Acosta, P.J., Manzanet-Daniels, Kapnick, Oing, JJ.

10741N Carl Langer, et al., Index 159912/14
Plaintiffs-Respondents,

-against-

MTA Capital Construction Company, et al.,
Defendants-Appellants-Respondents.

- - - - -

MTA Capital Construction Company, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

E-J Electric Installation Company,
Third-Party-Defendant-Respondent-Appellant,

Hatzel and Buehler, Inc.,
Third-Party Defendant-Respondent.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants-respondents.

Cullen and Dykman LLP, New York (Sasha Chegini of counsel), for respondents-appellants.

Michael J. Aviles Law, LLC, New York (Natascia Ayers of counsel), for Carl Langer and Tara Langer, respondents.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Hatzel and Bluehler, Inc., respondent.

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Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered February 1, 2019, which, to the extent appealed from as limited by the briefs, denied defendants Plaza Construction Corp., Plaza Construction LLC and Schiavone Construction Co. LLC (collectively, PSJV) summary judgment dismissing plaintiffs' common-law negligence, Labor Law § 200 and Labor Law § 241(6) claims, granted plaintiffs summary judgment against PSJV on their common-law negligence and Labor Law § 200 claims, denied PSJV and

MTA Capital Construction Company (MTA) summary judgment on their claims of contractual indemnity against third-party defendant Hatzel and Buehler, Inc. (Hatzel), granted Hatzel summary judgment dismissing these claims, denied PSJV summary judgment on their claims of contractual indemnity against third-party defendant E-J Electric Installation (E-J), granted E-J summary judgment dismissing these claims, denied PSJV and MTA summary judgment on their breach of contract claim against Hatzel, granted PSJV and MTA summary judgment on their breach of contract claim against E-J, denied E-J summary judgment dismissing this claim, granted Hatzel's motion dismissing E-J's cross claims against it, and denied E-J summary judgment on its cross claim for contractual indemnification against Hatzel, unanimously modified, on the law, to dismiss plaintiffs' claim pursuant to Labor Law § 241(6), to dismiss defendants' breach of contract claim against E-J, and otherwise affirmed, without costs.

This action is the rare case where summary judgment was appropriately granted in plaintiffs' favor on their claims of Labor Law § 200 and common-law negligence. Here, PSJV, the entities responsible for site cleanliness and trade coordination, at a time when the project was open to the elements, covered a recessed area of the third floor, where rainwater regularly collected, with non-waterproof planking, and never inspected it for water accumulation. Further, PSJV did not warn plaintiff or his employer that he was working under the recessed area, and

when he drilled into the second floor ceiling to affix electrical equipment, the sludgy, oily water poured down onto him, causing him to lose his balance and injure himself. Thus, plaintiffs made a prima showing that the accident occurred due to a defective condition on the premises of which PSJV had actual notice, having caused and created it (*see Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]; *Ruane v Allen-Stevenson School*, 82 AD3d 615 [1st Dept 2011]). In response, PSJV failed to adduce credible evidence that anyone else, including plaintiff electrician, negligently caused the accident.

However, plaintiffs' claim pursuant to Labor Law § 241(6) should have been dismissed. While Industrial Code §§ 23-1.8(a) and (c)(3) are sufficiently specific to support such a claim (*see Roque v 475 Bldg. Co., LLC*, 171 AD3d 543, 544 [1st Dept 2019]; *Willis v Plaza Constr. Corp.*, 151 AD3d 568 [1st Dept 2017]), and were arguably violated, such violations could not form the proximate cause of the accident here (*see Trippi v Main-Huron, LLC*, 28 AD3d 1069, 1070 [4th Dept 2006]; *Cunningham v Alexander's King Plaza, LLC*, 22 AD3d 703, 707 [2d Dept 2005]). Plaintiff's injuries were not the result of either improper eyewear or clothing. Moreover, plaintiff did not allege that he sustained an eye injury (*see e.g. Roque* 171 AD3d *at* 544).

That portion of defendants' motion seeking summary judgment on their claims of breach of the insurance procurement clauses

against E-J and Hatzel were properly denied (*see Kinney v Lisk Co.*, 76 NY2d 215, 219 [1990]). The record indicates that both of those parties purchased blanket endorsements to their respective policies adding as additional insureds those entities to whom they were contractually obligated to afford coverage, i.e. defendants. Indeed, E-J purchased just such an endorsement, and contracted with Hatzel for Hatzel to purchase such coverage, fulfilling their obligations twice over. However, at this time, that claim is dismissed as against E-J only, as Hatzel did not appeal that aspect of the order.

The court correctly dismissed defendants' indemnity claims as against Hatzel, as the provision in the contract between E-J and Hatzel required Hatzel to indemnify defendants only where there was evidence that Hatzel was negligent, which it was not here. PSJV's claim against E-J for indemnity should have been dismissed as well. Defendants are correct that the contract between those parties did not require a showing of negligence, and the contract contained a "savings clause" to prevent automatically running afoul of the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]). However, given that PSJV has been found negligent, and all other parties have been found free of negligence, there is no scenario under which E-J can be obligated to pay a portion of any judgment assessed against PSJV. Thus, the claim should have been

dismissed (*compare Hernandez v Argo Corp.*, 95 AD3d 782, 784 [1st Dept 2012]).

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

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

ENTERED: JUNE 4, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11532 The People of the State of New York, Respondent, Ind. 1467/14 3751/17

-against-

Tyrone Robinson, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (David Billingsley of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Richard Weinberg and Patricia M. Nuñez, JJ. at pleas, Nuñez, J. at sentencing), rendered March 13, 2018, convicting defendant of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and bail jumping in the first degree, and sentencing him to an aggregate term of six years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison terms for each controlled substance conviction to four years, resulting in a new aggregate prison term of four years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kern, Oing, Singh, JJ.

10468 Ellen Oxman, Index 350213/04
Plaintiff-Respondent-Appellant,

-against-

John Craig Oxman,
Defendant-Appellant-Respondent.

_____

Blank Rome LLP, New York (Dylan S. Mitchell of counsel), for appellant-respondent.

Norman A. Olch, New York, for respondent-appellant.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered December 8, 2017, which, insofar as appealed from as limited by the briefs, held plaintiff wife in contempt for violating an order of protection, same court and Justice, entered on or about May 10, 2016, and sanctioned her $10,000 pursuant to Judiciary Law § 753, awarded defendant husband, pursuant to Domestic Relations Law § 238, $10,000 in attorneys' fees incurred as a result of his contempt application and plaintiff's violation of the May 10, 2016 order, and denied defendant's application for attorneys' fees pursuant to the parties' stipulation of settlement, unanimously affirmed, without costs.

Supreme Court's failure to provide plaintiff with notice pursuant to Judiciary Law § 770 was harmless under the particular facts of this case (*cf. People v Slaughter*, 78 NY2d 485, 492 [1991]; *People v Hillard*, 73 NY2d 584, 586-587 [1989]). In that regard, defendant established by clear and convincing evidence that plaintiff knowingly disobeyed the clear and unequivocal May

10, 2016 order, causing prejudice to him (*see Simens v Darwish*, 104 AD3d 465 [1st Dept 2013]). The order clearly identified prohibited communications. Plaintiff repeatedly disobeyed its terms, and she does not disclaim knowledge or understanding of those terms. Prejudice to defendant is readily apparent, given the nature of the emails and the identity of their recipients, including his employer's chief executive officer. Plaintiff's assertions that the offending emails pre-dated the May 2016 order are belied by the record, which shows that almost every email is dated after May 2016. Some of the emails attach or re-forward older emails, but the transmitting emails post-date May 2016.

The $10,000 fine is not excessive, given plaintiff's multiple separate emails in disobedience of the order (*see* Judiciary Law § 773; *Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 631 [2d Dept 2012]; *317 W. 87 Assoc. v Dannenberg*, 170 AD2d 250, 251 [1st Dept 1991]). Nor did plaintiff offer any financial evidence to support her contention that the fine is punitive.

The award to defendant of $10,000 in attorneys' fees is proper. Plaintiff argues that any award must be limited to fees directly incurred in preparing the contempt motion. However, the court reasonably found that $10,000 in fees was "directly related to [plaintiff's] contemptuous conduct" and therefore is recoverable (*see e.g Vider v Vider*, 85 AD3d 906, 908 [2d Dept 2011]). Defendant's submissions included bills commencing in May

2016, reflecting work done in response to plaintiff's violations of the May 10, 2016 order. Defendant did not file his motion until October 2016, but the conduct warranting the award of fees necessarily preceded the filing of the motion, and therefore the award rationally includes fees incurred before October 2016.

In light of the court's reasonable reduction of the approximately $14,000 in billed fees to $10,000, one particular billing entry, for approximately $2,000, that plaintiff claims was unrelated to the contempt proceedings does not warrant disturbing the fee award.

Plaintiff's argument that the court failed to identify the specific communications that violated the May 10, 2016 order is without merit, given the clarity of the May 10, 2016 order and plaintiff's failure to cite any authority showing that it was the court's obligation to do so.

Plaintiff's arguments about the validity and effect of her "Notice of Discontinuance" and the denial of her recusal motion are not properly before us. Were we to entertain them, we would reject them.

The court properly denied defendant's application for fees pursuant to paragraph 59 of the parties' stipulation of settlement. Defendant's argument that fees incurred in connection with plaintiff's cross motion fall within this provision is unpreserved and, in any event, unavailing. Rather than challenging or seeking to set aside the stipulation,

plaintiff sought to reverse the court's denial of her previous efforts to withdraw her motion to invalidate the stipulation.

While defendant's request for attorneys' fees incurred in the Connecticut action presents a closer case, we agree with the motion court's denial of that request as well.

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

The Decision and Order of this Court entered on December 3, 2019 (178 AD3d 441 [1st Dept 2019]) is hereby recalled and vacated (see M-811 decided simultaneously herewith).

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

ENTERED: JUNE 4, 2020

CLERK

Renwick, J.P., Kapnick, Mazzarelli, Webber, JJ.

10772 Hyperlync Technologies, Inc., et al., Plaintiffs-Appellants, Index 650151/15

-against-

Verizon Sourcing LLC, Defendant-Respondent,

Synchronoss Technologies, Inc. Defendant.

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Crowell & Moring LLP, New York (Amanda Berman and Mark Klapow of counsel), for appellants.

Schlam Stone & Dolan LLP, New York (Norman (Jack) Minnear of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered December 10, 2018, which granted defendant Verizon Sourcing, LLC's motion for summary judgment dismissing the misappropriation of trade secrets, misappropriation of ideas, and breach of contract causes of action as against it, unanimously affirmed, without costs.

Plaintiffs contend that, in breach of a nondisclosure agreement, defendant Verizon Sourcing, LLC (Verizon) disclosed confidential information about a peer-to-peer phone provisioning application (app) to plaintiff Hyperlync Multimedia Israel, Ltd.'s competitor, defendant Synchronoss Technologies, Inc., which then released its own phone provisioning app based on the misappropriated information.

Contrary to Verizon's arguments, plaintiffs described the

allegedly misappropriated ideas with sufficient specificity (*see Schroeder v Cohen*, 169 AD3d 412 [1st Dept 2019]). Nevertheless, the ideas were not sufficiently novel to merit protection (*see id.*). The concepts behind plaintiffs' app were not new, were readily available in the public domain, and were used by a number of other apps on the market at the time. Plaintiffs argue that their app was an improvement in speed and functionality over the apps that existed in 2013. However, a smart adaptation of existing knowledge is not considered novel (*see id.*; *see also Paul v Haley*, 183 AD2d 44, 52-53 [2d Dept 1992], *lv denied* 81 NY2d 707 [1993]).

Nor were the ideas confidential (*see Schroeder v Cohen*, 169 AD3d at 413). Beginning in May 2013, before the alleged misappropriation, plaintiffs posted the app's demo videos on YouTube and repeatedly shared those videos with companies with which it did not have nondisclosure agreements. Plaintiffs' argument that the materials were promotional and did not contain any confidential information is belied by their own emails, in which they requested assurances of confidentiality. Plaintiffs' subjective understanding that there was an assurance of confidentiality does not create third-party obligations of confidentiality (*id.* at 413-414).

Plaintiffs also failed to establish that Verizon actually conveyed its ideas to Synchronoss. As an initial matter, plaintiffs did not share the app's source code, and they

encrypted its builds, making the source code unaccessible to Verizon. The record does not show the form in which the misappropriated information was transferred, such as technical specifications, prototypes, or PowerPoint decks, or the person or persons who did the alleged transferring. Plaintiffs' expert's opinion that the competing apps functioned similarly is not sufficient to raise an issue of fact. As the opinion is not based on the expert's review of the source code, the fact that both apps accomplish the same task in a manner that might seem similar to an end user does not prove misappropriation.

Finally, plaintiffs failed to demonstrate that a certain non-Verizon employee was exposed to any confidential information or that he transferred the information to Synchronoss. Nor did they explain how a certain Verizon employee who did not have the

ability to suggest or impose a solution was able to transfer the allegedly confidential information to Synchronoss.

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11588 The People of the State of New York, Ind. 5536/14
Respondent,

-against-

Winson Martinez-Severino,
Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (David Bernstein of counsel), and Milbank LLP, New York (Marguerite A. O'Brien of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 13, 2016, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of three years, unanimously affirmed.

The court's *Sandoval* ruling was a provident exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court permitted a limited inquiry into the underlying facts of a prior conviction. Despite some similarity to the charged crime, these facts were relevant to defendant's credibility, and any prejudicial effect was outweighed by the probative value.

Defendant expressly waived any claim that he was entitled to a charge on the justifiable use of ordinary physical force. The record fails to support defendant's assertion that his trial counsel merely acquiesced in the court's allegedly erroneous determination that no such charge would be given. On the

contrary, although counsel had previously sought to assert a justification defense, he ultimately conceded that the facts did not support such a defense and that he had no nonfrivolous basis to contend otherwise. We decline to review this claim in the interest of justice. As an alternative holding, we find that defendant was not entitled to an ordinary force justification charge because there is no reasonable view of the evidence that he used anything less than deadly force against the victim.

The court properly precluded defendant from calling a witness to testify about the victim's prior violent history, because defendant proffered no evidence, from that witness or otherwise, that defendant was aware of this history (*see People v Miller*, 39 NY2d 543, 552-553 [1976]). The other evidentiary rulings challenged on appeal were provident exercises of discretion that did not cause defendant any prejudice.

The court properly denied defendant's request for an adverse inference charge regarding a surveillance videotape that was not preserved by law enforcement. The record demonstrates that the video was not "reasonably likely to be material" (*see People v Handy*, 20 NY3d 663 [2013]).

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11589 Miguel Sinchi, Index 155217/15
Plaintiff-Respondent,

-against-

HWA 1290 III LLC, et al.,
Defendants-Appellants.

_____

Wood Smith Henning & Berman, LLP, New York (Kevin T. Fitzpatrick of counsel), for appellants.

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

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 23, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, denied defendants' cross motion for summary judgment dismissing the Labor Law § 200 claim, and purportedly granted plaintiff's motion for partial summary judgment on his Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-3.3(b)(1), unanimously modified, on the facts, to clarify that the part of plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 241(6) claim predicated on Industrial Code § 23-3.3(b)(1) was denied and the claim was dismissed, and otherwise affirmed, without costs.

Supreme Court properly granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim arising from the collapse of a ceiling that was not braced or shored during

demolition operations. Regardless of whether the entire ceiling or only a portion of it collapsed, it was not the intended target of demolition at the time of the accident (*see Ragubir v Gibraltar Mgt. Co, Inc.*, 146 AD3d 563, 564 [1st Dept 2017]). At the time of the accident, upon his supervisor's instruction, plaintiff had descended from the ladder upon which he was working and walked under the ceiling that collapsed in order to inspect or remove a sprinkler head. Plaintiff's supervisor acknowledged the ceiling would not have collapsed on plaintiff had he remained on the ladder. Moreover, because no safety devices were provided to brace or shore the ceiling, the fact that plaintiff may have pulled on it with a hook while inspecting or attempting to remove the sprinkler head at most amounts to comparative negligence, which is not a defense to a Labor Law § 240(1) claim (*see Messina v City of New York*, 148 AD3d 493, 494 [1st Dept 2017]).

Defendants failed to establish prima facie entitlement to dismissal of the Labor Law § 200 claim. Their arguments on appeal regarding the claim are unpreserved and beyond this Court's consideration (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525 [1st Dept 2014]).

We modify to the extent indicated so as to clarify that plaintiff's Labor Law § 241(6) claim insofar as predicated on Industrial Code § 23-3.3(b)(1) was actually dismissed by Supreme Court, as plaintiff acknowledges.

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11590 In re Lavdie H., Dkt. G-1818/16
Petitioner-Appellant,

-against-

Saimira V., et al.,
Respondents-Respondents.

_____

Turturro Law, P.C., Brooklyn (Natraj S. Bhushan of counsel), for appellant.

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

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Order, Family Court, Bronx County (Jennifer Burtt, Ref.), entered on or about September 20, 2016, which denied the subject child's motion for an order of special findings enabling him to petition the United States Citizenship and Immigration Services (CIS) for special immigrant juvenile status, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The record supports an order of special findings enabling the child to petition CIS for special immigrant juvenile status (*see* 8 USC § 1101[a][27][J] [Immigration and Nationality Act]; 8 CFR 204.11[c], [d]; *Matter of Marisol N.H.*, 115 AD3d 185, 188-189 [2d Dept 2014]). The evidence establishes that the child was unmarried and under the age of 21 at the time of the special findings hearing and order (*see* 8 CFR 204.11[c]). The Family Court's appointment of a guardian (petitioner) rendered the child dependent on a juvenile court (*see id.*; *Matter of Antowa McD.*, 50

AD3d 507 [1st Dept 2008]).

The evidence that the child had had no contact with his parents, and received no support from them, since at least September 2014 established that reunification with the parents was not viable due to neglect or abandonment (*see* 8 USC § 1101[a][27][J]; Family Court Act § 1012[f][ii]; Social Services Law § 384-b[5][a]; *Matter of Akasha J.G. [Vincent G.]*, 149 AD3d 734 [2d Dept 2017]). The parents' consent to the appointment of a guardian and waiver of service also demonstrate an intent to relinquish their parental rights.

In determining whether reunification was viable, the Family Court should not have refused to consider evidence of circumstances that occurred after the child's 18th, but before his 21st, birthday (*see* Family Court Act § 661[a]; 8 CFR 204.11[c][1]; *Matter of Goran S.*, 152 AD3d 698, 700 [2d Dept 2017]; *Matter of Sing W.C. [Sing Y.C. - Wai M.C.]*, 83 AD3d 84, 90-91 [2d Dept 2011]).

The record demonstrates that it is not in the best interests of the child to return to Albania (*see* 8 USC § 1101[a][27][J]; 8 CFR 204.11[c]). The evidence shows that the child suffered political persecution in Albania that his parents were unable to prevent (*see Matter of Juan R.E.M. [Juan R.E.]*, 154 AD3d 725, 727 [2d Dept 2017]), that he had had no recent contact with his parents and was not sure if they would accept him if he returned (*see Matter of Alamgir A.*, 81 AD3d 937, 940 [2d Dept 2011]), and

that he was doing well in petitioner's care (*see Matter of Marcelina M.-G. v Israel S.*, 112 AD3d 100, 114-115 [2d Dept 2013]).

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11591 Vladimira Koch also known as Vlad'ka Koch, et al.,
Plaintiffs-Appellants,

-against-

Sheresky, Aronson & Mayefsky LLP, et al.,
Defendants,

D'Agostino & Salvi, LLP, et al.,
Defendants-Respondents.

Index 112337/07

_____

Andrew Lavoott Bluestone, New York, for appellants.

Furman Kornfeld & Brennan LLP, New York (Rachel Aghassi of counsel), for respondents.

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Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered September 26, 2018, bringing up for review so much of an order of the same court and Justice, entered May 3, 2018, that granted defendants D'Agostino & Salvi, LLP and attorney Frank J. Salvi, Esq.'s (Salvi) motion for summary judgment dismissing the remaining Judiciary Law claim asserted by plaintiff Vladimira Koch (plaintiff) against them and denied plaintiff's cross motion for summary judgment against those defendants, unanimously affirmed, without costs.

In the amended complaint, plaintiff alleged that the Salvi defendants violated Judiciary Law § 487(1) by intentionally deceiving the court in a prior matrimonial action in which they represented plaintiff's former husband, Robert Koch, by allowing Robert to testify at an inquest that there were no children of the marriage, when they knew that plaintiff Michal Koch was

Robert's son or had been adopted by Robert.

An attorney violates Judiciary Law § 487(1) by intentionally deceiving the court or any party (*see Amalfitano v Rosenberg*, 12 NY3d 8, 11-12 [2009]). A claim premised on a violation of Judiciary Law § 487 must be supported by a showing that the attorneys intended to deceive or engaged in a chronic and extreme pattern of legal delinquency (*Brookwood Companies, Inc. V Alston & Bird LLP*, 146 AD3d 662, 668 [1st Dept 2017]). Thus, to make a prima facie showing that they were entitled to summary judgment on the Judiciary Law claim, defendants were not required to submit an affidavit from a legal expert, but rather, an affidavit from someone with actual knowledge of the allegations at issue suffices (*see Boye v Rubin & Ballin, LLP*, 152 AD3d 1, 9 [1st Dept 2017]).

Here, plaintiff cannot reasonably argue that defendants failed to submit an affidavit from a person with actual knowledge of the allegations at issue, since they submitted an affidavit from Salvi. In his affidavit, Salvi states that, in the prior action, Robert testified that there were no children in the marriage because "he disputed [the] validity of the adoption agreement . . . and also did not have any biological children with [his wife]." Salvi adds that, at the time of the testimony, Salvi "had not seen the [adoption judgment] or the purported birth certificate of Michal that lists [Robert] as his father." Thus, defendants have established that they did not intend to

deceive the court, nor did they engage in an extreme pattern of legal delinquency.

Plaintiff's reliance on a previous decision issued in October 2008 in the underlying matrimonial action is unavailing, since the court's findings relating to defendants' actions are dicta (*see Kellett's Well Boring v City of New York*, 292 AD2d 179, 181 [1st Dept 2002]). Further, those findings were premised solely on the fact that Robert acknowledged Michal as a child of the marriage in a settlement proposal, but that proposal has no evidentiary value and is not a concession on behalf of Robert or defendants (CPLR 4547; *see PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 AD3d 559, 560 [1st Dept 2013]).

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

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11592 Chester Campbell, Index 20153/17E
Plaintiff-Respondent,

-against-

Vincent Mincello, et al.,
Defendants,

Pauline Cardillo,
Defendant-Appellant.

_____

Collins, Fitzpatrick & Schoene, LLP, White Plains (Ralph Schoene of counsel), for appellant.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 1, 2018, which, to the extent appealed from as limited by the briefs, upon reargument and renewal, granted plaintiff's motion for partial summary judgment on the issue of liability as against defendant Pauline Cardillo, unanimously reversed, on the law, without costs, and the motion denied.

Even assuming that plaintiff established prima facie that the vehicle in which he was a passenger was rear-ended by defendant Mincello's vehicle, which was then rear-ended by defendant Cardillo, Cardillo raised a triable issue of fact as to her negligence through her affidavit averring that she was at a complete stop when her own vehicle was struck in the rear and propelled into the vehicle in front of her (*see Arellano v Richards*, 162 AD3d 967 [2d Dept 2018]; *Gustke v Nickerson*, 159 AD3d 1573, 1574 [4th Dept 2018], *lv dismissed in part, denied in part* 32 NY3d 1048 [2018]). That plaintiff, as a passenger in the

vehicle in front of defendant Mincello, may have been free of comparative negligence does not warrant a different outcome, as an innocent passenger must still establish a defendant driver's liability under traditional principles of tort liability in order to prevail on the issue of liability against that driver (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 117-120 [1st Dept 2016]).

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11593 In re Barklee 94 LLC, Index 101403/17
Petitioner-Appellant,

-against-

New York City Department of Finance,
Respondent-Respondent.

_____

Barbara Kraebel, Attorney at Law, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Daniel Joy of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered May 31, 2018, which granted respondent's motion to deny the petition to compel it to issue a more detailed 2017-2018 property tax bill, preclude any interest or penalty charges resulting from the revocation of past years' School Tax Rebate (STAR) credits due to ineligibility, and require it to provide the Senior Citizen Rent Increase Exemption (SCRIE) through the period covered by the tax bill, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to exhaust its administrative remedies prior to seeking judicial relief (*see Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 [1975]). First, petitioner did not make a demand for a more detailed tax bill that was rejected (*see Matter of Kolson v New York City Health & Hosps. Corp.*, 53 AD2d 827, 828 [1st Dept 1976]). Second, petitioner did not await the result of its administrative appeal

to the New York City Tax Commission, by which it challenged the STAR revocation that resulted in interest charges, before commencing this proceeding (*see* Real Property Tax Law § 425[12][b][ii], [12][c]). Third, petitioner did not contest before the Tax Commission any penalties that may have resulted from the STAR revocation (*see Slater v Gallman*, 38 NY2d 1 [1975]; *see* Real Property Tax Law § 425[13][a], [b]). Finally, petitioner concedes that it did not seek administrative review of any alleged failure to provide, or delay in providing, SCRIE credits.

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

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11594 Paul Kim, Index 650481/18
Plaintiff-Appellant-Respondent,

-against-

Jonathan Francis also known as Jonathon Francis San Pedro, etc., et al.,
Defendants-Respondents-Appellants,

BDG Media, Inc. doing business as Bustle Digital Group,
Defendant-Respondent,

Gerard R. Adams, et al.,
Defendants.

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

Joseph, Terracciano & Lynam, LLP, Syosset (Janine T. Lynam of counsel), for Jonathan San Pedro and Foster Garvey P.C., New York (Alan A. Heller of counsel), for David Arabov, respondent-appellant.

Mitchell Silberberg & Knupp LLP, New York (Eleanor M. Lackman of counsel), for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered June 3, 2019, which granted in part and denied in part defendants' respective motions to dismiss, unanimously modified, on the law, to dismiss the cause of action for promissory estoppel, and otherwise affirmed, without costs.

The complaint was properly dismissed as against defendant BDG Media Inc. (BDG) under CPLR 3211(a)(7), as the allegations against it failed to state any cognizable cause of action.

The motion court properly declined to dismiss the breach of contract claim against the individual defendants. Contrary to

defendants' contentions, neither the statute of limitations under CPLR 213(2) nor laches bars the contract claim, as a matter of law since the complaint alleged that the individual defendants acknowledged plaintiff's role in the company through correspondence, in February 2012, which plaintiff submitted in opposition to the motion, and defendants failed to assert what prejudice they suffered as a result of the filing of the complaint in January 2018 for laches to apply (*Matter of Linker*, 23 AD3d 186, 189 [1st Dept 2005]).

We modify to dismiss the promissory estoppel claim, however, because although it was adequately pleaded, the allegations were duplicative of the breach of contract claim (*Brown v Brown*, 12 AD3d 176 [1st Dept 2004]). As the motion court properly determined, also duplicative of the contract claim was the cause of action for breach of the implied covenant of good faith and fair dealing against the individual defendants (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]). The claim was also properly dismissed against BDG because there is a "lack of a valid and binding contract from which such a duty would arise" (*American-European Art Assoc., Inc. v Trend Galleries*, 227 AD2d 170 [1st Dept 1996]).

With respect to unfair competition, the complaint does not allege that defendants used plaintiff's property in competition with him, and therefore the cause of action was properly dismissed (*see e.g. ITC Ltd. v Punchgini, Inc.*, 9 NY3d 467, 479

[2007]). As for the trademark infringement claim, plaintiff failed to plead his actual use of the mark in commerce, in order to fulfill the elements of the claim (*La Societe Anonyme des Parfums le Galion v Jean Patou, Inc.*, 495 F2d 1265, 1271 [2d Cir 1974]). In addition, "only the owner of the trademark is entitled to sue for its infringement" (*Federal Treasury Enterprise Sojuzplodoimport v SPI Spirits Ltd.*, 726 F3d 62, 75 [2d Cir 2013]). The motion court properly relied upon the defendants' documentary evidence describing plaintiff as an "applicant" for the trademark, not a registrant or owner, since he abandoned the process in February 2012. Finally, although plaintiff contends on appeal that he was a minority shareholder owed a fiduciary duty by the individual defendants as majority shareholders in a closely-held

corporation, the complaint does not allege any such facts (*see* *Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [1st Dept 2013]).

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11595 The People of the State of New York, Ind. 4423/17
Respondent,

-against-

Claudia Joseph,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

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

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

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

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

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

ENTERED: JUNE 4, 2020

CLERK

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

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11596 The People of the State of New York, Ind. 2975/14
Respondent,

-against-

Ricky Alston,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Mark Dwyer, J.), entered on or about November 22, 2019, which denied defendant's CPL 440.10 motion to vacate that part of a September 8, 2015 judgment convicting defendant of criminal possession of a weapon in the third degree, unanimously reversed, as a matter of discretion in the interest of justice, the weapon possession conviction vacated, and that count of the indictment dismissed.

The People, in the exercise of their broad prosecutorial discretion, have agreed that defendant's third-degree weapon possession conviction should be vacated under the particular circumstances of the case and in light of recent legislation amending Penal Law § 265.01 to effectively decriminalize the simple possession of gravity knives, notwithstanding that this

law does not apply retroactively (*see People v Caviness*, 176 AD3d 522 [2019], *lv denied*, 34 NY3d 1076 [2019]). We agree, and we decline to address defendant's other arguments.

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11597 In re Mateo M.S.J. Dkt NN-19621-18

A Child Under Eighteen Years of Age, etc.,

Daniel M.A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Ehrlich Gayner, LLP, New York (Charles J. Gayner of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Julia Bedell of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about June 17, 2019, which, inter alia, after a hearing, found that respondent father neglected the subject child by committing an act of domestic violence against nonrespondent mother in his presence, released the child to the mother with supervision by Administration for Children's Services, and directed the father to engage in supervised visitation with the child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1012[f]; § 1046[b]). The record shows that during an altercation the father struck the mother in her arm with her cell phone while he was holding the child. Exposure to even a single instance of domestic violence may be a proper basis for a finding of neglect (*see Matter of*

Jermaine K.R. [Jermaine R.], 176 AD3d 648 [1st Dept 2019]; *Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]). Contrary to the father's contention, the child was in danger of becoming emotionally or physically impaired by the violence the father was inflicting upon the mother in the child's presence. The mother's testimony that during the incident the child was paralyzed, appeared afraid and later refused to eat dinner was sufficient to show that his emotional well being had been impaired by the altercation he witnessed (*see Matter of Isaiah D. [Mark D.]*, 159 AD3d 534, 535 [1st Dept 2018]). There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

Respondent failed to preserve his argument that the petition should have been dismissed pursuant to Family Ct Act § 1051(c), and we decline to consider it in the interest of justice (*see Matter of John S. [Milica S.]*, 137 AD3d 706 [1st Dept 2016]). Were we to consider it, we would find the argument unavailing.

Although the order directed the visits between the father and the child be supervised, it has been superseded by an order providing for unsupervised visitation. Thus, the father's challenges to that part of the order are academic (*see Matter of Antoine R.A. v Theresa M.*, 143 AD3d 649, 650 [1st Dept 2016]).

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

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11598 The People of the State of New York, Ind. 4241/15
Respondent,

-against-

Rolando Tavarez,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered March 16, 2017, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him to a term of eight years, unanimously affirmed.

Defendant claims that his guilty plea under an undisputedly valid count of the indictment was impacted or influenced by the presence of a more serious charge that defendant claims to have been jurisdictionally defective. He further claims that when he was told that he was facing a life sentence if convicted after trial, this information was inaccurate because the only class A felony charge in the indictment was the allegedly defective count. We conclude that these claims are not exempt from preservation requirements (*see generally People v Conceicao*, 26 NY3d 375, 381-382 [2015]).

For purposes of this appeal, we assume, without deciding, that the count charging defendant with predatory sexual assault against a child was jurisdictionally defective, and find it

unnecessary to address the parties' arguments on that issue. A claim that an indictment or count thereof was jurisdictionally defective is not subject to preservation rules (*see e.g. People v Thacker*, 173 AD3d 1360, 1361 [3d Dept 2019] *lv denied* 34 NY3d 938 [2019]). However, it does not follow that a claim that a defective count impacted a defendant's decision to plead guilty should be likewise exempt. While a jurisdictional defect may be apparent on the face of the indictment, the defect's impact on a plea would warrant the type of inquiry that would ordinarily be occasioned by a plea withdrawal motion (*see People v Frederick*, 45 NY2d 520, 524-525 [1978]; *see also People v Peque*, 22 NY3d 168, 183 [2013], *cert denied* 574 US 840 [2014]).

We decline to review defendant's unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal. The limited record before us fails to establish that the presence of the allegedly defective count impacted defendant's choice to plead guilty under a valid count. In particular, the record demonstrates that at the time of his plea, defendant was aware that the People had recognized a problem with the language of the predatory sexual assault count, and were taking steps to attempt to cure the defect. Similarly, defendant was correctly advised of his potential sentencing exposure.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11599 Chi Young Lee as Father and Natural Guardian of Merrick Lee, etc., et al.,
Plaintiffs-Respondents,

-against-

Snezana N. Osorio, M.D., et al.,
Defendants,

New York Presbyterian Hosp. Weill Cornell Campus,
Defendant-Appellant,

New York City Human Resources Administration,
Nonparty Respondent.

Index 116651/04

Stuart S. Perry, P.C., New York (Franklin P. Solomon of the bar of the State of New Jersey and Commonwealth of Pennsylvania, admitted pro hac vice of counsel) and (Stuart S. Perry of counsel), for appellant.

Vishnick McGovern Milizio LLP, Lake Success (Andrew A. Kimler of counsel), for Chi Young Lee, respondent.

Emmet, Marvin & Martin, LLP, New York (Mordecai Geisler of counsel), for BNY Mellon, N.A., respondent.

James E. Johnson, Corporation Counsel, New York (Eric Lee of counsel), for New York City Human Resources Administration, respondent.

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Appeal from order, Supreme Court, New York County (Joan A. Madden, J.), entered April 29, 2019, which declined to sign defendant's order to show cause, unanimously dismissed, without costs, as taken from a nonappealable order.

No appeal lies from an order declining to sign an order to show cause, since it is an ex parte order that does not decide a motion made on notice (CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333 [2003]; *Kalyanaram v New York Inst. of Tech.*, 91 AD3d

532 [1st Dept 2012]). To the extent defendant seeks review of the ex parte order pursuant to CPLR 5704, such relief is denied. Review under CPLR 5704 would not, in any event, address the merits of the motion defendant sought to make by order to show cause (*see Cypress Hills Mgt., Inc. v Lempenski*, 173 AD3d 830, 831 [2d Dept 2019]).

To the extent defendant contends that we should review the order or grant leave to appeal in the interest of justice, we decline to do so. This Court has already found that the settlement agreement in this matter obligated defendant to "'assume full responsibility'" for any Medicaid claim arising from the infant's hospitalization (*Commissioner of the Dept. of Social Servs. of the City of N.Y. v New York-Presbyt. Hosp.*, 164 AD3d 93, 94 [1st Dept 2018], *lv denied* 33 NY3d 901 [2019]).

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

ENTERED: JUNE 4, 2020

CLERK

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11600 Linkable Networks, Inc., Index 651964/19
Plaintiff-Appellant,

-against-

Mastercard Inc., et al.,
Defendants-Respondents.

_____

Constantine Cannon LLP, New York (David Alan Scupp of counsel), for appellant.

Baker Botts L.L.P., New York (Jennifer C. Tempesta of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about September 13, 2019, which, to the extent appealed from, granted defendants' motion to dismiss the first, second, third, fifth and sixth causes of action, and dismissed plaintiff's demand for punitive damages, unanimously affirmed, without costs.

The first, second, third and sixth causes of action (for misappropriation of trade secrets, unfair competition, misappropriation of ideas and unjust enrichment) were properly dismissed. The court correctly determined that these causes of action are "entirely based on alleged conduct that is proscribed by" contract; hence, they are duplicative of plaintiff's contract claim (*Bancorp Servs., LLC v American Gen. Life Ins. Co.*, 2016 WL 4916969, *9, 2016 US Dist LEXIS 18330, *29 [SD NY, Feb. 11, 2016, 14-CV-9687(VEC)]; *see also e.g. Nostrum Pharms., LLC v Dixit*, 2016 WL 5806781, *16, 2016 US Dist LEXIS 133844, *51-52 [SD NY,

Sept. 23, 2016, No. 13-cv-8718(CM)]). *Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. USA, Inc.* (2011 NY Slip Op 33870[U] [Sup Ct, NY County], *affd on other grounds* 98 AD3d 401 [1st Dept 2012]) is distinguishable because, in that case, the "contract claim d[id] not mention or involve . . . trade secrets" (*id.* at *11).

"The statute of limitations for tortious interference . . . with prospective business relations is three years from the date of injury, which is triggered when a plaintiff first sustains damages" (*Bandler v DeYonker,* 174 AD3d 461, 462 [1st Dept 2019], *lv denied* __ NY3d __, 2020 NY Slip Op 65162 [March 31, 2020]). Plaintiff alleges that defendants "sabotaged [its] current and prospective customer relationships" in 2015. Hence, it should have sued by December 31, 2018. However, it did not sue until April 3, 2019.

Plaintiff relies on its allegation that "[b]eginning in or about 2013, *and continuing in or about September 2017,* [it] had business relations with numerous current and prospective clients" (emphasis added). However, this merely alleges when plaintiff had those business relations, not when it first sustained damages.

We agree with the motion court's dismissal of plaintiff's demand for punitive damages. Here, the complaint fails to show that plaintiff is entitled to punitive damages, as it does not allege that defendants' actions were aimed at the public or

"evinc[ed] a high degree of moral turpitude and demonstrat[ed] such wanton dishonesty as to imply a criminal indifference to civil obligations" (*see Rocanova v Equitable Life Assurance Society of the USA et. al.*, 83 NY2d 603, 613 [1994] [internal citations omitted]; *Walker v Sheldon*, 10 NY2d 401, 405 [1961]; *Errant Gene Therapeutics LLC v Sloan-Kettering Institute for Cancer Research*, 174 AD3d 473, 475-76 [1st Dept 2019] [dismissal of demand of punitive damages on a motion to dismiss]).

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

ENTERED: JUNE 4, 2020

CLERK

CORRECTED ORDER - JUNE 12, 2020

Friedman, J.P., Kapnick, Kern, Singh, González, JJ.

11601N-
11602N &
M-1380 Maria Alexis Azria,
Plaintiff-Appellant,

-against-

Rene-Pierre Azria,
Defendant-Respondent.

Index 350021/17

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Robert Stephan Cohen of counsel), for appellant.

Dobrish Michaels Gross LLP, New York (Robert Z. Dobrish of counsel) **and Donohoe Talbert LLP, New York (Margaret M. Donohoe of counsel)**, for respondent.

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered September 10, 2019, which, inter alia, denied plaintiff wife's motion for the issuance of letters rogatory in order to depose defendant husband's brother Francois, who lives in France, unanimously affirmed, without costs. Order, same court and Justice, entered November 15, 2019, which denied the wife's motion to disqualify the husband's co-counsel (Dobrish Firm), unanimously affirmed, without costs.

The wife failed to demonstrate that the information sought via international deposition is crucial to the resolution of a key issue in this litigation (*see Kahn v Leo Schachter Diamonds, LLC*, 139 AD3d 635 [1st Dept 2016]; CPLR 3113[a][3]). The wife argues that two loans the husband received from a revocable trust

(Trust), of which he and Francois are co-trustees, were made in violation of the terms of the Trust. However, the issue of whether the husband violated a trust instrument or breached his fiduciary duty in his role as a trustee is not relevant in this matrimonial proceeding.

The wife further failed to show why she does not already have the necessary information for the imputed income argument she hopes to make. The husband states he has already produced account statements from the Trust for the entire time period she requested, and that she received duplicates of such statements and updated records of account activity via subpoena.

The motion court also exercised its discretion in a provident manner in denying the wife's motion to disqualify the Dobrish Firm (*see Macy's Inc. v J.C. Penny Corp., Inc.*, 107 AD3d 616 [1st Dept 2013]). The record shows that in 2016, the wife had a meeting and a couple of follow-up phone calls with a partner in the Dobrish Firm, but she did not retain the firm. Thereafter, in 2019, the husband retained the firm as cocounsel.

The wife fails to show that the partner with whom she met received information from her that could be significantly harmful to her in connection with the Dobrish Firm's representation of the husband (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.18[c]; *Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6-7 [1st Dept 2015]). Furthermore, the financial information she

shared with the partner would have been subject to discovery and was already known to the husband (*see Bongiasca v Bongiasca*, 254 AD2d 217 [1st Dept 1998], *lv dismissed* 93 NY2d 1040 [1999]).

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

M-1380 - *Azria v Azria*

Motion to take judicial notice of fact denied.

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

ENTERED: JUNE 4, 2020

CLERK

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

11609 The People of the State of New York, Ind. 5584/12
Respondent,

-against-

Anthony Rodriguez,
Defendant-Appellant.

_____

Warren S. Landau, Cedarhurst, for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 22, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, assault in the second degree, promoting prostitution in the third degree, endangering the welfare of a child, criminal possession of a weapon in the fourth degree (five counts) and unlawful possession of marijuana, and sentencing him to an aggregate term of 13 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the provisions of the orders of protection that directed that they remain in effect until July 21, 2035 and remanding the matter for a new determination of the duration of the orders, and otherwise 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. Defendant's legal

insufficiency claim relating to the dangerous instrument element of second-degree assault is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence supports a reasonable inference that defendant used a piece of broken glass in a manner that was readily capable of causing serious physical injury to the victim. *(see People v Mitcham, 159 AD3d 641* [1st Dept. 2018]).

With regard to defendant's claim under *People v O'Rama* (78 NY2d 270 [1991]), there was no mode of proceedings error exempt from preservation requirements, because the record establishes that counsel received notice of the content of the note and the court's intended response. Thus, counsel was given ample opportunity to suggest an appropriate response (*see* People v Mack, 27 NY3d 534, 538 [2016]); *People v Kadarko* 14 AD3d 426 [2010]; *People v Donoso*, 78 AD3d 129, 135 [1st Dept 2010], *lv denied* 15 NY3d 952 [2010]).

Defense counsel did not object to most of the prosecutor's leading examination of the complainant and any error in permitting the prosecutor to ask leading questions was harmless (*People v Rivera*, 130 AD3d 487, 488 [1st Dept 2015]). Defendant also did not preserve his challenges to evidence of uncharged crimes, to the prosecutor's summation, or to various alleged errors and omissions in the court's main and supplemental jury instructions, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for

reversal.

With regard to the issues that we have found to be unpreserved, defendant claims that his counsel rendered ineffective assistance by failing to make appropriate objections or requests to charge. However, these claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), including counsel's reasons for not pursuing certain issues (*see e.g. People v Rios*, 139 AD3d 620 [1st Dept 2016], *lv denied* 28 NY3d 973 [2016]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged omissions fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*id.*).

As the People concede, the order of protection's expiration date is incorrect because it did not take into account the jail time credit to which defendant is entitled (*see People v Jackson*, 121 AD3d 434 [1st Dept 2014]).

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

ENTERED: JUNE 4, 2020

CLERK

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

11610 Jacob Ivancev, Index 150434/15
Plaintiff-Appellant,

-against-

Roe Garrido,
Defendant-Respondent.

_____

Murray & Di Bella, LLP, New York (Martin J. Murray of counsel), for appellant.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about April 4, 2018, which, to the extent appealed from, granted defendant's motion to dismiss the complaint and denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, without costs.

In this post-divorce tort action, plaintiff alleges two causes of action for malicious prosecution, based on two family offense proceedings defendant commenced against him, and a cause of action for defamation. In the proposed amended complaint, plaintiff asserts abuse of proceeding as an additional cause of action. Neither the original complaint nor the proposed amended complaint state a cognizable cause of action (*see Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]; *see* CPLR 3025[b]).

The complaints fail to state a cause of action for malicious prosecution because they do not allege special injury (*see Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]). Plaintiff alleges that he lost his per diem employment as an armed security guard and was unable to find employment as a

result of defendant's family offense petitions against him, because his license to carry a weapon was suspended. However, under the circumstances, these allegations fail to satisfy the requirement for special injury (*see Engel v CBS, Inc.*, 93 NY2d 195, 206 [1999]). The original complaint does not state whether plaintiff was employed at the time he commenced this action, and does not mention his salary or the terms of his employment as an armed security guard. The proposed amended complaint alleges that plaintiff was not a full-time employee, and does not allege that he was entitled to continuing employment. The proposed amended complaint also alleges that plaintiff's employer did not offer him continuing per diem employment, but does not allege that the employer withdrew an employment offer or that other prospective employers would not hire plaintiff because of the family offense petitions (*see Dermigny v Siebert*, 79 AD3d 460 [1st Dept 2010]).

The complaints fail to state a cause of action for defamation (*see Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]). Contrary to plaintiff's argument, his defamation claim is barred by the absolute litigation privilege and there is no evidence that the family offense proceedings were sham actions brought solely to defame him (*see Flomenhaft v Finkelstein*, 127 AD3d 634, 637-638 [1st Dept 2015]).

The proposed amended pleading fails to state a cause of action for abuse of process (*see Curiano v Suozzi*, 63 NY2d 113,

116 [1984]). Defendant commenced two family offense proceedings based on separate incidents in which plaintiff allegedly hit her, verbally abused her, and threatened to shoot her. Both petitions were dismissed; one on the merits and the other without prejudice. The mere filing of petitions is not legally considered process capable of being abused (*see Curiano v Suozzi*, 63 NY2d at 113).

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

ENTERED: JUNE 4, 2020

CLERK

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

11611-
11611A In re Johnell E.K.,
Petitioner-Respondent,

-against-

Fatima T.,
Respondent-Appellant.

Dkt. V-30013/13
V-30012-13/14G
V-30013-13/15H
V-1771-14
V-1771-14/15G

Leslie S. Lowenstein, Woodmere, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

Orders, Family Court, Bronx County (Dakota D. Ramseur, J.), entered on or about October 17, 2016, and January 17, 2016, which, after a hearing, granted the father's petition, awarding him sole legal and physical custody of the parties' child, and denied the mother's petition, unanimously affirmed, without costs.

The court's determination that the award of sole legal and physical custody to the father would serve the best interests of the child has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982], citing Domestic Relations Law § 70). The evidence shows that the child has lived with the father since October 2014, and he takes care of her physical, emotional, educational, and medical needs. He has enrolled the child in day care, managed her asthma, bought her clothes, and, by all accounts, formed a close, loving bond with the child (*see generally Eschbach*, 56 NY2d at 172-174). The mother provided little or no financial support and has an

unpredictable work schedule. Beginning early on, after the parties separated, the mother continually interfered with the father's access to the child, prompting the court to award the father temporary custody during the pendency of these proceedings. The mother also did not initially believe the child's asthma diagnosis and refused to administer the prescribed medication (*id.*). By the mother's own testimony, the father cooperated in facilitating her visitation with the child and there is no indication that he would not continue to foster a positive relationship between mother and child as the custodial parent. While the trial court recognized the mother's strides

toward improving her parenting skills, overall the father still remained the parent more able to serve the child's best interests.

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

ENTERED: JUNE 4, 2020

CLERK

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

11612 John Hon, et al., Index 602236/04
Plaintiffs-Respondents,

-against-

Prince Development Company LLC,
et al.,
Defendants.
- - - - -
Roug Kang Wang, et al.,
Nonparty-Appellants.

_____

Wang Law Office, PLLC, Flushing (Jean Wang of counsel), for appellants.

Aronauer & Yudell, LLP, New York (Joseph Aronauer of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Kathryn E. Freed, J.), entered January 23, 2019, which, inter alia, granted plaintiffs' motion for an extension of their judgment lien on the subject property by 300 days, from January 30, 2019 through November 26, 2019, unanimously dismissed, as academic, with costs.

The expiration of the lien extension period renders the propriety of its extension academic (*see Matter of Pious Socy. of St. Paul v Goldhaber*, 35 AD2d 674 [2d Dept 1970]). Similarly, the other prong of plaintiffs' motion, for an extension of the lien until the Sheriff's sale had taken place, was, as Supreme

Court recognized, mooted by the conduct and completion of the Sheriff's sale.

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

ENTERED: JUNE 4, 2020

CLERK

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

11613-
11614 Steven M. Knobel, Index 655000/18
656660/17
Plaintiff-Appellant,

-against-

Demba Wei, LLP, et al.,
Defendants-Respondents.

- - - - -

In re Eric Wei,
Petitioner-Respondent,

-against-

Steven M. Knobel,
Respondent-Appellant.

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Shaw & Binder, P.C., New York (Stuart F. Shaw of counsel), for appellant.

Wei Law Group LLP, New York (Eric S. Wei of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (W. Franc Perry, J.), entered on or about April 2, 2019, upon petitioner's motion to confirm an arbitration award in its favor, confirming the award and directing the Clerk to enter judgment accordingly, unanimously reversed, on the law, the order and judgment vacated and the matter remanded to Supreme Court. Appeal from order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about September 14, 2018, which denied plaintiff's motion for a trial de novo to challenge the arbitration award and granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, the complaint is reinstated and the matter remanded to the Supreme

Court.

As the dismissal of a prior action commenced by Dembra Wei, LLP for failure to attend a calendar call (22 NYCRR 202.27[b]) was not on the merits, it does not have res judicata effect (*Hernandez v St. Barnabas Hosp.*, 89 AD3d 457 [1st Dept 2011]; *Espinoza v Concordia*, 32 AD3d 326 (1st Dept 2006]). Therefore, the parties were not precluded from commencing subsequent independent actions. Knobel subsequently timely commenced his action seeking a trial de novo of the arbitration award rendered in the prior fee dispute (*see* CPLR 304[a]; *Lomtevas v Pradhan*, 65 Misc 3d 1215(A), 2019 NY Slip Op 51658(U), *2 [Sup Ct, Kings County 2019]). He did not otherwise waive that. The parties so-ordered stipulation, in which they consented to binding arbitration pursuant to Section 137 of the New York County Fee Dispute Program, does not constitute a waiver of Knobel's right to seek de novo review. Subdivisions (B)(1) and (2) of section 6 of the Standards and Guidelines of the Board of Governors (Unified Court System, Attorney-Client Fee Dispute Resolution Program) provide any purported waiver is not valid on the part of a client unless it is "knowing and informed" and that a retainer agreement (or other writing) must contain express waiver language specifying that "the client understands that he or she is waiving the right to reject an arbitration award and to commence a trial de novo in court"
(http://www.courts.state.ny.us/admin/feedispute/pdfs/Standards.pd

f; *see also Maddox v Stein*, 42 Misc. 3d 134[A], 2014 NY Slip Op. 50057[U], [App Term 2d Dept, 2014]). In light of the fact that the so-ordered stipulation did not contain such language, or even a close approximation of such language, Knobel's consent to a binding arbitration pursuant to Section 137 of the New York County Fee Dispute Program cannot be considered to have been "knowing and informed." Consequently, Knobel's retained his right to commence an action to obtain judicial review of this fee dispute.

In view of our reinstatement of Knobel's dismissed proceeding, the motion court's entry of a judgment confirming the arbitration award must be vacated and the matter remanded to the

Supreme Court, where Knobel shall have the right to interpose an answer.

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

ENTERED: JUNE 4, 2020

CLERK

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

11615 The People of the State of New York, Ind. 81/17
Respondent, 82/17
753/18
-against- SCI. 3070/18

Jeffrey Lashley also known
as Willie Murray,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni 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 September 24, 2018,

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

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

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

ENTERED: JUNE 4, 2020

CLERK

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

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

11616-
11616A Administration Proceeding, File 2450/2019
Estate of Sam Abram, 2450A/2019
Deceased,

- - - - -

In re Robert Abram,
Petitioner-Appellant,

-against-

Edward A. Abram, et al.,
Respondents-Respondents,

Fanny Lucia Mendez,
Respondent.

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Markewich and Rosenstock LLP, New York (Lawrence M. Rosenstock of counsel), for appellant.

Greenfield Stein & Senior, LLP, New York (Anne C. Bederka of counsel), for respondents.

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Decree, Surrogate's Court, New York County, (Rita Mella, S.), entered on or about November 1, 2019, denying petitioner's appointment as an administrator of decedent's estate, and granting respondents' cross-petition to be appointed, unanimously affirmed, without costs. Decree (same court and Surrogate), entered on or about December 20, 2019, which, upon granting petitioner's motion to reargue, denied his motion to alter its prior determination to appoint petitioner as the administrator, and denied petitioner's alternative request to be made a joint administrator, unanimously affirmed, without costs.

The Surrogate did not abuse her discretion in not holding an evidentiary hearing on petitioner's allegations that one

respondent was unfit to be granted temporary letters under SCPA 707. The scattered allegations, many either irrelevant to operation of the estate's business or separated widely in time, were adequately addressed by the imposition of a bond requirement and acknowledgment of the ultimate right to an accounting (*see Matter of Marsh,* 179 AD2d 578 [1st Dept 1992]).

Nor did the Surrogate abuse her discretion in failing to make petitioner a joint administrator. The nature of his allegations as to one of the respondents was sufficient to demonstrate his hostility towards him and the impracticability of the two working closely together (s*ee Matter of Rudin,* 15 AD3d 199, 200 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005]).

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

ENTERED: JUNE 4, 2020

CLERK

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

11617-
11617A Odan Laboratories Ltd.,
Plaintiff-Appellant,

-against-

Alkem Laboratories Limited, et al.,
Defendants-Respondents,

Long Pharmaceuticals, LLC,
Defendant.

Index 653626/18

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The Law Offices of Steven Isser, New York (Steven D. Isser of counsel), for appellant.

Baker & Hostetler LLP, New York (John Siegal of counsel), for respondents.

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Judgment, Supreme Court, New York County (Andrea Masley, J.), entered April 17, 2019, dismissing the action as against defendants Alkem Laboratories Limited (Alkem) and Ascend Laboratories LLC (Ascend), pursuant to an order, same court and Justice, entered on or about March 26, 2019, which granted said defendants' motion to dismiss the complaint as against them, unanimously reversed, on the law, with costs, the judgment vacated, the motion denied, and the complaint reinstated as against them. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff Odan Laboratories (Odan) alleges that in February 2014, it entered into an agreement with defendant Long Pharmaceuticals, LLC (Long), requiring Long to produce a

lidocaine ointment batch for submission to the Food and Drug Administration (FDA) for approval for public use and distribution. The 2014 supply agreement contained confidentiality provisions to protect Odan's claimed proprietary information. When Odan terminated the supply agreement with Long in June 2014 due to Long's alleged failure to timely produce the lidocaine ointment batch for FDA submission, Long, it is alleged, continued to be bound by the confidentiality terms of the supply agreement. The complaint alleges that defendant Alkem acquired Long's assets and assumed its liabilities in June 2015, thereby becoming bound by the confidentiality agreements of the supply agreement, and that Alkem obtained FDA approval for a lidocaine product substantially similar to Odan's product in March 2017, and sold it in the United States itself and/or through Ascend. Odan alleges that Alkem either breached the contractual confidentiality provision or tortiously interfered with Long's contract with Odan, and that both Alkem and Ascend misappropriated Odan's confidential, proprietary information and engaged in unfair trade practices.

Alkem and Ascend moved to dismiss based on documentary evidence consisting of agreements showing that Long's assets were acquired by nonparty S&B Pharma, Inc. in June 2015, and letters between the FDA and Alkem/Ascend, which show that they submitted Alkem's application for approval of a lidocaine product in June 2014, a year earlier, and made a nonsubstantive amendment in

February 2015. These documents, submitted by way of an attorney affirmation, were not shown to be admissible or authentic (*see VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]; *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]). In any event, even considering the documents, they do not conclusively refute Odan's claims against Alkem and Ascend (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

As to the acquisition of Long, in opposition to the motion, Odan submitted documents, including a letter from Alkem's attorneys in response to Odan's cease and desist letter, which support Odan's allegation that it was Alkem that acquired Long's assets. Accordingly, prior to dismissal of its breach of contract claim against Alkem, Odan is entitled to discovery from Alkem to determine the full circumstances surrounding the transaction and whether Alkem subsequently or de facto acquired Long (see CPLR 3211[d]; *Curry v Hundreds of Hats, Inc.*, 146 AD3d 593, 594 [1st Dept 2017]).

As for the FDA letters, they refute Odan's allegation, made on information and belief, that Alkem was not developing a lidocaine product before the June 2015 acquisition of Long. However, the two letters, standing alone, without Alkem's actual application to the FDA, are insufficient to conclusively refute Odan's allegations that Alkem/Ascend wrongfully obtained access to its particular proprietary information through Long, either

during the due diligence process preceding the 2015 acquisition or thereafter. Nor do the two FDA letters, on their own, eliminate the possibility that Alkem made a substantive amendment to its FDA application at any time between June 2014 and March 2017 making use of such information.

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

ENTERED: JUNE 4, 2020

CLERK

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

11618 In re Emlie Anderson, etc. File 2746A/16
Deceased.

- - - - -

The Estate of Joan Anderson
by its Executrix, Emlie Anderson,
et al.,
Petitioners-Appellants,

-against-

Sue Renee Bernstein, etc., et al.,
Respondents-Respondents.

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Scarola Zubatov Schaffzin PLLC, New York (Richard J.J. Scarola of counsel), for appellants.

Farrell Fritz, P.C., Uniondale (Robert M. Harper of counsel), for Natural Resources Defense Counsel, Inc., respondent.

Holland & Knight LLP, New York (Sean C. Sheely of counsel), for Medecins Sans Frontieres USA, Inc. and Save the Children Federation, Inc., respondents.

Letitia James, Attorney General, New York (Joshua M. Parker of counsel), for Office of the New York State Attorney General, respondent.

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Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about February 28, 2019, which denied the petition brought pursuant to SCPA 1420 to construe a 30-day survivorship clause in the decedent Jill Morris's will as inapplicable to certain bequests to Joan Anderson, unanimously affirmed, without costs.

Article Eighth of the decedent Jill Morris's will states: "I make the following gifts of tangible personal property to the following entities . . . and persons (provided that he or she survives me by thirty (30) days)." It then makes 11 gifts to 12

beneficiaries, including Joan Anderson, to whom the decedent bequeathed $100,000, two residences, and various tangible property. Anderson died 12 days after the decedent's death.

The Surrogate's Court correctly concluded that a fair reading of Article Eighth "together with the will as a whole" supports the conclusion that the decedent intended all assets of substantial value, including the residences, cash, and all other property in Article Eighth, to pass subject to a survivorship condition, and that the gifts to Anderson were not exempt from that requirement (*see Matter of Fabbri*, 2 NY2d 236, 240 [1957]; *Matter of Bieley*, 91 NY2d 520, 524 [1998]; *Matter of Carmer*, 71 NY2d 781, 785 [1988]). Surrogate's Court correctly reasoned that the reference to solely "tangible property" in the introductory clause in Article Eighth was the product of "inept drafting," rather than any desire to exclude the two residences or cash from the survivorship requirement. As a result, the bequests lapsed and will go to the respondent charitable institutions as part of the residuary estate.

The Surrogate's Court properly declined to grant discovery or receive extrinsic evidence because the decedent's intent could be gleaned from the four corners of the will (*Matter of King*, 198 AD2d 115 [1st Dept 1993]; *Matter of Chernik*, 150 AD3d 728, 730 [2d Dept 2017]).

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

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

ENTERED: JUNE 4, 2020

CLERK

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

11619 The People of the State of New York, Ind. 1906/17
Respondent,

-against-

Keon Robinson,
Defendant-Appellant.

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Christina A. Swarns, Office of The Appellate Defender, New York (Gabe Newland of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Erika Edwards, J.), rendered April 11, 2018,

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

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

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

ENTERED: JUNE 4, 2020

CLERK

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

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

11620 Yahaira Lugo, Index 25583/15E
Plaintiff-Appellant,

-against-

Daytona Auto Sales, Inc.,
Defendant,

Ramy A. Alsadi,
Defendant-Appellant,

Evergreen Mechanical Corp.,
et al.,
Defendants-Respondents.

_____

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for Yahaira Lugo, appellant.

Law Office of Brian Rayhill, Elmsford (Jonathan R. Walsh of counsel), for respondents.

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Order, Supreme Court, Bronx County (Shawndya L. Simpson, J.), entered July 5, 2019, which granted defendants Evergreen Mechanical Corp. and Alexander Vega's (collectively, the Vega defendants) motion for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

This action arises from a collision between the Vega defendants' automobile, in which plaintiff was a passenger, and a vehicle driven by defendant Ramy S. Alsadi. The Vega defendants established prima facie entitlement to judgment as a matter of law. Their evidence, as a whole, demonstrates that the cause of the accident was the negligence of Alsadi, who failed to obey the stop sign at the intersection, and who testified that his view of

the intersection was obstructed. The Vega defendants' vehicle had the right of way (Vehicle and Traffic Law § 1142[a]) and was therefore "entitled to anticipate that other vehicles will obey the traffic laws that require them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260 [1st Dept 1997]).

In opposition, plaintiff and codefendant failed to raise an issue of fact to rebut the presumption of negligence arising from Alsadi's failure to yield the right of way to the Vega defendants' vehicle, or to demonstrate that any negligence on Vega's part contributed to the accident, the Vega defendants were entitled to summary judgment (*see Martinez v Cofer*, 128 AD3d 421, 422 [1st Dept 2015]; *Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]). Furthermore, plaintiff's contention that the Vega defendants' vehicle may have been driving over the posted speed limit was insufficient to raise an issue of fact as to comparative negligence

since there is no evidence that it could have contributed to the collision (*see Martinez*, 128 AD3d at 422).

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

ENTERED: JUNE 4, 2020

CLERK

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

11621 The People of the State of New York, Ind. 970/16
Respondent,

-against-

Michael Conner,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Milbank LLP, New York (Emily Scarisbrick of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Philip V. Tisne of counsel), for respondent.

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered May 10, 2017, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously reversed, on the law, and the matter remanded for a trial.

The trial court erred in denying defendant's request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that this police Sergeant and a police detective arrested the plaintiff without suspicion of criminality and lodged false charges against him (*see People v Smith*, 27 NY3d 652 [2016]). The civil complaint contained allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial.

Contrary to the People's allegations, the error was not harmless. The police sergeant's credibility was critical because he was the only eyewitness to the crime (*see People v Burgess*, 178 AD3d 609 [1st Dept 2019]; *People v Holmes*, 170 AD3d 532, 533-34 [1st Dept 2019]; *People v Robinson*, 154 AD3d 490, 491 [1st Dept 2017], lv denied 30 NY3d 1108 [2018]). Although the sergeant's testimony was corroborated by other evidence, none of this corroborating evidence was sufficient, on its own, to prove defendant's guilt, as all of it relied on the sergeant's testimony for context.

The verdict was not against the weight of the evidence. We find it unnecessary to reach any other issue.

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

ENTERED: JUNE 4, 2020

CLERK

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

11622-
11622A New York City Housing Authority,
Plaintiff-Respondent,

-against-

Michael Oakman,
Defendant-Appellant.

Index 452706/15

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Kishner Miller Himes P.C., New York (Jonathan Cohen of counsel), for appellant.

Simon Meyrowitz & Meyrowitz, P.C., New York (Matthew Kugler of counsel), for respondent.

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Judgment, Supreme Court, New York County (David B. Cohen, J.), entered November 30, 2018, awarding plaintiff the total amount of $74,089.51, pursuant to an order, same court and Justice, entered on or about September 17, 2018, which granted plaintiff's motion for summary judgment, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant owned a two-family house and resided in the first floor unit. In September 2001, defendant entered into a housing assistance payment (HAP) contract with plaintiff New York City Housing Authority (NYCHA) based on the tenancy of a female who resided with her two children in a separate second floor unit in defendant's house. Thereafter, in August 2003, defendant and the tenant became the parents of a child, who resided with the tenant in her second floor unit. Defendant and the tenant later had two

additional children who also resided with the tenant in the second floor unit. Defendant received housing assistance payments based on the tenancy until June 2014.

Plaintiff commenced this action in 2015 for alleged breach of the HAP contract based on defendant's receipt of the housing assistance payments at a time when he was not eligible to receive them because of his parental relationship with three of the tenant's children.

We find that the court properly granted plaintiff summary judgment. Defendant had a continuing obligation under the HAP contract to inform plaintiff of changes in his family composition that affected his eligibility for the housing assistance payments. During the term of the contract defendant was required to certify that the family receiving the housing assistance benefits did not include his child(ren). Further it was clear from the contract that the obligation was continuing (*see* form HUD-52641-A (3/2000), ref Handbook 7420.8).

While defendant contends that pursuant to 24 CFR 982.306(d), the restriction upon his receipt of housing assistance payments applied only when the tenant was first approved for housing assistance benefits, at which time there was no child of his living with the tenant, it is clear that the HAP contract imposed a continuing obligation on defendant to notify plaintiff of any changes during the "contract term."

The motion court properly found that the doctrines of

equitable estoppel, waiver and acquiescence were inapplicable. The doctrine of equitable estoppel only applies where a governmental subdivision acts wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice *(see Bender v New York City Health & Hospitals Corp.*, 38 NY2d 662, 668 [1976]; *Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482 [1st Dept 2007]). Defendant failed to show that plaintiff, acting in a governmental capacity acted wrongfully, negligently or induced defendant to continue receiving housing assistance payments at a time when he was ineligible to receive them. Defendant also failed to show how his position changed to his detriment.

Further, the HAP contract expressly stated that plaintiff's failure to exercise a right or remedy under the contract did not constitute a waiver of the right or remedy (*see Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Matter of Scheurer v New York City Employees' Retirement Sys.*, 223 AD2d 379 [1st Dept 1996]). Finally, even if plaintiff erroneously continued to make housing assistance payments to defendant at a time when it knew that he was ineligible to receive them, a mistake does not estop a governmental entity from correcting errors (*see Oxenhorn v Fleet Trust Co.*, 94 NY2d 110, 116 [1999]).

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

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

ENTERED: JUNE 4, 2020

CLERK

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

11623N-
11623NA Mark Parkinson,
Plaintiff-Appellant,

-against-

Fedex Corporation, et al.,
Defendants-Respondents.

Index 158263/15

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for appellant.

Brown Gavalas & Fromm LLP, New York (Frank J. Rubino, Jr. of counsel), for respondents.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 20, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion pursuant to CPLR 3126 to strike the answer or, in the alternative, to preclude defendants from presenting evidence on the issue of liability or compel them to produce outstanding discovery, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 25, 2018, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable order.

The court providently exercised its discretion in denying plaintiff's motion to strike, as the record does not show that defendants' noncompliance with the court's eight prior discovery orders was willful, contumacious or due to bad faith (*see Lee v 13th St. Entertainment LLC*, 161 AD3d 631 [1st Dept 2018]; *Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542 [1st Dept 2012]).

Although their responses to plaintiff's various notices to produce and to the court's orders were belated and piecemeal, defendants ultimately produced a substantial amount of discovery, as well as a good-faith search affidavit. To the extent plaintiff now raises further discovery abuses based on noncompliance that occurred pending a decision on the motion or after it was decided, these arguments are not properly before this Court, because they were not before the motion court when it decided the motion (*TMR Bayhead Sec., LLC v Aegis Texas Venture Fund II, LP*, 111 AD3d 508 [1st Dept 2013]).

The motion court properly denied plaintiff's request to compel defendants to produce an unredacted accident report and the personnel files of three employees working at the site and time of plaintiff's accident. The redacted "subsequent remedial measures" reflected in the accident report would not have been admissible in this negligence action (*see Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981]; *Kaplan v Einy*, 209 AD2d 248, 252 [1st Dept 1994]). The exceptions cited by plaintiff are inapplicable (*see e.g. Fernandez v Higdon El. Co.*, 220 AD2d 293 [1st Dept 1995]). The personnel files are not discoverable, as plaintiff has not asserted a cause of action for negligent hiring (*see Gerardi v Nassau/Suffolk Airport Connection*, 288 AD2d 181 [2d Dept 2001]; *Halina Yin Fong Chow v Long Is. R.R.*, 264 AD2d 759 [2d Dept 1999]). An in camera review to determine whether the personnel files contain "relevant and material" information

was unnecessary, as defendants had produced the employees' written accounts of the accident and proof of their completion of a safety training program, and the files likely would not contain further information relevant to the issue of defendants' liability (*compare Meder v Miller*, 173 AD2d 392, 393 [1st Dept 1991] [personnel records of doctor who substituted saline for drugs during surgeries and pilfered the drugs to feed his own habit and whose association with the hospital was later terminated because of his severe dependency problem "might very likely" contain information relevant to the litigation]).

No appeal lies from the denial of a motion for reargument (*D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]). We deny plaintiff's request that we deem the motion as one for renewal, as the "new facts" he claims he submitted were obtained while the motion to reargue was pending and were improperly submitted for

the first time in reply (CPLR 2221[e][2]; *70th St. Apts. Corp. v Phoenix Constr., Inc.*, 139 AD3d 619 [1st Dept 2016]).

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

ENTERED: JUNE 4, 2020

CLERK

CORRECTED OPINION - JUNE 12, 2020

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Judith J. Gische
Barbara R. Kapnick, JJ.

11412
Index 153765/17

_____x

Center for Independence of the Disabled, et al.,
Plaintiffs-Respondents,

-against-

Metropolitan Transportation Authority, etc., et al.,
Defendants-Appellants.

- - - - -

504 Democratic Club, Advocates for Justice, Community Access, Lenox Hill Neighborhood House, National Center for Law and Economic Justice and New York Lawyers for the Public Interest,
Amici Curiae.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Shlomo Hagler, J.), entered on or about June 6, 2019, which denied the motion of defendants Metropolitan Transportation Authority, Veronique Hakim, New York City Transit Authority and Darryl C. Irick to dismiss the complaint and denied, without prejudice, the motion of defendant the City of New York to dismiss the complaint.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Allan Arffa, Gregory F. **Laufer** and Joseph P. Kolatch of counsel), for Metropolitan Transportation Authority, Veronique Hakim, New York City Transit Authority and Darryl C. Irick, appellants.

James E. Johnson, Corporation Counsel, New York (Jeremy W. Shweder, Richard Dearing and Devin Slack of counsel), for City of New York, appellant.

Disability Rights Advocates, New York (Michelle Caiola, Torie Atkinson and Emily Seelendfreud of counsel), and Sheppard Mullin Richter & Hampton, LLP, New York (Daniel Brown of counsel), for respondents.

Dentons US LLP, New York (Sandra D. Hauser, Levon Golendukhin and Noel Y. Lee of counsel), and New York Lawyers for the Public Interest, New York (Ruth Lowenkron and Christopher Schuyler of counsel), for amici curiae.

GISCHE, J.

Plaintiffs bring this putative class action under the New York City Human Rights Laws (NYCHRL) challenging, as discriminatory, the New York City subway system's lack of accessibility to persons with certain disabilities. Plaintiffs consist of five non-profit disability rights organizations and three individuals with mobility impairments. Administrative Code of City of NY § 8-107(4)(a)(1)(a) makes it an unlawful discriminatory practice for "any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation . . . [t]o refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation" . . ."[b]ecause of any person's actual or perceived . . . disability . . . "directly or indirectly . . ."

The gravamen of the complaint, filed in 2017, is that over 80% of New York City's subway stations (360 out of 427) are not equipped with any vertical accessibility, other than stairs. Stair only stations cannot be utilized by persons who use wheelchairs, scooters, walkers or those with disabilities related to muscle, joint, heart or lung function. The scarcity of

accessible subways makes certain locations and neighborhoods in the City unreachable for persons with these disabilities.

Defendants consist of the Metropolitan Transit Authority, and its interim executive director, the New York City Transit Authority and its president (collectively the transit defendants) and the City of New York (CNY). Defendants are appealing the motion court's denial of their CPLR 3211 pre-answer motion to dismiss the complaint. Defendants argue the complaint should be dismissed because it is barred by the applicable statute of limitations, otherwise barred by preemption and because the dispute is nonjusticiable. CNY seeks dismissal on the additional ground that it is not a proper party because it has no control over the subway system.

Statute of Limitations

An action under the NYCHRL must be brought within three years after the discriminatory practice occurred (Administrative Code §8-502[d]). Defendants argue that the statute of limitations accrued when the subway stations were originally built at the turn of the last century. Under the NYCHRL, however, it has long been recognized that continuing acts of discrimination within the statutory period will toll the running of the statute of limitations until such time as the discrimination ends (*see Ferraro v New York City Dept. of Educ*,

115 AD3d 497 [1st Dept 2014]; *Batchelor v NYNEX Telesector Resources Group*, 213 AD2d 189 [1st Dept 1995]; *see also Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept [2016]). We reject defendants' arguments that the discrimination alleged by plaintiffs is not a continuing violation, but is limited to the single act of original construction of the subway system. The lack of access to the subway system, a place of public accommodation, continues every time a person seeks to use the subway system, but is prevented from doing so based upon their physical disability.

While the continuous violation doctrine is also well recognized under the federal and state discrimination laws (*see Patterson v County of Oneida*, 375 F3d 206, 220 [2d Cir 2004]; *Bermudez v City of New York,* 783 F Supp 2d 560 [SD NY 2011]), its contours are narrower. Under federal anti-discrimination laws, the continuing violation doctrine "is triggered by continual unlawful acts, [and] not by continual ill effects from the original violation" (*Hamer v City of Trinidad*, 924 F3d 1093, 1099 [10th Cir 2019][internal quotation marks omitted], *cert denied* –US–, 140 S Ct 644 [2019]). As this Court recognized in Williams v New York City Hous. Auth. (61 AD3d 62 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]), however, by virtue of the NYCHRL's mandate that it "be construed liberally for the accomplishment of

[its] uniquely broad and remedial" purposes (Administrative Code §8-130[a]), the reach of the continuous violation doctrine under NYCHRL is broader than under either federal or state law. A broad interpretation is consistent with a "rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them[selves] from challenges to their unlawful conduct that continues into the limitation period" (*Williams*, 61 AD3d at 73). Thus, defendants' claimed failure to provide an accessible subway system is a continuous wrong for purposes of tolling the statute of limitations under the NYCHRL.[1]

Defendants' attempts to distinguish and plaintiffs' attempts to embrace the reasoning of *Hamer* are misplaced. Although the circuit court in *Hamer* held that the statute of limitations did not bar a claim that sidewalks and curb cuts failed to comply with the federal Americans with Disabilities Act and Rehabilitation Act because each day that a public provided

[1]In 2019, the State legislature enacted legislation that provides effective immediately that the NYSHRL shall be "construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300).

service remained non-compliant was a new violation, the basis of the court's decision was not the continuous violation doctrine. Rather, the circuit court applied the more narrowly circumscribed repeated violations doctrine in connection with the federal anti-discrimination laws. Repeated violations doctrine treats each continuing offense during the limitation period as a new violation. Relief is limited to offenses only occurring within the limitations period. The continuous treatment doctrine, as applied under the NYCHRL, is not so narrow. The additional cases relied upon by defendants are largely inapposite, because they do not concern statutory discrimination claims in which the doctrine of a continuous violation has its own jurisprudence (*e.g. New York Yacht Club v Lehodey*, 171 AD3d 487 [1st Dept 2019], *lv denied* 33 NY3d 914 [2019][building code violation for chimney height]; *Henry v Bank of Am.*, 147 AD3d 599 [1st Dept 2017][fraud based claims for automatically enrolling the plaintiff in credit card plan without his consent].

Preemption

Defendants argue that this action is preempted by two separate State Laws, Transportation Law § 15-b and Public Authorities Law § 1266(8).

Municipalities generally have broad authority to adopt local laws provided that they are not inconsistent with either the

State Constitution or any general State law (*see DJL Rest. Corp. v City of New York*, 96 NY2d 91, 94 [2001]; NY Const, art IX, § 2 [c][ii]; Municipal Home Rule Law §10[1]). It has long been recognized that under home rule, CNY has broad policing power to act in furtherance of the welfare of its citizens and that the State has not preempted local anti-discrimination laws of general application (*see Matter of Levy v City Commn. of Human Rights*, 85 NY2d 740 [1995]; *New York State Club Assn v City of New York*, 69 NY2d 211, 219 [1987], *affd* 487 US 1 [1988]; *Patrolman's Benevolent Assn. of the City of N.Y., Inc. v City of New York*, 142 AD3d 53 [1st Dept 2016]), *appeal dismissed* 28 NY3d 978 [2016]). A local law will be preempted either where it is in direct conflict with a state statute (conflict preemption), or where the state legislature has indicated its intent to occupy the particular field (field preemption) (*Garcia v New York State Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018]; *Eric M. Berman P.C. v City of New York*, 25 NY3d 684 [2015]; *DJL Rest*. at 96). While these two avenues of preemption are interrelated, they present distinct and independent bases to analyze the issues implicated by the issues before us (*Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99 [1983]).

Conflict preemption occurs when a local law prohibits what would be permissible under state law, or imposes prerequisites or

additional restrictions on rights under state law that inhibit the operation of the State's general laws (*Garcia,* 31 NY3d at 617, *Eric M. Berman, P.C.*, 25 NY3d at 690; *Zakrzewska v New School*, 14 NY3d 469, 480 [2010]). The Court of Appeals, however, cautions that reading conflict preemption principles too broadly carries with it the risk of rendering the power of local governments illusory (*Garcia* at 617). The "'fact that both the [s]tate and local laws seek to regulate the same subject matter does not in and of itself give rise to an express conflict'" (*Garcia* at 617, quoting *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97 [1987]). Conflict preemption is generally present only "when the State specifically permits the conduct prohibited at the local level," or there is some other indication that deviation from state law is prohibited (*Garcia* at 617-618 [internal quotation marks omitted]). More specifically, "a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe . . . or (2) imposes additional restrictions on rights granted by State law" (*Jancyn Mfg. Corp.*, 71 NY2d at 97).

With field preemption, the State may expressly articulate its intent to occupy a field. It may also do so by implication

(*Garcia* at 618; *DJL Rest.* at 95). The State's intent to preempt the field may be implied from the nature of the subject matter being regulated as well as the purpose and scope of the state legislative scheme involved, including the need for state-wide uniformity in a particular field or issue (*Garcia* at 618; *People v Diack*, 24 NY3d 674, 679 [2015]). "'When the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field'" (*Garcia* at 618, quoting *Diack* at 677). State statutes do not necessarily preempt local laws, however, where the local laws only have a "tangential" impact on the State's interests. Local laws of general application – which are aimed at legitimate concerns of the local government – will not be preempted, if their enforcement only incidentally infringes on a preempted field (*DJL Rest.* at 97).

We hold that Transportation Law § 15-b does not preempt enforcement of the NYCHRL's disability discrimination provisions. Transportation Law § 15-b was originally enacted in 1984 and substantially amended in 1994. Insofar as relevant here, the Transportation Law currently provides for 100 specifically designated stations to be made accessible to persons with disabilities by July 2020. This law accounts for the approximate

20% of accessible stations that were in place at the commencement of this action. It also provides for the creation of a New York city accessible transportation disabled committee, which is to assist in the development of the integrated New York city accessible transportation system as outlined in the law. The Transportation Law was originally enacted as part of a compromise of pending litigation brought by advocates for the disabled community challenging the lack of accessibility in the New York City subway system (NYLS Governor's Bill Jacket L 1984 ch 498, Budget Report on Bills No 10133; *see Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.*, 117 Misc 2d 343 [Sup Ct, NY County 1982][EVPA]). In *EPVA*, the accessibility challenges were mounted under Public Buildings Law § 51, which at that time required that rehabilitation of public buildings and facilities conform to the construction code applicable to facilities for the physically handicapped.[2] When the action was brought, the defendants were engaged in an effort to modernize certain subway stations. Supreme Court issued a preliminary injunction,

[2]Although the action originally included discrimination claims under the State anti-discrimination laws, by the time an injunction was issued and a subsequent compromise was reached resulting the in the Transportation Law, the discrimination claims had been dismissed with only the Public Buildings Law claims remaining (*Eastern Paralyzed Veterans Assn v Metropolitan Transp. Auth.*, 79 AD2d 516 [1st Dept 1980]).

restraining the defendants from eliminating elevators from their station modernization plans, because the plaintiffs had demonstrated a likelihood that they would succeed on the merits of their claims, pending a trial on the application of the Public Buildings Law to the scope of the planned work (*EPVA* at 354). Consequently, the compromise reflected in Transportation Law § 15-b was not just limited to defendants making commitments for accessible public transportation, rather it also included amendment of the Public Buildings Law § 51 to exempt the subway system, so that its defendants' delayed construction plans could proceed. In 1984, the exemption was for eight years. In 1994, it was made a permanent exemption (Public Buildings Law § 51; L 1984 ch 498 § 3; L 1994 ch 610 § 1). Transportation Law § 15-b (7) expressly provides that insofar as the provisions of the law are inconsistent with provisions of any other general, special or local law, the provisions of the Transportation Law shall control. The law does not, however, prohibit the MTA from making any more than the 100 designated subway stations accessible. Other than Public Buildings Law § 51, the transit defendants are not expressly exempt from compliance with any specifically identified law. The discrimination laws are not referenced at all.

Transportation Law § 15-b and NYCHRL, when compared, reveal

no conflict preemption. The NYCHRL does not prohibit what the Transportation Law permits. Rather, the Transportation Law established a base line number of subways that must be made accessible to certain mobility impaired users. It does not set a maximum number of accessible subway stations. In fact, the transit defendants themselves point out that their "aspiration" is to install elevators in many more stations than the originally designated 100 and make them accessible by 2028.[3] Thus, even if plaintiffs were to prevail in their claim that under the NYCHRL additional subway stations are required to be made accessible, there would be no conflict with Transportation Law § 15-b's requirement that, at base line, 100 such stations exist by July 2020.

With respect to field preemption, there is no express provision that Transportation Law § 15-b preempts any local relating to issues of disability discrimination. The preemptive language in the statute only concerns local laws to the extent they are inconsistent with the Transportation Law. Such limiting language does not preempt every local law, provided the local law

[3]As explained in the transit defendants' brief, in May 2018, the transit defendants announced its "aspirational" plan to make 50 more stations accessible in a five year period and then 130 more stations accessible in the five year period after that (https://www.mta.info/sites/default/files/mtaimgs/fast_forward_the_plan_to_modernize_nyct.pdf [accessed April 6, 2020]).

does not interfere with the objectives of the Transportation Law (*see Tang v New York City Tr. Auth.*, 55 AD3d 720 [2d Dept 2008]). The primary objectives of Transportation Law § 15-b were to provide an accessible public transportation system for the mobility impaired residents of New York City and to allow its then delayed construction plans to go forward (Governor's Bill Jacket, L 1984 ch 498, Budget Report on Bills No 10133). These objectives are not inconsistent with the prohibition against discrimination in providing access to places of public accommodation.[4]

Defendants argue that the history and scope of the law evidences the legislature's implicit intent to occupy the field. In this regard we are called upon to evaluate whether the state statute is a detailed and comprehensive regulatory scheme in the relevant area (*DJL Rest.* at 97). Here, it is important to the analysis that the Transportation Law and the NYCHRL address entirely different areas of legislative concern. Transportation

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[4]Defendants' reliance on *New York City Health & Hosps. Corp. v Council of City of N.Y.*, (303 AD2d 69 [1st Dept 2003], *appeal withdrawn* 1 NY3d 539 [2003]), does not require a different result. In that case this Court applied the same required analysis under the preemption doctrine that we apply here. In reaching a different conclusion, we did so based upon the particular laws at issue. Unlike here, the challenged local law in *NYC Health & Hosps. Corp.* was not a law of general applicability.

Law § 15-b provides a specific plan, at a specific point in time, to make the New York City Transit System more accessible for mobility impaired users. The Transportation Law addresses accessibility as a function of Building Law requirements. The NYCHRL, in contrast, is a comprehensive remedial anti-discrimination law of general application. It is not limited to disability discrimination claims relative to the subway system. The particular provisions rleied upon by plaintiffs concern all places of public accommodation. The Court of Appeals has recognized that the State has not preempted local laws prohibiting discrimination (*see New York State Club Assn*, 69 NY2d at 219). While the Transportation Law and the NYCHRL touch upon the same area of concern, to wit accessible subway stations, each law approaches it from a different vantage point. There is nothing in the Transportation Law indicating that defendants were to be exempted from any claims of disability discrimination, or that by complying with the requirements of the Transportation Law, they would be immune for all time from claims that the subway system discriminates against a protected class of protected subway users because there are obstacles impeding their access to subway stations.

In advancing these arguments, defendants contend that Transportation Law § 15-b is a highly detailed scheme with

respect to the requirements for providing accessible transportation to disabled users. The Transportation Law does not refer to discrimination claims and in fact no discrimination claims were pending before the court at the time the statute was enacted as part of a litigation compromise.[5] The law has a sunset provision in July 2020, and otherwise contains no prohibition against defendants providing more accessible subway stations. Transportation Law § 15-b was amended in 1994 to increase the number of accessible stations from 54 to 100. The transit defendants have plans to increase the number of accessible stations beyond that required in the Transportation Law. All of this supports a conclusion that the Transportation Law was never intended to be the final word on accessibility. The fact that the legislature expressly exempted defendants from the requirements of Public Buildings Law § 51, which had been the primary statue utilized by disability advocates for mounting their challenges, suggests that had the legislature wanted to exempt the enforcement of other laws respecting facilities used by those with physical disabilities, it could have expressly done so.

Defendants' claim that this action is preempted under the

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[5]See footnote 2, *Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.*, 79 AD2d 516 [1st Dept 1980], *supra*).

Public Authorities Law is likewise rejected. The Public Authorities Law established the transit defendants and sets forth the scope of their authority to act. No one disputes that the Public Authorities law authorizes the transit defendants to acquire and operate the subway system, including the authority to construct, reconstruct, improve, maintain and operate it (Public Authorities Law § 1201 *et seq.*; *Matter of Levy v City Commn. on Human Rights*, 85 NY2d 740 [1995], *supra*). Public Authorities Law § 1266(8) contains an express preemption provision, but it is limited to local law "conflicting with this title or any rule or regulation of the [Transit Authority]." This limited statutory preemption only applies to laws that interfere with the accomplishment of the transit defendant transportation purposes and not to preempt the application of all local laws (*Tang*, 55 AD3d at 720). Compliance with the NYCHRL anti-discrimination provisions will not interfere with the transit defendants' mandate to maintain and operate the transit system *(Matter of Levy,* 85 NY2d at 745; *Tang* at 720-721; Simmons v New York City Tr. Auth., 2009 WL 2588753, 2009 US App LEXIS 17138 [2d Cir 2009]).

Justiciability

Focusing only on that aspect of plaintiffs' prayer for relief, seeking judicial imposition of a remedial plan to

eliminate discrimination, defendants argue that the issues raised in this action are nonjusticiable. Defendants argue that any such remedy would be an intrusion into the decision making reserved for the executive branch of government to allocate resources and make policy decisions regarding the subway system. This argument is rejected.

At its core, justiciabilty rests on the concept of the separation of powers of the three co-equal branches of government. It developed to identify which controversies are appropriate for the exercise of judicial authority, yet it has been described by the Court of Appeals as "perhaps the most significant and least comprehended limitation upon the judicial power" (*Matter of New York State Inspection, Sec. & Law Enforcement Emps. Dist. Councel 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 238 [1984]). Justiciability encompasses discrete, subsidiary concepts including, inter alia, political questions, ripeness and advisory opinions (*id.*). The judicial branch may only exercise its power in a manner consistent with its "judicial function," upon the proper presentation of matters of a "Judiciary Nature" (*id.*). Oft described as an "untidy" doctrine, we have recognized that determinations of justiciability must be made on a case-by-case basis (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 323 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]).

By focusing only on one of the remedies that could be implicated by this action, defendants miss the greater import of plaintiffs' complaint. Plaintiffs seek a declaratory judgment that defendants are in violation of the NYCHRL and a permanent injunction preventing them from doing so in the future. The remedial plan they seek is nothing more than having defendants implement a nondiscriminatory plan. Where, as here, plaintiffs are seeking to enforce services and rights afforded to them under the NYCHRL, those claims are justiciable (*see Matter of Klostermann v Cuomo*, 61 NY2d 525 [1984]). This complaint is similar to the complaint filed in *Klostermann* wherein the plaintiffs sought to have the court enforce their statutory right to services and housing following their discharge from state psychiatric institutions. The Court, in finding the *Klostermann* plaintiffs had presented a justiciable controversy, recognized that there was nothing inherent in the plaintiffs' attempts to seek a declaration and enforcement of their rights rendering the controversy nonjusticiable (*id.*). Similarly, plaintiffs in this case are seeking a declaration and enforcement of the rights afforded to them under the NYCHRL. While courts must be careful to avoid fashioning orders or judgments that go beyond any mandatory directives of the constitution, statutes or regulations and which intrude upon the policy-making and discretionary

decisions that are reserved to the legislative and executive branches, that limitation does not per se render a dispute nonjusticiable. We have recognized that a court can direct the State to prepare plans and programs to provide suitable treatment, which would also necessarily require the expenditure of funds, but not dictate the specific manner in which such plans and programs operate (*see Campaign for Fiscal Equity, Inc. v State of New York*, 29 AD3d 175 [1st Dept 2006], *affd as mod* 8 NY3d 14 [2006]).

CNY as a party

CNY raises a separate argument as to why this action should be dismissed as against it. While conceding that it is the owner of the subway system, it argues that it bears no responsibility for the claimed violations and has no authority to remedy them. CNY relies on the fact that it was required to and actually did lease the subway system to its codefendants. The motion court denied CNY's motion, without prejudice to renewal, following discovery. The motion to dismiss was properly denied because CNY waived that argument because it was raised for the first time in its reply brief below (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481, 482 [1st Dept 2017]). In any event, Supreme Court properly denied CNY's motion in light of legal and factual issues that cannot be resolved on the record developed.

Open issues include, at a minimum, the amount of control that CNY retains over the subway system's operation. CNY does not deny that it is responsible for a portion of MTA funding and it is unclear whether it has veto power over MTA subway projects, particularly under circumstances when capital costs exceed the amount reserved in the lease.[6]

Accordingly, the order of the Supreme Court, New York County (Shlomo Hagler, J.), entered on or about June 6, 2019, which denied the motion of defendants Metropolitan Transportation Authority, Veronique Hakim, New York City Transit Authority and Darryl C. Irick to dismiss the complaint and denied, without prejudice, the motion of defendant the City of New York to

[6]The record only contains the original 10 year 1953 lease and a 1995 amendment, without term, which refers to prior amendments, supplements and renewals that are not provided.

dismiss the complaint, should be affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about June 6, 2019, affirmed, without costs.

Opinion by Gische, J. All concur.

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, JJ.

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

ENTERED: JUNE 04, 2020

CLERK