SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 1, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5844 The People of the State of New York, Respondent, Ind. 3855/14

-against-

Daniel Brooks,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered July 28, 2015, convicting defendant, after a jury trial, of criminal contempt in the first degree and aggravated family offense, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

We reject defendant's challenges to the sufficiency of the evidence supporting his contempt conviction. The record supports reasonable inferences that at least a significant portion of the hundreds of calls, frequently containing threatening, hostile and

foul language, that defendant made to the victim in violation of an order of protection, was intended to harass, annoy, threaten, or alarm her, and that these calls were made with no purpose of legitimate communication (*see* Penal Law 215.51[b][iv]; *People v Shack*, 86 NY2d 529, 538 [1995]; *People v Padin*, 121 AD3d 628 [1st Dept 2014, *lv denied* 25 NY3d 1169 [2015])

The count charging aggravated family offense, in which certain misdemeanors are raised to felonies based on prior convictions, was not jurisdictionally defective. The count alleged all the elements of that crime, including that defendant committed a misdemeanor defined in Penal Law § 240.75(2), because it "unmistakably identified the 'specified offense' [second-degree contempt] defendant was alleged to have committed by stating its definition, albeit without identifying it by section number" (*People v Parrilla*, 145 AD3d 629, 629-630 [1st Dept 2016], *lv denied* 29 NY3d 951 [2017]). This count set forth the definition of second-degree criminal contempt under Penal Law § 215.50(3), which is a qualifying misdemeanor under Penal Law §

240.75. Although the only other count in the indictment charged first-degree contempt, a felony, there is no requirement that the "specified offense" relied upon to charge aggravated family offense be independently charged in a separate count.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5845 Mariano Gonzalez, Index 306437/09
Plaintiff-Appellant,

-against-

West 38th Street Development LLC,
et al.,
Defendants-Respondents.

Robert Goodman, P.C., New York (Louis A. Badolato of counsel), for appellant.

The Law Offices of Kenneth Arthur Rigby, PLLC, New York (Kenneth Arthur Rigby of counsel), for respondents.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered July 8, 2016, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment as to liability on his Labor Law § 241(6) claim, unanimously affirmed, without costs.

Regardless to whether plaintiff established a prima facie case for summary judgment, defendants raised an issue of fact in

opposition as to the adequacy of the lighting in the basement at the time of the accident.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5846 The People of the State of New York, Ind. 2607/12
Respondent,

-against-

Larry Morales,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen 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 (Larry Stephen, J., at plea; Patricia Nunez, J., at sentencing), rendered July 9, 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: MARCH 1, 2018

CLERK

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

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5847 Sara Buscemi-Sanz, Index 100207/11
Plaintiff,

-against-

Hudson Meridian Construction Group, LLC, et al.,
Defendants.

- - - - -

Hudson Meridian Construction Group, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

VIS Industries, also known as, VIS Plumbing Heating and Mechanical,
Third-Party Defendant-Appellant.

_____

Bartlett, LLP, Mineola (Douglas Langholz of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Patrice Coleman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 10, 2017, which, to the extent appealed from as limited by the briefs, denied summary judgment dismissing the third-party claims for common-law and contractual indemnification and contribution, and breach of contract, unanimously affirmed, without costs.

Because there is evidence that third-party defendant VIS installed copper piping in the basement apartment where plaintiff tripped, issues of fact exist as to whether the accident arose, in whole or in part, from acts or omissions of VIS.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5848 Alexander Rosario, Index 303220/13
Plaintiff-Respondent,

-against-

Albany Express, et al.,
Defendants-Appellants,

Jose A. Bonilla, et al.,
Defendants.

_____

Shearer PC, Locust Valley (Mark G. Vaughan of counsel), for appellants.

Law Offices of Alexander Bespechny, Bronx (Alexander Bespechny of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura Douglas, J.), entered on or about June 23, 2016, which denied the motion of defendants Albany Express and Dionicio Suarez to dismiss the complaint and all cross claims as against them for want of prosecution and failure to file a note of issue after service of a CPLR 3216 demand, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the motion to dismiss this personal injury action for want of prosecution (*see Espinoza v 373-381 Park Ave. S., LLC*, 68 AD3d 532, 533 [1st Dept 2009]). The record indicates that plaintiff actively litigated his claims against all four defendants, and appeared for a deposition and medical examination. The delay in

completing discovery was primarily due to repeated adjournments of incarcerated defendant Gutierrez's deposition, as requested by his counsel (*see Walker v Gibbons*, 137 AD3d 483 [1st Dept 2016]; *Donegan v St. Joseph's Med. Ctr.*, 283 AD2d 152 [1st Dept 2001]). Any delay by plaintiff in responding to movants' post-deposition demand for medical authorizations does not suggest "an intent to abandon prosecution, persistent neglect on the part of plaintiff, or particular prejudice to defendants" (*Gayle v Body*, ___AD3d___, 66 NYS3d 607, 607 [1st Dept 2018]).

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5849 The People of the State of New York, Respondent, Ind. 4761/14

-against-

Edwin Cruz, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Daniel P. Conviser, J. at jury trial and sentencing), rendered August 25, 2015, convicting defendant of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, tampering with physical evidence and resisting arrest, and sentencing him, as a second felony drug offender, to an aggregate term of 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing court saw and heard the witnesses, and there is no basis for disturbing its credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including those relating to a detective's ability to observe an apparent drug transaction. The

credible testimony established that the detective had probable cause to arrest defendant at the outset of the pursuit (*see e.g. People v Jack*, 22 AD3d 238 [1st Dept 2005], *lv denied* 5 NY3d 883 [2005]). Accordingly, defendant's abandonment of physical evidence was not precipitated by any police illegality.

Defendant's legal sufficiency claims relating to his tampering with physical evidence and resisting arrest convictions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also find that those convictions were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

We have considered and rejected defendant's arguments concerning the court's response to a jury note relating to the resisting arrest charge. In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5850 The People of the State of New York, Ind. 492/11
Respondent,

-against-

Francisco Mendoza,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered April 3, 2013,

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

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

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

ENTERED: MARCH 1, 2018

CLERK

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

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5851 In re Darryl Smith, Index 102079/15
Petitioner-Appellant,

-against-

New York City Department of Buildings,
Respondent-Respondent.

_____

Casella & Casella, LLP, Staten Island (Ralph P. Casella of counsel), for appellant.

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

_____

Judgment (denominated an order), Supreme Court, New York County (Barbara Jaffe, J.), entered July 13, 2016, denying the petition to annul a final determination of respondent, which denied petitioner's application for a master plumber's license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination that petitioner failed to supply satisfactory proof of at least seven years of total experience under the direct and continuing supervision of a licensed master plumber within the previous 10 years, with at least two years in plumbing design and installation while a registered journeyman plumber (*see* Administrative Code of City of NY §§ 28-408.3.1[4], 28-409.1), had a rational basis and was not arbitrary and

capricious (*see Matter of Krasniqi v Department of Citywide Admin. Servs.*, 105 AD3d 590 [1st Dept 2013]; *Matter of Rasole v Department of Citywide Admin. Servs.*, 83 AD3d 509 [1st Dept 2011]). The record shows that petitioner only had four years of plumbing experience supervised by a licensed master plumber. Furthermore, petitioner admits that he did not obtain his journeyman's registration card until October 2012, and as Supreme Court held, this fact alone supports denial of his application. Petitioner's argument that the journeyman registration requirement itself is irrational is unpreserved, since petitioner did not raise it before the agency or in his article 78 petition (*see Gregory v Town of Cambria*, 69 NY2d 655, 656-657 [1986]), and, in any event, is unavailing.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5852 Kelly Cabral, et al., Index 800254/11
Plaintiffs-Respondents,

-against-

Joshua Stern, M.D., et al.,
Defendants,

Anthony Aizer, M.D., et al.,
Defendants-Appellants.

_____

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered June 6, 2016, which, to the extent appeal from, denied the motion of defendants Anthony Aizer, M.D. and New York University Medical Center (Hospital) for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to dismiss the claim for lack of informed consent, and otherwise affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by submitting evidence showing that Dr. Aizer did not depart from good and accepted medical practice in the performance of two cardiac ablation procedures on plaintiff Kelly Cabral. Plaintiffs' opposition, including the opinions of experts, raised

triable issues of fact as to whether Kelly's preexisting condition of Factor V Leiden required a smaller catheter than was used during the procedure, whether post-procedure Doppler studies should have been conducted to rule out deep vein thrombosis, and whether there should have been a longer time frame with greater physical activity between procedures (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). Triable issues also exist as to Dr. Aizer's employment status at the hospital and whether the Hospital could be vicariously liable for Dr. Aizer's actions.

Defendants are, however, entitled to summary judgment dismissing plaintiffs' claim for lack of informed consent, as plaintiffs did not show that there is any issue of fact in this regard.

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

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5853 In re Baldev Singh, Index 102037/16
Petitioner,

-against-

NYC Taxi & Limousine Commission,
Respondent.

_____

Chhetry & Associates, P.C., New York (Khagendra Gharti-Chhetry of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Arron M. Bloom of counsel), for respondent.

_____

Determination of respondent New York City Taxi and Limousine Commission (TLC), dated December 8, 2016, which, after a hearing, revoked petitioner taxicab driver's license upon a finding that he threatened a passenger following a fare dispute, and imposed a $1,350 fine, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Arlene P. Bluth, J.], entered on or about April 4, 2017), dismissed, without costs.

Substantial evidence supports a finding that petitioner threatened and harassed a passenger where the passenger's testimony and security video footage demonstrated that petitioner shouted sexual threats at the passenger, and chased her through

the building's lobby while screaming obscenities, forcing her to hide in fear. The hearing officer credited the complaining witness's documentary evidence and testimony, and such determination is "largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures—all the nuances of speech and manner that combine to form an impression of either candor or deception" (*Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420 [1st Dept 2013] [internal quotation marks omitted]).

Petitioner contends that the complaining witness did not pay his fare; however, regardless of payment, the facts of his conduct, standing alone, support a finding that petitioner engaged in acts of harassment and "against the best interests of the public" (35 RCNY § 54-12(e) and (f)).[1] Under these circumstances, and the fact that in two unrelated 2015 incidents, petitioner also cursed at a passenger over a fare disagreement, all of which demonstrate a threat to public safety or breach of the public trust, the penalty of revocation does not shock the

[1]The regulations were repealed and recodified subsequent to the petition, in that 35 RCNY § 54-12 became 35 RCNY § 80-12 (d), (e) and (f). The repeal and recodification were not retroactive and have no effect on this case.

conscience (*see Matter of Bautista v City of New York*, 81 AD3d 472, 473 [1st Dept 2011] [lewd behavior]; *Matter of Mankarios v New York City Taxi & Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008] [verbal abuse and use of physical force]; *Matter of Arif v New York City Taxi & Limousine Commn.*, 3 AD3d 345, 346 [1st Dept 2004] [refused service]; *Matter of Fernandez v New York City Taxi & Limousine Commn.*, 193 AD2d 423, 423 [1st Dept 1993] [harassment, sexual comments, grabbed the breast of passenger]).

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5854 The People of the State of New York, Respondent, Ind. 4263/14

-against-

Michael Beaudette, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Eduardo Padro, J. at plea; Patricia Nunez, J. at sentencing), rendered January 14, 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: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5855 Rou Dong Yee, et al., Index 153032/12
Plaintiffs-Appellants,

-against-

Deluxe Meat Market Inc., et al.,
Defendants-Respondents.

_____

Law Offices of Wade T. Morris, New York (Kenneth J. Gorman of counsel), for appellants.

Gallo Vitucci Klar LLP, New York (Chad E. Sjoquist of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about June 1, 2016, which granted defendants' motion for summary judgment dismissing the complaint, and denied as moot plaintiffs' cross motion for spoliation sanctions, unanimously reversed, on the law, without costs, defendants' motion denied, and the matter remanded for a determination of plaintiffs' motion.

Plaintiff Rou Dong Yee seeks damages for injuries she sustained when she slipped and fell on the wet floor of the fish department of defendants' market. The record presents issues of fact whether defendants maintained the area in a reasonably safe condition under the circumstances (*see e.g. Grossman v TCR*, 142 AD3d 854 [1st Dept 2016], *appeal dismissed* 28 NY3d 1110 [2016]).

Plaintiffs' motion for sanctions for defendants' alleged failure to turn over any available surveillance video recorded on the date of the accident should be decided by the motion court in the first instance.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5856 In re Serena Abbitt, Index 101678/15
Petitioner-Appellant,

-against-

Michael Carrube, etc., et al.,
Respondents-Respondents.

_____

The Law Offices of Fausto E. Zapata, Jr., P.C., New York (Michael Coviello of counsel), for appellant.

Koehler & Isaacs, New York (Howard Wien of counsel), for Michael Carrube, Keith Blair, Patric Beauford, Thomas Cummings and Subway Surface Supervisors Association, respondents.

James B. Henly, Brooklyn (Kathryn E. Martin of counsel), for Christopher Johnson, respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 7, 2016, which, in this hybrid CPLR article 78 proceeding and plenary action, denied the petition to annul the determination of respondent Subway Surface Supervisors Association (SSSA or the union), dated January 8, 2016, upholding the recommendation of the union's trial committee that petitioner be removed from her elected position as Section Vice President, dismissed the proceeding, and granted defendants' motions to dismiss the libel claims, unanimously affirmed, without costs.

SSSA represents employees of the New York City Transit Authority (NYCTA) in various titles. Petitioner seeks to annul

SSSA's removal of her from an elected position and from an appointed position, and asserts libel claims against SSSA, its president, the chairperson and members of its trial committee, and the Senior Vice President of NYCTA's Office of Labor Relations.

SSSA's removal of petitioner from her elected position is consistent with its constitution and is rational and not arbitrary and capricious (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Petitioner's June 17, 2015 email to several NYCTA officials and her persistent use of personal business cards, email address, and cell phone number, despite directions to use those provided by SSSA, constitute a disregard for respondent union president Michael Carrube's directions and disloyalty to the union (*see Matter of Berich v Ithaca Police Benevolent Assn., Inc.*, 23 AD3d 904 [3d Dept 2005]; *see also Matter of Holmes v United Mut. Life Ins. Co.*, 286 App Div 500, 502 [1st Dept 1955], *affd in part, appeal dismissed in part* 2 NY2d 1001 [1957]).

The record demonstrates that petitioner was not prejudiced by the notice she received with respect to her removal from her elected position (*see Costanzo v Long Is. Bd. of Realtors*, 143

AD2d 625, 626 [2d Dept 1988]). She was provided with the requisite notice of the charges and an opportunity to be heard, and she fully participated in the hearing, at which she was represented by counsel and at which the charges were clarified. Petitioner failed to identify anything in SSSA's constitution that supports her contention that she is entitled to the same due process protections with respect to her appointed position.

The libel claim against SSSA was correctly dismissed since absolute immunity from liability for libel attaches to the trial committee's charges initiating the quasi-judicial proceedings against petitioner (*Wiener v Weintraub*, 22 NY2d 330 [1968]; *Sullivan v Board of Educ. of Eastchester Union Free School Dist.*, 131 AD2d 836, 839 [2d Dept 1987]) and to the hearing officer's decision (*Harms v Riordan-Bellizi*, 223 AD2d 624, 625 [2d Dept 1996]).

The libel claim against Carrube was correctly dismissed, since the alleged libelous statement, that petitioner violated the chain of command, is at least substantially true (*see Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94 [1st Dept 2015]). Carrube's use of the words "unethical" and "detrimental to the members" to describe petitioner's behavior is an expression of pure opinion and is supported by a factual

predicate (*see Steinhilber v Alphonse*, 68 NY2d 283, 289 [1986]; *Silsdorf v Levine*, 59 NY2d 8, 13–14 [1983], *cert denied* 464 US 831 [1983]).

The libel claim against respondent NYCTA Senior Vice President of Labor Relations Christopher Johnson arises from statements that Johnson made in an email to Carrube about the nature of the relationship between NYCTA's Office of Labor Relations and SSSA and the need for "mutual cooperation" and "respect" between them. Johnson's use of words such as "inappropriate," "disrespect," and "intimidation" to characterize petitioner's conduct is an expression of his opinion of her performance and its effect on SSSA's relationship with NYCTA, and, considered in the context of the entire email, including its tone and purpose, is not actionable (*see Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380 [1977], *cert denied* 434 US 969 [1977]; *Frechtman v Gutterman*, 115 AD3d 102, 105 [1st Dept 2014]). The only factual statement in Johnson's email that petitioner challenges was made to someone with a common interest in the subject matter and is therefore protected by a qualified privilege (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]). Petitioner's allegation of malice on Johnson's part is conclusory and therefore insufficient to overcome the privilege (*see Green v*

Combined Life Ins. Co. of N.Y., 69 AD3d 531 [1st Dept 2010]).

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: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5857 The People of the State of New York, Ind. 4840/13
Respondent,

-against-

Winnis Brito,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Michael J. Obus, J. at plea and sentencing), rendered December 4, 2014, convicting defendant of criminal possession of a weapon in the second degree and sentencing him to a term of four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression and sentencing claims. The plea court's oral colloquy with defendant concerning the waiver, which avoided conflating the right to appeal with the rights normally forfeited upon a guilty plea, met or exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). Furthermore, after consulting with counsel, defendant also signed a written waiver that supplemented the oral waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, we reject his suppression and sentencing claims. The police conducted a lawful protective sweep of an apartment while executing a bench warrant for another person, and frisked defendant based on reasonable suspicion. The record fails to support defendant's claim that the sentencing court misunderstood the lawful scope of sentencing, and we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5858 In re Deryck V.J., Jr.,

A Child under Eighteen Years
of Age, etc.,

Deryck T.J., Sr.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

_____

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

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Appeal from order, Family Court, New York County (Clark V. Richardson, J.), entered on or about March 27, 2017, which, to the extent appealed from as limited by the briefs, found that respondent father permanently neglected the subject child, unanimously dismissed, without costs.

The father's appellate arguments are not properly before this Court. Although the appeal is from the March 27, 2017 dispositional order, both appellate arguments are addressed to determinations made at the fact-finding stage. The father, however, never appeared at the fact-finding hearing and his

motion to vacate the fact-finding determination entered on his default was denied by the court. No appeal lies from an order entered on default (*see* CPLR 5511; *Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403 [1st Dept 2016]; *Matter of Darryl P.*, 228 AD2d 176 [1st Dept 1996]), and the father failed to appeal from the order denying his motion to vacate the default.

Were we to consider the father's claims, we would find that he presents no grounds to reverse. The issue of deprivation of counsel, raised for the first time on appeal, is not preserved (*see Matter of Derrick T.*, 261 AD2d 108 [1st Dept 1999]), and even if it were, he has not shown that he was deprived of such right by commencement of the hearing before his counsel arrived. The record shows that it was the father's own failure to appear and maintain contact with counsel that precluded counsel's participation at the hearing.

The record further shows that petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship between the father and the child. However, the father lacked interest in and failed to cooperate with the services to which petitioner referred him when he was not incarcerated, and he refused to sign relevant consents to enable the agency to monitor his receipt of services while he was

incarcerated. Furthermore, petitioner arranged for the child to visit the father while he was incarcerated at Rikers Island, and also adequately demonstrated that arranging for visitation once the father was transferred from Rikers Island to a correctional facility 10 hours away was not in the child's best interests. The child suffers from chronic asthma for which he has been hospitalized, and petitioner's caseworkers testified that they received advice from a physician that such travel was not medically advisable (*see* Social Services Law § 384-b[7][f][3], [5]); *Matter of Hope Linda P. [Cassandra P.]*, 140 AD3d 477 [1st Dept 2016]; *Matter of Jayson M.*, 177 AD2d 396 [1st Dept 1991]).

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5861 The People of the State of New York, Respondent, Ind. 2098/12

-against-

Carlos Bonilla, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Order, Supreme Court, Bronx County (James M. Kindler, J.), entered on or about April 24, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The felony complaint and case summary provided clear and convincing evidence supporting an assessment of points for a continuing course of sexual misconduct (*see People v Balic,* 12 NY3d 563, 576-577 [2009]). The court also correctly assessed points for a second victim. Defendant's conduct with the additional victim was clearly for the purpose of sexual gratification, when viewed in the context of defendant's contemporaneous course of conduct toward the first victim.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's age and health problems did not warrant a conclusion that he was unlikely to reoffend (*see e.g. People v Diaz*, 143 AD3d 552, 553 [1st Dept 2016]), and these alleged mitigating factors were outweighed in any event by the seriousness of defendant's offenses against children.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5862 The People of the State of New York, Respondent, Ind. 2897/10

-against-

Ponce Lopez, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Tomoeh Murakami-Tse of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 17, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately accounted for by the risk assessment instrument, and were in any event outweighed by the seriousness of the underlying crime. The fact that the victim's lack of consent was solely based on her age does not warrant a departure here, particularly

because the crime occurred when defendant was 43 years old and the victim was 13 (*see People v Mendoza*, 123 AD3d 417 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]); *People v James*, 103 AD3d 588 [1st Dept 2013], *lv denied* 21 NY3d 856 [2013]).

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5863-
5864-
5865 Index 652721/14

FCRC Modular, LLC, et al.,
Plaintiffs-Respondents,

-against-

Skanska Modular LLC, et al.,
Defendants-Appellants.

- - - - -

Skanska Modular LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Forest City Ratner Companies, LLC, et al.,
Third-Party Defendants-Respondents.

- - - - -

Berlin Rosen Ltd., et al.,
Nonparty Respondents.

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Peckar & Abramson, P.C., New York (Bruce Meller of counsel), for appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Harold P. Weinberger of counsel), for FCRC Modular, LLC, FC Modular, Forest City Ratner Companies, LLC and Forest City Enterprises, Inc., respondents.

Montgomery McCracken Walker & Rhoads LLP, New York (Charles Palella of counsel), for Berlin Rosen Ltd., respondent.

DLA piper (US), New York (Joseph Alonzo of counsel), for Greenland US Holding, Inc., respondent.

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Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 8, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiffs' and third-party

defendants' motion to dismiss the counterclaims and third-party claims under CPLR 3211(a)(1) and (7), and denied as moot defendants/third-party plaintiffs' (appellants) motion to hold nonparties Berlin Rosen Ltd. and Greenland US Holding, Inc. in civil contempt for failure to respond to a subpoena duces tecum, unanimously affirmed, without costs. Order, same court and Justice, entered September 5, 2017, which, among other things, denied appellants' motion, made pursuant to CPLR 2221(e) and 5013(a)(3), for leave to renew and vacate the orders entered August 8, 2016, unanimously affirmed, without costs.

The motion court correctly dismissed appellants' counterclaims and third-party claims for breach of the Limited Liability Company Agreement (LLC Agreement) between plaintiff FCRC Modular, LLC (FCRC Modular) and defendant/third-party plaintiff Skanska Modular LLC (Skanska Modular). Initially, we reject appellants' veil-piercing arguments and decline to treat plaintiffs and third-party defendants as alter egos of each other (*see Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12-13 [1st Dept 2016]). Further, the Opportunity Brief, a business proposal or brochure, was at most a nonbinding offer to enter into a joint venture, and insufficient to form the basis of a breach of contract claim (*see* Restatement [Second] of

Contracts § 26 [no binding offer created by proposal when parties intend "further manifestation of assent" in the future]; *Aksman v Xiongwei Ju*, 21 AD3d 260 [1st Dept 2005], *lv denied* 5 NY3d 715 [2005]).

Further, § 2.11 of the Construction Management and Fabrication Services Agreement (CM Agreement) did not incorporate extracontractual representations into the agreement so as to give rise to a breach of contract claim by Skanksa Modular. By its plain terms, § 2.11 permits nonparty Skanska USA Building Inc. (Skanska USA), not Skanska Modular, to rely upon "information supplied to it by or on behalf of Owner and its Affiliates." In addition, § 2.11, read as a whole, was intended to excuse Skanska USA from liability arising from design deficiencies, not to provide a means for it to sue for breach of contract. Moreover, the merger clause in the CM Agreement bars breach of contract claims based on extracontractual promises (*see ESG Capital Partners II, LP v Passport Special Opportunities Master Fund LP*, 2015 WL 9060982, *11-15, 2015 Del Ch LEXIS 302, *34-45 [Del Ch 2015]; *Kindler v Newsweek, Inc.*, 277 AD2d 159, 159-160 [1st Dept 2000]).

Even assuming there is an ambiguity in the CM Agreement, nothing in the LLC Agreement indicated that the provisions in the

CM Agreement were to be fully incorporated into the LLC Agreement. To the extent appellants rely on the contracts' negotiation history, parol evidence is unnecessary where, as here, the contract terms are unambiguous (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]; *Salamone v Gorman*, 106 A3d 354, 374-375 [Del 2014]). We have reviewed the arguments related to other subparts of the breach of contract claims and find them unavailing.

Appellants failed to state a claim for anticipatory repudiation of §§ 3.1(b) and (c) of the LLC Agreement, which committed FC+Skanska Modular, LLC (FC+Skanska) (now known as plaintiffs) to enter into contracts for modular work on B3 and B4 towers, as appellants failed to plead any act of repudiation on the part of FC+Skanska. On appeal, appellants argue only that third-party defendants should be held liable under an alter ego theory. As discussed, we reject this theory of liability.

Appellants also failed to state claims for fraudulent and negligent misrepresentation. Even assuming appellants have pleaded the claims with sufficient particularity, the representations in the Opportunity Brief were opinion and puffery, and therefore insufficient to support a fraud claim (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000];

Airborne Health, Inc. v Squid Soap, LP, 2010 WL 2836391, *8, 2010 Del Ch LEXIS 150, *19-20 [Del Ch, July 20, 2010, No. 4410-VCL]). Further, the misrepresentations were not made to Skanska Modular, but to nonparty Skanska USA. Moreover, appellants failed to allege a "special relationship" between third-party defendant Forest City Ratner Companies, LLC (Forest City) and Skanska USA; rather, the allegations show that the parties were engaged in an arms-length transaction at the time of the transmission of the Opportunity Brief (*see Basis Pac-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 124 AD3d 538, 539 [1st Dept 2015]; *Fortis Advisors LLC v Dialog Semiconductor PLC*, 2015 WL 401371, *9, 2015 Del Ch LEXIS 22, *28-29 [Del Ch, Jan. 30, 2015, No. 9522-CB]).

Appellants do not have a claim for promissory estoppel, as the LLC Agreement already governs the obligations underlying the claim (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Siga Technologies, Inc. v PharmAthene, Inc.*, 67 A3d 330, 348 [Del 2013]). To the extent appellants argue that Forest City could still be held liable for the alleged promises, as it was not a party to the LLC Agreement, the representations in the Opportunity Brief were made to Skanska USA, not Skanska Modular.

Appellants have not demonstrated entitlement to contractual indemnification under § 16.1 of the LLC Agreement, which requires

FCRC Modular to indemnify Skanska Modular for losses arising from "any breach of, or any failure to perform or comply with, any of such Member's representations, warranties and covenants contained in this Agreement." Appellants failed to allege breach of any provision governing FCRC Modular's obligation to negotiate a collective bargaining agreement. Nothing in the LLC Agreement required FCRC Modular to negotiate a term to afford FC+Skanska the ability to furlough employees.

Appellants failed to state a claim for libel. The challenged statement in a press release regarding defendant/third-party plaintiff Kennedy is protected by section 74 of the Civil Rights Law. As the press release merely "restate[d] the allegations of the complaint" (*McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]), the basis for which Kennedy does not dispute, the reporting is "fair and true" (*id.* [internal quotations marks omitted]; *Lacher v Engel*, 33 AD3d 10, 17 [1st Dept 2006]). Kennedy's allegations of malice are conclusory and insufficient to invoke the exception in *Williams v Williams* (23 NY2d 592 [1969]).

Given the foregoing, the motion court properly denied, as moot, appellants' motion for orders of contempt against Berlin Rosen and Greenland.

The motion court providently exercised its discretion in denying appellants' motion for renewal of the August 2016 orders. Skanska Modular has not set forth "reasonable justification" for its failure to submit the emails, which were in its possession, at the time of the prior motion (CPLR 2221[e][3]; *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. [USA] LLC*, 114 AD3d 432 [1st Dept 2014]). In any event, the emails would not "change the prior determination" (CPLR 2221[e][2]), as the negotiation history of the contracts is inadmissible where the contract language is unambiguous (*see W.W.W. Assoc.*, 77 NY2d at 163; *Salamone*, 106 A3d at 374-375).

The motion court properly denied appellants' motion to vacate the August 16 orders (*see* CPLR 5015[a][3]), as neither plaintiffs nor the third-party defendants misrepresented the record or made false arguments.

Leave to replead was also properly denied, as appellants failed to set forth any proposed amendments that would cure the present deficiencies (*see Seven Seventeen Corp. v JP Morgan Chase & Co.*, 32 AD3d 802, 802 [1st Dept 2006]).

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Friedman, Richter, Kapnick, JJ.

5866N K.B., etc., et al., Index 350067/12
Plaintiffs-Appellants,

-against-

SCO Family of Service,
Defendant-Respondent,

K.D.,
Defendant.

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Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered November 17, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion seeking an order directing defendant SCO Family of Service (SCO) to produce the infant plaintiff's foster care records without redactions except to protect the identities of other foster children and their families, and copies of Administration for Children's Services' (ACS) records concerning its investigation of the infant plaintiffs' placement in the foster care home of defendant Dixon, unanimously reversed, on the law, without costs, plaintiffs' motion granted, and SCO is directed to produce the foster care records without redaction, except to remove the names of other

foster children and their families, if any, and to produce the ACS investigative file, or an affidavit of a person with knowledge stating that the ACS file is not in SCO's possession.

Plaintiff mother seeks discovery of the infant plaintiffs' foster care records in pursuit of her claims that SCO negligently certified the individual defendant as a foster parent, and failed to properly supervise the foster home. Pursuant to Social Services Law § 372(1), SCO was required to maintain records while the children were in foster care. Those records are confidential, but are discoverable pursuant to article 31 of the CPLR (Social Services Law § 372[3]). The statutory confidentiality requirement is intended to protect the privacy of children in foster care and their natural parents (*Matter of Louis F.*, 42 NY2d 260, 264 [1977]; *Sam v Sanders*, 55 NY2d 1008 [1982]), not to prevent former foster children from obtaining access to their own records.

When a former foster child "seeks her own records, so she can further her own suit against the defendant custodian of those records, who would otherwise have unequal access to them" (*Wheeler v Commissioner of Social Servs. of City of N.Y.*, 233 AD2d 4, 11-12 [2d Dept 1997]), she is "presumptively entitled to her own records" and "only a powerfully compelling showing would

justify the court in potentially restricting" her access to the records (*id.* at 12).

In this case, the court properly undertook in camera review of the foster care records to ensure that no private information of nonparties would be disclosed. However, the court erred in determining that the identities of ACS caseworkers, mental health professionals and other professionals should be redacted. Plaintiffs sought access to those witnesses to determine whether they had any relevant knowledge, and SCO did not articulate any privacy interests of those professionals that would warrant redacting their names from the foster care records. Accordingly, plaintiffs are entitled to receive the infant plaintiffs' foster care records from SCO without redactions, except to the extent indicated.

The court had previously determined that both plaintiffs and SCO were entitled to subpoena investigative records from ACS.

Plaintiffs had difficulty obtaining the records from ACS and asked SCO to produce them, if it had obtained a copy itself. This was a proper request and should have been granted.

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

ENTERED: MARCH 1, 2018

CLERK

Friedman, J.P., Richter, Gische, Gesmer, JJ.

3805 Zurich American Ins. Company, et al., Index 110805/09
Plaintiffs-Appellants,

-against-

Tower National Insurance Company,
Defendant,

Port Richmond Glass & Storefronts Inc., etc.,
Defendant-Respondent.

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White Fleischner & Fino, LLP, New York (Alexandra E. Rigney of counsel), for appellants.

Marshall, Conway & Bradley P.C., New York (Lauren R. Turkel of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered March 9, 2016, which granted defendant Port Richmond Glass & Storefronts, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff General American Investors Company, Inc. (GA) is a lessee at a building owned by nonparty SLG 100 Park LLC (SLG). GA retained plaintiff Aragon, LLC (Aragon) as the general contractor for a construction project to be performed at GA's premises. Aragon, in turn, subcontracted with defendant Port Richmond Glass & Storefronts, Inc. (Port Richmond) to install glass doors and partitions for the project. On December 14,

2007, Don Brown, an employee of Port Richmond, was injured when several sheets of glass fell upon him, knocking him to the ground.

Brown commenced an action against Aragon and SLG for common-law negligence and violations of the Labor Law (the underlying action); third-party actions were brought naming GA and Port Richmond. The case proceeded to trial, where the jury returned a verdict against Aragon, found Brown 50% at fault, and assessed damages of approximately $1,000,000. The trial court subsequently set aside the verdict as to Aragon's liability, and Brown appealed. The case was ultimately settled during a preargument conference in this Court for the sum of $465,000 payable by Aragon and its insurer, plaintiff Zurich American Insurance Company.

Plaintiffs commenced this action against Port Richmond and its insurer alleging, as relevant here, that Port Richmond breached its contractual obligation to indemnify and procure insurance for Aragon and GA. Plaintiffs seek reimbursement for the settlement amount, as well as attorneys fees paid during the underlying action. The motion court dismissed the complaint as against Port Richmond and this appeal ensued. We now reverse.

It is well settled that "where an indemnitor does not

receive notice of an action settled by the indemnitee, in order to recover reimbursement [for the settlement], [the indemnitee] must establish that [it] would have been liable and that there was no good defense to the liability" (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 AD3d 32, 39 [1st Dept 2010] [internal quotation marks omitted]; *see Feuer v Menkes Feuer, Inc.*, 8 AD2d 294, 299 [1st Dept 1959]). Conversely, "[w]here the indemnitor does receive notice of the claim against the indemnitee, . . . the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make" (*Deutsche Bank* at 39 [internal quotation marks omitted]). As to notice, "'[i]t is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense'" (*id.* at 42, quoting *Oceanic Steam Nav. Co. [Ltd.] v Campania Transatlantica Espanola*, 144 NY 663, 665 [1895]).

Applying these principles, we find that the motion court improperly dismissed the indemnification claim. The subcontract plainly requires indemnification for claims arising out of Port Richmond's work on the construction project. On appeal, Port Richmond does not argue that Brown's injuries did not arise from

its work. Instead, Port Richmond contends that because the underlying action was dismissed against Aragon, plaintiffs cannot establish Aragon's liability for those injuries. However, where notice is given, the indemnitee need not establish its own liability for the underlying claim (*see Deutsche Bank*, 74 AD3d at 34). There is no dispute that Port Richmond had notice of the underlying action as well as the settlement negotiations in this Court. Although Port Richmond contends that it was asked to leave the room prior to the time the settlement was reached, that allegation was made in a reply affirmation below and cannot properly be considered. In any event, even if true, it would not entitle Port Richmond to judgment as a matter of law. Nor has Port Richmond shown as a matter of law that the settlement was unreasonable or not made in good faith.

The court should not have dismissed the insurance procurement claim. Port Richmond contends that it was not required to procure insurance for GA because GA was not the owner of the building. Although GA is not named as the owner in the subcontract, the prime contract, which is referenced in the subcontract, lists GA as "Owner." With respect to Aragon, Port Richmond maintains that the requisite coverage was obtained. However, Aragon contends that the insurer never assumed Aragon's

defense, has not paid any of Aragon's defense costs and has refused to pay any amount toward the settlement. It is unclear from the record whether or not the insurer has actually disclaimed coverage and, if so, on what basis. Thus, issues of fact exist as to whether the insurance coverage purportedly procured by Port Richmond satisfied its contractual obligation (*see Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 644 [1st Dept 2013]).

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

ENTERED: MARCH 1, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5828 In re Ty'Nayshia H.,

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

Monique P.,
Respondent-Appellant,

Heartshare St. Vincent Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Wingate, Kearney & Cullen, LLP, Brooklyn (Richard J. Cea of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Sara H. Reisberg of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Emily Olshansky, J.), entered on or about October 21, 2016, which granted petitioner agency's motion for summary judgment, terminated respondent mother's parental rights to the subject child on the ground that she suffers from an intellectual disability as defined in section 384-b(6)(b) of the Social Services Law (SSL), and committed custody and guardianship of the child to the agency and the Commissioner of Social Services, unanimously affirmed, without costs.

The agency established that the mother has an intellectual disability as defined in SSL § 384-b(6)(b). The agency submitted

the sworn testimony of the court-appointed psychologist at a prior proceeding involving the termination of the mother's parental rights to two of her other children; the clinical report prepared in connection with the psychologist's evaluation of the mother at the prior proceeding; and the court's findings of fact, conclusions of law and order of commitment in the prior proceeding. The evidence was entered without objection, and the order in the prior proceeding was issued just ten days prior to the filing of the instant summary judgment motion. The court-appointed psychologist testified that the mother has a developmental disability marked by deficits in cognitive and adaptive functioning that is not expected to appreciably remit, and that if her children were returned to her care, they would be at risk of becoming neglected children (*see* SSL § 384-b[6][b], [c]).

In opposition, the mother contends that summary judgment was not appropriate because she was accepted for homemaking services shortly after the court terminated her parental rights to her sons, and thus, a hearing was required to determine her parenting capacity with such assistance. However, the court-appointed psychologist expressly stated that "considering [the mother's] own parental functioning," long-term supportive services would

not change her conclusion regarding the mother's intellectual disability and its affect on her ability to care for her children.

Given the evidence showing that the mother's cognitive and adaptive deficits affected her parental functioning in a severe enough manner that any child in her care would be at risk, let alone one with such severe special needs as the subject child, no material issue of fact existed for the court to consider; thus, summary judgment was properly granted (*see Matter of Hope P. [Stephanie B.]*, 149 AD3d 947, 948 [2d Dept 2017]; *see also Matter of Phoenix J. [Kodee J.]*, 129 AD3d 603 [1st Dept 2015]).

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: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5867 The People of the State of New York, Ind. 2197/14
Respondent,

-against-

Azeez Powell,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at motion to preclude conviction; Michael R. Sonberg, J. at plea and sentencing), rendered August 24, 2015, convicting defendant of persistent sexual abuse, and sentencing him to a term of 1½ years, unanimously affirmed.

Defendant was not entitled, within this criminal proceeding, to challenge the constitutionality of a prior conviction that was used to elevate the charge to persistent sexual abuse (*see People v Knack*, 72 NY2d 825 [1988]). Defendant, who asserts that the record of his prior plea establishes its unconstitutionality, could have moved to withdraw that plea, or he could have taken and perfected a timely appeal. The fact that those opportunities were no longer available at the time of the present prosecution

does not entitle defendant to the creation of a new procedural device.

Defendant did not preserve his contention that, in the present case, he was misinformed about the permissible sentencing range, and that the court and counsel were likewise misinformed (*see People v Conceicao*, 26 NY3d 375 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that this claim is unsupported by the record, which indicates that the court had no intention of imposing anything but a prison sentence, and that any mention of defendant receiving the "minimum" sentence referred only to the minimum available prison sentence.

We do not perceive the agreed upon sentence to be excessive.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5868-
5869 Index 653921/13

Emmet Austin, et al.,
Plaintiffs-Appellants,

-against-

Jonathan Gould, et al.,
Defendants-Respondents.

_____

Law Office of Edward J. Boyle, Manhasset (Edward J. Boyle of counsel), for appellants.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Daniel G. Lyons of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 20, 2017, which granted defendants' motion to dismiss the summons and complaint pursuant to CPLR 3216, and denied plaintiffs' cross motion for an extension of time to file a note of issue, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 11, 2017, which denied plaintiffs' motion to reargue the January 20, 2017 order, unanimously dismissed, without costs, as taken from a nonappealable order.

"When served with a 90-day demand pursuant to CPLR 3216, it is incumbent upon a plaintiff to comply with the demand by filing a note of issue or by moving, before the default date, to either vacate or extend the 90-day period" (*Primiano v Ginsberg*, 55 AD3d

709, 709 [2d Dept 2008]; *Serby v Long Is. Jewish Med. Ctr.*, 34 AD3d 441 [2d Dept 2006], *lv denied* 8 NY3d 805 [2007]).

The court properly found that plaintiffs failed to provide a justifiable excuse for failing to file a note of issue or request an extension of time within 90 days of the date they admitted receiving the demand letter, May 16, 2016. Their cross motion was filed on August 19, 2016, three days too late (*see Umeze v Fidelis Care N.Y.*, 17 NY3d 751 [2011]).

Plaintiffs assert that they did not timely file the note of issue because they required further discovery. However, the court noted that on March 30, 2016, the date plaintiffs were ordered to file the note of issue, there was no indication that they claimed discovery was still outstanding (other than a deposition which took place in April 2016 as per the parties' stipulation). The record is devoid of evidence of any attempts by plaintiffs to avail themselves of available remedies for defendants' alleged noncompliance with discovery.

In any event, plaintiffs' motion was properly denied since the alleged error by the court as to the date of their receipt of

the 90-day demand letter did not affect its finding that plaintiffs failed to provide a justifiable excuse for failing to timely file their cross motion for an extension of time and that they lacked a meritorious claim.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5870- Ind. 239/15
5871 The People of the State of New York, 490/15
Respondent,

-against-

Tyheeme Reape,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Abraham Clott, J.), rendered February 24, 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: MARCH 1, 2018

CLERK

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

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5873-
5873A-
5873B-
5874 In re Ivahly M., and Others,

Children Under Eighteen Years
of Age, etc.,

Jennifer L.,
Respondent-Appellant,

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

_____

Steven N. Feinman, White Plains, for appellant.

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

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

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Orders of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about March 13, 2017, to the extent they bring up for review a fact-finding order, same court and Judge, entered on or about February 8, 2017, which found that the mother neglected Aiden and Victor, and derivatively neglected Avah, Ivahly, and Royal, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the orders of disposition.

Family Court's neglect finding against the mother based on her infliction of excessive corporal punishment on Aiden and Victor is supported by a preponderance of the evidence (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498 [1st Dept 2009]). The children's out-of-court statements that the mother had used excessive corporal punishment against them, on more than one occasion, including that the mother had punched Aiden in the face, causing him to become unconscious, and left a bruise on his forehead, were cross-corroborated by each others' statements, by their statements to agency caseworkers and to the maternal grandmother, and by the caseworker's and maternal grandmother's observations of bruises, as well as a one-inch laceration on Aiden's upper lip, which he stated was caused by the mother punching him (*see Matter of Tiara G. [Cheryl R.]*, 102 AD3d 611 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013]).

The court, in its discretion and in light of the credible evidence, properly rejected the mother's denials of excessive corporal punishment, and we find no basis to disturb the credibility determinations on appeal (*see Matter of Frantrae W.*, 45 AD3d 412, 413 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]).

The finding of neglect warranted a finding of derivative neglect as to the subject children Ivahly, Avah and Royal (*see Matter of Jasmine B.*, 66 AD3d 420 [1st Dept 2009]).

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: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5875 The People of the State of New York, Ind. 5603/10
Respondent,

-against-

Nolber Quinones,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Order, Supreme Court, New York County (Michael R. Sonberg, J.), entered on or about December 18, 2015, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We reject defendant's argument that 15 points should be deducted from his point score based on the People's violation of the 10-day notice provision of Correction Law 168-n(3), or that any further proceedings are necessary. The court provided a sufficient remedy when it offered defendant an adjournment for further preparation (*see People v Lucas*, 118 AD3d 415 [1st Dept 2014]), an offer that was declined. Defendant's contention that an adjournment would have interfered with his conditional release

from prison is speculative (*compare People v Cruz*, 132 AD3d 554 [1st Dept 2015] [defendant *actually* overdue for release]). In any event, the omission of the additional 15 points from the original risk assessment instrument was essentially a clerical error, and defendant conceded that there were no grounds to object to the factual predicate for this assessment.

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 circumstances of the underlying crime.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5876 Mark Coles, Index 309123/08
Plaintiff-Appellant,

-against-

Tracey Towers Associates, LP., et al.,
Defendants-Respondents,

I.B. Security Conscious, Inc., et al.,
Defendants.

_____

Preston & Wilkins, Levittown (Gregory R. Preston of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 30, 2016, which granted defendants Tracey Towers Associates, L.P., Tracey Towers Housing Co., Inc., and R.Y. Management Co., Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established prima facie that they satisfied their duty to take adequate safety precautions by hiring codefendants I.B. Security Conscious, Inc. and IBSC Agency, Inc. to provide 24-hour security services for the premises, and by having locking doors, an intercom system, and video cameras at all the entrances to the premises (*see James v Jamie Towers Hous. Co.*, 99 NY2d 639,

641 [2003]). Plaintiff failed to raise an issue of fact whether defendants' alleged negligence proximately caused his injury, since he submitted no evidence that the perpetrator was an unauthorized intruder and that he gained entry to the premises through a negligently maintained entrance (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]; *Sakhai v 411 E. 57th St. Corp.*, 272 AD2d 231, 232-233 [1st Dept 2000]).

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5877 Carfax, Inc., Index 655198/16
Plaintiff-Appellant,

-against-

Illinois National Insurance Company,
Defendant-Respondent.

_____

Blank Rome LLP, New York (James R. Murray of counsel), for appellant.

Carlton Fields Jorden Burt, P.A., New York (J. Robert MacAneney of counsel), and Maddin, Hauser, Roth & Heller P.C., Southfield, MI (Harvey R. Heller of the bar of the State of Michigan, admitted pro hac vice, of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered May 30, 2017, granting defendant's motion to dismiss the complaint and for a declaration that it does not have a duty to defend plaintiff in the underlying federal antitrust lawsuit, and so declaring, unanimously modified, on the law, to vacate the dismissal of the complaint, and deny defendant's motion to dismiss, and otherwise affirmed, without costs.

The policy issued to plaintiff by defendant covers loss "resulting from a Claim alleging a Wrongful Act." "Wrongful Act" is defined as "any act, error, omission, ... misstatement or misleading statement by an Insured ... *that results solely in* ...

defamation, libel, slander, product disparagement or trade libel or other tort related to disparagement or harm to character or reputation; including, without limitation, unfair competition" (emphasis added). The policy contains an exclusion from coverage for claims alleging antitrust violations.

The underlying lawsuit alleges, broadly, that plaintiff acquired and maintained its 90% market share of VHR (vehicle history report) sales by engaging in an anticompetitive scheme. Plaintiff contends that defendant owes it a defense in the suit because the suit alleges disparagement. It relies on the following allegations: "By contractually committing these two websites to include hyperlinks to Carfax VHRs and to exclude VHRs of any other provider, Carfax has stigmatized any listing without such a link in the eyes of consumers who infer that the absence means that the car has a blemished history." "Carfax also utilizes its inflated revenues to disparage and falsely malign dealers in order to mislead consumers into believing its VHRs are necessary and accurate."

These passing references to disparagement do not allege a "Wrongful Act." They were made "only in the context of the anti-trust claims, *i.e.*, as legal jargon pertinent to anti-trust and not as a means of even arguably alleging a separate claim for

libel, slander or product disparagement" (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Alticor, Inc.*, 2005 WL 2206461, *3, 2005 US Dist LEXIS 29833, *9 [WD Mich 2005], *affd* 2007 WL 273339, 2007 US App LEXIS 22585 [6th Cir 2007]). In any event, coverage under the policy is barred by the antitrust exclusion, and the exceptions thereto are inapplicable.

We modify solely to vacate the dismissal of the complaint and deny defendant's motion to dismiss (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951 [1989]).

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: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5878 In re Joyelli Latasha M.,

A Child Under Eighteen Years
of Age, etc.,

Charles M.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

_____

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

John R. Eyerman, New York, for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 21, 2017, to the extent it found, after a hearing, that respondent's consent to the child's adoption was not required, unanimously affirmed, without costs.

It is undisputed that respondent failed both to maintain "substantial and continuous or repeated contact" with the child and to provide financial support for her (Domestic Relations Law § 111[1][d])). He visited the child only once after she was placed in foster care and, even when not incarcerated, made no

further efforts to visit her. Respondent's incarceration did not relieve him of his obligation to provide support for, or to communicate with, the child while she was in foster care (*Matter of Javon Reginald G. [Everton Reginald G.]*, 89 AD3d 456 [1st Dept 2011]; *Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689 [1st Dept 2010]).

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5879 The People of the State of New York, Ind. 2404/15
Respondent,

-against-

Lynette Powell,
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 (Jill Konviser, J.), rendered November 19, 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: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5880 The People of the State of New York, Ind. 1210/15
Respondent,

-against-

Dexter Wood, also known as Dexter Rood,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered January 6, 2015, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 5½ years, unanimously affirmed.

Defendant's legal sufficiency claim relating to the serious physical injury element of first-degree assault is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that the victim's injury created a "substantial risk of death" (Penal Law § 10.00[10]). The attending physician

testified that the victim arrived at the hospital in "critical condition," meaning his injury, if not addressed, could result in his death, and that the stab wound to the victim's neck posed a substantial risk of death because of its location (*see People v Jones*, 38 AD3d 352 [1st Dept 2007], *lv denied* 9 NY3d 846 [2007]).

The court providently exercised its discretion in admitting the statement of a deceased declarant as an excited utterance, and admission of the statement did not violate the Confrontation Clause (*see People v Paul*, 25 AD3d 165, 168 [1st Dept 2005], *lv denied* 6 NY3d 752 [2005]). The police arrived at a shelter within minutes of learning of an assault in progress involving a knife, and saw a trail of blood, but had not found the weapon or the assailant. The declarant's excited utterance was not testimonial, because it was provided to help the police determine what happened and ensure the safety of other persons (*Davis v Washington*, 547 US 813, 822 [2006]; *People v Nieves-Andino*, 9 NY3d 12, 15-16 [2007]). To the extent there was any error, it was harmless.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5881-
5881A-
5881B

Index 850118/15

Nationstar Mortgage, LLC,
Plaintiff-Respondent,

-against-

Michael Cogen,
Defendant-Appellant,

New York State Department of
Taxation and Finance et al.,
Defendants.

_____

Yolande I. Nicholson P.C., Brooklyn (Yolande I. Nicholson of counsel), for appellant.

Sandelands Eyet LLP, New York (Mitchell E. Zipkin of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 19, 2016, which granted plaintiff's motion for summary judgment, and denied defendant Michael Cogen's cross motion for summary judgment dismissing the complaint as against him, and orders, same court and Justice, entered on or about October 19, 2016, which granted plaintiff's motion, denied defendant's cross motion to dismiss, and referred this action to a referee, unanimously reversed, on the law, with costs, plaintiff's motion denied, and defendant's cross motion for summary judgment dismissing the complaint as against him granted, without prejudice. The clerk is directed to enter judgment

accordingly.

Contrary to defendant's argument, the doctrine of collateral estoppel does not bar plaintiff from relitigating the issue of standing, because the issues in the prior action and the instant action are not identical. The issue in the prior action was whether Aurora Loan Services, LLC had standing as of March 30, 2009; the issue in the instant case is whether plaintiff had standing as of March 13, 2015 (*see U.S. Bank, N.A. v Foote*, 151 Conn App 620, 629-630, 94 A3d 1267, 1274 [Conn App Ct 2014], *cert denied* 314 Conn 930, 101 A3d 952 [2014]). Moreover, the dismissal in the prior action was without prejudice (*see 390 W. End Assoc. v Raiff*, 166 Misc 2d 730, 734 [App Term, 1st Dept 1995]).

Plaintiff established its standing by showing that the indorsed-in-blank note was in its possession at the commencement of this action (*Bank of Am., N.A. v Brannon*, 156 AD3d 1, 6 [1st Dept 2017]). The note is part of the record (*see Bank of Am., N.A. v Thomas*, 138 AD3d 523, 524 [1st Dept 2016]). The affidavit by Kimberly Cavagnaro, submitted by plaintiff, is sufficient to show that plaintiff had possession of the note when the action was commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 359-362 [2015]), and is neither conclusory (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]) nor inconsistent

(*see B & H Florida Notes LLC v Ashkenazi*, 149 AD3d 401, 402 [1st Dept 2017]).

Defendant's contention that there are issues of fact about the allonges is unavailing (*see U.S. Bank N.A. v Askew*, 138 AD3d 402 [1st Dept 2016]).

Nevertheless, the complaint should be dismissed as against defendant, without prejudice, because plaintiff failed to prove that it mailed the notices required by Real Estate Property Actions and Proceedings Law § 1304 (*see HSBC Bank USA v Rice*, 155 AD3d 443 [1st Dept 2017]) and by the mortgage agreement (*see e.g. HSBC Mtge. Corp. [USA] v Gerber,* 100 AD3d 966, 967 [2d Dept 2012]). The affidavit by Diondra Doublin, submitted by plaintiff, failed to demonstrate a familiarity with plaintiff's mailing practices and procedures (*see Rice*, 155 AD3d at 444 [RPAPL 1304 notice]; *see also e.g. Gerber*, 100 AD3d at 967 [notice required by mortgage agreement]). The fact that some of the RPAPL 1304 notices bear a certified mail number is also insufficient (*see Rice*, 155 AD3d at 444; *Wells Fargo Bank, N.A. v Trupia,* 150 AD3d 1049, 1050 [2d Dept 2017]). We further note that defendant submitted an affidavit denying that he had received any RPAPL 1304 notice (*see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]).

Plaintiff's motion should be denied for the additional

reason that the affidavit by defendant's wife creates an issue of fact as to whether plaintiff delivered the notice required by RPAPL 1303 with the summons and complaint (*see Jones*, 139 AD3d at 523; *Gorman v English*, 137 AD3d 556 [1st Dept 2016]).

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5882-
5883 Index 451216/14

Ismael Sylla,
Plaintiff-Appellant,

-against-

Condominium Board of the Kips Bay Towers Condominium, Inc., et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

Michael N. David, New York, for appellant.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about July 1, 2016, which granted defendants-respondents' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 28, 2016, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Defendants established prima facie that they neither created nor had any notice of a dangerous condition on their driveway, where plaintiff, a bicycle messenger making a delivery to the building, lost control and fell off his bicycle (*see DeRosa v*

City of New York, 30 AD3d 323, 325 [1st Dept 2006]). Photographs taken shortly after the accident do not show any dangerous condition, and the building manager testified that he saw no dangerous condition upon inspection of the area following the accident.

In opposition, plaintiff failed to raise a triable issue of fact as to the existence of a dangerous condition on defendants' property. As an initial matter, his affidavit is inadmissible, because it is unaccompanied by a translator's affidavit attesting to the translator's qualifications and the accuracy of the translation (*see* CPLR 2101[b]). In any event, the affidavit creates only a feigned issue of fact (*see Castro v Peguero*, 135 AD3d 584 [1st Dept 2016]). Plaintiff's General Municipal Law § 50-h hearing testimony and his deposition testimony differ greatly as to the cause and manner of his fall. In his affidavit he attempts to reconcile the differences with an explanation that he was unable to provide when asked about the discrepancies at his deposition. In any event, his affidavit is inconsistent with his testimony that the alleged defect caused him to be thrown backwards from his bike. Further, plaintiff failed to explain his admission that the photographs submitted do not depict a hole

that caused his fall. His testimony that he had been moved away from the accident site before the photographs were taken is undermined by the photographs themselves and other parts of his testimony.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5884 Victor Vila, Index 159071/12
Plaintiff-Appellant,

-against-

Foxglove Taxi Corp., et al.,
Defendants-Respondents.

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Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for respondents.

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Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about September 14, 2016, which granted defendant Foxglove Taxi Corp.'s, motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that he sustained various injuries, including to his lumbar spine and shoulder, when he was struck by defendant's taxi while riding his bike. Defendant met its prima facie burden through expert medical affidavits finding full range of motion and normal test results, and a radiologist's opinion that plaintiff's MRIs were either normal or showed degenerative changes consistent with his age. Defendant also noted that plaintiff's claim of serious injury was belied by his cessation

of treatment for about four years, which he was required to explain (*see generally Pommells v Perez*, 4 NY3d 566 [2005]).

In opposition, plaintiff submitted an affidavit that contradicted his testimony concerning the reason for his cessation of medical treatment. At his deposition, plaintiff testified that he terminated treatment after about six months because he didn't "like doctors," and, at the time of the accident, he had private insurance through his employment, and was covered by Medicaid thereafter. In his affidavit, however, plaintiff averred that he ceased treatment after three months because no-fault benefits were discontinued, and he could no longer afford to pay on his own. He further stated that an unnamed physician informed him that any further treatments would only be "palliative in nature." A party's affidavit that contradicts his prior sworn testimony "creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *see Cruz v Martinez*, 106 AD3d 482, 483 [1st Dept 2013]). Moreover, plaintiff's excuse of inability to pay due to lack of no-fault insurance "makes no sense" in this case, since he testified that he had other insurance (*see Cruz v Martinez*, at 483; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). The unexplained four-year period of time in which plaintiff

failed to seek treatment for any accident-related injuries, also renders the opinion of his medical expert, who provided a report in opposition to the motion, speculative as to the permanency, significance, and causation of the claimed injuries (*see Merrick*, 100 AD3d at 457; *Cekic v Zapata*, 69 AD3d 464 [1st Dept 2010]).

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5885 The People of the State of New York, Ind. 5463/13
Respondent,

-against-

Alejandro Perez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered August 14, 2014, convicting defendant, after a nonjury trial, of petit larceny and criminal possession of stolen property in the fifth degree, and sentencing him to concurrent terms of one year, unanimously modified, on the law, to the extent of vacating the larceny conviction and dismissing the corresponding count, and otherwise affirmed.

The indictment, as amplified by the bill of particulars, charged defendant in the first count with robbery in the second degree, for forcibly stealing one victim's cell phone, and in the second count with criminal possession of stolen property in the fifth degree, for possession of a bicycle, stolen from another victim, on which defendant attempted to flee the scene. In summation, the prosecutor repeatedly argued – in apparent

response to defense counsel's argument that the evidence showed that defendant abandoned the phone before striking one of his pursuers, and therefore that a robbery could not be established – that even if the court did not find that defendant used force to retain the phone, it could still find that he used force to retain the bicycle. Defense counsel objected to these arguments and the court overruled them.

We find that these arguments rendered the first count duplicitous by newly alleging that defendant was guilty under the first count if he forcibly stole either the phone or the bicycle (*see* CPL 200.30[1]). The lesser included offense of petit larceny, of which defendant was ultimately convicted, suffered from the same infirmity.

In rendering its verdict, the court made no specific findings of fact, and the record, including the colloquies relating to the prosecutor's summation, does not establish that the larceny conviction was based on the phone rather than the bicycle. However, we find that the second count was not rendered

duplicitous by the trial proceedings. The prosecutor never suggested that proof regarding the phone was relevant to the possession of stolen property count, and nothing in the record suggests that the court adopted such a view.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5886 James Latus, Index 157638/13
Plaintiff-Appellant,

-against-

Muhammad Ishtarq, et al.,
Defendants-Respondents.

_____

Bailly and McMillan, LLP, White Plains (John J. Bailly of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about October 5, 2016, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), and denied plaintiff's cross motion for partial summary judgment on the serious injury threshold as untimely, unanimously affirmed, without costs.

Plaintiff alleges that he suffered serious injuries in the area of his left hip, namely tears of his left gluteus medius muscle and anterosuperior acetabular labrum, after being struck by defendants' taxi cab while he was crossing the street.

Defendants met their initial burden by submitting both the affirmed report of an orthopedic surgeon and plaintiff's own hospital and medical records, and deposition testimony.

Defendant's orthopedist found full range of motion and normal tests, and opined that plaintiff's injuries had resolved (*see Frias v Son Tien Liu*, 107 AD3d 589 [1st Dept 2013]). Defendants' expert was not required to review plaintiff's medical records before forming her opinion (*see Mena v White City Car & Limo Inc.*, 117 AD3d 441, 441 [1st Dept 2014]). Plaintiff's medical records demonstrated prima facie that plaintiff ceased treatment five months after the accident, after his doctor found that he had full range of motion and that his diagnosed conditions had resolved, and that plaintiff had preexisting conditions that may have contributed to his conditions, including corrected spina bifida and osteoarthritis. Defendants thus shifted the burden to plaintiff to explain his cessation of treatment and to address why his preexisting conditions were not the cause of his current reported symptoms (*see Pommells v Perez*, 4 NY3d 566, 574-575 [2005]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

In opposition, plaintiff submitted his own affidavit and the affirmation of his orthopedist. The scrivener's error concerning the date of the accident was minor and did not warrant rejecting plaintiff's submissions entirely. Nevertheless, when reviewed on the merits, plaintiff's evidence was insufficient to raise an issue of fact. Plaintiff's physician provided only a conclusory

opinion that plaintiff's injuries were caused by the accident, without addressing the preexisting conditions documented in his own MRI, or explaining why plaintiff's current reported symptoms were not related to the preexisting conditions (*see Nakamura v Montalvo*, 137 AD3d 695, 696 [1st Dept 2016]; *Farmer v Ventkate Inc.*, 117 AD3d 562, 562 [1st Dept 2014]). Further, plaintiff's claim that he ceased treatment after no-fault benefits were discontinued is unpersuasive since he acknowledged that he had private insurance through his union (*see Green v Domino's Pizza, LLC*, 140 AD3d 546, 547 [1st Dept 2016]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Further, his prompt return to work as a stage manager, and cessation of treatment five months after the accident, were consistent with his own doctor's conclusion that his "hip strain" had resolved, and demonstrate that the injuries were minor in nature (*see Frias*, 107 AD3d at 590).

Plaintiff's allegation in his bill of particulars that he was confined to bed for one week and to home for two weeks, and his testimony that he was confined to bed and home for one week before returning to work, defeat his 90-180 day claim (*see Brownie v Redman*, 145 AD3d 636, 637 [1st Dept 2016]; *Frias*, 107 AD3d at 590).

Plaintiff's cross motion was not untimely (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 86-87 [1st Dept 2013]). Nevertheless, it fails on the merits for the reasons stated above.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5887 Jessie May Mosley, Index 20436/15E
Plaintiff-Appellant-Respondent,

-against-

E.H.J. LLC, et al.,
Defendants-Respondents-Appellants.

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Burns & Harris, New York (Jason S. Steinberg of counsel), for appellant-respondent.

Law Office of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Ruben Franco, J.), entered October 4, 2017, which granted defendants' motion to set aside the verdict as to liability and damages to the extent of setting aside the damages verdict and directing a new trial of damages unless plaintiff stipulated to reduce the award for past pain and suffering from $350,000 to $150,000 and the award for future pain and suffering from $1.3 million to $250,000, unanimously affirmed, without costs.

Plaintiff testified at trial that she fell when her ankle twisted on something as she was exiting defendants' store. Photographs admitted into evidence showed a sidewalk defect in the general area of plaintiff's fall. The jury found that defendants' negligence was the cause of plaintiff's injuries, and we cannot conclude that there was no valid line of reasoning and

permissible inferences that could lead rational persons to that conclusion (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Nor do we find that the verdict was against the weight of the evidence (*see id.*). Plaintiff's account of her fall was supported by circumstantial evidence, which is sufficient to establish defendants' negligence (*see Caraballo v Paris Maintenance Co.*, 2 AD3d 275 [1st Dept 2003]). We see no reason to disturb the jury's credibility determinations, which are accorded great deference (*see e.g. KBL, LLP v Community Counseling & Mediation Servs.*, 123 AD3d 488, 489 [1st Dept 2014]).

We agree with defendants that plaintiff's expert improperly relied on the report of a post-accident MRI comparing plaintiff's spinal stenosis to that seen on the most recent pre-accident MRI, because the pre-accident MRI film and report were not admitted into evidence, and the expert had not reviewed any of plaintiff's pre-accident medical records (*see Kovacev v Ferreira Bros. Contr., Inc.*, 9 AD3d 253, 253 [1st Dept 2004]; *see also Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726 [1984]). However, the error was harmless, since, as the trial court found, the evidence did not establish a significant aggravation of the stenosis and therefore could not have been a major component of the jury's damages awards.

We further find that the damages as reduced by the trial court do not deviate from reasonable compensation.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5888 The People of the State of New York, Ind. 2855/07
Respondent,

-against-

Robert Pollack,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about September 19, 2016, 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 correctly assessed 20 points under the risk factor for relationship (i.e. stranger) with victim, because clear and convincing evidence established that defendant and the victim were strangers within the meaning of the Guidelines, having only met within 24 hours of the crime (*see People v Corn*, 128 AD3d 436, 437 [1st Dept 2015]; *People v Serrano*, 61 AD3d 946, 947 [2d Dept 2009], *lv denied* 13 NY3d 704 [2009]; *People v Gaines*, 39 AD3d 1212 [4th Dept 2007], *lv denied* 9 NY3d 803 [2007]). The fact that defendant and the victim spent the night together

before defendant forcibly raped her the next morning does not undermine a finding that they were strangers.

Defendant's claim that the court incorrectly assessed five points for inflicting physical injury is academic because subtraction of those five points would not affect defendant's risk level (*see Corn*, 128 AD3d at 437). In any event, the determination that defendant caused substantial pain to the victim was also supported by clear and convincing evidence (*see People v Chiddick*, 8 NY3d 445, 447-448 [2007]).

In light of these determinations, we find it unnecessary to address any other issue.

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5889N Mahwanga Campbell, Index 302456/14
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant,

P.O. "John Doe I," et al.,
Defendants.

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Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for appellant.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 20, 2016, which granted plaintiff's motion to amend the complaint to substitute the names of the arresting officers for John Doe I and John Doe II, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff's acceptance of an adjournment in contemplation of dismissal bars the malicious prosecution claim (*see Hollender v Trump Vil. Coop.*, 58 NY2d 420, 425-426 [1983]; *Probber v Yousef*, 5 AD3d 204 [1st Dept 2004]). As to the remaining claims, plaintiff should not have been granted leave to amend his

complaint and substitute the officers' names under the relation back doctrine. The officers are not "united in interest" with the City of New York, the original defendant (*see Thomas v City of New York*, 154 AD3d 417 [1st Dept 2017]; *Higgins v City of New York*, 144 AD3d 511 [1st Dept 2016]).

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

ENTERED: MARCH 1, 2018

CLERK

Sweeny, J.P., Renwick, Tom, Mazzarelli, Oing, JJ.

5890N Sears Roebuck and Co., Index 156171/14
Plaintiff-Appellant,

-against-

Vornado Realty Trust, et al.,
Defendants-Respondents.

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Moses & Singer, LLP, New York (Jason Canales of counsel), for appellant.

French & Casey, LLP, New York (Victoria Kennedy of counsel), for respondents.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 11, 2017, which denied plaintiff's motion to strike the answer or compel defendants to comply with outstanding discovery demands, and granted defendants' cross motion to the extent of directing plaintiff to comply with all outstanding discovery demands, unanimously affirmed, without costs.

Nothing in the record suggests that defendants acted willfully, contumaciously, or in bad faith, warranting the drastic remedy of striking the answer (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). Indeed, defendants produced responsive documents to requests that were the subject of plaintiff's motion, as shown by their affirmation in support of the first cross motion, of which this Court takes judicial notice (*see Yuppie Puppy Pet Prods., Inc. v Street Smart*

Realty, LLC, 77 AD3d 197, 202 [1st Dept 2010]). Plaintiff is not entitled to confidential information about the interrelationship and ownership of defendants. Moreover, defendants submitted responses to plaintiff's 86 interrogatories, and, as the majority of their responses to the interrogatories in dispute were proper, the court was not obligated to "prune" the interrogatories for plaintiff (*see Lerner v 300 W. 17th St. Hous. Dev. Fund Corp.*, 232 AD2d 249, 250 [1st Dept 1996]).

The court providently exercised its discretion in directing plaintiff to comply with all outstanding discovery demands (*see Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). Having held numerous conferences during the four years of discovery in this action, the court was in the best position to decide this particular dispute.

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

ENTERED: MARCH 1, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4855 Jan Karwowski, Index 153277/12
Plaintiff-Appellant-Respondent, 595174/14

-against-

1407 Broadway Real Estate, LLC,
Defendant-Respondent-Appellant,

The Cayre Group, Ltd.,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

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Gregory J. Cannata & Associates, LLP, New York (Gregory J. Cannata of counsel), for appellant-respondent.

Baxter Smith & Shapiro, P.C., Hicksville (Sim R. Shapiro of counsel), for respondent-appellant.

Weiser & McCarthy, New York (David Weiser of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 9, 2016, reversed, on the law, without costs, plaintiff's Labor Law § 241(6) claim reinstated as against both defendants, and 1407 Broadway's cross motion for contractual indemnification granted.

Opinion by Kapnick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Judith J. Gische
Barbara R. Kapnick
Marcy L. Kahn, JJ.

4855
Index 153277/12
595174/14

_____x

Jan Karwowski,
Plaintiff-Appellant-Respondent,

-against-

1407 Broadway Real Estate, LLC,
Defendant-Respondent-Appellant,

The Cayre Group, Ltd.,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Ellen M. Coin, J.), entered August 9, 2016, which, insofar as appealed from as limited by the briefs, dismissed his Labor Law § 241(6) claims against defendants, and denied, as moot, defendant 1407 Broadway Real Estate LLC's cross motion for summary judgment on its contractual indemnification claim against defendant the Cayre Group, Ltd.

Gregory J. Cannata & Associates, LLP, New York (Gregory J. Cannata of counsel), for appellant-respondent.

Baxter Smith & Shapiro, P.C., Hicksville (Sim R. Shapiro, Robert C. Baxter and Jennifer Warycha of counsel), for respondent-appellant.

Weiser & McCarthy, New York (David Weiser of counsel), for respondent.

KAPNICK, J.

Plaintiff, a former employee of third-party defendant XCEL Interior Contracting, Inc. (XCEL), injured his left thumb on an unguarded table saw when he was cutting a piece of plywood to be used in the renovation of defendant the Cayre Group, Ltd.'s (Cayre) executive bathroom on the 41st floor of the building located at 1407 Broadway in Manhattan. Cayre leased its showroom space on the 41st and 42nd floors of the office building from defendant 1407 Broadway Real Estate, LLC (1407 Broadway), which held the net operating lease on the whole building. Cayre entered into a lease extension with 1407 Broadway in March 2011, which included a provision that 1407 Broadway would reimburse Cayre for tenant improvements in the space, and also included a schedule of approved contractors that were permitted to work in the building, which list included XCEL. Cayre hired XCEL to do the renovations to its space pursuant to an oral agreement. The lease extension also provided that "[a]ll work done by the contractor [XCEL] must be coordinated with the Building Manager," and that the contractor "must comply with all reasonable direction given by the Building Manager with respect to the scheduling and performance of the work."

The unguarded table saw was located on the 16th floor of the same office building, in a space where employees of XCEL kept

their tools and materials for renovation projects they were performing in the building. XCEL used only a portion of the 16th floor to store its materials and tools, including the table saw, but it did not have any personnel, or office furniture in the space. According to the record, XCEL did not have a lease with either Cayre or 1407 Broadway for the space, and it did not pay rent to anyone for the space.[1] XCEL's permanent office and workshop were located in Long Island City, Queens. XCEL employees only utilized the 16th floor space when working on renovation projects in that building, where XCEL was an approved contractor. Thus it was not, as Cayre argues throughout its brief, "merely fortuitous" that both XCEL and Cayre were located in the same building on the date of plaintiff's accident.

The motion court granted Cayre's motion for summary judgment, finding that the 16th floor work space "was a permanent workshop controlled by XCEL, not a temporary staging area ancillary to the Project and controlled by Cayre." Although 1407 Broadway did not seek summary judgment as to plaintiff's claims, the motion court nonetheless searched the record and found that because Labor Law § 241(6) did not apply to plaintiff's accident,

[1] Apparently, the courtesy of providing rent-free space in the building was extended to other approved contractors by 1407 Broadway as well.

plaintiff's Labor Law claims must be dismissed as against 1407 Broadway as well. The motion court further determined that its grant of summary judgment and dismissal of all causes of action against 1407 Broadway rendered its indemnification cross claims moot.[2]

The purpose of Labor Law § 241(6) is "to protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition . . ." (*Nagel v D&R Realty Corp.*, 99 NY2d 98, 101 [2002]). Labor Law § 241(6) provides, in relevant part, that "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . . 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty on property owners to "provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and

[2] Plaintiff is not appealing the dismissal of his common-law negligence and Labor Law § 200 claims.

regulations promulgated by the Commissioner of the Department of Labor" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *see also Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300 [1978]). "A lessee of property under construction is deemed to be an 'owner' for purposes of liability under article 10 of New York's Labor Law" (*Kane v Coundorous*, 293 AD2d 309, 311 [1st Dept 2002]). Indeed, the term "'owners' within the meaning of section 241 of the Labor Law is not 'limited to the titleholder . . . [It] encompass[es] a person who has an interest in the property and who fulfill[s] the role of owner by contracting to have work performed for his benefit" (*id.*), as was the situation here with Cayre having hired XCEL.

Defendants contend that the 16th floor space was not a temporary work space or staging area created for the renovation of Cayre's offices and executive bathroom, but rather, was XCEL's permanent workshop and, for the past 10 years, the location where plaintiff reported to work each day and was given his assignment for that day. Thus, defendants argue that plaintiff's accident does not fall within the scope of Labor Law § 241(6) because the 16th floor workshop does not constitute an "area[] in which construction, excavation or demolition work is being performed" as required by the statute (Labor Law § 241[6]). Cayre further

argues that Labor Law § 241(6) does not apply because at the time of his accident, plaintiff was involved in the fabrication and transportation of a component part to be used in the renovation project which, according to Cayre, was conduct that has been found to fall outside the scope of the statute.

We disagree and reverse the motion court's order. We find that there are disputed issues of fact concerning whether the 16th floor space qualifies as a construction area. "The *Flores* Court, relying on *Adams v Pfizer, Inc.* (293 AD2d 291 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]), looked to such factors as physical proximity and common ownership and operation of the off-site premises in determining whether the plaintiff was working in a construction area within the meaning of Labor Law § 241(6)" (*Gerrish v 56 Leonard LLC*, 147 AD3d 511, 513 [1st Dept 2017]). Indeed, "[g]enerally, the scope of a work site must be reviewed as 'a flexible concept, defined not only by the place but by the circumstances of the work to be done. Thus, Labor Law § 241(6) extends to areas where materials or equipment are being readied for use, as opposed to areas where they are merely stored for future use" (*Gonnerman v Huddleston*, 78 AD3d 993, 995 [2d Dept 2010] [internal citations omitted]). Here, although defendants contend that the 16th floor space is XCEL's permanent workshop, in fact, the 16th floor work space where the accident occurred

belonged to 1407 Broadway, and the 41st floor location of the executive bathroom being renovated was owned by 1407 Broadway, and leased to Cayre.

Cases in which it has been determined that the accident did not occur in a location that qualifies for Labor Law § 241(6) protection are distinguishable (*see Flores v ERC Holding LLC*,87 AD3d 419 [1st Dept 2011] [finding that the plaintiff was injured while working at a Bronx facility, which was leased by his employer for storage of equipment and materials to be used in a construction project in Queens on property owned by the defendant]; *Adams v Pfizer, Inc.*, 293 AD2d 291 [finding that the plaintiff was injured while working on a project for his employer *at his employer's facility*, and thus, was not engaged in "construction" within the intended meaning of the statute]; *Davis v Wind-Sun Constr., Inc.*, 70 AD3d 1383 [4th Dept 2010] [finding that the plaintiff was injured while working at his employer's facility]). Here, defendants cannot dispute that had the table saw been set up on the 41st floor and the accident occurred there, the protections of Labor Law § 241(6) would apply. Merely because it was more convenient to leave the table saw on the 16th floor and cut the wood there, and then bring the wood up to the 41st floor by elevator, should not result in the automatic loss of the protections afforded by the statute.

We further reject Cayre's argument that, under *Flores*, plaintiff's accident does not come within the ambit of Labor Law § 241(6) because he was engaged in the fabrication and transportation of materials to be used in connection with construction. As stated by the Court of Appeals, Labor Law § 241(6) covers industrial accidents that occur in the context of construction (*Nagel v D&R Realty Corp.*, 99 NY2d 98). Indeed, *Shields v General Elec. Co.* (3 AD3d 715 [3d Dept 2004]) is instructive. There, the Court noted that "work that is an 'integral part of the construction contract' and is 'necessitated by and incidental to the construction . . . and involve[s] materials being readied for use in connection therewith' is construction work" (*id.* at 717, quoting *Brogan v International Bus. Machs. Corp.*, 157 AD2d 76, 79 [3d Dept 1990] ["(T)he lack of proximity between the place of accident and the precise location of construction is not dispositive against Labor Law liability for injuries to workers handling construction materials and equipment"]).

Finally, we reverse the motion court's denial of 1407 Broadway's cross motion for summary judgment on its cross claim for contractual indemnification. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes

of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). The indemnity provision at issue here states, in relevant part, that the "Tenant shall indemnify, defend and save harmless Landlord . . . from and against (a) all claims of whatever nature against Landlord arising from any act, omission or negligence of Tenant, its subtenants, contractors, licensees, agents, servants, invitees, employees or visitors . . . ." This is a clear and unambiguous indemnity provision that does not, despite Cayre's argument to the contrary, require a finding of "active negligence" or fault on the part of Cayre. Rather, all that is necessary to trigger the provision is a claim arising from any act or omission of Cayre or Cayre's contractor, here, XCEL (*see Santos v BRE/Swiss, LLC*, 9 AD3d 303 [1st Dept 2004]; *Tobio v Boston Props., Inc.*, 54 AD3d 1022, 1024 [2d Dept 2008] [finding that "(t)he indemnification clause does not, by its terms, limit indemnification only to claims arising out of the negligence of (the indemnitor) in the performance of the work"]). It is clear from the contractual language at issue here that the landlord, 1407 Broadway, intended to be indemnified by the tenant, Cayre, for any work being done by Cayre or its contractors in the building.

Accordingly, the order of the Supreme Court, New York County (Ellen M. Coin, J.), entered August 9, 2016, which, insofar as appealed from as limited by the briefs, dismissed plaintiff's Labor Law § 241(6) claims against defendants, and denied, as moot, 1407 Broadway's cross motion for summary judgment on its contractual indemnification claim against Cayre, should be reversed, on the law, without costs, plaintiff's Labor Law § 241(6) claim reinstated as against both defendants, and 1407 Broadway's cross motion for contractual indemnification granted.

All concur.

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

ENTERED: MARCH 1, 2018

CLERK