Kathryn L. Tucker of the bar of the State of Washington, admitted pro hac vice, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Anisha S. Dasgupta, Holly A. Thomas and Steven C. Wu of counsel), for respondent.

Edward T. Mechmann, New York and Kelley Drye & Warren LLP, New York (Neil M. Merkl of counsel), for New York Catholic Conference, amicus curiae.

Michael Gilberg, Granite Springs, and Stephen F. Gold of the bar of the State of Pennsylvania, admitted pro hac vice, for Not Dead Yet, Adapt, Association of Programs for Rural Independent Living, Autistic Self Advocacy Network, Center for Disability Rights, Disability Rights Center, Disability Rights Education and Defense Fund, National Council on Independent Living, New York Association on Independent Living, Regional Center for Independent Living and United Spinal Association, amici curiae.

MAZZARELLI, J.

Nearly 20 years ago, the United States Supreme Court held that New York's prohibition against assisting one who attempts suicide does not violate the Equal Protection Clause of the Fourteenth Amendment when enforced against a physician who assists in hastening the death, through the prescription of lethal medication, of a mentally competent, terminally ill patient who is suffering great pain and desires to die (*Vacco v Quill*, 521 US 793 [1997]). The Supreme Court also held, in an opinion published the same day as *Vacco*, that Washington State's own ban on assisted suicide (since overturned by legislation in that state), considered in the same context, does not violate substantive due process under the US Constitution (*Washington v Glucksberg*, 521 US 702, 711 [1997]). Now, a group of plaintiffs composed of physicians, patients and advocates for the terminally ill, including some who were plaintiffs in *Vacco*, seek a declaration that the ban on physician assisted suicide, which they call "aid-in-dying" (a term we use here) violates the Equal Protection and Due Process Clauses of the State Constitution. They also seek a declaration that, as a matter of statutory construction, the relevant Penal Law provisions are not applicable to aid-in-dying.

Plaintiffs in this case are Sara Myers, a terminally ill

person, Eric Seiff, who suffers from an illness that he is concerned may progress to a terminal stage, five medical professionals who regularly treat terminally ill patients, and End of Life Choices New York, a not-for-profit organization that provides its clients with information and counseling on informed choices in end-of-life decision-making.[1] Plaintiffs maintain that, without a declaration to the contrary, the named physicians would be subject to criminal prosecution if they took steps to carry out the wish of their patients to hasten their deaths, and put an end to unbearable physical pain, by prescribing lethal medication. Plaintiffs presume that any such prosecution would be based on section 120.30 of the Penal Law, which provides that "[a] person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide," and section 125.15(3), which provides that "[a] person is guilty of manslaughter in the second degree when," among other things, "[h]e intentionally causes or aids another person to commit suicide." Plaintiffs initially named the Attorney General and the District Attorneys of various counties in New York State.

[1] Steve Goldenberg, a terminally ill person who was a named plaintiff when the action was commenced, passed away in January, 2016. Plaintiffs filed a Notice of Death indicating that his claims devolved to the surviving plaintiffs (*see* CPLR 1015[b]).

However, plaintiffs discontinued the action against the District Attorneys upon the District Attorneys' stipulation to be bound by any result reached in the litigation.

The complaint asserts that the physician plaintiffs have been deterred by the relevant provisions of the Penal Law from providing aid-in-dying to terminally ill and mentally competent persons who have no chance of recovery and for whom medicine cannot offer any hope other than some degree of symptomatic relief. They assert that the authorities wrongly consider aid-in-dying to be "assisted suicide," but that in fact it is starkly distinct from it. The complaint alleges that "[o]ver the past eighteen years, an increasing number of States and jurisdictions have legalized aid-in-dying through judicial decisions and legislation," and submit that "evolving medical standards and public views support aid-in-dying." It further alleges that the physician plaintiffs all believe that "it would be consistent with the highest standards of medical practice to assist and counsel mentally-competent, terminally-ill patients . . . in their decision to seek a peaceful death through aid-in-dying."

The Attorney General moved to dismiss the complaint pursuant to CPLR 3211(a)(2) and (7) and the court granted the motion. The court disagreed with the Attorney General's argument that the claims were not justiciable and that plaintiffs did not have

standing to sue. However, it rejected plaintiffs' claim that the Penal Law should be interpreted not to apply to aid-in-dying, stating that the Penal Law as written is clear and concise, rendering unnecessary any resort to an analysis of its legislative history. The court found that the constitutional claims were controlled by *Vacco*, and by *Matter of Bezio v Dorsey* (21 NY3d 93 [2013]), in which the Court of Appeals referenced the State's constitutionally-permissible distinction, recognized in *Vacco*, between the right to refuse medical treatment and the right to commit suicide or receive assistance in doing so.

On appeal, plaintiffs assert that the court should not have dismissed the complaint because it, along with affidavits submitted by three of the medical professional plaintiffs (including their voluminous exhibits), asserted factual allegations that, on their face, stated a claim for the requested relief. They contend that the court lacked the power to disregard factual statements pronouncing, for example, that professional organizations such as the American Public Health Association do not consider aid-in-dying to be equivalent to suicide, and that death certificates in Oregon and Washington, where aid-in-dying has been deemed lawful, list the cause of death as the underlying disease causing the patient's suffering, not the lethal medication administered to him or her. They

further argue that the court ignored their allegation that aid-in-dying is indistinguishable from other medical practices that are universally recognized as not constituting suicide, such as terminal sedation, in which a patient is placed in a deep sedation while food and fluids are withheld. Plaintiffs further contend that the court misapprehended their argument concerning the Penal Law sections at issue. They challenge the court's approach, which looked at the meaning of the language in the statutes. Instead, they maintain that the prohibition against assisted suicide simply does not apply to aid-in-dying, which they assert was not even a recognized concept in 1965, when the statutes were enacted in their current form.

As for plaintiffs' State Constitution-based claims, they principally argue that the court overlooked that New York has long recognized the existence of a person's fundamental right to self-determination over his or her own body and the type of medical treatment he or she receives. Thus, they assert, to the extent that the Penal Law does prohibit aid-in-dying, the law must be strictly scrutinized and may only be enforced in that context if it can be said to be narrowly tailored to advance a compelling state interest. Even if a fundamental right is not at issue, plaintiffs contend, their complaint establishes sufficient factual allegations such that discovery should proceed on the

issue of whether the relevant statutory sections are rationally related to a legitimate government interest. Plaintiffs further claim that the court failed to distinguish between their equal protection and substantive due process claims, addressing only the former. To the extent that, in rejecting the equal protection claim, the court relied on *Bezio v Dorsey*, plaintiffs assert that it is inapposite, since that case did not address aid-in-dying. They also question the court's reliance on *Vacco v Quill*, since it analyzed the right to aid-in-dying under the United States Constitution, not the New York State Constitution.

Finally, plaintiffs stress the United States Supreme Court's observation in *Vacco* that there may be some scenario where the Penal Law sections at issue could clash with patients' freedom, and that, as reflected in recent Supreme Court cases such as *Obergefell v Hodges* (__ US __, 135 S Ct 2584, 2602 [2015]), which recognized a constitutional right to same-sex marriage, evolving social views are entitled to consideration in identifying rights that historically were rejected by the courts.

The paramount goal in interpreting a statute is to effectuate the intent of the legislature, and clear and unambiguous statutory language should be construed so as to give effect to its the plain meaning (*see People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]). "In construing

statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [initial quotation marks omitted]). In the absence of any controlling statutory definition, reviewing courts construe words of ordinary import "with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as 'useful guideposts' in determining the meaning of a word or phrase" (*Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001]).

The word "suicide" has a straightforward meaning and a dictionary is hardly necessary to construe the thrust of Penal Law sections 120.30 and 125.15. It is traditionally defined as "the act or instance of taking one's own life voluntarily and intentionally," especially "by a person of years of discretion and of sound mind" (Merriam-Webster's Collegiate Dictionary [11th ed 2003]). Whatever label one puts on the act that plaintiffs are asking us to permit, it unquestionably fits that literal description, since there is a direct causative link between the medication proposed to be administered by plaintiff physicians

and their patients' demise. Of course, plaintiffs urge on us that adhering to a literal construction misses their point, which is that the term "suicide" traditionally connotes a person's conscious choice favoring death over life. Plaintiffs argue that aid-in-dying reflects a starkly different choice; that of death by a quick and painless means over death that is equally certain to happen in reasonably close temporal proximity but in a manner that is sure to be unbearably painful. According to plaintiffs, by the time aid-in-dying would be considered, life, at least one that to them is worth living, is unfortunately no longer something the patient is free to choose.

The Court of Appeals has addressed the purported dichotomy between suicide and aid-in-dying, albeit obliquely, in a manner that suggests that the statute does prohibit the latter practice. In *People v Duffy* (79 NY2d 611 [1992]), which unquestionably falls in the former category, the defendant was accused of recklessly encouraging a 17-year-old youth to shoot himself to death after the youth became distraught by a failed romance. In rejecting the defendant's argument that Penal Law section 125.15(3), which explicitly refers to "intentional" conduct, did not apply to his allegedly reckless conduct, the Court of Appeals referred to the Staff Notes of the Commission on Revision of the Penal Law and Criminal Code, released in 1964, which reflected

the Commission's conclusion that section 125.15(3) "applies even where the defendant is motivated by 'sympathetic' concerns, such as the desire to relieve a terminally ill person from the agony of a painful disease" (79 NY2d at 615). The Court of Appeals thus concluded that if the "intentional" act of assisting a person in causing his or her own death is prohibited even if done out of sheer humanitarianism, then surely a reckless act such as that committed by the defendant in *Duffy* is also prohibited.

Plaintiffs assert that *Duffy* and the Staff Note that it cites have no bearing on this case. That is because, according to plaintiffs, the scenario laid out in the Staff Note does not necessarily describe aid-in-dying, since the hypothetical assistant is not described as a trained physician and the person taking his or her own life has not been identified as a competent individual. Nonetheless, we know of no rule of statutory construction that permits us to ignore the plain language of a term because there is a possibility that the legislature, writing on a blank slate, would have chosen to carve out of that definition a particular application of the term. To the contrary,

> "[i]t is a general rule of construction that omissions in a statute cannot be supplied by construction; omissions are to be remedied by the Legislature, and not by the courts. Thus, a court cannot amend a statute by inserting words that are not there, nor will

> a court read into a statute a provision which the Legislature did not see fit to enact. . . Stated differently, judges should not attempt to fill up a *casus omissus* and interpolate into a statute what in their opinion should have been put there by its framers, however just and desirable it may be to supply the omitted provision" (McKinney's Cons Laws of NY, Book 1, Statutes § 363; *see also People v Boothe*, 16 NY3d 195, 198 ["It is well settled that courts are not to legislate under the guise of interpretation"] [internal quotation marks omitted]).

In light of the plain meaning of the term suicide, we hold, as a matter of statutory construction, that Penal Law sections 120.30 and 125.15 prohibit aid-in-dying.

Turning to the constitutional claims, in seeking a declaration that a ban on aid-in-dying violates their State constitutional equal protection and due process rights, plaintiffs start from a position of relative weakness, because the United States Supreme Court has already held that it does not violate those rights under the United States Constitution. As noted above, *Vacco v Quill* (521 US 793 [1997], *supra*) dealt with whether New York's assisted suicide prohibition, as applied to aid-in-dying, violated the Fourteenth Amendment's Equal Protection Clause. The plaintiffs in *Vacco* argued that the ban did, because it illegally differentiated between mentally competent, terminally ill patients seeking such medical intervention and mentally competent, terminally ill patients who refused life-saving medical treatment. The fact that one choice

was banned and the other perfectly legal, they argued, was arbitrary and irrational. The Supreme Court found this to be a false juxtaposition because the two groups of patients were entirely separate classes, not a single class with some being treated differently from others. As the Supreme Court noted,

> "On their faces, neither New York's ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently from anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide" (521 US at 800).

The Supreme Court observed that the distinction between the two methods of ending life was "widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational" (*id.* at 800 -801). The Supreme Court cited to the American Medical Association's Council on Ethical and Judicial Affairs, as well as the New York State Task Force on Life and the Law, both of which had published papers endorsing the view that the refusal of treatment and the affirmative administration of life-ending medication are fundamentally different things (*id.* at 800 n 6). It also conceded that there are differences of opinion on the question, as noted by the Task Force (*id.*).

In *Washington v Glucksberg*, the Supreme Court found that

Washington State's ban on assisted suicide posed no substantive due process threat to physicians administering lethal medications to their competent, terminally ill patients. Notwithstanding that Oregon had already passed legislation permitting aid-in-dying, and that other jurisdictions, including foreign countries, continued to struggle with the issue, the Supreme Court found that the ban implicated no fundamental liberty interest, and that Washington's ban was rationally related to its interests in preserving human life, protecting the integrity and ethics of the medical profession, and ensuring the welfare of vulnerable groups.

In general, the New York Court of Appeals uses the same analytical framework as the Supreme Court in considering due process cases, though, at times, it has found that the State Due Process Clause may be more protective of rights than its federal counterpart (*see Hernandez v Robles*, 7 NY3d 338, 361-362 [2006], *abrogated on other grounds* by *Obergefell v Hodges*, __ US __, 135 S Ct 2584 [2015], *supra*). By contrast, it has held that our Equal Protection Clause "is no broader in coverage than the Federal provision" (*id.* at 362 [internal quotation marks omitted]).

In arguing that this Court should interpret the right to aid-in-dying more broadly than did the United States Supreme

Court in *Washington v Glucksberg*, plaintiffs note that New York has for a long time treated a person's freedom of choice with respect to his or her own body and medical treatment as a vitally important right to be subordinated to the State's prerogatives under only compelling circumstances. This is unquestionably so. For example, the Court of Appeals has held that a mentally competent patient confined to a state mental hospital has the right to refuse antipsychotic medication (*Rivers v Katz*, 67 NY2d 485 [1986]) and that a competent adult member of Jehovah's Witnesses can decline a blood tranfusion (*Matter of Fosmire v Nicoleau*, 75 NY2d 218 [1990]). Further, in *Matter of Storar* (52 NY2d 363 [1981], *cert denied* 454 US 858 [1981]), the Court of Appeals upheld an order granting the appointment of a representative to carry out the expressly stated wish of a person not to be kept on life support, which wish was conveyed before he entered a vegetative coma with no reasonable hope of recovery. Both *Matter of Fosmire* and *Storar* relied on the common law, although *Rivers* noted that the "common-law right is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution" (67 NY2d at 493).

Nevertheless, these cases all involved a patient's right to refuse medical treatment, and are rooted in the same concepts that give rise to a cause of action for medical malpractice based

on the lack of informed consent (*see Matter of Storar*, 52 NY2d at 376 ["every person 'of adult years and sound mind has a right to determine what should be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages,'" quoting *Schloendorff v Society of N.Y. Hosp.*, 211 NY 125, 129-130 [1914] [Cardozo, J.]]). Thus, plaintiffs have a heavy burden of persuasion in arguing that the same principles apply to the affirmative act of taking one's own life.

Plaintiffs have failed to overcome this burden. Only three years ago, the Court of Appeals observed that "the State has long made a constitutionally-permissible distinction between a right to refuse medical treatment and a right to commit suicide (or receive assistance in doing so)" (*Matter of Bezio v Dorsey*, 21 NY3d at 103, citing *Vacco*). To be sure, *Matter of Bezio* did not deal with end-of-life decision making, but we are mindful of the Court of Appeals' recognition that aid-in-dying has been held to be fundamentally different from the refusal to receive life-prolonging measures. Further, plaintiffs offer nothing other than conclusory arguments for why, unlike the United States Constitution, the New York State Constitution should be construed to extend the right to refuse treatment, and let nature take its course, to a fundamental right to receive treatment that does the

opposite.

Plaintiffs contend that, even if the right to aid-in-dying is not a fundamental one, the State still must show that the ban is rationally related to a legitimate government interest. Of course, the United States Supreme Court already held that it is (*Vacco*, 521 US at 808-809). Recognizing this, plaintiffs point to *Glucksberg*'s coda, which stated that:

> "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society" (521 US at 735).

Plaintiffs interpret this language as an invitation to present evidence of how that debate has evolved to where there is now a consensus that, whether or not the right to aid-in-dying is fundamental, the State has no interest, much less a legitimate one, in banning it. They also cite *Vacco*'s suggestion that future challenges to the aid-in-dying ban may be appropriate:

> "Justice Stevens observes that our holding today 'does not foreclose the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient's freedom' 521 US at 751-752, 117 S Ct at 2310, (opinion concurring in judgments). This is true, but, as we observe in *Glucksberg*, at 735, n 24, 117 S Ct, at 2275, n 24, a particular plaintiff hoping to show that New York's assisted-suicide ban was unconstitutional in his particular case would need to present different and considerably stronger arguments than those advanced by respondents here" (521 US at 809, n 13).

Plaintiffs contend that their complaint and the affidavits they submitted in opposition to defendants' motion to dismiss present such "different and considerably stronger arguments" and that, at the very least, they have presented sufficient allegations to at least develop a full evidentiary record as to whether aid-in-dying is rationally related to a legitimate government interest and whether, for equal protection purposes, it is functionally indistinct from the refusal to be kept alive.

In arguing that the landscape has shifted sufficiently that the courts should now consider their constitutional claims, plaintiffs specifically point to the adoption of policies by four associations in favor of aid-in-dying. However, this evidence does not sufficiently demonstrate a societal evolution on the question of aid-in-dying such that, if the ban is upheld, we would be paying blind adherence to outmoded thinking (*compare Obergefell v Hodges*, 135 S Ct at 2602 [2015]) [recognizing the right to same-sex marriage arises, in part, "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era"]). For instance, two of the organizations whose conclusions plaintiffs present as evidence that opinion on the issue of aid-in-dying has changed, the American College of Legal Medicine and the American Medical Women's Association, expressly acknowledge in their policies that

a wide range of views continues to exist *within their own memberships* concerning end of life treatment options. *Principles Regarding Physician Aid in Dying*, promulgated by the American Medical Student Association, recognizes and acknowledges all of the concerns voiced by opponents of the practice, and calls for ongoing adjustment of the criteria "according to evolving opinion" among doctors, patients, families and the public. Notably, plaintiffs do not assert any change in position of the American Medical Association, the conclusion of which, that "'physician-assisted suicide is fundamentally incompatible with the physician's role as healer,'" was favorably quoted by the Supreme Court in *Glucksberg* (521 US at 731).

Plaintiffs also allege in their complaint that Gallup and Pew Research polls, both conducted in 2013, found, respectively, that "70% of Americans are in favor of allowing doctors to help terminally-ill patients end their life by painless means" and that "62% of Americans believe that patients should be able to end their life if suffering great pain with no hope of improvement." However, there is no indication that the questions underlying these polls were specifically about aid-in-dying, as opposed to more passive end of life choices such as withdrawal of hydration and nutrition. In either event, plaintiffs fail to allege whether those public polls reflect the

opinion of people who are fully informed of the arguments espoused by those who caution against permitting aid-in-dying, such as those articulated in the New York State Task Force on Life and the Law. Moreover, plaintiffs fail to allege whether public polling (to the extent there was any on the issue at the time *Vacco* was decided) has changed significantly over the past 20 years.

The Supreme Court of Canada's recent striking down of that country's prohibition against suicide as applied to aid-in-dying (*Carter v Canada [Attorney General]*, 2015 SCC 5 [2015]) should have no bearing on the issue in this country. Our highest Court's holding that there is no fundamental right to take one's own life was based on its reluctance to "reverse centuries of legal doctrine and practice, and [to] strike down the considered policy choice of almost every State" (*Glucksberg* at 723). The Canada Court did not discuss or consider the extent that permitting aid-in-dying would clash with its own legal traditions. Rather, it found that the right to take one's own life was part of a person's liberty interest in being able to make decisions concerning his or her bodily integrity and medical care, a right our Supreme Court has recognized (*see Cruzan v Director, Mo. Dept. of Health*, 497 US 261 [1990]), but has refused to extend to aid-in-dying.

Finally, plaintiffs rely on two papers that purport to offer empirical evidence that Oregon's Death with Dignity Act, now in effect for over 20 years, has not invited the fears articulated by people opposed to aid-in-dying, such as an adverse impact on vulnerable populations, and the difficulty in distinguishing whether a wish to end one's life is driven by a desire to control one's death, clinical depression, or something else. However, even were a finder of fact to determine that aid-in-dying is "workable," the issue before us transcends mere practical concerns. As the Supreme Court stated in *Glucksberg*, a state's interest in preserving human life "is symbolic and aspirational as well as practical" (521 US at 729), favorably quoting the New York State Task Force, which observed:

> "'While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions.' New York Task Force 131-132" (*id.*).

Our decision herein should not be viewed as reflecting a lack of sympathy for those suffering as death approaches, or even our opinion that aid-in-dying should never be introduced in New York as a viable option so long as appropriate safeguards are in place. However, we do not write on a blank slate, given the Penal Law as written and the Supreme Court and Court of Appeals'

opinions, by which we are bound. Rather, our only role in this appeal is to consider whether the facts alleged in the complaint fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). We find that, even giving plaintiffs the benefit of every reasonable inference, they have not presented sufficient allegations to suggest that the Penal Law has an implicit carve-out for aid-in-dying, or that, notwithstanding the precedents on the matter, the constitutionality of aid-in-dying is ripe for judicial reconsideration.

The issue before us unquestionably presents a host of legitimate concerns on both sides of the debate. As discussed above, plaintiffs present some compelling reasons for making aid-in-dying a legitimate option for those suffering from terminal illness. At the same time, the New York State Task Force on Life and the Law[2] in 1994 "unanimously recommend[ed] that New York laws prohibiting assisted suicide and euthanasia should not be changed" (*see* Task Force, When Death Is Sought: Assisted Suicide

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[2] According to its web site, the task force was established in 1985 by Governor Mario Cuomo, and consists of 23 Governor-appointed experts who volunteer their time to assist the State in developing public policy on issues arising at the interface of medicine, law, and ethics. The Task Force is comprised of leaders in the fields of religion, philosophy, law, medicine, nursing, and bioethics, and is chaired by New York State's Commissioner of Health.

and Euthanasia in the Medical Context [May 1994]). The Task Force based its view on the risks that could be presented to the elderly, poor, socially disadvantaged, and those without access to good medical care; and the role of treatable symptoms such as pain and depression in creating a desire for lethal medications. It also noted that most doctors lack a sufficiently close relationship to their patients to appropriately evaluate a request for help in ending life, and expressed the concern that it could open the door to euthanasia of those incapable of giving consent. We are not persuaded from the record before us that, even though society's viewpoints on a host of social issues have changed over the last 20 years, aid-in-dying is an issue where a legitimate consensus has formed. Accordingly, we are without power to rewrite the law, or to declare that the law violates a fundamental right that has never been articulated by the United States Supreme Court or even our Court of Appeals. Indeed, "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" (*Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 28 [2006] [internal quotation marks omitted]). Considering the complexity of the concerns presented here, we defer to the political branches of government on the question of whether aid-in-dying should be

considered a prosecutable offense.

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered October 19, 2015, which granted defendant Attorney General's pre-answer motion to dismiss the complaint, should be modified, on the law, to declare that (a) NY Penal Law §§ 120.30 and 125.15 provide a valid statutory basis to prosecute licensed physicians, who provide aid-in-dying, and (b) that to the extent that Penal Law §§ 120.30 and 125.15 prohibit a licensed physician from providing aid-in-dying, the application of that statute to such conduct does not violate the New York State Constitution, and, as so modified, affirmed, without costs.

All concur.

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

ENTERED: MAY 3, 2016

CLERK