SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 25, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5532 The People of the State of New York, Respondent, Ind. 1098/12

-against-

Edwin Duran,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 10, 2014, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of sixteen years to life, unanimously affirmed.

The court properly adjudicated defendant a persistent violent felony offender. Defendant did not meet his burden of establishing that his 1993 plea conviction was unconstitutionally obtained (*see People v Harris*, 61 NY2d 9, 15 [1983]).

During the allocution on defendant's 1993 plea to second-degree burglary, defendant offered an "explanation," the gist of

which was that he entered the premises at issue for the purpose of obtaining money owed to his wife. Defendant characterizes this explanation as asserting a claim of right defense (*see* Penal Law § 155.15[1]), thus negating the element of intent to commit a crime. However, the court engaged in a colloquy with defendant that was sufficient to ensure he understood he was admitting that his intent was nevertheless unlawful, because he was not permitted to use self-help to acquire cash in satisfaction of a debt (*see People v Green*, 5 NY3d 538, 543-544 [2005]).

As a condition of the 1993 plea, the court required defendant to withdraw an unspecified constitutional challenge to a 1987 predicate conviction, the validity of which is not at issue on this appeal. We do not find that this plea condition rendered the plea unconstitutional (*see People v McClemore*, 276 AD2d 32, 37 [4th Dept 2000]).

Defendant's claim that the 1993 plea was unconstitutionally obtained because the plea court's enumeration of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) was deficient, is unpreserved, and we decline to review it in the interest of

justice. As an alternative holding, we find that the record as a whole establishes the voluntariness of the plea (*see People v Sougou*, 26 NY3d 1052 [2015]).

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5533 In re Christian D., and Others,

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

Marian R.,
Respondent-Appellant,

SCO Family of Services of New York,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 22, 2016, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children, and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the mother failed to plan for the children's future (*see* Social Services Law

§ 384-b[7][a]). The agency made diligent efforts by, among other things, referring the mother for various parenting programs and mental health services, as well as by scheduling and facilitating visitation with the children (*see id.* § 384-b[7][f]; *see also Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]). Since the mother was already receiving drug treatment and drug testing as well as other services through the Family Treatment Court, the agency did not need to replicate those services, but did repeatedly encourage her to comply with them (*see Matter of Star A.*, 55 NY2d 560, 565 [1982]; *see also Matter of Robert Calvin R.*, 59 AD3d 265, 266 [1st Dept 2009]).

Despite the agency's efforts, the mother never meaningfully engaged in the multiple services offered to her and never attained sobriety during the relevant time period (*see* Social Services Law § 384-b[7][c]). The record amply supports Family Court's finding that the mother's numerous relapses into drug abuse after the children entered foster care, her failure to complete the other components of her service plan, and her failure to visit the children regularly constituted a failure to plan (*see e.g. Matter of Lihanna A. [Marcella H.]*, 140 AD3d 404, 404 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403 [1st Dept 2016]).

A preponderance of the evidence supports the determination

that termination of the mother's parental rights is in the best interest of the children (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). At the time of the dispositional hearing, the children had been in the same pre-adoptive, nonkinship foster homes for most of their lives, their needs were being met, and the foster parents wished to adopt them (*see Matter of Cameron W. [Lakeisha E.W.]*, 139 AD3d 494, 494-495 [1st Dept 2016]). Both sets of foster parents have also demonstrated a commitment to maintaining a relationship among the siblings. Given the foregoing, and the children's "strained" relationship with the mother, which was limited to supervised visits at the agency, Family Court properly concluded that a suspended judgment is not in the children's best interest (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011]).

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5534 Bradley Grossman, Index 153579/13
Plaintiff-Appellant,

-against-

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

_____

Kelner & Kelner, New York (Gail S. Kelner of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Anna Wolonciej of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered September 26, 2016, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates as a matter of law that defendants did not have constructive notice of the alleged water damage that caused the sudden collapse of the table on which plaintiff sat (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Soto v New Frontiers 2 Hope Hous. Dev. Fund Corp., Inc.*, 118 AD3d 471 [1st Dept 2014]; *Lance v Den-Lyn Realty Corp.*, 84 AD3d 470 [1st Dept 2011]). Plaintiff's own testimony showed that the alleged water damage was neither visible nor apparent before

the table collapsed and therefore that a reasonable inspection would not have revealed that the table would be unable to support plaintiff's weight.

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5535 Hertz Vehicles LLC, Index 160441/14
Plaintiff-Appellant,

-against-

Significant Care, PT, P.C., et al.,
Defendants,

Ksenia Pavlova, DO,
Defendant-Respondent.

_____

Rubin, Fiorella & Friedman LLP, New York (David F. Boucher Jr. of counsel), for appellant.

The Rybak Firm, PLLC, Brooklyn (Damin J. Toell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 17, 2017, which denied plaintiff Hertz Vehicles, LLC's motion for summary judgment on the grounds that it failed to demonstrate that it timely requested examinations under oath (EUO), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment declaring that Hertz owes no coverage for the no-fault services rendered by defendant Pavlova to defendant claimant Beard.

The affidavit of the Hertz claims handler personally assigned to this claim, as corroborated by the NF-10 denial of claim form (*Wausau Bus. Ins. Co. v 3280 Broadway Realty Co. LLC*, 47 AD3d 549, 549 [1st Dept 2008]; *see also American Tr. Ins. Co.*

v Longevity Med. Supply, Inc., 131 AD3d 841, 842 [1st Dept 2015]), stated that the date Pavlova's bill was received by the insurer was July 18, 2014. Hertz therefore established its compliance with 11 NYCRR 65-3.5(b) by generating the first EUO scheduling letter within 15 days of receipt of the provider's bill, and compliance with 11 NYCRR 65-3.6(b), by generating the second EUO scheduling letter less than 10 days after the first nonappearance on August 7, 2014.

Hertz also established proof of mailing because it included an affidavit of service, which was executed by the person who mailed the EUO notices and who attested that each was mailed by regular mail to the address provided on the claimant's claim form, as well as to claimant's attorney, in a "postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York" (*see American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013]; *see also Deluca v Smith*, 146 AD3d 732, 732 [1st Dept 2017]).

Pavlova's argument, raised for the first time on appeal, that the second EUO nonappearance date was not a non-appearance because the claimant's counsel was present, and because there was

a statement on the record which not only acknowledged claimant's nonappearance, but also agreed to reschedule the EUO, is unpreserved and unavailing.

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5536 The People of the State of New York, Respondent, SCI 728/15

-against-

Hector Acevedo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered July 1, 2015, convicting defendant, upon his plea of guilty, of criminal contempt in the first degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]). This waiver forecloses defendant's claims that the sentencing court misperceived its discretion and that the sentence was excessive (*see People v Watson*, 155 AD3d 553 [1st Dept 2017]).

Regardless of whether defendant made a valid waiver of his right to appeal, he did not preserve his claim that the court failed to apprehend and exercise its discretion to depart from

the sentence promised in the plea agreement (*see id.*). "While defendant characterizes his claim as one of unlawful sentencing, he is essentially arguing that a substantively lawful sentence was imposed by way of a defective procedure, and such claims require preservation. As a result of the lack of preservation, the court was never called upon to clarify its statement as to sentence" (*People v Giacchi*, 154 AD3d 544, 545 [1st Dept 2017] [citation omitted]). We decline to review this unpreserved claim in the interest of justice.

As an alternative holding, we find that even if the court may have misstated the extent of its discretion, "remand for resentencing is unwarranted because the record fails to indicate any possible harm flowing from the court's alleged error, such as an indication of reservation about the fairness of the sentence to be imposed" (*id.*).

We also perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5537 P. Zaccaro, Co., Inc., et al., Index 652141/15
Plaintiffs-Appellants,

-against-

DHA Capital, LLC, et al.,
Defendants,

Ding K. Wai also known
as John Wai, et al.,
Defendants-Respondents.

_____

Kishner & Miller, New York (Scott M. Himes of counsel), for appellants.

Soong & Liu, New York (Arthur J. Soong of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 5, 2017, which, to the extent appealed from as limited by the briefs, granted the cross motion of defendants Ding K. Wai a/k/a John Wai and Sentry Operating Corp. (together, the seller) to dismiss the amended complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, with costs.

Plaintiff P. Zaccaro, Co., Inc., a real estate broker for the seller, seeks a commission for the sale of a certain parcel of property. The motion court correctly dismissed the amended complaint, as Zaccaro also acted as a broker for the buyer of the property (former defendant DHA Capital, LLC), and therefore engaged in an impermissible dual agency without full disclosure

(*see Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 [1st Dept 2011], *affd* 20 NY3d 875 [2012]).

Plaintiffs' argument that Zaccaro was merely a finder instead of a real estate broker is unavailing. The amended complaint, which was verified by Zaccaro's president, alleges that plaintiffs were DHA's real estate brokers. This statement constitutes a formal judicial admission (*Bogoni v Friedlander*, 197 AD2d 281, 291 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]).

Furthermore, a finder has no obligation to negotiate the real estate transaction in order to obtain its fee (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 163 [1993]). Here, the amended complaint indicates that plaintiffs were obligated to negotiate the sale of the premises. In particular, the amended complaint alleges that DHA authorized plaintiffs "to act as the licensed real estate brokers along with [defendant] Nest Seekers *to the extent needed and/or requested to assist in the negotiation* of terms relating to the [sale] of the Premises between DHA and the Seller" (emphasis added). It also alleges that "DHA and/or the Seller would pay to each of the Plaintiffs and to Nest Seekers a Commission . . . *in consideration for the Plaintiffs* and Nest Seekers *assisting DHA in the negotiation* of the terms relating to the Sale of the Premises" (emphasis added).

Plaintiffs' contention that the seller was not injured by

Zaccaro's dual agency is unavailing. Where, as here, the duty of undivided loyalty is breached, plaintiff broker forfeits its right to a commission, "regardless of whether damages were incurred" (*Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 [1st Dept 2011], *affd* 20 NY3d 875 [2012]).

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5538 The People of the State of New York, Ind. 2525/15
Respondent,

-against-

Enrique Odorno,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered January 21, 2016,

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

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

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

ENTERED: JANUARY 25, 2018

CLERK

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

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5539 Rosenfeld Consulting, LLC, Index 651650/15
Plaintiff-Appellant,

-against-

OmniVere, LLC, et al.,
Defendants-Respondents.

_____

Steven J. Harvis, Briarcliff Manor, for appellant.

Bernstein & Associate, PLLC, Scarsdale (Robert B. Bernstein of counsel), for Omnivere, LLC, respondent.

Winget Spadafora & Schwartzberg LLP, New York (Dianna D. McCarthy of counsel), for Erik S. Post, respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 2, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's causes of action for promissory estoppel, unjust enrichment, and fraud, unanimously affirmed, with costs.

Plaintiff alleges that it was entitled to receive a $1 million commission from nonparties Intelligent Discovery Management, LLC (IDM), Saul Friedman and members of Saul Friedman's family (together, the IDM parties) in connection with an asset purchase agreement between defendant OmniVere, as purchaser, and IDM and another nonparty company, as sellers. Plaintiff alleges that, after the IDM parties insisted on paying

it consideration worth only $600,000, defendants orally promised to pay the remaining $400,000 commission owed by the IDM parties so that plaintiff would not take legal action against the IDM parties and thereby jeopardize the transaction.

In support of their motion to dismiss, defendants submitted documentary evidence establishing that plaintiff's principal entered into a release agreement with the IDM parties, which, in exchange for consideration worth $600,000, broadly released against the IDM parties and their affiliates claims arising out of plaintiff's services for the IDM parties. The valid release, which was broad enough to encompass OmniVere as an affiliate, is a complete bar to the claims against OmniVere (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 516 [1st Dept 2013]). Plaintiff's evidence in opposition to the motion failed to show that defendants made a clear and unambiguous promise to pay plaintiff the remaining commission amount.

Plaintiff's "[g]eneral allegations" that defendants "entered into a contract while lacking the intent to perform it are insufficient to support" its fraud claim (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]).

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: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5540 Sean McLean, Index 300263/12
Plaintiff-Respondent,

-against-

Eric A. Ripoli, et al.,
Defendants,

Pedro Lay, et al.,
Defendants-Appellants.

_____

Carman, Callahan & Ingham, LLP, Farmingdale (Gil Auslander of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 24, 2017, which denied defendants Pedro Lay and Autorama Enterprises of Bronx, Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On February 12, 2010, at about 1:45 a.m., plaintiff Sean McLean was riding in a Volkswagen Jetta, which was owned by codefendant Beverley Shelly and being operated by his cousin, nonparty Travis Roberts, when the vehicle broke down on the southbound Major Deegan Expressway near the Van Cortlandt Park exit. Defendant Pedro Lay, an employee of defendant Autorama

Enterprises of Bronx, Inc., was hitching the Jetta to his tow truck when a vehicle owned and operated by codefendant Eric A. Ripoli rear-ended the Jetta, pushed it into the rear of the tow truck then collided with a fourth nonparty vehicle. Ripoli has pled guilty to driving under the influence for his role in the accident.

Defendants-appellants are entitled to summary judgment, because the tow truck driver's affirmative negligence, if any, did nothing more than furnish the condition or give rise to the occasion by which plaintiff's injury was made possible (*see Roman v Cabrera*, 113 AD3d 541, 542 [1st Dept 2014], *lv dismissed in part, denied in part* 24 NY3d 949 [2014]; *Spence v Lake Serv. Sta., Inc.*, 13 AD3d 276, 277-278 [1st Dept 2004]). There is no allegation that their actions violated a traffic regulation and the record shows that the tow truck driver was in the process of securing the vehicle to tow it off the expressway when the accident happened.

Plaintiff's assertion that the accident would not have occurred if the tow truck driver had placed additional flares or moved the ones that the police officers had placed, displayed cones or removed the Jetta from the location sooner is speculative and insufficient to raise an issue of fact, because it is undisputed that Ripoli fell asleep before his vehicle rear-

ended the Jetta (*see Iqbal v Thai*, 83 AD3d 897, 898 [2d Dept 2011]; *Mendrykowski v New York Tel. Co.*, 2 AD3d 1410 [4th Dept 2003]).

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5541 The People of the State of New York, Respondent, Ind. 2353/12

-against-

Tyrone Hollar, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at plea; Laura A. Ward, J. at sentencing), rendered February 10, 2014, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5542 In re Jose M.,
Petitioner-Appellant,

-against-

Iesha M.,
Respondent-Respondent.

_____

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

_____

Appeal from order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about March 1, 2017, which granted petitioner father's petition to modify an order of visitation dated July 29, 2015, unanimously dismissed, without costs, and assigned counsel's motion to withdraw granted.

We have reviewed the record and agree with assigned counsel that there are no viable arguments to be raised on appeal (*see e.g. Matter of Weems v Administration of Children's Servs.*, 73 AD3d 617 [1st Dept 2010]). The father did not allege a material change of circumstances, but simply expressed his desire for expanded visitation, which was not sufficient to modify the visitation order (*Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 938

[1st Dept 2011], *lv denied* 18 NY3d 804 [2012]). Regardless, the court granted the father the relief he requested in the petition, thus rendering the appeal moot.

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5543 Barbara Robins, Index 805644/15
Plaintiff-Respondent,

-against-

Procure Treatment Centers, Inc., et al.,
Defendants,

Princeton Procure Management LLC, et al.,
Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Neil M. Willner of counsel), for appellants.

Law Office of Robert F. Danzi, Jericho (Joan M. Ferretti of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered April 19, 2017, which, insofar as appealed from, denied defendants Princeton Procure Management LLC and Procure Proton Therapy Center's motion to dismiss the complaint as against them for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff, a New York City resident, seeks damages for injuries she allegedly sustained as a result of proton radiation treatment she received at a facility owned by defendant Princeton Procure Management LLC (PPM) (d/b/a Procure Proton Therapy Center) and located in Somerset, New Jersey, after having

undergone resection of a non-malignant brain tumor at Mount Sinai Hospital in New York.

Plaintiff made a "sufficient start" in establishing that New York courts have jurisdiction over PPM under CPLR 301 and 302(a)(1) to be entitled to disclosure pursuant to CPLR 3211(d) (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]). With regard to general jurisdiction, codified in CPLR 301, it is not clear whether PPM's "affiliations with the State [New York] are so continuous and systematic as to render [it] essentially at home in the [] State" (*Daimler AG v Bauman*, __ US __, 134 S Ct 746, 761 [2014] [internal quotation marks omitted]). However, the record contains a State filing in which PPM identified itself as having a principal place of business in Manhattan – "tangible evidence" upon which to question PPM's claims to the contrary (*see SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004] [internal quotation marks omitted]).

With regard to specific jurisdiction (CPLR 302[a][1]), the record shows that PPM's activities in New York were "purposeful and [that] there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 72 [2006] [internal quotation and citation omitted], *cert denied* 549 US 1095 [2006]; *see also Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). PPM chose and

marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising, entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility, and provided the consortium's doctors with privileges at its facility. In contrast to *Paterno v Laser Spine Inst.* (24 NY3d 370 [2014]), a medical malpractice action in which the plaintiff argued that New York courts had jurisdiction over a Florida-based facility and its doctors based on an advertisement and communications, in this case, plaintiff did not seek out PPM. She says that she was directed to PPM by her New York doctor, defendant Raj Shrivastava, as part of a referral fee agreement, that Dr. Shrivastava thereafter co-managed her care, and that PPM billed her directly for Dr. Shrivastava's services.

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5544-
5545 Index 154644/15

Aurora Associates LLC,
Plaintiff-Appellant,

-against-

Mark Hennen, et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

_____

Kossoff PLLC, New York (Joseph Goldsmith of counsel), for appellant.

Grad and Weinraub LLP, New York (Catharine A. Grad of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 10, 2017, which to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its cause of action for ejectment and for dismissal of defendants' affirmative defenses, and granted defendants' cross motion for summary judgment dismissing the causes of action for ejectment and use and occupancy, unanimously modified, on the law, to deny dismissal of the ejectment claim to the extent based on profiteering, to grant dismissal of defendants' sixth affirmative defense (failure to serve notice to cure), and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 19, 2017, which, upon granting

reargument, adhered to its original determination, unanimously dismissed, without costs, as academic.

Plaintiff owns a building that is an interim multiple dwelling (IMD) as defined by Article 7-C of the Multiple Dwelling Law (Loft Law). Defendant Mark Hennen, a rent-regulated tenant, has occupied a loft apartment on the fifth floor since 1977, pursuant to a 1977 lease that expired in 1982.

Plaintiff seeks to eject defendants based on their having illegally sublet rooms in their loft through the Airbnb website to numerous individuals, over a period of about two years, resulting in profits well in excess of the legal regulated rent. It is well settled that, when regulated tenants rent space on a short-term basis to transient individuals at rates higher than allowed by applicable regulations, that conduct is "in the nature of subletting rather than taking in roommates, and constitute[s] profiteering and commercialization of the premises," which is an "incurable violation" (*220 W. 93rd St., LLC v Stavrolakes*, 33 AD3d 491 [1st Dept 2006], *lv denied* 8 NY3d 813 [2007]; *see Goldstein v Lipetz*, 150 AD3d 562 [1st Dept 2017]). Defendants do not dispute that tenants regulated pursuant to the Loft Law also are subject to eviction for profiteering (*see BLF Realty Holding Corp. v Kasher*, 299 AD2d 87, 93 [2002], *lv dismissed* 100 NY2d 535 [2003]; 29 RCNY § 2-09).

Since the alleged conduct is incurable, no notice to cure is required (*id.*). As for the adequacy of the predicate notice of termination, plaintiff served a notice under the terms of the expired lease, which carried over into the statutory tenancy and governed the amount of notice required when the tenant violates a substantial obligation of his tenancy or is alleged to have engaged in illegal conduct (*see 1165 Broadway Corp. v Dayana of N.Y. Sportswear*, 166 Misc 2d 939, 947 [Civ Ct, NY County 1995]; *cf. Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [2003]; RSC § 2524.3; RPL 231; *but see Kiamie-Princess Marion Realty Corp. v Lipton*, 20 Misc 3d 423, 424 [Civ Ct, NY County 2008][no current written lease applied to Loft Law tenant]).

Accordingly, there was no basis to dismiss the ejectment cause of action to the extent based on profiteering. However, to the extent that plaintiff alleges a host of other violations of law, it has offered no evidence in support of those claims.

In particular, while plaintiff argues strenuously that it is entitled to judgment because the building is a class A multiple dwelling under Multiple Dwelling Law § 4(8), and therefore occupancy for less than thirty days is not permitted, that argument is without merit. The premises is not a Class A multiple dwelling and, no certificate of occupancy for such a multiple dwelling has been issued. In any event, plaintiff would

not prevail simply by proving that defendants sometimes allowed people to stay in the apartment as roommates or boarders, since that would not be impermissible per se (*see* Real Property Law § 235 -f).

Contrary to plaintiff's contention, it has not demonstrated its entitlement to summary judgment on its ejectment claim since it did not offer any evidence in admissible form in support of its motion. Even if the printouts from the Airbnb site are considered, they do not provide a basis for determining that the nature and frequency of the rentals amounted to profiteering, warranting termination of the lease (*compare Goldstein v Lipetz*, 150 AD3d 562).

It is undisputed that plaintiff has failed to bring the building, which is an interim multiple dwelling under the Loft Law, into compliance with that law, including by obtaining a certificate of occupancy. As such, plaintiff cannot prevail on its cause of action for use and occupancy as a matter of law

(*Chazon, LLC v Maugenest*, 19 NY3d 410, 414-415 [2012]; Multiple Dwelling Law §§ 302[1][b] and 285[1]).

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5546 The People of the State of New York, Respondent, Ind. 17/16

-against-

Fama Conde, Defendant-Appellant.

Law Offices of Danielle Neroni, Albany (Angela Kelley of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 7, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 8½ years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see generally People v Frederick*, 45 NY2d 520 [1978]). Defendant asserted that on the day of the plea he had not received his antidepressant medication. However, there is nothing in the record to suggest that this circumstance had any effect on defendant's thought processes (*see People v Hamm*, 17 AD3d 105 [1st Dept 2005], *lv denied* 5 NY3d 763 [2005]). The plea minutes and the court's stated recollection of the plea proceedings support a finding

that the medication, or the absence thereof, had no effect on defendant's ability to understand the proceedings. Defendant appeared lucid throughout, and actively sought out a plea offer. Nothing in the thorough allocution casts doubt on defendant's guilt or on the voluntariness of his plea.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5547 Peter Pan Bus Lines, Inc., Index 300288/15
Plaintiff-Appellant,

Lexington Insurance Company,
Plaintiff,

-against-

The Hanover Insurance Company,
Defendant-Respondent.

_____

O'Connor Redd, LLP, Port Chester (Taylor J. Hills of counsel), for appellant.

Baxster Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered June 23, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff Peter Pan Bus Lines, Inc.'s motion for summary judgment declaring that defendant is obligated to defend and indemnify it on a primary, non-contributory basis in the underlying personal injury action and to reimburse it for all reasonable costs, disbursements, and attorneys' fees expended by it in that action, unanimously reversed, on the law, with costs, and the motion granted, and it is so declared.

The insurance policy issued by defendant to Peter Pan provides coverage for damages owed because of, inter alia,

"'bodily injury' ... caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" Regardless of whether the plaintiff in the underlying action, having arrived at her destination on a Peter Pan bus and seen the driver unloading the passengers' luggage, tripped over a suitcase while approaching her own suitcase or tripped on the curb while looking for her suitcase, her accident resulted from Peter Pan's use of the bus, a covered auto, and defendant is obligated to defend and indemnify Peter Pan in the underlying action (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *Axton Cross Co. v Lumbermens Mut. Cas. Co.*, 176 AD2d 482 [1st Dept 1991], *lv dismissed* 79 NY2d 822 [1991]; *Cosmopolitan Mut. Ins. Co. v Baltimore & Ohio R.R. Co.*, 18 AD2d 460 [1st Dept 1963]).

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

ENTERED: JANUARY 25, 2018

CLERK

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5548 The People of the State of New York, Ind. 5481N/14
Respondent,

-against-

Jesus Carlos Gutierrez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (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 (Anthony Ferrara, J.), rendered August 26, 2015,

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

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

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

ENTERED: JANUARY 25, 2018

CLERK

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

Acosta, P.J., Renwick, Kapnick, Kahn, Kern, JJ.

5549-
5550N Index 350024/13

Stephanie Olson,
Plaintiff-Respondent,

-against-

David Olson,
Defendant-Appellant.

_____

David Olson, appellant pro se.

Frejka PLLC, New York (Elise Frejka of counsel), for respondent.

_____

Order, Supreme Court, New York County (Tandra L. Dawson, J.), entered on or about August 9, 2016, which, after a fact-finding hearing, granted plaintiff wife's application for a final order of protection and issued a five-year order of protection against defendant husband upon a finding of aggravating circumstances, unanimously affirmed, without costs. Order, same court and Justice, entered November 15, 2016, which denied the husband's motion for a recusal, unanimously affirmed, without costs.

The credibility determinations of the Integrated Domestic Violence (IDV) Court are supported by the record and are entitled to deference. We see no basis to disturb them. (*Matter of Kondor v Kondor*, 109 AD3d 660 [2nd Dept 2013]; *Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]). The court's findings that the

husband committed the family offenses of third-degree assault and second-degree harassment, which caused the wife physical injury on two separate occasions, were supported by the record. The presence of these aggravating circumstances warranted the issuance of a five-year final order of protection in plaintiff's favor as reasonably necessary to provide meaningful protection to plaintiff (*see* Family Ct Act §§ 827[a][vii]; 842; *Matter of Coumba F. v Mamdou D.*, 102 AD3d 634 [1st Dept 2013]; *Mistretta v Mistretta*, 85 AD3d 1034 [2d Dept 2011]). The fact that a temporary order of protection was in effect during the pendency of the lengthy proceedings before the IDV Court does not dictate a contrary result. In any case, the order of protection was issued in accordance with Domestic Relations Law §§ 240 and 252, which do not, under these circumstances, prescribe any time limit for its duration.

We have considered the husband's remaining arguments, including those regarding the denial of his recusal motion, and find them unavailing.

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

ENTERED: JANUARY 25, 2018

CLERK

Richter J.P., Mazzarelli, Kahn, Moulton, JJ.

4935 Gobinjee Bania, et al., Index 100932/12
Plaintiffs-Appellants,

-against-

City of New York,
Defendant-Respondent.

_____

Sacco & Fillas, LLP, Astoria (Tonino Sacco of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 14, 2016, which granted defendant City of New York's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the matter remanded to Supreme Court for further proceedings.

Plaintiffs, both of whom are officers of the New York City Police Department, allege that on September 7, 2011, at about 12:40 a.m., while on patrol, they sustained personal injuries after their vehicle's tire fell into a hole in the roadway located on the northbound portion of Saint Nicholas Avenue between 124th Street and 125th Street. It is uncontroverted that defendant City of New York (City) owned and maintained the accident location. Although plaintiffs do not dispute that the

City did not receive prior written notice of the roadway defect under the Pothole Law (*see* Administrative Code of City of NY § 7-201[c][2]), they claim that no such notice was required because the City created the defect through an affirmative act of negligence by placing a patch over a hole that was at the subject location about 10 days before the accident.

The motion court erred in dismissing the complaint. At the outset, on a motion for summary judgment dismissing the complaint against the City alleging personal injury due to a roadway defect or hazard, the City has the initial burden of establishing that it lacked prior written notice of the defect or hazard under the Pothole Law (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Where the City meets that initial burden, the burden shifts to the plaintiff, who must demonstrate that the City "affirmatively created the defect [in question] through an act of negligence" (*id.*). The affirmative negligence exception is limited, however, to "work by the City that immediately results in the existence of a dangerous condition" (*id.*, quoting *Bielecki v City of New York*, 14 AD3d 301, 301-302 [1st Dept 2005]), as opposed to a defect that "developed over time" (*Yarborough*, 10 NY3d at 728).

Here, according to the printed results of a December 16, 2014 computerized search for records of the City's Department of

Transportation (DOT) concerning the roadway in the vicinity of the accident location, a complaint was made to the DOT on August 27, 2011, resulting in the issuance of a "Corrective Action Request" (CAR) that day. The DOT printout further reflects that on that same day, in response to the CAR, the roadway in that location was inspected by the City's Department of Environmental Protection (DEP). The DOT printout also includes "CAR Comments" reporting that a "2' x 1' area is caved in and down 6 feet in the bus lane, there are also voided areas that extend beyond the opening, DEP Closed: 9/8/2011 11:10:00 AM."

At a hearing held on December 12, 2011 pursuant to General Municipal Law § 50-h, plaintiff Amey R. Kaminska testified that while on patrol shortly after 7:00 a.m. on August 27, 2011, eleven days prior to the accident, she observed a hole in the roadway in the vicinity of 124th Street and Saint Nicholas Avenue, notified DOT about it, and was told that "they would send somebody." On her drive home later that morning, she observed that there was a DOT car "just sitting" near the hole. At her pre-trial deposition on January 16, 2013, Kaminska testified that she had seen the hole and reported it to the DOT "[l]ess than two weeks prior" to the September 7, 2011 incident and that the hole was "about a foot wide by maybe two feet long." Kaminska's description of the dimensions of the hole is consistent with the

"CAR Comments" description of the dimensions of the "caved in" area of the roadway.

In addition, Kaminska submitted an affidavit, sworn July 26, 2013, in opposition to defendant's summary judgment motion. In her affidavit, Kaminska stated that on August 27, 2011, while driving through St. Nicholas Avenue and West 124th Street to her police precinct, she observed two men with orange and green vests standing by a depression in the road. She noted that one of the men was holding a pole or shovel that was placed into the depression. She further states that on the morning of August 28, 2011, while on patrol, she and her partner drove by St. Nicholas Avenue and West 124th Street, where she observed that the depression she had seen the previous day "had been filled with a dark or blackish material like cement or tar."

Plaintiffs also proffered the affidavit of their expert, Stanley H. Fein, sworn August 14, 2015. In his affidavit, Fein, a professional engineer, opined that any attempted patch repair of the sinkhole -- "without excavation, proper backfilling and tamping -- would begin to fail almost immediately and manifest itself in the recurrence of the sinkhole." Fein further opines that, in the absence of proper excavation, backfilling and tamping, it was "reasonable [to] expect failure of the sinkhole to begin within 24 hours."

Based upon this record evidence, we find that although the City has met its initial burden of establishing the uncontroverted fact that it received no prior written notice of the sinkhole, thereby shifting the burden to plaintiffs, plaintiffs have met their burden of showing that there are triable issues of fact as to whether the City's affirmative negligence created the defect (*see Yarborough*, 10 NY3d at 723 [2008]). Specifically, plaintiff's testimony and affidavit demonstrate that the City attempted to repair the sinkhole on August 27, 2011. Moreover, the City has conceded based on the CAR report that it worked to fill the sinkhole on August 27, 2011 (eleven days prior to the accident) and August 28, 2011 (ten days prior to the accident). The affidavit of plaintiffs' expert raises the issues of whether the City's affirmative repair of the sinkhole negligently created a defective condition causing the repair to fail immediately after it was made. There is nothing in the record here to indicate that the dangerous condition in question developed over time (*cf. Yarborough,* 10 NY3d at 728 [affirming summary judgment dismissing the complaint where City lacked prior written notice and "plaintiff's expert found that . . . the condition that caused plaintiff's injury . . . developed over time"]; *Speach v Consolidated Edison Co. of N.Y., Inc.*, 52 AD3d 404, 404 [1st Dept 2008] [same]; *Bielecki*, 14 AD3d at 301

[affirming dismissal of complaint against City where there was no record evidence of prior written notice to City and plaintiff's expert opined that defect "developed over time"]). Thus, plaintiffs have sufficiently met their burden of raising triable issues of fact as to the City's liability. Accordingly, we conclude that Supreme Court improvidently granted the City's summary judgment motion and that the complaint was improperly dismissed.

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

ENTERED: JANUARY 25, 2018

CLERK

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

5497 Jerry E. Clements, et al., Index 650810/17
Plaintiffs-Appellants,

-against-

201 Water Street LLC,
Defendant-Respondent.

_____

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellants.

D'Agostino, Levine, Landesman & Lederman LLP, New York (Bruce H. Lederman of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Erika M. Edwards, J.), entered August 28, 2017, which granted defendant's motion to dismiss the complaint and for attorneys' fees and costs on the motion, and declared that the parties' purchase agreement is not void, illusory, or unenforceable and that plaintiffs are not entitled to the return of their down payment, unanimously modified, on the law, to deny defendant's motion to dismiss, and to vacate the declaration that plaintiffs are not entitled to the return of their down payment, and otherwise affirmed, without costs.

Contrary to plaintiffs' conclusory allegations, the purchase agreement does not place sole and absolute discretion in defendant sponsor to set a closing date on plaintiffs' condominium unit. Rather, the agreement requires defendant to

set a closing date either concurrently with or after the attainment of appropriate certificates of occupancy for the building or plaintiffs' unit, which was under construction when the parties entered into the agreement. Defendant is also obligated under the agreement to use best efforts to procure the certificates within two years of the issuance of the building's or any unit's first temporary certificate of occupancy. At the time plaintiffs commenced the instant action, the requisite certificates of occupancy were not yet obtained, and the complaint makes no allegation of unreasonable delays on defendant's part in the progress of the condominium's construction. While the agreement does not specify a closing date, the law provides for a reasonable time to close (*see Grace v Nappa*, 46 NY2d 560, 565 [1979]; *Kaiser-Haidri v Battery Place Green, LLC*, 85 AD3d 730, 733 [2d Dept 2011]). Accordingly, the agreement is not illusory or unenforceable (*see Kaiser-Haidri*, 85 AD3d 730).

The motion court correctly ruled that defendant is entitled to recover attorneys' fees and costs for the instant motion pursuant to the express terms of the agreement (*see Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279 [1st Dept 2004]).

We modify to declare in defendant's favor, rather than dismiss the complaint (*Hunter v Seneca Ins. Co., Inc.*, 114 AD3d 556, 557 [1st Dept 2014]). We also modify to strike the declaration that plaintiffs are not entitled to a return of their down payment as premature, since they may still close on their unit.

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

ENTERED: JANUARY 25, 2018

CLERK

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

5513 The People of the State of New York, Respondent, Ind. 1343/11

-against-

Robert Clarke, Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Eunice Lee of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered February 25, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. The first statement, made outside defendant's home, in response to an officer's inquiry as to "what happened," did not require *Miranda* warnings because it was not the product of interrogation, and because defendant was not in custody (*see People v Flores*, 153 AD3d 1186 [1st Dept 2017]; *People v Santiago*, 77 AD3d 422 [1st Dept 2010], *lv denied* 15 NY3d 955 [2010]; *People v Taylor*, 57 AD3d 327 [1st Dept 2008], *lv denied* 12 NY3d 860 [2009]).

Although several officers were present, they did not have their guns drawn, did not handcuff or restrain defendant in any way, and did not otherwise create a coercive or police-dominated atmosphere (*see Matter of Kwok T.*, 43 NY2d 213, 219 [1977]; *People v Rodney P. [Anonymous]*, 21 NY2d 1, 9-10 [1967]). A reasonable innocent person in defendant's position would not have thought that he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]), but rather "that the police were still in the process of gathering information about the alleged incident prior to taking any action" (*People v Dillhunt*, 41 AD3d 216, 217 [1st Dept 2007], *lv denied* 10 NY3d 764 [2008]). The officer's expectation that defendant would be arrested, based on the victim's complaint, was not conveyed to defendant. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation" (*Berkemer v McCarty*, 468 US 420, 442 [1984]; *see also Stansbury v California*, 511 US 318, 325 [1994]; *United States v Mendenhall*, 446 US 544, 554 n 6 [1980]).

Because the first statement was lawfully obtained, there is no basis for suppression of defendant's subsequent statement, which was entirely spontaneous.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The element of physical injury was satisfied by proof showing that the victim received stitches, and had a scar at the time of trial, which establishes impairment of physical condition (*see People v Tejeda*, 78 NY2d 936 [1991]). That element was also satisfied by proof that defendant stabbed the victim in the shoulder, creating a one-inch wound, "a lot" of bleeding, and a reported pain level of "5 out of 10," which permits an inference of substantial, or "more than slight or trivial" pain (*People v Chiddick*, 8 NY3d 445, 447 [2005]; *see also People v Rojas*, 61 NY2d 726, 727-728 [1984]).

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

ENTERED: JANUARY 25, 2018

CLERK

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

5514 Anthony Luciano, Index 23059/12
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Zaremba Brown, PLLC, New York (Brian Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 17, 2017, which granted plaintiff's motion for summary judgment as to liability on the Labor Law § 241(6) claim insofar as predicated on Industrial Code (12 NYCRR) § 23-1.7(d), unanimously modified, on the law, to the extent of directing a trial on the issue of comparative negligence, and otherwise affirmed, without costs.

Plaintiff's testimony that he slipped on water on the floor of the stairwell where he was working establishes prima facie a violation of Labor Law § 241(6) predicated on Industrial Code § 23-1.7(d) ("Slipping hazards"). In opposition, defendant, relying solely on speculative hearsay testimony (by another employee), failed to raise an issue of fact as to the way the accident occurred (*see Ying Choy Chong v 457 W. 22nd St. Tenants*

Corp., 144 AD3d 591, 592 [1st Dept 2016]; *see also Marrero v 2075 Holding Co. LLC*, 106 AD3d 408-409 [1st Dept 2013]).

While the record demonstrates defendant's liability as a matter of law, an issue of fact exists as to negligence on plaintiff's part (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]), which could result in an apportionment of liability (*see Maza v University Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004]; *McLean v Wical Realty Corp.*, 182 AD2d 554 [1st Dept 1992]). Plaintiff testified that, as he entered the stairwell, he was looking up to determine the location of the box through which he was to run cable, and that, while carrying a ladder in one hand, he attempted to descend the staircase without looking at the stairs or the landing in front of him.

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

ENTERED: JANUARY 25, 2018

CLERK

CORRECTED ORDER - FEBRUARY 9, 2018

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

5515-
5516 In re Cheron B., Jr.,

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

Vanessa G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Cheron B.,
Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), attorney for the child.

_____

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about May 5, 2017, which granted petitioner agency's motion for summary judgment finding that respondent mother had derivatively neglected the subject child, unanimously affirmed, without costs.

Petitioner made a prima facie showing of derivative neglect as to the subject child, based on the prior findings of neglect against the mother with respect to her older children and evidence that she had failed to ameliorate the conditions that

led to those findings (*Matter of Phoenix J. [Kodee J.]*, 129 AD3d 603 [1st Dept 2015]; *see also* Family Ct Act § 1046[a][i]). The prior findings of neglect, the continued placement of the older children in foster care, the termination of the mother's parental rights to the older children, and the mother's noncompliance with court-ordered services all support the Family Court's finding (*id.*; *Matter of Jaci Robert B.A. [Kobi R.]*, 138 AD3d 550, 551 [1st Dept 2016]).

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

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

ENTERED: JANUARY 25, 2018

CLERK

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

5517 In re Elias Hernandez, Index 24524/14E
Petitioner-Respondent,

-against-

Department of Housing Preservation
and Development of the City of New York,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 13, 2016, which granted the petition to vacate and discharge respondent's recorded notice of lien seeking relocation and administrative costs, and denied respondent's cross motion to dismiss the proceeding, unanimously reversed, on the law and the facts, without costs, the petition denied, and respondent's cross motion granted. The Clerk is directed to enter judgment dismissing the proceeding.

Based on the Court of Appeals' recent holding in *Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.* (29 NY3d 45 [2017]), this dispute regarding whether the individuals on whose behalf respondent claims to have incurred relocation expenses were subject to a vacate order and/or whether they were

petitioner's tenants, must be resolved through a foreclosure trial, rather than a summary discharge proceeding, as the dispute does not involve the facial validity of the notice of lien (*see Matter of Dock Properties*, __AD3d__, 2017 NY Slip Op 08742 [2017]).

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

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

ENTERED: JANUARY 25, 2018

CLERK

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

5518 In re 49 Bleecker, Inc., Index 570312/14
Petitioner-Respondent, 64244/13

-against-

Jen Gathien, et al.,
Respondents-Appellants.

_____

Ween & Kozek, PLLC, New York (Michael P. Kozek of counsel), for appellants.

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for respondent.

_____

Order, Appellate Term of the Supreme Court, First Department, entered June 13, 2016, which affirmed two orders, Civil Court, New York County (Brenda S. Spears, J.), entered March 14, 2014, denying respondents' motion for summary judgment dismissing the nonpayment proceeding, and granting petitioner's motion for leave to conduct discovery, unanimously reversed, on the law without costs, respondents' motion granted, and petitioner's motion denied as moot. The Clerk is directed to enter judgment accordingly.

Petitioner was the net lessee of the third floor of a six-story building, a de facto multiple dwelling; the net lease provided, inter alia, that there was no permanent certificate of occupancy for either the building or the demised premises. In April 2013, petitioner brought this proceeding alleging that

respondents, its subtenants, had failed to pay residential use and occupancy since January 2013. Affording the relevant statutory language its natural and ordinary meaning (*see generally Matter of Smith v Donovan*, 61 AD3d 505, 508 [1st Dept 2009], *lv denied* 13 NY3d 712 [2009]), we conclude that the proceeding must be dismissed because petitioner was not entitled to collect rent from respondents.

For purposes of the Multiple Dwelling Law, an "owner" is broadly defined to include a "lessee" (Multiple Dwelling law § 4[44]). Respondents' unit constituted a "dwelling" under the Multiple Dwelling Law ["any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings" (Multiple Dwelling Law 4[4]). The owner of a "dwelling or structure ... occupied in whole or in part for human habitation in violation of [§ 301]" may not recover rent for the period during which there is no certificate of occupancy for "such premises" (Multiple Dwelling Law § 302[1][b]). Nor may the owner maintain an action or special proceeding for possession of the premises for nonpayment of "such rent" (*id.*). Thus, petitioner, as owner of respondents' dwelling, was precluded from charging respondents rent or other

remuneration while the building lacked a certificate of occupancy for residential use (*see generally Caldwell v American Package Co., Inc.*, 57 AD3d 15 [2d Dept 2008]).

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

ENTERED: JANUARY 25, 2018

CLERK

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

5519-
5520 The People of the State of New York,
Respondent,

-against-

Maurice A. Goode,
Defendant-Appellant.

Ind. 3836/15

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 29, 2016,

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

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

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

ENTERED: JANUARY 25, 2018

CLERK

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

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

5521 Alan Dubrow, Index 651605/16
Plaintiff-Respondent,

-against-

Herman & Beinin, Attorneys at Law, et al.,
Defendants-Appellants.

_____

Herman & Beinin, Bellmore (Mark D. Herman of counsel), for appellants.

Jonathan Strauss, New York, for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered July 24, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the first cause of action alleging breach of an oral agreement, unanimously affirmed, without costs.

Plaintiff alleges that defendants, who represented him in an employment discrimination action, failed to return the unearned portion of his $176,500 retainer at the conclusion of that action. It is undisputed that defendants never provided plaintiff with a written agreement, as required under 22 NYCRR 1215.1, and failed to provide plaintiff with written billing statements, as required by 22 NYCRR 1210.1(4). In addition, defendants refused to provide an accounting of the time spent working on plaintiff's case when requested by plaintiff's

new attorney. Defendants moved to dismiss, arguing that the breach of contract claim was not adequately pleaded and that plaintiff's claim is barred by the "voluntary payment doctrine."

The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]). In the context of an attorney-client relationship, the attorney bears the burden of showing that the parties' fee agreement was fair, reasonable, and fully known and understood by plaintiff (*Jacobson v Sassower*, 66 NY2d 991, 993 [1985]; *see also Seth Rubenstein, PC v Ganea*, 41 AD3d 54, 64 [2d Dept 2007]).

Plaintiff has sufficiently alleged a claim for breach of contract based on defendants' failure to return the unearned balance of his retainer, pursuant to the parties' oral agreement (*see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515 [1st Dept 2016]). While defendants assert that plaintiff voluntarily made payments to compensate them for their services, they have not established that plaintiff had full knowledge of the relevant facts, such as the number of hours spent by defendants in connection with their representation of him (*see Dillon*, 100 NY2d at 525). Nor did they submit any evidence to show that the amount of plaintiff's payments was fair

and reasonably related to the value of services rendered (*see Jacobson*, 66 NY2d at 993). Since defendants did not conclusively refute plaintiff's allegations, their motion to dismiss was properly denied (*see Rite Aid of N.Y., Inc. v Chalfonte Realty Corp.*, 105 AD3d 470, 470-471 [1st Dept 2013]; *Kirby McInerney & Squire, LLP v Hall Charne Burce & Olson, S.C.*, 15 AD3d 233 [1st Dept 2005]).

Nor does defendants' contention that plaintiff never questioned their legal fees until the underlying matter was dismissed on summary judgment warrant dismissal. Plaintiff alleges that defendants promised to return any balance at the resolution of the underlying action, and his attempts to obtain an accounting after dismissal of the action are in line with this alleged understanding.

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

ENTERED: JANUARY 25, 2018

CLERK

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

5522 The People of the State of New York, Ind. 4708/07
Respondent,

-against-

Juan Carlos Baez,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about May 4, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying crime, which was committed against a child (*see e.g. People v Cruz*, 154

AD3d 610 [1st Dept 2017]; *People v Ogata*, 124 AD3d 416 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015); *People v Watson*, 112 AD3d 501, 503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

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

ENTERED: JANUARY 25, 2018

CLERK

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

5523 Frank Gericitano, Index 156327/13
Plaintiff-Respondent,

-against-

Brookfield Properties OLP Co. LLC sued herein as Brookfield Office Properties, et al.,
Defendants-Appellants.

Camacho Mauro Mulholland, LLP, New York (Wendy Jennings of counsel), for appellants.

Jonathan D'Agostino & Associates, P.C., Staten Island (Edward J. Pavia, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 21, 2016, which granted plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff established prima facie his entitlement to the protections of Labor Law § 240(1) by submitting evidence that he was injured when a corner of an electrical transformer weighing hundreds of pounds and suspended from a ceiling shifted downward and struck him on the head as he was standing on a ladder working on it and that he had not been provided with any safety devices adequate to his task (*see e.g. Rzymski v Metropolitan Tower Life Ins. Co.*, 94 AD3d 629 [1st Dept 2012]; *Luongo v City of New York*,

72 AD3d 609 [1st Dept 2010]; *Kollbeck v 417 FS Realty*, 4 AD3d 314 [1st Dept 2004]).

In opposition, defendants failed to raise an issue of fact as to their contention that plaintiff was the sole proximate cause of the accident. Plaintiff's coworker testified that there were no readily available safety devices to assist him and plaintiff in their task (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Gonzalez v City of New York*, 151 AD3d 492, 493 [1st Dept 2017]). While plaintiff's foreman testified that he had given specific instructions to his workers about using wooden delivery pallets to prop up the transformer at the corner being worked on, he conceded that he did not know whether plaintiff was standing near enough to him to have heard these instructions (*see Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404 [1st Dept 2017], *lv dismissed* 29 NY3d 1100 [2017]). In any event, defendants

submitted no evidence that this improvised method was a suitable safety device (*see Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 905 [2011]).

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

ENTERED: JANUARY 25, 2018

CLERK

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

5524 The People of the State of New York, Respondent, Ind. 3294/13

-against-

Robert Huey, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered May 6, 2015 , unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 25, 2018

CLERK

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

5525-
5526 In re Tyrese D.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about September 16, 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 sexual abuse in the first and second degrees and endangering the welfare of a child, and placed him on probation for a period of 18 months, unanimously modified, on the law, to the extent of vacating the finding as to sexual abuse in the second degree and dismissing that count, and otherwise affirmed, without costs.

We need not determine whether appellant's statement should have been suppressed, because any error in admitting it was harmless beyond a reasonable doubt. The evidence that appellant

committed the charged offenses was overwhelming, and there is no reasonable possibility that the result would have been any different if his "essentially exculpatory" statement, in which he denied coercing the complainant to touch his penis, had been suppressed (*Matter of Jahmeka W.*, 130 AD3d 437, 437 [1st Dept 2015], *lv denied* 26 NY3d 909 [2015]). His statement was a relatively minor component of the presentment agency's case, which included the testimony of the victim and a corroborating eyewitness, and the victim's report of the incident to medical personnel.

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). Moreover, as noted, we find that the evidence of appellant's guilt was overwhelming. There is no basis for disturbing the court's determinations concerning credibility.

The court properly permitted the eight-year-old victim to give sworn testimony. Her voir dire responses established that she "sufficiently understood the difference between truth and falsity, the nature of a promise to tell the truth, and the wrongfulness and consequences of lying" (*Matter of Paulette C.*, 34 AD3d 395 [1st Dept 2006]; *see also People v Nisoff*, 36 NY2d 560, 565-66 [1975]). There is nothing to indicate that the

presentment agency's trial preparation of the victim would warrant a different conclusion regarding her swearability.

The finding as to second-degree sexual abuse is dismissed as a lesser included offense.

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

ENTERED: JANUARY 25, 2018

CLERK

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

5527 Guillermo Torres, Jr., Index 161574/13
Plaintiff-Appellant,

-against-

Werner Bus Lines, Inc., et al.,
Defendants-Respondents.

_____

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

White Fleischner & Fino, LLP, New York (Deanna Hazen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered August 4, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established his entitlement to partial summary judgment through his testimony that he was crossing the intersection within the crosswalk and with the light in his favor, when defendants' bus struck him while making a left turn (*see Hines v New York City Tr. Auth.*, 112 AD3d 528, 529 [1st Dept 2013]). The testimony of defendant bus driver does not contradict plaintiff's testimony that he was in the crosswalk, since the driver did not see plaintiff until the moment of impact. The driver's observation of a white crossing signal

before commencing his turn also does not contradict plaintiff's testimony that he started crossing with the light in his favor.

In opposition, defendants failed to raise a triable issue of fact as to plaintiff's comparative negligence. Defendants proffered no evidence that plaintiff was outside of the crosswalk. Their driver was "not sure" if the impact took place within the crosswalk, and the position of plaintiff's body after impact is "not probative as to whether she was walking in the cross[]walk prior to being struck" (*see id.*).

The court should not have considered the videotape footage defendants provided as defendants neither authenticated it nor even showed that it had any relevance to the accident at issue (*see People v Price*, 29 NY3d 472 [2017]). It indicates, at most, that it was raining. Even if it showed, as defendants claim, that the pedestrian cross signal changed as plaintiff was crossing, that would not help defendants, as plaintiff was permitted to proceed across the avenue, once he started crossing

with the signal in his favor (*see* Vehicle and Traffic Law § 1112 [b], [c]; *DiDonna v Houck*, 111 AD3d 662, 663 [2nd Dept 2013]). The remainder of the videotape does not capture the accident so as to raise an issue of fact.

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

ENTERED: JANUARY 25, 2018

CLERK

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

5529 In re Joseph Pascale, Index 154424/16
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

_____

Sokolski & Zekaria, P.C., New York (Greg Caso of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Scott A. Eisman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered September 28, 2016, denying the petition to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated June 19, 2015, which denied petitioner's application for tenancy succession rights, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to timely appeal respondent Southbridge Towers, Inc.'s denial of his application for succession rights (*see* 9 NYCRR 1727-8.4[c] [30-day limit]). He waited until 234 days after he had received Southbridge's second denial letter and nearly three years after the first denial letter. The untimeliness of petitioner's appeal constitutes a failure to

exhaust administrative remedies, which precludes petitioner's subsequent article 78 proceeding (*Matter of Ross v DHCR*, 125 AD3d 434 [1st Dept 2015]).

Petitioner also failed to timely commence this article 78 proceeding, waiting until nearly a year after DHCR issued its final determination (*see* CPLR 217[1] [four-month limit]). Petitioner's claim that he did not receive DHCR's final determination because the determination showed an address for his attorney that was not valid is undermined by the fact that the notice of entry of the determination showed counsel's correct address.

In any event, the stipulation of settlement in the holdover proceeding, which required that the subject apartment be surrendered no later than May 31, 2016, renders this proceeding moot. Petitioner contends that he was not bound by the settlement because the attorney who signed it represented his son only. However, the caption of the proceeding includes both petitioner and his son, and the attorney, who also represented petitioner in his claim for succession rights, entered a notice

of appearance on behalf of petitioner. On its face the stipulation applies to both petitioner and his son, and the attorney signed it on behalf of both of them.

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

ENTERED: JANUARY 25, 2018

CLERK

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

5530 The People of the State of New York, Respondent, Ind. 1084/12

-against-

Rodney Bennett, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 2, 2012, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of six months, unanimously affirmed.

The court properly denied, without granting a hearing, defendant's motion to suppress the fruits of an allegedly unlawful arrest (*see generally People v Mendoza*, 82 NY2d 415 [1993]). The People provided defendant with detailed information about the undercover sale that formed the basis for his arrest. Defendant made, at most, a vague and conclusory denial of his involvement in the alleged sale, and the factual allegations supporting his motion did not address whether his innocent behavior occurred at the time of the crime or at the time of his

subsequent arrest (*see People v Howell*, 2 AD3d 258, 259 [1st Dept 2003], *lv denied* 2 NY3d 800 [2004]; *People v Hernandez*, 283 AD2d 190 [1st Dept 2001], *lv denied* 97 NY2d 641 [2001]).

Defendant did not preserve his claim that he was entitled to a hearing on the suggestiveness of an identification made by an additional undercover officer who was not a party to the drug transaction, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits because the identification at issue (for which the People duly provided CPL 710.30(1)[b] notice) was confirmatory under the principles set forth in *People v Wharton* (74 NY2d 921 [1989]).

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

ENTERED: JANUARY 25, 2018

CLERK

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

5531N In re Sciame Construction LLC, Index 651491/17
Petitioner-Appellant,

-against-

Re:Source New Jersey, Inc.,
Respondent-Respondent.

_____

Pepper Hamilton LLP, New York (Ira M. Schulman of counsel), for appellant.

Poff & Weber LLC, Nanuet (Michael A. Cretella of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 16, 2017, which denied petitioner's petition to permanently stay arbitration, and dismissed this CPLR article 75 proceeding, unanimously affirmed, without costs.

The typewritten terms of the parties' subcontract unambiguously and affirmatively establish an express agreement to arbitrate all disputes (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183-184 [1984]). To the extent any printed riders or exhibits were incorporated into the subcontract by reference, the subcontract's typewritten portions regarding binding dispute resolution "represent an express manifestation of the parties' actual intentions and take precedence over any inconsistent provisions in the printed form[s]" (*Matter of Cale Dev. Co. v Conciliation & Appeals Bd.*, 94 AD2d 229, 234 [1st Dept 1983],

affd 61 NY2d 976 [1984]). Contrary to petitioner's argument, an inconsistency provision in one of the purported exhibits is, by its plain terms, inapplicable to the parties' subcontract; to construe it otherwise would impermissibly rewrite the provision under the guise of contract construction (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 54 [1st Dept 2015]).

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

ENTERED: JANUARY 25, 2018

CLERK