SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 14, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2666 The People of the State of New York, Respondent, Ind. 2164/11

-against-

Andrey Ignatyev,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered September 4, 2013, as amended September 24, 2013, convicting defendant, after a jury trial, of criminal sexual act in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's challenge for cause to a prospective juror. The panelist's responses to questioning by the attorneys and the court, viewed as a whole, provided an unequivocal assurance that

he could keep an open mind and decide the case impartially based on the evidence (*see People v Chambers*, 97 NY2d 417, 419 [2002]; *People v Dunkley*, 61 AD3d 428 [1st Dept 2009], *lv denied* 12 NY3d 914 [2009]). Contrary to defendant's contention, the panelist's answers did not raise a "serious doubt" about his ability to apply the presumption of innocence (*People v Toliver*, 102 AD3d 411, 412 [1st Dept 2013] [internal quotation marks omitted], *lv denied* 21 NY3d 1011 [2013]). In light of our conclusion, we need not reach the People's alternative argument that defendant had failed to exhaust his peremptory challenges.

After the victim's testimony, defendant sought to call an expert witness to testify about the impact of alcohol on a person's memory, and the phenomenon of alcohol-induced "fragmentary" blackouts. The court denied defendant's request, finding that the proffered testimony was speculative and not beyond the ken of the ordinary juror. The court providently exercised its discretion in excluding defendant's proffered expert testimony. The proposed testimony about the general impact of alcohol on memory is within the ordinary experience and knowledge of jurors (*People v Paro*, 283 AD2d 669, 670 [3d Dept 2001] ["impact of intoxication on an individual's mental state is presumed to be within the ordinary experience and knowledge of jurors"], *lv denied* 96 NY2d 922 [2001]; *People v Fish*, 235 AD2d

578, 580 [3d Dept 1997], *lv denied* 89 NY2d 1092 [1997]).

Defendant failed to sufficiently explain how the proffered testimony about fragmentary blackouts was relevant to the particular circumstances of this case (*see People v Bedessie*, 19 NY3d 147, 157 [2012]). Defendant did not establish an adequate factual foundation to support the theory that the victim was experiencing a fragmentary blackout during the assault. In the absence of a more-detailed proffer, the mere fact that the victim did not recall all of the details of the attack, or that there was a period prior to the assault that she did not remember, was insufficient, by itself, to show that she had suffered a fragmentary blackout. Thus, the application of the proffered testimony to the facts of the case was speculative. To the extent defendant is raising a constitutional claim, that claim is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

In any event, any constitutional or nonconstitutional error in this regard was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). When the police showed defendant a picture of the victim, he stated, "[T]hat's the girl who I raped." The victim's testimony was

corroborated by her 911 call made immediately after the incident in which she reported that she had been raped. Further, the victim made a prompt outcry to three other witnesses, who described her as sobbing uncontrollably, traumatized and frightened. Moreover, the victim had physical injuries consistent with her testimony that defendant had struck her on the head with a glass bottle. Finally, defendant's testimony that all of the sexual acts were consensual was incredible.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 14, 2017

CLERK

Friedman, J.P., Renwick, Richter, Moskowitz, Kapnick, JJ.

2817 VFP Investments I LLC, Index 152153/15
Plaintiff-Appellant,

-against-

Foot Locker, Inc.,
Defendant-Respondent,

Kathleen Smith, et al.,
Defendants.

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Whiteford Taylor & Preston L.L.P., Baltimore, MD (William F. Ryan, Jr. of the bar of the State of Maryland, admitted pro hac vice, of counsel), for appellant.

Kelley Drye & Warren LLP, New York (John M. Callagy of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 26, 2015, which granted defendant Foot Locker, Inc.'s motion to dismiss the complaint as against it pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The fraudulent misrepresentation claim based on the theory of respondeat superior fails to state a cause of action. The allegations reasonably permit the inference that the verification of accounts receivable issued to Foot Locker by nonparty G3K, a provider of marketing materials, fell within the scope of defendant Smith's employment as Foot Locker's "Director of In-Store Marketing," although they do not support a finding that verification was within the scope of defendant Rainier's

employment as "Divisional Vice President of Franchise Development." However, nothing in the complaint permits the inference that Smith engaged in this fraudulent verification in furtherance of Foot Locker's business, rather than solely for personal motives (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932 [1999]).

The fraudulent misrepresentation claim based on implied actual authority fails to state a cause of action. The allegation that Smith procured marketing materials directly from G3K permits the inference that Smith could reasonably have believed that she had implied authority to verify G3K's accounts receivable (*see Greene v Hellman*, 51 NY2d 197, 204 [1980]). However, she could not reasonably have believed that she had the authority to verify receivables falsely, and Foot Locker is not bound by the conduct in which she engaged that "exceed[ed] [her] authority" (*Riverside Research Inst. v KMGA, Inc.*, 108 AD2d 365, 370 [1st Dept 1985], *affd* 68 NY2d 689 [1986]). The allegations do not support a finding that Rainier could reasonably have believed he had authority to verify G3K's accounts receivables.

The fraudulent misrepresentation claim based on apparent authority also fails to state a cause of action. As the trial court correctly noted, Smith's and Rainier's job titles were insufficient, by themselves, to convey that they had authority

over accounting matters. Moreover, the complaint fails to allege any misleading facts or words by Foot Locker (*see DLJ Mtge. Capital, Inc. v Kontogiannis*, 102 AD3d 489, 489 [1st Dept 2013].

The fraudulent misrepresentation claim based on authority by estoppel fails to state a cause of action. The complaint does not allege that Foot Locker intentionally or carelessly caused plaintiff to believe that Smith or Rainier had the authority to verify receivables on its behalf (*see* Restatement [Second] of Agency § 8B). It alleges only that Foot Locker knew or should have known of Smith's fraudulent acts but did not take reasonable steps to notify plaintiff of the acts, to plaintiff's detriment. However, the allegations that Foot Locker knew or should have known of Smith's fraudulent acts are conclusory. Nothing in the complaint shows that Foot Locker was aware of the communications between Smith and plaintiff.

The complaint fails to state a cause of action for aiding and abetting fraud. To the extent plaintiff argues that Foot Locker is liable for the acts of its corporate employees Smith and Rainier, it is relying on a theory of respondeat superior (*see Prudential-Bache Sec. v Citibank*, 73 NY2d 263, 276 [1989]). We have rejected this argument (*see id.*; *Judith M.*, 93 NY2d at 933). Further, while the allegations establish G3K's fraud scheme, nothing in the complaint permits the inference that Foot

Locker had knowledge of, or substantially assisted in, the fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]).

The negligence claim fails to state a cause of action, because it does not allege privity, or a relationship so close as to approach privity, between plaintiff and Foot Locker from which would arise a duty on Foot Locker's part to provide plaintiff with accurate information regarding G3K's receivables (*see Security Pac. Bus. Credit v Peat Marwick Main & Co.*, 79 NY2d 695, 702 [1992]; *LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 105-106 [lst Dept 2001]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Sweeny, J.P., Renwick, Andrias, Kahn, Gesmer, JJ.

2834 The People of the State of New York, Respondent, Ind. 3034/14

-against-

Steven B., Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Judgment, Supreme Court, New York County (Neil E. Ross, J. at plea and sentencing), rendered June 26, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to an indeterminate prison term of 1 1/3 to 4 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of adjudicating defendant a youthful offender and reducing the sentence to a term of 6 months incarceration and 5 years' probation, with the condition that defendant participate in a mental health and substance abuse program under the direction of the Probation Department, and otherwise affirmed.

We find that defendant's circumstances render him an eligible youth (see CPL 720.10[3][i]). In addition, we find the

sentence, including the denial of youthful offender treatment, excessive to the extent indicated.

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

ENTERED: FEBRUARY 14, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2902 Rich International Group Corp., Index 652263/14
Plaintiff-Respondent,

-against-

Soleil Capitale Corporation,
Defendant-Appellant.

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Peyrot & Associates, P.C., New York (David C. Van Leeuwen of counsel), for appellant.

The Law Office of Sidney Baumgarten, New York (Sidney Baumgarten of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered August 23, 2016, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

Defendant failed to establish as a matter of law that it issued the agreed-upon letter of credit in the amount of $25 million on which plaintiff could successfully draw, for which plaintiff agreed to pay a fee of $1.25 million. Plaintiff's acknowledgment that defendant issued a document denominated a letter of credit is not sufficient, in view of the provisions in the document that create a question as to its viability for use by plaintiff, and plaintiff's inability to obtain a confirmation of the purported letter of credit's legitimacy. Furthermore, the

independence principle does not bar plaintiff's claim because no one attempted to draw on the letter of credit.

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

ENTERED: FEBRUARY 14, 2017

CLERK

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

2940 PDL Biopharma, Inc., Index 653028/15
Plaintiff-Respondent,

-against-

Samuel J. Wohlstadter, et al.,
Defendants-Appellants.

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Arnold & Porter Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 29, 2016, which granted plaintiff's motion for summary judgment in lieu of complaint on liability pursuant to CPLR 3213 and denied, defendants' cross motion for summary judgment, unanimously modified, on the law, plaintiff's CPLR 3213 motion denied, and the matter remanded to be converted to a plenary action, and otherwise affirmed, without costs.

The issue to be addressed at this juncture is not whether the subject guaranties are or are not enforceable; it is solely whether the guaranties are entitled to the expedited treatment of CPLR 3213. We hold that the guaranties on which plaintiff seeks summary judgment in lieu of complaint do not qualify as instruments for the payment of money only.

"The prototypical example of an instrument within the ambit

of [CPLR 3213] is of course a negotiable instrument for the payment of money--an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time" (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). CPLR 3213 is generally used to enforce "some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness," so that "a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 154-155 [1975]). A document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make a more than de minimis deviation from the face of the document (*id.*).

Defendants Samuel Wohlstadter and Nadine Wohlstadter own non party Wellstat Diagnostics, LLC (Diagnostics), the diagnostic systems company that received the loan underlying the guaranties at issue in this motion. On November 2, 2012, Diagnostics borrowed $40 million from plaintiff PDL Biopharma to finance certain FDA development trials. The terms of the loan were memorialized in a Credit Agreement, a term note, a security agreement, and a patent security agreement, all dated November 2, 2012. Thereafter, following a default, PDL, Diagnostics and the

Wohlstadters entered into a Forbearance Agreement dated February 28, 2013. The two guaranties that accompanied this Forbearance Agreement, one executed by the Wohlstadters, the other by the remaining defendants (entities owned by the Wohlstadters), are the subject of the present motion.

It is true that generally, an unconditional guaranty qualifies as an instrument amenable to CPLR 3213 treatment (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). However, here, it is unclear whether that is the case. For one thing, the documents guarantee not only "payment" but also "performance" of the borrower's "obligations." The term "obligations" is not defined in either of the guaranties, although it is defined in the Credit Agreement as

> "all liabilities, indebtedness and obligations (including interest accrued at the rate provided in the applicable Loan Document after the commencement of a bankruptcy proceeding whether or not a claim for such interest is allowed) of any Loan Party under this Agreement, or the [Wohlstadters] or any Loan Party under any other Loan Document, any Collateral Document or any other document or instrument executed in connection herewith or therewith, in each case howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent, now or hereafter existing, or due or to become due, including the Applicable IRR Amount."

Notably, in addition, in the note documents, Diagnostics, as the borrower, warranted to provide certain information to PDL,

including annual and quarterly reports "until all obligations ... are paid in full."

The guaranties at issue also include a provision that "[u]nless new [l]oan [d]ocuments become effective under Section 21 of the Forbearance Agreement, the guarantee contained in this Section 2 shall remain in full force and effect until all the [o]bligations shall have been [f]ully [s]atisfied..." This provision may be interpreted to mean that if new loan documents are entered into, the referred-to guaranties would no longer remain in full force and effect. Since PDL and Diagnostics entered into an Amended and Restated Credit Agreement on August 15, 2013, there is a question as to whether the guaranties remain in effect at this time.

Moreover, we note that determination of preliminary legal issues, and reference to additional documents, was necessary before the motion court could address the question of whether the relied-on guaranties continued to be enforceable and whether they had come due. For instance, it was necessary for the motion court to construe the documents to decide whether the cash contribution required under the Amended and Restated Credit Agreement could be satisfied by the loan defendants obtained from White Oak, or whether the use of the loan funds constituted a default under that Agreement, and if so whether PDL accepted

tender of that payment as performance of defendants' contractual obligation. The motion court also had to construe the Forbearance Agreement and refer to the Restated Credit Agreement to determine that the guaranties remained effective despite the execution of new loan documents. Similarly, the motion court had to refer to the Joinder Agreement to establish some defendants' purported awareness that the guaranties continued to be in effect. This extent of reference to extrinsic evidence exceeds any permissible limited reference to outside sources allowable under CPLR 3213.

Given the foregoing necessity of considering the parties' complex arrangements, agreements and circumstances, and the inability to determine by simple reference to the guaranties whether defendants remained liable by their terms to pay a sum certain, plaintiff's motion must be denied. Once issue is joined and any appropriate discovery is conducted, it will be

appropriate to address the questions of whether issues of fact exist which preclude summary judgment.

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3079 The People of the State of New York, Respondent, Ind. 4689/11

-against-

Rafael Jiminez, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered May 3, 2013, convicting defendant of three counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. When defendant abandoned stolen credit and debit cards by discarding them on the street as a police officer approached him, the abandonment was not "precipitated by unlawful police activity" (*People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]). Regardless of the officer's subjective intent, at the time defendant abandoned the cards, the police had not yet interfered with him in any way. The plainclothes officer's actions, up to

that point, were limited to crossing in front of defendant on the sidewalk from about 10 feet away and displaying his shield, without saying a word. In any event, based on defendant's suspicious, unsuccessful efforts to use various cards to obtain money from a cash machine, the police had, at the least, a founded suspicion of criminality that entitled them to make a common-law inquiry (*see People v Francois*, 61 AD3d 524 [1st Dept 2009], *affd* 14 NY3d 732 [2010]), and their conduct cannot be viewed as exceeding that authority (*see People v Bora*, 83 NY2d 531, 532-535 [1994]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3081 Landmark Ventures, Inc., Index 651745/14
Plaintiff-Appellant,

-against-

Doron Birger,
Defendant-Respondent.

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McCabe & Flynn LLP, Rockville Centre (William B. Flynn of counsel), for appellant.

Beys Liston Mobargha & Berland LLP, New York (Nader Mobargha of counsel), for respondent.

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 20, 2015, dismissing the amended verified complaint, unanimously affirmed, with costs.

"[A] contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1)" (*Lischinskaya v Carnival Corp.*, 56 AD3d 116, 123 [2d Dept 2008] [internal citations omitted], *lv denied* 12 NY3d 716 [2009]; *see also Sydney Attractions Group Pty Ltd. v Schulman*, 74 AD3d 476 [1st Dept 2010]).

The forum selection clause in the 2012 supplement to the parties' 2010 agreement states, "Any disputes between the Parties with relation to or arising out of this Supplement or the [2010] Agreement or breach of any part thereto [sic], or to any matter stemming thereof [sic] will be brought to the suitable

jurisdiction of Tel Aviv district." The instant dispute has "relation to" and arises out of the Confidentiality and Intellectual Property Agreement (CIPA), which is part of the 2010 Agreement. Thus, at a minimum, the court properly dismissed the first cause of action, which alleges breach of the CIPA.

Plaintiff contends that it should be allowed to litigate its breach of contract claim in New York because the CIPA chooses New York law. However, a choice of *law* clause is different from a choice of *forum* clause (see *Boss v American Express Fin. Advisors, Inc.* (6 NY3d 242 [2006]).

Plaintiff also contends that the supplement's forum selection clause does not apply to its tort claims. This argument is unavailing (*see e.g. Couvertier v Concourse Rehabilitation & Nursing, Inc.,* 117 AD3d 772, 773 [2d Dept 2014]; *Erie Ins. Co. of N.Y. v AE Design, Inc.,* 104 AD3d 1319, 1320 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]).

Since dismissal was proper based on the forum selection clause, we need not reach plaintiff's arguments regarding forum non conveniens (*see Sydney,* 74 AD3d at 477; *see also Lischinskaya,* 56 AD3d at 123-124).

Defendant's argument that plaintiff should be sanctioned for bringing a frivolous appeal is unavailing. Even though the 2012 supplement to the parties' 2010 agreement chose Israel as the

forum, plaintiff's commencement of this action in New York was not frivolous (*see Sydney*, 74 AD3d at 476-477).

In light of the foregoing we need not reach the other claims.

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3083 The People of the State of New York, Ind. 1129/15
Respondent,

-against-

Frank Pagan,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Charity L. Brady of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya McGinn 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 (Marcy L. Kahn, J.), rendered July 15, 2015,

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

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

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

ENTERED: FEBRUARY 14, 2017

CLERK

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

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3084 In re Mermaid Marine, Ltd., Index 651789/15
Petitioner-Appellant,

-against-

Maritime Capital Management Partners, Ltd.,
Respondent-Respondent.

_____

Kennedy Lillis Schmidt & English, New York (Nathan T. Williams of counsel), for appellant.

Ceres Law PC, New York (Rudyard W. Ceres of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol Edmead, J.), entered November 6, 2015, which denied the petition for an order of attachment and an order compelling a representative of respondent to submit to a deposition, and dismissed the proceeding brought pursuant to CPLR article 75; and order, same court and Justice, entered October 30, 2015, which, upon reargument and renewal of the petition, adhered to the original determination, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying the petition for an order of attachment (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59 [1st Dept 2013]). Petitioner did not meet its burden of demonstrating that the arbitration award sought may be rendered

ineffectual without an order of attachment (CPLR 7502[c]; *Matter of Kadish v First Midwest Sec., Inc.*, 115 AD3d 445, 445 [1st Dept 2014]). In particular, petitioner has not shown through admissible evidence that respondent would be financially unable to pay the arbitration award or would undertake deceptive actions to avoid paying it, if one were rendered. Accordingly, an order of attachment for respondent's assets is inappropriate.

Petitioner has not shown the "necessity" for court-ordered discovery of respondent's assets at this time (*International Components Corp. v Klaiber*, 54 AD2d 550, 551 [1st Dept 1976]; *see also JPMorgan Chase Bank v Reibestein*, 34 AD3d 308, 309 [1st Dept 2006]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Moskowitz, Kapnick, JJ.

3086-
3087 In re the State of New York, Index 341104/08
Petitioner-Respondent,

-against-

C.B.,
Respondent-Appellant.

_____

Carol L. Kahn, New York, for appellant.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for respondent.

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Order, Supreme Court, Bronx County (Michael A. Gross, J.), entered May 22, 2015, which denied respondent C.B.'s (respondent) pro se motion to vacate an order, same court (Dineen A. Riviezzo, J.), entered August 24, 2009, which, upon a jury finding of mental abnormality, and a determination made after a dispositional hearing that respondent is a dangerous sex offender requiring confinement, committed respondent to a secure facility, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 18, 2015, which, upon reargument of the motion to vacate, adhered to the original determination, unanimously dismissed, without costs, as academic.

The motion court properly found that respondent is not entitled to vacatur of the dispositional order directing his confinement pursuant to the Sex Offender Management and Treatment

Act (SOMTA). Respondent's challenges to that order, including those based on the subsequent decision in *Matter of State of New York v Donald DD.* (24 NY3d 174 [2014]), do not constitute grounds for vacating an order pursuant to CPLR 5015(a). Moreover, the motion court providently exercised its discretion in declining to exercise its common-law power to vacate its own order (*see Pjetri v New York City Health & Hosps. Corp.*, 169 AD2d 100, 103 [1st Dept 1991], *lv dismissed* 79 NY2d 915 [1992]), given that respondent had already exhausted his appeals from that order (*id.*; *see* 88 AD3d 599 [1st Dept 2011]) and that provisions of SOMTA provide a more appropriate remedy for any of respondent's substantive claims (*see* Mental Hygiene Law § 10.09[b], [d], [g]). Accordingly, respondent's claim that he was deprived of his right to counsel on the motion to vacate is unavailing (*see People v Caban*, 5 NY3d 143, 152 [2005]).

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

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3088-
3089 Index 303841/13

Juana Frias,
Plaintiff-Appellant,

-against-

Victor Cesar Gonzalez-Vargas, et al.,
Defendants-Respondents.

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David S. Kritzer & Associates, P.C., Smithtown (David S. Kritzer of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for Victor Cesar Gonzalez-Vargas, respondent.

Maroney O'Connor LLP, New York (Ross T. Herman of counsel), for Juan R. Hernandez, respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 14, 2015, which granted defendants' separate 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 motions to the extent they sought dismissal of plaintiff's claims that she suffered serious injuries involving two ribs, her cervical spine and her lumbar spine, and otherwise affirmed, without costs. Order, same court and Justice, entered March 2, 2016, which, to the extent appealed from, denied plaintiff's motion to renew, unanimously affirmed, without costs.

Defendants satisfied their prima facie burden of

demonstrating that plaintiff did not sustain a serious injury to her right shoulder, cervical spine or lumbar spine by submitting the reports of their orthopedists and neurologists, who found full range of motion and opined that plaintiff's injuries had resolved (*see Birch v 31 N. Blvd., Inc.*, 139 AD3d 580, 580-581 [1st Dept 2016]). They also submitted an MRI report prepared by plaintiff's radiologist, who found no evidence of a rotator cuff tear in the right shoulder, a report of a portable chest X-ray taken in the emergency room, finding no rib fracture, and the report of an expert in emergency medicine, who opined that plaintiff's emergency room records were inconsistent with her claimed serious injuries.

In opposition, plaintiff raised an issue of fact concerning her claimed rib fractures by submitting the affirmed report of her radiologist, who took a second X ray a month after the accident, this one including multiple views, which revealed two fractured ribs on the right side. Although the initial X ray had not revealed those fractures, the emergency room records show that plaintiff complained of right-side rib pain days after the accident, and plaintiff's treating doctor diagnosed rib fracture or contusions caused by the accident. The record thus presents a factual issue as to whether the fractures were causally related to the accident (*see Uribe v Jimenez*, 133 AD3d 844 [2d Dept

2015]).

Plaintiff also raised an issue of fact as to her claim of significant and permanent consequential limitations of use of her cervical and lumbar spine. She submitted hospital records reflecting that she did make contemporaneous complaints of neck and back pain, the affirmed reports of her treating physicians who documented limitations in range of motion shortly after the accident, and affirmed reports of her pain management specialist who found continuing significant limitations three years later. Both treating physicians opined that plaintiff's spinal injuries were causally related to the accident. Plaintiff's pain management physician relied on MRI reports, included in the record, which revealed bulging and herniated discs in her cervical spine and bulging discs in her lumbar spine. These reports may be considered as they are not the sole evidence submitted in opposition to the motion (*see Rivera v Super Star Leasing, Inc.*, 57 AD3d 288, 288 [1st Dept 2008]). Although a subsequent follow-up MRI of the cervical spine over a year after the accident revealed degenerative changes, the report of the MRI taken shortly after the accident included no such findings, thus presenting issues of fact not subject to determination on a motion for summary judgment.

Plaintiff's submissions, however, were insufficient to raise

an issue of fact as to her claimed right shoulder injury, since her medical experts failed to address or explain the absence of findings of shoulder injury in her initial MRI. The additional medical affirmation that she submitted on renewal, which showed that she had surgery to repair a torn rotator cuff, acknowledged the existence of degenerative changes, but failed to adequately explain how the tear was caused by the accident three years earlier (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 509-510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]).

In opposition to defendants' prima facie showing of the lack of a 90/180-day claim, plaintiff did not submit sufficient medical or other evidence to support her claim that she was disabled for more than three months after the accident (*see Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3090 The People of the State of New York, Ind. 5025/14
Respondent,

-against-

Dennis Williams,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter 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 (Maxwell Wiley, J.), rendered June 24, 2015,

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

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

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

ENTERED: FEBRUARY 14, 2017

CLERK

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

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3091 Hezi Torati, et al., Index 155252/12
Plaintiffs-Respondents,

-against-

Veeda Vahabzadeh,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about July 11, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated December 23, 2016,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3092 Hezi Torati, et al., Index 155979/12
Plaintiffs-Respondents, 157177/13

-against-

Daniel Hodak,
Defendant-Appellant,

John Doe 1-100, et al.,
Defendants.

_____

Ganfer & Shore LLP, New York (Ira Brad Matetsky of counsel), for appellant.

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered September 22, 2015, which, insofar as appealed from, denied defendant Hodak's motion to dismiss the causes of action for libel and libel per se as against him pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to grant the motion except as to the claims based on the Facebook message, and otherwise affirmed, without costs.

The complaint alleges defamation stemming from negative comments anonymously posted by defendant on various consumer review websites or shared via Facebook message. With the exception of the Facebook message (which contains statements that are largely factual in nature), the challenged statements are not

actionable, because they are expressions of opinion (*see Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 117 [2009]). While the Internet reviews contain elements of both fact and opinion, when viewed in context, they suggest to a reasonable reader that the author was merely expressing his opinion based on a negative business interaction with plaintiffs (*see id.*; *Steinhilber v Alphonse*, 68 NY2d 283, 294 [1986]). The communications have a "[l]oose, figurative or hyperbolic" tone (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]), referring to plaintiff as a "bad apple," "incompetent and dishonest," and a "disastrous businessman," from whom consumers should "[s]tay far away." Moreover, they were posted anonymously online. As this Court has recognized, "[R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts" (*Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 44 [1st Dept 2011]).

The reviews are analogous to those at issue in *Matter of Woodbridge Structured Funding, LLC v Pissed Consumer* (125 AD3d 508 [1st Dept 2015]), which were found not to be actionable, although "some of the statements [were] based on undisclosed, unfavorable facts," because "the disgruntled tone, anonymous posting, and predominant use of statements that cannot be

definitively proven true or false" made them "only susceptible of a nondefamatory meaning, grounded in opinion" (at 509). The fact that, in this case, defendant was plaintiffs' business partner rather than an ordinary consumer is immaterial.

An additional ground for dismissing the claims based on the Yelp review is that they are time-barred, since they were asserted after the one-year statute of limitations had run (CPLR 215[3]). They cannot relate back to the original complaints, because those complaints were not sufficient to put defendant on notice of any Yelp-related claims (*see* CPLR 203[f]; *see also* CPLR 3016[a]).

The Facebook message, however, is actionable. The fact that it was only shared with three people, all members of the individual plaintiff's family, is not grounds for dismissal. Publication to even one person other than the defamed is sufficient (*Matter of Lentlie v Egan*, 61 NY2d 874, 876 [1984]), and the fact that the person to whom the statement was made is a

family member is immaterial (*see 60 Minute Man v Kossman*, 161 AD2d 574, 576 [2d Dept 1990]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3093 The People of the State of New York, Respondent, Ind. 2327/15

-against-

Michael Valentin, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Shari R. Michels, J.), rendered, October 8, 2015 unanimously affirmed.

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

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

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

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3094 Emilio Bagnoli, et al., Index 156158/14
Plaintiffs-Respondents,

-against-

3GR/228 LLC, et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty, LLP, Woodbury (Catherine R. Everett of counsel), for appellants.

Trolman, Glaser & Lichtman, P.C., New York (Tina M. Wells of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about July 11, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when he slipped and fell on a patch of ice in front of defendants' building. Defendants' storm-in-progress defense was unavailing where plaintiff and a nonparty witness testified that the ice patch on which plaintiff fell had a non-clear, whitish-to-gray coloration, with some thickness to it, and the meteorological experts for both sides opined that less than 1/10th of an inch of freezing rain had fallen in the storm that was occurring at the time of plaintiff's fall. The meteorological experts also stated that the freezing rain would

only account for a thin clear glaze on the sidewalk, and the meteorological records further established that the area experienced a six-to-seven inch snowfall several days prior to plaintiff's fall, with the temperatures thereafter remaining at or below freezing up until the time of plaintiff's fall. Under the circumstances presented, triable issues of fact exist as to whether plaintiff's fall was caused by an ice condition associated with the prior storm, and whether defendants had a reasonable time to remedy it before the accident (*see Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431 [1st Dept 2015]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3096- Index 22127/14E
3097-
3098 Karen Gross, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Marvin Neiman, et al.,
Defendants-Appellants-Respondents,

M&T Bank,
Defendant-Respondent,

West 159th Street Associates,
Defendant.

_____

Neiman & Mairanz P.C., New York (Marvin Neiman of counsel), for appellants-respondents.

Asher Fensterheim PLLC, White Plains (Kelly Paul Peters of counsel), for respondents-appellants.

Loeb & Loeb, LLP, New York (Jon Hollis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered May 6, 2015, which granted defendants Marvin Neiman, Gracon Associates (Gracon), Gracon Properties LLC (Properties), and Concourse Rehabilitation & Nursing Center, Inc.'s (collectively, the Gracon defendants) motion to dismiss the first, second, and fifth causes of action in the original complaint, denied their motion to vacate the notice of pendency, and granted plaintiffs' request to amend the caption to add

Gracon Holdings LLC (Holdings) as a defendant, unanimously modified, on the law, to vacate the notice of pendency, and otherwise affirmed, without costs. Order, same court and Justice, entered October 16, 2015, as amended by order entered November 2, 2015, which, to the extent appealed from as limited by the briefs, denied the Gracon defendants' motions to vacate the notice of pendency and to dismiss the first, second, and fifth causes of action in the amended complaint, and granted defendant M&T Bank's motion to dismiss the complaint as against it, unanimously modified, on the law, to grant the Gracon defendants' motions, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against M&T Bank.

Plaintiffs lacked standing to assert the first, second, and fifth causes of action in the original complaint against the Gracon defendants. Section 12(b) of the partnership agreement expressly prohibits plaintiffs, as assignees, from participating in the management or administration of the partnership, rendering them entitled only to receive a copy of the partnership's annual statement. Plaintiffs' assertions on appeal - both that Neiman is a partner in Gracon and that Gracon is an existing partnership - are contradictory to the allegations in the original complaint (*see Kwiecinski v Chung Hwang*, 65 AD3d 1443 [3d Dept 2009]). The

argument that the partnership agreement should not be considered in determining whether plaintiffs may assert the claims against the Gracon defendants is unpersuasive since plaintiffs received their interests in Gracon from one of the original partners (Shalom Fogel) pursuant to the partnership agreement.

Pursuant to both the partnership agreement and Partnership Law § 62(4), Gracon was dissolved at Fogel's death (*Fogel v Neiman*, 288 AD2d 429 [2d Dept 2001]). Plaintiffs did not become partners of Gracon by virtue of the dissolution (*see* Partnership Law § 40[7] ["No person can become a member of a partnership without the consent of all the partners"]). Moreover, on the death of a partner, the surviving partners have the exclusive right to wind up the affairs of the partnership (Partnership Law § 51[2][d]]); the representative of the deceased partner does not have any right to participate or interfere with the management of the partnership (*Silberfeld v Swiss Bank Corp.*, 273 App Div 686 [1st Dept 1948], *affd* 298 NY 776 [1948]).

The first, second, and fifth causes of action in the amended complaint should be dismissed as "a mere repackaging of previously dismissed claims" (*DiPasquale v Security Mut. Life Ins. Co. of N.Y.*, 293 AD2d 394, 395 [1st Dept 2002]).

In view of our holding that plaintiffs lacked standing, we need not consider their allegations that Neiman failed to satisfy

conditions precedent to exercising his purchase options.

The complaint was correctly dismissed as against defendant M&T Bank, a bona fide encumbrancer for value that had no notice of Neiman's lack of authority to convey the subject property on behalf of Gracon (*see* Real Property Law § 266; *Fleming-Jackson v Fleming*, 41 AD3d 175, 176 [1st Dept 2007]). Contrary to plaintiffs' contention, M&T Bank "[did] not have a duty of care to ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity" (*334 Corp. v Jericho Plaza, LLC*, 128 AD3d 679, 679 [2d Dept 2015]).

The notice of pendency should be vacated since plaintiffs have no legitimate claim to the real property of the partnership; their interest amounts to personal property, which does not entitle them to a notice of pendency (*see* CPLR 6501; *General Prop. Corp. v Diamond*, 29 AD2d 173, 176 [1st Dept 1968]; *see also Sealy v Clifton, LLC*, 68 AD3d 846 [2d Dept 2009]). Plaintiffs' claims for breach of fiduciary duty and an accounting do not entitle them to the filing of a notice of pendency, since these causes of action relate to their claim of an ownership interest in the partnership, not to any claim of an ownership interest in the real property itself (*see Delidimitropoulos v Karantinidis*, 142 AD3d 1038 [2d Dept 2016]).

The motion court providently exercised its discretion in granting plaintiffs' request to add Holdings to the caption of this action, since Holdings was designated as a defendant in the body of the original complaint, the Gracon defendants acknowledged in their answer that Neiman was the managing member of Holdings, and no prejudice has been claimed or shown as a result of the inadvertent omission (*see e.g. Fink v Regent Hotel*, 234 AD2d 39, 41 [1st Dept 1996]). The court providently exercised its discretion in considering plaintiffs' sur-reply.

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: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3099-
3100N

Pattie Latif,
Plaintiff-Appellant,

-against-

Eugene Smilovic Housing
Development Fund Co., Inc.,
Defendant-Respondent.

Index 308502/12

Spiegel & Barbato, LLP, Bronx (Stephen A. Iannacone of counsel), for appellant.

Burke, Conway, Loccisano & Dillon, White Plains (Marc Stiefeld of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J., entered July 10, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered August 21, 2015, which, to the extent appealable, denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic.

Defendant failed to establish its entitlement to judgment as a matter of law, in this action where plaintiff was injured when she tripped over a crack in the sidewalk in front of defendant's building, and fell to the ground. Defendant failed to show that it lacked constructive notice of the defect in the sidewalk, as the record shows that plaintiff testified that she saw the

condition that caused her fall about a year earlier, and the photographs taken within a week of the accident depict a condition that a jury might find existed for a sufficient period of time for defendant to have discovered and corrected it (*see King v City Bay Plaza, LLC*, 118 AD3d 476 [1st Dept 2014]; *Denyssenko v Plaza Realty Servs., Inc.*, 8 AD3d 207, 208 [1st Dept 2004]). Although plaintiff's testimony may contain inconsistencies, credibility issues are not appropriately resolved on a summary judgment motion (*see e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 [1st Dept 2002]).

Defendant also failed to demonstrate that the defect shown in the photograph and marked at plaintiff's deposition was, under the circumstances, physically insignificant or that its characteristics or the surrounding circumstances did not increase the risk it posed (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]; *King* at 476).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3101N In re 86th & 3rd Owner, LLC, Index 650603/16
Petitioner-Appellant,

-against-

Perlbinder Holdings LLC, et al.,
Respondents-Respondents.

Katsky Korins LLP, New York (Mark Walfish of counsel), for appellant.

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 6, 2016, which denied petitioner's motion to stay arbitration, unanimously affirmed, with costs.

Although the August 2009 letter of substantial completion was not a prerequisite to respondents' right to bring an action for breach of the parties' 2005 Contribution Agreement (*cf. John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]), delivery of the letter made respondents' damages ascertainable by allowing them to determine whether petitioner had complied with applicable floor area requirements as set forth in the 2005 agreement. Thus, the motion court correctly concluded that, while the parties' February 2009 agreement referred to claims that had already arisen, the claims did not accrue for statute of

limitation purposes until August 2009; as extended by the parties' tolling agreements, respondents' demand for arbitration was therefore timely. Nor did respondents' contravention of the arbitration clause's requirement that demand be made "promptly" constitute an impediment to arbitrability (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]); the motion court correctly concluded that such provision was a procedural matter for resolution by the arbitrator (*see Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 8-9 [1980]).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3102N Mishelle Young, etc., Index 22632/12
Plaintiff-Appellant,

-against-

New York City Health & Hospitals Corporation, et al.,
Defendants-Respondents.

_____

Law Office of William A. Gallina, PLLC, Bronx (Frank V. Kelly of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 23, 2015, which granted defendants' motion to dismiss the complaint for failure to file a notice of claim, unanimously modified, on the law, to deny so much of the motion as sought dismissal of the claims asserted against defendants Dr. Cornel Dumitriu and Dr. Amit Shah, and otherwise affirmed, without costs.

The motion court correctly dismissed plaintiff's claims against defendant New York City Health and Hospitals Corporation (HHC) and defendant Jacobi Medical Center, which HHC operates, since plaintiff's service of a notice of claim on the City of New York, through the City Comptroller's Office, did not constitute service upon HHC, a separate public entity (*see* General Municipal

Law § 50-e[1]; McKinney's Uncons Laws of NY § 7401[2]; Public Authorities Law § 2980; *Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606 [2005]; *Williams v City of New York*, 74 AD3d 548 [1st Dept 2010]). Because the time within which to commence an action against HHC had expired (*see* Uncons Laws § 7401[2]; Public Authorities Law § 2981), the motion court "lacked the power to authorize late filing of the notice" (*Pierson v City of New York*, 56 NY2d 950, 956 [1982]).

There is no basis for applying the doctrine of equitable estoppel (*Glasheen v Valera*, 116 AD3d 505, 505 [1st Dept 2014]). HHC's answer denying service of a notice of claim and identifying itself as a public benefit corporation, placed plaintiff on notice of a problem with service before the expiration of the statute of limitations (*see Scantlebury*, 4 NY3d at 613).

The motion court correctly dismissed the complaint against defendants Dr. Steven Sobey and Dr. Saadat Shariff, since they met their burden of establishing that they were employees of HHC subject to the notice of claim requirements (*see* Uncons Laws § 7401[6]; General Municipal Law §§ 50-e[1][a]; 50-k[1][e]; *Jae Woo Yoo v New York City Health & Hosps. Corp.*, 239 AD2d 267, 268 [1st Dept 1997]). The affidavit of Jacobi Medical Center's senior associate director of medical staff affairs confirmed that these doctors were resident physicians appointed to the

hospital's staff by HHC and fully indemnified by HHC. It is of no moment that defendants submitted the affidavit for the first time in reply to plaintiff's opposition to their motion, especially since plaintiff alleged in the complaint that the doctors were "employee[s] and/or contract agent[s]" of HHC.

Dr. Dumitriu and Dr. Shah, however, are not entitled to dismissal of the complaint. Plaintiff's allegations in the complaint regarding the employment and/or agency status of these doctors do not constitute formal judicial admissions, as they were made "[u]pon information and belief" (*see Smith v Das*, 126 AD3d 462, 463 [1st Dept 2015]). Defendants' claim that these doctors were employed with HHC through an affiliation agreement is not supported by evidence of the agreement and thus is insufficient to resolve the issue (*id.*).

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

ENTERED: FEBRUARY 14, 2017

CLERK

Tom, J.P., Sweeny, Renwick, Moskowitz, Kapnick, JJ.

3103N Dale Crooke, Index 155008/12
Plaintiff-Respondent,

-against-

Michael Bonofacio, et al.,
Defendants-Appellants.

_____

Gordon & Rees, Harrison (Allyson Avila of counsel), for appellants.

Block O'Toole & Murphy, New York (David L. Scher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about July 15, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to strike the answer of defendants Continuum Health Partners, Inc. and St. Luke's Roosevelt Hospital Center (collectively St. Luke's) to the extent of striking St. Luke's affirmative defense of justification, unanimously affirmed, without costs.

The court properly exercised its discretion under CPLR 3126 by striking St. Luke's affirmative defense of justification because plaintiff demonstrated that the failure to produce defendant Michael Bonofacio, who was accused by plaintiff of misconduct, for his deposition, was willful, deliberate, contumacious, and done in bad faith (*see Williams v Shiva Ambulette Serv., Inc.*, 102 AD3d 598 [1st Dept 2013]). Moreover,

St. Luke's failed to provide a reasonable excuse for its failure to comply (*compare Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]). The record shows that St. Luke's repeatedly failed to respond to plaintiff's inquiries about producing Bonofacio for deposition, and neglected to disclose — until well after the instant motion was filed — that it had terminated his employment causing him to refuse to appear.

Furthermore, it is noted that the court made efforts to limit its order by striking only the affirmative defense that would require Bonofacio's testimony. It did not strike the entire answer, thereby providing St. Luke's with other avenues of defending against plaintiff's claims. We note that courts are vested with broad discretion in fashioning remedies that are precisely tailored to the discovery abuse at issue (*see Red Apple Supermarkets v Malone & Hyde*, 251 AD2d 78 [1st Dept 1998]), and find that the court herein crafted an appropriate remedy.

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

ENTERED: FEBRUARY 14, 2017

CLERK

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

2364 In re Estate of Oscar Stettiner, Index 1705/13A
Deceased.
- - - - -
International Art Center,
Petitioner-Appellant,

-against-

The Estate of Oscar Stettiner, et al.,
Respondents-Respondents.

_____

Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for appellant.

McCarthy Fingar LLP, White Plains (Phillip C. Landrigan of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 10, 2015, affirmed.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

Index 1705/13A
2364

_____x

In re Estate of Oscar Stettiner,
Deceased.
- - - - -
International Art Center,
Petitioner-Appellant,

-against-

The Estate of Oscar Stettiner, et al.,
Respondents-Respondents.
_____x

Petitioner appeals from the order of the Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 10, 2015, which dismissed the petition to revoke ancillary letters of administration issued to respondent George W. Gowen.

Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for appellant.

McCarthy Fingar LLP, White Plains (Phillip C. Landrigan of counsel), for respondents.

TOM, J.P.

The genesis of this litigation was in 1939, when, with the Nazi invasion imminent, decedent Oscar Stettiner, a Jewish art collector, abruptly fled Paris, leaving his art collection behind. His art collection was later sold by the Nazis, including an early twentieth century painting by the Italian artist Amedeo Modigliani, which Stettiner's heir seeks to recover. The issue before this Court is whether petitioner International Art Center, S.A. (IAC), which purchased the painting in 1996 for $3.2 million, has standing to challenge the ancillary letters of administration issued to the heir's representative for purposes of commencing litigation to recover the painting. We hold that petitioner lacks standing, and that, in any event, the limited ancillary letters were properly issued.

In the immediate aftermath of World War II, the United States and its allies took on the task of locating and returning the many great works of art systematically looted by the Nazis. While millions of works were recovered and returned to the rightful owners, individual Holocaust victims and their heirs have struggled for decades to obtain restitution.

The efforts to recover these treasures have been recently popularized in movies including 2014's "Monuments Men," and 2015's "Woman in Gold," which chronicled Maria Altmann's pursuit

of her family's paintings looted in Austria, including Gustav Klimt's "Portrait of Adele" (1907), of which Altmann won restitution following litigation that reached the United States Supreme Court (*see Republic of Austria v Altmann*, 541 US 677 [2004]).

While this great theft may have taken place more than 70 years ago, a resolution was not possible until a combination of scholarship and technology allowed for the creation of databases compiling lists of missing works, and until nations agreed to international guidelines on art restitution such as those laid out in the 1998 Washington Principles on Nazi-Confiscated Art. Even at the tail end of 2016, the United States Congress felt it necessary to pass additional legislation to aid victims of Holocaust-era persecution and their heirs to recover works of art confiscated or misappropriated by the Nazis, and to ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner. This legislation became law on December 16, 2016 (*see* Holocaust Expropriated Art Recovery Act of 2016 (Pub L 114-308, 130 US Stat 1524, amending 22 USC § 1621 *et seq.*).

The painting at issue is known as "Seated Man With a Cane" (1918) and is currently owned by petitioner. It is alleged to

have been confiscated by the Nazis from decedent, who resided in Paris in the 1930s.

Respondents, the Estate of Oscar Stettiner (Estate), Philippe Maestracci, and George W. Gowen, as Limited Ancilliary Administrator of the Estate of Oscar Stettiner, contend that in 1930 decedent Oscar Stettiner purchased a painting, which he subsequently loaned to the 1930 Venice Biennale, a world-famous art exhibition. The painting was listed as number 35 in the exhibition, and, according to respondents, a label on the back of the painting by the Venice Biennale establishes it is the same painting as the one at issue in this case.

In 1939, before the Nazi invasion, decedent fled Paris to his home in what became the unoccupied zone of France. In 1941, the Nazis appointed a temporary administrator to sell Jewish property and turn the proceeds over to the Third Reich. On July 3, 1944, the subject painting was sold by the temporary administrator to J. Van der Klip.

In 1946, decedent sought the return of his painting in a French court and received an emergency summons voiding the forced sale and directing Van der Klip to return the painting to him. Van der Klip claimed that he did not know the whereabouts of the painting, having sold it to an unknown American officer in a café. Respondents contend that the painting was secreted by the

Van der Klip family for 52 years.

Decedent died intestate in France on February 25, 1948. Respondent Philippe Maestracci, a French domiciliary, is decedent's only surviving grandson and sole heir.

In 1996, Van der Klip's only surviving daughter and her nephew consigned a painting bearing the same title and artist in issue to Christie's in London, for auction on June 25, 1996. The catalogue for the auction stated that the painting was listed as number 16 at the 1930 Venice Biennale. Respondents contend that the artwork designated number 16 was not listed as belonging to decedent.

On June 25, 1996, petitioner IAC, a Panamanian entity, allegedly formed and controlled by the family of Hillel (Helly) Nahmad, owner of Helly Nahmad Gallery, Inc., purchased a painting for $3.2 million. Nahmad was a New York resident, and the Gallery, a New York corporation, was located in Manhattan and abroad. Respondents allege that the painting was the same painting that was stolen from decedent. In 2008, it was valued by Sotheby's at between $18 and $25 million.

The painting was exhibited at the Gallery's London location in 1998; at an art museum in Switzerland in 1999; at the Gallery in New York in 2005; and at the Royal Academy of Arts in London in 2006, "courtesy of Helly Nahmad."

In 2008, IAC consigned the painting to Sotheby's for sale in New York. The catalogue for the sale noted under "provenance" decedent's "possible" prior ownership and stated that the painting was exhibited as number 35 at the 1930 Venice Biennale.

There were no bids for the painting, and it was returned to IAC's storage facility in Switzerland in December 2008, where it remained until April 2016. Respondents contend that the painting was transported to Switzerland after Nahmad learned from Sotheby's that it had been stolen from decedent and potential bidders were concerned about title. It has been reported that in April 2016 Swiss authorities confiscated the painting as part of a criminal investigation into the ownership of the painting.

Although Maestracci demanded return of the painting from the Gallery in 2011, he received no response. Accordingly, that same year he commenced an action against the Gallery in the United States District Court for the Southern District of New York, seeking a declaratory judgment and asserting claims for conversion and replevin of the painting. The federal action was withdrawn without prejudice on March 27, 2012, possibly due to Maestracci's inability at that time to represent the Estate.

On March 7, 2013, respondent George W. Gowen, an attorney for Maestracci, and a New York resident, petitioned Surrogate's Court, New York County, for ancillary letters of administration

to commence litigation in Supreme Court, New York County, for return of the painting, which was allegedly under the control of the Gallery, Nahmad, and David Nahmad (agent for the gallery), New York residents (collectively, Nahmads), and IAC, a foreign entity transacting business in New York. The petition stated that there was no personal property of decedent in New York, and stated that the sole purpose of seeking appointment or an administrator was to commence a legal action by a New York resident against foreign parties.

To establish jurisdiction pursuant to SCPA 206, Gowen provided an affidavit from Edward W. Greason, Esq., an associate at the firm representing Maestracci. Greason recounted the history of the painting and stated that in order to commence a proceeding to recover it, appointment of a fiduciary for the Estate was necessary to act as the proper party in interest. Because Maestracci was not an American citizen, he did not qualify, so with Maestracci's consent, Gowen was seeking to act as administrator of decedent's ancillary New York estate.

In a second affidavit, Greason stated that pursuant to SCPA 103(44), a "chose in action" was defined as property, and the Estate had the right to commence an action in New York to recover the painting because the Nahmads were New York residents and the Gallery was a New York corporation. Greason also stated that the

painting was believed to be in New York in the possession of the Nahmads.

On June 27, 2013, the Surrogate's Court, New York County, issued limited ancillary letters of administration to Gowen. Thereafter, in 2014, respondents commenced an action in Supreme Court, New York County, against IAC and the Nahmads. Jurisdiction over IAC was based on allegations that it did business at the same office in Manhattan as the Gallery, purposely transacts business in New York, and that it was an offshore entity used by the Nahmad family as an instrument to hold their personal family interests in art, most of which were located in Switzerland. The complaint requested a declaratory judgment that Maestracci was the owner of the painting, and asserted claims for conversion and replevin.

On March 2, 2015, IAC filed a petition before the Surrogate's Court seeking to revoke the limited ancillary letters of administration issued to Gowen. Initially, IAC alleged that it had standing to seek the relief because it was a person "interested" in the Estate as the owner of the painting and a defendant in the action. The petition also alleged that resolution of whether the Surrogate's Court had subject matter jurisdiction to issue the ancillary letters might moot the action, and claimed the issuance of the letters was based on

material misstatements in that respondents falsely claimed that the Estate's sole asset, the painting, was located in New York, when it was returned to Switzerland in 2008.

In support of the petition, IAC submitted affidavits of Adelino Semedo, an officer of a storage facility in Switzerland, who detailed the location of the painting since it was received at the facility in Switzerland from Christie's London on March 21, 1997. In particular, he stated that the painting was shipped to Sotheby's New York on September 18, 2008, and returned to the facility on December 18, 2008, where it remained.

IAC also submitted affidavits of Harco Van Den Oever, and Julie Kim, International Business Director, and acting Director, respectively, for the Impressionist and Modern Departments of Christie's affiliates globally, stating that IAC purchased the painting at an auction on June 25, 1996. Further, IAC provided an affidavit of Daisy Edelson, senior vice president and business director of Sotheby's Impressionist and Modern Art Departments in New York, stating that the painting was consigned for auction by IAC, not Gallery and was returned to Switzerland on December 4, 2008.

IAC argued that the Surrogate's Court lacked subject matter jurisdiction for the issuance of the ancillary letters. IAC also maintained that factual misrepresentations were made to secure

the letters in that the painting was not in New York, and was purchased by IAC, not the Nahmads.

Respondents responded that IAC's wrongful refusal to return the painting was a tortious act amenable to suit in New York under CPLR 302 and SCPA 210(1) and (2)(a). They asserted that SCPA 103(44) and 2103(2) provided that a "chose in action" was an asset of an estate. Moreover, they claimed that IAC lacked standing as an interested person under SCPA 103(39) because it was not a beneficiary of the Estate or a trustee in bankruptcy or receiver, and that IAC's interest was in the painting and the action, not in the Estate. In addition, they argued that there was no other forum with jurisdiction over all parties, and equity favored a prompt resolution of the Estate's claims. They noted that IAC had avoided discovery and that Maestracci was over 70 years of age and contended that IAC was seeking to prolong the proceedings. Finally, they claimed they did not make material misstatements to the court to obtain the letters.

Surrogate's Court dismissed IAC's petition, finding that IAC lacked standing to bring the application to revoke the limited ancillary letters issued to Gowen. In addition, the court concluded that the ancillary letters were not obtained by misrepresentations and that it had jurisdiction over estates of nondomiciliaries with a claim in New York under SCPA 2103(2). We

now affirm.

In order to seek revocation of ancillary letters of administration based on any of the grounds listed in SCPA 711, one must be "a co-fiduciary, creditor, person interested, any person on behalf of an infant or any surety on a bond of a fiduciary." While IAC maintains it qualifies as a "person interested," that term is defined as "[a]ny person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person" (SCPA 103 [39]). However, IAC is neither a beneficiary nor a creditor of the Estate, and provides no other basis for a conclusion that it is a "person interested." Moreover, a defendant in an action brought by an estate is not an interested person (*see Matter of Chabrier*, 281 AD2d 346 [1st Dept 2001]). Accordingly, IAC does not have standing to seek revocation of the letters.

Nevertheless, SCPA 719 permits the court to revoke letters when it becomes aware of facts supporting grounds for revocation. In this case, IAC alleges that Gowen obtained his letters by fraud. In particular, IAC claims that Gowen procured the letters by falsely claiming that the painting was located in New York when it was in fact located in Switzerland. This allegation stems from a statement in one affidavit that indicated a belief that the painting was in New York. However, the petition for the

letters explicitly stated that the Estate had no property in New York, other than the right to commence an action. In other words, the petition did not assert that the painting was in New York, and there is no reason to believe that this assertion in one affidavit played a part in the court's determination to issue the ancillary letters.

IAC also challenges whether the Surrogate's Court had jurisdiction to entertain this matter. SCPA 206(1) provides that the Surrogate's Court has jurisdiction over the estate of any nondomiciliary decedent who leaves property in the state. The Surrogate's Court should decline to exercise jurisdiction only when the controversy in no way affects the affairs of a decedent or the administration of the estate (*see Matter of Piccone*, 57 NY2d 278, 288 [1982]).

Significantly, although the authority of the Surrogate's Court over a nondomiciliary's estate in an ancillary proceeding is generally limited to estate assets within New York (*see Matter of Obregon*, 91 NY2d 591, 601 [1998]), property includes a "chose in action," e.g. a cause of action in New York (*see* SCPA 103[44]).

Accordingly, contrary to IAC's contention, SCPA 206(1) does not require the physical presence of the subject property in New York at the time the proceeding for ancillary letters was

commenced. It is sufficient that the Estate had a valid "chose in action" against two New York domiciliaries (the Nahmads), a New York corporation (the Gallery), and IAC, a foreign entity alleged to be owned and controlled by New York residents and doing business in New York.

IAC's reliance on cases where, unlike the "chose in action" here, the estate property was not located in New York is misplaced (*see e.g. Leve v Doyle,* 6 AD2d 1033 [1st Dept 1956]). IAC similarly misplaces reliance on *Obregon* which involved the estate pursuing claims against parties and trust assets in the Cayman Islands and not in New York.

Nor is there merit to IAC's personal jurisdiction claim. Initially, Surrogate's Court did not require personal jurisdiction over IAC in order to determine whether or not to revoke the grant of ancillary letters of administration since ICA was not a respondent in that proceeding. In any event, a court may exercise personal jurisdiction over any nondomiciliary who, in person or through an agent, transacts any business within the state or contracts anywhere to supply goods or services in the state or commits a tortious act within the state or regularly does or solicits business or engages in any other persistent course of conduct (CPLR 302[a][1] and [2]). The commission of some single or occasional acts of an agent in a state may be

enough to subject a corporation to specific jurisdiction in that state with respect to suits relating to that in-state activity (*see International Shoe Co. v Washington*, 326 US 310, 318 [1945]; *Daimler AG v Bauman*, __US__, __, 134 SCt 746, 754 [2014]; *see also LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214-216 [2000]).

In this case, personal jurisdiction was acquired based on IAC's admitted agreement with Sotheby's to act as its agent to sell the painting in New York in 2008. Further, personal jurisdiction over IAC may be based on respondents' allegations that IAC transacted business in New York through the Nahmads at the Gallery's office in Manhattan.

Respondents' motion to enlarge the record (M-5552) is denied.

Accordingly, the order of the Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 10, 2015, which dismissed the petition to revoke limited ancillary letters of

administration issued to respondent George W. Gowen, should be affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 14, 2017

CLERK