SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 9, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

CORRECTED ORDER - JANUARY 19, 2018

Manzanet-Daniels, J.P., Mazzarelli, Kapnick, Webber, JJ.

5165 Macquarie Capital (USA) Inc., Index 650988/15
Plaintiff-Appellant,

-against-

Morrison & Foerster LLP,
Defendant-Respondent.

____

Marino, Tortorella & Boyle, P.C., New York (Kevin H. Marino of counsel), for appellant.

Williams & Connolly LLP, Washington, D.C. (Kannon K. Shanmugam of the bar of the District of Columbia and the State of **Kansas**, admitted pro hac vice, of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about July 21, 2016, which granted defendant law firm's CPLR 3211 motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion denied.

Accepting plaintiff client's allegations as true and drawing all reasonable inferences in its favor (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), a legal malpractice claim was sufficiently alleged (*see Fielding v Kupferman*, 65 AD3d 437, 439 [1st Dept 2009]). Plaintiff, a lead underwriter on a public

offering of a Chinese corporation, claimed that defendant law firm was negligent in failing to uncover material misrepresentations made by the corporation in connection with the offering. Plaintiff sufficiently asserted that but for defendant's negligence, plaintiff would have ceased its involvement in the public offering and avoided the fees, expenses and other damages it incurred in defending against, as well as settling claims against it (*see id.*).

Defendant's argument that an investigative report gave plaintiff prior constructive notice of the material misrepresentations is unavailing (*cf. Ableco Fin. LLC v Hilson*, 109 AD3d 438 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]). In *Ableco*, this Court granted the defendants' motion for summary judgment, dismissing the plaintiff's legal malpractice claim "on the basis of information plaintiff indisputably possessed" prior to the closing of the transaction at issue (*id.* at 439). Specifically, the plaintiff, the maker of commercial loans, received a press release that explicitly excluded certain property from the available inventory of a bankruptcy estate, and thus, the evidence refuted the plaintiff's claim that it was unaware that it would not be getting a first priority lien on the entire inventory (*id.* at 438, 439). Moreover, this Court's

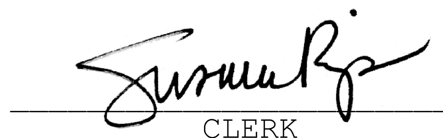
determination was founded not only upon the plaintiff's possession of the press release, but also on the clear and explicit presentation of the information such that counsel's legal interpretation was not required (*id.* at 439). Here, on a pre-answer motion to dismiss, although plaintiff acknowledges that it had possession of the investigative report, the information contained in the report cannot, at this stage, be described as explicitly putting plaintiff on notice and not requiring counsel's interpretation of the information. Defendant "may not shift to the client the legal responsibility it was specifically hired to undertake" (*Escape Airports [USA], Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437, 439 [1st Dept 2010] [internal quotation marks omitted]).

It may be reasonably inferred from plaintiff's allegations that it incurred damages attributable to defendant's conduct (*see Fielding*, 65 AD3d at 442), including litigation expenses incurred

in an effort to avoid, minimize, or reduce the damages caused by defendant’s alleged negligence (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 [2007]).

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Renwick, Tom, Kahn, Kern, JJ.

5265 Eugene Cross, Index 114988/07
Plaintiff-Respondent-Appellant,

-against-

Noble Ellenburg Windpark, LLC,
et al.,
Defendants-Appellants-Respondents,

Thomas Bellemare, Ltd.,
Defendant.

____

Cartafalsa, Slattery, Turpin & Lenoff, New York (Raymond F. Slattery of counsel), for appellants-respondents.

Sacks & Sacks LLP, New York (Scott N. Singer of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Debra A. James, J.), entered May 17, 2017, which, to the extent appealed from as limited by the briefs, granted the Noble defendants' motion for summary judgment the extent of dismissing plaintiff's Labor Law § 241(6) claim, denied the Noble defendants' motion to the extent they sought summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and sua sponte granted plaintiff summary judgment on his Labor Law § 240(1) claim, unanimously modified, on the law, to deny plaintiff summary judgment on his Labor Law § 240(1) claim, and otherwise affirmed, without costs.

The motion court correctly dismissed plaintiff's Labor Law

§ 241(6) claim. Plaintiff fell due to a chain catching his foot, and not due to a slippery condition or foreign substance, and thus Industrial Code (12 NYCRR) § 23-1.7(d) was not implicated (*see Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159 [1st Dept 2005]; *Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]). Plaintiff fell from a tractor trailer, and not in a passageway, rendering Industrial Code § 23-1.7(e)(1) inapplicable (*see Solano v Skanska USA Civ. Northeast Inc.*, 148 AD3d 619, 620 [1st Dept 2017]; *Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). The metal bars welded to the trailer's body for use as a ladder or stairway to the trailer's top were not a "[s]ingle ladder[]" subject to Industrial Code § 23-1.21(c).

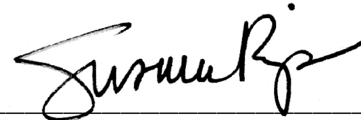
The motion court should not have sua sponte granted plaintiff summary judgment on his Labor Law § 240(1) claim. Plaintiff, who was attaching lifting lugs to a wind turbine base tower so it could be hoisted off its trailer and onto a concrete foundation, was engaged in an enumerated activity under that provision (*see Naughton v City of New York*, 94 AD3d 1 [1st Dept 2012]; *Myiow v City of New York*, 143 AD3d 433, 436 [1st Dept 2016]; *Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578 [1st Dept 2012]). Nevertheless, questions of fact exist as to whether

plaintiff was the sole proximate cause of his accident (*see Cherry v Time Warner, Inc.*, 66 AD3d 233 [1st Dept 2009]).

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

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

ENTERED: JANUARY 9, 2018



CLERK

Richter, J.P., Tom, Kapnick, Kern, Moulton, JJ.

5349 The People of the State of New York, Ind. 569/14
Respondent,

-against-

Johnny Torres,
Defendant-Appellant.

____

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

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J. at calendar calls; Patricia M. Nuñez, J. at hearing, jury trial and sentencing), rendered July 16, 2015, convicting defendant of criminal contempt in the second degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly granted defendant's request to represent himself. The combination of the trial court's colloquy with defendant and the colloquies already conducted by the calendar court was sufficient to warn defendant of the risks and disadvantages of proceeding pro se, the range of possible sentences, and the advantages of being represented by an attorney. Moreover, the trial court elicited some information covering defendant's personal background and familiarity with the

criminal justice system. This was sufficient to ascertain that defendant's waiver was knowing, intelligent and voluntary (*see People v Arroyo*, 98 NY2d 101 [2002]; *People v Smith*, 92 NY2d 516, 520 [1998]). Moreover, the court permitted defense counsel to remain as a legal advisor and to conduct portions of the trial, and there is nothing in the record to indicate that the court should have inquired into defendant's mental condition at the time he sought to waive his right to counsel (*see People v Collins*, 77 AD3d 404 [1st Dept 2010], *lv denied* 16 NY3d 797 [2011]).

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

ENTERED: JANUARY 9, 2018

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5383 The People of the State of New York, Ind. 2956/13
Respondent,

-against-

Jimmy Hidalgo,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered March 25, 2014, as amended April 17, 2014, convicting defendant, after a nonjury trial, of predatory sexual assault against a child and sexual abuse in the first degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supported the conclusion that the underlying crime

of course of sexual conduct extended over a period of not less than three months, as required by Penal Law § 130.75 (*see People v Paramore*, 288 AD2d 53 [1st Dept [2001], *lv denied* 97 NY2d 759 [2002]), in that this conduct began in 2007 and ended in 2011. The evidence also warranted the inference that defendant's behavior in the 2007 incident went far beyond merely holding a child on his lap, and that it established the elements of first-degree sexual abuse.

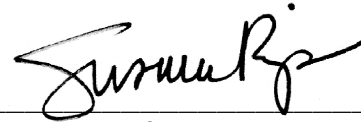
Defendant did not preserve his claim that the prosecutor's summation constructively amended the indictment and deprived defendant of fair notice of the charges, and we decline to review this claim in the interest of justice. As an alternative holding, we reject it on the merits. The predatory sexual assault count contained language that defendant's alleged sexual conduct "included at least one act of sexual intercourse and oral sexual conduct." Notwithstanding the use of conjunctive rather than disjunctive language, the People were not required to prove both sexual intercourse and oral sexual conduct (*see People v*

Charles, 61 NY2d 321, 327-328 [1982]), and they were entitled to argue that oral conduct sufficed. Furthermore, defendant received all the notice required by law.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5384 Lacole Gonzalez, Index 20630/14E
Plaintiff-Respondent,

-against-

Vernessa Bishop,,
Defendant-Appellant,

Andres Pulinario,
Defendant-Respondent,

Rufino Polanco,
Defendant.

____

Keane & Bernheimer PLLC, Valhalla (Connor W. Fallon of counsel), for appellant.

The Law Offices of Joseph Monaco, P.C., New York (Joseph D. Monaco, III of counsel), for Lacole Gonzalez, respondent.

Saretsky Katz & Dranoff, L.L.P., New York (Jonah S. Zweig of counsel), for Andres Pulinario, respondent.

____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered February 3, 2017, which denied defendant Bishop's motion for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Contrary to plaintiff's argument, a prior court decision granting plaintiff's motion for summary judgment did not find that defendant Bishop was negligent in connection with the motor

vehicle collision, because plaintiff, who was a passenger in Pulinario's vehicle, was granted summary judgment only "to the extent that plaintiff is deemed free of culpable conduct."

Bishop met her prima facie burden for summary judgment by demonstrating that Pulinario was negligent as a matter of law, and that Bishop was not negligently operating her vehicle. Bishop and plaintiff testified that Pulinario failed to stop for a stop sign, which is a violation of Vehicle & Traffic Law §§ 1142(a) and 1172(a), which constitutes negligence as a matter of law (*see Pace v Robinson*, 88 AD3d 530, 531 [1st Dept 2011]; *see e.g. Sanchez v Lonero Tr., Inc.*, 100 AD3d 417 [1st Dept 2012]). Bishop, who had the right of way, was "'entitled to anticipate that other vehicles will obey the traffic laws that require them to yield,' and ha[d] 'no duty to watch for and avoid a driver who might fail to stop . . . at a stop sign'" (*Dinham v Wagner*, 48 AD3d 349, 349-350 [1st Dept 2008] [citations omitted]).

Although a driver lawfully entering an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008]), plaintiff and Pulinario failed to raise a triable material issue of fact as to whether Bishop was

negligent. The evasive measures that Bishop took during the less than three seconds before impact did not constitute negligence, "under the emergency-like circumstances confronting her" (*Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340 [1st Dept 2004]; *Rooney v Madison*, 134 AD3d 634, 634-635 [1st Dept 2015], *lv denied* 27 NY3d 911 [2016]).

Plaintiff's and Pulinario's contention that Bishop was speeding was speculative and conclusory (*see Murchison v Incognoli*, 5 AD3d 271 [1st Dept 2004]; *Cardona v Fiorentina*, 149 AD3d 495 [1st Dept 2017]).

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

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

ENTERED: JANUARY 9, 2018

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5385 In re Justice N. L. J., etc.,

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

Ebony J., also known as Salima A.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

____

Geoffrey P. Berman, Larchmont, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about June 21, 2016, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding of permanent neglect (Social Services Law § 384-b[7]). The record shows that the agency exerted diligent efforts to strengthen the

mother's relationship with the child by referring her to programs for substance abuse, anger management and parenting skills for special needs children, and for mental health therapy, and by scheduling visitation and providing her with a visiting coach to improve the quality of the visits (*see Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512 [1st Dept 2015]; *Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545 [1st Dept 2014]).

Despite these diligent efforts, the mother failed to substantially plan for the child's future. Although the mother was able to successfully address her substance abuse issues, the record reflects that the mother did not sufficiently focus on her mental health problems and controlling her anger, or on the child's special needs. The caseworker testified that the quality of the mother's visits varied and she was unable to control the child's behavior, having to physically restrain him. The mother was also unreceptive to the visitation coaching, and visits often ended chaotically, with the mother rushing to leave (*see Matter of Alexandria D. [Brenda D.]*, 136 AD3d 604 [1st Dept 2016]).

A preponderance of the evidence supports the determination that it was in the best interests of the child to terminate the mother's parental rights (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child was in the same stable foster

home for three years, where he resided with his half brother, as well as his maternal uncle, and where his needs were met, and the foster parents wanted to adopt him *(see e.g. Cerenithy B. [Ecksthine B.]*, 149 AD3d 637 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]). A suspended judgment was not warranted under the circumstances.

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

ENTERED: JANUARY 9, 2018

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5386 Jose Colon, et al., Index 158976/15
Plaintiffs-Respondents,

-against-

Vals Ocean Pacific Sea Food,
Inc., et al.,
Defendants-Appellants.

____

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counel), for respondents.

____

Order, Supreme Court, New York County (Letitia M. Ramirez, J.), entered November 7, 2016, which, in this action for personal injuries sustained in a motor vehicle accident, granted plaintiffs' motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiffs established entitlement to judgment as a matter of law on the issue of liability. The police accident report and the affidavit of plaintiff Jose Colon were sufficient to demonstrate that defendant Jason S. Gilbert's negligence in failing to stop for the red light and yield the right of way in the intersection was the sole proximate cause of the accident (*see e.g. Cruz v Skeritt*, 140 AD3d 554 [1st Dept 2016]). His

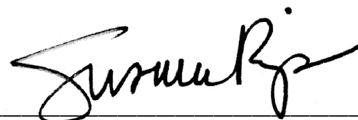
affidavit also showed the absence of comparative negligence in that he stated that he was going 25 miles per hour, looking straight ahead in the direction of travel, and could not see defendants' van because of a chain link fence, train trestle, and the height of his motor scooter (*compare Calcano v Rodriguez*, 91 AD3d 468 [1st Dept 2012]).

Although Gilbert denied that he stated to the police that he did not know that he had to stop for the red light, the court correctly concluded that the affidavit was insufficient to raise an issue of fact because statements by a party in a police accident report may constitute admissions, and later conflicting statements containing a different version of the facts present only a feigned issue of fact (*see Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014]).

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

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

ENTERED: JANUARY 9, 2018



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Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5388 The People of the State of New York, SCID 99002/16
Respondent,

-against-

Daryl Ryan,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

____

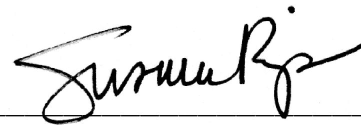
Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about September 28, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure based on clear and convincing evidence establishing the existence of aggravating factors not adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]; *People v Velasquez*, 143 AD3d 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]). The court reasonably concluded that an increased likelihood of reoffense, not captured in the risk assessment instrument, was indicated by, among other

things, the large number of child pornography images and videos possessed by defendant, the particularly disturbing nature of some of the material, the duration of defendant’s retention of the material, and his trading of the material with others. The mitigating factors cited by defendant were accounted for in the risk assessment instrument or were outweighed by the seriousness of his conduct.

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

ENTERED: JANUARY 9, 2018



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Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5389 In re Bernadette Pascall, Index 102227/15
Petitioner-Appellant,

-against-

Sheila J. Poole, etc., et al.,
Respondents-Respondents.

____

Seymour W. James, Jr., The Legal Aid Society, Brooklyn (Lester Helfman and John Bryant of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Eric R. Haren of counsel), for State respondent.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for City respondent.

____

Determination of respondent New York State Office of Children and Family Services (OCFS), dated August 20, 2015, made after a fair hearing, which affirmed the decision of respondent New York City Administration for Children's Services (ACS) denying petitioner's application for retroactive foster care benefits at the "exceptional" rate for the period of September 25, 2012 through July 30, 2014, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Barbara Jaffe, J.], entered September 21, 2016), dismissed, without costs.

The OCFS's determination that the child did not meet the relevant criteria to qualify for "exceptional" rate foster care payments during the first 22 months she was in the foster mother's care is supported by substantial evidence, and is not arbitrary and capricious. It is undisputed that during this time no qualified psychiatrist or psychologist certified that the child had severe behavioral problems that required high levels of individualized supervision in the home (18 NYCRR 427.6[d][3]), and that no physician had certified that she required around-the-clock care or had been diagnosed by a physician with a qualifying illness such as autism (18 NYCRR 427.6[d][2], [d][4]). The child was diagnosed with autism by a physician, her pediatrician, in July of 2014, and respondents correctly found that she was entitled to exceptional rate benefits following the time she was diagnosed (18 NYCRR 427.6[d][4]). In the absence of a diagnosis from the time the child was placed with the foster mother until the time of her diagnosis 22 months later, however, respondents correctly denied the foster mother's application for exceptional

rate benefits (*id.*; *Matter of Sulker v Johnson*, 60 AD3d 411, 411 [1st Dept 2009]).

We have considered the remainder of petitioner’s contentions and find them unavailing.

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

ENTERED: JANUARY 9, 2018

CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5390 Annmarie Prunella, Index 111103/09
Plaintiff-Appellant,

-against-

Empire City Subway Company, et al.,
Defendants-Respondents,

Verizon New York Inc., et al.,
Defendants.
- - - - -
[And A Third-Party Action]

____

Pavlounis & Sfouggatakis, LLP, Brooklyn (Andrew G. Sfouggatakis of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for Empire City Subway Company, respondent.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for City respondent.

____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered June 21, 2016, which, insofar as appealed from, granted the cross motion of defendant Empire City Subway Company (Empire) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Empire failed to establish its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she tripped and fell on a defect located within a crosswalk. Empire failed to show that the work it performed in

the vicinity of plaintiff's fall could not have caused the defect because it was outside the area where plaintiff stated her accident occurred (*see Cosme v City of New York*, 20 AD3d 320 [1st Dept 2005]; *compare Flores v City of New York*, 29 AD3d 356 [1st Dept 2006]). Although plaintiff did testify that she fell "[a]t least three feet" from the curb that she was approaching and Empire records show that it excavated a trench about 10 to 14 feet from the subject curb, plaintiff also stated that she was not good at measurements and twice described the accident location as being "[a]bout three-quarters" of the way across the intersection, which would be in the area of Empire's trench work.

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

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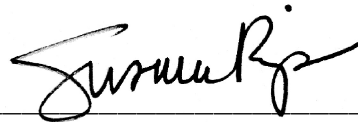

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Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5392 The People of the State of New York, Ind. 5591/14
Respondent,

-against-

Froilan Rosado,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered September 15, 2015, convicting defendant, after a jury trial, of sex trafficking and two counts of promoting prostitution in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 7 to 14 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the credibility determinations of the jury. The evidence amply supported all of the elements of sex trafficking, including the requisite forcible compulsion (*see* Penal Law § 230.34[5][a]). One of the prostitutes who worked for defendant

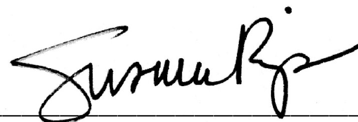
testified that he grabbed her by the throat when she refused to meet with a client she thought was an undercover police officer. She testified that she only went on the call because she feared defendant would harm her if she did not obey him.

The court providently exercised its discretion when it denied defendant's request for an inquiry into whether the jury had engaged in premature deliberations. The jurors' use of the word "we" in their midtrial request that the court explain the charges to them was not necessarily indicative of premature deliberations. Moreover, any prejudice was prevented by the court's constant reminder that premature deliberations were not permitted (*see People v Mejias*, 21 NY3d 73, 79-80 [2013]; *People v Joaquin*, 138 AD3d 422 [1st Dept 2016], *lv denied* 28 NY3d 931 [2016]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2018



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Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5394 The People of the State of New York, SCI 705/16
Respondent,

-against-

Rolando Calderon,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen 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 (Shari Michels, J.), rendered April 13, 2016,

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

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

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

ENTERED: JANUARY 9, 2018

CLERK

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

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5397 Michael Lutin, Index 114393/10
Plaintiff-Appellant,

-against-

SAP V/A Atlas 845 WEA Associates
NF LLC, et al.,
Defendants-Respondents,

Cetra/Ruddy Inc., et al.,
Defendants.

____

Karim H. Kamal, New York (Karim H. Kamal of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Deborah E. Riegel of counsel), for SAP V/A Atlas 845 WEA Associates NF LLC, respondent.

Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (M. Diane Duszak of counsel), for SAP V/A Atlas 845 WEA Associates NF LLC, Sterling American Property Inc., Atlas Capital Group LLC and R.A. Cohen & Associates, Inc., respondents.

____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 7, 2016, which, to the extent appealed from, granted defendants-respondents' motion for summary judgment dismissing the "negligence - personal injury" claim as time-barred and limiting the breach of contract claim to allegations arising on or after July 24, 2008, unanimously affirmed, without costs.

Plaintiff's failure to serve defense counsel Rosenberg & Estis, P.C., with a copy of the notice of appeal is not fatal to

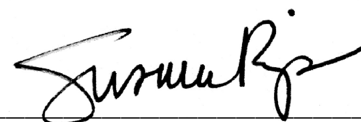
his appeal. The notice of appeal indicates that it was served on defense cocounsel Frenkel Lambert Weiss Weisman & Gordon, LLP, which firm, as defendants' own submissions demonstrate, also represented defendants in this litigation.

Since the notice of appeal limited the appeal to the parts of the order that dismissed the negligence claim and limited the breach of contract claim, we cannot consider plaintiff's arguments addressed to the denial of his cross motion for partial summary judgment (*see* CPLR 5515[1]; *D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 453 [1st Dept 2013]).

We do not reach plaintiff's arguments in support of reinstating the negligence claim and the part of the breach of contract claim that the motion court determined was time-barred, because they are fact-based arguments improperly raised for the first time on appeal (*DeBenedictis v Malta*, 140 AD3d 438 [1st Dept 2016]).

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5398 Ladera Partners, LLC, Index 150703/15
Plaintiff-Appellant,

-against-

Goldberg, Scudieri & Lindenberg,
P.C., formerly known as Goldberg,
et al.,
Defendants-Respondents.
____

Andrew Lavoott Bluestone, New York, for appellant.

Clausen Miller P.C., New York (Joseph Ferrini of counsel), for respondents.
____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 10, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

On this motion to dismiss pursuant to CPLR 3211, the court correctly considered defendants' evidentiary material to determine whether plaintiff had a cause of action for legal malpractice, not whether the complaint stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

The conclusory allegation that, but for defendants' negligence, plaintiff would have successfully opposed the summary

judgment motion in the foreclosure action and defended the action is insufficient to support the legal malpractice claim, because the evidentiary material reveals that plaintiff had no viable defense (*see West 45th St. Venture LLC v Ladera Partners, LLC*, 2012 NY Slip Op 31834[U], *7-8 [Sup Ct, NY County 2012], *affd* 106 AD3d 412 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]).

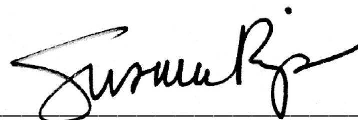
The court properly applied the doctrine of collateral estoppel to preclude plaintiff from alleging any injury relating to the manner in which the notice of the foreclosure sale was provided to it in the foreclosure action (*see generally D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). Plaintiff contends that the doctrine of collateral estoppel does not apply, because defendants' negligence in preparing the affidavit in support of the motion to vacate the foreclosure sale is at issue here. However, the affidavit submitted in opposition to the instant motion to dismiss fails to cure any of the alleged deficiencies. In any event, the sufficiency of defendants' drafting is irrelevant, given the foreclosure court's finding that, even if there was a deficiency of notice, vacatur of the sale was inappropriate because no substantial right of plaintiff was prejudiced (*see West 45th St. Venture LLC*, 2012 NY Slip Op 31834[U], *7-8).

The legal malpractice cause of action is not properly supported by conclusory allegations and speculation that, but for defendants' negligence, plaintiff would have been able to redeem the mortgage and/or outbid the other participants at auction, where the property sold for more than the amount of the mortgage, and thereby protect its investment (*see Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292 [1st Dept 1993]; *Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909 [2d Dept 2013]).

The breach of fiduciary duty claim alleges that defendants made excessive demands for attorneys' fees and billed excessively, and seeks a disgorgement of attorney's fees. Since this claim is premised on the same facts and seeks the same relief as the breach of contract claim, it is duplicative of that dismissed claim. Also, plaintiff provided no details in the complaint as to the nature of the billing improprieties.

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5399 Netherlands Insurance Company, Index 153327/15
Plaintiff-Appellant,

-against-

Endurance American Specialty
Insurance Company,
Defendant-Respondent.

____

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondent.

____

Order and judgment, (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered September 13, 2016, granting defendant's motion for summary judgment to the extent of declaring that defendant is not obligated to defend and indemnify Bangor Realty, LLC, plaintiff's insured, in the underlying personal injury action, and denying plaintiff's motion for summary judgment for a declaration in its favor, unanimously reversed, on the law, without costs, defendant's motion denied, plaintiff's motion granted to the extent of declaring that defendant is obligated to defend and indemnify Bangor, and the matter remanded for further proceedings.

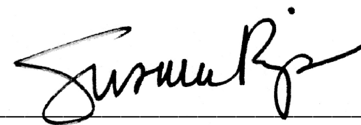
The additional insured endorsement to the subject general

liability policy affords coverage to "[a]ny entity required by written contract ... to be named as an insured." The "Bid Proposal Document" for the construction project in which the underlying personal injury action arose is such a written contract. The proposal names the parties and the "Total agreed price," contains the dated signatures of the parties immediately below the agreed price, and incorporates by reference "the approved plan for the entire project," stating that all work is to be completed in strict accordance with the approved plan and with the plans and specifications prepared by the architect. Although the parties may have intended to execute a more formal agreement later, the proposal constitutes a binding agreement (*see Bed Bath & Beyond Inc. v IBEX Constr., LLC*, 52 AD3d 413 [1st Dept 2008]; *Zurich Am. Ins. Co. v Endurance Am. Speciality Ins. Co.*, 145 AD3d 502 [1st Dept 2016]), and it requires the contractor, defendant's insured, to obtain a policy naming the owner (Bangor) as an additional insured. Thus, Bangor is, in the terms of the policy endorsement, "[a]n[] entity required by written contract ... to be named as an insured" (*compare Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 151 [1st Dept 2016] [where policy endorsement provides coverage to "'any person or organization *with whom you have*

agreed to add as an additional insured by written contract,'" it "requires that the named insured execute a contract with the party seeking coverage as an additional insured"] [emphasis added]; *AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 426 [1st Dept 2013] ["policies containing broader language have been found to allow for an agreement naming an additional insured without an express contract between the parties"]).

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5400 The People of the State of New York, Ind. 3123/95
Respondent,

-against-

Ronald Biavaschi,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

____

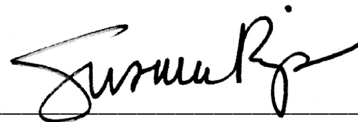
Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about July 6, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were outweighed by the seriousness of the underlying crime, which involved the forcible, predatory rape of a young child.

Defendant failed to sufficiently elaborate on his medical conditions or present any detailed evidence to suggest that a level two adjudication overassesses his dangerousness and risk of sexual recidivism. We have considered and rejected defendant's remaining arguments.

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5401 The People of the State of New York, Ind. 5224N/15
Respondent,

-against-

Job Durango,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack 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 (Richard Weinberg, J. at plea; Gilbert C. Hong, J. at sentencing), rendered February 25, 2016,

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

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

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

ENTERED: JANUARY 9, 2018

CLERK

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

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5402 The People of the State of New York, Ind. 328N/09
Respondent,

-against-

Carlos Ortiz,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 18, 2010, unanimously affirmed.

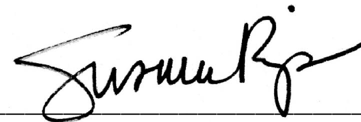
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: JANUARY 9, 2018



CLERK

Friedman, J.P., Richter, Gesmer, Kern, Moulton, JJ.

5403N Ivan Gordillo, Index 23930/14E
Plaintiff-Appellant,

-against-

Champ Hill LLC,
Defendant-Respondent.

____

Greenberg Law, P.C., New York (Raquel J. Greenberg of counsel), for appellant.

Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for respondent.

____

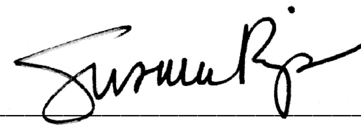
Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 12, 2016, which, in an action for personal injuries, inter alia, granted defendants' motion to change venue from Bronx County to New York County, unanimously affirmed, without costs.

The untimeliness of defendant's demand for a change of venue and the subsequent motion is excusable because the summons improperly indicated that plaintiff resided in Bronx County (*see Philogene v Fuller Auto Leasing*, 167 AD2d 178 [1990]; *see also Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]; *Mann v Janyear Trading Corp.*, 83 AD3d 566 [1st Dept 2011]). The parties do not contest the fact that while plaintiff does not reside on the island of Manhattan, his Marble Hill building is located in

New York County, and not the Bronx. The record shows that defendant promptly moved after ascertaining that the statement made by plaintiff was incorrect (*see Mann* at 566). Plaintiff's arguments that defendant failed to show due diligence and was guilty of laches are unpersuasive, as the motion was made pursuant to CPLR 510(1) (improper county) and not CPLR 510(3) (convenience of the witnesses).

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

ENTERED: JANUARY 9, 2018



CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5405 Anthony Lynch, Index 157257/14
Plaintiff-Appellant,

-against-

C & S Wholesale Grocers, Inc.,
Defendant-Respondent.

____

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

Morrison Mahoney LLP, New York (Christopher P. Keenoy of counsel), for respondent.

____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 17, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff truck driver/delivery person alleges that he was injured while manually unloading heavy boxes from a trailer owned by defendant. Plaintiff claims the shrink-wrap used by defendant's employees to secure the boxes to a pallet came loose, causing the boxes to fall to the floor and requiring them to be unloaded by hand.

Defendant established its entitlement to judgment as a matter of law first by showing that it did not create the alleged hazardous condition. Defendant submitted, inter alia,

plaintiff’s testimony that he and defendant’s employees inspected the trailer before he left defendant’s facility to commence deliveries, and did not observe loose boxes on the floor. Nor did plaintiff observe loose boxes when he re-secured the load after his first delivery on the day of his accident (*see e.g. Atashi v Fred-Doug 117 LLC*, 87 AD3d 455 [1st Dept 2011]; *Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599 [1st Dept 2010]). Defendant also showed that it lacked actual or constructive notice that there were boxes on the trailer’s floor. Plaintiff testified he did not notify defendant about the loose boxes before he decided to manually unload them at his second delivery of the day (*see Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]).

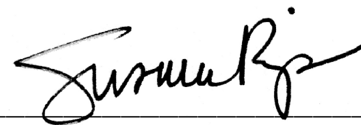
In opposition, plaintiff failed to raise a triable issue. The possibility of injury arose only when plaintiff voluntarily opted to pick up the boxes and toss them to a store employee, even though he was not required to do so (*see Lee v New York City Hous. Auth.*, 25 AD3d 214, 219 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006] [“(t)he law draws a sharp distinction between a condition that merely sets the occasion for or facilitates an accident and an act that is a proximate cause of the accident”]).

Furthermore, plaintiff’s certified packing expert failed to identify any professional or industry standard to substantiate

his assertions (*see Griffith v ETH NEP, L.P.*, 140 AD3d 451, 452 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]; *Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006])). The fact that defendant may have been aware that shrink-wrapping had previously come loose from other pallets did not establish that defendant had constructive notice that the subject pallet was loose before plaintiff sustained the injuries alleged (*see Vaughn v Harlem Riv. Yard Ventures II, Inc.*, 118 AD3d 604 [1st Dept 2014]).

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

ENTERED: JANUARY 9, 2018



CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5406-
5407 In re Cohen D., and Another,

Children under the Age of Eighteen
Years, etc.,

Chantal D., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

____

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

Andrew J. Baer, New York, for Rakeem D., appellant.

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

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

____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about August 22, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 9, 2016, which found neglect and derivative neglect, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence in the record supports

Family Court's determinations that both parents medically neglected Cohen, who was born prematurely and with serious medical issues, that the mother neglected both Cohen and Carmaj on account of her untreated mental health condition, and that the father derivatively neglected Carmaj (*see* Family Court Act §§ 1012[f][1][A]; 1046[b][i]).

The medical and hospital records and the testimony of Cohen's pediatrician at Bellevue Hospital show that the parents failed to ensure that Cohen received adequate nutrition, which led to a diagnosis of failure to thrive. The pediatrician ruled out other possible causes for the child's failure to thrive, and, after he was re-admitted to the hospital, Cohen fed well, gained weight steadily, and exhibited none of the intestinal issues that the parents had cited as barriers to feeding him (*see Matter of Justin A. [Jesus A.]*, 94 AD3d 575 [1st Dept 2012], *lv denied* 19 NY3d 807 [2012]. The record also shows that the father left the home at some point, leaving the children's care to the mother, who was uncooperative with Cohen's doctors, missed appointments, and disregarded medical advice. The mother's conduct placed the medically vulnerable Cohen in imminent danger of impairment; among other things, she caused an extended delay in obtaining early intervention services for him (*see Matter of Jaelin L.*

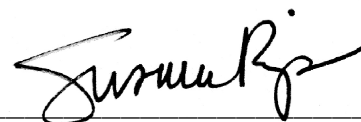
[Kimrenee C.], 126 AD3d 795 [2d Dept 2015], *lv denied* 25 NY3d 910 [2015]; *Matter of Josephine BB. [Rosetta BB.]*, 114 AD3d 1096, 1098-99 [3d Dept 2014]). Petitioner agency repeatedly referred the mother for mental health evaluations, but she failed to address her evident mental health issues, which significantly impaired her judgment concerning the medical and other needs of both children (see *Matter of Danielle M.*, 151 AD2d 240, 243 [1st Dept 1989]; *Matter of Zariyasta S.*, 158 AD2d 45, 48 [1st Dept 1990]).

The parents' medical neglect of Cohen demonstrates so flawed an understanding of the responsibilities and duties of parenthood as to support the finding of derivative neglect of Carmaj (*see* Family Court Act § 1046[a][i]; *Matter of Justin A.*, 94 AD3d at 575).

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

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

ENTERED: JANUARY 9, 2018



CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5408-
5409 Index 153323/15

Joseph Liporace, Jr., et al.,
Plaintiffs-Respondents,

-against-

Neimark & Neimark, LLP, et al.,
Defendants-Appellants.

____

Lewis Brisbois Bisgaard & Smith LLP, New York (Conor McDonald of counsel), for Neimark & Neimark, LLP, Marshall Adam Neimark and Richard Neimark, appellants.

Goldberg Segalla LLP, New York (Stewart G. Milch of counsel), for Budin Reisman Kupferberg & Bernstein LLP, Harlan Budin, Alice Kupferberg and Adam Bernstein, appellants.

Ronemus & Vilensky LLP, Garden City (Lisa M. Comeau of counsel), for respondents.

____

Orders, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 18, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss the legal malpractice claim as against them, unanimously modified, on the law, and to grant the motion as to the Neimark defendants, and otherwise affirmed, without costs.

The Neimark defendants' failure to serve a timely notice of claim on the New York City Department of Education in the underlying action is not the proximate cause of plaintiff's alleged damages, because the statute of limitations had not yet

expired when the Budin defendants were substituted as plaintiff's counsel. This substitution of counsel was a superseding and intervening act that severed any potential liability for legal malpractice on the part of the Neimark defendants (*Pyne v Block & Assoc.*, 305 AD2d 213 [1st Dept 2003]).

The complaint sufficiently alleges a claim for legal malpractice against the Budin defendants as plaintiff has sufficiently met the minimum pleading requirements (*see Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 [1st Dept 2003]).

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

ENTERED: JANUARY 9, 2018

CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5411 Pedro Serrano, et al., Index 308884/11
Plaintiffs-Appellants-Respondents,

-against-

TED General Contractor,
Defendant-Respondent-Appellant,

Eight Avenue Sky, LLC,
Defendant-Respondent,

Perimeter Bridge and Scaffold Co.,
Inc., et al.,
Defendants.

____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellants-respondents.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondent-appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 17, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiffs’ motion for partial summary judgment on the issue of defendants Eighth Avenue Sky’s (EAS) and TED General Contractor’s (TED) Labor Law 240(1) liability, unanimously reversed, on the law, without costs, and the motion granted. Cross appeal by TED from so much of the order as made certain findings as to it, unanimously dismissed,

without costs.

Plaintiff Pedro Serrano was injured when, during the course of moving sheetrock into a building, he stood on top of a sidewalk shed that broke beneath him, causing him to fall to the sidewalk below. While the motion court correctly determined that these facts demonstrated plaintiffs' prima facie entitlement to summary judgment (*see e.g. Tzic v Kampanas*, 93 AD3d 438, 438-439 [1st Dept 2012]), it erred in finding that EAS raised a triable issue of fact. That no witness other than plaintiff testified as to the occurrence of the accident does not bar judgment in his favor, "where nothing in the record contradicts his version of the occurrence or raises an issue as to his credibility" (*Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015]), and defendant EAS's expert report was purely speculative in that it was not based on an examination of the sidewalk shed at the time of the accident (*Pastabar Caffé Corp. v 343 E. 8th St. Assoc., LLC*, 147 AD3d 583, 585 [1st Dept 2017]).

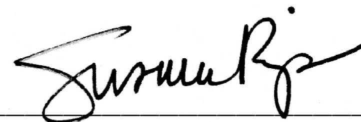
The motion court properly found that TED was the general contractor of the project given that the evidence clearly demonstrated that it had authority to control the work *(DeMaria v RBNB 20 Owner*, 129 AD3d 623, 624-625 [1st Dept 2015]), and that plaintiff was found to be a worker protected under the statute

because he was making deliveries of construction materials to the worksite during an ongoing construction project (*Serowik v Leardon Boiler Works, Inc.*, 129 AD3d 471 [1st Dept 2015]).

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

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

ENTERED: JANUARY 9, 2018



CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5412 The People of the State of New York, Ind. 1987/13
Respondent,

-against-

Samuel Morales,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about November 18, 2015,, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

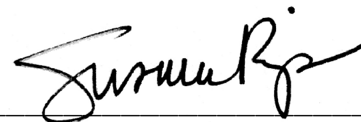
The court correctly assessed 10 points for unsatisfactory conduct while confined, based on defendant's two recent Tier III disciplinary infractions. These serious infractions were not remote in time, and the record fails to support defendant's remaining arguments against this assessment. Defendant's argument that the court improperly assessed 15 points for failure to accept responsibility is unpreserved and unavailing.

The court providently exercised its discretion in denying

defendant’s request for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account in the risk assessment instrument or that outweighed the seriousness of the underlying offense, which was committed against a child. The probative value of defendant’s low Static-99 score test is limited because that assessment does not take into account the nature of the sexual contact with the victim or the potential harm that could be caused by reoffense (*see People v Roldan*, 140 AD3d 411, 412 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]).

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

ENTERED: JANUARY 9, 2018



CLERK

Tom, J.P., Kapnick, Webber, Oing, JJ.

5413 The People of the State of New York, Ind. 511/15
Respondent,

-against-

Kelly Colesone,
Defendant-Appellant.

____

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

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

____

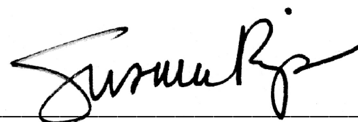
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered September 29, 2016,

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

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

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

ENTERED: JANUARY 9, 2018



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

Tom, J.P., Kapnick, Webber, Oing, JJ.

5414 The Segal Company (Eastern States), Inc., Index 650244/15
Plaintiff-Appellant,

-against-

333W34 SLG Owner LLC,
Defendant-Respondent,

ARC NY333W3401, LLC, et al.,
Defendants.

____

Zukerman Gore Brandeis & Crossman, LLP, New York (Ted Poretz of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondent.

____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 27, 2017, which, to the extent appealed from as limited by the briefs, dismissed the first cause of action of the second amended complaint, unanimously affirmed, with costs.

In May 2016, the court dismissed the causes of action asserted in the complaint and first amended complaint regarding tax escalation, but gave plaintiff leave to replead a claim for breach of the implied covenant of good faith and fair dealing, with specific instructions (*cf. Sheppard v Coopers', Inc.*, 13 Misc 2d 862, 865 [Sup Ct, NY County 1956], *affd* 3 AD2d 909 [1st

Dept 1957]). Plaintiff filed a notice of appeal from the 2016 order but failed to perfect its appeal.

The second amended complaint fails to comply with the directions in the 2016 order; therefore, the court properly dismissed the cause of action for breach of the implied covenant of good faith and fair dealing (*see Sheppard v Coopers', Inc.*, 14 Misc 2d 180, 181 [Sup Ct, NY County 1957], *appeal dismissed* 7 AD2d 971 [1st Dept 1959], and 14 Misc 2d 211, 213 [Sup Ct, NY County 1958]).

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

ENTERED: JANUARY 9, 2018

CLERK

Tom, J.P., Kapnick, Webber, Kahn, JJ.

5415 PAF-PAR LLC, Index 654384/16
Plaintiff-Appellant,

-against-

Michael Silberberg, et al.,
Defendants-Respondents.

____

Pryor Cashman LLP, New York (William L. Charron and Kaveri Arora of counsel), for appellant.

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for respondents.

____

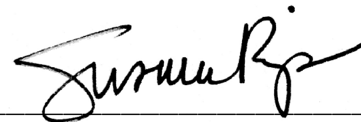
An appeal having been taken to this Court by the above-named appellant from a an order of the Supreme Court, New York County, (Anil C. Singh, J.), entered January 31, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Anil C. Singh, J.

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

ENTERED: JANUARY 9, 2018



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Tom, J.P., Kapnick, Webber, Oing, JJ.

5416 The People of the State of New York, Ind. 3411/11
Respondent,

-against-

Miguel Laureano,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered May 16, 2014, convicting defendant, after a jury trial, of attempted robbery in the first and second degrees, and sentencing him to an aggregate term of five years, unanimously affirmed.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters of trial strategy not fully explained by the record (*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 his claim may not be addressed on appeal.

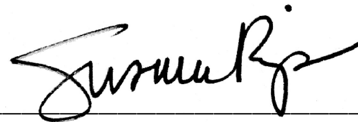
As an alternative holding, to the extent the existing record permits review, we find that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that they deprived defendant of a fair trial or affected the outcome of the case. We note that although counsel's opening statement set forth a hypothesis of innocence, counsel never "promised" that this hypothesis would be developed by any particular means. Furthermore, he emphasized that his client was not required to testify or meet any burden of proof.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 9, 2018



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Tom, J.P., Kapnick, Webber, Oing, JJ.

5417 The People of the State of New York, Ind. 3913/15
Respondent,

-against-

Joseph Diaz,
Defendant-Appellant.

____

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

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

____

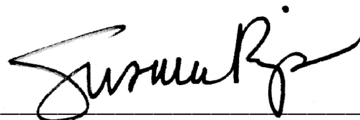
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg, J.), rendered February 9, 2016,

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

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

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

ENTERED: JANUARY 9, 2018



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CLERK

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

Tom, J.P., Kapnick, Webber, Oing, JJ.

5423 The People of the State of New York, Ind. 360N/16
Respondent,

-against-

Amy Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Zucker 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 (Richard M. Weinberg, J.), rendered May 12, 2016,

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

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

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

ENTERED: JANUARY 9, 2018

CLERK

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

Tom, J.P., Kapnick, Webber, Oing, JJ.

5424 The People of the State of New York, Ind. 2968/15
Respondent,

-against-

Ramon Ortiz,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered May 19, 2016, unanimously affirmed.

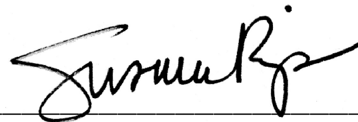
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised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

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

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

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

ENTERED: JANUARY 9, 2018



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Renwick, J.P., Tom, Kapnick, Oing, JJ.

5425N In re Nelson Suero, Index 100164/15
Petitioner-Appellant,

-against-

Touro College, et al.,
Respondents-Respondents.

____

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

Meyer, Suozzi, English & Klein, P.C., Garden City (Paul F. Millus of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered August 22, 2016, inter alia, compelling arbitration of the parties' dispute, unanimously affirmed, without costs.

The special referee properly exercised his discretion in declining to recuse himself on the ground of a conflict of interest (*see Orr v Yun*, 95 AD3d 661 [1st Dept 2012]). We find that his impartiality may not "reasonably" be questioned (*see* 22 NYCRR 100.3[E][1]) on the basis of his having been an adjunct professor at respondent Touro College's law school for "a couple of semesters," more than 15 years before the hearing in this proceeding against respondent Touro College of Osteopathic Medicine.

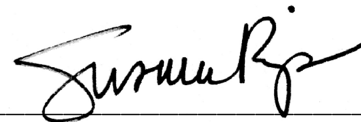
Petitioner failed to meet his burden of showing that his

share of the cost of arbitration was prohibitively high (*see Matter of Brady v Williams Capital Group, L.P.*, 14 NY3d 459, 462 [2010]). He did not sufficiently establish the likely cost of arbitration or the differential between arbitration and litigation costs. Even accepting counsel's conclusory estimate of those costs, petitioner did not show that he would be unable to afford them.

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

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

ENTERED: JANUARY 9, 2018



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

5064 Suzette Watson, Index 103253/12
Plaintiff-Appellant,

-against-

Emblem Health Services,
Defendant-Respondent.

____

Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for appellant.

Cozen O’Connor, New York (Michael C. Schmidt of counsel), for respondent.

____

Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about July 8, 2016, reversed, on the law, without costs, and the motion denied.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Peter Tom
Richard T. Andrias
Ellen Gesmer, JJ.

5064
Index 103253/12

_______________________________________x

Suzette Watson,
Plaintiff-Appellant,

-against-

Emblem Health Services,
Defendant-Respondent.
_______________________________________x

Plaintiff appeals from the order of the Supreme Court, New York County (David B. Cohen, J.), entered on or about July 8, 2016, which granted defendant's motion for summary judgment dismissing the complaint.

Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for appellant.

Cozen O'Connor, New York (Michael C. Schmidt of counsel), for respondent.

ANDRIAS, J.

Plaintiff alleges that defendant terminated her employment because of her disability in violation of the New York City Human Rights Law (NYCHRL) (Administrative Code of the City of New York § 8-107[1][a]). Supreme Court granted defendant's motion for summary judgment dismissing the complaint, finding that there was no evidentiary route that could allow a jury to find that discrimination played a role in plaintiff's termination. However, giving plaintiff the benefit of all favorable inferences which may reasonably be drawn, we conclude that she proffered sufficient evidence to raise a triable issue of fact as to whether the reason put forth by defendant for terminating her employment was merely pretextual and that the grant of summary judgment in defendant's favor was not warranted.

In 2005, plaintiff began working with defendant's predecessor as a marketing supervisor and was later promoted to marketing manager. In 2009, she was diagnosed with a brain tumor, underwent surgery and returned to work four months later, ahead of the six month to one year's convalescence recommended by her treating physician.

In June 2011, plaintiff experienced a relapse and recurrence of cerebral tumors, which caused her to suffer migraine headaches and vertigo. On June 6, 2011, she informed defendant that she

would be out sick due to this condition. On June 20, 2011, plaintiff's family brought plaintiff and her children to their home in Trinidad so that they could assist her and take care of the children until she recovered. That day, plaintiff's doctor also issued a note stating that she would need additional medical leave until July 10, 2011, which was faxed to defendant on June 28.

On July 8, 2011, one of plaintiff's supervisors contacted defendant's human resources (H.R.) department about how to carry plaintiff's time. In response to the supervisor's email of that date, plaintiff called and informed him that she was recovering in Trinidad, and that she could not return to work by July 10.

The supervisor told plaintiff to contact defendant's H.R. benefits analyst. Plaintiff complied, and the analyst told her that due to the length and nature of her absence, she needed to file a claim for short-term disability leave with defendant's disability and leave claims administrator, the Hartford, so that it could verify with her doctor the nature of her medical condition, and confirm or deny her disability leave claim.

Following these instructions, plaintiff called the Hartford's domestic toll free number, but could not get through because she was calling from Trinidad. Plaintiff then called a friend in the United States, who initiated a three-way call with

the Hartford so that plaintiff could file her claim. However, plaintiff did not have all of the necessary information at hand and the Hartford told her that she could call back later to initiate a claim seeking retroactive benefits, and then have 15 days to submit supporting documentation.

On July 18, 2011, defendant's lead employee relations specialist sent plaintiff a letter terminating her employment, effective that date. The letter stated cryptically:

> "A review of our attendance records indicate that you have been out on an unapproved leave since July 1, 2011. To date you have not contacted Hartford's Short-Term Disability and FML unit to file a claim. After careful review a decision has been made to terminate your employment effective July 18,2011. You may still contact Hartford to file a disability claim on your own."

Upon her return to the United States at the end of July, plaintiff received the termination letter and contacted the lead employee relations specialist. Plaintiff informed the specialist that she wanted to be reinstated and to return to work and was told that she had been terminated for failing to file a disability claim as instructed. At the specialist's suggestion, plaintiff submitted doctor's notes dated June 3, 2011 and August 3, 2011, and a letter explaining what happened. Plaintiff also submitted a Family and Medical Leave Act (FMLA) claim on August 3, 2011, which the Hartford approved on August 15, 2011, for the

period commencing on June 20, 2011 until July 20, 2011. Nevertheless, defendant refused to reinstate plaintiff, who commenced this action alleging that defendant discriminated against her in violation of the NYCHRL by discharging her based on her disability or perceived disability.

Section 8-107(1)(a) of the NYCHRL makes it an unlawful discriminatory practice for an employer to discriminate in terms and conditions of employment or discharge an employee because of disability. A "disability" is defined by § 8-102(16) of the NYCHRL as "any physical, medical, mental or psychological impairment." Section 8-107(15)(a) of the NYCHRL provides that an employer has the obligation to "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job . . . provided that the disability is known or should have been known by the [employer]."

"A request for accommodation need not take a specific form," so the "requests for accommodation may be in plain English, need not mention the statute, or the term reasonable accommodation and need not be in writing" (*Phillips v City of New York*, 66 AD3d 170, 189 n24 [1st Dept 2009] [internal quotation marks omitted]). Pursuant to the NYCHRL, there is no accommodation, including indefinite leave or any other need created by a disability, which is excluded from the category of reasonable accommodation

(*see Romanello v Intesa Sanpaolo S.p.A.,* 22 NY3d 881, 884 [2013]).

As a remedial statute, the NYCHRL should be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]). A plaintiff may prove her case if she "proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]).

On a motion for summary judgment dismissing a NYCHRL claim, a defendant, as the moving party, bears the burden of showing that, "based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes [applicable to discrimination cases]" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). If this burden is met, a plaintiff may defeat summary judgment by offering "some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" (*id.*; *see also Cadet-Legros v New York Univ. Hosp. Ctr.,* 135 AD3d 196, 200 [1st Dept 2015]). This is because once a plaintiff introduces "pretext" evidence, "a host of determinations properly

made only by a jury come into play, such as whether a false[, misleading, or incomplete] explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons" (*Bennett* at 43).

Defendant argues that it met its prima facie burden of establishing a nondiscriminatory motive for its actions by offering evidence that it terminated plaintiff's employment because she did not promptly file a disability claim with the Hartford, as directed. Defendant maintains that although the Hartford may have given plaintiff confusing information about whether she could file a claim later, that phone call was not reported to defendant, and that when defendant decided to terminate her employment, it relied on the Hartford's representation that no claim had been filed. However, when viewed in the light most favorable to plaintiff, the evidence in the record raises a material issue of fact as to whether defendant's stated reason for terminating her employment was a pretext and whether defendant failed to engage in an interactive process and reasonable accommodation analysis prior thereto (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 827 [2014] [the NYCHRL generally precludes summary judgment in favor of an employer where the employer has failed to demonstrate that

it responded to a disabled employee's request for a particular accommodation by engaging in a good faith interactive process regarding the feasibility of that accommodation]).

There is no question that defendant was apprised of plaintiff’s medical condition and her need for medical leave. The record establishes that in June 2011, plaintiff told her supervisor that she would be out sick until July 10 due to the recurrence of her cerebral tumors. On July 8, 2011, she advised the supervisor, and an H.R. officer shortly afterwards, that she was still ill, and requested additional time to convalesce as a reasonable accommodation of her medical condition.

Defendant’s response was to have an H.R. officer advise plaintiff that she needed to file a disability claim to be paid. However, the H.R. officer did not tell plaintiff that her employment would be terminated if she did not file the claim within 10 days. While defendant’s Leaves of Absence Guide summarizes leave policies that an employee must follow, and warns of the possibility of discharge, it does not specify a time frame within which a claim must be filed with the Hartford.

Moreover, the record, including telephone records and the statements of plaintiff and her friend, supports plaintiff’s claim that she did attempt to file a claim with the Hartford, defendant’s agent, upon being advised by defendant to do so.

While defendant claims that it did not know about this, its H.R. officer admitted during her deposition that, in response to her inquiry, the Hartford acknowledged that it would tell an employee that he or she could call at a later date when they needed to obtain the necessary information in order to file a claim.[1] Furthermore, one may reasonably question how advising plaintiff to file for private disability benefits to get paid would fulfill defendant's legal obligation to "hold a constructive dialogue about the possibility of a reasonable accommodation" (*Jacobsen*, 22 NY3d at 838 n2) and whether giving an employee suffering from a brain tumor a mere 10 days to file a disability claim before firing her was reasonable.

Significantly, no effort was made by anyone at defendant to contact plaintiff during this short period of time to apprise her of the sudden precariousness of her position, even though such efforts could have been made. While the discharge letter stated that plaintiff was on unapproved leave since July 1, plaintiff was not told to contact the Hartford until July 8, and received no written notification or warning that her leave was unapproved.

---

[1]Defendant's employee relations analyst testified that he was informed that defendant checked with the Hartford after plaintiff was told to contact it, but the carrier could not confirm whether plaintiff had filed a claim, or made any communication attempting to file a claim.

Defendant's actions after terminating plaintiff also cast doubt on its stated reason for plaintiff's discharge. Plaintiff was by all accounts a good employee who had an unblemished record and reached her performance goals. Nevertheless, defendant refused to reinstate plaintiff after she informed it that its statement in the termination letter that she never contacted the Hartford was incorrect, and after she filed an application and was ultimately approved for FMLA leave for the period June 20, 2011 to July 20, 2011. Defendant also altered her termination date so that it would fall outside the legally protected FMLA period. Moreover, the record contains numerous emails in which derogatory comments were made about plaintiff and her medical condition and her need for time off to recover. This includes comments such as "[a]pparently, the West Indies is nice this time of year," and accusations that plaintiff was not being treated for her condition in June and July 11 despite the fact that defendant had received medical documentation concerning such treatment.

Given this evidence of a possible pretextual motive, defendants' motion for summary judgment should have been denied (*see Duckett v New York Presbyterian Hosp.*, 130 AD3d 473 [1st Dept 2015]).

Accordingly, the order of the Supreme Court, New York County (David B. Cohen, J.), entered on or about July 8, 2016, which granted defendant's motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, and the motion denied.

All concur.

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

ENTERED: JANUARY 9, 2018

CLERK