SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 20, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7361 The People of the State of New York, Ind. 4006N/12
Respondent,

-against-

Eduardo Disla,
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 (Ross D. Mazer of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 20, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of 2½ years, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

Although defendant did not file a CPL 440.10 motion, the existing record is sufficient to review his ineffective assistance of counsel claim (*see People v Pequero*, 158 AD3d 421 [2018]; *People v Doumbia*, 153 AD3d 1139 [2017]). Defendant was

deprived of effective assistance when his counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation (*see id.*).

Defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea (*see id.*) and we hold the appeal in abeyance for that purpose. While defendant requests that his conviction be replaced by a conviction under a different subdivision of Penal Law § 220.16 that may entail less onerous immigration consequences, we find that to be an inappropriate remedy, and we instead order a hearing.

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

ENTERED: JUNE 20, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Kahn, Gesmer, Oing, JJ.

9015 In re A.V.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about November 28, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed her on probation for a period of 12 months, affirmed, without costs.

The court providently exercised its discretion when it adjudicated appellant a juvenile delinquent and placed her on probation, which was the least restrictive alternative consistent with appellant's needs and those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Although this was appellant's first arrest, she was a participant in an unprovoked violent attack on two strangers. There is no dispute that appellant's

father instigated the attack. In the ensuing melee, appellant repeatedly struck the female complainant with a mini or souvenir baseball bat, while the father's girlfriend continuously punched the complainant. Appellant continued the attack by joining her father and his girlfriend in chasing the two complainants, who were able to seek refuge in a restaurant where they called 911. After the police arrived, the complainants were transported by ambulance to the hospital to be treated for their injuries. The female complainant suffered from anxiety after the attack and continuing to the time of trial, and intended to relocate to another borough as a result of the attack. The dissent parses the incident focusing on the injuries inflicted by appellant, but as part of a group assault she is responsible for the consequences of the attack.

In addition to the seriousness of the offense, the available information supported the conclusions that appellant would benefit from engagement in mental health services and monitoring with regard to her school attendance and her academic performance and that she was in need of a longer period of supervision than the six-month period that an adjournment in contemplation of dismissal would have provided (*see e.g. Matter of Jaquiya F.,* 167 AD3d 428 [1st Dept 2018]). We find no abuse of discretion in the decision of the court, which heard the evidence and observed

appellant throughout the proceedings. We note that appellant may seek relief from the juvenile delinquent adjudication when she reaches the age of 17 (*see* Family Court Act §§ 375.2 and 375.3).

All concur except Manzanet-Daniels and Gesmer, JJ. who dissent in a memorandum by Gesmer, J. as follows:

GESMER, J. (dissenting)

In my view, the Family Court abused its discretion as a matter of law. Accordingly, I respectfully dissent.

When determining the "least restrictive available alternative" in a juvenile delinquency proceeding (Family Court Act § 352.2[2][a]), a court is "bound to view [the minor's] conduct. . . in the context of [his or her] total life circumstances for the purpose of determining the least restrictive dispositional alternative consistent with both appellant's needs and the need for protection of the community" (*Matter of Juan P.*, 114 AD3d 460, 464 [1st Dept 2014]). The court must "consider the child's background, the stability of the child's home life, the adult supervision available in the home, the child's age at the time of the incident and the progress the child has made since the incident" (*Matter of Narvanda S.*, 109 AD3d 710, 714 [1st Dept 2013]). "The disposition is not supposed to punish a child as an adult, but provide effective intervention to 'positively impact the lives of troubled young people while protecting the public'" (*id.* at 712 [quoting *Matter of Robert J.*, 2 NY3d 339, 346 [2004]).

A.V. was 13 when she joined in an attack her father had instigated against two strangers on March 8, 2017. This was A.V.'s only arrest (*see Matter of Juan P.*, 114 AD3d 460), she

participated in the attack under her father's direction, and there was no evidence that she had ever been in any trouble before or since, at home or in school. She expressed remorse for her acts (*see Matter of Tyttus D.*, 107 AD3d 404 [1st Dept 2013]). The Administration for Children's Services (ACS) immediately removed A.V. from her father's chaotic and traumatic custody and placed her in her grandmother's care. Since the move, A.V. achieved a substantial improvement in her school attendance and performance. Family Court explicitly acknowledged that A.V. had learned from the incident, and "does not need to be dealt with harshly" (*see Narvanda S.*, 109 AD3d 710). At the time of the hearing, both A.V. and her grandmother wanted A.V. to participate in counseling, and the foster care agency supervising her placement with her grandmother was attempting to secure mental health services for her (*see id.*). Indeed, as Family Court acknowledged, she was "getting services already through ACS." Under these circumstances, the Family Court's adjudication of A.V. as a juvenile delinquent and imposition of one year of probation was not "the least restrictive available alternative" (Family Ct Act § 352.2[2][a]).

The two complainants, a man and a woman, testified at the fact finding hearing as follows. On March 8, 2017 at approximately 8:00 p.m., they encountered A.V.'s father

panhandling on the subway. They refused his request for money because he was drunk. Mr. V. then cursed at and argued with them, claiming that he was trying to get food for his daughter. A.V. was standing at the far end of the train during this exchange.

At 10:00 p.m., they passed A.V.'s father on the street by chance. Mr. V. made eye contact with them and said, "Oh, look, I have something for you." He then ran to a nearby storefront, knocked on the window and said, "Come out" to A.V. and a woman who they later learned was Mr. V.'s adult girlfriend, Arielle Ortiz. As the couple walked away from Mr. V., Mr. V. began arguing with the man, and Ms. Ortiz began punching the woman in the face and upper body. A.V. then approached and hit the woman with a small toy souvenir baseball bat approximately three to five times on her arm, back and leg. After about one minute, Mr. V., Ms. Ortiz and A.V. started to walk away, but then, approximately 30 seconds later, returned. As Ms. Ortiz again punched the woman and A.V. hit her again with the toy bat, the male complainant tried to intervene. At about the same time, an unidentified man hit the male complainant on the back of his head with a pipe. The male complainant then pulled the female

complainant into a nearby restaurant.[1] As they were trying to pull the door shut, A.V.'s father and his girlfriend tried to push it open, and A.V.'s father hit the woman in the face with a glass bottle. The couple called the police, who arrived within a few minutes. A.V., her father and his girlfriend were arrested. The entire incident, from the time the couple encountered Mr. V. on the street until it ended, lasted approximately 15 minutes.

As a result of the attack, the female complainant suffered cuts, scrapes, and bruises to her face, where she had been punched by Ms. Ortiz and hit with a bottle by Mr. V. She was released from the hospital the same evening, and advised to take Advil, which she did for one week. Her cuts and bruises lasted for a week or two.

As discussed further below, at the time of this incident, ACS had already commenced a neglect proceeding against A.V.'s father and his girlfriend because their inadequate care led her to miss school often, which was "precluding her from receiving necessary services to address her learning disability and support her educational progress," including group and individual therapy. Two days after the incident, ACS placed A.V. in the home of her paternal grandmother, Ivette V.

---

[1]Contrary to the majority's statement, neither complainant testified that anyone "chased" them.

On or about March 31, 2017, the Corporation Counsel filed a petition alleging, in eight counts, that A.V. had committed acts, which, if committed by an adult, would constitute a crime, and that she was in need of supervision, treatment, or confinement. The fact finding hearing took place on September 27, 2017 and October 11, 2017. On October 11, 2017, the Family Court dismissed seven of the charges and sustained only one, finding that the Corporation Counsel had proven beyond a reasonable doubt that A.V. had committed an act that, if committed by an adult, would constitute assault in the third degree, a class A misdemeanor (Penal Law § 120.00).[2]

Contrary to the majority's statement, Family Court did not find that A.V. was responsible for all of the consequences of the attack. A.V. was never charged with any offense in connection with the unknown man's assault on the male complainant with a pipe. Consequently, Family Court did not consider the male

[2]Counts 1 and 5 alleged attempted gang assault in the first degree and attempted assault in the second degree, both based on the premise that A.V. had intended to cause serious physical injury and had done so. Counts 2, 3 and 7 alleged attempted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the fourth degree, respectively, all based on the glass bottle, wielded by Mr. V. Counts 4 and 8 alleged assault in the second degree and criminal possession of a weapon in the fourth degree, respectively, both premised on the allegation that the toy bat in A.V.'s hands was "a dangerous or deadly instrument or weapon" (Penal Law § 265.01[2]; *see also* Penal Law § 120.05[2]).

complainant's injuries at all in reaching its factual determination as to A.V. Furthermore, Family Court did not find A.V. liable for her father's hitting the female complainant in the face with a glass bottle because it did not find that A.V. even knew that he possessed the bottle, and, accordingly, the court dismissed all of the counts based on the use of the glass bottle. Family Court found that the toy bat A.V. used was not a dangerous instrument and that A.V. did not intend to cause physical injury, and accordingly dismissed counts 4 and 6. Family Court sustained only the class A misdemeanor charge of assault in the third degree, finding that, were A.V. an adult, her acts would have resulted in accomplice liability for only Ms. Ortiz's acts in punching the woman complainant.[3]

At the dispositional hearing on November 28, 2017, the Family Court considered, inter alia, the Investigation Report of the New York City Department of Probation (IR), A.V.'s New York City Public School records, her Individualized Education

[3]Accomplice liability requires a finding of mental culpability necessary for the commission of the crime charged (Penal Law § 20.00), i.e., that AV acted recklessly, with the intent to cause physical injury, or with a deadly weapon or dangerous instrument (Penal Law § 120.00). Family Court expressly found that A.V. did not intend to injure the complainant (Penal Law § 120.00[1]) and that the toy bat was not a deadly weapon or dangerous instrument. Therefore, it implicitly found that A.V. acted recklessly (Penal Law § 120.00[2]).

Program (IEP), the neglect petition filed against Mr. V. and his girlfriend on or about January 6, 2017, and the report by A.V.'s foster care agency case planner to the court hearing the neglect proceeding (Foster Care Agency Report).[4]

A.V. is currently 15, and the one-year probation term imposed by Family Court on November 28, 2017 has ended. She now asks that this Court hold that an adjournment in contemplation of dismissal (ACD) was the least restrictive available alternative, and dismiss the petition.

In my view, under the circumstances of this case, the court improvidently exercised its discretion when it adjudicated A.V. a juvenile delinquent and imposed probation. This was not "the least restrictive available alternative" (Family Ct Act § 352.2[2][a]). An ACD with appropriate terms and conditions, including supervision by the Probation Department and a requirement that A.V. cooperate with mental health services (Family Court Act §§ 315.3[1], [2]), would have sufficed to serve A.V.'s needs and to protect society, and would have "avoided the stigma of a juvenile delinquency adjudication" (*Matter of Anthony M.*, 47 AD3d 434, 435 [1st Dept 2008]).

---

[4]The majority's statement that Family Court "observed" A.V. during the proceedings is inapposite to its dispositional findings, since A.V. did not testify, and Family Court made no mention of A.V.'s demeanor during the proceedings.

The Family Court correctly observed that A.V. requires mental health treatment and that she had a history of missing school while in her father's custody. However, its determination that a juvenile delinquency finding and 12 months of probation was the appropriate disposition to ensure that she receive treatment and continue to attend school is not supported by Family Court's own findings.

First, the Family Court made no specific finding that a 12 month period of Probation Department supervision was necessary to achieve these goals or that the six-month period of an ACD would not suffice to do so. Indeed, Family Court found that the Probation Department "doesn't have to do anything fancy but coordinate the services ACS is giving and make sure she attends school and have limited oversight."

Second, as discussed above, and as acknowledged by the Family Court, the record demonstrates that A.V. has vastly improved her school attendance and performance since being in her grandmother's care (*see Narvanda S.*, 109 AD3d at 712 [ACD appropriate where attendance improved between incident and dispositional hearing, at which time appellant had four absences]).

Third, as the Family Court acknowledged, the foster care agency supervising A.V.'s placement with her grandmother was

already attempting to put mental health services in place.[5] In addition, A.V.'s IEP indicates that she was to receive counseling in school, which was confirmed by the Foster Care Agency Report.

---

[5]The July 18, 2017 Foster Care Agency Report explains that A.V.'s case planner was in the process of attempting to obtain parental consent as a prerequisite to referring A.V. for individual psychotherapy. At the time of the dispositional hearing, A.V. remained in a temporary kinship foster care placement with her grandmother. Although Family Court Act § 383-b permits the local commissioner of social services to "give effective consent for medical, dental, health and hospital services" for children in foster care, ACS generally seeks parental consent to non-emergency medical and mental health treatment (*see Matter of Matthew V. [Lynette G.]*, 59 Misc 3d 288, 295-296 [Fam Ct, Kings County 2017] [parents retain the right to make medical decisions for their children even after the state obtains temporary custody, and a hearing is required before the ACS may override the parent's wishes]; *Matter of Martin F.*, 13 Misc 3d 659, 678 [Fam Ct, Monroe County 2006] [legislative purpose of Social Services Law § 383-b was to provide for immediately necessary medical treatment when no parent was available to consent]), particularly where, as here, the requested treatment may lead to the administration of psychotropic medications (*see Matter of Isaiah T.F.-C. [Charisse F.-D'Juan C.]*, 136 AD3d 687 [2d Dept 2016]; *Matter of Justin R.*, 63 AD3d 1163 [2d Dept 2009]). This policy is based on the agency's recognition that parents retain their constitutional right to make such decisions for their children in foster care (*see* ACS Parent Handbook: A Guide for Parents with Children in Foster Care ["As a Parent of a Child in Foster Care, You Have the Right to: . . . Consent to medication and speak with the prescribing doctor. . . ."] [available at: https://www1.nyc.gov/assets/acs/pdf/advocacy/parent_ handbook.pdf [last accessed May 21, 2019]]; *see also* Public Health Law § 2504[2], [4] [parental consent required for all but emergency medical treatment of children]; *Santosky v Kramer*, 455 US 745, 753 [1982] ["The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State"]).

Moreover, the IR noted that A.V. and her grandmother were not only willing for A.V. to attend counseling, but believed that she was in "dire need" of mental health services (*see Narvanda S.*, 109 AD3d at 713; *Juan P.*, 114 AD3d at 463 [in each case, ACD was appropriate where appellant and care giver were willing for appellant to receive mental health services]). The only obstacle appears to have been the foster care agency's difficulty obtaining consent from either of her apparently dysfunctional parents. There is no evidence that another agency's involvement would have secured such services any more expediently, and, in any event, the Probation Department could have coordinated with the school and foster care agency just as effectively during a six-month ACD.

Finally, Family Court appropriately found that it was A.V.'s "tumultuous history when she was with the father . . . that led to this incident that took place while she was together with her father," and that "she learned from [the incident] and is doing better with the grandmother."[6]

---

[6]The trial record reveals that, while in her father's custody, A.V. had to walk a tightrope of pleasing her father while maintaining her own moral compass. Her ability to do this is illustrated, for example, by the IR's statements that she was drug-free, despite having been introduced to marijuana at the age of 12 by her father's girlfriend, and that she had rejected becoming a part of the gang of which her father was reportedly a member.

The majority emphasizes the seriousness of A.V.'s acts. However, "[a]lthough the seriousness of the juvenile's acts is an extremely important factor in determining an appropriate disposition . . ., it is not the only factor. The disposition is not supposed to punish a child as an adult, but provide effective intervention to 'positively impact the lives of troubled young people while protecting the public'" (*Narvanda S.*, 109 AD3d at 712 quoting *Matter of Robert J.*, 2 NY3d 339, 346 [2004]). Indeed, we have previously held that an ACD with oversight and services was appropriate where, as here, the Family Court had determined that the young person's acts, if committed by an adult, would have constituted assault in the third degree (*see Tyttus D.*, 107 AD3d 404; *Matter of Besjon B.*, 99 AD3d 526 [1st Dept 2012]; *Matter of Juli P.*, 62 AD3d 588 [1st Dept 2009]). Moreover, as discussed above, the Family Court specifically found that A.V. did not intend to cause injury, acted recklessly, and was not responsible for the acts that resulted in the complainants' most serious injuries (*see Matter of Juli P.*, 62 AD3d at 589).

Appellants' acts in *Juan P.* (114 AD3d 460) and *Narvanda S.* (109 AD3d 710) were arguably as bad as, or worse than, A.V.'s, but each resulted in an ACD. In both of those cases, the appellant restrained and forcibly partially undressed and groped

a classmate until the young woman managed to get away. In contrast to A.V., each committed those acts on his own volition and despite having a "stable home life" (*Narvanda S.*, 109 AD3d at 714) and a "strong social network" (*Juan P.*, 114 AD3d at 467). In contrast, A.V. clearly acted while under the control of her father, who instigated the attack and told her to "come out" and join him. Moreover, as Family Court acknowledged, the IR and the neglect petition show that A.V.'s five years in her father's custody was traumatic due to his "questionable parental abilities," and there was no evidence that A.V. was ever in any trouble before or after this incident,[7] despite being subjected to a chaotic family life before being placed in her grandmother's home, which, as Family Court found, was the stable home A.V. had previously been deprived of. Furthermore, A.V. immediately acknowledged and expressed remorse for her part in the attack,[8] unlike *Juan P.* (114 AD3d at 468 [Richter, J., dissenting]) and

[7]As noted in the IR, there is no indication in A.V.'s school records or IEP that she has ever been suspended or been in any serious trouble at school, which is consistent with her grandmother's report to the Probation Department investigator that she has no history of cutting class or of being suspended.

[8]The IR states that A.V. "feels terrible about her involvement in the instant offense and shared that in hindsight, she would have removed herself from the altercation." In addition to her acceptance of responsibility reflected in the IR, A.V. did not challenge the Family Court's findings and its sustaining the charge against her of assault in the third degree.

Narvanda S. (109 AD3d at 716 [Richter, J., dissenting]), each of whom was, nevertheless, found suitable for an ACD.

The majority cites to *Matter of Jaquiya F.* (167 AD3d 428 [1st Dept 2018]) for the proposition that a juvenile delinquency adjudication is appropriate where a juvenile has committed a serious offense, would benefit from mental health services and monitoring with regard to school attendance and performance and requires a period of supervision exceeding six months. However, *Jaquiya F.* did not address at all the appropriate period of supervision, and involved a juvenile who "demonstrated a multitude of behavioral problems at school and at home," and whose acts were found to have caused injuries to the victim (*id.* at 428). Here, A.V. has no history of serious behavioral problems and there is no evidence that she committed any act that caused injury, or that she intended to cause injury, to either of the complainants. Family Court abused its discretion by declining to impose an ACD.

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

ENTERED: JUNE 20, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9550 U.S. Bank National Association, etc., Plaintiff-Appellant, Index 35131/14E

-against-

Pierre Charles, Defendant-Respondent,

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

_____

Sandelands Eyet LLP, New York (Mindy L. Kallus of counsel), for appellant.

Richland & Falkowski, PLLC, Washingtonville (Daniel H. Richland of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered November 15, 2017, which, upon granting defendant Pierre Charles's motion for renewal and reargument, vacated an order, same court and Justice, entered on or about June 1, 2017, and granted Charles's motion to amend his answer to the extent of deeming it served and filed as of November 9, 2017, unanimously affirmed, without costs.

Charles contends that this mortgage foreclosure action is time-barred, because the six year statute of limitations was triggered by a prior foreclosure action, in which plaintiff accelerated the mortgage debt. Plaintiff counters that, because

it had failed to comply with a contractual 30-day notice requirement in accordance with section 22 of the mortgage, the mortgage was not accelerated by the prior action.

In the prior order, Supreme Court granted plaintiff's motion for summary judgment, finding that plaintiff's voluntary discontinuance of the prior action for its failure to comply with section 22 of the mortgage did not accelerate the mortgage in the prior action.

Charles moved for leave to renew and reargue on the grounds that acceleration took place when the 2007 foreclosure action was commenced regardless of whether or not plaintiff had complied with the 30-day notice requirement of section 22. He argued that the provision only requires notice of a default, but it is not a condition precedent required to accelerate the loan.

Acceleration only takes place when the holder of the note and mortgage takes "affirmative action . . . evidencing the holder's election" to do so (*Wells Fargo Bank N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]). This may be accomplished in the form of a notice to the borrower (*see Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530 [1st Dept 2017], *lv denied* 30 NY3d 959 [2017]). Affirmative action can also occur when the first foreclosure action is commenced (*see Capital One, N.A. v Saglimbeni*, 170 AD3d 508, 509 [1st Dept

2019]; *HSBC Bank USA v Kirschenbaum*, 159 AD3d 506, 506 [1st Dept 2018]). The prior foreclosure action sought the accelerated mortgage amount.

There is an issue of fact in this particular case regarding whether plaintiff's discontinuance of the prior foreclosure action de-accelerated the mortgage (see *Capital One, N.A., supra*). We note that neither the motion seeking discontinuance or the order entered granting that relief provided that the mortgage was de-accelerated or that plaintiff would now be accepting installment payments from the defendant (*Bank of NY Mellon v Craig*, 169 AD3d 627, NY [2d Dept 2019]). We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9669 The People of the State of New York, Respondent, Ind. 435/14

-against-

Tommy Barnes, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Taylor L. Napolitano of counsel), for appellant.

Tommy Barnes, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J. at suppression motion; Robert M. Stolz, J. at motion in limine; Edward J. McLaughlin, J. at jury trial and sentencing), rendered June 28, 2016, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 15 years, unanimously affirmed.

Defendant's suppression motion was properly denied, and the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the credibility determinations made by the suppression court or the jury. We do not find that defendant's acquittal of

a sale charge undermines the weight of the evidence supporting the possession conviction (*see People v Rayam*, 94 NY2d 557 [2000]; *People v Johnson*, 73 AD3d 578, 580 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]).

The court providently exercised its discretion in denying defense counsel's motion in limine seeking to cross-examine a police witness based on a federal action against him and other officers that had been settled without any admission of wrongdoing. Defendant failed to identify "specific allegations that are relevant to the credibility of the law enforcement witness" (*People v Smith*, 27 NY3d 652, 662 [2016]). The federal "complaint did not allege, or even support an inference, that [the witness] personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers" (*id.* at 663 [internal quotation marks omitted]; *see also People v Smith*, 179 AD3d 523 [1st Dept 2019]). Moreover, the in limine motion court conducted an inquiry that revealed that in the incident giving rise to the federal lawsuit the witness merely signed paperwork at the stationhouse after other officers had made the allegedly improper arrest elsewhere, outside the witness's presence (*see People v Cepeda*, 158 AD3d 468, 469 [1st Dept 2018], *lv denied* 31 NY3d 1080 [2018]).

Defendant did not preserve his challenges to the court's

main and supplemental jury charges, and we decline to review them in the interest of justice. As an alternative holding, we find that the court's permissive charge on intent did not shift the burden of proof (*see People v Getch*, 50 NY2d 456 [1980]) and that the charge under *Allen v United States* (164 US 492 [1896]) was not coercive (*see People v James*, 135 AD3d 602 [1st Dept], *lv denied* 27 NY3d 1070 [2016]).

Defendant's absence from a discussion between the court and the attorneys of a jury note seeking clarification about the elements of certain counts was not reversible error, because this was "a purely legal matter about which defendant could not have provided meaningful input" (*People v Peters*, 166 AD3d 500, 502 [1st Dept 2018], *lv denied* __NY3d__ 2019, NY Slip Op 97941[U] [2019]).

We have considered and rejected the arguments raised in defendant's pro se supplemental brief.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9670 Guy Savall, Index 302008/15
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent,

Rodney Campbell,
Defendant.

_____

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

Lawrence Heisler, New York City Transit Authority, Brooklyn, (Alison Estess of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about September 27, 2018, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff's motion was properly denied in this action for personal injuries sustained in a collision between defendants' bus and plaintiff's vehicle. Triable issues of fact exist as to how the accident occurred since plaintiff and defendant Campbell provided conflicting versions of the accident (*see e.g. Hedian v MTLR Corp.*, 169 AD3d 620 [1st Dept 2019]). Plaintiff's argument that Campbell's version of the accident should be rejected because the affidavit he submitted was a self-serving attempt to

defeat summary judgment is unavailing. The discrepancies in the affidavit and Campbell's deposition testimony cited by plaintiff are not so fundamental as to provide a basis for discrediting Campbell's version of the accident.

Furthermore, the motion court did not impose on plaintiff the burden to prove the absence of his own comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]). Rather, the court properly found plaintiff did not conclusively establish that Campbell was negligent. Campbell's version of the accident exonerated him and attributed the accident exclusively to plaintiff's negligence in trying to squeeze between the bus and the stopped cars at the intersection. Thus, it is not a question of whether plaintiff's conduct was also negligent, but there are triable issues of fact as to whether or not Campbell was negligent at all (*see Ugarriza v Schmeider*, 46 NY2d 471, 474 [1979]).

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9671 In re Maria K.,
Petitioner-Appellant,

-against-

Dimitra L., et al.,
Respondents-Respondents.

_____

Carol L. Kahn, New York, for appellant.

Leslie S. Lowenstein, Woodmere, for Dimitra L., respondent.

The Reiniger Law Firm, New York (Douglas H. Reiniger of counsel), for Christopher B., respondent.

Tennille M. Tatum-Evans, New York, attorney for the child Matthew B.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child Zak B.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about February 7, 2018, which, to the extent appealed from as limited by the briefs, denied petitioner mother's custody modification petition to the extent of directing the children to remain in the primary physical custody of respondent great-grandmother, and awarding the great-grandmother final decision-making responsibilities in the event of a dispute with the mother, unanimously affirmed, without costs.

The court's determination, after a hearing, that it was in the best interests of the subject children to remain in the

physical custody of their maternal great-grandmother, and awarding her final decision making authority in the event of a dispute with the mother, has a sound and substantial basis in the record (*Matter of Reeva A.C. v Richard C.*, 84 AD3d 521 [1st Dept 2011]; *Matter of China S. [Tonia J.-Levon S.]*, 77 AD3d 568 [1st Dept 2010]). The record shows that the great-grandmother provided a stable and nurturing home for the children and they received consistent good care living with her. The mother has not cared for the children since 2008, and she has a less stable housing history, having moved three times, in two years, since relocating to New Hampshire. The mother has only recently obtained a steady job, and has no feasible plan for the children's relocation to rural New Hampshire or appropriate concern for the impact the move would have on the children, who would be uprooted them from their school and community in New York City, where they have regular access to their father, grandmother and extended family.

The mother's contention that she was deprived of a fair hearing by the Family Court's failure to obtain medical records and conduct an updated forensic evaluation is unpreserved for appellate review because she did not make requests for reports or an updated evaluation at any point during the proceedings (*Matter*

of Bailey v Carr, 125 AD3d 853 [2d Dept 2015]). In any event, the Family Court possessed sufficient information to enable it to render its determination and the mother was not deprived of a fair hearing (*see Matter of Solovay v Solovay*, 94 AD3d 898, 900 [2d Dept 2012], *lv denied* 19 NY3d 808 [2012]).

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9672 Kahan Jewelry Corp., et al., Index 160007/13
Plaintiffs-Appellants,

-against-

Coin Dealer of 47th St. Inc., et al.,
Defendants,

David Yusupov,
Defendant-Respondent.

_____

Usher Law Group, P.C., Brooklyn (Mikhail Usher of counsel), for appellants.

Cox Padmore Skolnik & Shakarchy LLP, New York (Steven D. Skolnik of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 16, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' summary judgment motions to the extent of dismissing the claims against the individual defendants Yusupov and Aronov, unanimously affirmed, without costs.

To pierce the corporate veil and hold the individual defendants liable for a corporation's actions, plaintiffs were required to show that "(1) the [individual] owner[s] exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in

plaintiff's injury" (*First Capital Asset Mgt. v N.A. Partners*, 300 AD2d 112, 116 [1st Dept 2002]). Plaintiffs who seek to pierce the corporate veil "bear a heavy burden" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]), which was not met here.

First, even if the court were to accept plaintiffs' contention that Aronov had complete domination over the corporate defendants, it would not allow plaintiffs to collect against Yusupov. While plaintiffs argue extensively that defendant Aronov was the alter ego of Coin Dealer of 47th St. Inc. (Coin Dealer 47), they do not show or even attempt to argue that Yusupov abused the corporate form in any way or that he engaged in any affirmative fraudulent or wrongful actions. The mere fact that Yusupov is the sole shareholder of Coin Dealer 47 is not sufficient to pierce the corporate veil as to this defendant (*Skanska USA Bldg Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 13 [1st Dept 2016], *affd* 31 NY3d 1002 [2018]).

Nor has any claim for veil-piercing been established as to defendant Aronov, who was not an owner of either of the corporate defendants at the time of the alleged breach of contract. While plaintiffs claim that Aronov fully dominated the corporate form by his control of the business transactions of the corporate defendants, they have not shown that such domination was abused in order to commit a fraud against plaintiffs, apart from the

alleged breach of contract, which does not constitute a wrong warranting piercing the corporate veil *(Skanska*, 146 AD3d at 12).

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9673 The People of the State of New York, Ind. 5314/14
Respondent,

-against-

Robert Percodani,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Arza Feldman of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 30, 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: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9674 Amilcar Reyes, Index 302773/15
Plaintiff-Appellant,

-against-

Bruckner Plaza Shopping Center LLC, et al.,
Defendants-Respondents.

_____

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

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for Bruckner Plaza Shopping Center LLC, and Ashkenazy Acquisition Corp., respondents.

Russo & Toner, LLP, New York (Josh H. Kardisch of counsel), for Metro Mechanical LLC, respondent.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, Brooklyn (Melanie Wiener of counsel), for Western Beef Retail, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about April 13, 2018, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously modified, on the law, to grant plaintiff's motion as against defendants Bruckner Plaza Shopping Center LLC (Bruckner) and Metro Mechanical, LLC (Metro), and, upon a search of the record, to grant defendant Ashkenazy Acquisition Corp.'s cross motion to dismiss the complaint as against it, and otherwise affirmed, without costs. The Clerk is

directed to enter judgment dismissing the complaint as against Ashkenazy.

Plaintiff fell off the roof of a building while installing metallic roof edging called "gravel stops." Defendant Bruckner owned the property, and defendant Ashkenazy was the managing agent of the property. Defendant Western Beef Retail, Inc. (Western) leased the property from Bruckner, and had retained defendant Metro as the general contractor to renovate it for operation as a supermarket. Metro subcontracted plaintiff's employer, Mar-Sal Contracting Inc. (Mar-Sal), to replace the roof.

Plaintiff established prima facie violation of Labor Law § 240(1) through his testimony and the affidavit and testimony of his co-worker Alfonso Perez, establishing that no safety devices were provided for their use at the job site (*see e.g. De Oleo v Charis Christian Ministries, Inc.*, 106 AD3d 521, 521-522 [1st Dept 2013]). In response, defendants failed to raise an issue of fact as to whether plaintiff, by recalcitrantly refusing to use safety equipment that had been provided to him, was the sole cause of the accident (*see generally Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]). Accordingly, plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240(1) claim should have been granted as against Bruckner and

Metro.

We reject defendants' request to preclude Perez's affidavit and testimony on the ground that plaintiff did not disclose Perez's identity until after the filing of note of issue (*see* CPLR 3126), in light of the parties stipulation, pursuant to which defendants were ultimately able to depose Perez before disposition of the summary judgment motions, and the lack of prejudice to them (*see Lozada v Build On Top, HDFC*, 266 AD2d 63 [1st Dept 1999]).

An issue of fact exists as to whether Western, the lessee, was an "owner" or "agent" of the owner, for Labor Law purposes. Record evidence showing that Western was responsible for renovating the premises, including the roof, and had retained Metro as the general contractor for the renovation work, raises an issue of fact as to whether Western had the authority to supervise and control the work site (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [1st Dept 2005]; *Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]). The testimony of Western's director of merchandising that he was not involved with the construction work is insufficient to excuse Western from liability, where he had no knowledge of, and could not testify to, the lease arrangements between Western and Bruckner, as well

as the arrangement between Western and Metro (*see Zaher*, 18 AD3d at 340).

However, a search of the record establishes as a matter of law that managing agent Ashkenazy was not an "agent" of the owner, and we grant its cross motion for summary judgment dismissing the complaint as against it. Ashkenazy had no interest in the property, and its responsibilities as the managing agent entailed only the "upkeep of the shopping center, making sure the tenants get billed, and rents are collected." It was property owner Bruckner that leased the premises to Western, which in turn contracted directly with Metro to perform the renovation work. Ashkenazy had no involvement with the construction work, and was onsite only to check on its progress, and to ensure it did not interfere with the other tenants. The belief of its "Director of Property Management" that he may have been able to stop work at the job site "[w]ith proper notice I guess as per the lease" is too equivocal to raise an issue of fact. Because there was no evidence that Ashkenazy had authority to supervise or control the work site, the Labor Law § 240(1) claim should be dismissed against it (*see Russin*, 54 NY2d at 317; *cf. Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524 [1st Dept 2009]; *Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97 [1st Dept 1999]). Ashkenazy is also entitled to dismissal of the Labor Law

§ 241(6) claim because, for the same reasons, it is not an "owner" or "agent" under that statute (*see Santos v Condo 124 LLC*, 161 AD3d 650, 653-654 [1st Dept 2018]). Without authority to supervise or control plaintiff's work, Ashkenazy also may not be held liable under Labor Law § 200 and common law negligence principles in this case involving the means and method of plaintiff's work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9675 Cheryl Stephney, Index 102676/10
Plaintiff-Respondent,

-against-

MTA Metro-North Railroad,
Defendant-Appellant.

_____

Krez & Flores, LLP, New York (William J. Blumenschein of counsel), for appellant.

The Wilder Law Firm, P.C., New York (Nick Wilder of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered September 19, 2018, which denied defendant MTA Metro-North Railroad's motion for summary judgment dismissing plaintiff's sole claim under the Federal Employee Liability Act, unanimously affirmed, without costs.

On the evening of March 13, 2007, plaintiff Cheryl Stephney was working as an assistant conductor on Metro-North's New Haven Line, when she was physically attacked by a passenger while seeking to collect her fare.

The Federal Employers' Liability Act (FELA) (45 USC § 51 *et seq.*) provides that operators of interstate railroads shall be liable to their employees for on-the-job injuries resulting from the railroad's negligence. In an action under FELA, "the plaintiff must prove the traditional common-law elements of

negligence: duty, breach, damages, causation and foreseeability" (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 [1st Dept 2005]). However, these elements are "substantially relaxed" and "negligence is liberally construed to effectuate the statute's broadly remedial intended function" (*id.* at 218-219; *see also Foster v Port Auth. of N.Y. & N.J.*, 154 AD3d 543, 544 [1st Dept 2017]). A claim under FELA "must be determined by the jury if there is any question as to whether employer negligence played a part, however small, in producing plaintiff's injury" (*Hairston v Metro-North Commuter R.R.*, 2 AD3d 127, 128 [1st Dept 2003]). "A case is deemed unworthy of submission to a jury only if evidence of negligence is so thin that on a judicial appraisal, the only conclusion that could be drawn is that negligence by the employer could have played no part in an employee's injury" (*Pidgeon v Metro-North Commuter R.R.*, 248 AD2d 318, 319 [1st Dept 1998]).

To establish the element of foreseeability, a plaintiff must show that the defendant had either actual or constructive notice of the defective condition (*id.*). However, notice generally presents an issue of fact for the jury (*Hyatt*, 16 AD3d at 219). "As with all issues under FELA, the right of the jury to pass on this issue must be liberally construed, with the jury's power to draw inferences greater than in a common-law action" (*id.*).

Under the foregoing relaxed standard, there is sufficient

evidence to raise an issue of fact concerning defendant's actual or constructive notice of a risk of assault to conductors on the New Haven Line. Plaintiff testified that she was previously assaulted by a passenger, and that there was an ongoing problem of physical intimidation by large groups of adolescents refusing to pay their fares, which caused her to fear for her safety. Plaintiff also testified that she has called the MTA's rail traffic controllers for police assistance at least 250 times to deal with abusive passengers; another conductor was punched in the face and knocked out on the New Haven Line; a passenger attempted to stab and rob another conductor on the Harlem Line. Based on plaintiff's testimony, summary judgment dismissing the complaint was properly denied (*see Hairston*, 2 AD3d at 128; *Ingrassia v Metro-North Commuter R.R.*, 235 AD2d 350 [1st Dept 1997]; *cf. Okeke v Long Is. R.R. Co.*, 2004 WL 2088513, *1 [SD NY Sept. 20, 2004]).

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9676 Index 40000/88
In re New York City Asbestos Litigation 190413/13

- - - - -

Claudine DiScala, etc.,
Plaintiff-Respondent,

-against-

Charles B. Chrystal Company, Inc., et al.,
Defendants,

Whittaker Clark & Daniels, Inc.,
Defendant-Appellant.

_____

Pillsbury Winthrop Shaw Pittman LLP, New York (David G. Keyko of counsel), for appellant.

Levy Konigsberg, LLP, New York (Renner K. Walker of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered August 29, 2017, upon a jury verdict in plaintiff's favor, and bringing up for review an order, same court and Justice, entered June 19, 2017, which denied defendant Whittaker Clark & Daniels, Inc.'s motion for judgment notwithstanding the verdict, unanimously reversed, on the law, without costs, the judgment vacated, the motion granted, and the complaint dismissed as against said defendant. The Clerk is directed to enter judgment accordingly.

Plaintiff failed to adduce evidence that the decedent was

exposed to sufficient levels of asbestos in defendant's talc to cause mesothelioma. Plaintiff's causation expert merely opined that the decedent's exposure to unspecified "detectable" or "significant" levels of asbestos in the talcum product she used caused her mesothelioma. Plaintiff was not required to quantify the decedent's exposure level with exact mathematical precision (*see Matter of New York City Asbestos Litig.*, 148 AD3d 233, 235-238 [1st Dept 2017], *affd* 32 NY3d 1116 [2018]; *Parker v Mobil Oil Corp.*, 7 NY3d 434, 449 [2006]). However, in this case the evidence failed to establish a level of exposure sufficient to cause the illness.

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9677 Mario Gagliardi, Index 162540/14
Plaintiff-Appellant,

-against-

Compass Group, USA, Inc., et al.,
Defendants-Respondents.

_____

Russo & Toner, LLP, New York (Josh H. Kardisch of counsel), for appellant.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Robb Denney of counsel), for Compass Group USA, Inc., Restaurant Associates Events Corp., Restaurant Associates Corp., Restaurant Associates LLC, and Restaurant Associates LP, respondents.

Tobias & Kuhn, New York (Curtis B. Gilfillan of counsel), for Seven Hanover Associates, LLC, respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered January 24, 2018, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action where plaintiff was injured when he slipped and fell in defendants' cafeteria, defendants established their prima facie entitlement to judgment as a matter of law by showing that they neither created nor had notice of the slippery condition that caused plaintiff's fall. Defendants submitted evidence including their cleanup inspection schedule which indicated that the cafeteria floor was inspected every 15 minutes

and was inspected about two minutes prior to plaintiff's fall, and the testimony of the cafeteria manager that no liquid was observed on the cafeteria floor (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571 [1st Dept 2014]; *Warner v Continuum Health Care Partners, Inc.*, 99 AD3d 636, 637 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's claim that the cafeteria's employees created the allegedly slippery condition by allowing an ice cube to fall on the floor is speculative. Plaintiff testified that he did not observe anything on the floor prior to his fall, he did not see the substance that he slipped on, and he had no idea how long the liquid substance was on the floor or how it got there (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]).

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: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9678 The People of the State of New York, Ind. 3603/14
Respondent,

-against-

Paul Martinez,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Patricia Nunez, J.), rendered December 22, 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: JUNE 20, 2019

CLERK

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

Friedman, J.P., Richter, Kahn, Singh, JJ.

9679-
9680 The People of the State of New York, Ind. 396/14
Respondent,

-against-

Michael Cole,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Felicia A. Yancey 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 (Alvin Yearwood, J.), rendered January 26, 2017, as amended October 10, 2018,

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: JUNE 20, 2019

CLERK

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

Friedman, J.P., Richter, Kahn, Singh, JJ.

9681 Jannique Bou, Index 31473/17
Plaintiff-Respondent,

-against-

Carlos A. Llamoza,
Defendant,

Vault,
Defendant-Appellant,

Bryan F. Lytle,
Defendant-Respondent.

_____

Montfort, Healy, McGuire & Salley LLP, Garden City (Hugh Larkin of counsel), for appellant.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for Jannique Bou, respondent.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for Brian F. Lytle, respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 3, 2018, which denied defendant Vault's motion to dismiss the complaint, with leave to renew, unanimously affirmed, without costs.

Defendant Vault, the owner of the vehicle that allegedly struck plaintiff's vehicle, moved to dismiss the complaint against it based on documentary evidence purportedly establishing that it is a commercial lessor of vehicles, and therefore immune from vicarious liability under the Graves Amendment (49 USC §

30106[a]; *see Olmann v Neil*, 132 AD3d 744, 745 [2d Dept 2015]; *Hernandez v Sanchez*, 40 AD3d 446, 447 [1st Dept 2007]). The affidavit and lease submitted by Vault in support of its motion did not establish a defense based on documentary evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Since the lease agreement did not name either Vault, or its purported affiliate Allied Financial Services (Ally), as a lessor or assignee of the lease, it was insufficient to establish that Vault was engaged in the trade or business of renting or leasing vehicles (*see Cassidy v DCFS Trust*, 89 AD3d 591 [1st Dept 2011]). The affidavit of an employee from Ally does not constitute "documentary evidence" for purposes of a motion to dismiss pursuant to CPLR 3211(a)(1) (*Art & Fashion Group Corp. v Cyclops Prod. Inc.*, 120 AD3d 436 [1st Dept 2014]). In any event, the affidavit did not adequately explain the relationship between Vault and Ally, and also failed to sufficiently authenticate the lease, as the affiant did not demonstrate that he had sufficient personal knowledge of the specific lease in question (*cf. Burrell v Barreiro*, 83 AD3d 984, 985 [2d Dept 2011]). For the same reasons, Vault's documentary submissions also fail to conclusively establish a defense to the allegations that it was negligent in its ownership, supervision,

or maintenance of the vehicle (*see Leon v Martinez*, 84 NY2d at 88 [1994]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9682 The People of the State of New York, Respondent, Ind. 5149/15

-against-

Darnelle Watts, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Megan D. Byrne of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 15, 2017, convicting defendant, after a jury trial, of predatory sexual assault against a child, sexual abuse in the first degree (two counts) and endangering the welfare of a child (two counts), and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

Defendant's argument that the verdict convicting him of predatory sexual assault against a child was against the weight of the evidence is unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The main victim's testimony established numerous sex acts, including an act of oral sex.

The court properly admitted evidence that one of the three child victims saw defendant engage in a sexual assault against a

fourth child, who was not named as a victim in the indictment. That testimony was probative of the child endangerment count pertaining to the child who observed that conduct (*see People v Johnson*, 95 NY2d 368, 372 [2000]). The People were not required to stop after presenting a minimum of evidence (*see People v Alvino*, 71 NY2d 233, 245 [1987]), and the probative value of this evidence outweighed any prejudicial effect.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9683-
9684 Index 304554/11

Wanda Marti, Individually and as Administratrix of the Estate of Stephen Eric Marti, deceased, et al.,
Plaintiffs-Appellants,

-against-

Thakor C. Rana, M.D., et al.,
Defendants,

Maria Pia DeBlasio, M.D.,
Defendant-Respondent.

_____

Law Offices of G. Oliver Koppell & Associates, New York (G. Oliver Koppell of counsel), for appellants.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered on or about November 27, 2018, which granted plaintiffs' motion for renewal and reargument and, upon renewal and reargument, adhered to the prior determination granting defendant Maria Pia DeBlasio, M.D.'s motion for summary judgment dismissing the complaint as against her, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about May 7, 2018, unanimously dismissed, without costs, as academic.

It is undisputed that defendant met her prima facie burden

of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of the decedent's injuries (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). The affidavit by plaintiffs' expert was insufficient to raise any issues of fact, because it improperly raised a new theory of liability for the first time in opposition to summary judgment (*Biondi v Behrman*, 149 AD3d 562, 563-564 [1st Dept 2017], *lv dismissed in part, denied in part* 30 NY3d 1012 [2017]). Contrary to plaintiffs' contention, this affidavit did not merely add additional detail but rather offered a distinct and conflicting theory - that defendant was negligent in failing to diagnose and treat the decedent's congestive heart failure as opposed to his atrial fibrillation or flutter.

We need not decide whether it would have been appropriate to grant leave to amend the complaint or bill of particulars, as plaintiffs never moved for such relief.

The fact that oral argument was held before a different Justice than the Justice who ultimately decided the motion for summary judgment is not a proper basis for vacating the order granting summary judgment. Although Judiciary Law § 21 provides that a Supreme Court Justice "shall not decide or take part in the decision of a question, which was argued orally in the court,

when he was not present and sitting therein as a judge," reversal is not warranted on this ground, because the Justice who granted the motion decided a purely legal question (*People v Hampton*, 21 NY3d 277, 286 [2013]).

Plaintiffs argue that they were prejudiced because certain statements made by the court at oral argument led them to believe that a motion for leave to amend was not necessary. This argument is unavailing. To the extent counsel relied on his impressions of the court's leanings, which were never incorporated into a binding order, he did so at his own peril.

While plaintiffs may have been prejudiced to the extent they made arguments at oral argument that they did not make in their opposition brief, any such prejudice has been mitigated by the fact that these arguments were raised and considered in connection with the motion to reargue or renew.

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9685 Israel Elihu, et al., Index 23970/16E
Plaintiffs-Respondents,

-against-

Mireille Nicoleau, et al.,
Defendants-Appellants.

_____

Law Offices of Richard M. Sands, P.C., Freeport (Richard M. Sands of counsel), for appellants.

The Law Offices of Stuart M. Kerner, P.C., Bronx (Stuart M. Kerner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about August 6, 2018, which granted plaintiffs' separate motions for partial summary judgment on the issue of liability and for summary judgment dismissing the counterclaim against plaintiff Israel Elihu, unanimously affirmed, without costs.

The court providently exercised its discretion in entertaining and deciding plaintiffs' successive motions for summary judgment. The motions were made on the basis of new evidence (*see Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526 [1st Dept 2013]; *cf. Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 625-626 [1st Dept 2015]). In addition, they enhanced judicial efficiency, since they relieved the court and the movants of the burden of a plenary trial (*see Landmark Capital*

Invs., Inc. v Li-Shan Wang, 94 AD3d 418, 419 [1st Dept 2012]; *Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]).

The court also properly awarded plaintiffs partial summary judgment on the issue of liability, and correctly dismissed defendants' counterclaim against plaintiff Israel Elihu. Plaintiffs met their prima facie burden by demonstrating that they were stopped or stopping in stop-and-go traffic when they were rear-ended by the defendants' vehicle (*see e.g. Bajrami v Twinkle Cab Corp.*, 147 AD3d 649 [1st Dept 2017]; *Chowdhury v Matos*, 118 AD3d 488 [1st Dept 2014]; *Cartagena v Martinez*, 112 AD3d 521 [1st Dept 2013]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). Defendants' allegation that plaintiffs' vehicle stopped suddenly in stop-and-go traffic is not a sufficient non-negligent explanation for the accident, and therefore fails to raise a triable issue of material fact in

opposition (*see e.g. Miller v DeSouza*, 165 AD3d 550, 550 [1st Dept 2018]*; Bajrami*, 147 AD3d at 649; *Chowdhury*, 118 AD3d at 488; *Johnson*, 261 AD2d at 271).

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

ENTERED: JUNE 20, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9686 Joanna Cutler, Index 650586/17
Plaintiff-Respondent,

-against-

Renee Cafaro, et al.,
Defendants-Appellants.

_____

Kaplan Rice LLP, New York (Daniel D. Edelman of counsel), for appellants.

_____

Order, Supreme Court, New York County (Melissa Crane, J.), entered July 31, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, and the motion granted, without costs. The Clerk is directed to enter judgment accordingly.

Defendants established as a matter of law that plaintiff was not the procuring cause of the sale of unit 615. Accordingly, plaintiff is not entitled to a commission (*Republic Realty Republic Realty Servs., Inc. v Kuafu Props. LLC*, 167 AD3d 436, 437 [1st Dept 2018]).

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

ENTERED: JUNE 20, 2019

CLERK