SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Angela M. Mazzarelli
Richard T. Andrias
Paul G. Feinman
Troy K. Webber, JJ.

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Wayne Schnapp,
Plaintiff-Appellant,

-against-

Miller's Launch, Inc.,
Defendant-Respondent

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Plaintiff appeals from the order of the Supreme Court, New York County (Lucy Billings, J.), entered June 2, 2016, which to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint.

Hofmann & Schweitzer, New York (Paul T. Hofmann of counsel), for appellant.

Rubin, Fiorella & Friedman, LLP, New York (Michael Evan Stern and Joseph R. Federici of counsel), for respondent.

ACOSTA, J.P.

This action seeks damages for personal injuries allegedly suffered by plaintiff Wayne Schnapp when he embarked upon a vessel by jumping from a bulkhead approximately 40 inches from the deck of the vessel. The appeal raises issues about the various duties that a vessel owner owes a harbor worker asserting a claim pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 USC § 901 *et seq*.) (*see Scindia Steam Nav. Co. v De Los Santos*, 451 US 156 [1981]). We find that under the circumstances of this case, there are issues of fact as to whether defendant violated the turnover duty as well as the duty to intervene.

Plaintiff was employed by nonparty Weeks Marine, Inc., as a surveyor at a project working on the Spuyten Duyvil Bridge. Since portions of the bridge were only accessible by water, Weeks's employees were transported by launch owned by defendant Miller's Launch, Inc. and operated by its crew.

Under the terms of the charter agreement between Weeks and Miller's, Miller's would provide Weeks with a dedicated launch boat and a survey boat for up to 10 hours of continuous operation a day. The boats would be available for the exclusive use of Weeks. Weeks agreed to indemnify and hold Miller's harmless from any and all claims for personal injury, except those claims

"arising from the negligence or willful misconduct of [Miller's] or the unseaworthiness of the vessel(s) provided."

On April 14, 2008, plaintiff took the launch (the Marguerite Miller, a 42 foot vessel), captained by Martin Plage, from the Spuyten Duyvil Bridge to Weeks's facility at Greenville, New Jersey, to transport two port-a-johns for cleaning. He and Plage were the only people on board the Marguerite for that trip. Plaintiff's responsibilities on that trip included "get[ting] ahold" of Eric, a person in charge of the Greenville yard, and letting Eric know that he had arrived and that he was there to "swap out toilets and whatever [he] may have had to bring back and to get [Eric] to get a forklift and unload it." The actual loading and unloading of the port-a-johns were to be handled by other workers.

When docking at the Greenville facility, Plage would always bring the Marguerite to the same slip. Plaintiff testified that he did not need to instruct Plage where to go; Plage "pretty much knew" because they had done it before. When Plage docked at the facility, he would not tie up the vessel to the bulkhead dock. Instead, he would leave the engines running in reverse to keep the stern of the Marguerite against the bulkhead. When they arrived on the day of the accident, plaintiff told Plage that he would be "right back," and disembarked the Marguerite by climbing

up the bulkhead wall. He located Eric, and they both returned to where the Marguerite was docked.

Upon reaching the Marguerite, Eric boarded the vessel by jumping down off the bulkhead onto the boat's deck. That day the distance between the bulkhead and the boat deck was a little more than it was at other times, about four feet. Plaintiff asked Eric to help him board by standing still, so he could place his hands on Eric's shoulders while he jumped down. Plaintiff jumped, and when he landed, he fractured his tibia and fibula. Plaintiff remained on the boat until Walter, a Weeks yard man, brought over a gangway, and plaintiff was assisted off the boat. Plaintiff assumed that the gangway was owned by Weeks; it did not come off the Marguerite. Plage had no involvement in plaintiff's decision to jump onto the Marguerite, and was not on the deck as plaintiff attempted to board. Plaintiff believed that Plage was in the wheelhouse. While plaintiff knew Weeks had gangways available at the facility, he did not ask to use one to board that day. He testified at his deposition that jumping "was the way you got on and off the boat. They never gave you any means to get on and off the boat anywhere that you were at."

Captain Plage testified that the location and timing of his trips were decided by Weeks employees. The Weeks facility at Greenville Yard was "kind of run-down." The facility was large,

and as Plage was not familiar with it or its dangers, he would not have selected where to dock. When they approached the Weeks facility on the date of the incident, plaintiff contacted "someone as to where the boat should go or there was some determination." Plage's best recollection was that when they docked that day there was a distance of at least two feet, but no more than four feet, between the deck of the Marguerite and the top of the bulkhead dock. Plage did not see plaintiff embark, nor did he have a recollection of watching plaintiff disembark; he had remained in the wheelhouse, awaiting his next order via a VHF channel or cell phone. The next time Plage saw plaintiff was when he was lying on the deck of the vessel.

On the day of the incident, there was no portable stair or step for use on the Marguerite. In response to the deposition question, "Does the Marguerite . . . to your knowledge . . . carry a ladder to assist passengers to get from the higher height down to the deck of the Marguerite when boarding?" Plage responded, "Sometimes."

Sven Van Batavia, vice-president of operations at Miller's, testified that Miller's policy is to use the gangway provided by the facility where its boat is docking. The vessels cannot carry their own gangways, because a vessel of that size does not have the room to carry one long enough for all situations, and since

they were docking at facilities not operated or controlled by Miller's, they had no way of determining the proper gangway. It is Miller's stated policy that the person disembarking is the one who makes the decision as to whether it is safe to get on or off the vessel. In terms of where to dock, while the captain considers whether the location could cause the vessel to run aground, so long as there is ample water under the hull and nothing in the waterway that could harm the vessel, Miller's will dock where directed by its client.

According to Miller's safety manual, employees are not to climb on and off equipment when the vessel is in motion. Regarding "Dockside Transfers," the manual provides:

> "Should a gangway be unavailable to transfer from or to a shore side installation, transfers may be effected using appropriate alternate means of ingress or egress, the decisions as to whether or not the alternate means is safe and acceptable must be made by the individuals being transferred. Under no circumstances should any transfer be undertaken on any object that is not secured or steady."

Plaintiff alleged in his complaint that he is a covered employee under the LHWCA who was injured by unsafe and inherently dangerous conditions to the vessel, and by a violation of the International Safety Management Code.

While the matter was initially removed to federal court pursuant to the maritime Limitations of Liability Act (LOLA), the matter was remanded back to state court, with Miller's retaining the right to return to federal court for LOLA relief upon completion of litigation.

Miller's moved for summary judgment, arguing that it was not negligent, and that a claim of "unseaworthiness" is precluded by the LHWCA. Miller's provided an affidavit from Sven Van Batavia, who averred consistently with his deposition. Specifically, he stated that plaintiff directed Plage as to where to dock the vessel. Plage, who was in the wheelhouse, was unaware of plaintiff's intention to jump onboard, and it is Miller's policy to allow the passenger to decide whether it is safe to embark or disembark from a vessel. Miller's vessels do not carry their own gangways because there is no space onboard for a gangway of a sufficient length that could be used at all docking stations, and the Weeks facility had ladders and gangways available.

In support of his opposition, plaintiff annexed the expert report of maritime safety consultant and former Coast Guard officer Alan Blume. Blume opined that "for the purpose of applying Coast Guard vessel inspection regulations to the MARGUERITE MILLER," plaintiff was a passenger, since he was a person transported on the vessel other than as the master, a crew

member, or a representative of the owner (46 USC § 2101[21][A][i][iii]). According to Blume, although the inspection regulations applicable to the Marguerite do not specifically require a gangway or other means to board or disembark a vessel, providing appropriate means of boarding and disembarking safely "is a general good marine practice," and it was the responsibility of the Marguerite's operator to ensure passengers could board and disembark safely. Blume asserted that the captain and Miller's violated their maritime duty by failing to assess the risk and provide plaintiff any means of access. He further opined that defendant breached its duty to plaintiff to equip the Marguerite with, or make arrangement for, a gangway or other suitable means for boarding and disembarking from the vessel, and that as a result, it was not fit and safe to convey passengers.

The motion court granted defendant's motion and dismissed the complaint.[1] Specifically, the motion court held that,

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[1]Plaintiff perfected an appeal from that order, which this Court dismissed, finding that since, prior to the motion being decided, plaintiff's wife, who was then a plaintiff, had died and no substitution had been effectuated, the order was void. Thereafter, by order to show cause, plaintiff moved for an order determining defendant's prior motion in accordance with the prior ruling but with appropriate modification based on the discontinuance of the wife's derivative claim. The motion included a stipulation of discontinuance of the loss of consortium claim, executed by plaintiff as the executor of his

because plaintiff was a harbor worker asserting a claim against a vessel owner pursuant to the LHWCA, defendant only owed him limited duties pursuant to *Scindia Steam Nav. Co. v De los Santos* (451 US 156 [1981]). Those duties were limited to turning over the vessel in a reasonably safe condition (turnover duty), conducting operations still under its control reasonably safely (active control duty), and intervening if it had knowledge of an unsafe condition under the stevedore's control (duty to intervene). Under that standard, the court held that, although the turnover duty includes providing a safe means of accessing the vessel, a vessel owner is not liable for an obvious hazard, such as the distance between the dock and deck here. The court also held that the active control duty was inapplicable because the vessel was not involved in choosing the docking location, the methods and operations of the unloading and loading process, or in plaintiff's disembarkation and reboarding. Lastly, the court held that the duty to intervene was inapplicable because the record contained no evidence that the captain was aware that Weeks did not provide a gangway or other device, or that plaintiff was choosing to jump onto the boat. We now reverse.

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wife's estate. By order entered June 2, 2016, the motion court granted plaintiff's motion to the extent of granting defendant summary judgment dismissing plaintiff's claim.

Any analysis of this matter must begin by resolving the scope of defendant's duty to plaintiff, which is initially determined by plaintiff's status as a passenger or worker while aboard the vessel. If plaintiff was merely a passenger, being transported to work via time charter, then an ordinary reasonable standard of care applies (*see Kermarec v Compagnie Generale Transatlantique*, 358 US 625 [1959]). In *Kermarec* the Court concluded that it was a "settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew" (*id.* at 630). Furthermore, a vessel owes a duty of safe ingress and egress to its passengers (*see e.g. Raab v Laboz*, 226 AD2d 692 [2d Dept 1996]; *Schwartz v B&D Modeling & Restoration, Inc.*, 2016 WL 4485453, 2016 US Dist LEXIS 116133 [ED NY, March 31 2016, No. 13-CV-5428 [JMA]{SIL]]).

If, however, plaintiff was engaged in work while on the vessel, then the scope of duty is defined by the Supreme Court's decision of *Scindia*, which interpreted the LHWCA. The LHWCA establishes a comprehensive federal workers' compensation program to provide harbor workers and their families with medical, disability, and survivor benefits for work-related injuries and death (*Howlett v Birkdale Shipping Co.* 512 US 92, 96 [1994]). In addition to receiving benefits, a harbor worker covered under the

LHWCA may commence an action against a vessel owner for its negligence, and the vessel owner is prohibited from recovering against the harbor worker's employer (33 USC § 905[b]). Negligence, for which a vessel owner may be liable under the act is to be determined in accordance with "accepted principles of tort law and the ordinary process of litigation" (*Howlett*, 512 US at 97-98 [internal quotation marks omitted]).

In *Scindia* (451 US 156 [1981]), the Supreme Court addressed the duty of care owed by a shipowner to a longshoreman injured in the course of stevedoring operations aboard a ship. The Court held that the ship's liability for due care under the circumstances is limited to turning over the vessel in a reasonably safe condition (the turnover duty); conducting reasonably safely operations regarding the vessel and stevedoring operations in which it actively involves itself (the active control duty); and intervening in areas under the stevedore employer's control only if the vessel has actual knowledge of an unsafe condition that the stevedore is not exercising reasonable care to protect against (duty to intervene) (*id.* at 167-178; *see also Howlett*, 512 US at 98; *Gravatt v City of New York*, 226 F3d 108, 120-121 [2d Cir 2000], *cert denied sub nom. Gravatt v Simpson & Brown Inc.*, 532 US 957 [2001]).

Application of *Scindia* is not limited to the stevedoring

context, but "clearly applies to any independent contractor and its harborworker employees covered by the LHWCA and working aboard ship" (*Hudson v Schlumberger Tech. Corp.*, 452 Fed Appx 528, 532 [5th Cir 2011]; *see also Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46 [1st Dept 2004] [*Scindia* applied to rigger]; *McConville v Reinauer Transp. Co., L.P.*, 16 AD3d 387 [2d Dept 2005] [*Scindia* applied to worker involved in dock construction injured by ship's affixed crane]).

Here, plaintiff was not a mere passenger, but was working aboard the Marguerite at the time of the accident. The boat owner's liability is therefore limited to the duties outlined in *Scindia*. At the time of his accident, plaintiff was on the clock, charged with the responsibility of accompanying used Weeks port-a-johns on their journey from the bridge to the yard via the Marguerite. Indeed, at his deposition, when asked what was the purpose of the trip, he responded, "I know it was to bring stuff there and I think I had to pick up stuff to bring back" (*Chesapeake & Ohio R. Co. v Schwalb*, 493 US 40, 47 [1989] ["Coverage is not limited to employees who . . . physically handle the cargo. . . . (An employee, in this case a maintenance worker repairing a) piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment"]; *see also Gravatt*, 226 F3d 108).

We find that there are issues of fact as to whether defendant violated both the turnover duty and the duty to intervene. First, the turnover duty has two discrete duties - the duty of safe condition and the duty to warn (*Scheuring v Traylor Bros.*, 476 F3d 781, 789 [9th Cir 2007]). The first of the turnover duties requires a vessel owner to "exercise ordinary care under the circumstances to turn over the ship and its equipment and appliances in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to persons and property" (*Howlett*, 512 US at 98 [internal quotation marks omitted]; *accord Scindia*, 451 US at 166-167; *Emanuel*, 10 AD3d at 53).

"[T]he turnover duty, at a minimum, requires a vessel to provide a safe means of access" (*Scheuring*, 476 F3d at 790, *citing Gay v Barge 266*, 915 F2d 1007, 1012 [5th Cir 1990]; *Davis v Partenreederei M.S. Normannia*, 657 F2d 1048, 1053 [9th Cir 1981] [holding that the vessel owner had a responsibility to correct the positioning of the gangway]); *Casey v Commerce Const. Corp.*, 2010 WL 2761102 *7, 2010 US Dist LEXIS 68997, *23-24 [D NJ, July 8 2010, NO. 08-955 [JBS/JS]] [questions as to whether

vessel owner breached turnover duty where the walkways to its barges did not have handrails]).

The second of the turnover duties – or corollary to the turnover duty – is a duty to warn of latent hazards on the ship or with respect to its equipment that are known, or with the exercise of reasonable care should be known, to the vessel owner and are likely to be encountered by, but not obvious to or anticipated by, the stevedore in the reasonably competent performance of his work (*Howlett*, 512 US at 98-100).

Here, the motion court concluded that because the hazard was open and obvious, defendant could not be liable for violating the turnover duty, citing *Kirksey v Tonghai Maritime* (535 F3d 388, 393- 397 [5th Cir 2008] [where defects in the stow, which may have shifted during voyage or been improperly stowed, are open and obvious, no duty to correct the unsafe condition]), *Morehead v Atkinson-Kiewit, J/V* (97 F3d 603, 614 [1st Cir 1996] [hatch left open by coworker was an obvious condition], *cert denied* 520 US 1117 [1997]), and *Kirsch v Plovidba* (971 F2d 1026, 1027 [3d Cir 1992] [oil slick in cargo hatch was open and obvious condition]). Indeed, the dissent cites to *Kirksey* and *Kirsch*, for its position that the absence of a gangway and the distance from the bulkhead to the deck were both noticeable hazards that were open and obvious. These cases, however are not dispositive

of this appeal. As noted above, the turnover duty requires a vessel to provide a safe means of access to the ship (*Scheuring*, 476 F3d at 790).

Moreover, "the obviousness of the defect does not absolve the vessel owner of its duty to turn over the ship in a condition under which expert and experience[d] stevedores can operate safely" (*Martinez v Korea Shipping Corp.*, 903 F2d 606, 610 [9th Cir 1990]). As explained by the Fifth Circuit, such a defense cannot be absolute since, "when faced with an openly dangerous shipboard condition, the longshoreman's 'only alternatives would be to leave his job or face trouble for delaying the work'" (*Stass v Am. Commercial Lines, Inc.*, 720 F2d 879, 882 [5th Cir 1983], quoting *Napoli v Hellenic Lines, Ltd.*, 536 F2d 505, 509 [2d Cir 1976], cited in *Scindia*, 451 US at 176 n 22). Here, there are issues of fact as to whether plaintiff really had the option of obtaining a gangway or insisting that one be provided. As noted above, he testified that jumping "was the way you got on and off the boat. They never gave you any means to get on and off the boat anywhere that you were at." Furthermore, a captain must provide a safe access to his ship, and Captain Plage had been to the Greenville facility before, knew the condition of the bulkhead, and acknowledged that he sometimes carried ladders to help passengers board. Thus, the fact that the Marguerite was

not designed to carry a gangway suitable for all docks is of no moment; there were other methods of safely boarding his boat.

In any event, *Morehead*, *Kirsch* and *Kirksey* are factually distinguishable. In *Kirksey*, the defect was to the cargo, not the ship. And in *Morehead* and *Kirsch*, the conditions complained of were transient in nature and not attributable directly to the owner or the vessel.

Accordingly, under *Scindia*, questions of fact exist as to whether defendant breached its turnover duty. It is for a jury to determine whether Miller's stated policy of not providing a gangway, and instead leaving it up to its passengers to decide whether embarkation was safe, breached that duty (*Howlett*, 512 US at 98, citing, inter alia, *Scindia*, 451 US at 167; *see also Scheuring*, 476 F3d 781).

There are also issues of fact as to whether defendant violated its duty to intervene. The duty to intervene requires the vessel owner to intervene in areas under the principal control of the stevedore if the owner has actual knowledge that a condition of the vessel or its equipment poses a risk of harm and the stevedore or other contractor is not exercising reasonable care to protect its employees from that risk (*O'Hara v Weeks Marine, Inc.*, 294 F3d 55, 65 [2d Cir 2002]; *Emanuel*, 10 AD3d at 53; *Gravatt*, 226 F3d at 121). Plaintiff here contends that the

dangerous condition was that the vessel docked four feet below the bulkhead, a situation that made it unsafe for plaintiff to embark without assistance. Plaintiff points to Captain Plage's testimony that a height differential of 40 inches was, in his opinion, dangerous, and that he would not let a passenger "hop" down onto the deck.

Although Captain Plage was in the wheelhouse and did not see plaintiff embark the vessel, and there is no evidence that Plage knew what plaintiff intended to do (facts relied on by the dissent), he was aware of the dangerous distance between the pier and the deck of the vessel at the time of the accident, and he knew that plaintiff would have to disembark and eventually reboard (*see Scheuring*, 476 F3d at 790 n 7, citing *Gay*, 915 F2d at 1012 ["The vessel owner has a duty to intervene in the stevedore's operations when he has actual knowledge both of a hazardous condition *and* that the stevedore, in the exercise of 'obviously improvident' judgment, intends to continue work in spite of that condition"]). Moreover, plaintiff testified at his deposition that in the previous 12 times or so that he had reboarded the Marguerite at the Greenville facility he jumped down to the boat on his own. Thus, Plage should have known that plaintiff boarded the Marguerite by jumping.

Whether there are issues of fact as to a breach of the duty

of active control poses a more difficult question. The duty of active control is implicated when the vessel owner is actively involved in the harbor worker's operations (*see Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46, 53 [1st Dept 2004]). To be sure, there is no evidence that Plage was in control of the activity engaged in at the time of the accident (i.e., the intended off-loading of the port-a-johns). But, "even where the vessel does not actively involve itself in the stevedoring operations, it may be liable 'if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation'" (*Gravatt*, 226 F3d at 121, quoting *Scindia*, 451 US at 167 [emphasis omitted]). Although an argument can be made that a captain of a vessel should always be actively involved in the boarding and disembarking of his ship, this Court need not decide this issue inasmuch as it is precluding summary judgment for the reasons stated above.

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered June 2, 2016, which to the extent appealed from as limited by the briefs, granted defendant's

motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, and the motion denied.

All concur except Andrias, J. who dissents in an Opinion.

ANDRIAS J. (dissenting)

Plaintiff, a surveyor employed by nonparty Weeks Marine, was assigned to a "fendering" project at the Spuyten Duyvil Bridge. Weeks Marine chartered a 42-foot launch boat from defendant, manned with a captain, to transport workers and equipment. In the course of transporting two port-a-johns from the bridge to Weeks Marine's Greenville yard, where they were to be swapped for new ones, plaintiff injured his leg when he attempted to board the boat by jumping from a bulkhead at the yard onto the deck below, a distance of approximately four feet, rather than calling for a gangway or ladder that was readily available from his employer.

We all agree that plaintiff's negligence claim is governed by section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 USC § 901 *et seq.*) and turns on whether defendant breached a duty under *Scindia Steam Nav. Co. v De los Santos* (451 US 156, 166-167 [1981]). In reversing the grant of summary judgment in defendant's favor dismissing the complaint, the majority finds that issues of fact exist as to whether defendant breached its "turnover duty" or "duty to intervene." However, "a shipowner can, ordinarily, reasonably rely on the stevedore (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise

to avoid those hazards where practical to do so. Thus, where a danger is obvious but easily avoidable, the shipowner will not be liable for negligence" (*Kirsch v Plovida*, 971 F2d 1026, 1030 [3d Cir 1992]; *see also Tsaropoulos v State of New York*, 9 AD3d 1, 10-11 [1st Dept 2004]).

Here, even if defendants' failure to provide a gangway could possibly be considered as a defective or hazardous condition, it was still not a hazard that was "not known by the [plaintiff] and would not be obvious to or anticipated by him if reasonably competent in the performances of his work" (*Scindia*, 451 US at 167). Plaintiff was not a mere passenger. He was in charge of the return of the port-a-johns to his employer's facility and told the captain where to dock. The record establishes that there was a ladder or gangway at the Weeks Marine yard and that there were no exigent circumstances that required plaintiff to jump the four feet from the bulkhead to the deck. Furthermore, as to the duty to intervene, the boat's captain did not see plaintiff jump and was not involved in plaintiff's decision to do so. Therefore, I respectfully dissent.

The turnover duty requires the owner to exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo

operations with reasonable safety (*Scindia*, 451 US at 166-167). Additionally, the owner has a duty to warn the stevedore of latent or hidden dangers which are known or should have been known to the owner (*id.*). However, an owner has not breached it duty to turn over a safe vessel if the defect that causes injury is open and obvious and one that the stevedore should have seen (*see Kirksey v Tohghai Mar.*, 518 F3d 388, 395 [5th Cir 2008]), unless the stevedore's "only alternatives when facing an open and obvious hazard are unduly impracticable or time consuming" (*Pimental v LTD Can. Pac. Bul*, 965 F2d 13, 16 [5th Cir 1992]).

According to plaintiff's deposition testimony, although the height differential between the bulkhead and the deck could be between two and five feet, depending on when one got there, plaintiff never asked the boat's captain to provide him with a ladder, gangway or any other form of aid. Plaintiff also acknowledged that ladders and gangways were available at the yard if he wanted them, that he never asked for either, and that prior to the accident he had disembarked and boarded the boat at the same location in the yard "[m]aybe a dozen times" without incident.

Plaintiff explained that he would disembark by climbing over the bulkhead and that when he had to reboard he would "jump down." When asked if he thought that was a safe way to board, he

replied: "I didn't think there was anything so wrong with it, that was common," and that just about every Weeks Marine worker did it.

Plaintiff further testified that on the date of the accident, the height differential between the bulkhead and the deck was "[a]bout four feet," which was not unusual. In accordance with his customary practice, plaintiff climbed up on the bulkhead, face forward, and informed a coworker that he was there and what needed to be done. The pair walked back to the boat together and the coworker boarded first by jumping down. Plaintiff did not ask anyone at Weeks Marine for a gangway or ladder and decided to ask the coworker to stand there for a second so he could put his hand on his shoulder as an anchor and jump down. Plaintiff did not see the boat's captain, who "had no involvement in [his] decision to reboard or jump on the boat."

Plaintiff leaned forward with his left arm to reach his coworker's shoulder, then jumped. He had never tried to use a coworker to hold onto while he jumped before. When plaintiff landed, his leg "blew out." Plaintiff laid on his back "until [a Weeks Marine employee] got a gangway out and an ambulance showed up." If the coworker had not been there, plaintiff would have turned around and climbed down from the bulkhead.

The coworker stated in an affidavit that he had asked a

supervisor for a gangway, but decided not to wait for it to board the boat because they "had a lot of work to do that morning." After he boarded, he saw plaintiff falling towards him, and tried to hold him up. He did not know why plaintiff attempted to board the boat or why he lost his balance.

The boat's captain testified that the location and timing of his trips were decided by Weeks Marine employees. When they approached the Greenville yard, plaintiff would call the facility by cell phone to determine where they should dock. The captain remained in the boat's wheelhouse, monitoring the marine radio and waiting for instructions, and did not see plaintiff disembark or attempt to board the boat. Generally, the boat, which did not have its own gangway, portable stairs or ladder on board, matched up pretty well to the heights of Weeks Marine's barges.

Defendant's vice-president of operations testified that the company's policy is to use the gangway provided by the facility where the boat is docking. The boat could not carry its own gangway because vessels of that size do not have the room to carry one long enough for all situations. Defendant's stated policy is that the person disembarking is the one who decides whether it is safe to get on or off the boat. As long as there is ample water under the hull and nothing in the waterway that could harm the vessel, the boat will dock where the client

directs.

On this record, defendant did not violate its *Scindia* turnover duty. The failure to provide a gangway was open and obvious when Weeks Marine chartered the vessel, and the record reveals no evidence that plaintiff's means to reboard the vessel was limited to jumping down onto the deck or that requesting a safer alternative to board would have been unduly impractical or time-consuming. As the motion court found, plaintiff does not present any evidence that the distance between the pier and the deck was a condition that an experienced stevedore would not expect to encounter or that such condition would prevent the stevedore from carrying out its cargo operations with reasonable safety. Accordingly, defendant was entitled to rely on plaintiff's experience working at his employer's facility, his familiarity with the conditions there and the process of boarding from a pier to the vessel.

The majority disagrees, holding that issues of fact exist as to whether defendant's stated policy of not providing a gangway or other device to permit safe disembarkation from its vessel, and leaving it up to its passengers to decide whether embarkation was safe, violated its turnover duty. Stating that the turnover duty at a minimum requires a vessel to provide a safe means of access and that the obviousness of the defect does not absolve

the owner of its duty to turn over the vessel in a condition under which an experienced stevedore can operate, the majority finds that there are issues of fact as to whether plaintiff really had the option of obtaining a gangway or insisting that one be provided.

However, unlike the cases cited by the majority, such as *Scheuring v Traylor Bros.* (476 F3d 781 [9th Cir 2007]) and *Gay v Barge 266* (915 F2d 1007 [5th Cir 1990]), which dealt with injuries caused by defective ramps or gangways, we are dealing with the failure to provide a gangway. "There is no duty to turn over an absolutely safe vessel" (*Sinagra v Atlantic Ocean Shipping*, 182 F Supp 2d 294, 300 [ED NY 2001]), and the failure to provide a gangway is not negligence per se. Defendant's vice-president of operations testified that the boat was not designed to carry a gangway suitable for all docks at all Weeks Marine facilities and plaintiff's expert acknowledged that the inspection regulations applicable to the boat did not specifically require a gangway or other means to board or disembark from the vessel. Furthermore, the absence of a gangway or other device for boarding or disembarking and the distance of approximately four feet between the bulkhead and the deck of the boat were immediately noticeable and any hazard posed thereby was an open and obvious condition. Plaintiff did not present any

evidence that the condition was one that an experienced stevedore would not expect to encounter or that the condition would prevent the stevedore from carrying out its cargo operations with reasonable safety. Nor did plaintiff produce any evidence that requesting a safer alternative to board would have been unduly impractical or time-consuming.

Indeed, plaintiff admits that on prior occasions he had boarded the boat at the same location by jumping down from the bulkhead, that he never requested any form of assistance from any source to board the boat, even though he was aware that Weeks Marine kept gangways or ladders available for his use at its facility where the boat docked, and that he had no intention to make such a request. Significantly, plaintiff was not faced with exigent circumstances that required him to jump from the bulkhead to the deck, and he acknowledges that he did not notify the captain when he was reboarding and that he decided to jump down to the deck only because he believed he could lean on the worker in front of him for support.

Nor is there an issue of fact as to whether defendant breached its duty to intervene. "The duty to intervene is an exception to the generally limited duties imposed on the vessel once operations have begun. Under the duty to intervene, the vessel owner must intervene if it acquires actual knowledge that

(1) a condition of the vessel or its equipment poses an unreasonable risk of harm and (2) the stevedore is not exercising reasonable car[e] to protect its employees from that risk" (*Giganti v Polsteam Shipping Co.*, 588 Fed Appx 74, 75 [2d Cir 2015] [internal quotation marks and citation omitted]; *Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46, 53 [1st Dept 2004]). If the owner knows of a potentially dangerous condition, but "reasonably believe[s] . . . that the stevedore will act to avoid the dangerous condition[], the owner cannot be said to have been negligent, for the decision whether a condition imposes an unreasonable risk of harm to longshoremen is 'a matter of judgment committed to the stevedore in the first instance'" (*Hodges v Evisea Mar. Co., S.A.*, 801 F2d 678, 687 [4th Cir 1986] [quoting *Scindia*, 451 US at 175], *cert denied*, 480 US 933 [1987]). Thus, the danger posed by the absence of a gangway being open and obvious, defendant was entitled to rely on Weeks Marine's judgment as to whether its operations could safely be undertaken, unless its "judgment in proceeding under the circumstances was 'obviously improvident'" (*Bonds v Mortensen and Lange*, 717 F2d 123, 128 [4th Cir 1983], quoting *Scindia*, 451 US at 175).

The majority finds that there are issues of fact as to whether defendant breached its duty to intervene because the

captain was aware of the dangerous distance between the pier and the deck, and that plaintiff would have to disembark and eventually reboard at some point. The majority further finds that because plaintiff testified that he had reboarded by jumping on 12 or so prior occasions, the captain should have been aware of the dangerous method of accessing the boat.

However, as the majority acknowledges, the captain did not see plaintiff embark. There is no evidence that he had actual knowledge of what plaintiff intended to do and "'should-have-known' constructive knowledge is insufficient to meet the actual knowledge requirement" (*Gravatt v City of New York*, 226 F3d 108, 127 n 17 [2d Cir 2000], *cert denied sub nom. Gravatt v Simpson & Brown, Inc.*, 532 US 957 [2001]). In any event, the majority's theory is speculative (*see Park v Kovachevich*, 116 AD3d 182, 191, 192 [1st Dept 2014], *lv denied*, 23 NY3d 906 [2014]). While a gangway and ladders were available at the Weeks Marine yard, plaintiff did not ask for one and decided to put his hand on a coworker's shoulder and jump down, a method he had not used before. Indeed, plaintiff testified that if his coworker had not been there, he would have turned around and climbed down from the bulkhead. Furthermore, even if Weeks Marine's employees regularly boarded by jumping, there is no evidence that the captain ever observed them jumping from a distance of four feet.

Nor is there any proof that proceeding with Weeks Marine's operations under the circumstances was "obviously improvident" (*Scindia*, 451 US at 175).

Accordingly, the order granting defendant summary judgment should be affirmed.

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

ENTERED: MARCH 23, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 23, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2825 Eileen Stein, Index 104943/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Consolidated Edison Company of New York, Inc., et al.,
Defendants.

_____

David Horowitz, P.C., New York (Piotr M. Burdzy of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), and Willkie Farr & Gallagher LLP, New York (Alexander L. Cheney of counsel), for respondent.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered February 20, 2015, which granted the motion of defendant City of New York for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The City established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when, while crossing the street within the crosswalk, she

tripped and fell in a pothole. The City submitted evidence showing that it neither created nor had written notice of the defective condition that caused plaintiff to fall (Administrative Code of City of NY § 7-201[c]; *see e.g. Rosenblum v City of New York*, 89 AD3d 439 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff offers only speculation that further discovery may yield evidence that raises a triable issue (*see e.g. First City Natl. Bank and Trust Co. v Heaton*, 165 AD2d 710, 712 [1st Dept 1990]).

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

ENTERED: MARCH 23, 2017

CLERK

Friedman, J.P., Mazzarelli, Andrias, Feinman, Gesmer, JJ.

3107-
3108 Carlyle CIM Agent, L.L.C.,
Plaintiff-Appellant,

-against-

Trey Resources I, LLC,
Defendant-Respondent.

- - - - -

Carlyle CIM Agent, L.L.C.,
Plaintiff-Appellant,

-against-

Trey Resources, Inc.,
Defendant-Respondent.

Index 652493/16
652504/16

_____

Holwell Shuster & Goldberg, LLP, New York (James M. McGuire of counsel), for appellant.

Hall Estill, Oklahoma City, OK (Leah Rudnicki of the bar of the State of Oklahoma and the State of Texas, admitted pro hac vice, of counsel), for respondents.

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Orders (based on the same decision), Supreme Court, New York County (Charles E. Ramos, J.), entered October 11, 2016, and October 17, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' cross motions to dismiss the actions pursuant to CPLR 3211(a)(4), unanimously reversed, on the law and the facts, with costs, and the cross motions denied.

Resolution of these appeals concerns enforcement of a forum selection clause that was permissive as to plaintiff-lender, but mandatory as to defendants-borrower and guarantor.

Plaintiff-lender Carlyle CIM Agent, LLC, commenced two actions pursuant to CPLR 3213 in New York Supreme Court, one against defendant-borrower Trey Resources I LLC (Trey LLC) after it defaulted on interest payments on notes issued by plaintiff and secured in part by defendants' oil and gas assets, and the other against defendant-guarantor Trey Resources Inc. (Trey Inc.) upon its failure to honor the terms of its guarantee with plaintiff following Trey LLC's default. On the same day, plaintiff commenced an in rem foreclosure proceeding in Oklahoma, pursuant to 12 Okla Stat § 142, seeking to preserve its collateral represented in oil and gas assets and real property owned by Trey LLC, as well as the appointment of a receiver.

In the Oklahoma action, Trey LLC answered and filed counterclaims alleging fraud and tortious interference with contract, among other claims. Trey Inc., which had previously commenced an action in Oklahoma and voluntarily dismissed it after plaintiff filed its actions, petitioned to intervene in the foreclosure proceeding; its motion to intervene was subsequently granted. The Oklahoma court appointed a receiver. Plaintiff moved to dismiss the counterclaims based on the forum selection clauses contained in the parties' Note Purchase Agreement and Pledge Agreement; however, the Oklahoma court denied its motion without comment.

In the New York matters, defendants cross-moved to dismiss the CPLR 3213 proceedings, arguing that dismissal was warranted under CPLR 3211(a)(4), because of the pendency of the Oklahoma action, and that complete relief could be accorded there.

Supreme Court erred in granting the cross motions to dismiss plaintiff's actions based on the Oklahoma action. The unambiguous terms of the forum selection clauses in section 11.15 of the parties' Note Purchase Agreement and section 9.11(b) of the Pledge Agreement required defendants to commence any cause of action against plaintiff exclusively in the state or federal courts of New York County.[1] There is no merit to defendants' argument that the forum selection clauses did not pertain to counterclaims brought in another venue. This is because there is no distinction between a claim and a counterclaim, the latter of which "is itself a cause of action" (*Geddes v Rosen*, 22 AD2d 394, 397 [1st Dept 1965], *affd* 16 NY3d 816 [1965]; *see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:1). This same principle is fatal to defendants' argument that because plaintiff commenced an action in Oklahoma, they were free to bring counterclaims there. Finally, their

[1] In contrast, sections 11.15 of the Note Purchase Agreement, and 9.11(b) of the Pledge Agreement, provided that plaintiff "may" bring any or all judicial proceedings arising out of the two agreements in New York.

argument that they were prohibited from bringing counterclaims in these CPLR 3213 motions carries little weight. Although the general rule is that a counterclaim should not be entertained where the plaintiff seeks summary judgment in lieu of complaint, interposition is allowed when "it appears that the transactions upon which the counterclaim is based are inseparable from and may constitute a defense to the main claim" (*Harris v Miller*, 136 AD2d 603, 603 [2d Dept 1988] [granting summary judgment in lieu of complaint, and severing the counterclaims for pleading in a formal answer]; *see also* Siegel, NY Prac § 292 at 493 [5th ed 2011]). For example, in *Mitsubishi Trust & Banking Corp. v Housing Servs. Assoc.* (227 AD2d 305 [1st Dept 1996]), where we granted summary judgment pursuant to CPLR 3213, we addressed the merits of not only the defenses, but also the defendant's counterclaims and ruled that the defendant's allegations were unsubstantiated, irrelevant, or created issues "separate and severable from [the] plaintiff's claim under the notes" (227 AD2d at 305-306).

Defendants contractually agreed not to file any claim outside of New York County, and doing so was a defined breach under the clear terms of the mandatory forum selection clauses. Thus, absent plaintiff's consent, it is therefore improper to dismiss the New York actions pursuant to CPLR 3211(a)(4) so as to

consolidate them with the Oklahoma proceeding (*see Boss v American Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005], *affd* 6 NY3d 242, 247 [2006] [well-settled policy to enforce contractual forum selection clauses]). To do so would wrongfully reward defendants for their breach.

That plaintiff's actions should be litigated in New York is also required under General Obligations Law section 5-1402, which provides that any party may maintain an action in New York state courts where there is a contractual agreement providing for a choice of New York law and forum, and the case involves at least $1 million, all of which occur here (General Obligations Law § 5-1402). Under this statute, a New York court may not decline jurisdiction even if "the only nexus is the contractual agreement" (*AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495, 496 [1st Dept 2011] [internal quotation marks omitted]; *see also IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 NY3d 310, 314 [2012], *cert denied* ___ US ___, 133 S Ct 2396 [2013]). The purpose of General Obligations Law § 5-1402 is to enhance New York as "one of the world's major financial and commercial Centers," by "encourag[ing] the parties to significant commercial, mercantile or financial contracts to choose New York law" and forum (Mem of Mayor of City of NY, 1984 McKinney's Session Laws at 3288). The statute's proponents wanted to avoid

any "uncertainty about any aspect of the ability of a contracting party effectively to submit itself to the jurisdiction of the New York Courts," as it would "almost certainly operate to deter the parties from selecting New York law in the first place" (*id.*).

To the extent that defendants argue that plaintiff is precluded from making its argument that General Obligations Law § 5-1402 applies for the first time on appeal, we disagree. We have held many times that where a party does not allege new facts on appeal but argues a legal theory that is apparent on the face of the record and could not have been avoided by the opposing party if raised at the proper juncture, the issue is reviewable (*see e.g. Harrington v Smith*, 138 AD3d 548 [1st Dept 2016]; *Kapilevich v City of New York*, 103 AD3d 548 [1st Dept 2013]; *Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]).

Plaintiff's request for reassignment of the actions upon remand is denied.

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3366 New York Convention Center Development Corporation, et al., Plaintiffs-Respondents, Index 158783/13

-against-

National Casualty Company, Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Ellen M. Coin, J.), entered on or about November 18, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 22, 2017,

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3469 The People of the State of New York, Respondent, Ind. 640/14

-against-

Robert McEachern, Defendant-Appellant.

_____

Green & Willstatter, White Plains (Theodore S. Green of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered July 7, 2016, convicting defendant, after a jury trial, of reckless endangerment in the second degree and prohibited use of weapons (eight counts), and sentencing him to a conditional discharge for a period of one year, with a $1,000 fine and community service, unanimously affirmed.

Defendant's legal sufficiency claim relating to his reckless endangerment conviction is unpreserved (*see People v Hines*, 97 NY2d 56, 61 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence with regard to any of the charges (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determination that shots were

fired by defendant, and not the driver of the car in which defendant was riding. Defendant's creation of a risk of, at least, serious physical injury was abundantly established by evidence that, while in an intoxicated state, he fired a pistol out of the window of a moving car eight times while in a densely populated area. The record fails to support defendant's assertion that the shots were fired in a manner that was unlikely to injure anyone.

The court providently exercised its discretion in admitting a sufficiently authenticated video recording showing footage obtained from two surveillance cameras (*see generally People v Patterson*, 93 NY2d 80, 84-85 [1999]). The driver testified that he was able to recognize his own car in the video, and the totality of the evidence provided by the driver and the police lieutenant who obtained the videotape supported the inference that it was taken at the relevant time and place. The court's instructions provided the jury with suitable guidance regarding the videotape, and, in the circumstances presented, the alleged uncertainty about whether the videotape depicted the events at issue went to the weight to be accorded the evidence rather than its admissibility. In any event, we find that any error in admitting the video, stills therefrom, and related testimony was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant contends that, in summation, the prosecutor mischaracterized testimony about whether defendant and his friend, the man driving the car at the time of the shooting, were "horsing around" when defendant fell into some trash cans shortly before the incident, or whether the friend flung defendant into the trash cans. Defendant further contends that the prosecutor's argument that the friend would not have had time in which to fire shots out of his window while driving the car was unsupported by evidence. However, we find that these comments were supported by the testimony, and that any impropriety was not so egregious as to deprive defendant of his right to a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant did not preserve his remaining challenges to the prosecutor's summation, or his challenges to evidence regarding the police patrol guide and related disciplinary procedures, and

to the court's charge, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3470 Block 2829 Realty Corp., et al., Index 650805/14
Plaintiffs-Appellants,

-against-

Community Preservation Corp., et al.,
Defendants-Respondents.

_____

Law Offices of Ambrose W. Wotorson, New York (Stephen Bergstein of counsel), for appellants.

Abrams Garfinkel Margolis Bergson, LLP, New York (Andrew W. Gefell of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 5, 2015, which denied plaintiffs' motion to vacate a prior order, same court and Justice, entered August 11, 2014, dismissing plaintiffs' claim for breach of fiduciary duty against defendant Community Preservation Corp. (CDC), on default, unanimously affirmed, without costs.

"A plaintiff seeking to vacate a default in responding to a motion to dismiss pursuant to CPLR 5015(a)(1) must proffer both a reasonable excuse for the default and a meritorious cause of action" (*Kassiano v Palm Mgmt. Corp.*, 95 AD3d 541, 541 [1st Dept 2012]). With regard to a claim for breach of fiduciary duty, as here, where the remedy sought is purely monetary in nature, courts construe the suit as alleging "injury to property" within

the meaning of CPLR 214(4), which has a three-year limitations period (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Moreover, "where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] [internal quotation marks omitted]). Plaintiffs' allegations of fraud, release and rescission against CPC, which were not asserted in their original claim for breach of fiduciary duty, but were asserted in the Halstead affidavit merely as a statute of limitations defense, do not alter the three-year statute of limitations.

Thus, the court properly denied plaintiffs' motion to vacate the prior order dismissing the complaint against defendant CDC, as plaintiffs did not have a meritorious cause of action, its

sole claim being barred by the statute of limitations.

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3471-
3472 In re Jared S.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

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Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Amanda Sue Nichols of counsel), for presentment agency.

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about May 8, 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 robbery in the second degree, grand larceny in the fourth degree, and two counts of criminal possession of a weapon in the fourth degree, and that he also committed the act of unlawful possession of a weapon by a person under the age of 16, and placed him with the Office of Children and Family Services for a period of 13 months, unanimously affirmed, without costs.

The police had reasonable suspicion to stop and detain appellant based upon a description that was sufficiently specific given the close spatial and temporal factors, coupled with police observations of appellant's suspicious behavior of ducking behind

a car and raising his hands when he saw the police, as well as the fact that appellant appeared to be accompanied by another person who met the description of the other robber and who was also acting suspiciously (*see e.g. People v Brown*, 14 AD3d 356, 356 [1st Dept 2005], *lv denied* 4 NY3d 852 [2005]).

The prompt showup identification was not unduly suggestive (*see People v Brisco*, 99 NY2d 596 [2003]). In challenging the legality of the showup, appellant improperly relies on evidence adduced at the fact-finding hearing, rather than at the suppression hearing; in any event, that evidence would not warrant a finding of suggestiveness (*see People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]).

The fact-finding determination 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 findings concerning identification.

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3473 Lawrence Ray, et al., Index 163020/15
Plaintiffs-Appellants,

-against-

Lee Chen,
Defendant-Respondent.

_____

Glenn H. Ripa, New York, for appellants.

Lee Chen, respondent pro se.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about February 16, 2016, which denied plaintiffs' motion for leave to reenter their former residence and take possession of their personal property, and sua sponte dismissed the complaint, unanimously modified, on the law and in the exercise of discretion, to reinstate the complaint, and otherwise affirmed, without costs.

The motion court properly denied plaintiffs' motion, because plaintiffs offered no recognized legal basis to reclaim their allegedly converted property, the ultimate relief sought on the complaint. The parties have competing claims that must be determined before plaintiffs can obtain this relief.

To the extent that the order sua sponte dismissed the complaint, that portion of the order is not appealable as of right (*see* CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335

[2003]). However, given the extraordinary nature of the sua sponte relief (that is, dismissal of the complaint), the parties' competing factual claims for conversion, and the motion court's failure to identify any legal basis for dismissing the complaint, we sua sponte deem the notice of appeal from that portion of the order to be a motion for leave to appeal, and grant such leave (*see* CPLR 5701[c]; *Serradilla v Lords Corp.*, 12 AD3d 279, 280 [1st Dept 2004]). "The power of a nisi prius court to dismiss an action sua sponte should be used sparingly and only in extraordinary circumstances" (*Grant v Rattoballi*, 57 AD3d 272, 273 [1st Dept 2008] [internal quotation marks omitted]). No such circumstances are present here. In the absence of notice that plaintiffs would be required to respond to a motion to dismiss, "the court was virtually without jurisdiction to grant the relief afforded to defendant[]" (*Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 45 [1st Dept 2001] [internal quotation marks omitted]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3474 Ulises Martinez, Index 23337/14E
Plaintiff-Respondent,

-against-

Clean Air Car Service & Parking Branch One, LLC, et al.,
Defendants-Appellants.

_____

Rubin, Fiorella & Friedman LLP, New York (Stewart B. Greenspan counsel), for appellants.

Morgan Levine Dolan, P.C., New York (Amit Sondhi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered July 11, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when he was allegedly struck by defendants' vehicle as he rode his bicycle. The parties' differing versions

as to how the accident occurred present triable issues as to liability for the accident (*see Susino v Panzer*, 127 AD3d 523, 524 [1st Dept 2015]; *DeRosa v Valentino*, 14 AD3d 448 [1st Dept 2005]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3475-
3476 Sarah Perris,
Plaintiff-Appellant,

-against-

Malachy J. Maguire,
Defendant-Respondent.

- - - - -

[And a Third-Party Action]

Index 307163/12
83735/13

_____

Mitchell Dranow, Sea Cliff, for appellant.

Richard T. Lau & Associates, Jericho (Irene A. Schembri of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered November 4, 2015, dismissing the complaint against defendant, pursuant to an order, same court and Justice, entered October 8, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from order, same court and Justice, entered October 6, 2016, which, to the extent appealed from as limited by the briefs, denied the branch of plaintiff's motion that sought renewal of defendant's motion for summary judgment, unanimously dismissed, without costs, as academic.

Defendant's motion for summary judgment should have been denied, due to conflicting accounts of the accident presented in

his own moving papers. Defendant's deposition testimony about the damage to his vehicle supported a reasonable inference of a side impact to his vehicle, instead of a rear-end collision caused by a motorcycle on which plaintiff was a passenger. Because defendant relied upon the presumption of negligence in a rear-end collision, and because issues of fact exist as to whether a rear-end collision had occurred, he failed to meet his prima facie burden of establishing his entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Given the foregoing determination, we need not consider the parties' remaining arguments.

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3478 Raymond G. Saleeby, Index 650371/16
Plaintiff-Appellant,

-against-

Remco Maintenance, LLC, et al.,
Defendants-Respondents.

_____

Berg & Androphy, New York (Michael M. Fay of counsel), for appellant.

Mandel Bhandari LLP, New York (Robert Glunt of counsel), for Remco Maintenance, LLC, respondent.

Steptoe & Johnson LLP, New York (Charles A. Michael of counsel), for Patriarch Partners, LLC and Lynn Tilton, respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered July 26, 2016, which granted defendants' motions to dismiss plaintiff's claim for conversion and his contract claims as to defendants Tilton and Patriarch, unanimously affirmed, with costs.

While plaintiff pleaded facts and damages in support of his conversion claim that were independent of his breach of contract claim, his 7.5% "common interest" ownership share in a limited liability company was a type of intangible property that could not be the subject of a conversion claim (*see C & B Enters. USA, LLC v Koegel*, 136 AD3d 957, 958 [2d Dept 2016]; *Peters v Gould*, Sup Ct, NY County, Jan. 9, 2012, Kapnick, J., index No.

651505/2010, op at 19-20).

Plaintiff's breach of contract claim against Tilton, in her role as manager of Remco LLC was also properly dismissed. As a manager, Tilton is not liable for the debts of the LLC (see 6 Del C § 18-303). Plaintiff's attempt to use the limitation of liability provision in the LLC's operating agreement is unavailing. Such provisions cannot be used to create additional duties on the manager (*see Fisk Ventures, LLC v Segal*, 2008 WL 1961156, 2008 Del Ch LEXIS 158 [Del Ch, May 7, 2008], *affd* 984 A2d 124 [Del 2009]; *Dawson v Pittco Capital Partners, L.P.*, 2012 WL 1564805, 2012 Del Ch LEXIS 92 [Del Ch, Apr. 30, 2012]).

Finally, plaintiff's claims for breach of contract against Tilton and Patriarch under an alter ego theory were properly dismissed. Plaintiff alleged no more than that Tilton was manager of Remco, and president of the entities that held a majority ownership of Remco. Patriach was alleged to simply have an ownership or management role with regard to those other

entities. This was clearly insufficient to impose alter ego liability (*see Doberstein v G-P Indus., Inc.*, C.A. No. 9995-VCP, 2015 WL 6606484, *4, 2015 Del Ch LEXIS 275, *12-15 [Del Ch, Oct. 30, 2015]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3479 Daniel R. Wotman & Associates, PLLC,
Plaintiff-Respondent,

-against-

Janet Chang,
Defendant-Appellant. Index 110893/10

_____

Vernon & Ginsburg, LLP, New York (Mel B. Ginsburg of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Ronald W. Weiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered December 23, 2015, which granted plaintiff's motion for summary judgment dismissing defendant's counterclaim for legal malpractice and denied defendant's cross motion to amend her counterclaim, unanimously affirmed, without costs.

In this action commenced by plaintiff to recover legal fees, defendant asserted a counterclaim for legal malpractice. Plaintiff moved for summary judgment dismissing that counterclaim and in response, defendant cross-moved for leave to amend the counterclaim to expand and alter her theory of recovery.

Supreme Court providently exercised its discretion in denying defendant leave to amend her legal malpractice counterclaim. The motion for leave to amend came years after the

counterclaim was first asserted and well after the conclusion of discovery. Moreover, defendant failed to articulate a reasonable excuse for her delay in amending the counterclaim and was unquestionably in possession of all the facts she needed to seek leave at an earlier time in the litigation (*see Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392 [1st Dept 2003], *lv dismissed, denied* 100 NY2d 636 [2003]).

The motion court also properly granted plaintiff summary judgment dismissing the counterclaim. Defendant's proof failed to demonstrate that plaintiff was negligent in any way (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3480 The People of the State of New York, Ind. 5667/12
Respondent,

-against-

Davon Woodley,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Richard Tarlowe of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered September 17, 2013, as amended September 30 and October 3, 2013, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant slammed the victim's head into a wall, and also fractured the victim's pelvis by stomping on it, and thereby evinced an intent to inflict serious physical injury.

Defendant's challenges to the prosecutor's summation are entirely unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The remarks at issue generally constituted permissible responses to defense counsel's summation, and to the extent there were improprieties, they did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3481 In re Macin D., and Another,

Children Under the Age of Eighteen Years, etc.,

Miguel D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

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

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

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about January 29, 2016, which, to the extent appealed from as limited by the briefs, found, after a hearing, that respondent father had neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence adduced at the fact-finding hearing established that the children were neglected by the father within the meaning of the Family Court Act (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; Family Ct Act § 1012[f]). The evidence before the Family Court, which included the father's aggressive and intimidating behavior in front of the children,

causing them visible distress, and incidents of domestic violence against the children's mother while the children were present, was sufficient to establish that the children were subject to actual or imminent danger of injury or impairment of their emotional and mental condition (*see e.g. Matter of Naveah P. [Saquan P.]*, 135 AD3d 581 [1st Dept 2016]; *Matter of Patrice S.*, 63 AD3d 620, 620-621 [1st Dept 2009]). The Family Court's credibility determinations are entitled to deference (*Matter of Irene O.*, 38 NY2d 776 [1975]; *see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]).

We have considered the father's procedural and due process arguments, and find them unavailing. The father has not shown that he was prejudiced by any delay in the fact-finding proceeding.

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3482 Meghan Dziuma, Index 20765/13E
Plaintiff-Appellant,

-against-

Jet Taxi, Inc.,
Defendant-Respondent.

Karim Ahmad,
Defendant.

_____

Alpert, Slobin & Rubenstein, LLP, Bronx (Morton Alpert of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 15, 2015, which granted defendant Jet Taxi's motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not suffer any serious injury through the affirmed report of its orthopedist, who found full range of motion in all affected body parts, its radiologist, who opined that the conditions shown in the spinal MRIs were degenerative and that there was no evidence of traumatic injury in the left shoulder, and its psychologist,

who opined that plaintiff did "not present with any evidence for any psychological disability" due to the subject accident (*see Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]).

In response, plaintiff failed to come forward with evidence to rebut defendant's showing, since she presented no medical evidence to substantiate her claims (*see Windham v New York City Tr. Auth.*, 115 AD3d 597, 599 [1st Dept 2014]; *Turner v Benycol Transp. Corp.*, 78 AD3d 506, 507 [1st Dept 2010]).

Defendant established prima facie that plaintiff did not sustain a 90/180-day injury by submitting her deposition testimony showing that she was not confined to home or bed for longer than about five weeks (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3483-
3484 Index 303092/08

Denise Rivera,
Plaintiff-Respondent,

-against-

United Parcel Service, Inc.,
Defendant-Appellant.

_____

Greenberg Traurig, LLP, New York (Wendy Johnson Lario of counsel), for appellant.

Schwartz Perry & Heller LLP, New York (Brian Heller of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about January 12, 2016, awarding plaintiff the total amount of $1,555,104.46, upon her stipulation to the reduced back and front pay awards, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about December 29, 2015, which granted defendant's motion to set aside or reduce the jury verdict, only to the extent of ordering a new trial on damages for future pain and suffering unless plaintiff stipulated to a reduced award for back and front pay, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff was a supervisor employed by defendant. The evidence adduced at trial showed that one of plaintiff's fellow

supervisors ruthlessly harassed her, both on the job and outside of work hours. The supervisor repeatedly made gross and highly offensive sexually-charged remarks to plaintiff, including in front of plaintiff's subordinates, causing them to lose respect for plaintiff and fueling rumors about her proclivity to engage in workplace affairs. The supervisor called her and followed her around after work, forcing her to give him rides and otherwise communicate with him, on pain of threats of losing her job.

The evidence further showed that plaintiff was the subject of widespread and unfounded workplace rumors that she was having affairs with multiple coworkers, and that, in this lax environment, her subordinates made crude and offensive remarks to each other and in plaintiff's presence.

The foregoing evidence supports the jury's finding that defendant engaged in gender discrimination in violation of the New York City Human Rights Law (City HRL) (*see Gonzalez v EVG, Inc.*, 123 AD3d 486, 487 [1st Dept 2014]; *see also Walsh v Covenant House*, 244 AD2d 214, 215 [1st Dept 1997]).

The evidence also showed that plaintiff complained about the supervisor's conduct and the rumors to several more senior supervisors in March 2006, as well as in December 2006 to a Human Resources (HR) manager, who responded with a formal (albeit ineffectual) investigation. Defendant responded to the March

2006 complaints by transferring plaintiff to a facility known as the Remote, which was an undesirable assignment. Defendant responded to the December 2006 complaint to HR by repeatedly transferring plaintiff, ending in her March 2007 transfer to a facility near the World Trade Center, run by a supervisor who was the mentor of the supervisor who had harassed plaintiff, and who was openly hostile to plaintiff, which led to a series of write-ups and plaintiff's termination. The foregoing evidence amply established plaintiff's prima facie cause of action for retaliation (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206 [1st Dept 2015]).

To the extent any objection was preserved, the trial court providently exercised its discretion in the challenged evidentiary rulings, including the exclusion of evidence of plaintiff's posttermination romantic relationship with one of her former subordinates (*see Wolak v Spucci*, 217 F3d 157, 160-161 [2d Cir 2000]).

The compensatory damages award of $300,000 and the stipulated economic damages awards of $307,750 in back pay and $300,000 in front pay did not materially deviate from what would constitute reasonable compensation for like claims (*see e.g. Belton v Lal Chicken, Inc.*, 138 AD3d 609, 611 [1st Dept 2016] [$300,000 for emotional distress]; *Williams v City of New York*,

105 AD3d 667, 667-668 [1st Dept 2013] [$225,000 for future lost earnings]; *Madtes v 809A 8th Ave. Rest.*, 184 AD2d 326 [1st Dept 1992] [$300,000 for future loss of income], *lv denied* 81 NY2d 702 [1992]).

The punitive damages award of $300,000 was not grossly excessive, particularly given defendant's substantial income, and when compared with punitive damages awards for similar claims under the City HRL (*see Salemi v Gloria's Tribeca Inc.*, 115 AD3d 569, 569, 570 [1st Dept 2014] [$1.2 million]; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, 269, 271 [1st Dept 1998] [$1.5 million], *appeal dismissed* 93 NY2d 919 [1999], *lv denied* 94 NY2d 753 [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: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3485-
3486 Index 161186/15

Urban Soccer, Inc.,
Plaintiff-Appellant,

-against-

Royal Wine Corporation,
Defendant-Respondent.

_____

Wrobel Markham Schatz Kaye & Fox LLP, New York (Daniel F. Markham of counsel), for appellant.

Snitow Kaminetsky Rosner & Snitow, LLP, New York (Franklyn H. Snitow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 22, 2016, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about August 8, 2016, which, inter alia, granted defendant's motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The unambiguous rider to the sublease gave defendant sublessor the sole right to terminate the sublease and retain plaintiff's deposit if the City of New York did not consent to the sublease within five months of June 11, 2015 (*see Rogan LLC. v YHD Bowery Commercial Unit LLC*, 132 AD3d 612 [1st Dept 2015]). Plaintiff had no right to declare the sublease null and void, and

certainly not before the passage of the five-month period.

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: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3487 The People of the State of New York, Ind. 3878N/13
Respondent,

-against-

Jonathan Deleon,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James M. Burke, J.), rendered March 11, 2015,

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

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

ENTERED: MARCH 23, 2017

CLERK

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

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3488 Jeffrey Tavarez, Index 305639/13
Plaintiff-Respondent,

-against-

Felix Manuel Castillo Herrasme,
et al.,
Defendants-Appellants.

_____

Chesney & Nicholas, LLP, Syosset (Jeffrey M. Burkhoff of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered July 11, 2016, which, in an action for personal injuries sustained in a motor vehicle accident, denied defendants' motion to renew, unanimously affirmed, without costs.

The court properly denied defendants' motion to renew plaintiff's motion for partial summary judgment on the issue of liability, which was previously granted by Supreme Court and later affirmed by this Court (*see* 140 AD3d 453 [1st Dept 2016]).

There is nothing in plaintiff's deposition, which was taken after he was granted summary judgment, that constitutes new noncumulative facts that would warrant granting renewal (*see Varela v Clark*, 134 AD3d 925 [2d Dept 2015]; CPLR 2221[e]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3489 In re Bleecker Street Investors, LLC, Petitioner-Respondent, Index 570731/15 72392/12

-against-

Doron Zabari, Respondent-Tenant-Appellant,

John Doe, et al., Respondents-Undertenants.

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for respondent.

Order, Appellate Term of the Supreme Court, First Department, entered March 10, 2016, which reversed an order of the Civil Court, New York County (Arlene H. Hahn, J.), entered on or about September 10, 2014, inter alia, denying petitioner landlord's motion for summary judgment on its holdover petition seeking possession of the apartment, use and occupancy and reasonable attorneys' fees, and granted such petition, awarded petitioner possession, and remanded the matter to the Civil Court for a hearing to determine the amount of use and occupancy and reasonable attorneys' fees, unanimously reversed, on the law, without costs, petitioner's motion denied, and the matter remanded for further proceedings.

Collateral estoppel did not apply to bar respondent tenant from challenging the alleged nonregulated rent status of the subject apartment where the record establishes that the Loft Board did not provide notice of the 2005 determination to the tenant who then occupied the apartment, who therefore did not have an opportunity to litigate such issue (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 226 [2011]). A qualifying apartment's regulated status is deemed a continuous circumstance until such time as facts or events are demonstrated that change the status of the apartment (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011]). Here, the tenant's documentary evidence and eyewitness statements raised triable issues whether a basis ever existed to deregulate the apartment. While the present tenant challenged the Loft Board's 2005 determination in a 2012 article 78 proceeding, the Supreme Court judgment, denying and dismissing the article 78 petition "without prejudice," could not serve as a basis to collaterally estop the tenant from asserting his two affirmative defenses and counterclaim in the instant holdover proceeding, inasmuch as the merits underlying

the affirmative defenses were not decided (*see e.g. Lester v New York State Off. of Parks, Recreation & Historic Preserv.*, 87 AD3d 561 [2d Dept 2011]; *see also Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]).

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3490-
3490A The People of the State of New York, Respondent,

Ind. 2853/13
871/14

-against-

Rodney Watts,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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Judgments, Supreme Court, New York County (Robert M. Stolz, J. at pleas; Daniel P. FitzGerald, J. at sentencing), rendered April 8, 2015, convicting defendant of two counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 2½ to 5 years, unanimously affirmed.

The indictments, charging defendant with second-degree criminal possession of a forged instrument under Penal Law § 170.25, in that he possessed counterfeit concert and New York Knicks tickets, were not jurisdictionally defective. As we determined in an alternative holding in *People v Davis*, 127 AD3d 614 [1st Dept 2015], *lv denied* 26 NY3d 928 [2015]), such tickets were written instruments that purported to "evidence, create,

transfer, terminate or otherwise affect a legal right, interest, obligation or status" (Penal Law § 170.10 [1]). We have considered and rejected defendant's arguments for revisiting our determination in *Davis*.

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

ENTERED: MARCH 23, 2017

CLERK

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

3491 In re Dean Michael Steffy, Index 1303A/10
Deceased.

Delcy L. Steffy,
Petitioner-Appellant,

-against-

Diane Mammolito,
Respondent-Respondent.

_____

Richard A. Klass, Brooklyn, for appellant.

Zelenitz, Shapiro & D'Agostino, P.C., Briarwood (Zachary Karram of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about January 16, 2016, which granted respondent's motion for summary judgment dismissing the petition, unanimously affirmed, without costs.

There is no triable issue of fact as to whether the change-of-beneficiary form signed by decedent on or about June 7, 2002 was effective. He followed "the method prescribed by the insurance contract" (*McCarthy v Aetna Life Ins. Co.*, 92 NY2d 436, 440 [1998]) by sending written notice in a form satisfactory to nonparty TIAA-CREF at its home office in New York, New York. It is true that the change-of-beneficiary form said, "This Designation of Beneficiary is effective for each annuity contract listed by number on it if the Designation is in form satisfactory

to TIAA-CREF and if it is recorded by TIAA-CREF for that contract," and that decedent failed to fill in the TIAA and CREF annuity numbers. However, at her deposition, TIAA-CREF's representative explained that if a policyholder – like decedent in 2002 – had only one contract set (comprised of a TIAA number and a CREF number), the change of beneficiary had to apply to that contract set. She also explained that, at some point before 2002, TIAA-CREF's policy changed. Before, TIAA-CREF would follow up with a policyholder who failed to fill in the TIAA-CREF annuity numbers even if he/she had only one contract set. After the change, TIAA-CREF no longer followed up if a policyholder had only one contract set.

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

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

ENTERED: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3492-
3492A Gemmon LLC,
Plaintiff-Appellant,

-against-

Vera Wang Becker, et al.,
Defendants-Respondents.

Index 652726/11

Law Offices of James G. McCarney, New York (James G. McCarney of counsel), for appellant.

Wachtel Missry LLP, New York (Steven J. Cohen of counsel), for respondents.

Judgments, Supreme Court, New York County (Ellen M. Coin, J.), entered December 14, 2015, dismissing the complaint as to each defendant, unanimously affirmed, without costs.

The court properly dismissed the fraud claim against individual defendant Vera Wang Becker because the amended complaint failed to plead any misrepresentations made by her to plaintiff, since plaintiff dealt with others and there were no allegations that she authorized the alleged misrepresentations by others with knowledge of their falsity (*see National Westminster Bank USA v Weksel*, 124 AD2d 144, 147 [1st Dept 1987], *appeal denied* 70 NY2d 604 [1987]). Becker had no duty to plaintiff to disclose confidential negotiations concerning a possible licensing agreement with Kohl's (*see Jolly King Rest. v Hershey*

Chan Realty, 214 AD2d 422 [1st Dept 1995]).

The court properly found that defendant Vera Wang Bridal House (VWBH) sustained its initial burden of demonstrating the absence of loss causation based on evidence that plaintiff's business was in arrears before Kohl's began selling Vera Wang merchandise; VWBH had a substantial quantity of fine jewelry accessible to plaintiff, when its account was brought current; the change in the manufacturer of the fragrance products did not result in an unwarranted delay in the availability of the merchandise; and VWBH had no obligation to continue its relationship with any particular vendor.

Plaintiff failed to present evidence sufficient to raise a triable issue of fact as to these issues. The "prevention doctrine" is unavailing because it is applicable only to conditions precedent (*see Thor Props., LLC v Cherit Group LLC*, 91 AD3d 476, 477 [1st Dept 2012]).

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: MARCH 23, 2017

CLERK

Tom, J.P., Friedman, Mazzarelli, Kapnick, Kahn, JJ.

3494N-
3494NA Bronski Dockery, etc.,
Plaintiff-Respondent,

-against-

UPACA Site 7 Associates, LP,
et al.,
Defendants-Appellants.

Index 155538/12

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for appellants.

Mirman Markovits & Landau, P.C., New York (David Weissman of counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about August 3, 2016, which granted the branch of plaintiff's motion that sought leave to amend the bill of particulars, and denied defendants' motion to strike the proposed amended bill of particulars dated April 12, 2016 and dismiss the complaint; and order, same court and Justice, entered August 18, 2016, which, among other things, granted the branch of plaintiff's motion that sought leave to amend the complaint, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting plaintiff's motion for leave to amend the pleadings, as plaintiff's proposed amendment to change the date of the alleged accident would not cause prejudice or surprise (*see Cherebin v*

Empress Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007]; *see also* CPLR 3025[b]). The date of the accident is not central to defendants' theory of the case (*compare Garguilo v Port Auth. of N.Y. & N.J.*, 137 AD3d 708, 709 [1st Dept 2016] [*lv denied* 28 NY3d 905 [2016]). Moreover, plaintiff submitted a reasonable excuse for the delay and an affidavit of merit in support of the motion.

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

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3496 Luis Flete Guzman, Index 24086/14E
Plaintiff-Respondent,

-against-

Jack P. Desantis, et al.,
Defendants,

Carlos B. Martinez, et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, appellants.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 13, 2016, which, upon reargument, granted plaintiff's motion for summary judgment "on the issue of fault," unanimously modified, on the law, to grant plaintiff's motion to the extent of finding no culpable conduct by plaintiff on the issue of liability, and otherwise affirmed, without costs.

Given that plaintiff expressly sought summary judgment on the issue of liability "against all defendants," and that the court granted plaintiff's motion "on the issue of fault," it appears that both plaintiff and the court misunderstood this Court's holdings in *Garcia v Tri-County Ambulette Serv.* (282 AD2d 206 [1st Dept 2001]) and *Mello v Narco Cab Corp.* (105 AD3d 634 [1st Dept 2013]). In fact, plaintiff, as an innocent back-seat passenger, and in the absence of any finding as a matter of law

of the defendants' respective liability, was entitled to summary judgment only to the extent of finding no culpable conduct by him on the issue of liability (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 117 [1st Dept 2016]).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3497 In re Ariana S. S., etc.,

A Dependent Child Under the Age of 14 Years, etc.,

Antoinette S.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 6, 2016, which, to the extent appealed from as limited by the briefs, terminated respondent mother's parental rights to the subject child upon the mother's admission of abandonment, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The record supports the conclusion that termination of the mother's parental rights is in the best interest of the child, and that a suspended judgment is unwarranted (*see Matter of Star*

Leslie W., 63 NY2d 136, 147-148 [1984]; *Matter of Alani G. [Angelica G.]*, 116 AD3d 629, 629-630 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]). The mother, among other things, failed to address the conditions that led to the child's placement, including her long-term substance abuse, failure to engage in drug rehabilitation and mental health treatment, and failure to maintain contact with the agency. She also failed to visit the child regularly, including during a six-month period when she simply disappeared. Nor did she demonstrate a realistic and feasible plan to provide an adequate and stable home for the child and her siblings. In addition, the mother presented no evidence as to how she would plan separately from the child's putative father, with whom the mother continued to reside despite the restrictions on his ability to be around children due to his sex offender status. Accordingly, it is in the child's best interest to be freed for adoption by her long-term foster mother,

with whom she has resided her entire life, and where she is well-cared for and all of her needs are met (*Matter of Alani G.*, 116 AD3d at 629).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3498 In re Downtown Auto Center, Inc., Petitioner-Appellant, Index 155433/15

-against-

The State of New York, Department of Motor Vehicles, Respondent-Respondent.

The Law Offices of Edward J. Troy, Greenlawn (Patrick J. Morganelli of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (David S. Frankel of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered on or about December 8, 2015, which denied the petition to annul the determination of respondent Department of Motor Vehicles (DMV), dated January 27, 2015, denying the reinstatement of petitioner Downtown Auto Center, Inc.'s (Downtown) licenses to repair and inspect motor vehicles based on the failure to submit required documentation, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

An appeal to DMV's Appeals Board must be taken within 60 days of the date that the "license . . . is denied, suspended or revoked" (Vehicle Traffic Law § 261(1)-(2)). Here, Downtown's administrative appeal, postmarked November 6, 2014, was untimely

as to any claims that its repair shop and public inspection licenses were "seized" on March 20, 2014, yet was timely with respect to the September 9, 2014 denial of its application for the reinstatement of its licenses for failure to provide the required documentation.

The court correctly found that DMV acted rationally when it denied Downtown's application for the reinstatement of its repair shop and public inspection station licenses for lack of documentation (*see Matter of City of New York v New York State Nurses Assn.*, 130 AD3d 28, 34 [1st Dept 2015]). The DMV inspector attested that neither Downtown's principals nor their attorney ever requested that the appointment be rescheduled, and that DMV had no record that counsel or anyone else attempted to provide the required documents later that day or at any other time. Counsel's affirmation, submitted to supplement Downtown's article 78 petition, raised factual issues not presented before the administrative agency, i.e., that the inspector refused to adjourn the conference or accept documents from counsel later that day, which are not properly before this Court (*see Matter of Miller v Kozakiewicz*, 300 AD2d 399, 400 [2d Dept 2002]).

Downtown's contention that the court should not have reached the merits, but instead should have remanded the matter to DMV for a "full hearing" on the merits is unavailing, since once the

Court found that Downtown's failure to refute the documentary evidence failed to raise an issue of fact, "the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding" (CPLR 7804(g); *see also Matter of Dequito v New School for Gen. Studies*, 68 AD3d 559, 559 [1st Dept 2009]).

Further, while a license, such as a driver's license, cannot be revoked without due process (*see Matter of Breslow v Hults*, 26 AD2d 931, 931 [1st Dept 1966]), this is a case involving reinstatement, which is akin to a new license, for which there is no property interest (*see Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 274 [1st Dept 2010]).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3500 Mulberry Development LLC, Index 155548/16
Plaintiff-Respondent,

-against-

Peak Performance NYC, LLC,
et al.,
Defendants-Appellants.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Zisholtz & Zisholtz, LLP, Mineola (Joseph McMahon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered November 18, 2016, which denied defendants' motion for partial summary judgment discharging a mechanic's lien as wilfully exaggerated, unanimously affirmed, without costs.

Defendants' motion was properly denied since they failed to establish that the mechanic's lien filed by plaintiff was willfully exaggerated (*see* Lien Law § 39-a; *On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500 [1st Dept 2013]; *compare Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392 [1st Dept 2006]). Inclusion of allegedly outstanding retainage fees was supported by the terms of the contract providing that 10 percent of all invoices would be retained until completion of the job. Furthermore, although, after the lien was filed, defendants

paid some subcontractors directly, that does not render the lien retroactively exaggerated. We decline to adopt defendants' interpretation of Lien Law § 12-a as providing for an affirmative continuing duty on the part of the lienholder to amend the lien to reflect subsequent payments, or else be subject to a finding of willful exaggeration under Lien Law § 39-a.

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

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3502 Heather H. Kany, Index 303079/15
Plaintiff-Appellant,

-against-

Steven Kany,
Defendant-Respondent.

_____

Donohoe Talbert, LLP, New York (Margaret M. Donohoe of counsel), for appellant.

Berman Frucco Gouz Mitchel & Schub P.C., White Plains (Benjamin E. Schub of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about September 11, 2015, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a) and/or for summary judgment pursuant to CPLR 3212, and for counsel fees, unanimously affirmed, without costs.

Plaintiff's fraud claims are conclusively refuted by the plain terms of the parties' 1995 written settlement agreement, which was referenced by, and attached as an exhibit to, the complaint. Pursuant to the agreement, plaintiff waived any and all right and claim to "any participation or interest that [defendant] may now or in the future have in any retirement plan." Thus, she assumed the risk that at the time the agreement was executed defendant had an interest in a retirement plan of which she was not aware. Moreover, plaintiff "specifically

acknowledged that she had made her own independent investigation of defendant's business affairs and was waiving further disclosure" (*DiSalvo v Graff*, 227 AD2d 298 [1st Dept 1996]; *and see Kojovic v Goldman*, 35 AD3d 65, 68-69 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

The allegation that the supplemental retirement benefits were fraudulently concealed from plaintiff is also flatly refuted by the emails and written correspondence submitted on defendant's motion, many by plaintiff herself. The emails and written correspondence may be considered documentary evidence, because they were submitted to show that defendant's supplemental retirement assets were disclosed, and they are "essentially undeniable" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks omitted]). Since, at the very least, the disclosures in defendant's net worth statement and in the benefits booklet issued by his employer put plaintiff on inquiry notice that defendant was entitled to supplemental retirement benefits, the complaint is time-barred (*see DeLuca v DeLuca*, 48 AD3d 341 [1st Dept 2008]; CPLR 213[8]).

Defendant is entitled to counsel fees under the agreement.

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: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3503 RMB Properties, Index 654491/13
Plaintiff-Appellant,

-against-

American Realty Capital III, LLC, et al.,
Defendants-Respondents.

_____

Kennedy Berg LLP, New York (James W. Kennedy of counsel), for appellant.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Jennifer G. Schecter, J.), entered August 31, 2016,

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

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Schecter, J., without costs and disbursements.

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3504 The People of the State of New York, Respondent, Ind. 2190/13

-against-

Devonte Kelly, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered September 21, 2015, as amended September 22, 2015, convicting defendant, after a jury trial, of sexual abuse in the first degree and three counts of forcible touching, and sentencing him to an aggregate term of four years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the sexual gratification element of sexual abuse (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's actions and words support the inference that he acted for the purpose of gratifying a sexual desire. The record fails to support defendant's claim that he had such difficulty expressing himself that his sexual remark to the victim should not be taken literally.

Defendant was appropriately charged with a single count of first-degree sexual abuse, and that count was not duplicitous, because all of the sexual abuse occurred during a single "uninterrupted course of conduct" (*People v Alonzo*, 16 NY3d 267, 270 [2011]). The fact that the victim briefly fought defendant off before he resumed his attack did not create two separate incidents that should have been charged to the jury separately.

Contrary to defendant's argument, the People did not actually introduce evidence of an uncharged crime or bad act, and even if the evidence challenged by defendant is deemed to fall within the category of bad acts, it was still providently admitted. The court received limited testimony that shortly before the charged incident occurred, a teacher had seen one of his students crying in the playground, that when he asked what was wrong, the student pointed to defendant, and that after directing defendant to leave and calling the police, the teacher drove around with the police and pointed out defendant, who then had his arms around the victim of the charged crime as he hugged and kissed her. The jury was never informed that defendant did anything to the crying girl, and "mere speculation that a jury might discern something sinister about a defendant's behavior does not render that behavior an 'uncharged crime"' (*People v Flores*, 210 AD2d 1, 2 [1st Dept 1994], *lv denied* 84 AD2d 1031

[1995]). In any event, even if analyzed under the principles applicable to uncharged crimes and bad acts, this evidence completed the narrative, explaining why the police stopped defendant even though all they saw was hugging and kissing. Furthermore, defendant's articulate remark when the teacher told him to leave tended to refute his claim of difficulty in communicating, and defendant's arguments regarding the scope of our review of the court's ruling are unavailing (*see People v Nicholson*, 26 NY3d 813 [2016]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014]). The probative value of this evidence outweighed any prejudicial effect, which was minimized by the court's thorough limiting instructions.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3505 In re Donna C.,
Petitioner-Appellant,

-against-

Kuni C.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Kuni C., respondent pro se.

_____

Order, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about April 26, 2016, which, after a hearing, denied petitioner-appellant's violation petition for failure to establish a prima facie case, unanimously affirmed, without costs.

The Family Court's determination that respondent's actions did not rise to the level of the family offenses of aggravated harassment in the second degree, harassment in the second degree or disorderly conduct is supported by the evidence (*see* Family Ct Act § 832). In particular, petitioner failed to establish that respondent committed the family offense of harassment in the second degree by sending her one text message on November 30, 2015 and two text messages on December 25, 2015. Respondent's use of foul and disparaging language to petitioner in his three text messages, although inappropriate, did not rise to the level

of harassment (*see Matter of Thelma U. v Miko U.*, 145 AD3d 527 [1st Dept 2016]). Nor can it be said that respondent's conduct of sending petitioner the text messages served no legitimate purpose, because he sent them to discuss issues regarding their children (*see Matter of Cavanaugh v Madden*, 298 AD2d 390, 392 [2d Dept 2002]), or in response to messages she sent to him. There is no basis to disturb the court's credibility determinations (*see Matter of Everett C. v. Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3506 WiAV Solutions Inc., Index 651634/13
Plaintiff-Appellant,

-against-

HTC Corporation,
Defendant-Respondent.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (David G. Ebert of counsel), for appellant.

Haynes & Boone, LLP, New York (Jonathan D. Pressment of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 18, 2016, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court, in a thorough decision, properly determined that none of the three patent licensing agreements that defendant executed with third parties entitled plaintiff to additional payments under the agreement between plaintiff and defendant (*see e.g. Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1 [1st Dept 2012]). The court properly rejected plaintiff's arguments that certain options granted by defendant to those third parties, which were not alleged to be exercised, as well as the ownership status of certain patent rights transferred to the third parties, constituted a "Triggering Event" under the

agreement. The court also properly determined that plaintiff's unsupported allegations of the existence of other Triggering Events failed to state a claim and that further discovery was not warranted (*id.*).

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: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3507-
3507A The People of the State of New York,
Respondent,

Ind. 5311/10
SCI 4742/14

-against-

Joseph Rojas,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered May 7, 2015,

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

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

ENTERED: MARCH 23, 2017

CLERK

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

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3508 Harold Hirsch, Index 150788/15
Plaintiff-Appellant,

-against-

Stellar Management, et al.,
Defendants-Respondents,

Peter Krasowski, et al.,
Defendants.

_____

Lawrence J. Fredella, New York, for appellant.

Landman Corsi Ballaine & Ford P.C., New York (Jennifer A. Ramme of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about September 22, 2016, which, insofar as appealed from as limited by the briefs, upon the motion of defendants-respondents (defendants), dismissed the second amended complaint as to defendants Aore Holdings, Moshe Azogui, and Yan Ouaknine, dismissed plaintiff's fraud claim for failure to comply with CPLR 3016, and struck the allegations of fraud from the second amended complaint, unanimously modified, on the law, to reinstate the second cause of action as against Aore Holdings, Moshe Azogui, and Yan Ouaknine, and reinstate the factual allegations that are relevant to the second cause of action, and otherwise affirmed, without costs.

The motion court correctly determined that plaintiff failed

to plead a fraud claim with the requisite specificity (*see* CPLR 3016[b]). Although plaintiff alleged that defendants committed a material misrepresentation of fact, plaintiff failed to allege specific details to demonstrate that he justifiably relied on the misrepresentation to his detriment (*see Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 748 [1st Dept 2013]). Nevertheless, to the extent that defendants' alleged wrongdoing is relevant to plaintiff's second cause of action, which survived defendants' motion to dismiss, the allegations should not be struck from the second amended complaint (*see New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391 [1st Dept 2005]). Further, because the second amended complaint alleges that Aore Holdings, Moshe Azogui, and Yan Ouaknine submitted false information in obtaining the work permits that give rise to plaintiff's surviving claim, the court erred in dismissing the second cause of action as to these defendants.

The parties confirm that after the issuance of the motion court's order, the court clarified that plaintiff's second cause of action could encompass injuries caused by toxins including, but not limited to, asbestos. Accordingly, plaintiff's argument

on this point is moot, as he has already received the relief he is requesting (*see e.g. Masterwear Corp. v Bernard*, 3 AD3d 305, 306 [1st Dept 2004]).

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: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3509 Ana Ramona Liranzo, Index 151720/13
Plaintiff-Respondent,

-against-

Apartment Company, LLC,
Defendant-Appellant.

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Matthew J. Zizzamia of counsel), for appellant.

Ferro, Kuba, Mangano, Skylar, P.C., Hauppauge (Kenneth E. Mangano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered November 4, 2015, which, in an action for personal injuries sustained when plaintiff slipped and fell down the stairs of defendant's building, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law by showing that it did not have constructive notice of the debris and beer on the stairs on which plaintiff allegedly slipped. Defendant submitted, inter alia, the testimony of its superintendent, who described his daily cleaning schedule, which included a morning cleaning of the stairs and an evening inspection, and that he adhered to that schedule on the day of the accident (*see e.g. Rodriguez v New York City Hous. Auth.*,

102 AD3d 407 [1st Dept 2013]).

In opposition, plaintiff raised a triable issue of fact through the deposition testimony of her daughter, who testified that the hazardous condition existed the night before the accident, and during the day of the accident, after the superintendent testified that he had cleaned. Contrary to defendant's assertions, this testimony was not "feigned evidence tailored to avoid the consequences of plaintiff's deposition testimony" (*Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp.*, 50 AD3d 469, 470 [1st Dept 2008]), since the daughter's testimony did not contradict plaintiff's deposition testimony. In fact, plaintiff stated that on the day of the accident, she did not leave her apartment until the time of her fall.

Because there is an issue of fact as to notice of the condition, there remains an issue of fact as to whether there is a violation of Multiple Dwelling Law § 80 (*compare Zapin v Israel*, 285 App Div 968, 968 [2d Dept 1955]).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3510-
3510A The People of the State of New York, Ind. 835/11
Respondent, 2406/11

-against-

Tyrone Gregory,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

_____

Judgments, Supreme Court, Bronx County (William Condon, J.), rendered July 11, 2013, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3511-
3512 Luxor Capital Group, L.P., etc., Index 654406/13
590102/14
Plaintiffs-Appellants,

-against-

The Seaport Group LLC, et al.,
Defendants-Respondents.
- - - - -
[And a Third-Party Action]

_____

Kleinberg, Kaplan, Wolff & Cohen, P.C., New York (David M. Levy of counsel), for appellants.

Manatt, Phelps & Phillips, LLP, New York (Ronald G. Blum of counsel), for respondents.

_____

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 18, 2016, which, respectively, denied plaintiffs' motion for summary judgment, and granted defendants' motion for summary judgment dismissing the amended complaint, unanimously affirmed, with costs.

The motion court correctly dismissed the amended complaint alleging breach of contract, as there was no binding, enforceable contract. The instant messages exchanged between the parties reflect that the transaction at issue was "subject to language" to be agreed upon, and was contingent upon "mutually satisfactory documentation." Further, plaintiff Luxor Capital Group, L.P.'s internal communications and actions reflect an intent not to be

bound absent execution of various documents and receipt of additional information, and the record shows that Luxor never received those documents and information (*see Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

The Court of Appeals' decision in *Stonehill Capital Mgt. LLC v Bank of the W.* (28 NY3d 439 [2016]) does not compel any result to the contrary. Here, in contrast to *Stonehill*, the documents to be executed was not between plaintiffs and defendants. Rather, in this case, the document was to be executed by plaintiffs and a third-party seller; indeed, the parties did not even discuss the document before agreeing to the trade. Moreover, unlike in *Stonehill*, the totality of the circumstances here does not reflect any certainty as to the existence of an

enforceable agreement.

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

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

ENTERED: March 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3513 Ousman Savane, Index 153348/15
Plaintiff-Respondent,

-against-

District Attorney of New York County, etc., et al.,
Defendants-Appellants,

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

_____

Cyrus R. Vance, Jr., District Attorney, New York (Christina Ante of counsel), for appellants.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 17, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of the District Attorney defendants to dismiss the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's causes of action against defendant assistant district attorney, including for false arrest, malicious prosecution, malicious abuse of process, denial of due process, conspiracy and unreasonably prolonged detention, whether brought under state law and/or under 42 USC § 1983, should have been dismissed absent allegations that would overcome the assistant

district attorney's entitlement to absolute immunity in performing what was her official duties as a prosecutor (*see Arzeno v Mack*, 39 AD3d 341, 342 [1st Dept 2007]; *Shmueli v City of New York*, 424 F3d 231 [2d Cir 2005]).

Additionally, the felony complaint submitted by plaintiff in opposition to the motion, together with the pleadings and acknowledgment of an indictment, established that there was probable cause to arrest plaintiff (*see Brown v City of New York*, 289 AD2d 95 [1st Dept 2001]), and there was no allegation to indicate the assistant district attorney's involvement with the case until some time after plaintiff was formally charged. Under such circumstances, probable cause afforded a complete defense to plaintiff's claims against the assistant district attorney for false arrest, false imprisonment and malicious prosecution brought under state law, as well as the related claims brought under 42 USC § 1983 (*see Hernandez v City of New York*, 100 AD3d 433 [1st Dept 2012], *lv dismissed* 21 NY3d 1037 [2013]). Plaintiff further failed to make out a prima facie case of malicious prosecution by failing to overcome the presumption of probable cause that attached upon his indictment (*see Pang Hung Leung v City of New York*, 216 AD2d 10 [1st Dept 1995]).

Defendant District Attorney was entitled to absolute

immunity as a defense to plaintiff's claims under 42 USC § 1983 alleging his liability as a policy maker, and in his management capacity in the District Attorney's Office (*see Van de Kamp v Goldstein*, 555 US 335 [2009]).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3514 The People of the State of New York, Ind. 1305/13
Respondent,

-against-

Eric Williams,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered August 6, 2015,

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

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

ENTERED: MARCH 23, 2017

CLERK

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

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3515 Ruben Ruiz, Index 302045/14
Plaintiff-Respondent, 20499/14E

Barbara L. Borgella, et al.,
Plaintiffs,

-against-

Roberto C. Reyes, et al.,
Defendants-Appellants.

- - - - -

Frank C. Randazzo, etc.,
Plaintiff,

-against-

Aztec Auto Restoration, Inc.,
et al.,
Defendants-Appellants,

Maeleen Ambulette Transport, Inc.,
et al.,
Defendants-Respondents.

_____

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

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Elizabeth M. Hecht of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered August 31, 2016, which granted the motions of respondents Ruben Ruiz, Barbara L. Borgella and Maeleen Ambulette Transport, Inc. (MATI), for summary judgment on the issue of defendants Aztec Auto Restoration, Inc. (Aztec) and Roberto C. Reyes's liability, unanimously affirmed, without costs.

This action arises out of an automobile accident where a tow truck owned by Aztec and driven by defendant Reyes crashed head-on into an ambulette owned by respondent MATI and driven by respondent Ruiz. The evidence, including affidavits of Ruiz and of respondent Borgella, who was a passenger in the ambulette, shows that at the time of the accident, the two vehicles were traveling in opposite directions, when Reyes's vehicle crossed over the double yellow lines of traffic and struck the ambulette. The motion court correctly concluded that the evidence demonstrated the absence of any negligence on Ruiz's part, and that Aztec and Reyes failed to raise a triable issue of fact (*see e.g. Zapata v Sutton,* 84 AD3d 521 [1st Dept 2011]).

Furthermore, Aztec and Reyes failed to demonstrate entitlement to discovery concerning the emergency doctrine defense because Reyes did not deny Ruiz's assertions that Reyes was traveling at an excessive rate of speed when he collided

head-on with the ambulette. The emergency doctrine does not apply when the emergency was of a defendant's own making (*see e.g. Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]).

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

ENTERED: MARCH 23, 2017

CLERK

Sweeny, J.P., Richter, Moskowitz, Feinman, Gische, JJ.

3516 Fernanda Vello, et al., Index 101824/12
Plaintiffs-Appellants,

-against-

Liga Chilean de Futbol, et al.,
Defendants-Respondents,

The Public Administrator of the
County of New York, etc.,
Nonparty.

_____

Asta & Associates, P.C., New York (Eliot S. Bickoff of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Laura E. Dolan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered October 28, 2015, which denied plaintiffs' motion pursuant to CPLR 1015(a) to substitute the "Public Administrator of New York County, as Administrator of the Estate of David Tagle, deceased d/b/a Liga Chilean de Futbol" as a named defendant in place of defendant Liga Chilean De Futbol, and granted defendants' cross motion to dismiss the action as against Liga Chilean De Futbol, unanimously affirmed, without costs.

The infant plaintiff was injured when an inflatable ride collapsed during a festival sponsored by Liga Chilean de Futbol (Liga Chilean), which obtained a permit identifying David Tagle as its authorized agent. Plaintiffs thereafter commenced an

action against Liga Chilean and Randall's Island Sports Foundation, Inc. In their answer, defendants denied the allegations that Liga Chilean was a corporation, and they subsequently informed plaintiffs that Liga Chilean was not a business entity, but was a name used by David Tagle to do business, and that Tagle had died two months after the accident, which was before this action was commenced. Although plaintiffs successfully petitioned Surrogate's Court to issue limited letters of administration to the Public Administrator so that the administrator could be substituted as a party, they never served the Public Administrator with any motion to either substitute or add the Public Administrator as a party before the statute of limitations elapsed (CPLR 203, 210[b], 214[5]).

The motion to substitute the Public Administrator as a defendant was properly denied because no action was ever brought against Tagle before his death (*Marte v Graber*, 58 AD3d 1, 3 [1st Dept 2008]). Plaintiffs argue that the action against Liga Chilean should be treated as one against Tagle, but any action commenced against Tagle after his death would be a "nullity" since "the dead cannot be sued" (*id.*). Instead, plaintiffs were required to commence a legal action naming the personal representative of the decedent's estate (*Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]).

Liga Chilean's motion to dismiss was properly granted because it is not an existing entity and therefore cannot "sue or be sued" (*Zarzycki v Lan Metal Prods. Corp.*, 62 AD3d 788, 789 [2d Dept 2009]).

Even assuming that Tagle conducted business in a deceptive or misleading manner through a fictitious entity, as plaintiffs argue, plaintiffs were not prejudiced or harmed as a result of that conduct. Indeed, defendants in this action disclosed to plaintiffs that Liga Chilean was not a legal entity well before the statute of limitations had elapsed. Thus, plaintiffs were not prejudiced or harmed by Tagle's conduct.

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

ENTERED: MARCH 23, 2017

CLERK

Acosta, J.P., Mazzarelli, Andrias, Feinman, Webber, JJ.

2656 Wayne Schnapp, Index 115059/08
Plaintiff-Appellant,

-against-

Miller's Launch, Inc.,
Defendant-Respondent.

_____

Hofmann & Schweitzer, New York (Paul T. Hofmann of counsel), for appellant.

Rubin, Fiorella & Friedman, LLP, New York (Michael Evan Stern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered June 2, 2016, reversed, on the law, without costs, and the motion denied.

Opinion by Acosta, J.P. All concur except Andrias, J. who dissents in an Opinion.

Order filed.