SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 12, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Kapnick, Kahn, Gesmer, JJ.

5992 Tracey Hejailan-Amon, Index 161488/15
Plaintiff-Appellant,

-against-

Maurice Alain Amon, et al.,
Defendants-Respondents,

Crozier Fine Arts Inc.,
Defendant.

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Stein Riso Mantel McDonough, LLP, New York (Gerard A. Riso of counsel), for appellant.

Bronstein Van Veen LLC, New York (Peter E. Bronstein of counsel), for Maurice Alain Amon and Artmon Limited, respondents.

The Weinstein Law Firm, PLLC, New York (Andrew J. Weinstein of counsel), for the Heller Group, LLC and Sanford Heller, respondents.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 18, 2017, which denied, without prejudice, plaintiff's motion for a preliminary injunction, and granted, without prejudice, defendants' motions to dismiss, unanimously affirmed, without costs.

On November 6, 2015, plaintiff, Tracey Hejailan-Amon,

commenced this action seeking temporary and permanent injunctions, the return of certain property, and/or money damages as remedies for her claims of replevin and conversion against all defendants, and breach of fiduciary duty against defendants Sanford Heller and the Heller Group (collectively, the Heller defendants).

Plaintiff (wife) and defendant Maurice Alain Amon (husband) were married in Hong Kong on December 22, 2008, and have lived since then in various locations around the world. Defendant Artmon Limited is a company formed under the laws of the United Kingdom that is controlled and/or owned by the husband. The Heller defendants provide art consulting services. It is undisputed that the Heller defendants provided such services to Artmon pursuant to a written agreement. The wife alleges that they also provided such services to her, but does not claim that there is a written agreement to that effect. The wife does not deny Sanford Heller's statement in his affidavit in support of the motion to dismiss the amended complaint that the written agreements between the Heller defendants and Artmon are "the *only* art advisory agreements that have ever existed" between the Heller defendants and any of the other litigants in this case. Defendant Crozier Fine Arts is a New York company that provides

art storage.[1]

The wife makes the following allegations in her amended complaint. The complaint is focused on approximately 20 artworks worth in excess of $25,000,000, that she describes as "marital property." On or about September 29, 2015, unbeknownst to the wife, the husband commenced a divorce action against her in Monaco. On or about October 6 and 13, 2015, the husband, Artmon and the Heller defendants removed some of the artworks alleged to be marital property from the husband and wife's New York City residence without the wife's knowledge or consent. On October 14, 2015, the wife became aware of the husband's divorce action for the first time.

The wife commenced this action on November 6, 2015. On March 11, 2016, she commenced a divorce action in New York. Supreme Court (Sattler, J.) dismissed the divorce action by order entered on or about October 23, 2016, based on a finding that

[1]The wife's inclusion of Crozier as a defendant appears to be intended solely to make it subject to any injunctive order she might obtain, since she makes no allegations of wrongdoing by Crozier, but only alleges that artworks at issue in this action were moved to a Crozier storage facility from another facility controlled by the Heller defendants. Crozier submitted an affirmation in support of the Heller defendants' motion to dismiss, noting that it has no contractual relationship with the wife. Crozier has not appeared in this appeal.

neither party met the residency requirements of the Domestic Relations Law (§ 230).

In this action, plaintiff moved for a preliminary injunction, and the Heller defendants, the husband and Artmon moved to dismiss the amended complaint. By order entered January 18, 2017, the court (Reed, J.) denied the wife's motion and granted the motions to dismiss, correctly finding that the extent to which the art at issue is marital property or, as defendant contends, his separate property, can only be determined in the course of the parties' divorce proceedings. We now affirm, but for reasons different from those stated by the motion court.

In order to make out a cause of action for conversion, the wife was required to plead, inter alia, that she had legal ownership or a superior right to the property at issue (*Aetna Cas. & Sur. Co. v Glass*, 75 AD2d 786 [1st Dept 1980]). However, she claims only that the artworks at issue are "marital property," which does not give her a superior right to them as against the husband (*see e.g. KS v ES*, 39 Misc 3d 1219[A], 2013 NY Slip Op 5064[U], 9-10 [Sup Ct, NY County 2013]; *Young v Young*, 50 Misc 3d 1212[A], NY Slip Op 50092[U], *2 [Sup Ct, Suffolk County 2016]; *compare Abrams v Pecile*, 115 AD3d 565 [1st Dept 2014] [plaintiff had a superior right to possession of

photographs taken of her by her husband on his camera as against husband's former employee who had refused to return them to husband]). Indeed, her claim that the art is "marital property" can only be determined at the time of divorce. Under New York law, marital property "'is a statutory creature, is of no meaning whatsoever during the normal course of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action'" in New York (*O'Brien v O'Brien*, 66 NY2d 576, 583 [1985]). The provisions of our Domestic Relations Law permitting a New York divorce court to enjoin the transfer of the parties' property before it is designated as marital or separate, to make such designations, and to distribute marital property only apply in actions to change marital status and proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce (Domestic Relations Law § 236[B][2], [5]). Therefore, the wife's claim that the artwork is marital property cannot be adjudicated in this action. We note that she does not allege that any of the artwork at issue is jointly titled or that any of it was gifted to her. Since the wife's causes of action for conversion and replevin of the artworks are based solely on her claim that they are "marital property," they

fail.[2]

The cause of action for breach of fiduciary duty against the Heller defendants is based on the wife's claim that the Heller defendants assisted the husband in his alleged conversion of the artworks at issue. Since her claim for conversion fails, her claim for breach of fiduciary duty does as well.

The wife's requests for permanent and temporary injunctions do not survive, since "[a]n injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against that defendant" (*Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 59 [1st Dept 2012]). Moreover, the wife has already requested, as interim relief, that the Monaco divorce court prohibit the husband from transferring real or personal property without her approval and direct him to return works of art removed from the parties' residences. There is no claim that the Monaco court cannot or will not grant such relief.

Finally, the motion court did not address the parties'

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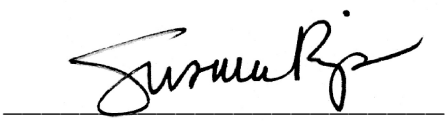
[2]Should a court with jurisdiction over the divorce determine that the wife is entitled to some or all of the artwork, or make a distributive award to her based on its value, the wife's remedy at that time would be to bring a new action to seek enforcement of the divorce decree.

jurisdictional claims, nor do we. Moreover, we do not take any position on whether this Court would have jurisdiction over any future dispute between the parties.

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

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

ENTERED: APRIL 12, 2018



CLERK

Friedman, J.P., Tom, Andrias, Gesmer, JJ.

5075 Richard Davis, etc., Index 157930/14
Plaintiff-Appellant,

-against-

Cohen & Gresser, LLP,
Defendant-Respondent.

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Judd Burstein, P.C., New York (Judd Burstein of counsel), for appellant.

Joseph Hage Aaronson LLC, New York (Gregory P. Joseph of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered July 27, 2016, which dismissed the second amended complaint, and brings up for review an order, same court and Justice, entered March 25, 2016, which granted defendant's motion to dismiss, unanimously affirmed, without costs.

In this action, plaintiff Richard Davis contends that defendant committed legal malpractice by failing to name two key parties as defendants in a related action brought on behalf of the decedent C. Robert Allen, III (*Allen v Devine*, No. 09-cv-0668 [ED NY]) (the Devine action). The motion to dismiss was properly granted because the legal malpractice claim was untimely.

This case arises out of a fraud scheme perpetrated by

nonparties Christopher Devine and Bruce Buzil against decedent and nonparty Excelsior Capital LLP, which is wholly owned by Davis. Decedent introduced Davis to Devine and Buzil, resulting in Davis also being defrauded. The scheme resulted in decedent lending more than $70 million to the fraudsters and Davis, through Excelsior, lending them $18 million. Davis, as a judgment creditor of decedent's estate, was permitted to commence and prosecute this action on behalf of the estate.

Defendant was retained by decedent to defend him in an action commenced by Excelsior, and to pursue claims in a federal action under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Devine and Buzil. Defendant commenced that federal action in 2009; decedent died on March 9, 2011.

Following decedent's death, defendant was separately retained to represent decedent's son as a third-party defendant in the Devine action; to defend decedent's estate in two separate actions commenced by Excelsior; and to represent the estate in connection with a potential criminal investigation of Devine.

The statute of limitations for a legal malpractice claim is three years (CPLR 214[6]; *McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Here, the latest date on which the claim could have accrued is March 9, 2011, because that is when decedent died,

thereby severing the attorney-client relationship between decedent and defendant (*see Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1188 [2d Dept 2012]; *see also Velazquez v Katz*, 42 AD3d 566, 567 [2d Dept 2007]). March 9, 2011 is more than three years prior to the commencement of this action on August 12, 2014.

In opposing defendant's prima facie showing that the claim is untimely, Davis had the burden of demonstrating the statute of limitations has been tolled or does not apply (*see CLP Leasing Co., LP v Nessen*, 12 AD3d 226, 227 [1st Dept 2004]). Davis cannot rely on the continuous representation doctrine to toll the statute of limitations as the doctrine "tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice" (*see Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]).

The documentary evidence establishes that following decedent's death, defendant did not represent the estate in the Devine action. The retainer agreements executed with defendant after the decedent's death were explicitly limited to representing the estate in other litigation and not the Devine litigation. In addition, the evidence demonstrated that

following decedent's passing defendant never entered an appearance on the estate's behalf while other law firms were substituted as counsel in the Devine action, made a motion to substitute the estate as plaintiff, and appeared on behalf of the estate, and ultimately settled with the Devine parties in May 2014 (*see Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005] [no continuous representation where plaintiff had "retained new counsel"]).

Further, the continuous representation doctrine does not apply where there is only a vague "ongoing representation" (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 68 [1st Dept 2015]). For the doctrine to apply, the representation must be specifically related to the subject matter underlying the malpractice claim, and there must be a mutual understanding of need for further services in connection with that same subject matter (*see Shumsky*, 96 NY2d at 168; *see also CLP Leasing*, 12 AD3d at 227).

Contrary to purported ongoing representation by decedent's family and advisors, the record evidence demonstrates the lack of a mutual understanding that defendant would continue to represent the estate in the Devine action, even if there was a continuation of a general professional relationship (*see Pellegrino v*

Oppenheimer & Co., Inc., 49 AD3d 94, 99 [1st Dept 2008] ["a party cannot create the relationship based on his or her own beliefs or actions"]; *Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451, 451 [1st Dept 1993], *lv denied* 82 NY2d 654 [1993] ["plaintiff's unilateral beliefs and actions do not confer upon it the status of client"]).

Defendant never appeared in the Devine action after decedent's death, and when the estate was later substituted as plaintiff, this matter was handled by different counsel. In fact, defendant filed a "Suggestion of Death Upon the Record" advising the court in the Devine action of decedent's death, in which defendant identified itself as "Former Attorneys for C. Robert Allen, III." As such, "there was no concrete task defendant[] [was] likely to perform," and "while there was certainly the *possibility* that the need for future legal work would be required," decedent's representatives "could not have 'acutely' anticipated the need for further counsel from defendant[] that would trigger the continuous representation toll" (*Johnson*, 129 AD3d at 68).

The fact that defendant represented the estate in related matters is not sufficient to establish continuous representation, as these matters were sufficiently distinct as to not be "part of

a continuing, interconnected representation" (*cf. Town of Amherst v Weiss*, 120 AD3d 1550, 1552-1553 [4th Dept 2014]; *Deep v Boies*, 53 AD3d 948, 948-952 [3d Dept 2008]). The continuous representation doctrine is limited to ongoing representation "pertain[ing] specifically to the matter in which the attorney committed the alleged malpractice" and "is not applicable to a client's ... continuing general relationship with a lawyer" (*Shumsky*, 96 NY2d at 168; *see also Pace*, 95 AD3d at 1188). Nor is the fact that defendant represented decedent's son personally in the Devine action sufficient, as he is a separate client.

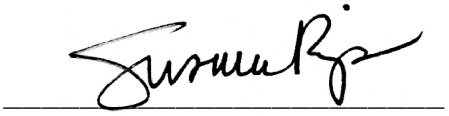
Even were it not untimely, the malpractice claim should also be dismissed because "the proximate cause of any damages sustained by plaintiff was not the alleged malpractice of defendant[], but rather the intervening and superseding failure of plaintiff's successor attorney" (*Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 10 [1st Dept 2017]). This is the case where successor counsel had "sufficient time and opportunity to adequately protect plaintiff's rights," but failed to do so (*Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652, 652 [1st Dept 2011]; *Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377 [1st Dept 2007]).

The statute of limitations for a civil RICO claim is four

years (*Agency Holding Corp. v Malley-Duff & Assoc., Inc.*, 483 US 143, 156 [1987]). Davis, who now stands in decedent's shoes, is bound by decedent's judicial admissions, including admissions made in the Devine complaint that the fraud was uncovered at the end of 2007 (*see New Greenwich Litig. Trustee, LLC v Citco Fund Servs. [Europe] B.V.*, 145 AD3d 16, 25 [1st Dept 2016], *lv denied* 29 NY3d 917 [2017][admissions, including informal judicial admissions, by a "representative or predecessor in interest of a party" are binding on the party]). Since Davis is bound to the allegation that the fraud was uncovered at the end of 2007, and successor counsel appeared in the Devine action by June 2011, successor counsel had approximately six months to adequately protect decedent's rights when the limitations period for the RICO claim would run at the end of 2011.

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

ENTERED: APRIL 12, 2018



CLERK

Richter, J.P., Mazzarelli, Webber, Gesmer, JJ.

5616 Board of Managers of the 120 East 86th Street Condominium, Plaintiff-Appellant, Index 162584/14

-against-

Park Avenue Physicians Realty, LLC, Defendant-Respondent,

Gateway 1 Group Inc., et al., Defendants,

120/86 Owners Corp., Additional Defendant-Appellant,

"John Doe," etc., et al., Additional Defendants.

Braverman Greenspun, P.C., New York (Jon Kolbrener of counsel), for appellants.

Singer Netter Dowd & Berman PLLC, White Plains (Edward M. Berman of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 3, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff board and additional defendant Owners' (together, appellants) motion for summary judgment dismissing defendant Park Avenue Physicians Realty's (Physicians) claims against them, unanimously modified, on the law, to grant the motion as to Physicians' first, second and fourth counterclaims, and otherwise affirmed, without costs.

Plaintiff Board of Managers of the 120 East 86th Street Condominium (Condominium) manages a "cond-op" that is comprised of three separate units: (1) a cooperative residential unit (the Coop) (2) a retail unit condominium on the first floor; and (3) a professional unit condominium on the second floor that is owned by Physicians. Physicians purchased the professional unit on July 23, 2003. On that date a deed to the unit was tendered to Physicians, "care of" its attorneys, Singer, Netter, Doud & Berman of Manhattan. Edward M. Berman, a member of that law firm, is the father of David Berman, M.D., who is a member of Physicians. The deed provided:

> "Acceptance of this deed by [Physicians] shall constitute assumption of the provisions of the Declaration, By-Laws and Rules and Regulations of [Condominium] as the same may be amended from time to time."

Article 2 of the bylaws referenced in the deed addressed governance of the Condominium by a board. Section 2.7 provided, in pertinent part:

> "From and after the first annual meeting of the Unit Owners, the Condominium Board shall consist of five individuals[1] to be elected [three] by the Residential Unit Owner[2], one by the Retail Unit Owner and one by the Professional Unit Owner pursuant to the terms of Section 4.9 hereof."

Despite this language reserving a seat for the owner of the professional unit, Physicians was never represented on the board.

In March 2013, the Condominium's management company sent a letter addressed to "Park Avenue Medical," the name Physicians did business as, informing it that the board had decided to go forward with work to modernize the building's elevator, as well as to address a problem with the building's façade that had resulted in a violation notice from the Buildings Department. The letter stated that the Condominium would be borrowing $360,000 for the project, and that the professional unit's share of the loan would be $97,746. In May 2013, the management company sent another letter to Physicians, informing it that, in

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[1] Section 4.1 of the bylaws conflicts with section 2.7 in that it mentions a nine-member Board, although it does not delineate how many seats each unit of the Condominium is allotted on such a board. Physicians posits that if the bylaws were somehow interpreted as establishing a nine-member board, it would have identical proportions to the five-member board referenced in section 2.7; i.e., 5 seats for the Coop, and two each for the professional and retail units.

[2] i.e., the Coop.

addition to the elevator and façade work, the board had decided to paint the building's common areas, install a security camera system and upgrade the intercom system. In contrast to the March letter, which indicated that a loan to the Condominium would finance the work, the May letter stated that the Coop would be financing its share of the cost, and that the professional unit would be required to pay directly for its share, now represented to be $81,365, or secure its own financing in that amount. Eventually Physicians' share of the work was reduced to $70,688, of which it paid $24,000.

After Physicians failed to pay the balance, the Condominium filed a lien in the amount of $46,698.00 against the professional unit, and commenced this action to foreclose on the unit, and for breach of contract. Physicians interposed an answer containing four counterclaims. The first counterclaim sought a declaratory judgment that, because Physicians was never represented on the board, the existing board was a nullity and that a new board should be constituted, reflecting the provision in the bylaws reserving at least one seat for the owner of the professional unit. The second counterclaim alleged that the board, in violating the bylaws provisions concerning board composition, breached its fiduciary duty, such that any and all charges

imposed on Physicians related to the 2013 building improvements lien should be reversed, the lien removed, and punitive damages assessed against the board in connection with actions that were done "willfully, intentionally and maliciously." The third counterclaim asserted that the board engaged in self-dealing by arranging for the Coop to finance its share of the improvements while requiring the professional and retail units to either pay directly or arrange their own financing. Finally, the fourth cause of action sought damages for the board's allegedly illegal behavior under the theory that it constituted a prima facie tort.

The Condominium moved for summary judgment dismissing the counterclaims, and Physicians cross-moved for, inter alia, a declaration that the board was improperly constituted and so was unauthorized to assess Physicians or impose a lien on the professional unit. The court denied both motions, finding that there were issues of fact preventing resolution, and that the motions were premature because of outstanding discovery.

The Condominium argues on appeal that Physicians has no basis for protesting its lack of representation on the board because it neglected to assert its right to be represented over a period of over 10 years. Physicians counters by citing *Board of Mgrs. of the 85 8th Ave. Condominium v Manhattan Realty LLC* (102

AD3d 548 [1st Dept 2013]) (*Manhattan Realty*), which it claims is fully controlling. In that case, the plaintiff condominium's bylaws, similarly to those at bar, provided for a five-member board of managers, allocated between a cooperative residential unit, a garage unit and a commercial unit. The members of the board of the residential cooperative unit called a meeting at which they elected themselves as the condominium board. When that board then imposed charges on the garage unit and the commercial unit, the defendants in the case, they protested that the assessments were unauthorized because they were issued by an illegally constituted board. This Court held that there were issues of fact precluding resolution of whether the board was constituted in accordance with the bylaws (102 AD3d at 549-550).

The facts here differ from *Manhattan Realty* such that it does not, as Physicians urges, dictate the result. In that case, the defendants presented evidence that the board was purposefully constituted in a way to deprive them of the representation guaranteed them under the bylaws. Further, this Court noted that "at various points . . . defendants demanded that a condominium board be created pursuant to the bylaws, to no avail" (102 AD3d at 549). Here, Physicians presents no evidence that it was deliberately excluded from representation on the board.

Moreover, there is no evidence that it ever invoked its right to be represented but was rebuffed. Indeed, Physicians asserts that it never knew of its right to have a seat on the board. However, this right was clearly stated in the bylaws that it, as grantee, expressly assumed to abide by upon acceptance of the deed. While it appears that Physicians' attorney, the father of one of its principals, took possession of the deed, he did so as Physicians' agent, such that knowledge of the bylaws' contents, including Physicians' right to representation on the board, is imputable to Physicians (*see Kirschner v KPMG LLP*, 15 NY3d 446, 466 [2010]).

Based on the foregoing, the first two counterclaims, which relate solely to the composition of the board, fail to state a cause of action. To the extent Physicians contends there is outstanding discovery that might shed further light on how and why the board was composed the way it was, they fail to offer a scintilla of evidence that the decision was made in bad faith, as opposed to as a result of Physicians' inaction. However, as to the third counterclaim, plaintiff has not satisfied its prima facie burden of showing that its decision, as alleged, to arrange for financing of the assessment for the residential cooperative, but not Physicians and the retail unit, advanced a legitimate interest of the Condominium (*see Pomerance v McGrath*, 124 AD3d

481, 483 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [2015]). Accordingly, summary judgment was appropriately denied on that counterclaim.

Finally, the condominium is entitled to dismissal of Physicians' fourth counterclaim, for prima facie tort. Although it alleges intentional and malicious action, Physicians does not allege, as required, that the Condominium's sole motivation was "disinterested malevolence" (*see Posner v Lewis*, 18 NY3d 566, 570 n 1 [2012] [internal quotation marks omitted]).

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

ENTERED: APRIL 12, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Andrias, Kapnick, Webber, JJ.

6201 Cindy Chupack, Index 151348/14
Plaintiff-Appellant-Respondent,

-against-

Rebecca Gomez also known as Rebecca Flores, et al.,
Defendants-Respondents-Appellants,

Ian Wallach,
Nonparty Appellant-Respondent.

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The Greenberg Law Firm, LLP, Purchase (Bill Greenberg of counsel), for appellants-respondents.

Thomas S. Fleishell & Associates, P.C., New York (Thomas S. Fleishell of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered May 9, 2017, which, to the extent appealed from as limited by the briefs, granted defendants Rebecca Gomez, Michael Flores and 13 East 9th Street, LLC's motion for summary judgment dismissing the breach of contract and fraudulent conveyance causes of action as against them and on their breach of contract counterclaim, and granted their request for costs and sanctions against plaintiff and nonparty Ian Wallach, her attorney, to the extent of awarding them $5,000, unanimously modified, on the law, to vacate the award of costs and sanctions against nonparty appellant, and to direct that plaintiff pay the entire $5,000

award, and otherwise affirmed, without costs.

The court properly ordered plaintiff to pay costs directly to defendants (*see* 22 NYCRR 130-1.1[a]; *Premier Capital v Damon Realty Corp.*, 299 AD2d 158, 158-159 [1st Dept 2002]). The court fully explained its decision to impose a monetary award, and its determination of the amount, and we see no basis for disturbing the court's exercise of discretion in doing so (*Tsabbar v Auld*, 26 AD3d 233, 234 [1st Dept 2006]). Although we are concerned about the nonparty appellant's actions in this case, the court should not have directed him to pay half the award because the notice of motion did not seek such relief nor was it clear from the affirmation in support that sanctions were being sought against both plaintiff and her counsel (*see Bogan v Royal Realty Co.*, 209 AD2d 178, 179 [1st Dept 1994]).

In opposition to defendants' prima facie showing that plaintiff's breach of contract and fraudulent conveyance claims were without merit and that there was no defense to their breach of contract counterclaim, plaintiff failed to raise an issue of fact, even considering her out-of-state affidavits, to which she failed to attached a certificate of conformity (*see* CPLR 2309[c]; *American Cas. Co. of Reading, Pennsylvania v Motivated Sec. Servs., Inc.*, 148 AD3d 521, 521 [1st Dept 2017]; CPLR 2001). The

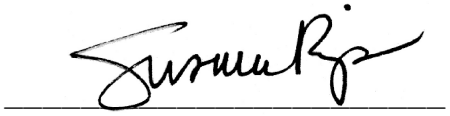
emails exchanged between the parties, in which all the material terms were offered and accepted, establishes the existence of an enforceable agreement (*see Kowalchuk v Stroup*, 61 AD3d 118, 122 [1st Dept 2009]; *cf. Mark Bruce Intl., Inc. v Blank Rome, LLP*, 60 AD3d 550, 551 [1st Dept 2009] ["The exchange of e-mails, which did not set forth the fee for plaintiff's services or an objective standard to determine it, was too indefinite to be enforceable"]). Plaintiff's affidavit saying that she never signed a lease agreement does not avail her, since the parties gave no indication that they intended to be bound only by a written agreement (*Kowalchuk*, 61 AD3d at 123). Plaintiff also failed to present any evidence that controverts the record evidence showing that defendants attempted to re-rent the apartment and mitigate their damages.

The factual allegations underlying plaintiff's fraudulent conveyance claim, e.g., that defendants' limited liability company was formed with "intent to hinder, delay, or defraud either present or future creditors," are insufficiently detailed,

and plaintiff's affidavit does nothing to cure the deficiency (*see* CPLR 3016][b]; *Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [1st Dept 2000]).

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Moulton, JJ.

6256 The People of the State of New York, Ind. 1171/11
Respondent,

-against-

Michael Findley,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 1, 2013, convicting defendant, after a jury trial, of robbery in the second degree, reckless endangerment in the first degree, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 11 years, unanimously affirmed.

After permitting defendant to represent himself at trial, the court providently exercised its discretion in declining to replace or dismiss defendant's standby counsel. Initially, to the extent defendant sought to proceed with no standby counsel at all, that request was properly denied. That option would have risked a mistrial in the event termination of defendant's pro se

status became necessary, and this was of particular concern because defendant had a history of disrupting the proceedings (*see Faretta v California*, 422 US 806, 834, n 46 [1975]). Defendant was under no obligation to solicit or accept any advice from his standby counsel.

Furthermore, there was no good cause for replacement of defendant's standby counsel, who was defendant's third assigned attorney, with yet another attorney (*see People v Medina*, 44 NY2d 199, 207-08 [1978]). While the record sometimes shows contentious exchanges between defendant and this attorney, the record also shows that he consulted with him, as a legal advisor, on other occasions. There was no irreconcilable conflict amounting to good cause for substitution (*People v Linares*, 2 NY3d 507, 510 [2004]). Defendant's "unjustified hostility" towards counsel does not warrant substitution (*People v Taylor*, 92 AD3d 556 [1st Dept 2012]), nor does any disagreement over trial strategy (*Linares* at 511). The attorney's negative comments about defendant, quoted in a newspaper article, should have been avoided, but they were made well before trial, and did not prejudice defendant or amount to an irreconcilable conflict. Similarly, in requesting another article 730 competency examination over defendant's objection, his legal advisor sought

to act in defendant's interest, not contrary to it, and defendant's appellate counsel now takes the position that such an examination was warranted.

The court providently exercised its discretion in denying standby counsel's requests for a third CPL article 730 examination during trial, notwithstanding defendant's prior psychiatric history (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 879-80 [1995]). The most recent reports concluded that defendant was competent, and the court, which was fully familiar with defendant, observed him during the proceedings. Although defendant was argumentative and obstreperous on numerous occasions, there was no indication that he was unable to understand the proceedings (*People v Taylor*, 92 AD3d 556, 557 [1st Dept 2012]).

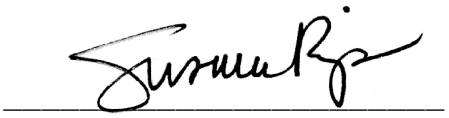
The court properly declined to instruct the jury on the justification defense relating to emergencies (Penal Law § 35.05[2]). Defendant claimed the victim had tried to sexually assault him and had threatened to kill him in the back of the victim's cab. Even assuming defendant was justified in fleeing the victim, once defendant, who was under the influence of drugs and alcohol, had driven off at a high speed purportedly to

contact the police, he did not stop when he saw a police car, and at this time the victim, and any related threat, were far away. Thus, at that point his conduct in continuing to drive at over 80 miles per hour through red lights in lower Manhattan was no longer "necessary as an emergency measure" (Penal Law § 35.05[2).

However, a justification instruction under Penal Law §35.15(1) was warranted regarding the robbery charge, because defendant testified that he punched the victim and took his cab after the victim threatened him and tried to sexually assault him. Nevertheless, any error in denying that charge was harmless (*see People v Jones*, 3 NY3d 491, 497 [2004]).

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6257 Denise Jones, Index 307690/10
Plaintiff-Appellant,

-against-

Underhill Realty, LLC,
Defendant-Respondent.

_____

Eisenberg & Baum, LLP, New York (Sagar Shah of counsel), for appellant.

The Chartwell Law Offices, LLP, New York (William H. Grae of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 19, 2016, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant satisfied its prima facie burden of establishing that the door that slammed shut on plaintiff's right foot was not a defective or dangerous condition. Defendant's expert established that the mechanism located at the top of the door was not defective and that it was not a device that was intended to hold the door open or prevent it from slamming shut. The expert also established that the door mechanism did not violate any code, regulation or standard (*see Nielsen v 300 E. 76th St. Partners, LLC*, 111 AD3d 414 [1st Dept 2013]; *DeCarlo v Village of*

Dobbs Ferry, 36 AD3d 749 [2d Dept 2007]; *Hunter v Riverview Towers*, 5 AD3d 249, 250 [1st Dept 2004]).

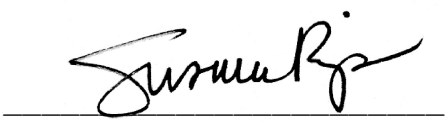
In opposition, "plaintiff fail[ed] to submit any evidence that [the door was] actually defective or dangerous" (*Lezama v 34-15 Parsons Blvd., LLC*, 16 AD3d 560, 560 [2d Dept 2005]). Specifically, plaintiff's expert's conclusion was not based on his own personal observations of the door mechanism, and he failed to establish that the door mechanism was maintained in violation of any specific code, regulation or standard (*see Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 721 [2d Dept 2011], *lv denied* 20 NY3d 856 [2013]; *DeCarlo*, 36 AD3d at 750; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]).

The doctrine of res ipsa loquitur is inapplicable to the facts of this case, inasmuch as the allegedly defective door — being part of plaintiff's own apartment — was not in defendant's exclusive control, and because it was equally plausible that the accident occurred due to plaintiff's comparative negligence (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-228 [1986]; *Meza v 509 Owners LLC*, 82 AD3d 426 [1st Dept 2011]; *Giordano v Toys R Us*, 276 AD2d 669 [2d Dept 2000]).

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: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6258-
6259 In re Dior S., and Another,

Children under Eighteen Years
of Age, etc.,

Latisha H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about February 22, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about December 2, 2016, which found that respondent mother neglected the subject children, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner agency proved by a preponderance of the evidence

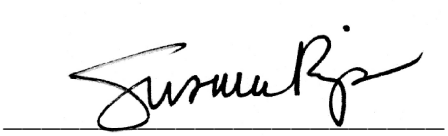
that the mother neglected the children by failing to treat her mental illness (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016]). The grandmother's testimony about the mother's violent behavior toward her and the mother's admission that she was diagnosed with bipolar disorder raised the substantial probability that the mother's failure to treat her mental illness would place the children at imminent risk of impairment if released to her care (*see Matter of Enrique S. [Kelba C.S.]*, 134 AD3d 576, 577 [1st Dept 2015], *lv denied* 27 NY3d 948 [2016]). In addition, the testimony about the April 3, 2016 incident demonstrated that the mother's untreated mental illness not only created an imminent risk of harm to the children, but resulted in actual impairment to the younger child after she lost her temper, threw an aluminum pot cover and struck him in the head resulting in the child sustaining injuries that were visible for at least three days after the incident (*see Matter of Princess Ashley C. [Florida S.C.]*, 96 AD3d 682, 682 [1st Dept 2012]).

The mother's regular, long-term drug use while the children were in her care constituted prima facie evidence of neglect, which she failed to rebut by showing that she was regularly participating in treatment (*see* Family Ct Act § 1046 [a] [iii];

Matter of Nyheem E. [Jamila G.], 134 AD3d 517, 519 [1st Dept 2015]). The fact that she entered a drug treatment program about 16 days before the neglect petitions were filed does not outweigh her significant history (*see Matter of Messiah C. [Laverne C.]*, 95 AD3d 449, 450 [1st Dept 2012]).

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6260 Marisol Vasquez, Index 150909/12
Plaintiff-Appellant,

-against-

Nealco Towers LLC,
Defendant-Respondent.

_____

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

Pillinger Miller Torallo LLP, Elmsford (Daniel O. Dietchweiler of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 10, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

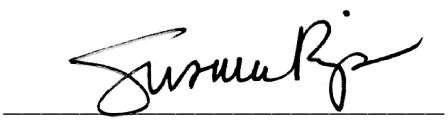
Defendant established entitlement to judgment as a matter of law by submitting evidence showing that it neither created the alleged hazardous condition of the step on which plaintiff fell nor had actual or constructive notice of it. The deposition testimony of the building superintendent and the property manager's affidavit established that there were no prior complaints or incidents involving the same step (*see Johnson v Wythe Place, LLC*, 134 AD3d 569 [1st Dept 2015]), and plaintiff's own testimony, that she did not see the defect as she walked up

the stairs approximately 20 minutes prior to the incident, indicates that the alleged defective condition was not visible and apparent so as to constitute constructive notice (*id.*).

In opposition, plaintiff failed to raise a triable issue of fact. The evidence failed to show a specific recurring condition that was routinely left unremedied by defendant, as a opposed to a general awareness of such a condition, for which defendant would not be liable (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407, 408 [1st Dept 2013]). Plaintiff's argument that inadequate lighting in the staircase was a proximate cause of her fall is unavailing, since she testified that she slipped because of the defect on the stairs, not because of inadequate lighting (*see Sarmiento v C & E Assoc.*, 40 AD3d 524, 526 [1st Dept 2007]).

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6261 In re Jocelyn Leka, Index 102213/15
Petitioner-Appellant,

-against-

The New York City Law Department,
et al.,
Respondents-Respondents.

Law Offices of Richard J. Washington, P.C., New York (Richard J. Washington of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondents.

Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about October 6, 2016, granting respondents' cross motion to dismiss the petition to annul the determination, which terminated petitioner's probationary employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

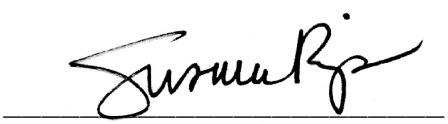
A probationary employee may be terminated without a hearing, for any reason or no reason at all, as long as the dismissal is not unlawful or in bad faith (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [1st Dept 2006]). Here, petitioner makes only conclusory assertions, and offers no evidence to show, that her termination was for an illegal reason, discriminatory or in bad

faith. Indeed, the record demonstrates that the determination was based on petitioner's performance evaluation and an overall restructuring of respondents' department. To the extent petitioner alleges irregularities in the performance review process, such, without more, does not constitute bad faith or deprivation of a substantial right (*see Matter of Francois v Walcott*, 136 AD3d 434 [1st Dept 2016]). In fact, the record shows that petitioner was provided with a thorough performance evaluation, which contained both positive comments regarding her performance as well as specific areas for improvement. While petitioner also alleges that respondent hired a male to fill a substantially similar position after her termination, that fact, even if accurate, in and of itself does not raise an inference of discrimination (*see e.g. Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]).

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

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6262 The People of the State of New York, Ind. 2316/12
Respondent,

-against-

Jeremy Erazo,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

_____

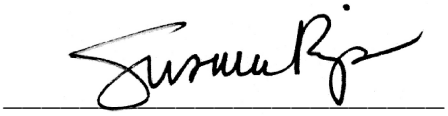
Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 25, 2013, as amended March 27, 2013, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

Defendant's challenge to a summation remark by the prosecutor is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the remark was responsive to defense counsel's summation, and that it

permissibly commented on the victim's credibility without constituting improper vouching (*see People v Overlee*, 236 AD2d 133, 144 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]).

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6263-
6264 Index 653408/13

Age Group, Ltd.,
Plaintiff-Respondent,

-against-

Martha Stewart Living Omnimedia, Inc.,
Defendant-Appellant.

_____

Greenspoon Marder, P.A. P.C., New York (Wendy Michael of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (Thomas J. Amburgy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 3, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 27, 2017, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable order.

The motion court correctly found that plaintiff may recover lost profits, since plaintiff submitted evidence supporting its claim that such damages were caused by defendant's alleged breach

of the parties' contract, are capable of proof with reasonable certainty, and were fairly within the contemplation of the parties at the time the contract was made (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]; *Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799 [2014]). It is for a jury to determine whether plaintiff's expert's analysis of damages was flawed (*see Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 87 [1st Dept 2012]).

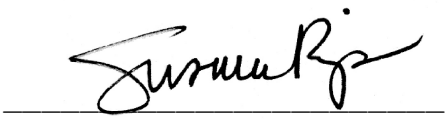
The court correctly found that issues of fact exist as to whether defendant breached the agreement by saying that it would not approve any new designs. While defendant was permitted to refuse any design on subjective grounds such as personal taste and sensibilities, it was nevertheless obligated to exercise its refusal in good faith, based on dissatisfaction genuinely and honestly arrived at (*see Golden v Worldvision Enters.*, 133 AD2d 50 [1st Dept 1987], *lv denied* 71 NY2d 804 [1988]; *see also Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 [1st Dept 2003] ["even an explicitly discretionary contractual right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement"]). The

examination of such a state of mind is for a jury (*see Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 487 [1st Dept 2011]).

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

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6265 In re Geraldine Rosa, Index 101297/15
Petitioner-Respondent,

-against-

New York City Housing Authority,
Straus Houses,
Respondent-Appellant.

_____

David I. Farber, New York (Laura R. Bellrose of counsel), for appellant.

Jeanette Zelhof, Mobilization for Justice, Inc., New York (Sandra Gresl of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered July 22, 2016, annulling the determination of respondent New York City Housing Authority (NYCHA), dated March 9, 2015, which terminated the tenancy of petitioner for criminal drug activity and chronic rent delinquency, and remanding the matter for a new hearing before a different hearing officer solely on the rent delinquency charge, unanimously reversed, on the law, the determination confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

The IAS court erred in finding that NYCHA's administrative findings were in violation of petitioner's due process rights.

First, the IAS court erred in rejecting the arresting officer's testimony because the underlying criminal proceeding against petitioner had been dismissed and sealed. The sealing of a criminal case will not immunize a defendant against all future consequences of the charges, and an administrative tribunal is permitted to consider evidence of the facts leading to those charges when they are independent of the sealed records (*Matter of Skyline Inn Corp. v New York State Liq. Auth.*, 44 NY2d 695, 696 [1978]; *Matter of Dockery v New York City Hous. Auth.*, 51 AD3d 575, 575 [1st Dept 2008], *lv denied* 11 NY3d 704[2008]). The IAS court's finding that the officer's testimony was improperly based on sealed records, rather than his independent recollection, was simply not accurate. Regardless, the "reception of erroneously unsealed evidence at [an administrative] hearing does not, without more, require annulment of respondent's determination" (*Matter of Charles Q. v Constantine*, 85 NY2d 571, 575 [1995]).

The IAS court also improperly rejected the officer's testimony as impermissible hearsay. It is well-settled that hearsay is admissible in administrative proceedings, that it may be the basis for an administrative determination and – if sufficiently relevant and probative – may constitute substantial

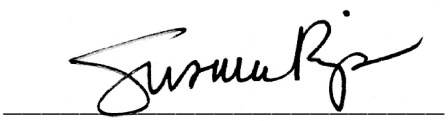
evidence alone (*People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]; *Matter of Café la China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007]). Petitioner did not suffer any due process violation at the hands of NYCHA.

Further, our independent review of the record confirms that NYCHA's administrative findings are supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The officer's hearsay and nonhearsay testimony, as well as petitioner's own admissions, were more than sufficient to meet this standard (*Café la China Corp.*, 43 AD3d at 281). Regardless, respondent had the discretion to terminate petitioner's tenancy based on her chronic failure to pay rent alone, which was clearly established at the administrative hearing (*Matter of Hairston v New York City Hous. Auth.*, 144 AD3d 416, 417 [1st Dept 2016]).

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

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6266 The People of the State of New York, Ind. 589/12
Respondent,

-against-

John Draper,
Defendant-Appellant.

_____

The Elbert Law Firm, Melville (Michael D. Elbert of counsel), for appellant.

John Draper, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at hearing; Ronald A. Zweibel, J. at jury trial and sentencing), rendered March 25, 2014, convicting defendant of attempted assault in the first degree and assault in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

The court properly denied defendant's motion to suppress the lineup identification. The lineup was not unduly suggestive, because defendant and the fillers were all reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). There was no

noticeable age discrepancy, regardless of the variation in actual age among the lineup participants. While the fillers were somewhat more casually dressed than defendant, the difference was not particularly striking, and none of the witnesses had described the assailant's clothing.

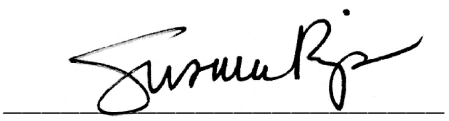
The court providently exercised its discretion in precluding defendant from introducing a police record related to the impoundment of his car, which contained a handwritten notation indicating "blood in vehicle, locked." Although defendant asserts that the presence of blood in his car would cast doubt on the People's version of the incident, this notation was unexplained, and was inconsistent with the electronic version of the form, as well as the recollections of the police officer who prepared the form and the detective who found no blood when he searched the car. Regardless of whether defendant could have laid a sufficient foundation for the admissibility of this notation as a business record, it was irrelevant to any of the issues actually litigated at trial, or, at most, was of slight probative value that was outweighed by the potential of misleading the jury (*see People v Primo*, 96 NY2d 351, 355 [2001]). To the extent that defendant is raising a constitutional claim, that claim is unpreserved and we decline to

review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The court also providently exercised its discretion when it determined that, under the circumstances presented, defendant created a misleading impression about the alleged inadequacy of the police investigation, and thereby opened the door to testimony about a photo identification that led to his arrest (*see People v Cole*, 59 AD3d 302, 303 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]). In any event, the challenged evidence was not unduly prejudicial.

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6267- Ind. 4024N/14
6267A The People of the State of New York, 4645/15
Respondent,

-against-

Shawn Shields,
Defendant-Appellant.

_____

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

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

_____

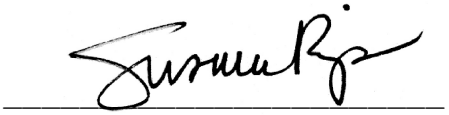
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered February 9, 2016; and a judgment of the same court (Bonnie Wittner, J.), rendered March 3, 2016,

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

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

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

ENTERED: APRIL 12, 2018



CLERK

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

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6268 Carol Kaszar, Index 800008/15
Plaintiff-Respondent,

-against-

Samuel K. Cho, M.D., et al.,
Defendants-Appellants,

Nicole Ansell, M.D., et al.,
Defendants.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for appellants.

Becker & D'Agostino, P.C., New York (Michael D'Agostino of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 6, 2017, which granted plaintiff's motion to renew the motion of defendants Samuel K. Cho and the Mount Sinai Medical Center to dismiss the complaint as against them, and upon renewal, denied the motion to dismiss, and vacated the judgment previously entered in favor of those defendants, unanimously affirmed, without costs.

Although it is true that a motion to renew should generally be based upon newly-discovered facts, this rule is not inflexible, and the court has discretion to grant renewal in the interest of justice even upon facts that were known to the movant

at the time the original motion was made (*Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]). Here, we decline to interfere with the court's discretionary decision to grant renewal. Further, in view of the strong policy in favor of resolving disputes on the merits, and in the absence of prejudice to defendants, we conclude that the motion court, upon renewal, providently exercised its discretion in vacating the judgment.

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

ENTERED: APRIL 12, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6269 Florists' Mutual Insurance Company, Inc., doing business as Hortica Insurance and Employee Benefits,
Plaintiff-Appellant,

-against-

Behman Hambelton, LLP, et al.,
Defendants-Respondents.

Index 154427/16

_____

Rawle & Henderson, LLP, New York (Richard Polner of counsel), for appellant.

Blank Rome LLP, New York (Andrew T. Hambelton of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered December 12, 2016, which granted defendants' motion to dismiss the complaint alleging legal malpractice as time-barred, unanimously affirmed, without costs.

Plaintiff's contention that it was obligated to pursue an appeal of the underlying action prior to filing a legal malpractice claim is unavailing, as the appeal to the Workers' Compensation Board was not likely to succeed (*Grace v Law*, 24

NY3d 203, 209-210 [2014]). Furthermore, the Workers' Compensation Board's appellate decision was issued on October 29, 2013, leaving plaintiff almost two years to bring an action on the alleged malpractice, which accrued in September 2012.

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

ENTERED: APRIL 12, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6270-
6270A Janiya W.-G., etc.,
Plaintiff-Appellant,

Janel G., etc.,
Plaintiff,

-against-

Michael Smith, et al.,
Defendants,

Canje Discount, Inc., et al.,
Defendants-Respondents.

- - - - -

Durst Corporation,
Third-Party Plaintiff-Appellant,

-against-

Hercules Chemical Company, Inc., et al.,
Third-Party Defendants-Respondents.

- - - - -

Durst Corporation,
Second Third-Party Plaintiff-Appellant,

-against-

Hercules Chemical Company, Inc., et al.,
Second Third-Party Defendants-Respondents.

Index 350663/08
83807/09
84155/09

_____

Kelner & Kelner, New York (Joshua D. Kelner of counsel), for appellant.

Goldberg Segalla LLP, White Plains (William T. O'Connell of counsel), for Durst Corporation, respondent/appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for Canje Discount, Inc., respondent.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for Oatey Supply Chain Services, Inc., respondent.

O'Connor Redd LLP, Port Chester (Joseph M. Cianflone of counsel), for Hercules Chemical Company, Inc., respondent.

Orders, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered June 28, 2016, which, to the extent appealed from, denied the infant plaintiff's motion for summary judgment as to liability as against defendants Canje Discount, Inc. and Durst Corporation and to amend the complaint to add a demand against Durst for punitive damages, granted Canje's and Durst's motions for summary judgment dismissing the complaint and all cross claims against them, and granted third-party and second third-party defendants' motions for summary judgment dismissing all claims as against them, unanimously modified, on the law, to deny Canje's and Durst's motions as to the negligence claims as against them, the negligent performance of contract claim as against Durst, and any cross claims against them based on those claims, and otherwise affirmed, without costs.

As plaintiff does not allege that the sulfuric acid drain opener that allegedly caused her injuries was defectively designed or manufactured or that there was a failure to warn, no

claim for strict products liability lies (*Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]).

Because defendant Canje, the retail outlet at which the product was purchased, never agreed to abide by the sale policy of the manufacturer, third-party defendant Hercules Chemical Company, Inc., to restrict the sale of the product to plumbing and/or building professionals, it cannot be held liable for launching a force of harm in negligent discharge of a contractual obligation (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). However, issues of fact exist whether defendant Durst, the distributor that sold the product to Canje, had a contractual duty to refrain from selling the product to Canje and whether Durst breached this duty and its acknowledged contractual undertakings to take appropriate steps to assure the proper sale and use of the product and to comply with the Seller's Notice prohibiting sales to non-professionals and the display of the product where it was easily accessible. Durst argues that even if it breached such a duty it did not launch a force or instrument of harm. However, in the cases it cites in support of this argument, the defendants failed in their contractual obligations merely to improve an existing condition (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Trawally v*

City of New York, 137 AD3d 492 [1st Dept 2016]; *Vasquez v Port Auth. of N.Y. & N.J.*, 100 AD3d 442 [1st Dept 2012]). This case, in which there is evidence that Durst created the unsafe condition by supplying the product without proper safeguards, is more akin to *Landon v Kroll Lab. Specialists, Inc.* (22 NY3d 1 [2013]), in which the Court of Appeals found that the allegation that the defendant's negligent testing procedures subjected the plaintiff to legal proceedings stated a cause of action based on the launch of a force of harm.

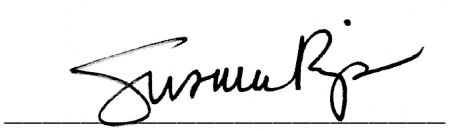
Plaintiff's argument that Durst and Canje breached an industry standard of care by allowing a 93% concentration sulfuric acid drain-opener to be placed in a variety store and sold to a non-professional is unavailing, since her expert's assertion of such an industry standard is unsupported by any authority or concrete proof (*Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]). However, an issue of fact exists whether Durst or Canje was negligent in violating an industry standard by failing to follow the manufacturer's prescribed safety instructions, as plaintiff's expert asserted. Notably, Durst's chief of operations agreed that potentially hazardous chemicals are to be handled in accordance with the

manufacturer's specifications, which in this case prohibited sale to non-professionals.

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: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6271 In re Anthony Carty, Index 101367/14
Petitioner-Appellant,

-against-

New York City Police Department,
Respondent-Respondent.

_____

Anthony Carty, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

_____

Judgment (denominated a decision and order), Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 23, 2017, denying the petition seeking to compel respondent to disclose documents requested by petitioner pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously modified, on the law, to deny, without prejudice, that portion of the New York City Police Department's motion to dismiss relating to the 17 previously undisclosed responsive records and to remand the matter to the Supreme Court for further proceedings, including supplementation of the record, and otherwise affirmed, without costs.

This proceeding is moot as to records responsive to

petitioner's FOIL request that respondent has already disclosed to petitioner (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 749 [2001]). Moreover, petitioner's claim challenging redactions to already disclosed records is time-barred (CPLR 217[1]).

However, respondent concedes that its prior responses did not inform petitioner that he was being denied access to records beyond those already disclosed. Respondent requests we remand to allow the court to determine whether there was a valid basis to withhold the nondisclosed responsive records and to supplement the record to demonstrate that these records were already disclosed to petitioner. Accordingly, the matter is remanded for this purpose.

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

ENTERED: APRIL 12, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6272 Volko Kerzhner, Index 161313/13
Plaintiff-Appellant,

-against-

G4S Government Solutions, Inc.,
et al.,
Defendants-Respondents,

Elliot Ray,
Defendant.

_____

Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 16, 2017, which granted the motion of defendants G4S Government Solutions, Inc., and Wackenhut Services, Incorporated (collectively defendants) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that, while at a Social Security Administration office to address an issue with his benefits, defendant Ray, a security guard employed by defendants, pushed him to the ground without provocation. Plaintiff's intentional tort claims were previously dismissed as barred by the statute of limitations, leaving only a claim that defendants were liable for

negligent hiring, training and supervision (*see* 138 AD3d 564 [1st Dept 2016]).

Supreme Court properly granted defendants' motion. Defendants submitted an affidavit from the former deputy general manager for defendant G4S Government Solutions' operations, who stated, among other things, that the security guard's duties include removing individuals from the premises. Since Ray acted within the scope of his employment in ushering plaintiff out of the office, his actions were within the scope of his employment and thus, the negligent hiring claim must be dismissed (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]*; Ashley v City of New York*, 7 AD3d 742 [2d Dept 2004]).

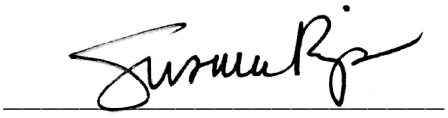
Plaintiff's opposition failed to raise an issue of fact as to whether defendant Ray was acting within the scope of his employment. Indeed, the video of the incident shows defendant Ray escorting plaintiff out of the premises.

Plaintiff's argument that dismissal is not required because he is seeking punitive damages (*see Karoon* at 324) is unavailing, as the claim for punitive damages was previously dismissed and the dismissal was affirmed by this Court (*see* 138 AD3d at 564).

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: APRIL 12, 2018



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Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6273 The People of the State of New York, Ind. 4946/15
Respondent,

-against-

Michael Silva,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered February 8, 2016, unanimously affirmed.

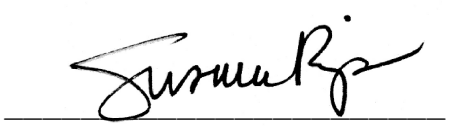
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6274N Accounting by Dominick Eugene, as the Executor of the Estate of Marco Eugene, Deceased. File No. 93C/10

- - - - -

Denise Schumacher, et al., Potential Objectants-Respondents,

-against-

Dominick Eugene, as the Executor of the Estate of Marco Eugene, Respondent-Appellant.

_____

D'Ambrosio & D'Ambrosio, P.C., Irvington (James J. D'Ambrosio of counsel), for appellant.

Cormac McEnery, City Island (Cormac McEnery of counsel), for respondents.

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Order, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered March 17, 2017, which, inter alia, granted potential objectants' motion to appoint a temporary receiver, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion in granting the motion where potential objectants demonstrated by clear and convincing evidence that continued control by respondent executor would result in irreparable harm to their interests (*see Matter of Sakow*, 278 AD2d 378 [1st Dept 2001], *affd* 97 NY2d 436 [2002]; CPLR 6401). The potential objectants

submitted evidence showing, among other things, that the executor commingled funds, delayed the proceedings, failed to comply with the stipulation requiring sale of the estate properties, engaged in self-dealing, and failed to account for the revenues generated by the estate properties, all of which endangered the properties and potential objectants' interests therein (*see Somerville House Mgt. v American Tel. Syndication Co.*, 100 AD2d 821 [1st Dept 1984]).

The executor admitted in his affidavit that he used personal funds to pay a portion of the estate's taxes and paid his company for services rendered to the estate, without judicial approval, as required by SCPA 1805(1). He also admitted that invoices were sent to the estate for services allegedly rendered by his wife, and while he denied that she had been paid, it is unclear why invoices were sent if there was no intention to pay her at some point.

The record further reflects that in October 2014, the executor stipulated to sell the properties at a mutually agreeable price. In his affidavit, he admitted that he had offers to purchase the properties which he intended to accept, but he failed to indicate the reason for the delay in accepting the offers, and did not detail his efforts to market the

properties, when the offers were received, and whether he communicated them to objectors. The executor also stated that his various counsel were dilatory, without his consent, but he is responsible for failing to properly supervise and direct them. Furthermore, the potential objectors' attorney's affirmation was sufficient to make a prima facie showing of the executor's dilatory conduct in that the attorney had first-hand knowledge of the facts stated therein.

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

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

ENTERED: APRIL 12, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6275N Naber Electric, et al., Index 651008/17
Plaintiffs-Appellants,

-against-

Triton Structural Concrete, Inc., et al.,
Defendants-Respondents.

Munzer & Saunders, LLP, New York (Craig A. Saunders of counsel), for appellants.

Diefenbach Law Group, New York (James C. Diefenbach of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 21, 2017, which denied plaintiffs' motion for a default judgment, and granted defendants' cross motion to compel plaintiffs to accept their answer, and deemed the answer timely filed and accepted, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiffs' motion and granting defendants' cross motion to compel plaintiffs to accept their answer (CPLR 3012[d]), which was served two weeks late. Defendants' attorney explained that the brief delay in answering resulted from his mistake in calendaring the date the response was due, after he mistakenly requested an extension of time to April 7, rather than May 7.

Since defendants' time to answer, without any extension, was April 17th, his mistake should have been apparent to plaintiffs' attorney, who agreed to the requested extension. Defense counsel's inadvertent mistake in calendaring his deadline provided a reasonable excuse for the minimal delay in answering (*see Newyear v Beth Abraham Nursing Home*, 157 AD3d 651 [1st Dept 2018]; *Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]; CPLR 2005).

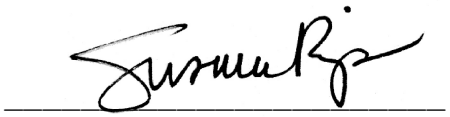
Although the affidavit of merit provided by defendants' executive lacked any detail concerning their potential defenses to plaintiffs' claims for payment for work performed on three subcontracts, an affidavit of merit is "not essential to the relief sought" by defendants before entry of a default order or judgment (*DeMarco v Wyndham Intl.*, 299 AD2d 209, 209 [1st Dept 2002]; *see Nason v Fisher*, 309 AD2d 526 [1st Dept 2003]). Accordingly, given the shortness of the delay and absence of evidence of willfulness or prejudice to plaintiffs, as well as the State's policy of resolving disputes on the merits, defendants were properly granted an opportunity to defend

plaintiffs' claims on the merits (*see e.g. Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417 [1st Dept 2016]).

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

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

ENTERED: APRIL 12, 2018



CLERK

Sweeny, J.P., Richter, Andrias, Webber, Moulton, JJ.

6276N Sutton Apartments Corporation, et al., Index 104289/10
Plaintiffs-Appellants, 590665/13
590287/14

-against-

Bradhurst 100 Development LLC, et al.,
Defendants-Respondents,

Magnusson Architecture and Planning PC, et al.,
Defendants.

- - - - -

Bradhurst 100 Development LLC,
Third-Party Plaintiff-Respondent,

-against-

Magnusson Architecture and Planning PC,
Third-Party Defendant.

- - - - -

West Manor Construction Corp.,
Second Third-Party Plaintiff-Respondent,

-against-

Larino Masonry Inc., et al.,
Second Third-Party Defendants,

Capital Interiors Construction Corp.,
Second Third-Party Defendant-Respondent.

_____

Bailey Duquette P.C., New York (David I. Greenberger of counsel), for appellants.

Silverman Shin & Byrne, New York (Andrew V. Achiron of counsel), for Bradhurst 100 Development LLC, respondent.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (John P. Cookson of counsel), for West Manor Construction Corp., respondent.

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for Capital Interiors Construction Corp., respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 30, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion pursuant to CPLR 1003 and 3025 seeking leave to join additional parties as plaintiffs and to serve an amended complaint, unanimously affirmed, without costs.

We review the order for abuse of discretion (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003]), and find plaintiffs present no grounds to disturb the order on appeal. We disagree with plaintiffs' characterization of the motion as a mere effort to cure "standing issues," where plaintiffs do not show that the claims against defendant Bradhurst 100 Development LLC (Bradhurst) as to the non-common areas in the building had been previously dismissed on grounds of lack of standing (*see e.g. Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646, 647-648 [1st Dept 2013]; *Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 127 AD3d 603 [1st Dept 2015]).

Instead, we view the motion as plaintiffs' effort to reinstate previously-dismissed claims, which is not a proper use of a motion to amend (*see Kassover v PVP-GCC Holdingco. II, LLC*,

73 AD3d 626, 629 [1st Dept 2010], *lv dismissed* 15 NY3d 821 [2010]). Defendant Bradhurst was entitled to assume that claims against it concerning the building's non-common areas were resolved years ago, and re-introduction of those claims now would be prejudicial (*see B.B.C.F.D., S.A. v Bank Julius Baer & Co., Ltd.*, 62 AD3d 425 [1st Dept 2009], *lv dismissed* 13 NY3d 933 [2010]). Moreover, as there were, at the time of the motion to amend, no viable claims against Bradhurst as to the non-common areas of the building, the relation back doctrine cannot salvage plaintiffs' proposed time-barred claims (*see Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011]).

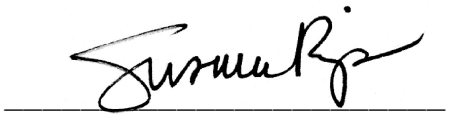
Denial of the motion was also proper as concerns defendant West Manor Construction Corp. To the extent the claim against West Manor already encompasses claims arising from non-common areas of the building, the proposed amendment serves no apparent purpose other than to vastly inflate the costs and extend the delays that will inevitably ensue upon the addition of 98 new parties. In any case, the motion was also appropriately denied in light of plaintiffs' long delay, which they do not adequately explain, and which occurred notwithstanding that the facts and issues that underlie the proposed amendments were known to them

from the outset of the case (*see Inwood Tower v Fireman's Fund Ins. Co.*, 290 AD2d 252, 252 [1st Dept 2002]).

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

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

ENTERED: APRIL 12, 2018



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando Acosta, P.J.
Peter Tom
Troy K. Webber
Ellen Gesmer
Anil C. Singh, JJ.

5001

_____x

In re Luis P.,

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

_____x

Luis P. appeals from the order of disposition of the Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about February 9, 2016, which adjudicated him a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), sexual misconduct (two counts), and endangering the welfare of a child, and placing him on probation for a specified period.

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

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for presentment agency.

SINGH, J.

The primary issue on this appeal is whether the presentment agency adequately proved beyond a reasonable doubt that appellant's oral and written statements were voluntary. We find that the presentment agency met its burden of proving the voluntariness of appellant's oral and written statements, and therefore affirm the order of disposition adjudicating him a juvenile delinquent.

As a preliminary matter, Family Court's factual findings are based in part on credibility determinations that are entitled to deference (*see People v Prochilo*, 41 NY2d 759, 761 [1977]; *Matter of Cy R.*, 43 AD3d 267, 268 [1st Dept 2008], *lv denied* 9 NY3d 814 [2007], *cert denied* 552 US 1320 [2008]). Where the court "carefully considered the relevant circumstances, including demeanor," this Court will not disturb these credibility determinations (*Matter of Michael S.*, 303 AD2d 170, 171 [1st Dept 2003]; *see Matter of Alberto R.*, 84 AD3d 593 [1st Dept 2011]). After reviewing the record[1], we present the facts as determined by Family Court and find no basis to disturb these findings.

From July 16th to July 30th 2014, L.F. visited his father,

[1] The record consists of a *Huntley* hearing, which occurred on February 5, 2015 and a fact-finding hearing, which occurred on April 15, April 22, April 30, and May 26, 2015.

Joshua M. in his apartment complex in the Bronx. L.F. lives with his mother, Cynthia M. Joshua M. lives in the same apartment complex as his girlfriend, Lizbeth S., who also has a son, the appellant in this case. At the time of the complained-of incident, L.F. was 9 years old and appellant was 13 years old. Appellant did not live with his mother because as a child, he was sexually abused by his brother. In May 2014, the Administration for Children's Services placed appellant in the care of his grandmother after the Family Court made a finding of child neglect against Lizbeth for failing to protect appellant from his brother.

During most of this visit, L.F. stayed with his grandmother on the second floor of the apartment complex. However, one night - all parties are unclear as to which specific night - L.F. stayed in Lizbeth's apartment with Joshua M. and appellant. Appellant and L.F. stayed in one room with bunk beds and Joshua M. and Lizbeth stayed in the other bedroom. Around noon on the day in question, appellant entered the room where L.F. was sleeping on his stomach.

Appellant pulled down L.F.'s pants and placed his "peanuts" in L.F.'s mouth and anus. L.F. explained that "peanuts" are something used to "[p]ee in the bathroom." When appellant put his penis in L.F.'s anus, he moved up and down while he pulled

L.F.'s shoulders so that L.F. simultaneously moved up and down. Appellant then stopped and turned L.F. around, so that his back was on the mattress. He then put his penis in L.F.'s mouth while using his hands to move L.F.'s head up and down. After the incident, appellant did not speak, and he left the room.

Three days after returning from this visit, L.F. told his mother that appellant had "raped [him]." L.F. had used this specific language after watching several episodes of Law & Order. After this revelation, Cynthia took L.F. to the Children's Hospital at Montefiore Medical Center and was referred to the Butler Child Advocacy Center (CAC) by his primary care physician. The Montefiore records contain nearly the same accusations as earlier described.

At CAC, Dr. Linda Cahill performed a physical examination that revealed only a small internal anal fissure, which is a finding not specific to sexual abuse. L.F. was also tested for sexually transmitted diseases, with negative results.

At some time prior to September 25, 2014, Lizbeth agreed to bring appellant to the Bronx Special Victims Unit office to speak with New York City Police Detective James Barrenger. On September 25, 2014, appellant and his grandmother, who was appellant's legal guardian, arrived at the precinct. When Lizbeth arrived at the precinct, appellant and Lizbeth were

informed by Detective Barrenger that they were going to be interviewed and were escorted to the juvenile interrogation room.

Once in the interrogation room, Detective Barrenger recited the simplified *Miranda* warnings to both appellant and Lizbeth that the NYPD specifically uses for juveniles.[2] After reading each warning, Detective Barrenger asked if they understood and after hearing their affirmative statements, he would write down

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[2] Specifically, Barrenger advised appellant and his mother:

"1. You have the right to remain silent and refuse to answer any questions. That means you don't have to say anything to me.

"2. Anything you say may be used against you in a court of law. That means I can tell the court what you say or write to prove what you may have done.

"3. You have the right to consult an attorney before speaking to the police (or the prosecutor) and to have an attorney present during any questioning now or in the future. That means that you can talk to a lawyer before I ask you any questions and your lawyer can be with you when I ask you any questions.

"4. If you cannot afford an attorney, one will be provided for you without cost. That means that if you want a lawyer but do not have the money to pay for one, a lawyer will be given to you for free.

"5. If you do not have an attorney available, you have the right to remain silent until you have had an opportunity to consult with one. That means if you want a lawyer and a lawyer is not available right now, you do not have to speak with me until you have had the chance to speak to a lawyer.

"6. Now that I've advised you of your rights, are you willing to answer questions."

"yes" after each warning. Detective Barrenger then asked, "[N]ow that I have advised you of your rights, are you willing to answer questions." Both appellant and his mother responded, "Yes," at which point appellant, Lizbeth and Detective Barrenger all signed the bottom of the form. During this time, neither appellant nor his mother asked Detective Barrenger any questions, asked to stop or requested a lawyer.

Detective Barrenger then informed appellant and Lizbeth that he was there to speak about the incident with L.F.. At this point, appellant stated that he did not want to talk about the incident with his mother present. The detective asked Lizbeth "if she was all right with that, if she wanted to leave the room. She said she was okay with it. She complied and she left the room." Detective Barrenger did not suggest that Lizbeth should leave the room and would have preferred if she had stayed.

After Lizbeth left the room, Detective Barrenger asked appellant to explain the incident between him and L.F.. Appellant responded that he put his "peanuts" inside L.F.'s mouth and "butt." Detective Barrenger asked appellant what he meant by "peanuts" and after some discussion, appellant admitted that he meant his penis. Appellant was then asked by Detective Barrenger if he would like to write an apology letter to L.F. apologizing for what had happened. Appellant responded that he would like to

write the apology letter. At no point did Detective Barrenger tell appellant that this letter would be used in court against him. Detective Barrenger gave appellant a pen and paper, told him to write the letter in his own words and left the room while appellant wrote the letter.[3]

When appellant appeared to be finished, Detective Barrenger reentered the room and read the letter out loud with appellant. Detective Barrenger gave appellant an opportunity to make changes or corrections. Appellant had already crossed out words and did not make any other changes. In all, the *Miranda* warning and waiver, and appellant's oral and written statements lasted about 15 to 20 minutes. During the interview, appellant was not handcuffed and Detective Barrenger was in business attire and was

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[3] The letter stated:

> "Dear [L.F.],
>
> "Im sory [sic] for what I did. I know it was the wrong thing to do. But when I was little I was abused sexually by my brother Angel and I didn't know any better. But Im sorry for putting my peanuts in your butt and I wont do it again. I know its wrong but we didnt know any better and Im sorry for touching you all the times you would put your pants down. I promise it wont happen again. Im going to seek help and Im going to get help. Im also sorry for the time I put my peanuts in your mouth. But Im really sorry sorry [sic] for doing these things to you, it wont happen again. Please forgive me for doing this to you.
>
> "Sincerly (sic) [Appellant]"

unarmed. Detective Barrenger did not make any promises or threats to induce appellant to write the letter, and did not tell appellant or imply that he would be allowed to go home if he wrote the letter. After Lizbeth left the room, appellant never asked Detective Barrenger to stop the interview or have his mother return to the room, and never asked for a lawyer.

On December 10, 2014, the Corporation Counsel of the City of New York filed a designated felony act petition in Bronx County Family Court. The petition charged appellant, who was 13-years-old at the time, with the commission of acts that, if done by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), sexual misconduct (two counts), and endangering the welfare of a child. Attached to this petition was a supporting deposition from L.F. and Detective Barrenger alleging that appellant put his "peanuts" in L.F.'s mouth and anus. Additionally, attached to the petition was appellant's apology letter to L.F.

A *Huntley* hearing was conducted on February 5, 2015. At the hearing, appellant's grandmother, Julia C., testified that she brought appellant to the police station on September 25, 2015, she met Lizbeth at the station, and that when Detective Barrenger arrived, he escorted appellant and Lizbeth, leaving her in the

lobby. A short time later, Lizbeth rejoined her, and appellant and Detective Barrenger were alone in the room for about 15 minutes.

Appellant testified that when Detective Barrenger read each *Miranda* warning he did not respond at all because he did not understand any of the warnings being given. He did not tell Detective Barrenger this because he was scared and although he did sign the form, he did not tell Detective Barrenger that he was willing to answer questions. He also testified that his mother did sign the form but left the room when Detective Barrenger asked her to step out. Appellant did not want Lizbeth to leave the room and he did not say to Detective Barrenger that he would not talk about L.F. in front of his mother. According to appellant, after Lizbeth left the room, he refused to answer any of Detective Barrenger's questions and after the detective accused him of putting his "peanuts" in L.F.'s mouth and anus, appellant told him that the accusation was not true.

Appellant testified that he wrote and signed the apology letter because Detective Barrenger told him that it was what was best for him. Appellant stated that he did not know what an apology letter was and that he just wrote down what the detective said. Appellant also testified that he would not use the word "peanuts" to refer to his penis and instead used the word

"[d]ick." Finally, during this time he did not ask for his mother because once the detective asked her to step out, he didn't realize that either his mother or his grandmother could come back in.

During cross-examination, appellant defined essential concepts. For example, appellant acknowledged that the word "silent" means "[t]o be quiet" and "you don't have to say anything to me" means "[d]on't talk." He also agreed that when Detective Barrenger advised him that what he said could be used in court, that meant the detective could tell the judge what he had said. Finally, appellant stated that the detective informed him that a lawyer would be given to him if he could not afford one, and that he could talk to a lawyer before the detective asked him any questions.

Family Court held a *Huntley* hearing and denied appellant's suppression motion. In doing so, the court credited the testimony of Detective Barrenger and of appellant's grandmother, but rejected appellant's testimony in its entirety as "contradictory and self-serving and incredible." The court concluded that the presentment agency met its burden of proving beyond a reasonable doubt that appellant's statements were made knowingly and voluntarily, and that appellant failed to establish that the statements were made in violation of his rights or that

he was unaware of what his rights were. Family Court determined that appellant knowingly and voluntarily waived his *Miranda* rights, after which he made oral and written statements. The court found appellant's testimony that he wrote down exactly what the detective told him to write as "frankly incredible."

Subsequently, Family Court held a fact-finding hearing, in which L.F., Joshua M., Cynthia M. and Lizbeth all testified for the presentment agency. L.F. testified to the substantially similar facts as stated above. Detective Barrenger was also called to testify about his interview with appellant and Lizbeth. His testimony was substantially similar to that presented during the *Huntley* hearing.

Lizbeth testified as to the interview with Detective Barrenger. She testified that she did not recognize the contents of the *Miranda* form, but did recognize her signature. Lizbeth also indicated that appellant did state that he was uncomfortable speaking about the incident with L.F. in front of her but that it was Detective Barrenger who asked her to leave to be able to speak to appellant alone. Lizbeth testified that she did not understand that she had the right to remain in the interrogation room and did not realize that she could act on appellant's behalf because the court had placed appellant with his grandmother, who was outside of the interrogation room. Lizbeth did not recall

Detective Barrenger informing her and appellant of the *Miranda* rights. Family Court found Detective Barrenger's testimony that appellant asked his mother to leave the room more credible than Lizbeth's statement that Detective Barrenger asked her to leave.

Over objections from appellant's counsel, Family Court admitted two sets of redacted medical records. The first concerned L.F.'s August 13, 2014 visit, accompanied by his mother, to Montefiore. There, L.F. told Dr. Sofia Chiocconi that appellant first hid in the bathtub and watched him while he was naked in the bathroom, then later "started molesting him from the back." L.F. described that appellant pulled down his shorts, held his hips and "put his balls on [L.F.'s] butt," causing L.F.'s "belly and butt" to hurt. L.F. reported that he "told him, no," but "I just freeze." Appellant does not raise on appeal the admission of the Montefiore records.

The second set of records were from CAC, where L.F. was referred by his primary care physician. As stated by Dr. Linda Cahill, L.F. was referred to CAC because he had been sexually abused by the 14-year-old son of his father's girlfriend over the course of a few months. Dr. Cahill noted that on September 2, 2014, she had conducted a forensic interview in conjunction with the presentment agency and the SVU during which L.F. had "described what he experienced and it included anal and oral

sodomy." Dr. Cahill's examination revealed a "small internal fissure" in the anus, which was "a non-specific finding that can happen with sexual abuse or when a child has a hard bowel movement." Appellant challenges Family Court's decision to admit CAC's records.

In a written decision dated August 19, 2015, Family Court found that the presentment agency had established beyond a reasonable doubt that appellant had committed the criminal acts charged in all seven counts of the petition. The court credited the testimony of the presentment agency's witnesses, including that of Detective Barrenger regarding the circumstances of appellant's confession and his writing of the letter. It determined that appellant had willingly confessed to the charged acts and willingly wrote the letter. The court further found that appellant's confession was "sufficiently corroborated by independent evidence of the crime," and that L.F.'s sworn testimony was consistent with appellant's oral and written confessions and corroborated by other witnesses.

On February 9, 2016, Family Court adjudicated appellant a juvenile delinquent and placed him on level two probation for 18 months. As of the date of this appeal, appellant has completed this period of placement. Appellant challenges Family Court's finding that the presentment agency proved beyond a reasonable

doubt that his oral and written confessions to Detective Barrenger were voluntary.

Whether Appellant Voluntarily Waived his *Miranda* Warnings

Family Court properly determined that appellant received full and effective *Miranda* warnings, and made a knowing and voluntary waiver of his rights before making his oral confession. When a juvenile is taken into custody by a police officer without a warrant, the Family Court Act guarantees certain fundamental rights. Among these are the right to have a parent or guardian present during a police interrogation, the right to have the parent or legal guardian immediately notified that the child has been taken into custody, and the right to be questioned only after the child and the parent or legal guardian are notified of their *Miranda* warnings (Family Ct. Act 305.2[3], [7], [8]; *see People v Mitchell*, 2 NY3d 272, 275 n 11 [2004]).

In practical terms, this means that the parent "should not be discouraged, directly or indirectly," from attending the child's interrogation (*Matter of Jimmy D.*, 15 NY3d 417, 422 [2010]). While a parent may choose not to be present when a child is being interviewed, "the police should always ensure that the parent is aware of the right of access to his or her child during questioning," and if asked to leave, "the parent should be made aware that he or she is not required to leave" (*id.*).

To be sure, the presence of a parent is important, as a parent may help a child understand *Miranda* warnings "so that the child can consciously and voluntarily choose whether to waive or to exercise his constitutional rights to remain silent, to have an attorney present at his questioning, and to have an attorney provided for him without charge if he is indigent" (*id.*). A parent present at questioning also is able to "monitor the interrogation lest the police engage in coercive tactics" (*id.*).

However, a child does not have an absolute right to the presence of a parent during interrogation, and "it does not follow as a matter of law that a child's confession obtained in the absence of a parent is not voluntary" (*id.*). The presentment agency must prove beyond a reasonable doubt that the juvenile's statements are voluntarily made based on the totality of the circumstances (*People v Jin Cheng Lin*, 26 NY3d 701, 719, 725 [2016]; *Jimmy D.*, 15 NY3d at 423); *see also* Family Ct. Act § 344.2[2] [a statement is "involuntarily made" if, inter alia, it was obtained by threat of physical force or undue pressure, or in violation of a respondent's constitutional rights]).

Where, a juvenile clearly states that he or she understands each right and gives no indication to the contrary and the statements are made in the presence of a parent, the warnings may be voluntarily waived (*Matter of Johnny H.*, 111 AD3d 576 [1st

Dept 2013]; *Matter of Lyndell C.*, 23 AD3d 306 [1st Dept 2005]). A waiver may be valid even if the officer does not read from the juvenile version of the *Miranda* warnings containing supplemental explanations of the standard phrasings (*Matter of Steven F.*, 127 AD3d 536 [1st Dept 2015], *lv denied* 26 NY3d 906 [2015]).

We find the holding in *Jimmy D.* determinative of the issue at hand. In *Jimmy D.*, the Court of Appeals upheld as voluntary the confession of a 13-year-old boy accused of sexually abusing his nine-year-old cousin, even though the boy's mother was not present during the custodial interrogation that resulted in his confession. The detective read juvenile *Miranda* warnings to both the boy and his mother; after each right, the boy and then his mother responded that they understood; and both the boy and his mother signed the *Miranda* waivers. The detective asked the mother's permission to speak to the boy alone, explaining that "children sometimes do not feel comfortable talking to a detective in front of a parent" (*Jimmy D.* at 420). After the boy consented to talk to the detective alone, the mother left the interview room and the boy orally confessed (*id.* at 420-423). The Court of Appeals held that under these circumstances the statements made by Jimmy were validly waived.

The facts in this case are nearly identical to those in *Jimmy D.* Detective Barrenger notified appellant's mother that

she needed to bring appellant to the precinct. When appellant and his grandmother arrived at the precinct, he and his mother had nearly 15 minutes to discuss why he was brought to the precinct. Detective Barrenger then escorted appellant and his mother to a juvenile interrogation room, which contained a window that looked out into the hallway.

Detective Barrenger left appellant and his mother in the room while he printed out the *Miranda* warnings. When he returned, Detective Barrenger read the juvenile *Miranda* warnings to both appellant and his mother, which included supplemental explanations of the standard phrasings. Appellant's mother could have, but decided not to raise any questions or discuss the warnings with appellant before he waived his rights. Appellant and his mother affirmatively responded that they understood each of the warnings and signed the bottom of the page. Moreover, appellant's mother voluntarily left the interrogation room after the *Miranda* warnings were given at her son's request. Accordingly, Family Court properly held that the presentment agency met its burden of proving the voluntariness of appellant's oral confession.

For the first time on appeal, appellant argues that the fifth *Miranda* warning given by Detective Barrenger was deficient and nullified the effects of the other warnings. However, this

challenge is unpreserved. Where a party fails to "challenge a narrow aspect of the sufficiency of the [*Miranda*] admonitions given him, at a time when the People would have an evidentiary opportunity to counter his assertion, he may not then be heard to complain on appeal" (*People v Tutt*, 38 NY2d 1011, 1013 [1976]; *see also People v Bartlett*, 191 AD2d 574 [2d Dept 1993], *lv denied* 81 NY2d 1010 [1993] [finding that where a defendant does not raise the issue of whether certain *Miranda* warnings were improper at the trial court, the issue is unpreserved for appellate review]). It is undisputed that appellant did not raise the issue of whether the fifth *Miranda* warning was deficient at either the suppression hearing or at the fact-finding hearing. Therefore, it is unpreserved for our review.

Whether Appellant's Written Confession was Involuntarily Obtained

We disagree with our dissenting colleagues finding that Detective Barrenger's alleged use of guile to extract a written confession from appellant without his mother present leads to the conclusion that the apology letter was involuntarily made. We stress that whether the written confession was obtained voluntarily need not be addressed today in light of the dissent's conclusion that Family Court properly denied suppression of appellant's oral statements.

However, even if we were to consider the dissent's argument,

we find that the written confession was voluntary. In finding deception on the part of the police that results in involuntariness, there must be "some showing that the deception was so fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d 1, 11 [1980]). Although the dissent makes a compelling argument that juveniles do not think the same way as adults, we believe that the holding in *Jimmy D.* necessitates the conclusion that appellant's written confession was voluntary under the totality of the circumstances (15 NY3d at 423).

The dissent argues that the absence of appellant's mother weighs heavily in determining the voluntariness of the statement. Just as in *Jimmy D.*, Detective Barrenger elicited an oral and written confession from appellant while his mother was outside of the interrogation room (*id.* at 420-421). The Court of Appeals emphasized that one of the advantages of having a parent present is that a parent is "able to monitor the interrogation lest the police engage in coercive tactics" and "the emotional and intellectual immaturity of a juvenile creates an obvious need for the advice of a guardian...at an interrogation from which charges of juvenile delinquency may ensue." (*id.* at 422 [internal quotation marks omitted]).

However, this right is not absolute as a child's confession obtained in the absence of a parent is not per se involuntary

(*id.*). The factors we consider are whether the parent escorts the child to the place of interrogation, they have an opportunity to talk while there, the parent is present during the *Miranda* warnings, both agree to the child being questioned outside of the mother's presence, the child does not ask for the parent during questioning and the child's whereabouts are not concealed from the parent (*id.* at 423). A written confession is validly obtained after a clear oral confession, particularly when, as here, there is no deception on the part of the detective (*id.* at 424).

Here, the factors weigh in favor of finding that the absence of appellant's mother did not affect the voluntariness of appellant's confession. Although appellant was not escorted by his mother to the precinct, they had an opportunity to talk while at the precinct. Furthermore, both appellant and his mother were present during the *Miranda* warnings and both agreed to appellant being questioned without his mother present. At no point during any of the questioning did appellant ask for his mother and there is nothing in the record to suggest that appellant's whereabouts were concealed. Accordingly, appellant and his mother were not so isolated from one another as to affect the likelihood that his confession was voluntary and we disagree with the dissent's contention that the simple absence of appellant's mother weighs

heavily against this finding.

The cases cited by the dissent from around the country do not merit a different result. In *Commonwealth v Bell* (365 SW3d 216, 224 [Ky Ct App 2012]), a 13-year-old boy's *oral* confession was held to be invalid when he was escorted by school officials into a room and repetitively questioned by police officers in his school building. In addition, the police officers feigned superior knowledge of what happened and repeatedly demanded answers (*id.* at 225). The fact that the interrogation occurred in a school building factored heavily into the court's reasoning (*id.* at 224-225 ["a school is where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority. Like it or not, that is the definition of coercion"]).

Similarly, the California Court of Appeals' decision in *In re Elias V.* (237 Cal App 4th 568 [Cal Ct App 2015]), is inapplicable to the facts at hand. As in *Bell*, the detective interrogated the child at his school (*id.* at 581). The child was brought by the principal to a small room, containing a single desk with three chairs, and a uniformed deputy stood outside of the door (*id.*). The court made a point in highlighting that "the mere fact of police questioning of a minor in the schoolhouse setting may have a coercive effect, because the child's presence

at school is compulsory and his disobedience at school is cause for disciplinary action" (*id.* [internal quotation marks and brackets omitted]). To make matters worse, the detective engaged in an interrogation technique known as the Reid methodology, the use of which led to the Supreme Court's decision in *Miranda v Arizona* (384 US 436 [1966]). The court in *Elias*, found that the use of the school building in conjunction with the coercive nature of the Reid methodology unfairly induced the child to incriminate himself (*Elias V.* at 589).

Even if we were to ignore *Jimmy D.*, the cases cited by the dissent are readily distinguishable. In both *Bell* and *Elias*, the respective courts emphasized that the location of the interrogation, i.e. the school, is inherently coercive in and of itself. The dissent contends that we attempt to distinguish these cases by relying on the fact that these interrogations of children were considered coercive because they occurred in the school.

However, we emphasize that it is the courts themselves that make these distinctions (*see Bell*, 365 SW3d at 224 ["a school is where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority. Like it or not, that is the definition of coercion"]; *Elias*, 237 Cal App 4th at 581 ["the mere fact of police

questioning of a minor in the schoolhouse setting may have a coercive effect, because the child's presence at school is compulsory and his disobedience at school is cause for disciplinary action"] [internal quotation marks and brackets omitted]).

In contrast, in New York, when a child is questioned at the precinct, the officer should take the child to a designated juvenile interview room, consisting of a clean, well-lit room that is separate from areas accessible to the general public and adult detainees, and which is in an office-like rather than jail-like setting that minimizes public exposure and mingling with detainees (Family Ct. Act § 305.2[4][b]; *see* Uniform Rules for Trial Cts. [22 NYCRR] § 205.20). Appellant was questioned in the SVU's designated juvenile room that comported with the Family Court Act. The dissent's argument that the designated juvenile room that follows the guidelines set forth in the Family Court Act is somehow only slightly less coercive than a school is not persuasive.

In addition, both out-of-state cases analyzed whether the alleged *oral confessions* were voluntary and found the school to have a coercive effect. As the dissent has conceded that appellant's oral confession is voluntary, we fail to see the applicability of these cases to the facts at hand. Neither case

analyzes whether a written confession is involuntary when an officer gives simplified *Miranda* warnings to the child with the mother present who then voluntarily leaves the interrogation room and then asks a child to write an apology letter after the officer obtains a valid oral confession. Finally, there is no evidence in the record that Detective Barrenger used the Reid methodology in questioning appellant. This fact alone renders the holding in *Elias* unpersuasive.

The dissent also points to *State of Ohio v Bohanon* (2008 WL 660536, 2008 Ohio App Lexis 933, 2008 - Ohio - 1087 [2008]). In *Bohanon*, the Ohio Court of Appeals held that a written confession was involuntarily obtained when a detective recommended that a mildly mentally retarded woman who suffered from a psychotic disorder and was on multiple anti-psychotic drugs write an apology letter for her behavior (*id.* at ¶¶ 7-11). The dissent posits that, as in *Bohanon*, appellant's Fifth Amendment rights were offended because of his young age, inexperience with the juvenile justice system and his mother's absence after appellant had asked his mother to leave the interrogation room. However, the holding in *Bohanan* is limited to how the Ohio courts treat the written confessions of the mentally infirm and not how the courts should handle juveniles, such as appellant. There is no question that appellant understood the *Miranda* warnings before

giving an oral and written confession.

In sum, Detective Barrenger did not engage in deceptive or coercive practices. There is no doubt that Detective Barrenger questioned appellant in accordance with Family Court Act § 305.2. Detective Barrenger, after appellant orally confessed, asked one time, if he would like to write an apology letter. Appellant was free to refuse this offer. There was no ongoing or coercive conversation. Only when appellant answered that he would like to write the letter, did Detective Barrenger give appellant a pen and paper and leave the room while appellant wrote the letter. Nor do the contents of the apology letter suggest that it expressed anything other than appellant's own recollections and simply reiterated what appellant had already orally confessed to Detective Barrenger (*Jimmy D.*, 15 NY3d at 423).

We note that there is no case law for the proposition, as the dissent suggests, that appellant's mother had to be made aware of the fact that the detective was going to ask appellant to write an apology letter, in order for the written apology letter to be voluntary. Here, given appellant's valid waiver of his rights and his voluntary oral confession, there is no basis either legally or factually to find that Detective Barrenger's method in obtaining a written confession was an interceding act that requires the matter to be remanded for a new fact-finding

hearing. We are bound by *Jimmy D.*, and the dissent's argument to the contrary is not persuasive.

Finally, we do not believe that appellant's young age and inexperience with the juvenile justice system leads to the conclusion that the apology letter was involuntary. The record does not support the dissent's position that appellant did not understand that the apology letter would be given to the court because of his young age and inexperience with the judicial system. The record establishes that appellant understood the meaning of the *Miranda* warnings given to him by Detective Barrenger. Upon cross-examination, he was able to summarize, in his own words, what each of the warnings meant. Accordingly, we find that under the totality of the circumstances, appellant's written statement was voluntarily made.

Whether There is Sufficient Corroboration

After finding that appellant's confessions were voluntary, we turn to whether there is sufficient corroboration. Family Court's finding is based on legally sufficient evidence and is not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). We agree with the dissent that the lack of DNA records or an eyewitness necessitates that we examine whether there is sufficient corroboration. We note however that

eyewitnesses are not necessary to corroborate L.F.'s testimony of sexual abuse (*see generally Matter of Jimmy D.*, 15 NY3d at 424 [holding that the lower court's decision was properly corroborated even where the only eyewitness was the victim]; *Matter of Johnny H.*, 111 AD3d at 576 [same]).

It is axiomatic that we may review the entire record even when a lower court's factual findings are limited (*see* Criminal Procedure Law 470.15[5]; *Danielson*, 9 NY3d at 342; *Matter of Traekwon I.*, 152 AD3d 431 [1st Dept 2017]. Here, the record sufficiently corroborates appellant's oral and written confessions (Criminal Procedure Law § 60.50 ["(a) person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed"]). Corroboration "does not mandate submission of independent evidence of every component of the crime charged but merely requires some proof, of whatever weight, that a crime was committed by someone" (*People v McGee*, 20 NY3d 513, 517 [2013] [internal quotation marks omitted]). L.F., at the fact-finding hearing, described in graphic detail what occurred when he was alone with appellant. His testimony was consistent with appellant's oral confession as well as what he said to his mother after being sexually abused.

Importantly, appellant's confession is corroborated by the

medical records, which were properly admitted into evidence by Family Court. Appellant does not challenge the Montefiore records but claims that the CAC records are inadmissible on the theory that they were prepared for litigation. Hospital records are admissible under the business records exception to the hearsay rule when they reflect "acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects" of the patient's hospitalization (*People v Ortega*, 15 NY3d 610, 617 [2010] [internal quotation marks omitted]). Statements in medical records that are sufficiently related to diagnosis and treatment are admissible (*People v Parada*, 67 AD3d 581, 582 [1st Dept 2009], *affd on other grounds* 17 NY3d 501 [2011]). Furthermore, testimony regarding a child sexual abuse victim's responses, when asked by a CAC nurse practitioner about why he was at the CAC, are properly admitted as an exception to the hearsay rule to the extent that the statements are "germane to diagnosis and treatment" (*People v Spicola*, 16 NY3d 441, 451 [2011], *cert denied* 565 US 942 [2011]).

Here, L.F.'s primary care physician referred the family to the CAC, which has specialists in the detection, diagnosis and treatment of child sexual abuse. There is no evidence in the record, as the dissent contends, that L.F. was referred to CAC

for investigatory rather than treatment purposes by his primary care physician. The CAC provides a multidisciplinary approach designed to prevent child victims from being subjected to repeated interviews with similar questions, needlessly causing trauma to the child victim. The evidence appellant challenges is Dr. Cahill's notation in her medical evaluation that L.F. had been referred because of sexual abuse by the 14-year-old son of his father's girlfriend, and that the doctor had conducted a forensic interview during which L.F. had "described what he experienced and it included anal and oral sodomy".

As this evidence is germane to L.F.'s treatment, it was properly admitted by Family Court. Although appellant contends that one purpose of CAC's interview was intended to be used by law enforcement personnel, the statements made by L.F. to Dr. Cahill were also made for the purposes of treatment and diagnosis, and therefore were properly admitted under the business records exception.

Whether the Admission of the Apology Letter was Harmless Error

In finding that appellant's apology letter was involuntary, the dissent goes on to argue that Family Court's admission of the written apology letter was not harmless beyond a reasonable doubt, and would remand the matter for a new fact-finding hearing. Even accepting, arguendo, that the written confession

was involuntarily obtained, we disagree that a new hearing is mandated. "A trial court's error involving a constitutionally protected right is harmless beyond a reasonable doubt only if 'there is no reasonable possibility that the error might have contributed to defendant's conviction'" (*Matter of Delroy S.*, 25 NY3d 1064, 1066 [2015], quoting *People v Crimmins*, 36 NY2d 230, 237 [1975]).

We disagree with the dissent's reliance upon *People v Hardy* (4 NY3d 192 [2005]) and *People v Marinez* (121 AD3d 423 [1st Dept 2014]). In *Hardy*, the only evidence that inculpated the defendant was the testimony of a person with a dubious criminal history and the plea allocution of a nontestifying codefendant (4 NY3d at 198-199). The plea allocution was admitted by the People to be critical to their case. It was also found that the jury used the plea allocution to find the defendant guilty of all counts against the express instructions of the court (*id.* at 199).

In *Marinez*, police officers searched the defendant's phone without obtaining a warrant, subsequently finding two photographs that depicted a pistol that was recovered at a separate location (121 AD3d at 423). We held that since the principal issue was the defendant's connection to the weapon, which rested entirely on the credibility of the officers, and the prosecution

"emphatically relied" on the photos in summation, the conviction would not have occurred except for the admission of the photos (*id.* at 424).

As we discussed in further detail, *supra*, appellant's oral confession was corroborated by the testimony of L.F., L.F.'s mother, and the medical records of both Montefiore and CAC. We reject the dissent's contention that the written confession was an important element of the presentment agency's case relied upon by Family Court as "more reliable and more detailed than [appellant's] oral statements." The oral confession, as the presentment agency notes, is "compelling evidence of guilt." Appellant admits to putting his "peanuts" in L.F.'s "mouth" and "butt." In the written confession, appellant simply apologizes for the sexual abuse.

The written confession was not given greater weight than other evidence of guilt, and the dissent's argument to the contrary is not supported by the record. Family Court makes a distinction between the two confessions. Moreover, given that the evidence of appellant's guilt was overwhelming, there is no merit to the dissent's contention that the alleged error of admitting appellant's written confession may have contributed to his conviction.

We have considered appellant's remaining contentions and

find them unavailing.

Accordingly, the order of disposition of the Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about February 9, 2016, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), sexual misconduct (two counts), and endangering the welfare of a child, and placing him on probation for a period of 18 months, should be affirmed, without costs.

All concur except Acosta, P.J. and Gesmer, J.
who dissent in an Opinion by Gesmer, J.

GESMER, J (dissenting)

I respectfully dissent.

This appeal asks us to consider the distinction between acceptable behavior by law enforcement when questioning a juvenile as compared to when questioning an adult. In the interrogation before us, the detective used deception, a tactic frequently approved by our courts in adult interrogations. However, here, the suspect subjected to this police deception was appellant Luis P., a 13-year-old boy with no prior experience in the criminal justice system, alone in a room with the detective. The detective obtained his written confession by suggesting that Luis write an "apology letter" to the complainant. Under these circumstances, I would hold that the presentment agency did not meet its burden beyond a reasonable doubt of proving that Luis's written statement was voluntary. In addition, I would conclude that the admission of his written statement at the fact-finding hearing was not harmless beyond a reasonable doubt, even though the judge properly admitted his oral statements. Accordingly, I would suppress the written statement, reverse the order of disposition and remand for a new fact-finding hearing.

In December 2014, Luis was charged with committing acts that, if committed by an adult, would constitute the offenses of criminal sexual act in the first degree, sexual abuse in the

first degree, sexual misconduct, and endangering the welfare of a child. The petition alleged that, on one occasion in July 2014, Luis touched his penis to the mouth and buttocks of his mother's boyfriend's son, nine-year-old L.F.

Luis filed a motion in Family Court in January 2015, seeking, as relevant here, to suppress the statements he made to Detective James Barrenger in September 2014. The court granted that branch of the motion to the extent of ordering a *Huntley* hearing (*People v Huntley*, 15 NY2d 72, 78 [1965]) to determine whether those statements were admissible.

At the hearing in February 2015, the presentment agency called only Detective Barrenger to testify. Luis testified on his own behalf, and he called his grandmother as a witness. The Family Court credited Detective Barrenger's testimony but did not credit Luis's testimony. The Family Court credited Luis's grandmother's testimony, but found it to be irrelevant. The Family Court did not make extensive findings of fact. Deferring to the trial judge's credibility findings (*see Matter of Denzel F.*, 44 AD3d 389, 389-390 [1st Dept 2007]; *Matter of Chauncey T.*, 24 AD3d 682, 683 [1st Dept 2005]), the relevant facts proven at the hearing are as follows.

Sometime before September 25, 2014, Detective Barrenger contacted Luis's mother and asked her to bring Luis to the

precinct to be arrested. On September 25, 2014, Detective Barrenger met with Luis and his mother at the precinct in a room used to interview juveniles. Detective Barrenger had been assigned to the Special Victims Unit for 2 1/2 years, but had no specific training in interviewing children. Detective Barrenger read the juvenile version of *Miranda* warnings to Luis and his mother.[1] Detective Barrenger asked Luis and his mother if they understood each of the warnings and they responded in the affirmative. Luis and his mother also each signed the document from which Detective Barrenger read the warnings. Detective Barrenger informed Luis that he wanted to ask him questions about the alleged incident with L.F. Luis responded that he did not want to discuss that in front of his mother. Detective Barrenger asked Luis's mother whether "she was all right with that, if she wanted to leave the room." Luis's mother indicated that she was, and left.

With only Luis alone in the interview room with Detective Barrenger, the detective asked Luis about the incident with L.F. Luis told Detective Barrenger that he put his "peanuts" in L.F.'s

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[1] The juvenile *Miranda* warnings provide simplified explanations after each warning. As is relevant here, the juvenile *Miranda* warnings inform a child that "[a]nything you say may be used against you in a court of law . . . . That means I can tell the court what you say or write to prove what you may have done."

"mouth and . . . butt." When Detective Barrenger asked Luis what he meant by "peanuts," Luis responded his "front private." Detective Barrenger asked Luis whether he meant his penis and Luis said yes. Detective Barrenger then "asked [Luis] if he would like to write an apology letter to [L.F.] and he replied yes." Detective Barrenger explained the "apology letter" to Luis as a "letter apologizing to [L.F.] for what had happened." In response to a question on cross-examination, Detective Barrenger explained that he had asked Luis to write the "apology letter" in order to obtain a statement as to "what if anything happened with [L.F.]," but he did not explain to Luis that this was his purpose. Detective Barrenger did not believe that he had explained to Luis that he was going to show the "apology letter" to the judge and use it against Luis in court. Detective Barrenger did not tell Luis that he could refuse to write the letter. He also did not testify that Luis could discuss with his mother whether he wanted to write the "apology letter."

The "apology letter," which was admitted into evidence at the *Huntley* hearing, stated the following:

> "Dear [L.F.],
>
> "Im [sic] sory [sic] for what I did. I know it was the wrong thing to do [sic] But when I was little I was abused sexually by my brother [A.] and I didn't know any better. But Im [sic] sorry for putting my peanuts in your butt and I wont [sic] do it again [sic] I know

> its [sic] wrong but we didnt [sic] know any better and im [sic] sorry for touching you all the times you would put your pants down. I promise it wont [sic] happen again. Im [sic] going to seek help and Im [sic] going to get help. Im [sic] also sorry for the time I put my peanuts in your mouth. But Im [sic] really sorry sorry [sic] for doing these things to you, it wont [sic] happen again. Please forgive me for doing this to you.
>
> "Sincerly [sic],
>
> "Luis P[.]"

Luis argued that his statements should be suppressed because, inter alia, the presentment agency had not met its burden of proving beyond a reasonable doubt that he had made his oral and written statements voluntarily, considering the totality of the circumstances. The presentment agency argued that it had met its burden, noting that Luis's mother was present when he waived his *Miranda* rights, and that her absence during his oral and written statements did not require that they be suppressed. The Family Court denied Luis's suppression motion. I would reverse that decision and grant Luis's suppression motion to the extent of suppressing the written "apology letter" and remanding for a new fact-finding hearing.

At a *Huntley* hearing, the presentment agency bears the burden of proving beyond a reasonable doubt that the child made the challenged statement voluntarily beyond a reasonable doubt (*People v Witherspoon*, 66 NY2d 973 [1985]). "Statements must not

be products of coercion, either physical or psychological, meaning that they must be the result of a free and unconstrained choice by their maker (*People v Jin Cheng Lin*, 26 NY3d 701, 719 [2016] [internal quotation marks and citations omitted]; *see also* Family Ct Act § 344.2[2][b]). When any defendant challenges the voluntariness of his statement, including one made after *Miranda* warnings, we must examine the totality of the circumstances under which the statement was made (*People v Guilford*, 21 NY3d 205, 208 [2013]; *see also People v Thomas*, 22 NY3d 629, 641-642 [2014]; *People v Aveni*, 22 NY3d 1114, 1117 [2014]). This analysis requires that we review the specific circumstances of the case before us, including both the "'characteristics of the accused'" and the "'details of the interrogation'" (*Guilford*, 21 NY3d at 208, quoting *Dickerson v United States*, 530 US 428, 434 [2000]). The Court of Appeals has instructed us that we must analyze the statements of children under the totality of the circumstances (*Matter of Jimmy D.*, 15 NY3d 417, 423 [2010]). Relevant factors include "the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given [to] him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights" (*Fare v Michael C.*, 442 US 707, 725 [1979]). In *Matter of Jimmy D.*, our Court of Appeals "[r]ecogniz[ed] that special care must

be taken to protect the rights of minors in the criminal justice system" (*Jimmy D.*, 15 NY3d at 421), echoing the holding by our colleagues in the Second Department that "[i]t is well recognized that over and beyond the ordinary constitutional safeguards provided for adults subjected to questioning, the police must exercise greater care to insure that the rights of youthful suspects are vigilantly observed" (*People v Gotte*, 150 AD2d 488, 488 [2d Dept 1989], *lv denied* 74 NY2d 896 [1989] [internal quotation marks omitted]; *accord Matter of Robert P.*, 177 AD2d 857, 858 [3d Dept 1991]; *People v Smith*, 217 AD2d 221, 232 [4th Dept 1995], *lv denied* 87 NY2d 977 [1996]).[2] Accordingly, this precedent must govern our analysis of the interrogation of a juvenile.

Application of the analysis set out in *Jimmy D.* to the facts of this case requires us to conclude that Luis's written statement was involuntarily made. That result is compelled by our consideration of three factors in particular: Luis's young

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[2] These concerns have also been echoed by the highest courts of several other states, who have taken the position that a juvenile's statements to law enforcement should be reviewed with heightened scrutiny (*see State v Barker*, 149 Ohio St 3d 1, 11-12, 73 NE3d 365, 376 [2016]; *In re D.L.H., Jr.*, 392 Ill Dec 499, 514, 32 NE3d 1075, 1090 [2015]; *In re J.F.*, 987 A2d 1168, 1177 n 16 [DC 2010]; *In re Jerrell C.J.*, 283 Wis 2d 145, 157, 699 NW2d 110, 116 [2005]; *In re Andre M.*, 207 Ariz 482, 485, 88 P3d 552, 555 [2004]; *State v Horse*, 644 NW2d 211, 218 [SD 2002]).

age and inexperience, the absence of his mother or another trusted adult at the time he wrote the "apology letter," and Detective Barrenger's use of deception.

First, in this analysis, important "'characteristics of the accused'" (*Guilford*, 21 NY3d at 208, quoting *Dickerson*, 530 US at 434) include Luis's young age and lack of experience with the juvenile justice system (*see Gotte*, 150 AD2d at 488). Both the United States Supreme Court and our Court of Appeals have recognized that young people, as compared to adults, lack maturity and sophistication, and are prone to impetuosity and recklessness (*see Montgomery v Louisiana*, - US -, 136 S Ct 718, 733-734 [2016]; *Miller v Alabama*, 567 US 460, 477-478 [2012]; *J.D.B. v North Carolina*, 564 US 261, 272-273 [2011]; *Graham v Florida*, 560 US 48, 78 [2010]; *Jimmy D.*, 15 NY3d at 422; *Matter of Benjamin L.*, 92 NY2d 660, 669 [1999]; *People ex rel. Wayburn v Schupf*, 39 NY2d 682, 687-688 [1976]). As a result, as the Supreme Court has noted, "[C]hildren cannot be viewed simply as miniature adults" (*Miller*, 567 US at 481, quoting *J.D.B.*, 564 US at 274). Consistent with this, the Court has stated that a juvenile being interrogated "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions" (*Gallegos v Colorado*, 370 US 49, 54 [1962]), and that "the greatest care must be taken to assure

that [a juvenile's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair" (*In re Gault*, 387 US 1, 55 [1967]).

Second, the absence of Luis's mother at the time he wrote the "apology letter" weighs heavily against finding that it was a voluntary statement. While the Court of Appeals held in *Matter of Jimmy D.* that a confession obtained from a juvenile in the absence of a parent is not, as a matter of law, involuntarily made, it carefully emphasized the importance of the presence of a parent or other appropriate adult when a juvenile is interrogated. It explained that the many "advantages of having a parent present during custodial interrogations" (*id.* at 422) may include helping a child to understand the *Miranda* warnings and the potential consequences of waiving those rights, and, if a child chooses to waive *Miranda* rights, "monitor[ing] the interrogation lest the police engage in coercive tactics" (*id.* at 422). The Court went on to conclude "[t]he emotional and intellectual immaturity of a juvenile creates an obvious need for the advice of a guardian . . . at an interrogation" (*id.* [internal quotation marks omitted]), with the result that "New York courts carefully scrutinize confessions by youthful suspects who are separated from their parents while being interviewed"

(*id.* at 421).

Here, Detective Barrenger did not suggest to Luis that he write an "apology letter" to L.F. until after his mother had left the room. Accordingly, Luis was without the guidance or advice of a parent or other trusted adult at the time that he followed the detective's suggestion to write an "apology letter."

The presentment agency notes that Luis asked his mother to leave of his own accord, unlike the situation in *Jimmy D.*, where the detective herself suggested that Jimmy's mother leave (*Jimmy D.*, 15 NY3d at 420). However, Luis's request that his mother leave is not dispositive. Luis asked his mother to leave the interview room after Detective Barrenger had only asked him to speak about the alleged incident; Detective Barrenger did not suggest that Luis write the "apology letter" until after his mother was already gone. Moreover, Detective Barrenger did not at that point suggest to Luis that he could refuse to write the "letter," or that he could discuss the "apology letter" with his mother. Since Detective Barrenger did not suggest that Luis write the "apology letter" until after Luis's mother had left the room, she could not serve the important monitoring role recognized by the Court of Appeals and potentially protect her son from the detective's deceptive tactics. Moreover, not providing Luis's mother an opportunity to weigh this intended use

of deception as part of her decision to leave seems to run afoul of the "better practice" for juvenile interrogations identified by the Court of Appeals (*id.* at 722 [noting that a parent should not be discouraged from attending a child's interrogation either "directly or indirectly"]).[3]

Third, I find particularly significant Detective Barrenger's use of deception. Police deception of an adult defendant "need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process" (*People v Tarsia*, 50 NY2d 1, 11 [1980]). However, in "the specific context of police interrogation, events that would leave a man cold and unimpressed can overawe and overwhelm a [teen]" *(J.D.B.,* 564 US at 272 [internal quotation marks omitted]). Thus, courts have concluded that interrogation tactics that might not render an adult's statement involuntary may be unacceptable with a juvenile. In *Commonwealth v Bell* (365 SW3d 216, 225 [Ky Ct App 2012]), the Kentucky Court of Appeals concluded that the statement of a 13-year old suspect was involuntarily made when,

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[3] Indeed, as one court has stated, "'in marginal cases—when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings—lack of parental or legal advice could tip the balance against admission'" (*A.M. v Butler*, 360 F3d 787, 801 n 10 [7th Cir 2004], quoting *United States v Wilderness*, 160 F3d 1173, 1176 [7th Cir 1998]).

inter alia, he was questioned alone in a separate room at his middle school by detectives who "feigned superior knowledge" of a sexual assault that he had allegedly perpetrated, insisted that he had committed the assault, and continued the interrogation for 32 minutes until he confessed. The court rejected the prosecution's argument that the young suspect's statement was voluntary because he was questioned in a calm and conversational tone, was not deprived of food or sleep, was read his *Miranda* rights, and was not told that he was under arrest (*Bell*, 365 SW3d at 224). Rather, that court explained, "These . . . statements may serve to assure an adult, or even a mature minor, that he should feel free of coercion, that he is free to say nothing and even to leave the officers' presence any time he desires. However, we do not believe they provided that same assurance, under these circumstances, to this thirteen-year-old boy" (*id.*).

Here, the hearing record is devoid of any evidence that 13-year-old Luis had ever before been arrested or subjected to police interrogation.[4] He was provided a simplified *Miranda* warning informing him that the detective could tell the court what he said or wrote in order to prove what he may have done.

[4] Luis's lack of experience is significant because, had Luis been an experienced subject of the juvenile justice system, that experience would weigh in favor of finding his written statement voluntarily made (*see Michael C.*, 442 US at 726-727).

However, Detective Barrenger suggested to Luis that he write the "letter" to "apologiz[e] to [L.F.] for what had happened." It is quite likely that Luis did not understand that this "letter" would be given to the court.

Indeed, the case law suggests that an inexperienced 13-year-old would be more likely to believe that "a letter apologizing to [L.F.]" was just that, and would be less likely to understand that the "letter" could be used against him (*see Jimmy D.*, 15 NY3d at 422 ["[J]uveniles charged with delinquency may not fully understand the scope of their rights and how to protect their own interests. They may not appreciate the ramifications of their decisions . . . ."] [internal quotation marks omitted]).[5]

For example, in *In re Elias V.* (237 Cal App 4th 568, 587, 593 [Cal Ct App 2015]), the First District of the California Court of Appeal found an inexperienced 13-year-old's statement involuntary, based in part on a detective's use of a deceptive

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[5] Scholarly literature underscores this point (*see e.g.* Christine S. Scott-Hayward, *Explaining Juvenile False Confessions*: *Adolescent Development and Police Interaction*, 31 Law & Psychol Rev 53, 62-66 [2007] [highlighting that juveniles are "less risk adverse and more impulsive than adults," and that juveniles under the age of 15 are most likely to misunderstand *Miranda* warnings; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J Crim L & Criminology 219, 244–245 [2006] [noting that "interrogation techniques designed to manipulate adults may be even more effective and thus problematic when used against children"]).

methodology. The California Court of Appeal explained its concerns, in part, by stating that, "There appears to be a growing consensus--among the supporters of those [interrogation] techniques, not just the critics--about the need for extreme caution in applying them to juveniles" (*id.* at 587).[6] Indeed, other courts have also taken the view that certain interrogation tactics raise greater concerns of involuntariness when used with juveniles (*see e.g. D.L.H., Jr.*, 392 Ill Dec at 520, 32 NE2d at 1096 ["Though an adult might very well have been left 'cold and unimpressed' with [the detective's] mode of questioning, respondent was just a boy of nine, functioning at the level of a seven- or eight-year-old, and thus far more vulnerable and susceptible to police coercion of this type [internal citation omitted]); *Jerrell C.J.*, 283 Wis 2d at 163, 699 NW2d at 119 ["Not only did the detectives refuse to believe Jerrell's repeated denials of guilt, but they also joined in urging him to tell a different 'truth,' sometimes using a 'strong voice' that 'frightened' him. . . . . [W]e remain concerned that such a technique applied to a juvenile like Jerrell over a prolonged

[6] These concerns were underscored by research showing the unreliability of confessions by children, especially when the product of deception (*Elias V.*, 237 Cal App 4th at 588-589).

period of time could result in an involuntary confession"]).[7]

Here, Detective Barrenger used deception to procure Luis's written statement by disguising his request for a written statement as an opportunity to write L.F. an "apology letter." While courts have condoned a detective's request that an adult suspect write an apology letter to a complainant as part of an interrogation (*see People v Scott*, 212 AD2d 1047 [4th Dept 1995], *affd* 86 NY2d 864 [1995]; *State of Maine v LaVoie*, 2010 ME 76 ¶ 22, 1 A3d 408, 414 [2010]), juveniles do not think the same way as adults and thus "may not fully understand the scope of their rights" nor "appreciate the ramifications of their decisions" (*Jimmy D.*, 15 NY3d at 422 [internal quotation marks omitted]). Detective Barrenger's request that Luis write L.F. an "apology letter" struck at the core of Luis's right against self-incrimination and muddied the substance of the applicable juvenile *Miranda* warning. Detective Barrenger had warned Luis that he could tell the court what Luis said or wrote to prove

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[7] The majority attempts to distinguish my citation to *Elias V.* and *Bell* by emphasizing that the children in those cases were interrogated at school, which a child may perceive as coercive. We cannot find as a matter of law that interrogation at a school is inherently more coercive than at a precinct as occurred here, even if the questioning occurs in the slightly more benign juvenile room. The fact, cited by the majority, that some courts have found that an interrogation at a school is coercive by no means proves that an interrogation at a precinct is not.

what he may have done. However, the "apology letter" was not addressed to the court, nor was it addressed to Detective Barrenger. It was presented as a chance for Luis to apologize to L.F. Accordingly, in order to find that Luis was not deceived by this request, we would have to find that a 13-year old boy, with no apparent experience in the juvenile justice system, could appreciate the application of his Fifth Amendment rights to this apparently innocent "letter."[8] That conclusion would be inconsistent with the body of case law firmly holding that children do not think the same way as adults.[9] Moreover, in reviewing the totality of the circumstances, I find this use of deception on a person of Luis's age and inexperience aggravated by the fact that Luis's mother was not present when Luis was asked to write the "letter." While Luis's mother, an adult, may have been able to recognize that the "letter" could be used

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[8] Indeed, while the majority highlights that Luis was able to identify some of his rights when cross-examined at the *Huntley* hearing, Luis never testified about the application of those rights to the "apology letter."

[9] The majority's conclusion that Luis could have simply refused to write the "apology letter" or requested to speak with his mother before writing it, is also inconsistent with these cases, and their recognition of children's lesser cognitive and emotional abilities. Moreover, there is no indication that Detective Barrenger told Luis that he did not have to write the "letter." Similarly, there is no indication that Luis realized he was being deceived, and that he would have realized that he might benefit from speaking with his mother about whether to write the "apology letter."

against her son, she was never made aware that this request would be made before she left the interview.

By way of analogy, Luis cites *State of Ohio v Bohanon* (2008 WL 660536, 2008 Ohio App LEXIS 933, 2008 - Ohio - 1087 [2008]), a case in which the Court of Appeals of Ohio held that the defendant's written apology letter to the complainant was involuntary, taking into account her limited intellect and psychological impairment. As that court explained, "Perhaps an Oxford don would have recognized the legal implications that an apology would have, but someone of appellee's limited intelligence and psychological condition would not" (*id.* at ¶ 11). While Luis's situation differs from that of an intellectually and psychologically disabled adult, the *Bohanon* court's conclusion underscores a significant point. Disguising a request for a written confession as an opportunity to write an apology letter to a complainant raises a genuine risk of offending a suspect's Fifth Amendment rights. In *Bohanon*, that risk rose to the level of involuntariness because of the defendant's limited mental capacity. In this case, that risk rose to the level of involuntariness because of Luis's young age and inexperience with the juvenile justice system, coupled with his mother's absence.

As the Court of Appeals has stated, "'A series of

circumstances may each alone be insufficient to cause a confession to be deemed involuntary, but yet in combination they may have that qualitative or quantitative effect'" *(Jin Cheng Lin*, 26 NY3d at 719, quoting *People v Anderson*, 42 NY2d 35, 38 [1977]). Here, the combination of Luis's young age and inexperience with the juvenile justice system, the absence of his mother at the time he was asked to write the "apology letter," and Detective Barrenger's deceptive use of the "letter" to procure a written statement, lead me to conclude that the statement embedded in the "apology letter" was involuntarily made.

I reach a different conclusion as to Luis's earlier oral statements. Unlike the "apology letter," Luis's oral statements did not flow from the use of deception. Detective Barrenger's request that Luis speak about the alleged incident directly followed the juvenile *Miranda* warnings. Since no deception was used to elicit his oral statements, Luis's oral statements about the alleged incident, even though elicited without his mother present, raise fewer concerns. In addition, Luis's mother left the interview room knowing that Luis would be speaking about the alleged incident in her absence, while she did not know that he would be asked to write the "apology letter." Similarly, Luis asked her to leave expecting to talk about the alleged incident

with Detective Barrenger without his mother present, unlike the "apology letter," which was not suggested to him until after she had already left. In their totality, the circumstances do not weigh in favor of finding Luis's oral statements involuntary as they do with respect to the written "apology letter." Accordingly, I conclude that the Family Court properly denied the suppression of Luis's oral statements.

I turn now to the question of whether the admission of the written "apology letter" was harmless error.[10] An error involving a constitutional right is harmless only when it is "harmless beyond a reasonable doubt," meaning that "there is no reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). This analysis applies with equal force in juvenile delinquency proceedings (*see Matter of Delroy S.*, 25 NY3d 1064, 1066 [2015]).

Here, neither DNA nor other physical evidence connected Luis to the alleged incident. There were also no eyewitnesses to the alleged incident. In addition, no medical evidence proved that

[10] The presentment agency does not directly label its argument as one of harmless error. However, it does contend that Luis's arguments as to the written "apology letter" do not undermine his oral statements, which were themselves "compelling evidence of guilt."

L.F. had been abused sexually; the doctor who examined L.F. only observed an anal fissure that could have been caused by a hard bowel movement.[11] Accordingly, the presentment agency's proof that Luis had sexually assaulted L.F. rested only on the testimony of L.F. and the corroboration offered by its other witnesses, Luis's admissions, and statements made by L.F. to the doctors who examined him. Thus, Luis's written "apology letter" was an important piece of the presentment agency's case. The presentment agency stressed its importance by reading it into the record during summation and highlighted that its evidence against Luis included an admission "in his own handwriting." That the presentment agency itself viewed the written "apology letter" as an important piece of evidence supports the conclusion that its admission was not harmless beyond a reasonable doubt (*see People v Hardy*, 4 NY3d 192, 199 [2005]; *People v Marinez*, 121 AD3d 423, 424 [1st Dept 2014]; *Wood v Ercole*, 644 F3d 83, 98-99 [2d Cir 2011]). Notably, the Family Court cited the "apology letter" in finding that the presentment agency had proven its case beyond a reasonable doubt.

Furthermore, the admission of Luis's oral statement does not render harmless the admission of his written statement. The

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[11] Since this medical evidence was inconclusive, the Family Court afforded it no weight in its fact-finding decision.

Court of Appeals has held that the failure to suppress a written statement is not harmless error simply because a different oral statement of the accused has been found admissible, because "written materials . . . ordinarily are looked at as more reliable than their more evanescent oral counterparts, which are so much more often subject to the vagaries of memory and narration" (*People v Garofolo*, 46 NY2d 592, 602 [1979]).[12] In addition, the written "apology letter" was more detailed than Luis's oral statements, which is another factor to consider in a case involving cumulative statements (*see People v Schaeffer*, 56 NY2d 448, 455 [1982]).

Since the written "apology letter" was an important component of the presentment agency's case, was expressly relied upon by the Family Court in adjudicating Luis a juvenile delinquent, and because it was both more reliable and more detailed than Luis's oral statements, I would hold that its admission was not harmless beyond a reasonable doubt. While Luis

[12] This statement by the Court of Appeals is underscored by Detective Barrenger's actions in this case. If Luis's oral admissions were indeed compelling evidence in and of themselves, Detective Barrenger would not have sought a written confession.

has completed the placement ordered by the Family Court, the allegations in the petition are serious, and I would decline his request that we dismiss the petition as a remedy upon reversal. Instead, I would remand for a new fact-finding hearing.[13]

Order of disposition of the Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about February 9, 2016, affirmed, without costs.

Opinion by Singh, J. All concur except Acosta, P.J. and Gesmer, J. who dissent in an Opinion by Gesmer, J.

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

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

ENTERED: APRIL 12, 2018

CLERK

[13] I would also hold that the admission of the CAC records was improper. L.F. received an appropriate examination and treatment at Montefiore Medical Center after alleging that Luis had abused him. He was subsequently referred to the CAC for a "forensic interview" attended by, inter alia, the Presentment Agency, and thus was for investigatory rather than treatment purposes. Accordingly, his statements at the CAC do not fall within the treatment exception, and are inadmissible hearsay (*cf. People v Spicola*, 16 NY3d 441, 451 [2011], *cert denied* 565 US 942 [2011]).