SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 13, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5655 Ly Giap, et al., Index 302201/13
Plaintiffs-Appellants,

-against-

Hathi Son Pham, et al.,
Defendants-Respondents.

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Krentsel & Guzman, LLP, New York (Steven E. Krentsel of counsel), for appellants.

Law Offices of James J. Toomey, New York (Jason Meneses of counsel), for Hathi Son Pham, respondent.

Cascone & Kluepfel, LLP, Garden City (James O'Sullivan of counsel), for Juan Carlos Mejia Velez, respondent.

Russo & Tambasco, Melville (Yamile R. Al-Sullami of counsel), for Roheem Bibbins, respondent.

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Order, Supreme Court, Bronx County (Ben Barbato, J.), entered December 2, 2016, which, in this action for personal injuries sustained in a motor vehicle accident, granted the motion of defendant Juan Carlos Mejia Velez for summary judgment dismissing the complaint as against him and, upon a search of the record, dismissed the complaint as against defendant Roheem Bibbins, unanimously modified, on the law, to the extent of

dismissing that portion of the complaint asserting claims by plaintiff Ly Giap as against defendant Hathi Son Pham, and otherwise affirmed, without costs.

The complaint as against defendants Mejia Velez and Bibbins was properly dismissed, although we affirm on different grounds. The cars driven by Mejia Velez and Bibbins were stopped in traffic when defendant Pham rear ended Mejia Velez, and the impact propelled Mejia Velez's car into the rear of Bibbins's car. Bibbins, the driver of the first car, testified that a cab in front of him "abruptly stopped" and then Bibbins quickly stopped behind it. Mejia Velez, the driver of the middle car, testified that he saw Bibbins's car merge onto the road and that Mejia Velez was forced to gradually reduce his speed. Mejia Velez then saw Bibbins's brake lights come on and his car come to a stop, at which point Mejia Velez brought his car to a "controlled stop" behind Bibbins's car.

Defendant Pham, the driver of the rear car, in which plaintiffs were passengers, testified that she was traveling at approximately 50 miles per hour before the accident, that Mejia Velez's vehicle came to an abrupt stop, and that his car was stopped for approximately one second before the impact. Defendant Pham testified that she did not press her brakes before the accident. A claim that the lead driver came to a sudden

stop, standing alone, is insufficient to rebut the presumption that the rearmost driver was negligent and the stopped vehicle was not negligent (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *Woodley v Ramirez*, 25 AD3d 451 [1st Dept 2006]; *Malone v Morillo*, 6 AD3d 324 [1st Dept 2004]. Thus, neither Mejia Velez nor Bibbins can be found liable for plaintiffs' injuries.

Plaintiff Giap's complaint as against defendant Pham should also have been dismissed. The record included the affirmation of a radiologist who reviewed plaintiff Giap's cervical spine MRI and opined that it revealed preexisting degenerative conditions that could not be causally related to the accident.

Plaintiff Giap failed to meet the serious injury threshold because his physicians did not explain why the accident, as opposed to degeneration, was the cause of his injuries. As to his 90/180-day claim, defendants met their burden by demonstrating the absence of causation and relying on plaintiffs' deposition testimony, which showed that Giap's activities were essentially the same after the accident (*see Brownie v Redman*, 145 AD3d 636, 637 [1st Dept 2016]*; Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

Plaintiff Pham, however, did raise an issue of fact as to the cause of her injuries. She submitted the affirmation of a radiologist, as well as her underlying MRI reports, which found

degenerative conditions in her cervical and lumbar spine. Since plaintiff's own medical records showed evidence of preexisting degenerative conditions, she was required to address those findings and explain why her current reported symptoms were not related to the preexisting conditions (*see Lee v Lippman*, 136 AD3d 411 [1st Dept 2016]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). To the extent plaintiff's physicians asserted that plaintiff Pham had degenerative joint disease which was common for her age, that she was previously asymptomatic, that the accident aggravated her underlying degenerative joint disease, and that trauma "increases the rate of disc desiccation," rendering her now symptomatic, this was sufficient to raise an issue of fact as to causation (*see McIntosh v Sisters Servants of Mary*, 105 AD3d 672, 673 [1st Dept 2013] [while the plaintiff's medical records showed degenerative osteoarthritic changes, she was asymptomatic for four years before the accident, and expert's explanation that the injuries sustained were "superimposed upon her already delicate medical condition" sufficed to raise issues of fact as to the significant limitations of her spine]).

To the extent defendants argue that plaintiff Pham's claims should be barred due to a gap in treatment, such argument is

unavailing. Plaintiff Pham testified that she underwent therapy until No-Fault Insurance no longer paid for treatment. This is an adequate explanation for any alleged gap in treatment (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]).

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5956-
5957 The People of the State of New York,
Respondent,

-against-

Yuseiph Sidberry,
Defendant-Appellant.

Ind. 3239N/12

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered October 31, 2013, as amended August 18, 2016, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 8 years, and otherwise affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including, among other things, counsel's strategy, analysis and pretrial preparations (*see People v Rivera*, 71 NY2d 705, 709 [1988];

People v Love, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). The record does not establish defendant's claim that his counsel misunderstood or mishandled defendant's specific agency defense, which was that he acted as both an agent and as a buyer in his own right (*see People v Andujas*, 79 NY2d 113 [1992]). In any event, defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

The court providently exercised its discretion in permitting the People to refute defendant's agency defense by eliciting his prior convictions relating to the sale of drugs, including their underlying facts (*see People v Valentin*, 29 NY3d 150, 156 [2017]). The probative value of this evidence outweighed the potential for undue prejudice, which the court minimized by means of a limiting instruction (*see People v Massey*, 49 AD3d 462 [1st Dept 2008], *lv denied* 10 NY3d 866 [2008]). The court's *Sandoval*

ruling, allowing impeachment use of these convictions and another felony conviction, likewise balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]).

Defendant did not preserve his claims that the prosecutor exceeded the scope of the court's rulings on the use of prior convictions, or misused these convictions in summation. Defendant also did not preserve any of his challenges to the court's main and supplemental agency charges. We decline to review any of these claims in the interest of justice. As an alternative holding, we find no basis for reversal.

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5958-
5959 In re Vincent Latora, et al.,
Petitioners-Appellants,

-against-

Department of Citywide Administrative Services, et al.,
Respondents-Respondents.

Index 100466/14

Abrams, Fensterman, LLP, Brooklyn (Maya Petrocelli of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondents.

Order, Supreme Court, New York County (Carol E. Huff, J.), entered December 17, 2014, which denied the petition to vacate final determinations of respondent New York City Department of Buildings (DOB), dated December 26, 2013, denying petitioners' applications for master plumber licenses, unanimously affirmed, without costs. Order, same court (Margaret A. Chan, J.), entered March 10, 2017, to the extent it denied petitioners' motion to renew the petition, unanimously affirmed, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

DOB's determinations that petitioners failed to supply satisfactory proof that they each had at least seven years of experience in the design and installation of plumbing systems are

rational and not arbitrary and capricious (*see Matter of Padmore v New York City Dept. of Bldgs.*, 106 AD3d 453 [1st Dept 2013]; *Matter of Licata v Department of Citywide Admin. Servs.*, 105 AD3d 520 [1st Dept 2013]). DOB reasonably required petitioners to produce documentary evidence to substantiate their plumbing experience, including experience they claim to have accrued outside of New York City. DOB rationally refused to credit petitioners for their experience under the supervision of a plumber licensed in Suffolk County but not in any of the jurisdictions where petitioners claim to have worked (*see Matter of Reingold v Koch*, 111 AD2d 688 [1st Dept 1985], *affd for reasons stated below* 66 NY2d 994 [1985]). The fact that the supervising plumber obtained a license in New York City in 2015 does not cure the defect; indeed, it highlights the fact that the plumber was not suitably licensed when he supervised petitioners, in the years between 1990 and 2000.

Petitioners had no due process right to hearings upon their

initial applications for licenses (*Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied* 523 US 1074 [1998]; *Matter of Rasole v Department of Citywide Admin. Servs.*, 83 AD3d 509 [1st Dept 2011]).

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5960 The People of the State of New York, SCID 30154/14
Respondent,

-against-

Russell Mann,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about October 28, 2014, which adjudicated defendant a level three predicate 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 denying defendant's application for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]. Defendant was a presumptive level three offender by virtue of both his score on the risk assessment instrument and a presumptive override based on his previous rape conviction. Based on the violent and heinous nature of his sexual criminality, none of the considerations asserted by

defendant warranted a conclusion that a level three adjudication would constitute an overassessment of his dangerousness and risk of reoffense.

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5961 Hitech Homes, LLC, Index 160469/15
Plaintiff-Respondent,

-against-

Tanya J. Burke, et al.,
Defendants-Appellants.

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Zara Watkins, New York, for appellants.

Altschul & Altschul, New York (Mark M. Altschul of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about July 12, 2016, which granted plaintiff's motion for summary judgment seeking judicial sale and partition of the subject premises, deemed an appeal from the judgment, same court and Justice, entered December 19, 2016, implementing the order, and so considered, said judgment unanimously affirmed, without costs.

The motion court correctly concluded, as a matter of law, that physical partition of the one-family dwelling co-owned by the parties – which has either four stories or three stories plus a basement, is approximately 17 feet wide and 50 feet long, is on a lot that is approximately 25 feet wide and 100 feet long, and has only one source for water and sewer service – could not be made without great prejudice to the owners (*see Ferguson v*

McLoughlin, 184 AD2d 294, 295 [1st Dept 1992], *appeal dismissed* 80 NY2d 972 [1992]).

It is true that "the remedy [of partition] has always been subject to the equities between the parties" (*Ripp v Ripp*, 38 AD2d 65, 68 [2d Dept 1971], *affd* 32 NY2d 755 [1973]). However, the IAS court properly found that defendants failed to raise a triable issue. The fact that plaintiff has failed to pay its share of the real estate taxes on the property "fails to establish that the equities favor dismissal of the action" (*Manganiello v Lipman*, 74 AD3d 667, 669 [1st Dept 2010]). Defendants' "desire ... to keep the premises in the family" is also "an insufficient basis to deny partition and sale" (*Crestwood Capital Group Corp. v Schuermann*, 2010 NY Slip Op 32787[U], *12 [Sup Ct, NY County 2010]). Unlike *Arata v Behling* (57 AD3d 925 [2d Dept 2008]), this is not a case where the defendant raised an issue of fact as to whether the plaintiff was

even entitled to seek partition and sale because the deed by which he obtained his interest in the property may have been invalid.

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5962 Samjungcast Co., Ltd., Index 652314/16
Plaintiff-Appellant,

-against-

Expway Corp.,
Defendant-Respondent,

Moon-Ki Jeong,
Defendant.

_____

Kimm Law Firm, New York (Adam Garcia of counsel), for appellant.

Loeb & Loeb LLP, New York (Christian D. Carbone of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about November 17, 2016, which granted defendant Expway Corp.'s motion to dismiss the complaint on forum non conveniens grounds, unanimously dismissed, without costs, as untimely.

As the notice of appeal from the order was served more than 30 days after service of the order, with written notice of its entry, it is untimely (CPLR 5513[a]; *Hill Dickinson LLP v Il Sole Ltd.*, 149 AD3d 471 [1st Dept 2017]).

Even if we were to have jurisdiction to review the order, defendant met its heavy burden under CPLR 327 of establishing

that New York is an inconvenient forum (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Norex Petroleum Ltd. v Blavatnik*, 151 AD3d 647, 648 [1st Dept 2017], *lv denied* 30 NY3d 906 [2017]).

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5963 Dogwood Residential, LLC, et al., Index 157621/15
Plaintiffs-Respondents,

-against-

Stable 49, Limited,
Defendant-Appellant.

_____

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for appellant.

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered December 30, 2016, which, to the extent appealed from, granted plaintiffs' motion for leave to reargue defendant's motion for summary judgment dismissing the complaint, and, upon reargument, denied defendant's motion as to the claims for breach of contract and attorneys' fees, and granted plaintiffs leave to amend the complaint to assert a breach of fiduciary duty claim against defendant's board of directors, unanimously affirmed, without costs.

Plaintiffs allege that defendant breached their proprietary lease by failing to make necessary repairs to the private elevator and roof that are part of the "exclusive area" appurtenant to their penthouse apartment. The proprietary lease obligates shareholder lessees to maintain their apartments,

except for repair and maintenance of the "Building's structure," for which defendant is solely responsible so long as such repair or maintenance is not necessitated by the lessees' use.

In support of its motion, defendant submitted plaintiff Blumenfeld's pre-closing written representation that he would accept responsibility for repairs of the elevator and roof, on which defendant contends it relied in approving plaintiffs' purchase application, and evidence that plaintiffs thereafter filed an application for a work permit with the Department of Buildings. The motion court initially ruled that plaintiffs' claims were barred by the doctrine of estoppel. Plaintiffs then moved for leave to reargue and renew on the ground that the pre-closing representation was parol evidence offered to contradict or modify the terms of the proprietary lease, and could not be considered.

The court providently exercised its discretion in granting plaintiffs leave to reargue although they failed to comply with the requirement of CPLR 2221(f) that in a combined motion for reargument and renewal each item of relief be separately identified (*see generally Corporan v Dennis*, 117 AD3d 601 [1st Dept 2014]; *see also GMAC Mtge., LLC v Spindelman*, 136 AD3d 1366, 1367 [4th Dept 2016]). The court also providently exercised its discretion in considering a legal argument not expressly made by

plaintiffs in opposition to defendant's motion, since the issue could not have been avoided if it had been raised at that stage (*see generally Harrington v Smith*, 138 AD3d 548 [1st Dept 2016]; *see also Rochester v Quincy Mut. Fire Ins. Co.*, 10 AD3d 417, 418-419 [2d Dept 2004]).

As Blumenfeld made the representation that he would be responsible for structural repairs before the parties entered into the lease, and the lease unambiguously provides that structural repairs are defendant's sole responsibility, the representation cannot be considered for the purpose of contradicting the terms of the lease (*Marine Midland Bank-S. v Thurlow*, 53 NY2d 381 [1981]; *Cellular Mann, Inc. v JC 1008 LLC*, 113 AD3d 521 [1st Dept 2014]; *see also Continental Bank & Trust Co. of N.Y. v W.A.R. Realty Corp.*, 265 App Div 729, 733 [1st Dept 1943] ["The parol evidence rule cannot be evaded or set aside by the device of claiming an estoppel"]; *Le Bovici v Jamaica Sav. Bank*, 81 AD2d 150, 152 [2d Dept 1981], *affd* 56 NY2d 522 [1982]).

The motion court providently exercised its discretion in granting plaintiffs leave to assert the breach of fiduciary duty claim against defendant's board of directors (*see Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017]). The court properly overlooked plaintiffs' failure to attach a proposed amended complaint since the proposed amendment was adequately described

in their notice of motion and the attorney affirmation (*see Berkeley Research Group, LLC v FTI Consulting, Inc.*, __ AD3d ___, 2018 NY Slip Op 00222, *3 [1st Dept, Jan. 11, 2018]; *accord Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1592 [4th Dept 2016]).

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

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5964 M.P., an Infant by her Mother and Natural Guardian, Elizabeth C., et al.,
Plaintiffs-Appellants,

-against-

The New York Transit Authority, et al.,
Defendants-Respondents,

Derek Dunston, et al.,
Defendants.

Index 350073/11

Mitchell Dranow, Sea Cliff, for appellants.

Lawrence Heisler, Brooklyn, (Harriet Wong of counsel), for the New York Transit Authority, Metropolitan Transportation Authority, the MTA Bus Company and Ruben Sims, respondents.

Russo & Tambasco, Melville (Yamile R. Al-Sullami of counsel), for William Cotto, respondent.

Order, Supreme Court, Bronx County (Barry Salman, J.), entered November 16, 2016, which granted defendants' motions for summary judgment dismissing the complaint based on infant plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by submitting evidence showing that infant plaintiff did not sustain a serious injury to her lumbar spine. Defendants offered the affirmations of an orthopedic surgeon and neurologists, who found normal ranges of motion and normal test

results. Furthermore, their radiologist found that a CT scan showed only bulges of no significance and degenerative in nature.

In opposition, infant plaintiff offered objective evidence of injury and her initial treating physician opined that the injury was causally related to the accident, particularly given the absence of prior symptoms (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). However, upon recent examination, infant plaintiff was found only to have a minor limitation in one plane of range of motion, which was insufficient to raise a triable of fact as to whether she sustained a serious injury under Insurance Law § 5102(d) (*see Gaddy v Eyler*, 79 NY2d 955 [1992]*; Moore v Almanzar*, 103 AD3d 415 [1st Dept 2013]*; Eisenberg v Guzman*, 101 AD3d 505 [1st Dept 2012]).

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5965- Ind. 4277/11
5966 The People of the State of New York,
Respondent,

-against-

Gregory Smith,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered January 28, 2014, convicting defendant, after a jury trial, of two counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, and order (same court and Justice), entered on or about February 28, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The record, as expanded by way of the CPL 440.10 motion, establishes that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Under the circumstances of this case, it was

objectively reasonable for trial counsel to concede that defendant was present during the robbery, and instead assert the defense that defendant did not act in concert with the separately tried codefendant (*see People v Lemma*, 273 AD2d 180, 181 [1st Dept 2000] *lv denied* 95 NY2d 906 [2001]).

As trial counsel explained in connection with the 440.10 motion, he evaluated the evidence, including a surveillance videotape, and reached the conclusion that the best defense was that defendant was not accessorially liable for the robbery, notwithstanding his presence at the scene. Furthermore, he selected this defense in consultation with defendant (*see People v Clark*, 28 NY3d 556, 562-563 [2016]), who had always insisted that he was present but did not assist the codefendant.

Given this choice of defenses, evidence tending to establish the uncontested element of identity was not damaging. Accordingly, defendant was not prejudiced by any of counsel's alleged deficiencies in his handling of suppression issues. Furthermore, given the circumstantial evidence, defendant has not shown that even if counsel had prevented the introduction of

certain identification and physical evidence, he could have obtained a dismissal or acquittal based on lack of evidence of identity.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5967 Tyrone Hinson, etc., Index 306730/10
Plaintiff-Appellant,

-against-

Patrick Anderson, M.D., et al.,
Defendants-Respondents,

Richard Duncalf, M.D., et al.,
Defendants.

_____

Meagher & Meagher, P.C., White Plains (Merryl F. Weiner of counsel), for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for Patrick Anderson, respondent.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Bronx Lebanon Hospital Center, respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 19 2016, which granted defendants Patrick Anderson, M.D.'s and Bronx Lebanon Hospital Center's motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established prima facie, through expert affirmations, that they did not depart from the accepted standard of medical care in treating plaintiff's decedent and that, contrary to the theory of a failed diagnosis set forth in plaintiff's bill of particulars, the cause of death was not a pulmonary embolism (*see Scalisi v Oberlander*, 96 AD3d 106, 120

[1st Dept 2012]). In opposition, plaintiff did not address defendants' prima facie showing. Instead, he presented a new theory of liability through an expert affirmation opining that the decedent's cardiac arrest resulted from an undiagnosed ileus (intestinal blockage). Contrary to plaintiff's contention, this theory was not encompassed in his pleadings, and therefore its assertion cannot defeat summary judgment (*Biondi v Behrman*, 149 AD3d 562 [1st Dept 2017], *lv dismissed in part, denied in part* 30 NY3d 1012 [2017]).

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

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5968 Janette Henry, etc., Index 100959/09
Plaintiff-Respondent,

-against-

Lenox Hill Hospital, et al.,
Defendants-Appellants,

David Miller, M.D., et al.,
Defendants.

_____

Martin Clearwater & Bell LLP, New York (Jean Marie Post of counsel), for Lenox Hill Hospital, appellant.

Bartlett LLP, White Plains (David C. Zegarelli of counsel), for Iraj Akhavan, P.M.D., appellant.

Law Office of Jay Stuart Dankberg, New York (Jay Stuart Dankberg of counsel), for respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered February 2, 2017, which, insofar as appealed from as limited by the briefs, denied in part defendant Lenox Hill Hospital's and defendant Iraj Akhavan, P.M.D.'s motions to enforce the conditional preclusion order and for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motions in full, and, as so modified, affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff failed to fully comply with the conditional preclusion order because she failed to provide the requisite

specificity in her supplemental bill of particulars as to dates of confinement and special damages. She also failed to demonstrate "a reasonable excuse for the failure to produce the requested items" and "the existence of a meritorious claim," as required to obtain relief from the order (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). She should thus have been precluded from offering evidence of liability and damages at trial, as per the terms of the order (*id.*; *Jenkinson v Naccarato*, 286 AD2d 420, 420-421 [2d Dept 2001]).

Because the result of precluding plaintiff from offering evidence on liability or damages at trial is that she will not be able to make out a prima facie case, the complaint should be dismissed (*see Arzuaga v Tejada*, 133 AD3d 454, 455 [1st Dept 2015]).

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5969-
5970-
5971 In re Armoni M.K.I., etc.,
and Others,

Dependent Children Under Eighteen
Years of Age, etc.,

Jasmine M.W., etc.,
Respondent-Appellant,

The Commissioner of the Administration
for Children's Services of the City
of New York,
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondents.

Dawne Mitchell, The Legal Aid Society, New York (Judith Stern 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 July 5, 2016, which, based on respondent mother's admission that she violated the terms of a suspended judgment, terminated her parental rights to the children, after a hearing, and committed their custody to petitioners for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence adduced at the dispositional hearing supports the Family Court's conclusion that it was in the

best interests of the children to be freed for adoption (*see Matter of Gianna W. [Jessica S.]*, 96 AD3d 545, 545-546 [1st Dept 2012]). Although respondent obtained employment, she failed to maintain suitable housing, regularly attend her mental health treatment programs, visit the children consistently or complete Parenting through Change Return Home-Reunification as required by the suspended judgment, which she acknowledged (*see Matter of Aliyah Careema D. [Sophia Seku D.]*, 88 AD3d 529, 529 [1st Dept 2011]).

Under these circumstances, termination of respondent's parental rights to facilitate the children's adoption was in the children's best interests because they have been residing in the same foster home for most of their lives, and the foster mother, who has provided for their special needs, wants to adopt them. Respondent is no closer to addressing her mental health issues nor has she demonstrated that she has the ability to care for the children (*see Matter of Anthony Wayne S. [Damaris S.]*, 110 AD3d 464, 464 [1st Dept 2013]).

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5972 The People of the State of New York, Ind. 764/14
Respondent,

-against-

Victor Semenets,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.) rendered April 14, 2015, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to and three years' probation with 40 days' community service, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations, including its evaluation of alleged inconsistencies in testimony and its assessment of the reliability of eyewitnesses.

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5974 In re Ilan Safit, Index 101149/16
Petitioner-Appellant,

-against-

Pace University,
Respondent-Respondent.

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Stewart Lee Karlin Law Group, P.C., New York (Stewart L. Karlin of counsel), for appellant.

Bond, Schoeneck & King, Syracuse (Laura H. Harshbarger of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 5, 2016, which denied the petition challenging respondent's determination to deny petitioner tenure, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's decision to deny petitioner tenure was not arbitrary and capricious (*see Matter of Loebl v New York Univ.*, 255 AD2d 257, 259 [1st Dept 1998]; *Matter of Fruehwald v Hofstra Univ.*, 82 AD3d 1233, 1234 [2d Dept 2011]). Contrary to petitioner's argument, he received due process during the tenure application process. In response to petitioner's complaints regarding alleged procedural issues, respondent remanded his application to the stage where the issue arose, and allowed his application to proceed anew.

Furthermore, the determination not to recommend promotion or tenure was supported by the evidence, including the affidavits of multiple faculty members and officials, which demonstrated that petitioner's application received the benefit of multiple reviews by differently constituted faculty committees, was given full and fair consideration, and was a proper exercise of academic judgment (*see Pauk v Board of Higher Educ. of City of N.Y.*, 62 AD2d 660, 664 [1st Dept 1978], *affd* 48 NY2d 930 [1979]).

We have considered petitioner's remaining contentions, including that he was denied tenure because of his age, and find them unavailing.

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

ENTERED: MARCH 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5975 The People of the State of New York, Ind. 5672/14
Respondent,

-against-

Donovan Lopez,
Defendant-Appellant.

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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 (Daniel P. FitzGerald, J. at plea; Ronald Zweibel, J. at sentencing), rendered July 9, 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 13, 2018

CLERK

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5977 The People of the State of New York, Ind. 5644/11
Respondent,

-against-

Ramon Garcia,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered March 26, 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 13, 2018

CLERK

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

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5978- Ind. 948/05
5979 The People of the State of New York,
Respondent,

-against-

Nicholas Simpson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole 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 (Edward McLaughlin, J.), rendered August 26, 2014,

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

It is unanimously ordered that the 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 13, 2018

CLERK

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

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5980 The People of the State of New York, Ind. 1320/15
Respondent,

-against-

Derick Mays,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered March 8, 2016,

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

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

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

ENTERED: MARCH 13, 2018

CLERK

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

Friedman, J.P., Andrias, Singh, Moulton, JJ.

5981N 154 E. 62 LLC, Index 155966/16
Plaintiff-Respondent,

-against-

156 E 62nd Street LLC,
Defendant-Appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for appellant.

Kossoff, PLLC, New York (Ranakdevi Londoner of counsel), for respondent.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 26, 2017, which granted plaintiff's motion for a default judgment on liability and an injunction against further construction on defendant's building, and denied defendant's cross motion to vacate any default attributable to it and extend its time to serve an answer, to dismiss the claims for injunctive relief, and to cancel plaintiff's notice of pendency, unanimously affirmed, without costs.

Defendant's excuse for its failure to answer the complaint or otherwise appear in this action, that it did not learn of the action until two months after its time to answer had expired, is undermined by the evidence that a copy of the summons and complaint, which had been served on the secretary of state pursuant to Limited Liability Company Law § 303, was delivered to

defendant's address by certified mail, return receipt requested (*see id.*), and signed for by an individual with the same surname as that of defendant's manager, approximately 20 days before the time to answer expired.

Plaintiff submitted sufficient proof of its causes of action to warrant a default judgment (*see* CPLR 3215[f]). Defendant's cross motion to dismiss the claims for injunctive relief was correctly denied on the ground of defendant's default in this action (*see generally Security Tit. & Guar. Co. v Wolfe*, 56 AD2d 745 [1st Dept 1977]). Contrary to defendant's contention in support of cancelling the notice of pendency against its property, the relief plaintiff demands would affect the possession, use or enjoyment of real property (*see* CPLR 6501; *see e.g. Moeller v Wolkenberg*, 67 App Div 487 [1st Dept 1902]).

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

ENTERED: MARCH 13, 2018

CLERK