SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 8, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Saxe, Feinman, JJ.

14511 In re Agah Durudogan, Index 100065/13
Petitioner-Appellant,

-against-

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

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LaSasso Law Group PLLC, New York (Mariel LaSasso of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael S. Legge of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered September 19, 2013, which granted respondents' cross motion to dismiss the petition and dismissed the proceeding brought pursuant to CPLR article 78, unanimously vacated, and the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, respondents' determination, dated September 11, 2011, dismissing him as a New York City police officer and thereby denying him vested interest retirement

benefits, unanimously confirmed, and the petition dismissed, without costs.

The petition, having raised an issue of substantial evidence, should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we "will 'treat the substantial evidence issue[] de novo and decide all issues as if the proceeding had been properly transferred'" (*see Matter of Roberts v Rhea*, 114 AD3d 504 [1st Dept 2014], quoting *Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

Substantial evidence supports the determination that petitioner was guilty of numerous violations demonstrating his inability to conform his conduct to police department regulations. Petitioner's contention that the hearing officer improperly relied on hearsay evidence in finding him guilty of engaging in a verbal and physical domestic dispute is unavailing. The hearing officer's determination was based on petitioner's inconsistent statements in that his testimony at the hearing differed from statements he gave during an investigative interview. Thus, it is based on the hearing officer's credibility findings which are entitled to deference (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Moreover, an

administrative tribunal can rely upon credible hearsay evidence to reach its determination (*Matter of Muldrow v New York State Dept. of Corr. & Community Supervision*, 110 AD3d 425 [1st Dept 2013]).

The penalty imposed, dismissing petitioner from the police force, is not shocking to one's sense of fairness (*see generally Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). Petitioner was brought up on five separate charges, based on events that occurred over a three-year period, and he was found guilty of nine of the specifications charged following a hearing. Although petitioner was a decorated officer, with eighteen years of service, who often received high ratings on department evaluations, he also was previously disciplined for insubordination and placed on one-year dismissal probation.

Petitioner lost entitlement to deferred vested retirement rights upon his dismissal from the force. Section 13-256 of the Administrative Code of the City of New York explicitly excludes police officers whose service is discontinued because of dismissal, death and retirement from applying for a deferred retirement allowance. Additionally, officers who qualify must file an application for a deferred retirement allowance at least

30 days prior to the date of discontinuance. Only then will they have an automatic vested right to receive a deferred retirement allowance (Administrative Code of City of NY § 13-256[a], [b]). Nor does he fall within the exception found in section 13-256.1 of the New York City Administrative Code that provides that a member who attains at least 20 years of service in the retirement system will receive the full benefits to which he or she is entitled, even if discharged or dismissed from employment (Administrative Code of City of NY § 13-256.1).

Matter of Vecchio v Kelly (94 AD3d 545 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]), is not on point. In *Vecchio*, we annulled the decision to terminate the petitioner, dismissed certain of the charges brought against him, and remanded the proceeding for determination of a new penalty, stating that if the Commissioner adhered to the penalty of termination, the petitioner should be permitted to apply for vested interest retirement benefits, so as to avoid a punishment disproportionate to the offense, namely the extreme financial hardship to his innocent family (94 AD3d at 545-546]). In *Vecchio*, unlike here, the Court found circumstances that warranted restoring petitioner to a status that made him eligible to apply for the deferred retirement allowance as provided by Administrative Code § 13-

256(a), (b).

Absent restoration to the police force, petitioner's status is more similar to that of the petitioner in *Matter of Kiess v Kelly*, 118 AD3d 595 [1st Dept 2014], *lv denied* 24 NY3d 917 [2015]), where we held that a police officer who resigned from the force was not permitted to seek reconsideration from the Police Medical Board concerning his application for accident disability benefits; he was no longer a member of the police force pursuant to sections 13-215 and 13-252 of the Administrative Code of the City of New York, and the municipal respondents were thus required to deny his application (*see also Fuoto v McGuire,* 101 Misc 2d 132, 134 [Sup Ct, New York County 1979] [the date on which the petitioner was dismissed from the police force was the date that he ceased to be a member of the pension fund; as he had less than the required number of years of service for his retirement benefit rights to vest, and had not filed the mandatory application for a retirement allowance 30 days before discontinuing service, he could not be granted retirement benefits]).

We have considered petitioner's remaining arguments and find them to be unpreserved and/or unavailing.

The Decision and Order of this Court entered herein on March 12, 2015 is hereby recalled and vacated (*see* M-4507 decided simultaneously herewith).

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Saxe, Richter, Gische, JJ.

16150 JPMorgan Chase Funding Inc., Index 151693/13
Plaintiff-Appellant,

-against-

William D. Cohan,
Defendant-Respondent.

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Levi Lubarsky Feigenbaum & Weiss LLP, New York (Howard B. Levi of counsel), for appellant.

Liddle & Robinson, L.L.P., New York (Blaine H. Bortnick of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 25, 2015, which, among other things, denied plaintiff's motion for a protective order, unanimously modified, on the law, to grant the motion solely as to any tax returns produced, and otherwise affirmed, without costs.

Plaintiff, a subsidiary of defendant's former employer, failed to show that, other than the tax returns, the requested documents, regarding a partnership and investments made by the partnership, contain trade secrets (*see Mann v Cooper Tire Co.*, 33 AD3d 24, 30-31 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]). Plaintiff's counsel's affirmation contains conclusory assertions (*see Linderman v Pennsylvania Bldg. Co.*, 289 AD2d 77, 78 [1st Dept 2001]), and does not discuss the extent to which the

approximately 6,000 potentially responsive documents contain information known outside of the partnership, the current value of that information to both the partnership and its competitors, the manner in which the information was obtained and kept, and the ease or difficulty of obtaining the information from nonpublic funds or other investors (*see Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993]). Although the initial showing required by a party seeking a protective order against discovery of documents containing trade secrets is "minimal" (*Jackson v Dow Chem. Co.*, 214 AD2d 827, 828 [3d Dept 1995]), it still must be non-conclusory and give rise to a "concern that [plaintiff's] competitors may gain some competitive advantage as a result of discovery of secret business procedures and information" (*Linderman*, 289 AD2d at 78 [internal quotations omitted; bracketed material altered]). Plaintiff failed to make the requisite showing. We also reject plaintiff's claim that defendant is otherwise contractually bound to keep the documents confidential.

Nonetheless, we find that the demanded tax returns are entitled to confidentiality at this point in the litigation. We have consistently treated discovery requests for tax returns with heightened scrutiny, recognizing that they are confidential by

their nature (*see e.g. Kodsi v Gee*, 54 AD3d 613, 614 [1st Dept 2008]; *Rosenfeld v Kaplan*, 245 AD2d 176 [1st Dept 1997]). Under the circumstances, the trial court should have directed that the disclosure of tax returns in this case be made subject to an order of confidentiality. We cannot ascertain on the record presently before us whether the claims in the underlying action put the tax returns "at issue" in this action (see *People v Greenberg*, 63 AD3d 576 [1st Dept 2009]; *Veras Inv. Partners LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370 [1st Dept 2008]). Regardless, because an at issue waiver affects whether a document is discoverable, not whether it can be cloaked with confidentiality against outsiders to the litigation, it would not change the outcome of this dispute.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16315- Ind. 2468/11
16315A- 5134/11
16315B The People of the State of New York, 1395/12
Respondent,

-against-

Chris Wingate,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 20, 2012, as amended March 26 and 28, 2012, convicting defendant, after a jury trial, of identity theft in the second degree, scheme to defraud in the second degree, criminal possession of stolen property in the fifth degree (three counts) and criminal impersonation in the second degree (two counts), and sentencing him to an aggregate term of one to three years, and judgments, same court and Justice, rendered March 11, 2013, convicting defendant, upon his pleas of guilty, of two counts of grand larceny in the second degree and two counts of

identity theft in the first degree, and sentencing him to a concurrent aggregate term of three to nine years, unanimously affirmed.

Authenticated records of purchase confirmation emails were properly admitted, not for their truth, but for the nonhearsay purpose of showing that defendant's identifying information, including his address, phone number, last name, nickname and date of birth, appeared in a particular email account that was associated with a fraudulent credit card application. In the context of the case, the contents of these emails constituted circumstantial evidence linking defendant to that account (*see People v Boswell*, 167 AD2d 928 [4th Dept 1990], *lv denied* 77 NY2d 876 [1991], *lv dismissed* 81 NY2d 785 [1993]; *see also People v Lynes*, 49 NY2d 286, 291-293 [1980]). In any event, any error in receipt of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16316 Jerry Washington, et al., Index 305612/10
Plaintiffs-Respondents,

-against-

Autumn Properties II, LLC,
Defendant,

National Distribution Alliance,
Defendant-Appellant.

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McMahon, Martine & Gallagher, LLP, Brooklyn (Ryan Canavan of counsel), for appellant.

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about September 11, 2014, which, inter alia, denied defendant National Distribution Alliance's (defendant) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Jerry Washington was injured when he tripped over the forks of a power jack parked in the 25-foot-wide central walkway between rows of work tables in a commercial warehouse leased by defendant. Plaintiff, a subcontractor of defendant, had been working at one of the tables when a power outage plunged the warehouse into complete darkness, and after about 20 seconds

he decided to leave the warehouse. He turned from his table and took a few steps into the central walkway, and tripped over the jack. About 10 seconds later, the power was restored.

Defendant failed to establish prima facie that it maintained the premises in a reasonably safe condition and did not create a dangerous condition that posed a foreseeable risk of injury to individuals expected to be on the premises (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]). Plaintiff testified that the power jacks were usually stored in an area near the front of the building and that he had never seen one unattended in the central walkway. Moreover, the record shows that machinery in the warehouse was operated solely by defendant's employees.

Under the circumstances, defendant's argument that the power jack was an open and obvious hazard and not inherently dangerous is misplaced. Nor did defendant establish as a matter of law that plaintiff's decision to walk through the dark warehouse was the sole proximate cause of his injury, since, even in the dark, plaintiff could not have tripped over a jack that was not there. Defendant also failed to establish as a matter of law that the power outage was a supervening event that severed the causal connection between any negligence on its part and plaintiff's

injury (*see Kush v City of Buffalo*, 59 NY2d 26, 32-33 [1983]). As indicated, darkness alone could not have caused the accident. Moreover, defendant made no showing that power outages in the area were a very rare occurrence in the area, and the record demonstrates that the warehouse had a working back-up generator.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16317-
16318-
16319 In re Giannis F.,

A Child Under Eighteen
Years of Age, etc.,

Vilma C.,
Respondent-Appellant,

Manny M.,
Respondent,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about March 18, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about December 18, 2013, which found that respondent mother had neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal

from the order of disposition. Appeal from decision, same court and Judge, entered on or about December 16, 2013, unanimously dismissed, without costs, as taken from a nonappealable paper.

A preponderance of the evidence supports the finding of neglect against the mother (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). At the fact-finding hearing, the subject child testified that her half brother sexually abused her for nearly four years and that although she alerted her mother on two separate occasions to the abuse, the mother failed to protect her (*see Matter of Dayanara V.* [*Carlos V.*], 101 AD3d 411, 412 [1st Dept 2012]). Family Court's credibility determinations are entitled to deference (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]), and they are supported by the record (*see Dayanara*, 101 AD3d at 412).

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16320 In re Nikolas D.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for presentment agency.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 28, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree, and placed him on probation for 12 months, unanimously affirmed, without costs.

Probation is the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given the seriousness of this sex offense against a much younger child. We find no basis for disturbing the court's conclusion that a six-month adjournment in contemplation of dismissal would not have provided sufficient supervision, especially because

appellant was in need of a therapy program that was scheduled to conclude more than one year after disposition.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16321-
16322 &
M-5674 Ind. 3884/10

The People of the State of New York,
Respondent,

-against-

Hugues-Denver Akassy,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Hugues-Denver Akassy, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 17, 2011, as amended December 29, 2011, convicting defendant, after a jury trial, of rape in the first degree, three counts of aggravated harassment in the second degree, and two counts of stalking in the third degree, and sentencing him to an aggregate term of 20 years, and order (same court and Justice), entered on or about October 3, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting his rape conviction (*see People*

v Danielson, 9 NY3d 342, 348-349 [2007]). Even without testimony from the victim, a foreign tourist who did not return to the United States for trial, there was ample evidence, in many forms, to support the conclusion that the sex act was forcible, and not consensual as claimed by defendant.

The court properly admitted, under the excited utterance exception to the hearsay rule, statements that the victim made to a man she approached after she emerged from a wooded area in the park where the incident occurred (*see People v Johnson*, 1 NY3d 302 [2003]; *People v Gantt*, 48 AD3d 59, 64 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]). The record fully supports inferences that the victim's statements closely followed a startling event, and were "so influenced by the excitement and shock of the event that it is probable that . . . she spoke impulsively and without reflection" (*People v Caviness*, 38 NY2d 227, 231 [1975]).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se arguments, including those relating to the court's denial of his

CPL 440.10 motion (45 Misc 3d 1211[A], 2014 NY Slip Op 51543[U][Sup Ct, NY County 2014]).

M-5674 - *The People of the State of New York v Hugues-Denver Akassy*

Motion to declare a default and for other relief denied.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16323 Barton Mark Perlbinder, et al., Index 654039/13
Plaintiffs-Appellants,

-against-

Board of Managers of the 411
E. 53rd Street Condominium,
Defendant-Respondent.

_____

Granger & Associates LLC, New York (Raymond R. Granger of counsel), for appellants.

Meyers Tersigni Feldman & Gray LLP, New York (Anthony L. Tersigni of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 10, 2014, which granted defendant's motion to hold plaintiffs in contempt for failing to comply with a prior order and for a preliminary injunction, unanimously modified, on the law, to require an undertaking by defendant, and to remand for a determination of the amount thereof, and otherwise affirmed, without costs.

The record supports a finding of civil contempt against plaintiffs (*see El-Dehdan v El-Dehdan*, __ NY3d __, 2015 NY Slip Op 07579 [2015]; Judiciary Law § 753). In a prior order, the motion court directed plaintiffs, who operate a parking garage in defendant's building, to cordon off the area of the garage's sub-

cellar in which there was spalled concrete and exposed rebar to prevent people from walking there and cars from being parked there. However, plaintiffs continued to use that area of the garage.

A preliminary injunction against the use of the garage's sub-cellar "until proper repairs (conforming with all permit and legal requirements) are completed" is also warranted (*see Unique Laundry Corp. v Hudson Park NY LLC*, 55 AD3d 382 [1st Dept 2008]).

However, the court erred in issuing the injunction without requiring defendant to give an undertaking (*see* CPLR 6312[b]). In fixing the amount of the undertaking, the court may revisit the scope of the injunction, considering any further deterioration that may have occurred and any remedial steps that plaintiffs may have taken to repair conditions.

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

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16324 2BSurrey, LLC, Index 652226/14
Plaintiff-Respondent,

-against-

20 East 76th Street Owner LLC,
et al.,
Defendants-Appellants.

_____

Greenberg Traurig, LLP, New York (James W. Perkins and Michael Manning of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 20, 2015, which denied defendants' pre-answer motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court properly denied the motion to dismiss. At issue is plaintiff's proposed $10 million purchase of an interest in a ground lease relating to the Surrey Hotel in New York City. The complaint alleges that the parties, by their course of conduct, waived any writing requirement at least three times: by adjourning the closing date without a writing prior to the original agreement's January 31, 2014 expiration; by allowing defendants to complete financing without "written approval . . .

in a writing executed by both Parties and delivered to the other"; and by adjourning the closing date from June 30th to July 30th without a writing.

The motion court properly found that the complaint, as amplified by the affidavits (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), sufficiently alleged that the parties had consistently waived the writing requirements under the subject agreement. The motion court also correctly found sufficient, at the pleading stage, plaintiff's allegations of partial performance and equitable estoppel as a basis for preventing defendants from invoking the no oral modification clause of the parties' agreement. Similarly, plaintiff sufficiently pled a "willful default" by defendants that would entitle plaintiff, under the written agreement, to specific performance, and not just a return of its down payment.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16325 The People of the State of New York, Ind. 7454/01
Respondent,

-against-

Maurice McCollough,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 10, 2012, resentencing defendant to an aggregate term of 25 years, with 5 years' post release supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*People v Lingle*, 16 NY3d 621 [2011]). We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16326 In re Liska NY, Inc., et al., Index 101484/13
Petitioners-Appellants,

-against-

The City Council of the City
of New York, et al.,
Respondents-Respondents.

_____

Sheldon Lobel, P.C., New York (Richard Lobel of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered June 11, 2014, denying the petition to annul the determination by respondent City Council, dated October 9, 2013, which disapproved the City Planning Commission's grant to petitioners of a special zoning permit, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The City Council's determination disapproving the City Planning Commission's (CPC) grant of a special permit to petitioners has a rational basis and is not arbitrary and capricious (*see Cummings v Town Bd. of N. Castle*, 62 NY2d 833 [1984]). Having reserved to itself the power to grant or deny a

special permit, without enunciating standards for the exercise of its discretion (*see* NY City Charter § 197-d), the Council is not bound by the specific permit standards of Zoning Resolution § 74-902, which circumscribes the CPC's review, but has broader review powers (*see Cummings*, 62 NY2d at 834). It may consider policy issues. The Council properly denied petitioners' application upon consideration of matters related to the public welfare, including concerns about the over-saturation of similar buildings in the area, the poor condition of petitioners' building, and the precedent that approval of the permit would set for overbuilding first and requesting permission after the fact.

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

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16327 Resurgence Asset Management, LLC, et al.,
Plaintiffs-Respondents,

-against-

Steve Gidumal,
Defendant-Appellant.

Index 651737/12

_____

O'Brien LLP, New York (Sean O'Brien of counsel), for appellant.

Pollack Solomon Duffy LLP, New York (Barry S. Pollack of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Anil C. Singh, J.), entered September 2, 2014, which granted plaintiff Resurgence Asset Management, LLC's (RAM) motion for summary judgment on its breach of contract (first) cause of action, deemed an appeal from judgment, same court and Justice, entered October 16, 2014, awarding RAM the total amount of $522,162.41, and, so considered, said judgment unanimously reversed, on the law, without costs, and RAM's motion denied.

On September 28, 2008, RAM and certain affiliates entered into an agreement terminating defendant's employment as fund manager. In connection with that, RAM, among other things, agreed to pay defendant an amount equal to $838,662, which represented accrued and unpaid profits of the fund managed by

defendant as of his termination date ("compensation payment"). That payment was subject to a future clawback obligation entitling RAM to recover a portion of the fees advanced to defendant, to repay certain fund investors. RAM also represented in the termination agreement that defendant's compensation payment is not less than the "compensation amount" paid or payable to defendant's colleague for the same period.

In 2012, plaintiffs initiated this action asserting, among other things, a breach of contract cause of action alleging that defendant had breached his obligation to return his pro rata share of the clawback amounts owed by RAM.

The court erred in granting RAM's motion for summary judgment on its breach of contract cause of action, as material issues of fact exist with respect to how RAM calculated defendant's pro rata share of the clawback obligation. Before defendant is held liable as matter of law for the amount sought by RAM, he should be entitled to depose a witness who can provide a full explanation as to how the pro rata share was determined, including an explanation of how RAM determined the persons who were subject to the clawback obligation and the persons who were not.

In addition, the court erred to the extent its order can be

read as determining that RAM, as a matter of law, provided documentation sufficient to show that it had satisfied the representation that defendant's compensation payment was not less than the compensation amount paid or payable to defendant's colleague, and to the extent it can be read as determining that RAM provided complete and accurate documentation showing that it had paid defendant all the profits to which he was entitled under the termination agreement, including any additional profits coming due following his termination date.

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16328 The People of the State of New York, Ind. 2102/10
Respondent,

-against-

Jaime DeJesus,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered May 2, 2013, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 20 years, unanimously reversed, on the law, and as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

Defendant's right of confrontation was violated by testimonial hearsay evidence that went beyond the permissible scope of explanatory background material. Over timely and specific objection on Confrontation Clause grounds, the detective in charge of investigating the case testified that he learned of defendant's nickname and home address from, among others, two nontestifying informants or 911 callers describing the fleeing

shooter, and that defendant was found at that same address. In addition, the victim testified that defendant went by that same nickname, and the jury saw a photograph of the nickname tattooed on defendant's arm. The hearsay evidence did not merely explain the police investigation, but improperly provided strong evidence on the central issue of identification (*see People v Garcia*, 25 NY3d 77, 86-88 [2015]). This impropriety was compounded by the prosecutor's improper argument, in violation of the court's limiting instruction, that the out-of-court statements made to the detective constituted "evidence" that defendant was the shooter (*see People v Minus*, 126 AD3d 474 [1st Dept 2015]). "The only purpose of the prosecutor's improper comments was to suggest to the jury, in this one-witness identification case, that the complainant was not the only person who had implicated the defendant" (*People v Benitez*, 120 AD3d 705, 706 [2d Dept 2014]).

Defendant was further deprived of his right to a fair trial by other portions of the prosecutor's summation (*see People v Calabria*, 94 NY2d 519 [2000]). The prosecutor's argument that defendant shot the victim over a dispute involving a mountain bike that defendant "had nothing to do with," and that defendant "was looking to take credit for" the shooting, suggested that a third person had engaged defendant to shoot the victim. This

line of argument ran afoul of a prior ruling striking the victim's testimony that defendant had shot him over a mountain bike (*see People v Birch*, 6 AD2d 28, 30 [1st Dept 1958], *cert denied* 369 US 880 [1962]). Contrary to the People's argument, defense counsel did not waive the right to object to these comments by cross-examining the victim about the mountain bike, which the court permitted as a curative measure after striking the initial testimony about the bike, or by arguing in summation that the victim's inconsistent testimony about the bike undermined his credibility. Other improprieties in the summation included emotional appeals, safe streets arguments and denigration of defense counsel.

During jury deliberations, the court should have granted defendant's mistrial motion, made on the ground that any verdict would be reached under coercive circumstances. The court's statements during jury deliberation were also prejudicial to defendant's right to a fair trial. The jury returned two notes, on the second and fourth day of deliberations, announcing that the jury was deadlocked; the second note emphatically listed different types of evidence the jury had considered. The court's *Allen* charges in response to both notes were mostly appropriate but presented the prospect of protracted deliberations by

improperly stating that the jury had only deliberated for a very short time when it had actually deliberated for days (*see People v Aponte*, 2 NY3d 304, 308-309 [2004] [trial court improperly stated, among other things, that it was "nowhere near" the point when it would find a hung jury, where deliberation had lasted two days]). The court initially informed the jury that its hours on one day would be extended to 7:00 p.m., before reversing that decision and merely extending the hours to 5:00 p.m., and then it extended the hours to 6:00 p.m. on the next day, a Friday. The court improperly described those changes as a "tremendous accommodation" that was "loathed" by the system (*see People v Huarotte*, 134 AD2d 166, 170-171 [1st Dept 1987]; *see also Aponte*, 2 NY3d at 308 [finding reversible error where, among other things, *Allen* charge "suggested that the jurors were failing in their duty"]).

The court further indicated that the jury would likely continue deliberating into the next week although jurors had been told during jury selection that the case would be over by the aforementioned Friday, raising concerns for one juror who was going to start a new job the following Monday and another juror who was solely responsible for his child's care in the first

three days of the next week (*see People v Diaz*, 66 NY2d 744, 746 [1985]; *see also People v Nelson*, 30 AD3d 351 [1st Dept 2006]). After the court informed the latter juror that he would be required to show up the next week despite the juror's purportedly fruitless efforts to obtain alternative childcare, and then brought the juror back into the courtroom solely to reiterate that point more firmly, the jury apparently returned its verdict within less than nine minutes, at about 3:29 p.m. on the Friday (*see People v Mabry*, 58 AD2d 897 [2d Dept 1977]). The totality of the circumstances supports an inference that the jury was improperly coerced into returning a compromise verdict.

To the extent any of these issues could be deemed unpreserved, we review them in the interest of justice. These cumulative errors were not harmless, since the evidence of defendant's guilt was not overwhelming, and there is a significant probability that defendant would have been acquitted if not for the violation of his right of confrontation, the prosecutor's improper statements in summation, and the court's improper statements during deliberation (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Since we are ordering a new trial, we find it unnecessary to discuss defendant's other arguments, except that we find that the

verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16329 In re David R. Kozlow, Jr., Index 101725/13
Petitioner,

-against-

The City of New York, etc.,
Respondents.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondents.

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Determination of respondents, dated August 23, 2013, which dismissed petitioner from his position as a police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered December 9, 2014), dismissed, without costs.

Substantial evidence supports respondents' finding that petitioner had engaged in numerous acts of misconduct, including failing to follow proper procedure in presenting a prisoner at the station house; delaying his return to the station house in order to earn overtime; abandoning a fixed post; failing to follow directions to proceed immediately to a post; writing improper comments on his monthly report; and being discourteous

to supervisors *(see Matter of 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 180-181 [1978]). There exists no basis to disturb the credibility determinations of the Hearing Officer *(Matter of Berenhaus v Ward,* 70 NY2d 436, 443 [1987]).

Given petitioner's prior disciplinary record, which included prior dismissal probations, and in light of the number and persistency of his infractions, termination from employment does not shock our sense of fairness *(see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). Contrary to petitioner's contention, the Police Commissioner was authorized to impose the penalty of a 30-day suspension without pay and to dismiss petitioner from the police force (*see* Civil Service Law § 75[3-a]; Administrative Code of City of NY § 14-115[a]). Petitioner was also not entitled to his unused accrued vacation and sick leave since he was terminated from employment *(see Grishman v New York,* 183 AD2d 464, 465 [1st Dept 1992], *lv denied* 80 NY2d 760 [1992]).

Respondents properly denied issuing petitioner a Pistol License Inquiry Response Form. After being served with the charges and specifications, petitioner was placed on modified

assignment and his firearm privileges were revoked and he never sought a change in that status prior to the time of his dismissal (*see Matter of Baloy v Kelly*, 92 AD3d 521, 522 [1st Dept 2012]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P, Andrias, Moskowitz, Gische, JJ.

16330 The People of the State of New York, Ind. 5408/12
Respondent,

-against-

John Morales,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Renee White, J.), rendered on or about June 18, 2013,

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

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

ENTERED: DECEMBER 8, 2015

CLERK

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

Sweeny, J.P., Acosta, Andrias, Moskowitz, JJ.

16331 The People of the State of New York, Ind. 5625/12
Respondent,

-against-

Johnny Jackson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 14, 2014, convicting defendant, upon his plea of guilty, of sex trafficking, and sentencing him, as a second felony offender, to a term of 9 to 18 years, unanimously modified, on the law, to the extent of vacating the supplemental sex offender fee, and otherwise affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence. As the People concede, the imposition of a supplemental sex offender fee, as reflected in the Uniform

Sentence and Commitment Sheet, should be vacated because sex trafficking is not one of the enumerated offenses for which that fee may be imposed (*see* Penal Law § 60.35[1][b]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Sweeny, J.P, Acosta, Andrias, Moskowitz, JJ.

16333 The People of the State of New York, Ind. 3463/12
Respondent,

-against-

Michael Poindexter,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about December 5, 2012,

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.

ENTERED: DECEMBER 8, 2015

CLERK

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

Sweeny, J.P, Acosta, Andrias, Moskowitz, JJ.

16335 The People of the State of New York, Respondent, Ind. 5763/08

-against-

Mark Hollingsworth, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Anant Kumar of counsel), for appellant.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about July 20, 2011, 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: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16338 The People of the State of New York, Ind. 4330/10
Respondent,

-against-

Jorge Gudino,
Defendant-Appellant

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered April 11, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act Correction Law art 6-C), unanimously affirmed, without costs.

Initially, we reject the People's argument that, because defendant has been deported, we should decline to hear his appeal (*see People v Edwards*, 117 AD3d 418 [1st Dept 2014]).

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the guidelines, or did not

warrant a downward departure under the totality of the circumstances, including the egregiousness of the underlying sex crime against a child.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16339 David Bakhash, Index 151999/14
Plaintiff-Respondent,

-against-

Jonathan Winston,
Defendant-Appellant.

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Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Jeffrey A. Miller of counsel), for appellant.

The Weinstein Group, P.C., Woodbury (Lloyd J. Weinstein of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 24, 2014, which, inter alia, granted plaintiff's motion for summary judgment in lieu of complaint, unanimously reversed, on the law, with costs, and the motion denied.

The subject note is usurious as a matter of law and, therefore is void (*see e.g. Szerdahelyi v Harris,* 67 NY2d 42, 48 [1986]; *Freitas v Geddes Sav. & Loan Assn.,* 63 NY2d 254, 262 [1984]). "The maximum per annum interest rate for a loan . . . is 16% under New York's civil usury statute and 25% under the

state's criminal usury statute (*see* General Obligations Law § 5-501 [civil usury]; Penal Law §§ 190.40, 190.42 [criminal])" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 182 [1st Dept 2013]).

It is true that the stated rate on the four-month note is 12%. However, it does not say 12% per annum. Where, as here, the loan is for less than a year, the interest rate is annualized (*see e.g. O'Donovan v Galinski*, 62 AD3d 769, 770 [2d Dept 2009]), and thus, the annual rate on the note is 36%, well above the criminal usury rate of 25%. It is also true that the note says, "in no event shall the rate of interest payable hereunder exceed the maximum interest permitted to be charged by applicable law and any interest paid in excess of the permitted rate shall be credited to principal and any balance refunded to" defendant. However, that does not make the subject note nonusurious (*see Simsbury Fund v New St. Louis Assoc.*, 204 AD2d 182 [1st Dept 1994]). Furthermore, even if defendant drafted the note, that

"does not relieve the lender from a defense of usury" (*Pemper v Reifer*, 264 AD2d 625, 626 [1st Dept 1999]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16340-
16341 In re Christopher H.,
Petitioner-Appellant,

-against-

Marisa S.-H.,
Respondent-Respondent.

_____

Christopher H., appellant pro se.

Marisa S.-H., respondent pro se.

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Order, Family Court, New York County (Tandra L. Dawson, J.), entered on or about January 16, 2015, which, to the extent appealed from as limited by the briefs, denied petitioner's objections to a support magistrate's order, entered on or about September 3, 2014, denying his 2013 petition for a downward modification of a 2012 child support order, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about June 7, 2013, which denied petitioner's objection to a support magistrate's order, entered on or about April 11, 2013, denying his 2010 petition for a downward modification of a 2009 child support order, unanimously dismissed, without costs, as abandoned.

Since 2010, petitioner has brought multiple, sequential

petitions to have his child support obligation reduced. The last petition and the only one currently on appeal concerns whether petitioner's loss of employment constituted a sufficient change in circumstance to warrant a downward modification of his support obligations. After hearing, the Support Magistrate concluded that because petitioner had failed to make diligent efforts to secure new employment, no such modification was warranted. The Family Court correctly confirmed the Support Magistrate's findings. The conclusion that no downward modification of the existing permanent child support award was warranted is amply supported by the evidentiary record and credibility determinations, which we will not disturb on appeal. Other issues raised by petitioner, challenging the manner in which child support was calculated and credits to which he claims he is entitled, were all previously determined in earlier proceedings. Those earlier determinations were either never appealed or the appeals filed were never timely perfected. The trial court correctly concluded that petitioner had no right to re-litigate those issues as part of the current petition and those earlier determinations are not reviewable on this appeal.

We have examined petitioner's remaining contentions and find them to be without merit.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16342 Juan Carlos Caamaño Montiel, Index 309598/11
Plaintiff-Respondent,

-against-

Owen Sailsman,
Defendant-Appellant,

The City of New York,
Defendant,

Bronxdale Realty, LLC,
Defendant-Respondent.

- - - - -

Owen Sailsman,
Third-Party Plaintiff-Appellant,

-against-

Bronxdale Realty, LLC,
Third-Party Defendant-Respondent.

_____

Farber Brocks & Zane L.L.P., Garden City (Charles T. Ruhl of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for Juan Carlos Caamaño Montiel, respondent.

Law Offices of Epstein Gialleonadro & Rayhill, Elmsford (David M. Heller of counsel), for Bronxdale Realty, LLC, respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 10, 2015, which, insofar as appealed from as limited by the briefs, denied defendant Owen Sailsman's motion for summary judgment dismissing plaintiff's complaint as against

him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that he slipped and fell on ice on a public sidewalk abutting defendant Sailsman's property, near the property line of a vacant lot owned by defendant Bronxdale Realty, LLC. Sailsman made a prima facie showing that his property is a two-family home in which he resides, not subject to liability pursuant to Administrative Code of City of NY § 7-210 (b), and that his voluntary snow removal efforts did not create or exacerbate the alleged hazardous condition on the sidewalk (*see Titova v D'Nodal*, 117 AD3d 431 [1st Dept 2014]; *Rios v Acosta*, 8 AD3d 183, 184-185 [1st Dept 2004]). Sailsman testified that the day before the accident, he removed the snow and ice from the sidewalk and applied enough salt to completely melt the ice, and provided a neighbor's affidavit confirming that the sidewalk was clear and safe to walk on, as well as photographs taken shortly after the accident.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to offer any basis from which it could be reasonably inferred that defendant's snow-removal efforts "created or heightened" the alleged hazardous condition (*Rios* at

184-185). His arguments that Sailsman was negligent in failing to completely clear the area of snow and ice, or in plowing the snow into a pile from which some snow may have fallen off and been trampled by pedestrians causing "compressed snow," are insufficient to raise an issue of fact as to whether Sailsman created or exacerbated the condition (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007]; *Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 [1st Dept 2007]; *see also Ortiz v Citibank*, 62 AD3d 613 [1st Dept 2009]). Plaintiff's arguments as to the origin of the hazardous conditions are speculative and conclusory, and thus insufficient to defeat defendant Sailsman's motion for summary judgment (*Fung v Japan Airlines Co., Ltd.*, 51 AD3d 861, 862-863 [2d Dept 2008], *lv denied* 11 NY3d 713 [2008]; *Rios* at 184-185).

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

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16344 Capstone Business Funding, LLC, Individually and as assignee of Barden Contracting Services, LLC, Plaintiff-Respondent, Index 652991/13 95057/14

-against-

Optimum Construction, Inc., Defendant,

RLI Insurance Company, Defendant-Appellant.

- - - - -

[And a Third-Party Action]

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Dreifuss Bonacci & Parker, PC, Florham Park, NJ (David C. Dreifuss of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 9, 2014, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs.

The motion court correctly found defendant surety bound by the estoppel certificate signed by its principal, as plaintiff detrimentally relied on the certificate in advancing funds to the subcontractor for whose benefit the surety's payment bond was

required (*see JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 393 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]), there was no defense, such as economic duress, that would vitiate the estoppel certificate (*see Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]), and the bond contained a provision waiving the surety's right to a discharge from its obligations based upon its principal's conduct (*see Aniero Concrete Co., Inc. v New York City Constr. Auth.*, 1998 WL 148324, 1998 US Dist LEXIS 3938 [SD NY 1998], *affd sub nom Aetna Cas. & Sur. Co. v Aniero*, 404 F3d 566 [2d Cir 2005]).

We have considered appellant's other contentions and find them unavailing.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16345 The People of the State of New York, Ind. 737/13
Respondent,

-against-

Dwight Smith,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered on or about June 21, 2013,

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

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

ENTERED: DECEMBER 8, 2015

CLERK

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

Tom, J.P., Friedman, Saxe, Gische, JJ.

16348 The People of the State of New York, Ind. 4595/08
Respondent,

-against-

Brandin Santiago,
Defendant-Appellant.

_____

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

Brandin Santiago, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered July 27, 2011, as amended August 12, 2011, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 75 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence, including the number of shots fired and the surrounding circumstances, supports an inference that defendant intended to kill two men with whom he had been involved in a dispute. Accordingly, defendant was also liable for the death of a third

victim under a transferred intent theory. The inference of homicidal intent was not undermined by the fact that he hit the two surviving victims in the lower extremities, because "[t]he location of the *wounds* does not establish the direction of defendant's *aim*" (*People v Blue*, 55 AD3d 391, 391 [1st Dept 2008], *lv denied* 11 NY3d 922 [2009]). Defendant's claim that he lacked a propensity for violence is irrelevant to weight of the evidence review, and is in any event based on evidence not presented to the jury. To the extent defendant is making a legal sufficiency claim, in his pro se brief or otherwise, it is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we similarly reject it.

The court properly exercised its discretion in denying defendant's mistrial motion, made on the basis of a brief phrase of testimony that could be viewed as bolstering identifications made by other witnesses. The court sustained an objection and struck the testimony. The drastic remedy of a mistrial was not warranted, because the offending phrase was not particularly harmful, and because the court's curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]; *see also People v Young*, 48 NY2d 995 [1980]).

We have considered and rejected defendant's pro se arguments.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16349 In re Jaynie S.,
Petitioner-Respondent,

-against-

Gaetano D.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Andrew J. Baer, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the child.

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Order, Family Court, New York County (Diane Kiesel, J.), entered on or about November 14, 2013, which, after a nonjury trial, determined that respondent committed the family offenses of aggravated harassment and stalking, by sending several letters to petitioner, and that aggravated circumstances existed, and imposed a five-year order of protection against respondent, unanimously affirmed, without costs.

Respondent's request for vacatur of the finding that he committed the family offense of aggravated harassment in the second degree, on the basis that Penal Law § 240.30 (1)(a) has been declared unconstitutional by the Court of Appeals (*see People v Golb*, 23 NY3d 455, 467-468 [2014], *cert denied* _US_, 135

S Ct 1009 [2015]), is unpreserved, and we decline to review it in the interest of justice (*see People v Scott*, 126 AD3d 645 [1st Dept 2015], *lv denied* 25 NY3d 1171 [2015]; *Matter of Nakia C. v Johnny F.R.)*, _AD3d_, 2015 NY Slip Op 07596 [1st Dept 2015]).

In addition, we find that the credited hearing testimony proved by a fair preponderance of the evidence that respondent's actions, by mailing petitioner two additional letters, dated November 14, 2012 and November 17, 2012, and a third letter, dated November 20, 2012, addressed to the child, after he received the August 16, 2012 temporary order of protection, constituted the family offense of stalking in the fourth degree because it cannot be seriously argued that he was not "clearly informed" to cease sending petitioner and the child letters (*see* Penal Law § 120.45 [2]). Although the August 16, 2012 temporary order of protection states that respondent was not to communicate with petitioner or the child except for contact as necessary to effectuate court-ordered visitation or to discuss the child's welfare, the record shows that there was no order of visitation in place when respondent sent the November letters to petitioner and the contents of those letters go beyond asking for visitation with the child or inquiring about his welfare. Moreover, the mother testified that receiving the letters had frightened her.

Contrary to respondent's contention, the Intergrated Domestic Violence (IDV) Court properly determined that a fair preponderance of the evidence supported a finding that respondent sent harassing letters to the mother from prison in repeated violation of the temporary order of protection, which constituted aggravating circumstances and warranted the issuing of a five-year order of protection (*see* Family Ct Act § 827[a][vii]). Indeed, the record shows that on February 22, 2001, respondent pleaded guilty to menacing in the second degree in connection with pointing a rifle at the mother, had violated prior orders of protection issued in the mother's and the child's favor directing him to stay away from them, and was willing to violate the temporary order of protection by addressing the mother directly in open court (*see Matter of Angela C. v Harris K.*, 102 AD3d 588, 589-590 [1st Dept 2013]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16350 Kenneth Wecker, Index 106895/10
Plaintiff-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered May 22, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record belies plaintiff's claim that defendants failed to reasonably accommodate his medical disabilities (*see* Administrative Code of City of NY § 8-107[4][a], [15][a]). The evidence shows that defendant Department of Homeless Services (DHS), and one of its outreach programs in Staten Island, initially offered plaintiff numerous options for transitional housing with elevators which would have accommodated his disability of neuropathy, but which plaintiff refused because

they could not accommodate his pet birds. Defendants also demonstrated that other options sought by plaintiff would cause them undue hardship, as the hotel in which plaintiff initially insisted on trying to remain at cost well above DHS's allotted hotel/motel budget (*see* Administrative Code § 8-102[18]).

Following plaintiff's move to Brooklyn, DHS had another outreach program assist him, and plaintiff again refused the housing options offered to him. While he argues that he rejected those options because he needed to be in an elevator building close to his doctors, and needed a private room to recover from his chemotherapy, he did not elaborate on the frequency, duration, or side effects of such treatment to support this conclusory assertion. Moreover, that outreach program ultimately procured rental vouchers, found him suitable housing, and helped him move.

Defendants also submitted evidence, through a phone log and deposition testimony of the relevant outreach team members and DHS staff, showing that they engaged in a good faith interactive process with plaintiff that assessed his needs and the reasonableness of his accommodation requests, and their

discussions were ongoing (*see Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]; *see also Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 838 [2014]).

To the extent that plaintiff argues that defendants discriminated against him on account of his race, religion, marital status and disability, his claim is largely based on the same allegations as his claim that defendants failed to reasonably accommodate him. For the previously stated reasons, plaintiff did not establish that he was denied or rejected services or housing, and thus never established a prima facie case of discrimination, nor any "mixed motive" for denial of services or housing (*see McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973]; *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). The few comments plaintiff claims a DHS worker made regarding his disability and race do not establish discriminatory intent, as stray derogatory remarks, without more, do not constitute evidence of

discrimination (*see Fruchtman v City of New York*, 129 AD3d 500, 501 [1st Dept 2015]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16351 The People of the State of New York, Ind. 3027/13
Respondent,

-against-

Shombe McBroom,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered March 5, 2014, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The evidence established that when defendant used force against store employees, his intent was, at least in part, to overcome resistance to his retention of stolen merchandise (*see generally People v Gordon*, 23 NY3d 643, 649-651 [2014]).

Moreover, since there was not even a reasonable view of the evidence, viewed most favorably to defendant, that he used force solely to escape, the court properly denied his request for submission of the lesser included offense of petit larceny (*see People v Durden*, 5 AD3d 333 [1st Dept 2004], *lv denied* 2 NY3d 798 [2004]). At no time during the struggle at the store did defendant relinquish the stolen property, which he dropped only after he had already escaped from the store and was fleeing into a subway station. There was no evidence in the testimony of the People's witnesses or defendant, or in a videotape, supporting any reasonable view that defendant attempted to surrender the merchandise at the store. In any event, defendant did not, in fact, surrender the merchandise, but fled with it.

The court properly adjudicated defendant a second felony offender. Since defendant's challenge to his predicate conviction was limited to a meritless claim that it was not actually a felony conviction, he failed to preserve his present claim that the conviction was unconstitutionally obtained, and we decline to review it in the interest of justice. As an alternative holding, we find that there was no basis for finding

that the prior plea was involuntary, or for conducting a hearing on that issue (*see generally People v Konstantinides*, 14 NY3d 1, 15 [2009]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Saxe, Gische, Kapnick, JJ.

16352 In re Christopher Abell, et al., Index 650691/10
Petitioners-Appellants,

-against-

JetBlue Airways Corporation,
Respondent-Respondent.

_____

Locke Lord LLP, Chicago, IL (Robert M. Stephenson of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

Holland & Knight LLP, New York (Marisa Marinelli of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 18, 2015, which denied petitioners' motion to vacate an arbitration award, and granted respondent's cross motion to confirm the award, unanimously affirmed, without costs.

Petitioners failed to meet their heavy burden of showing that the arbitrator did not even "arguably" interpret the parties' employment agreement in rendering his award and therefore he exceeded his arbitral powers pursuant to Section 10(a) of the Federal Arbitration Act (*see Oxford Health Plans LLC v Sutter*, ___ US ___, ___, 133 S Ct 2064, 2068 [2013]). It is apparent from the face of the award that the arbitrator analyzed the agreement and subsequent amendments closely and carefully,

and that is all that is required to preclude the court from overruling him (*id.* at 2070-2071).

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

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16353 Salvatore Giuffre, et al., Index 250573/13
Plaintiffs-Appellants,

-against-

Bart Bulgues, et al.,
Defendants-Respondents.

_____

Krentsel & Guzman, LLP, New York (Joshua Ram of counsel), for appellants.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Bart Bulgues and Charlie Ann Beshara, respondents.

Marjorie E. Bornes, Brooklyn, for Justo Santos, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 2, 2014, which granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff Giuffre's claims of "permanent consequential" and "significant" limitations of use of his lumbar spine, and otherwise affirmed, without costs.

Plaintiffs allege that, as the result of a motor vehicle accident that occurred in June 2011, they both suffered serious injuries to their cervical and lumbar spines, Giuffre underwent a laminectomy and partial discectomy in 2014 that resulted in

scarring, and Baz also suffered scarring of her knees.

Defendants established prima facie that plaintiff Giuffre did not suffer a serious injury by submitting a radiologist's report finding no evidence of cervical spine injury and a lumbar spine herniation attributable to preexisting degenerative disc disease. In addition, they submitted reports of an orthopedist and neurologist who found no permanent or significant limitations and a plastic surgeon who found no disfiguring scars.

In opposition, Giuffre raised an issue of fact as to his lumbar spine claims by submitting the reports of his orthopedic surgeon, who found severe limitations in range of motion and averred that a lumbar spine MRI performed in 2012 and surgery revealed a herniated disc, which he opined was causally related to the accident. Particularly in light of Giuffre's relatively young age at the time of the accident, that was sufficient to raise an issue of fact as to causation (*see Sanchez v Draper*, 123 AD3d 492 [1st Dept 2014]). Although the surgeon did not examine Giuffre until over a year after the accident, plaintiffs submitted evidence corroborating Giuffre's testimony that he received physical therapy during the year following the accident and an MRI report prepared about one month after the accident that also showed a lumbar herniation. Thus, Giuffre provided

sufficient evidence to raise an issue of fact as to a causal connection between the accident and his lumbar spine injury (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]). However, Giuffre's physician offered no opinion as to any causal connection between the accident and his claimed cervical spine injury, and there is no competent evidence in the record of any treatment of the cervical spine. Nor did Giuffre provide any evidence to refute the showing that his scarring was not disfiguring.

As for plaintiff Baz, defendants submitted the reports of their radiologist, who found no injuries, and their orthopedist and neurologist, who found normal range of motion. In opposition, Baz failed to present any evidence of cervical spine injury (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 480 [1st Dept 2014]). Further, she presented no competent evidence of any medical treatment contemporaneous with the accident to raise an issue as to a causal connection between the accident and her claimed injuries (*see Perl*, 18 NY3d at 217-218). She presented no evidence of disfiguring scars.

Defendants established prima facie that plaintiffs did not sustain a serious injury under the 90/180-day category through plaintiffs' bill of particulars, which did not include a

90/180-day claim, and deposition testimony (*see Colon v Tavares*, 60 AD3d 419 [1st Dept 2009]). In opposition, plaintiffs failed to submit competent medical evidence sufficient to raise an issue of fact.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16354 The People of the State of New York, Respondent, Ind. 3991/10 5135/11

-against-

Dennis Watkins, Defendant-Appellant.

_____

Dennis Watkins, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered July 5, 2012, convicting defendant, after a jury trial, of assault in the second degree (two counts), disorderly conduct (two counts) and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established each of the elements of the crimes charged. The record does not

support defendant's claim that he was experiencing a seizure during the incident; on the contrary, it demonstrated that he feigned a seizure.

We have considered and rejected defendant's remaining claims.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16355 The People of the State of New York, Ind. 4339/11
Respondent,

-against-

Ariel Olivier,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 30, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the fourth degree and 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 an aggregate term of eight years, unanimously affirmed.

The court properly adjudicated defendant a second felony drug offender whose prior felony conviction was a violent felony. Defendant's conviction of criminal possession of a weapon in the third degree pursuant to former Penal Law § 265.02(4) qualifies as a violent felony (*see e.g. People v McGhee*, 125 AD3d 537 [1st Dept 2015], *lv granted* 26 NY3d 968 [2015]; *People v Thomas*, 122

AD3d 489 [1st Dept 2014], *lv denied* 24 NY3d 1123 [2015]), and we decline to revisit our prior holdings on this issue.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16356 Richard Djeddah, Index 111319/95
Plaintiff,

Rachel Djeddah,
Plaintiff-Respondent,

-against-

Daniel Turk Williams, M.D.,
Defendant-Appellant.

_____

Callan, Koster, Brady & Nagler LLP, New York (Janine L. Peress of counsel), for appellant.

Rachel Djeddah, respondent pro se.

_____

Appeal from order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about December 11, 2014, which granted plaintiff Rachel Djeddah's oral application for an extension of time to comply with the terms of a conditional order of dismissal, same court and Justice, dated August 8, 2014, to the extent of directing plaintiff to serve expert disclosure within 30 days and to withdraw her motion to vacate the conditional order, unanimously dismissed, without costs, as taken from a nonappealable order.

The order, issued at a conference, is not appealable as of

right because it did not decide a motion made on notice (*see* CPLR 5701[a][2]*; Sholes v Meagher*, 100 NY2d 333 [2003]*; Sidelev v Tsal-Tsalko*, 52 AD3d 398 [1st Dept 2008]).

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16357 The People of the State of New York, Ind. 2971/10
Respondent,

-against-

Uriah Williams,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered or about September 10, 2014, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly designated defendant a sexually violent offender because he was convicted of rape in the first degree, an enumerated sexually violent offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). We decline to revisit our holding in *Bullock*. In any event, although no factual finding of violence is necessary, the record establishes that defendant's conduct can be fairly described as violent.

Defendant's due process argument is unpreserved and without merit.

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

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16358 The People of the State of New York, Ind. 535/13
Respondent,

-against-

Adam Rivera,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about July 11, 2013,

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

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

ENTERED: DECEMBER 8, 2015

CLERK

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

Tom, J.P., Friedman, Saxe, Gische, JJ.

16359N Aldo Jorge, Index 300803/12
Plaintiff-Appellant,

-against-

Police Officer Edward Conlon, etc.,
Defendant-Respondent,

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

_____

G. Wesley Simpson, P.C., Brooklyn (G. Wesley Simpson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about April 2, 2014, which granted defendants' motion to renew and, upon renewal, denied plaintiff's motion for a default judgment against defendant Police Officer Edward Conlon, and directed plaintiff to accept service of defendants' amended answer upon certain conditions, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting defendants' motion to renew plaintiff's motion for a default judgment. Defendants were entitled to renewal in the interest of justice, even though the information in Officer Conlon's affidavit could have been, but was not, provided by defendants in opposition to plaintiff's original motion (*see Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597, 598 [1st Dept 2010]). Plaintiff failed to show any prejudice resulting from the officer's delay in answering the complaint (*see Hines v New York City Tr. Auth.*, 112 AD3d 528, 528 [1st Dept 2013]). At the time defendants filed their motion for renewal, discovery had not begun, and defendant City had already asserted in the amended answer filed on Officer Conlon's behalf the same defense of probable cause that it had asserted in its original, timely-filed answer (*see Drawhorn v Iglesias*, 254 AD2d 97, 97 [1st Dept 1998]). Moreover, defendants were not required to submit an affidavit of merit from Officer Conlon in opposition to

plaintiff's original motion (*see Silverio v City of New York*, 266 AD2d 129, 129 [1st Dept 1999]; *see also Arrington v Bronx Jean Co., Inc.*, 76 AD3d 461, 462 [1st Dept 2010]).

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: DECEMBER 8, 2015

CLERK

Tom, J.P., Friedman, Saxe, Gische, JJ.

16360 In re Lidya Radin, Index 250824/15
[M-4692]& Petitioner,
M-3524&
M-5392 -against-

Hon. Kenneth L. Thompson, Jr., etc., et al.,
Respondents.

_____

Lidya Radin, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg of counsel), for Hon. Kenneth L. Thompson, Jr., respondent.

Agulnick & Gogel, LLC, Great Neck (William A. Gogel of counsel), for William Gogel, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

M-3524 &
M-5392 ***Lidya Radin v Hon. Kenneth L. Thompson, J., et al.***

Motions to intervene, and all other requested relief, denied.

ENTERED: DECEMBER 8, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, JJ.

15554- Index 111311/09
15555 Jessie Cadet-Legros,
Plaintiff-Respondent-Appellant,

-against-

New York University Hospital Center,
doing business as New York University
Langone Medical Center,
Defendant-Appellant-Respondent.

_____

DeLince Law PLLC, New York (J. Patrick DeLince of counsel), for appellant-respondent.

Tarter Krinsky & Drogin LLP, New York (Richard L. Steer of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 9, 2014, modified, on the law, to grant motion as to the cause of action for discriminatory discharge, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando Acosta
Richard T. Andrias
Karla Moskowitz, JJ.

15554-15555
Index 111311/09

_____x

Jessie Cadet-Legros,
Plaintiff-Respondent-Appellant,

-against-

New York University Hospital Center,
doing business as New York University
Langone Medical Center,
Defendant-Appellant-Respondent.

_____x

Cross appeals from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 9, 2014, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the cause of action for discriminatory discharge, and granted the motion as to the cause of action for retaliation.

DeLince Law PLLC, New York (J. Patrick DeLince of counsel), for appellant-respondent.

Tarter Krinsky & Drogin LLP, New York (Richard L. Steer and Laurent S. Drogin of counsel), for respondent-appellant.

ACOSTA, J.

Plaintiff, an African-American woman who worked as a clinical supervisor in defendant's Langone Serology/Diagnostic Immunology Lab (the lab), claims that she was discharged from employment because of her race and in retaliation for filing an internal complaint of discrimination. Defendant argues that plaintiff was fired not on the basis of race, but because of her long-standing insubordination and disruptive behavior. We find that, in response to defendant's evidence of a nondiscriminatory reason for firing her, plaintiff failed to adduce evidence that either created a factual dispute as to whether defendant's decision to terminate her employment might have been based in part on race or would allow a reasonable jury to conclude that she was discharged in retaliation for engaging in protected activity, and we therefore dismiss both causes of action.

Facts and Background

Plaintiff was hired in 1992. In 2007, she began to engage in a struggle with her managers concerning her behavior and her resistance to the administrative hierarchy. Plaintiff was first admonished in or around May 2007. Five days later, she was issued a "Final Warning" regarding her "insubordination and unacceptable behavior as a member of the management team." Around that time, plaintiff received a performance evaluation of

2 out of 5, which she claims was retroactively downgraded from a rating of 5.

Defendant's personnel continued to complain about plaintiff's inappropriate interactions with them throughout the rest of the year. In January 2008, plaintiff received a 2 on her performance evaluation for May to December 2007, in which it was noted that she had failed to improve her communication or respect the chain of command and that she was continuing to inappropriately air her grievances to her staff. Her supervisors warned her that her failure to immediately improve would result in her termination.

In February 2008, plaintiff was once again seen to be conducting herself inappropriately, and one manager said that this was evidence that a "leopard does not change its spots." Another manager, with a less negative view of plaintiff's record from December to February, did not disagree with the first manager's overall characterization, but said that plaintiff's recent "attitude and demeanor" had been excellent.

At this juncture, despite the new incident and the December 2007 warning about termination, plaintiff was not terminated.

In a memo dated August 18, 2008, after several incidents in which she refused to report directly to the designated manager, plaintiff was issued a "Final Warning" for her "refusal to accept

[her manager as her] superior and to communicate with him as required." She was again warned that failure to improve would result in immediate termination. Almost immediately thereafter, plaintiff filed an internal complaint of racial discrimination.

Plaintiff received additional warnings because of what defendant described as her continuing insubordination and refusal to report to a manager. One was a "critical alert" in late 2008 and another was a third "Final Warning" in early 2009.

By May 2009, a manager who had maintained over the years that plaintiff should be given additional chances now agreed with another manager that plaintiff did indeed need to be fired. That previously supportive manager and a third manager (the person who had hired plaintiff) then completed plaintiff's final performance evaluation, again giving her a 2. A termination letter was prepared on May 11, 2009, and given to plaintiff on May 14, 2009.

Plaintiff brought the instant action in August 2009, asserting four causes of action under the New York City Human Rights Law (the City HRL) (Administrative Code of City of NY § 8-107 *et seq.*). Only two of the causes of action are relevant to this appeal: disparate treatment (discriminatory discharge) and retaliation. The motion court denied defendant's motion for summary judgment dismissing the disparate treatment claim (to the extent it was predicated on plaintiff's termination), and granted

the motion with respect to the retaliation claim. Both parties appeal.

Discussion

1. Standard of Review

Where a defendant has "offered evidence in admissible form of one or more nondiscriminatory motivations for its actions, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 39-40 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Instead, the court should focus on "whether the defendant has sufficiently met its burden, as the moving party, 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]" (*id.* at 45).[1] One way for a plaintiff to defeat summary judgment is by offering "some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" (*id.*).

If the plaintiff succeeds in this regard, "such evidence of

[1] Among these evidentiary routes is the "mixed motive" standard, which permits a plaintiff to defeat summary judgment if he or she can show that the defendant was motivated at least in part by the plaintiff's protected status (*see Bennett*, 92 AD3d at 40-41).

pretext should in almost every case indicate to the court that a motion for summary judgment must be denied" (*id.*). 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" (*id.* at 43).

This formulation, founded on the uniquely broad and remedial purposes of the City HRL, provides the framework for evaluating the sufficiency of evidence, and differs significantly from federal civil rights law (by assigning, for example, more weight to the possibility that a pretextual justification reflects consciousness of guilt).[2] As a practical matter, therefore, the

[2] *See Bennett*, 92 AD3d at 34-35 ("[T]he identification of the framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the section 8-130 rule that all aspects of the City HRL must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law . . . [F]or us to create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL - that it is unlawful 'to discriminate' - would impermissibly invade the legislative province. And walling off from examination the doctrines that are appropriate to shape the presentation and evaluation of evidence that 'discrimination' has occurred would create just such an exemption") (footnotes and internal citations omitted).

Bennett formulation helps embody the *substantive* law applicable to City HRL claims (i.e., what constitutes *because of discrimination*).

How the City HRL's distinctive substantive definitions, standards, and frameworks interact with existing standards for summary judgment has been the subject of some confusion (*see e.g. Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 n 8 [2d Cir 2013]). As with any other civil case, a discrimination plaintiff must produce enough evidence to preclude the moving defendant from being able to prove that (1) no issues of material fact have been placed in dispute by competent evidence, and (2) a reasonable jury (resolving all inferences that can reasonably be drawn in favor of the non-moving party) could not find for the plaintiff on any set of facts under any theory of the case. But recognizing that the general evidentiary standard remains the same in discrimination cases does not permit a court to *apply* the standard in a manner that ignores the distinctiveness of City HRL causes of action. All the general standard does, in other words, is provide the template that says, "Defendant must prove that no reasonable jury can conclude X." The "X" depends on the cause of action.

Thus, the only substantive requirement in a City HRL case where the plaintiff goes the "pretext" route is for the plaintiff

to produce some evidence to suggest that *at least one reason* is "false, misleading, or incomplete." A plaintiff who satisfies this requirement may well have produced less evidence than would be required under the state and federal laws. But he or she will have produced enough evidence to preclude the defendant from proving that no reasonable jury could conclude that any of the defendant's reasons was pretextual. In other words, the general evidentiary standard comfortably co-exists with the distinctive substantive framework that must be applied to City HRL claims.[3]

2. Discriminatory Discharge

Plaintiff suffered an adverse action when defendant terminated her employment[4]; the question is whether that action

[3] *Littlejohn v City of New York* (795 F3d 297 [2d Cir 2015]) provides a useful analogy. In that case, the court explained that, while Title VII complaints are subject to the same procedural requirements of Rule 8(a) of the Federal Rules of Civil Procedure -- pleading facts sufficient to state a claim -- the burden-shifting framework specific to Title VII under *McDonnell Douglas* means that pleading in those cases need not be targeted to the ultimate question of discriminatory intent but "only give plausible support to a minimal inference of discriminatory motivation" (795 F3d at 311). Here, too, the application of a general procedural rule is dependent on the distinct requirements of a particular cause of action.

[4] There is no question that termination is an "adverse action," so we recognize that the discussion in the motion court's decision about what constitutes an adverse action is dicta. We note, however, that, of the two cases cited by the motion court, one (*Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314 [1st Dept 2005]) was decided before the 2005 Local Civil Rights Restoration

was motivated, in whole or in part, by racial discrimination. Because defendant offered in support of its summary judgment motion admissible evidence of one or more nondiscriminatory motivations for its actions, we will move directly to the question of whether defendant carried its burden of showing that plaintiff did not raise an issue of fact as to whether defendant's reasons were pretextual or whether race otherwise played a part in its decision to fire her (*see Bennett*, 92 AD3d at 39-40). We conclude that, notwithstanding the more plaintiff-friendly City HRL standard discussed above, defendant showed that plaintiff failed to adduce a sufficient quantum of evidence to allow a reasonable jury to conclude either that defendant's nondiscriminatory reason for firing her was pretextual or that discrimination otherwise played a role in defendant's decision to discharge her; therefore, summary judgment dismissing her claim of discriminatory discharge is warranted.

Defendant submitted evidence - essentially undisputed by

Act (Local Law No. 85 of City of New York [2005] [Restoration Act]) came into effect, and the other (*Matter of Block v Gatling*, 84 AD3d 445 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]) did not engage in the analysis required by the Restoration Act. We note here only that (a) the text of the New York City Human Rights Law does not set forth a requirement that an adverse action be "materially" adverse; and (b) it is easy to imagine circumstances where an action would be adverse in a manner contrary to the City HRL, even where one's salary and many job responsibilities remain the same.

plaintiff - of a legitimate, nondiscriminatory reason for firing plaintiff. As the motion court explained, defendant had been warning plaintiff for years that her conduct was unacceptable. This conduct included "insubordination, disrespect of her supervisors, and failure to communicate." The record contains written documentation of multiple warnings to plaintiff about her conduct, and documentation, including emails from plaintiff, that illustrate an ongoing struggle, apparently unrelated to race, as to whether and from whom plaintiff was going to accept direction. Indeed, one of the most striking things about the record is that it conveys an unusual willingness on defendant's part to continue working with an employee who was repeatedly insubordinate and disruptive of the workplace. Therefore, defendant met its initial burden of providing a legitimate explanation for terminating plaintiff's employment.

Plaintiff had the opportunity to submit evidence to suggest that defendant's reason for terminating her was false, misleading, or incomplete. She argues that (1) an affidavit by her former coworker and (2) the use of what plaintiff characterizes as racially "coded language" by her supervisors sufficiently call into question defendant's reason for firing her. However, as discussed below, the affidavit is not probative of pretext, and plaintiff failed to offer any evidence from which

a reasonable jury could conclude that the language used by her supervisors was coded language.

In denying the part of defendant's motion seeking summary judgment dismissing the cause of action for discriminatory discharge, the motion court relied principally on an affidavit submitted on plaintiff's behalf by a supervisor who also worked for defendant (in a different department) during part of the period in question. Portions of that affidavit relate to evaluation procedures, which are not a material issue in the case. Nothing about the evaluation procedures is even vaguely suggestive of discrimination. The procedures did not and could not change the underlying and uncontested reality: Defendant consistently found (and told plaintiff) that her performance was deficient, principally because of her repeated disrupting of the workplace by being insubordinate and otherwise. Plaintiff herself confirms that she was repeatedly warned.

The affiant praised the quality of plaintiff's work, yet this does not avail plaintiff. If defendant had grounded its action (in whole or in part) on deficiencies in plaintiff's technical performance, then the averments of a person with knowledge of and respect for plaintiff's technical skill would have constituted pretext evidence. However, defendant was very clearly *not* complaining about plaintiff's technical performance.

Defendant's problem was with plaintiff's insubordination and disruptive behavior.

The affiant also said that she did not witness incidents of the type that defendant complained of. This statement does not avail plaintiff. If defendant had relied on events that had allegedly occurred in the affiant's presence, and the affiant denied that those events had occurred, then her statement would have been evidence of pretext. But the affiant was not privy to the alleged events, so her failure to observe them does not contradict defendant's account or indicate pretext. Thus, the motion court erred in finding that the affidavit created a factual issue as to pretext or racial motivation in plaintiff's termination.

Plaintiff also failed to raise an issue of fact as to whether her supervisors' use of the phrase a "leopard does not change its spots" or the term "tirade" amounted to racially coded language. It is true that discrimination seldom announces itself openly (*see Vega v Hempstead Union Free Sch. Dist.*, 801 F3d 72, 86 [2d Cir 2015], quoting *Robinson v 12 Lofts Realty, Inc.*, 610 F2d 1032, 1043 [2d Cir 1979] ["As we have recognized, 'clever men may easily conceal their motivations'"]). For that reason, it is important that discrimination plaintiffs be permitted to present a wide range of indirect evidence of discrimination, including

the fact that a defendant (or its agent or employee) used coded language, that is probative of discriminatory intent.[5] While some language is unmistakably reflective of the presence of race or other protected class status in the mind of the speaker, in many other cases meaning is context-dependent, as the motion court correctly pointed out. It is not enough, however, to state that meaning is context-dependent. A court considering a motion for summary judgment must actually examine the statement, and in some cases its historical usage, in addition to the context in

[5] It is often said that discriminatory "animus" must be shown, but it is only intent to discriminate -- to act "because" of race or other protected factor -- that is required (*see Goodman v Lukens Steel Co.*, 482 US 656, 668-669 [1987] [liability for intentional discrimination under Title VII of the Civil Rights Act of 1964 and 42 USC § 1981 requires only that decisions be premised on race, not that they be motivated by racial hostility or animus], *superseded on statute of limitations grounds Jones v R.R. Donnelley & Sons Co.*, 541 US 369 [2004]). The City HRL's construction provision, of course, operates as a "one-way ratchet," by which interpretations of state and federal civil rights statutes can serve only "as a *floor* below which the City's Human Rights law cannot fall" (*Loeffler v Staten Is. Univ. Hosp.*, 582 F3d 268, 278 [2d Cir 2009], quoting Restoration Act § 1). An "animus" requirement is not supported by statutory language or by legislative history. Whether a defendant is motivated by animus, or misguided benevolence, or some other consideration, the conduct in question is illegal so long as it was (at least in part) *because of* protected class status and operated to the disadvantage of the plaintiff. Thus, for example, a company vice president may think fondly of older employees even as that vice president is explaining that it is "time for new blood"; that fondness does not take away from the fact that the phrase suggests that it is time for older workers to move on and that any decision to fire older workers may have been based on their age (*cf. Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 125-126 [1st Dept 2012]).

which it is used (*see Ash v Tyson Foods, Inc.*, 546 US 454, 456 [2006] ["(A) speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage"]). If a defendant moving for summary judgment fails to prove that no reasonable jury could conclude that the statement in context was coded racial language, then summary judgment must be denied.[6] Conversely, if a plaintiff fails to offer evidence that could lead a reasonable jury to conclude that the statement in context actually reflected the speaker's use of the language in a racially coded manner, then summary judgment must be granted to defendant. Such is the case before us.

The most significant language in question is the colloquial expression, "A leopard does not change its spots." The record contains two emails in which plaintiff's supervisors used some variation of this expression. Plaintiff points out that, at the turn of the 20th century, the phrase was used in a racist fashion in a novel by Thomas Dixon, Jr. (The Leopard's Spots [1902]) and in a Joseph Rudyard Kipling tale (Just So Stories, *How the Leopard Got his Spots* [1901]). However, plaintiff offered no evidence from which to infer that the expression is imbued with racial meaning in contemporary parlance. In fact, today it is

[6] Even if such a comment is a "stray" remark, it can provide a window into what is motivating the speaker and thus create an issue of fact for a jury (*cf. Melman*, 98 AD3d at 125).

commonly understood to mean that a person's pattern of behavior tends not to change (*see* Random House Dictionary of America's Popular Proverbs & Sayings 201 [2d ed 2006] ["Human nature is as fixed and unchanging as the spots on a leopard's skin"]; The American Heritage Dictionary of Idioms 265 [2d ed 2013]). The racially derogatory meaning the expression "a leopard does not change its spots" may have had more than 100 years ago is too attenuated, without more, to permit a discriminatory meaning to be imputed to a speaker whenever the expression is uttered today.

In any event, on the evidence in the record, defendant's use of the language in reference to plaintiff is only consistent with the view, frequently expressed by defendant's employees and having no apparent reference to race whatsoever, that plaintiff was someone who, when faced with criticism or discipline, would reflexively argue that she was being treated unfairly or unjustly. A jury could not reasonably conclude that plaintiff's supervisors intended to employ the phrase in a racially charged manner.[7]

The other term on which plaintiff relies, "tirade," is even less probative of pretext, since unlike the "leopard's spots"

[7] This is not the circumstance, therefore, where a court is obliged to decide between two competing narratives, each of which a reasonable jury could credit, even if one is stronger than the other.

expression it has no historically racial meaning and is entirely race-neutral (*see* Merriam-Webster's Dictionary [online ed 2015] ["tirade" defined as "a protracted speech usually marked by intemperate, vituperative, or harshly censorious language"]). Plaintiff's supervisors used the term in several emails and in a memorandum to her employee file; they also used the terms "outbursts" and "hostile and insubordinate behavior," with which plaintiff does not take issue. There is nothing to suggest that "tirade" was used in reference to her race.

Since plaintiff failed to carry her burden of creating a factual issue as to whether defendant's nondiscriminatory reason for its decision to terminate her was pretextual or whether its decision was based, at least in part, on race, we reverse the order of the motion court insofar as it denied defendant summary judgment dismissing the discriminatory discharge claim. 3. Retaliation

To make out a prima facie case of retaliation under the City HRL, plaintiff was required to show that "(1) [she] participated in a protected activity known to defendant[]; (2) defendant[] took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

Plaintiff was fired in May 2009. Her claim is that she was fired in retaliation for having filed an internal complaint of racial discrimination in August 2008. But she offered no evidence of a causal connection. In fact, whether one considers the matter from defendant's point of view (plaintiff's improper conduct) or from plaintiff's point of view (improper supervision by various of defendant's personnel), all the discord -- in scope, kind, and frequency -- preexisted her internal complaint. The discharge that was effected in 2009 was the culmination of continuous progressive discipline (*see Koester v New York Blood Ctr.*, 55 AD3d 447, 449 [1st Dept 2008] [where "termination followed more than a year of progressive disciplinary complaints . . .[,] the temporal proximity between plaintiff's [internal discrimination] complaint and defendant's adverse action [was] alone insufficient to support a claim of retaliatory discharge"]).

It is certainly true that a complaint of discrimination could be the "extra factor" that pushes an employer from a posture of dissatisfaction with an employee to a determination to discharge the employee, and so an employer cannot avoid scrutiny of its post-complaint conduct by virtue of having begun to

discipline an employee pre-complaint. But the evidence is abundant and uncontroverted that, before plaintiff made her internal complaint, she was hanging on by a thread, and that she was still employed only because defendant, far from conspiring to get rid of her, continued to try to see if she could be made to understand what was required of her. After plaintiff made the complaint, the same type of conduct that had previously produced final warnings and poor evaluations continued. A reasonable jury could not conclude that any causal connection existed between plaintiff's internal complaint and her discharge.

Conclusion

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 9, 2014, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the cause of action for discriminatory discharge, and granted the motion as to the cause of action for retaliation, should be modified, on the law, to grant the motion as to the

cause of action for discriminatory discharge, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

All concur.

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

ENTERED: DECEMBER 8, 2015

CLERK