SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 22, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1902 The People of the State of New York, Respondent, Ind. 5681/13

-against-

Anthony Estevez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered January 20, 2015, convicting defendant, after a jury trial, of assault in the second degree and five counts of criminal possession of a forged instrument in the second degree, and sentencing him to an aggregate term of 6 months, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility

determinations. The arresting officer, who had substantial experience in recognizing ticket scalping (*see generally People v Valentine*, 17 NY2d 128, 132 [1966]), observed defendant, whom he recognized as matching the description of a person who had been recently selling forged tickets, and who was known to the police as a scalper, standing near the Madison Square Garden box office, pacing back and forth. The officer saw defendant accost a couple approaching the box office, and heard defendant ask the couple about two tickets. These factors, viewed as a whole, provided probable cause to arrest defendant for violating sections 25.11 and 25.35 of the Arts and Cultural Affairs Law, which prohibit all ticket resale transactions at such locations (*see People v Lewis*, 50 AD3d 595 [1st Dept 2008], *lv denied* 11 NY3d 790 [2008]).

The subsequent strip search conducted in a cell at the precinct was unnecessary. However, the search had not yet progressed to a strip search when the police recovered tickets from defendant's sleeve and cash from his sock, locations that were still within the scope of an ordinary search incident to arrest (*see People v Smith*, 137 AD3d 442, 443 [1st Dept 2016], *lv denied* 27 NY3d 1139 [2016]).

We reject defendant's challenges to the sufficiency and

weight of the evidence supporting the assault conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The People established that the injured officer was performing a lawful duty (*see* Penal Law § 120.05[3]) by way of evidence that was similar to the above-discussed suppression hearing evidence. The element of physical injury was established by evidence that, as a result of being repeatedly punched and kicked by defendant, the officer suffered swelling and bruising on his cheek, rib cage and hand requiring the use of ice for several days, and that the pain and soreness lasted a week (*see People v Chiddick*, 8 NY3d 445, 447 [2007]).

Defendant's challenge to the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Feinman, Kahn, JJ.

2238 Harlem Capital Center, LLC, Index 156113/14
Plaintiffs-Appellant-Respondent,

-against-

Rosen & Gordon, LLC, et al.,
Defendants-Respondents-Appellants.

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Charles E. Boulbol, P.C., New York (Charles E. Boulbol of counsel), for appellant-respondent.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Virginia K. Trunkes of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 6, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff tenant's motion for summary judgment on its conversion claim, granted plaintiff's motion to dismiss defendants' counterclaims and cross claims, and denied defendants' cross motion to dismiss plaintiff's complaint and to order summary judgment on their attorneys' fees claim, unanimously modified, on the law, to grant defendants' cross motion to the extent of dismissing plaintiff's claim for breach of the lease, and otherwise affirmed, without costs.

Plaintiff failed to make a prima facie showing of entitlement to judgment on the conversion claim as the bank statement showing that the alleged security deposit was held in

equities and fixed income investments does not clearly demonstrate a violation of General Obligations Law § 7-103 (1) or that defendants commingled the deposit with personal funds. While defendants' failure to respond to plaintiff's notice, which alleged commingling and requested the name and address of the bank where the deposit was placed, permits the court to infer that landlord violated the statute by commingling the deposit with personal funds (*Dan Klores Assoc. v Abramoff*, 288 AD2d 121 [1st Dept 2001]; *see also Paterno v Carroll*, 75 AD3d 625, 628 [2d Dept 2010]; *LeRoy v Sayers*, 217 AD2d 63, 68 [1st Dept 1995]), this inference is rebuttable (*see Dan Klores*, 288 AD2d at 121). The bank statement, which reflects an amount slightly more than the security deposit and lists the account name as "RG Security Dep," raises triable issues of fact with respect to whether there was actually commingling. Plaintiff relies solely on the bank statement and the inference to support its motion.

Even where the funds are not properly segregated in the first instance, a landlord may cure the defect during the term of the lease (*see Spagnoletti v Chalfin*, 131 AD3d 901 [1st Dept 2015]; *Dan Klores*, 288 AD2d at 121 [inference of commingling existed when the lease expired]; *see also 160 Realty Corp. v 162 Realty Corp.*, 113 NYS2d 618 [Sup Ct NY County 1952], *affd* 280 App

Div 762 1st Dept 1952]). It is the landlord's burden to prove that it did not commingle the security deposit with other funds (*see U.S. Legal Support, Inc. v Eldad Prime, LLC*, 125 AD3d 486, 488 [1st Dept 2015] [landlord's failure to deposit the tenant's security into an interest-bearing account created a presumption of conversion]). Here, because it is not established that tenant successfully terminated its tenancy in June 2013 when it returned the keys, and may have remained responsible for all terms of the lease until some later date, as defendant alleges, defendant's bank statement and testimonial evidence are sufficient to defeat summary judgment (*see Park Towers S. Co., LLC v 57 W. Operating Co., Inc.*, 96 AD3d 443 [1st Dept 2012]). The record contains documents that suggest that landlord has applied the funds from the security deposit to various expenses attributable to the tenancy. Ultimately, of course, if landlord cannot prove that the security deposit was segregated prior to the termination of the lease, it will be required to repay those monies to tenant, with interest (*Dan Klores* at 121-122).

Supreme Court did not explicitly address that branch of landlord's motion seeking dismissal of tenant's complaint, and therefore the motion is deemed denied (*Genger v Arie Genger 1995 Life Ins. Trust*, 84 AD3d 471, 472 [1st Dept 2011]). The statute

of limitations for conversion is three years (*Harmit Realties LLC v 835 Ave. of the Ams., L.P.*, 128 AD3d 460 [1st Dept 2015]). A claim for conversion accrues when the conversion or taking occurred (*Sporn v MCA Records*, 58 NY2d 482, 488-489 [1983]; *Close-Barzin v Christie's, Inc.*, 51 AD3d 444 [1st Dept 2008]). Tenant alleged in the complaint that the commingling occurred "from and after September 2002" and the security deposit notice was ignored until February 2013. It is unclear from the evidence presented when, if ever, the commingling occurred. Accordingly, discovery is needed to resolve when the conversion claim accrued. Moreover, plaintiff properly pleaded conversion.

The statute of limitations for breach of fiduciary duty is three years where the relief sought is monetary (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). "A breach of fiduciary duty claim accrues where the fiduciary openly repudiates his or her obligation — i.e., once damages are sustained" (*Lebedev v Blavatnik*, __ AD3d __, 2016 NY Slip Op 06463, *8 [1st Dept 2016]). Landlord did not "openly repudiate" its obligations under General Obligations Law § 7-103 until it ignored the security deposit notice in February 2013, less than two years before commencement of this action. In addition, tenant adequately pleaded landlord's breach of fiduciary duty,

commingling the deposit by landlord, and damages regarding landlord's failure to return the deposit.

Plaintiff's breach of lease claim is solely premised on the commingling of the deposit with personal funds; however, the lease does not prohibit such activity. Thus, while such commingling violates the statute, it does not violate the lease. Accordingly, this claim should have been dismissed.

Plaintiff made sufficient allegations to support claims against the individual defendants for participating in the commingling of plaintiff's deposit.

As for defendants' attorneys' fees claim, defendants do not seek to enforce any right under the lease in this action, and merely assert their right to apply the security deposit to plaintiff's outstanding debts as a defense. As tenant's obligation to pay landlord's attorneys' fees in this situation is not "virtually inescapable" (*Gotham Partners, L.P. v High Riv.*

Ltd. Partnership, 76 AD3d 203, 209 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]) and "unmistakably clear" (*Adesso Café Bar & Grill, Inc. v Burton*, 74 AD3d 1253, 1254 [2d Dept 2010]), this claim was properly dismissed.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

2266N In re New York City Asbestos Litigation — Index 190413/13

- - - - -

Claudia DiScala, etc.,
Plaintiff-Respondent,

-against-

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

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

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Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for appellant.

Levy Konigsberg LLP, New York (Matthew A. Toporowski of counsel), for respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered March 8, 2016, which denied the motion of defendant Whittaker Clark & Daniels, Inc. (Whittaker) to include in the record the PowerPoint presentations used by plaintiff's counsel during opening and closing statements, unanimously modified, to direct that the PowerPoint presentation used during closing statements be included in the record, and otherwise affirmed, on the law, without costs.

Whittaker's objections to the content of plaintiff's

counsel's PowerPoint presentation used during its opening arguments are waived, since Whittaker's counsel reviewed and consented to it in advance of opening statements. However, Whittaker timely objected to the content of the PowerPoint presentation used by plaintiff's counsel in its summation, and timely moved to include it in the record. The question of whether the jury may have been prejudiced by slides shown during closing arguments, including slides counsel cycled through quickly, is an issue likely to be raised on a post-verdict CPLR 4404(a) motion, and on appeal (*People v Santiago*, 22 NY3d 740, 750-751 [2014]). Accordingly, the PowerPoint slides used by plaintiff's counsel during summation should have been included in the record.

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

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

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

2276-
2277 Index 653722/13

Leslie Trinin,
Plaintiff-Appellant,

-against-

Victoria Classics, Ltd., et al.,
Defendants-Respondents.

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Law Offices of Roger D. Olson, New York (Roger D. Olson of counsel), for appellant.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Richard M. Howard of counsel), for respondents.

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Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered April 7, 2016, awarding plaintiff judgment against defendants in the sum of $87,602.74, representing an unpaid bonus for 2007 plus interest, as well as judgment of $30,472 in liquidated damages, legal fees and reimbursable expenses, unanimously modified, on the facts, to increase the legal fees award by the amount of $10,675, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly. Appeal from order, same court and Justice, entered March 9, 2015, which, inter alia, denied plaintiff's cross motion for summary judgment with respect to unpaid bonuses for the years 2008-2013, and granted defendants' motion for summary judgment

dismissing the claims with respect to those years, and referred the issue of reasonable attorneys' fees to a special referee, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The terms of the parties' agreement, as determined within its four corners and disregarding extrinsic evidence, are unambiguous (*Brad H. v City of New York*, 17 NY3d 180, 185-186 [2011]), and only entitle plaintiff to a bonus for 2007.

The amendment to Labor Law § 198(1-a), which took effect on April 9, 2011, was not intended by the Legislature to apply retroactively and, therefore, plaintiff is only entitled to recover liquidated damages equal to 25% of the total amount of the wages found to be due (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]; *see Gold v New York Life Ins. Co.*, 730 F3d 137, 143-144 [2d Cir 2013]; *Galeana v Lemongrass on Broadway Corp.*, 120 F Supp 3d 306, 317-319 [SD NY 2014]).

The special referee correctly determined that the lodestar method of calculating the fees due to plaintiff was reasonable under the circumstances of this case (*Sheridan v Police Pension Fund, Art. 2 of City of N.Y.*, 76 AD2d 800, 801 [1st Dept 1980]; *Friar v Vanguard Holding Corp.*, 125 AD2d 444 [2d Dept 1986]; *see*

Nager v Teachers' Retirement Sys. of City of N.Y., 57 AD3d 389, 390 [1st Dept 2008], *lv denied* 13 NY3d 702 [2009]). However, the mathematical formula was incorrectly applied, requiring that the legal award be increased by the amount of $10,675, for a total legal fees award of $19,049.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2519 The People of the State of New York, Ind. 2358/11
Respondent,

-against-

Juan Ponce,
Defendant-Appellant.

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

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

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered September 23, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or were outweighed by the seriousness of the underlying crime, which consisted of sexual assaults on a child over an extended period.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

We have considered and rejected defendant's constitutional arguments.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2520 Visions Federal Credit Union as Successor by Merger to Paragon Federal Credit Union, Plaintiff-Respondent, Index 381197/11

-against-

Michael Perez, Jr., et al., Defendants-Appellants,

Clerk of the Criminal Court of the City of New York, et al., Defendants.

_____

Lettera & Mosiello Law Group, LLP, White Plains (Barak P. Cardenas of counsel), for appellants.

Dorf & Nelson LLP, Rye (Jonathan B. Nelson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 20, 2015, which, following a traverse hearing, denied the motion of defendants Michael Perez, Jr. and Navia Perez to dismiss the complaint as against them for lack of personal jurisdiction, unanimously affirmed, without costs.

There exists no basis to disturb the hearing court's determination, based on an assessment of the witnesses' credibility, that service was properly effected upon defendants.

Defendants failed to establish that they did not reside at the mortgaged property where plaintiff's process server delivered and mailed the summons and complaint (*see Arrufat v Bhikhi*, 101 AD3d 441 [1st Dept 2012]).

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2523 The South Tower Residential Board of Managers of Time Warner Center Condominium, Plaintiff-Respondent, Index 156148/12

-against-

The Ann Holdings, LLC, formerly known as The Ann LLC, Defendant-Appellant.

_____

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about October 30, 2015, which denied defendant's motion for summary judgment dismissing plaintiff's request for attorneys' fees, unanimously affirmed, with costs.

Defendant's argument that plaintiff is not entitled to attorneys' fees should have been raised in its prior appeal, which resulted in this Court's affirmance of a judgment in favor of plaintiff (127 AD3d 485 [1st Dept 2015], *lv dismissed* 25 NY3d 1196 [2015]). Thus, the issue will not be considered on this appeal (*see Katz v City of New York*, 231 AD2d 448 [1st Dept 1996]; *Harbas v Gilmore*, 214 AD2d 440 [1st Dept 1995], *lv*

dismissed 87 NY2d 861 [1995]). The error in allowing plaintiff to obtain attorneys' fees is not so fundamental as to impel us to address this issue in the interest of justice (*cf. Abreu v Manhattan Plaza Assoc.*, 214 AD2d 526, 527 [2d Dept 1995], *lv denied* 86 NY2d 707 [1995]).

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2524 The People of the State of New York, Ind. 621/10
Respondent,

-against-

Gigi Jordan,
Defendant-Appellant.

_____

Law Office of Marc Fernich, New York (Marc Fernich of counsel), and Law Office of Allan L. Brenner, Long Beach (Allan L. Brenner of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered May 28, 2015, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing her to a term of 18 years, unanimously affirmed.

The court properly declined to instruct the jury on the defense of duress, and properly excluded evidence having no relevance except to the extent it supported a legally baseless purported duress defense. Furthermore, even if the excluded evidence had been admitted there would still have been no basis for a duress charge. The strange, euthanasia-like defense offered by defendant did not satisfy any of the statutory requirements of a duress defense.

Viewed most favorably to defendant, her claim was essentially that she killed her eight-year-old son because she believed that her dangerous ex-husband would kill her at some future time, that her death would lead to her son being sexually abused by another ex-husband, who was the boy's biological father, and that her son would be better off dead than being subject to such abuse. Initially, we note that defendant was not precluded from raising a psychiatric defense, and she did assert an extreme emotional disturbance defense, which the jury apparently accepted when it acquitted her of murder.

The affirmative defense of duress requires proof that a defendant engaged in proscribed conduct because he or she was "coerced to do so by the use or threatened imminent use of unlawful physical force," which force or threatened force must be such that "a person of reasonable firmness in [the defendant's] situation would have been unable to resist" (Penal Law § 40.00). Inherent in the concept of coercion is that a third party compels a defendant to commit a particular crime, and does so by using or threatening force. Here, there was no claim that defendant's ex-husband made any threats aimed at coercing defendant into harming her son. In any event, the ex-husband's alleged threat of harm to defendant was not "imminent" (*see People v Moreno*, 58 AD3d

516, 518 [1st Dept 2009], *lv denied* 12 NY3d 819 [2009]).

Defendant's Sixth Amendment right to a public trial was not violated when the court briefly closed the courtroom during a discussion of a legal matter relating to protecting the jury from exposure to publicity about the case. This was the equivalent of a sidebar, robing room or chambers conference. The right to a public trial does not extend to such conferences, and does not restrict judges "in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings" (*Richmond Newspapers, Inc. v Virginia*, 488 US 555, 598, n 23 [1980]; *see People v Olivero*, 289 AD2d 1082 [4th Dept 2001], *lv denied* 98 NY2d 639 [2002]). Moreover, the conference had no impact upon the conduct of the trial other than having the court repeat its previous instructions about trial publicity and minutes and exhibits that had been sealed were unsealed the same day.

The record does not establish that defendant's sentence was based on any improper factors, and we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2525 Laverne Pierre, Index 76179/08
Plaintiff-Appellant,

-against-

Derick M. Pierre,
Defendant-Respondent.

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Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Amanda Giglio of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Nelida Malave-Gonzalez, J.), entered January 8, 2015, which to the extent appealed from as limited by the brief, awarded defendant husband, 50% of the marital home and computed child support arrears from June 19, 2008 through March 2011 only, unanimously modified, on the law, the facts and in the exercise of discretion, to award plaintiff wife 95% of the marital home and additional child support arrears for the period April 2011 through November 24, 2014, at a rate of $746 per month, for a total arrears of $57,069, and otherwise, affirmed, without costs.

Marital fault can only be considered under Domestic Relations Law § 236(B)(5)(d)(14), where the misconduct is "so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship--misconduct that 'shocks the conscience'

of the court, thereby compelling it to invoke its equitable power to do justice between the parties" (*Howard S. v Lillian S.*, 62 AD3d 187, 190-191 [1st Dept 2009], *affd* 14 NY3d 431 [2010]). To be deemed egregious, the conduct must callously imperil the value society places on human life and "'the integrity of the human body'" (*Havell v Islam*, 301 AD2d 339, 345 [1st Dept 2002], *lv denied* 100 NY2d 505 [2003]).

Here, defendant stabbed plaintiff wife two times with a steak knife, slammed her head against the toilet and put it into the bowl, causing her to enter a coma, require months of hospitalization and five surgeries, and rendering her disabled. He pleaded guilty to attempted assault in the first degree. This conduct is so egregious as to warrant a reduction in the equitable distribution award to defendant husband.

With respect to child support, the court improperly failed to include in its award retroactive child support to the date of the judgment, a period of some 43 months.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2527 The People of the State of New York, Ind. 824/13
Respondent,

-against-

Luis Gonzalez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered November 12, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years with three years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the period of postrelease supervision to 1½ years, and otherwise affirmed.

The verdict rejecting defendant's agency defense was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Among other things, defendant led the undercover officer to an accomplice, whom he knew was working in

the area at the time, touted the quality of the heroin, accompanied the officer and accomplice to a building where defendant stood as a lookout during the sale, and remained with the accomplice after the sale. Thus, it is a reasonable inference that defendant acted as a steerer whose duties included escorting customers to the place of the sale, and there was no evidence suggesting that he was doing a risky "favor" for a total stranger (*see People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]; *see also People v Vaughan*, 300 AD2d 104 [1st Dept 2002], *lv denied* 99 NY2d 633 [2003]).

Defendant's claim under *People v O'Rama* (78 NY2d 270 [1991]), which involves a jury note that the court read into the record in full before responding, is concededly unpreserved, and we decline to review it claim in the interest of justice. As an alternative holding, we find that although the court should have discussed the note with counsel on the record outside the jury's presence before responding, defendant was not prejudiced by the lack of full compliance with the *O'Rama* procedures. The court merely reread portions of the charge already provided to the jury, and counsel's input into any response could have only been minimal (*People v Snider*, 49 AD3d 459, 460 [1st Dept 2008], *lv denied* 11 NY3d 795 [2008]).

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]). The undercover officer testified that, among other things, he was still working in the vicinity of defendant's arrest. Such testimony has consistently been held to demonstrate a substantial probability that the officer's undercover status and safety would be jeopardized by testifying in an open courtroom (*see People v Echevarria*, 21 NY3d 1, 12-14 [2013], *cert denied sub nom. Johnson v New York*, __US__, 134 S Ct 823 [2013]; *People v Sykes*, 135 AD3d 535 [1st Dept 2016], *lv denied* 27 NY3d 969 [2016]; *People v Williams*, 134 AD3d 639, 640 [1st Dept 2015], *lv denied* 27 NY3d 970 [2016]). Furthermore, the record sufficiently demonstrates that the court fulfilled its obligation under *Waller* to consider reasonable alternatives, and, to the extent the court considered some alternatives and not others, it can be imferred that the court determined that no lesser alternative would suffice (*see Echevarria*, 21 NY3d at 14-19).

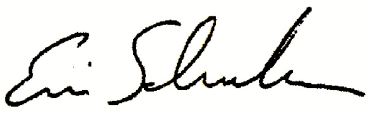
Defendant's constitutional challenge to his prison sentence, which is the minimum permitted by law because of his prior violent felony conviction, is unpreserved (*see People v Tufano*, 105 AD3d 648, 649 [1st Dept 2013], *lv denied* 21 NY3d 1011

[2013]), and we decline to review it in the interest of justice. As an alternative holding, we find this claim unavailing (*see People v Thompson*, 83 NY2d 477, 480 [1994]; *People v Broadie*, 37 NY2d 100, 114-15 [1975], *cert denied* 423 US 950 [1975]).

However, as the People concede, since the court stated that it was imposing the "minimum" period of postrelease supervision permitted by law, but actually imposed a greater period, we modify the sentence accordingly.

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

ENTERED: DECEMBER 22, 2016



DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2528 The People of the State of New York, Ind. 4654/11
Respondent,

-against-

Jose Milan,
Defendant-Appellant.

_____

Patrick J. Brackley, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 19, 2014, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the court's finding that defendant had no reasonable expectation of privacy in duffel bags after he left them on the ground in a public place and walked away in an obvious effort to distance himself from the bags (*see People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Sosa*, 246 AD2d 387 [1st Dept 1998], *lv denied* 91 NY2d 945 [1998]), notwithstanding

that he later admitted that the bags were his. The record also supports the court's alternative finding that, based on a chain of suspicious circumstances, including defendant's walking away from the bags, and his false and evasive answers (*see e.g. People v Wigfall*, 295 AD2d 222 [1st Dept 2002], *lv denied* 99 NY2d 50 [2002]), the police were in reasonable fear for their safety and were justified in inspecting the bags as a safety measure (*see People v Moore*, 32 NY2d 67, 71 [1973], *cert denied* 414 US 1011 [1973]).

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2529 Athlyn Williams, Index 300091/09
Plaintiff-Appellant,

-against-

River Place II, LLC, et al.,
Defendants-Respondents,

"John Doe," et al.,
Defendants.

_____

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

Harrington, Ocko & Monk, LLP, White Plains (Dominic S. Curcio of counsel), for River Place II, LLC, Larry Silverstein, Inc., Silverstein Properties, Gotham Construction, Co., LLC. and Pro Safety Services, LLC, respondents.

Quirk and Bakalor, P.C., Garden City (Richard H. Bakalor of counsel), for S-B Power Tool Co., Skill Power Tool Co. and Robert Bosch Tool Co., respondents.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered March 12, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.5(c)(3) and 23-1.12(c)(a), the Labor Law § 200 and common-law negligence claims, and the products liability claims, and denied plaintiff's cross motion for spoliation sanctions, unanimously modified, on the

law, to deny defendants River Place II, LLC, Larry Silverstein, Silverstein Properties, Inc., Gotham Construction Co., LLC, and Pro Safety Services, LLC's motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on a violation of Industrial Code (12 NYCRR) § 23-1.5(c)(3) as against River Place II, Larry Silverstein, and Gotham Construction, and otherwise affirmed, without costs.

Plaintiff claims he was injured while using a power saw with a blade with broken teeth. He further claims he twice asked his supervisor for a replacement blade which was not furnished.

Plaintiff argues that the Labor Law § 241(6) claim is properly supported by violations of Industrial Code (12 NYCRR) §§ 23-1.5(c)(3) and 23-1.12(c)(1). There is no evidence that 12 NYCRR 23-1.12(c)(1), which requires that a power saw be equipped with "a movable self-adjusting guard below the base plate which will completely cover the saw blade to the depth of the teeth when such saw blade is removed from the cut," was violated. However, evidence that there were teeth missing from the blade of the saw that plaintiff was using when he was injured raises issues of fact whether defendants River Place II, LLC, as the alleged owner, Larry Silverstein as the owner's alleged agent, and Gotham Construction, Co., LLC, as the general contractor,

violated 12 NYCRR 23-1.5(c)(3), which requires that "[a]ll safety devices, safeguards and equipment in use shall be kept sound and operable, and shall be immediately repaired or restored or immediately removed from the job site if damaged," and whether that violation was a proximate cause of plaintiff's accident (*see Becerra v Promenade Apts. Inc.*, 126 AD3d 557 [1st Dept 2015]; *Perez v 286 Scholes St. Corp.*, 134 AD3d 1085 [2d Dept 2015]). Contrary to plaintiff's contention, defendant Pro Safety Services, LLC, a safety consultant to Gotham Construction, is not subject to liability under Labor Law § 241(6) (*Cappabianca v Skanska USA Bldg. Inc.*, 39 AD3d 139, 148 [1st Dept 2012]).

Since plaintiff's accident was caused not by a dangerous condition of the work site but by plaintiff's employer's means, methods, and materials, and there is no evidence that defendants River Place II, LLC, Larry Silverstein, Silverstein Properties, Inc., Gotham Construction, Co., LLC, and Pro Safety Services, LLC exercised supervision and control over the injury-causing work, the Labor Law § 200 and common-law negligence claims were correctly dismissed (*see Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). Nor are said defendants liable for any defects in the saw, which was supplied to plaintiff by his employer (*see Zucchelli v City Constr. Co.*, 4 NY2d 52 [1958]; *Lusardi v Regency*

Joint Venture, 35 AD2d 264 [1st Dept 1970]; *see also Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013]).

The manufacturer defendants made a prima facie showing that their power saw was designed and manufactured under state of the art conditions, that their manufacturing process complied with applicable industry standards, and that plaintiff's own misuse of the saw could have caused the accident (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218 [2008]). In opposition, plaintiff relied on the fact that the accident happened, and failed to show that the saw did not perform as intended and that there were no other possible causes for its failure not attributable to the manufacturer defendants (*see Small v Caprara*, 100 AD3d 1353 [4th Dept 2012]). Nor did plaintiff show that the saw, as designed, was not reasonably safe for its use and that it was feasible to design the saw to be safer (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]).

Plaintiff submitted no evidence that his expert, a civil engineer with a background in building design, was qualified to opine on the design and manufacture of power saws. However, in any event, the expert did not opine that the danger of the saw outweighed its utility, and did not offer a superior alternative design that would have prevented the accident. Although he

discussed the use of a riving knife, he did not address defendants' expert's statement that the riving knife, a removable component, would have had to be detached before plaintiff could perform the pocket cut that he was engaged in at the time of his accident. Nor did plaintiff's expert address defendants' expert's statement that riving knives were not state of the art and that their use increased the failure rates of lower guards, which made the design of the saw less safe.

Plaintiff failed to show that the warnings on the saw and in the manual – warnings that he did not read – were insufficient or that their insufficiency was a proximate cause of the accident (*see Reis v Volvo Cars of N. Am., Inc.*, 73 AD3d 420, 423 [1st Dept 2010]).

In support of his motion for spoliation sanctions, plaintiff made no showing that defendants were ever in possession or control of the saw, which was given to him by his employer.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2530 Peter Guido, Index 113126/10
Plaintiff-Appellant,

-against-

The Dormitory Authority of the State
of New York, et al.,
Defendants-Respondents-Appellants,

Sea Crest Construction Corp.,
Defendant-Respondent.
- - - - -
Turner Construction Company,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Owen Steel Company, Inc., et al.,
Third-Party Defendants-Respondents-Appellants.
- - - - -
Hillside Iron Works,
Second Third-Party Plaintiff-Appellant,

-against-

P.I.I., LLC,
Second Third-Party Defendant-Respondent.
- - - - -
Sea Crest Construction Corp.,
Third Third-Party Plaintiff-Respondent,

-against-

Owen Steel Company, Inc., et al.,
Third Third-Party Defendants-Appellants,

P.I.I., LLC,
Third Third-Party Defendant-Respondent.
_____

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

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for the Dormitory Authority of the State of New York, respondent-appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (David P. Feehan of counsel), for Turner Construction Company, respondent-appellant/appellant-respondent.

Fabiani Cohen & Hall, LLP, New York (Marc M. Mahoney of counsel), for Owen Steel Company, Inc., respondent-appellant/appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Hillside Iron Works, respondent-appellant/appellant and Maximum Security Products Corp., appellant.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for Sea Crest Construction Corp., respondent.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for P.I.I., LLC, respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered February 10, 2015, which, to the extent appealed from as limited by the briefs, granted defendants', third-party defendant Hillside Iron Works', and second third-party defendant P.I.I., LLC's motions for summary judgment dismissing the complaint, granted third-party defendant Owen Steel Company, Inc.'s motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against it, denied plaintiff's motion to amend the complaint to add direct claims against Hillside and Owen,

granted Hillside, Owen, defendant Turner Construction Company and defendant Sea Crest Construction Company's motions for summary judgment dismissing all counterclaims and cross claims against them, and denied Hillside's motion for summary judgment on its contractual indemnification claim against P.I.I. (PII), unanimously modified, on the law, to grant Hillside's motion for summary judgment against PII, and otherwise affirmed, without costs.

The work that plaintiff was engaged in when he was injured, i.e., retrieving ladders that his employer had used in its work at the site, was a construction-related activity covered by Labor Law §§ 240(1) and 241(6) (*see Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]). However, it did not present an elevation-related risk contemplated by Labor Law § 240(1) (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 407-408 [2005]; *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711 [2d Dept 2007], *lv denied* 10 NY3d 701 [2008]). Moreover, in view of plaintiff's testimony that he did not notice the tilt of the truck onto which he was loading the ladders, any elevation differential resulting from the tilt was de minimis. Nor is Industrial Code (12 NYCRR) § 23-1.7(e), which requires that passageways and working areas be kept free of accumulations of

dirt and debris, a proper predicate for plaintiff's Labor Law § 241(6) claim, since the area outside the gate to the loading dock where plaintiff parked his truck was not a passageway or working area (*see Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592 [1st Dept 2013]; *Dacchille v Metropolitan Life Ins. Co.*, 262 AD2d 149 [1st Dept 1999]; *Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013]).

While issues of fact exist whether Turner or Sea Crest was responsible for clearing debris from the area where plaintiff parked his truck on debris that allegedly caused it to tilt, the record demonstrates as a matter of law that plaintiff was the sole proximate cause of his accident (*see Kerrigan v TDX Constr. Corp.*, 108 AD3d 468 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]). Although the first ladder that he loaded onto the rack atop the truck slid toward the end of the rack as he loaded it, after plaintiff had secured it with a bungee cord and loaded the second ladder, instead of taking another of the several bungee cords available to him, he unhooked the bungee cord securing the first ladder, intending to wrap it around both ladders, and the ladders slid into him and knocked him off the truck. In view of the foregoing, plaintiff's proposed amended complaint is devoid of merit (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117

AD3d 421 [1st Dept 2014]).

Hillside's subcontract with PII required PII to indemnify Hillside for damages and losses, including legal fees, arising from injury "resulting from" acts or omissions of PII and its employees in connection with the performance of PII's work pursuant to the subcontract. As plaintiff's accident occurred during construction-related activity at the site while plaintiff was performing PII's work pursuant to the subcontract, Hillside is entitled to indemnification by PII. The subcontract does not require a showing of negligence on PII's part to trigger the indemnification obligation.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2531 In re Jose M.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about August 4, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted assault in the third degree and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding 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 court's credibility determinations. The evidence established the elements of each of the offenses at issue.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2532 The People of the State of New York, Ind. 1671/12
Respondent,

-against-

Taryn Miller,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Wachtell, Lipton, Rosen & Katz, New York (Vladislav S. Vainberg of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered December 18, 2013, convicting defendant, after a jury trial, of grand larceny in the first degree, and sentencing her to a term of three to nine years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Defendant argues that her conviction was based on the improper aggregation of the amounts of five separate thefts to reach the one million dollar property value threshold for grand larceny in the first degree (Penal Law § 155.42). In each instance, defendant acted in concert with the bookkeeper for the Kings County Public

Administrator who had devised a method for generating fraudulent checks made payable to accomplices and camouflaging the unauthorized disbursements in the Public Administrator's record system. Defendant's role in the scheme included recruiting relatives, friends or acquaintances to receive the fraudulent checks, delivering the checks, and coordinating the distribution of the stolen funds by instructing the recipients, who were allowed to keep some of the proceeds for themselves, to issue bank checks, make bank transfers, or withdraw and pay large sums of cash to other people – most often defendant herself.

Multiple thefts from the same owner may be aggregated only if a defendant acted "pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme" (*People v Cox*, 286 NY 137, 142 [1941]; *see also People v Rossi*, 5 NY2d 396 [1959]). Defendant argues that aggregation was improper here both because the multiple thefts were from different "owners" for purposes of aggregation, and because, even if the Public Administrator was the same owner, the evidence was legally insufficient to prove that the thefts involved a unitary fraudulent scheme, rather than separate and independent impulses.

The Public Administrator administers the estates of intestate decedents lacking heirs willing and able to act in that

capacity, and is therefore, for the purpose of determining whether a larceny occurred, an "owner" of the estates under the Penal Law, which defines stealing as the wrongful taking, obtaining, or withholding of property from an "owner thereof" (Penal Law § 155.05[1]), and defines "owner thereof" as "any person who has a right to possession superior to that of the taker, obtainer, or withholder" (Penal Law § 155.00[5]). However, defendant urges that when the issue is aggregation, a different definition of "owner" should control, requiring that the owner be the "real" or "ultimate" owner, and excluding an entity that exercises a custodial function over the property of others from qualifying as the "same owner."

We see no compelling reason, based on legislative intent or otherwise, for looking behind the statutory definition of owner when assessing whether aggregation is warranted. Nor do we find any support in case law for such an approach. In particular, *People v Hinds* (77 AD3d 429 [1st Dept 2010], *lv denied* 15 NY3d 953 [2010]), on which defendant relies, does not support her argument on this issue. *Hinds* was decided on the ground that the multiple thefts at issue there were not the product of a "single intent and one general fraudulent plan" (*id.* at 430). The question whether a bank, where all of the individual looted

accounts were located, was the "same owner" for purposes of aggregation was neither litigated by the parties nor decided by this Court. Accordingly, as to this particular issue, *Hinds* lacks precedential effect (*see e.g. Texas v Cobb*, 532 US 162, 169 [2001]; *People v Louree*, 8 NY3d 541, 546 n [2007]).

The evidence also supports the conclusion that defendant's thefts were committed pursuant to a single, ongoing intent (*see People v Malcolm*, 131 AD3d 1068 [2d Dept 2015], *lv denied* 27 NY3d 1153 [2016]; *People v Danielson*, 9 NY3d 342 [2007]). We have considered and rejected defendant's remaining arguments regarding aggregation.

Although certain hearsay testimony from one of defendant's accomplices should have been excluded, this testimony was limited and nonprejudicial, and any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2533 Helen Siller, Index 151313/14
Plaintiff-Appellant,

-against-

The Third Brevoort Corporation,
et al.,
Defendants-Respondents.

_____

The Law Offices of Daniel S. Steinberg P.C., New York (Daniel S. Steinberg of counsel), for appellant.

Abrams Garfinkel Margolis Bergson, LLP, New York (Barry G. Margolis of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered July 15, 2015, which granted defendants' motion to dismiss the second amended complaint with prejudice, unanimously affirmed, with costs.

The gravamen of the complaint is that defendants Third Brevoort Corporation and Diane C. Nardone, the president of the coop board, breached plaintiff's proprietary lease and a 1990 agreement under which plaintiff built a laundry room in her apartment by refusing to allow her to replace her broken washer and dryer with machines of her choice rather than any of the three brands that the coop's house rules, as amended in 2010, allow for replacement machines.

The governing agreements flatly contradict plaintiff's allegations of breach of contract (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Plaintiff has not identified a single term or provision that gives her a contractual right in perpetuity to install any replacement laundry machine she chooses. She relies generally upon the board's approval of her plans to construct the laundry room in 1990 and the lease provision making her solely responsible for repairing her appliances, but nothing in those agreements gives her a right to repair the appliances in a manner that conflicts with the house rules. In fact, plaintiff concedes that she is required by the agreements to seek the board's approval before replacing her machines.

Plaintiff's reliance upon the provision of the lease requiring that any house rules be "reasonable" is unavailing (*Braun v 941 Park Ave., Inc.*, 32 AD3d 21, 24 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). Even under a standard of reasonableness, rather than the less stringent business judgment rule, plaintiff has not established a breach, since the house rule at issue is reasonable on its face and was not unfairly targeted at plaintiff.

Absent an underlying breach of contract, the claim for attorneys' fees under Real Property Law § 234 and paragraph 27 of

the lease fails to state a cause of action. The claim for an injunction and declaratory relief is duplicative of the breach of contract claim (*see Anonymous v Axelrod*, 92 AD2d 789 [1st Dept 1983]); in addition, there has been no showing of irreparable harm (*see Unique Laundry Corp. v Hudson Park NY LLC*, 55 AD3d 382, 384 [1st Dept 2008]). The claim for declaratory relief under RPAPL 1515 is unsupported by an alleged adverse property claim by the coop (*East 41st St. Assoc. v 18 E. 42nd St.*, 248 AD2d 112 [1st Dept 1998]).

The claims asserted against Nardone for prima facie tort and tortious interference with contract, based on the speculative and far-fetched theory that Nardone blocked plaintiff's attempts to replace her washing machines in order to receive a kickback, fail to state causes of action. The claim that Nardone violated Judiciary Law § 487 by making false and misleading statements in an affirmation fails to state a cause of action, because Nardone is a party to this action who is represented by counsel and not acting in her capacity as an attorney (*see e.g. Seldon v Spinell*,

95 AD3d 779, 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]).

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

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2534 Desiree Smith, as Administratrix of the Goods, Chattels and Credits which were of Connie Hobson, deceased, etc., Plaintiff-Appellant, Index 305814/08

-against-

Frank Watkins, M.D., et al., Defendants,

St. Barnabas Hospital, Defendant-Respondent.

_____

William Schwitzer & Associates, New York (Dennis A. Breitner of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered March 19, 2015, which, to the extent appealed from as limited by the briefs, granted the motion of defendant St. Barnabas Hospital for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying plaintiff's request for an adjournment to permit her to provide a supplemental expert affirmation after St. Barnabas provided three pages from its expert's affirmation that had been inadvertently omitted. The omitted pages were largely repetitive

of the remainder of the affirmation, and the substance of those pages was recounted in the motion papers.

Plaintiff alleges that two physicians at St. Barnabas, defendants Watkins and Erlikh, departed from the standard of medical care in treating the decedent, who was admitted to the hospital after fracturing her hip. Assuming that St. Barnabas could be held vicariously liable for malpractice committed by those physicians, Drs. Watkins and Erlikh were granted summary judgment dismissing the claims against them and plaintiff has not pursued an appeal as to those claims. As there is no liability for plaintiffs' decedent's injuries or wrongful death against Drs Watkins and Erlikh, there can be no vicarious liability against the hospital (*see Kukic v Grand*, 84 AD3d 609 [1st Dept 2011]). Assuming the physicians acted with apparent agency on behalf of the hospital, liability is still "contingent upon the plaintiff having a viable claim against the physician who treated [her]" (*Polgano v Christakos*, 104 AD3d 501, 502 [1st Dept 2013]).

Plaintiff's argument that the hospital could still be found liable based on its overall negligence or negligence of other employees in treating decedent, who was a service patient, is unavailing (*see Escobar v New York Hosp.*, 111 AD2d 128, 129 [1st Dept 1985]). Plaintiff did not allege or provide evidence to

support a claim of independent negligence against St. Barnabas. Plaintiff's medical expert only addressed the negligence of defendant doctors, not of St. Barnabas' staff, and there is no claim that any doctor's orders were so clearly contraindicated that St. Barnabas' staff should have questioned the orders. Accordingly, there is no basis for finding that the hospital staff committed independent acts of negligence (*see Suits v Wyckoff Hgts Med. Ctr.*, 84 AD3d 487, 488 [1st Dept 2011]; *Walter v Betancourt*, 283 AD2d 223, 224 [1st Dept 2001]).

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

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2535 The People of the State of New York Dkt. 42499C/11
Respondent,

-against-

Jose Quezada,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered July 30, 2012, convicting defendant, after a nonjury trial, of attempted assault in the third degree (three counts), harassment in the second degree (three counts) and menacing, and sentencing him to an aggregate term of 120 days, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). As to each of

the incidents at issue, there is no basis for disturbing the trial court's credibility determinations, including its evaluation of alleged inconsistencies and conflicting testimony.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2536 110 West 123 Street Realty Associates, LLC, Plaintiff-Respondent, Index 157940/12

-against-

High Power Construction Corp., Defendant-Appellant.

- - - - -

[And a Third-Party Action]

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Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for appellant.

Fishbeyn & Briskin, LLC, New York (Peter E. Briskin of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 23, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

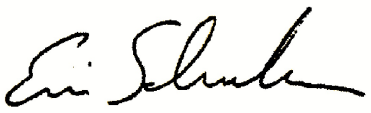
Defendant failed to meet its initial burden of establishing, as a matter of law, that its acts and/or omissions did not cause or contribute to the collapse of plaintiff's building (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Triable issues of fact exist as to the nature and scope of defendant's involvement in the renovation work at that premises. Third-party defendant Artour Kagulian, whose work is

alleged to have caused and/or contributed to the collapse, identified himself as a manager employed by defendant to run the project, which work defendant was to review on a weekly basis. Furthermore, two permits were issued to defendant for the project, for which defendant was paid, and defendant insured the work.

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

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

ENTERED: DECEMBER 22, 2016



DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2537 Sarah Weinberg, Index 652273/13
Plaintiff-Respondent,

-against-

Leslie Sultan, et al.,
Defendants,

Kenneth J. Glassman,
NonParty-Appellant.

_____

Kenneth J. Glassman, New York, appellant pro se.

Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 17, 2016, which denied nonparty appellant's motion for an order allowing him to release funds held by him as escrow agent to pay legal fees owed to him by plaintiff, his former client, and granted the cross motion of nonparty Brennan Law Firm PLLC, plaintiff's successor counsel, to the extent of determining that the escrow funds should be transferred to that firm to be held in escrow, unanimously affirmed, without costs.

Appellant, who represented plaintiff in unsuccessful litigation seeking, among other things, to rescind the sale of a building that she had owned (*Weinberg v Sultan*, __ AD3d __, 2016 Slip Op 05939 [1st Dept 2016]), held the net proceeds of that

sale in escrow pursuant to a court-ordered stipulation "until further Order of the court" or until plaintiff "withdraws with prejudice the cause of action for rescission" of the sale. Although appellant participated in the agreement that resulted in the net sales proceeds being placed in escrow, he has no statutory charging lien as to those funds since they were not the proceeds of the "favorable result of litigation" (*Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1st Dept 2005]; Judiciary Law § 475). Nor does appellant have a retaining lien that attaches to the escrow fund, since the funds came into his possession in his capacity as escrow agent, to be held by him as a fiduciary, subject to a stipulation governing disposition of the funds (*see PIK Record Co. v Eckstein*, 226 AD2d 122 [1st Dept 1996]; *Schelter v Schelter*, 206 AD2d 865 [4th Dept 1994]; *Marsano v State Bank of Albany*, 27 AD2d 411, 414 [3d Dept 1967], *appeal dismissed* 23 NY2d 1018 [1969]).

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2538-
2538A Index 652507/15

In re Chaim Kopicel,
Petitioner-Appellant,

-against-

Joseph Schnaier,
Respondent,

Mark Arzoomanian, et al.,
Respondents-Respondents.

_____

Law Office of Jeffrey Fleischmann, PC, New York (Jeffrey Fleischmann of counsel), for appellant.

Sichenzia Ross Friedman Ference LLP, New York (Sameer Rastogi of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered November 4, 2015, which, inter alia, denied in part the petition pursuant to Debtor and Creditor Law § 274, unanimously modified, on the law, to award petitioner prejudgment interest under CPLR 5001, and otherwise affirmed, without costs. Order, same court and Justice, entered April 19, 2016, which granted respondents' motion to renew and, upon renewal, vacated the November 4, 2015 order, unanimously reversed, on the law and in the exercise of discretion, without costs, and the prior order reinstated as modified.

Renewal should have been denied where, as here, respondents

offered no reasonable justification for failing to proffer the "newly discovered" evidence on the original order to show cause, when that evidence had been in their possession for years (*see Queens Unit Venture, LLC v Tyson Ct. Owners Corp.*, 111 AD3d 552, 552-553 [1st Dept 2013]). It was further an abuse of discretion to allow renewal where respondents used it as an opportunity to change legal theories, after they had the court's initial decision (*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). Even had the court properly considered the unsworn, unsigned net worth statement of the debtor, prepared a year before the transaction at issue, it would have been insufficient to rebut the presumption of insolvency (*cf. Matter of Shelly v Doe*, 249 AD2d 756, 757 [3rd Dept 1998]).

With regard to the first order appealed from, the IAS court was correct that the petition did not state a claim under Debtor and Creditor Law § 274. There was no showing that the challenged transaction rendered any business of the debtor under-capitalized, or any allegation of a subsequent transaction for which debtor had too little capital (Debtor and Creditor Law § 274; *see In re Chin*, 492 BR 117, 128-129 [Bankr ED NY 2013]).

However, the court should have awarded prejudgment interest on petitioner's claim for fraudulent conveyance under Debtor and

Creditor Law § 273 (*see CDR Creances S.A. v Cohen*, 104 AD3d 17, 30 (1st Dept 2012), *affd as modified sub nom. CDR Creances S.A.S. v Cohen*, 23 NY3d 307 (2014).

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2539N United States Fidelity & Guaranty Company, et al.,
Plaintiffs-Respondents,

-against-

American Re-Insurance Company, et al.,
Defendants-Appellants,

One Beacon America Insurance Company, et al.,
Defendants.

Index 604517/02

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Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Elizabeth M. Sacksteder of counsel), for ACE Property & Casualty Insurance Company and Century Indemnity Company, appellants.

Simpson Thacher & Bartlett LLP, New York (Mary Beth Forshaw of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 13, 2016, which, to the extent appealed from, denied defendants Ace Property & Casualty Insurance Company and Century Indemnity Company's motion for a change of venue, unanimously affirmed, with costs. Appeals by American Re-Insurance Company, Express Casualty Reinsurance Association, and Excess and Treaty Management Corporation from the aforesaid order unanimously withdrawn in accordance with the stipulation of the parties filed November 28, 2016.

In this reinsurance coverage dispute, defendants have moved,

on the eve of trial, for a change of venue pursuant to CPLR 510(2) on the ground that "an impartial trial could not be had." Defendants based this motion on the fact that plaintiffs' former lead counsel, who was scheduled to be a fact witness, had retired from law firm practice and become a Justice of the Supreme Court, Commercial Division. In the first instance, we note that the motion court correctly determined that defendants' motion for a change of venue was untimely, in that they waited nine months after his designation as an Acting Justice of the Supreme Court, and until the eve of trial; all of the arguments raised by defendants in support of venue change existed when he was appointed a Justice to New York County at that time, not when he was later appointed to the Commercial Division within the same county.

To succeed on a CPLR 510(2) motion, a movant must adduce factual evidence demonstrating that there is a strong possibility that an impartial trial cannot be had in the venued county (*Locker v 670 Apts. Corp.*, 232 AD2d 176 [1st Dept 1996]; *see also Matter of Michiel*, 48 AD3d 687, 687 [2d Dept 2008]).

Here, defendants' arguments consist not of factual evidence, but of conclusory allegations, beliefs, suspicions, and the repeated invocation of the phrase "appearance of impropriety."

The evidence in the record demonstrates that the motion court providently exercised its discretion in denying defendants' motion. There is no personal relationship between the trial judge and the judge-witness and no personal relationship between the judge-witness and the party (*see Locker*, 232 AD2d at 176). The mere fact that the jury may discover a nonparty witness is a judge is not enough to prejudice a defendant where a plaintiff does not seek to exploit the witness's status to enhance his credibility (*see e.g. People v Cabrera*, 133 AD3d 495, 496 [1st Dept 2015], *lv denied* 28 NY3d 927 [2016]). Moreover, the same concerns would exist, no matter in what venue the case is tried.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2540N In re Liquidation of Midland Insurance Company — Index 41294/86

- - - - -

PPG Industries, Inc.,
Claimant-Appellant,

-against-

The Superintendent of Financial Services of the State of New York as Liquidator of Midland Insurance Company,
Liquidator-Respondent.

_____

K&L Gates LLP, New York (Priya Chadha of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Andrew T. Frankel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about June 5, 2015, which confirmed a Special Referee's report disallowing claimant PPG Industries Inc.'s insurance claim filed against its insolvent insurer, Midland Insurance Company, unanimously affirmed, without costs.

The claim was properly disallowed, since it was contingent, and not absolute, on the final date for filing proofs of claim (*see* Insurance Law § 7433[c]). The Trust Funding Agreement fixing PPG's funding obligation was unsigned and, thus, unenforceable by its terms. Moreover, numerous contractual

conditions precedent were not met, including those that would trigger Midland Insurance Company's liability. Also, the Modified Third Amended Plan of Reorganization had not been confirmed by the bankruptcy court and/or district court; the Trust Funding Agreement had not been approved by the bankruptcy court and/or district court; the appellate remedies as to the confirmation of the Modified Third Amended Plan of Reorganization were not exhausted or expired; and the effective date of the Reorganization plan, as defined in that instrument, had not occurred.

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

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Friedman, J.P., Moskowitz, Webber, Kahn, Gesmer, JJ.

2541 In re Teddy Moore, Index 79/16
[M-5539] Petitioner,

-against-

Departmental Disciplinary Committee,
Supreme Court, Appellate Division
First Judicial Department,
Respondent.

_____

Teddy Moore, petitioner pro se.

John W. McConnell, New York State Office of Court Administration, New York (Lee A. Adlerstein of counsel), for respondent.

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

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

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

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Andrias, J.P., Saxe, Feinman, Gische, Kahn, JJ.

2804 In re Donald L. Citak, et al., Dkt. 77/16
[M-5571] Petitioners,

-against-

Hon. Laura Visitación-Lewis, etc.,
Respondent.

_____

Peter Wessel, New York, for petitioners.

Eric T. Schneiderman, Attorney General, New York (Jonathan D. Conley of counsel), for respondent.

_____

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

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

It is unanimously ordered that the application be and the same hereby is granted to the extent of directing that the underlying matter be transferred randomly to another Justice, without costs or disbursements.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1754 In the Matter of Commissioner of
Social Services on behalf of N.Q.,
Petitioner-Respondent,

-against-

B.C.,
Respondent-Appellant.

_____

Law Office of Israel Premier Inyama, New York (Israel Premier Inyama of counsel), for appellant.

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

Law Office of Kenneth G. Roberts, P.C., Larchmont (Kenneth G. Roberts of counsel), attorney for the child.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about December 11, 2014, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Karla Moskowitz
Ellen Gesmer, JJ.

1754

_____x

In the Matter of Commissioner of
Social Services on behalf of N.Q.,
Petitioner-Respondent,

-against-

B.C.,
Respondent-Appellant.

_____x

Respondent appeals from an order of the Family Court, New York County (Jane Pearl, J.), entered on or about December 11, 2014, which, inter alia, found a ceremonial marriage between respondent and the subject child's mother.

Law Office of Israel Premier Inyama, New York (Israel Premier Inyama of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L. Stodola and Richard Dearing of counsel), for respondent.

Lawyers for Children, New York (Shirim Nothenberg of counsel), and Law Office of Kenneth G. Roberts, P.C., Larchmont (Kenneth G. Roberts of counsel), attorney for the child.

ACOSTA, J.

This appeal requires us to consider a relatively narrow factual issue: whether the Family Court abused its discretion in finding that respondent father and the subject child's mother entered into a ceremonial marriage, thereby giving rise to the presumption that the child is a legitimate child of the marriage who is entitled to support under Family Court Act § 417. Because the Family Court's decision was supported by the evidence, and inasmuch as the court's credibility assessments are entitled to significant deference, we affirm the court's determination that a ceremonial marriage occurred.

The Commissioner of Social Services (petitioner) - on behalf of the mother, N.Q., who had applied for and received Medicaid assistance for the child - filed the petition, dated September 12, 2014, seeking an order directing respondent to provide health insurance for the child. Petitioner alleged that N.Q. and respondent were married, which provided a basis on which to charge respondent with support of the child. Petitioner made the allegation of marriage on information provided by N.Q., in addition to the facts that respondent is identified as the father on the child's birth certificate and that the child shares respondent's surname.

When the parties appeared before a support magistrate,

respondent argued that he and N.Q. were never married. The magistrate assigned counsel for the child and transferred the matter to Family Court to adjudicate, among other things, the factual issue of whether a marriage had occurred. Family Court set a hearing to determine whether or not there was a ceremonial marriage pursuant to Section 417 of the Family Court Act. The hearing took place over several days between September and December 2014.

N.Q. testified via an Urdu interpreter to the following. She met respondent at a time when he was looking for someone to care for his daughters from a previous marriage, and she and respondent were married in an Islamic religious ceremony in late 2004. She noted that several people attended the ceremony, including respondent's friends. An imam performed the ceremony and recited religious wedding verses, which N.Q. acknowledged by saying "yes" three times; respondent also recited verses. Although there was no written marriage contract, and the couple did not obtain a marriage license, N.Q. stated that an Islamic marriage "can also be verbal." N.Q. wore traditional wedding attire, including a "large ornate scarf." She also placed a traditional henna tattoo on her body, as respondent directed. Respondent gave her gifts, including earrings, a ring, a $100 "haq mehr" ("money that the groom gives to the wife"), and

clothing associated with the ceremony. Following the ceremony, there was a reception in a Brooklyn restaurant, attended by many people. She and respondent did not engage in sexual relations until after the marriage ceremony; the child was born approximately two years later.

N.Q. further testified that she and respondent lived together for approximately three years after the wedding, including the first year of the child's life. When the child was approximately three months old, they traveled to North Carolina to visit N.Q.'s sister. A picture of respondent, N.Q., the subject child, N.Q.'s children from her first marriage, and N.Q.'s sister was admitted into evidence on consent. Respondent and N.Q. subsequently divorced pursuant to a "Taliq," an Islamic procedure by which the husband states three times his intention to divorce his wife.

N.Q. also submitted a photograph (the wedding photo), which she testified was taken on the day of the wedding, at the home of respondent's friend. According to N.Q., the wedding photo depicted herself, respondent, the imam who performed the ceremony, and N.Q.'s daughter from her previous marriage. Although N.Q. could not recall the date of the wedding or the date of the photograph, she noted that it was around the time "the kids used to go to school." A faint ink stamp on the back

of the picture indicated "SPT 23."

In addition, N.Q. stated that her older daughter, who was born in 1996, attended the wedding when she was around eight or nine years old. Her daughter, who was 18 years old at the time of the hearing, also testified that she attended the wedding when she was approximately 8 years old. She identified herself in the wedding photo and recalled that the picture was taken in 2004, while she was in the third grade. She believed the photograph was taken in November, at the home of respondent's friend, and that it was a fair and accurate representation of her mother's wedding to respondent. She identified the older man in the photograph as "like a priest," who read things "relating to [marriage] vows . . . in an Islamic way" from a book "like the Bible." The daughter confirmed that both respondent and her mother said "yes" when the imam asked if they wanted to be husband and wife. She also identified her mother, respondent, and her mother's friend in the picture.

Respondent denied that a ceremonial marriage had ever occurred. He testified that he had married another woman in 2001, but that they were separated. Respondent also testified that the wedding photo depicted the couple at his friend's wedding, not a wedding between N.Q. and himself. However, he admitted that he lived with N.Q., that he relied on her to raise

his children, and that he and N.Q. made efforts to develop an intimate relationship (but her boyfriend interfered). In addition, when asked at an earlier hearing before the support magistrate whether he and N.Q. were married, respondent had answered, "No, not married, it was like a commitment, like a religious law . . . [a]s girlfriend, as boyfriend."

Family Court found that petitioner met its burden of demonstrating a ceremonial marriage, and referred the matter to a support magistrate. The court acknowledged that N.Q. had significant lapses in memory, but nonetheless found her testimony credible. The court also found that N.Q.'s daughter testified credibly as to the timeframe of the wedding photo. Finally, the court found that respondent's testimony about his relationship with N.Q. and his denial that there had been a ceremonial marriage were not credible.

Respondent appeals.

"There is an established legal presumption that every person is born legitimate," a presumption which "operates . . . in any case in which legitimacy is in issue" (*Matter of Fay*, 44 NY2d 137, 141-142 [1978], *appeal dismissed* 49 US 1059 [1979]). It is "'one of the strongest and most persuasive [presumptions] known to the law'" (*id.* at 142, quoting *Matter of Findlay*, 253 NY 1, 7 [1930]). This presumption of legitimacy has its origins in

England, where it was formerly all but irrefutable (*Findlay*, 253 NY at 7 ["If a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity. The presumption in such circumstances was said to be conclusive"]). In *Findlay*, however, the Court of Appeals made clear that the presumption may be rebutted, but only if "common sense and reason are outraged by a holding that it abides" (*id.* at 8).

The presumption of legitimacy has since been codified in the Family Court Act, which provides, "A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of [support proceedings] regardless of the validity of such marriage" (Family Court Act § 417).[1] A ceremonial marriage need not take any

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[1] While the parties appear to dispute the validity of the marriage, that issue is of no moment, because, as Family Court Act § 417 dictates, the presumption of legitimacy operates irrespective of the marriage's legal validity. Thus, while the attorney for the child is correct that there is a strong presumption in favor of a valid second marriage even where one party was not yet divorced (*see Matter of Brown*, 40 NY2d 938, 939 [1976]), and that presumption is strengthened if a ceremonial marriage occurred (*Matter of Meehan*, 150 App Div 681, 683 [1st Dept 1912]), it is of no consequence, because the validity of the purported marriage is not at issue here.

The issue confronting this Court is simply whether a ceremonial marriage occurred; if so, its occurrence gives rise to the presumption of the child's legitimacy - entitling the child

particular form, provided that the parties solemnly declare in the presence of a clergyman or magistrate, and at least one witness, that they intend to be married (Domestic Relations Law § 12).

Findlay notwithstanding, the statute's use of the word "deemed" appears to make a child's legitimacy unrebuttable when the parents have entered into a ceremonial marriage (*see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Court Act § 417 at 284). However, New York courts have continued to treat the presumption as a rebuttable one (*see e.g. Fay*, 44 NY2d at 142; *Matter of Barbara S. v Michael I.*, 24 AD3d 451 [2d Dept 2005]; *Richard B. v Sandra B.B.*, 209 AD2d 139 [1st Dept 1995], *lv dismissed* 87 NY2d 861 [1995]; *Ghaznavi v Gordon*, 163 AD2d 194 [1st Dept 1990]). To rebut the presumption, the challenger must disprove legitimacy by clear and convincing evidence (*Barbara S.*, 24 AD3d at 452; *Ghaznavi*, 163 AD2d at 195).

The court's determination after a hearing that respondent and N.Q. entered into a ceremonial marriage is supported by the evidence and the court's credibility determinations, which "are entitled to great weight, since the nisi prius court is in a better position to evaluate the witnesses" (*Matter of Benjamin*

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to support - regardless of the marriage's legal validity (Family Court Act § 417).

L., 9 AD3d 153, 155 [1st Dept 2004]). Therefore, we affirm the court's factual determination that a ceremonial marriage took place.

Respondent's contention that petitioner was required to prove the ceremonial marriage by clear and convincing evidence impermissibly shifts the burden of proof from the challenger to the party relying on the presumption of legitimacy. Respondent supports this argument by citing inapposite cases in which a party sought to prove paternity, not a ceremonial marriage (*see e.g. Matter of Commissioner of Social Servs. v Julio J.*, 20 NY3d 995 [2013]; *Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137 [1983]; *Matter of Commissioner of Welfare of City of N.Y. v Wendtland*, 25 AD2d 640 [1st Dept 1966]). In fact, it was respondent's burden to rebut the presumption of legitimacy by clear and convincing evidence (*see Barbara S.*, 24 AD3d at 452; *Ghaznavi*, 163 AD2d at 195). He failed to carry that burden.

Finally, respondent's argument that the ceremony did not comply with the requirements of Islam (because there was no written marriage contract) is unavailing. The First Amendment generally prohibits courts from resolving disputes over religious doctrine (*see Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282 [2007]; *Matter of Ming Tung v China Buddhist Assn.*, 124 AD3d 13, 18 [1st Dept 2014], *affd* 26 NY3d 1152

[2016]). In any event, as discussed above, the child's legitimacy does not depend on the validity of the marriage (Family Court Act § 417). As long as respondent and N.Q. entered into a ceremonial marriage, the child is presumed to be legitimate and, therefore, entitled to support.

Accordingly, the order of Family Court, New York County (Jane Pearl, J.), entered on or about December 11, 2014, which, inter alia, found a ceremonial marriage between respondent and the subject child's mother, N.Q., should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 22, 2016

DEPUTY CLERK