SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 9, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

725 Robert Obey, Index 106088/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

New York City Transit Authority,
Defendant-Respondent.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Mark R. Bernstein of counsel), for appellant.

Lawrence Heisler, Brooklyn, for respondent.

_____

Upon remittitur from the Court of Appeals (_NY3d_, 2017 NY Slip Op 02590 [2017]), for consideration of issues raised but not determined on the appeal to this Court, order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 22, 2014, insofar as it denied plaintiff's motion to set aside the jury's award of damages for pain and suffering, unanimously affirmed, without costs.

The jury's award of $450,000 for past and future pain and suffering did not differ materially from what is reasonable

compensation, and plaintiff raises no challenge on appeal to the award for medical expenses. The cases relied on by plaintiff in support of his challenge to the pain and suffering award (*see e.g.*, *Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18 [2d Dept 2008], *lv denied* 11 NY3d 705 [2008]) are distinguishable, because in those cases plaintiff had significantly more surgery than occurred here. We see no reason to increase the jury's damages award or to order a new trial on damages.

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

ENTERED: MAY 9, 2017

CLERK

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

3754N In re Lisa Broad, Index 101304/14
Petitioner-Respondent,

-against-

The New York City Board/Department of Education,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Kathy Park of counsel), for appellant.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Candice L. Deaner of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered October 23, 2015, which granted the petition to set aside a determination of an arbitrator, dated October 29, 2014, sustaining numerous charges and specifications against petitioner and terminating her employment as a tenured teacher, unanimously reversed, on the law, without costs, the petition denied, the determination of the arbitrator reinstated, and the proceeding brought pursuant to CPLR article 75, dismissed.

The arbitrator's decision had a rational basis and was supported by adequate evidence (*see e.g. Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). The record shows that the arbitrator reasonably

determined that petitioner's performance as a teacher was deficient for two years based on the observations and ratings of the school principal and two assistant principals. Although some of the charges and specifications were not significant, the record reflects that petitioner was provided with substantial assistance over a two-year time period to improve her pedagogical skills, but she was unwilling to improve her performance.

The penalty of termination from employment does not shock our sense of fairness (*see e.g. Matter of Russo v NYC Dept of Educ., 25 NY3d 946 [2015]; Matter of Webb v City of New York*, 140 AD3d 411 [1st Dept 2016]).

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

ENTERED: MAY 9, 2017

CLERK

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

3775N Samaad Bishop, Index 251419/13
Plaintiff-Appellant,

-against-

Katz Delicatessen of Houston Street, Inc., et al.,
Defendants-Respondents,

Fred Austin, etc., et al.,
Defendants,

Zurich American Insurance Company, et al.
Nonparty Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Betty Owens Stinson, J.), entered on or about January 15, 2016,

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 April 24, 2017,

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

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

ENTERED: MAY 9, 2017

CLERK

Sweeny, J.P., Acosta, Renwick, Moskowitz, Kahn, JJ.

3847 Sian Green, Index 161441/14
Plaintiff-Appellant,

-against-

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

Faysal Kabir Mohammad Himon, et al.,
Defendants.

_____

The Marchese Law Firm, LLC, Newton, NJ (Daniel G.P. Marchese of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered March 4, 2016, which granted the motion of defendants City of New York, New York City Department of Transportation and New York City Taxi & Limousine Commission to dismiss the complaint as against them, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Plaintiff was severely injured when, while standing on the sidewalk, a taxicab hopped the curb and struck her. The taxi driver had numerous penalty points on his license that might have supported a suspension of his license prior to the accident, and plaintiff alleges that the failure to suspend the driver sooner

was the result of a "computer glitch" at defendant Taxi & Limousine Commission. Plaintiff seeks damages for the City defendants' failure to enforce their own rules and regulations. However, absent a special relationship giving rise to a duty on the part of the municipality to exercise care for the benefit of a particular class of individuals, no liability may be imposed upon a municipality for failure to enforce a statute or regulation (*see Valdez v City of New York*, 18 NY3d 69, 75 [2011]).

Plaintiff alleges no facts sufficient to show a special duty owed by the City defendants to her. She set forth no statutory provisions or other facts to show that the taxi licensing regulations she sued under were for the benefit of a limited class of persons that included her, as opposed to the public at large (*see Burbach v City of New York*, 194 AD2d 391 [1st Dept 1993]). Nor has she alleged that the City defendants voluntarily assumed a duty that generated reasonable reliance, or that they assumed positive direction and control in the face of a known, blatant and dangerous safety violation. Accordingly, the complaint was properly dismissed as against the City defendants (*see Metz v State of New York*, 20 NY3d 175 [2012]).

As these defects were not cured by plaintiff's proposed

amended complaint, her cross motion to amend was also properly denied (*cf. MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2011]).

M-1795 - *Sian v The City of New York, et al.*

Motion to dismiss appeal denied.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3932 The People of the State of New York, Ind. 2290/15
Respondent,

-against-

Ray Ruiz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Tomoeh Murakami Tse of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni 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 (Edward J. McLaughlin, J.), rendered October 13, 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: MAY 9, 2017

CLERK

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

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3933 Jessica Peña, Index 302550/12
Plaintiff-Respondent,

-against-

Tyrax Realty Management, Inc., et al.,
Defendants-Appellants.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellants.

Cellino & Barnes, P.C., Garden City (John Lavelli of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about May 31, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to make a prima facie showing of their entitlement to summary judgment, since the evidence they submitted raises genuine issues of fact about whether they created a dangerous condition (*see DiVetri v ABM Janitorial Serv., Inc.*, 119 AD3d 486, 487 [1st Dept 2014]). The superintendent of the building owned by defendant 2305 Grandco and managed by defendant Tyrax testified that he had mopped the accident location with soap and water approximately five minutes before plaintiff slipped and fell and did not place warning signs

in the area. Moreover, plaintiff's testimony provides a nonspeculative basis for her version of the accident and sufficiently establishes a nexus between the hazardous condition and the circumstances of her fall (*Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637, 637-638 [1st Dept 2013])

Even if defendants had made a prima facie showing, it was rebutted by, among other things, the transcript of a recorded conversation between plaintiff and a Tyrax manager, in which the manager conceded that the area had been mopped and that no warning signs were placed thereafter. Even if a portion of the transcript is hearsay, under the particular circumstances it may be considered in conjunction with the other evidence to defeat summary judgment (*see Marquez v 171 Tenants Corp.*, 106 AD3d 422, 423 [1st Dept 2013]).

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3934 In re Naitalya B., and Another,

Children Under Eighteen Years
of Age, etc.,

Melissa B.
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 26, 2015, which found that respondent mother neglected her daughter and derivatively neglected her son, unanimously affirmed, without costs.

The Family Court's findings that the mother neglected her daughter and derivatively neglected her son were supported by a preponderance of the evidence. The record showed that the mother inflicted excessive corporal punishment on her daughter by striking her with her hand and with a plastic softball bat, causing the child to sustain bruises all over her body. The

child's out-of-court statements were sufficiently corroborated by the agency caseworker and hospital staff's observations of the bruises on the child, photographs depicting the injuries, and medical records (*see Matter of Tyson T. [Latoyer T.]*, 146 AD3d 669 [1st Dept 2017]; *Matter of Harrhae Y. [Shy-Macca Ernestine B.]*, 112 AD3d 512 [1st Dept 2013]). In addition, while the child's repetition of the same allegations that her mother hit her did not provide corroboration for the out-of-court statements, the consistency of her reported statements enhanced her credibility (*see Matter of David R. [Carmen R.]*, 123 AD3d 483, 484 [1st Dept 2014]). Furthermore, the mother's behavior of punishing the child by forcing her to remain in a bathroom for two days and unevenly shaving parts of her head clearly threatened the child's emotional well-being (*see e.g. Matter of Patrice S.*, 63 AD3d 620 [1st Dept 2009]).

The court also properly found that the son was derivatively neglected inasmuch as the physical and emotional abuse toward the daughter demonstrated such an impaired level of parental judgment

as to create a substantial risk of harm for the son in the mother's care (*see Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]).

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3936N Leo Chiagkouris, also known as Leo Chiag Kouris,
Plaintiff-Respondent,

-against-

201 West 16 Owners Corp.,
Defendant-Appellant.

Index 160540/16

_____

Pryor Cashman LLP, New York (Eric D. Sherman of counsel), for appellant.

Zingman & Associates PLLC, New York (Mitchell S. Zingman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert Reed, J.), entered January 13, 2017, which granted plaintiff's motion for a preliminary injunction, unanimously reversed, on the law and the facts, without costs, and the motion denied.

We reverse the IAS Court's grant of the preliminary injunction because plaintiff failed to show irreparable injury absent the injunction (*see New York City Off-Track Betting Corp. v New York Racing Assn.*, 250 AD2d 437, 437-439 [1st Dept 1998]; *O'Hara v Corporate Audit Co.*, 161 AD2d 309, 309-310 [1st Dept 1990]). Defendant states – and plaintiff does not dispute – that it cannot recover possession of his apartment unless a court of competent jurisdiction determines that defendant's notice of termination was valid; in other words, even absent an injunction,

plaintiff will be entitled to remain in possession of his apartment pending an adjudication of the merits. Moreover, the issues raised in this proceeding can be raised defensively and adjudicated in a summary proceeding.

Furthermore, in his affidavit in support of his motion for a preliminary injunction, plaintiff said "[o]n information and belief" that he would be in default of his mortgage if his lease was terminated and that he would "face severe financial consequences" if he was in default. This statement does not demonstrate that plaintiff risks default under the mortgage before the parties' disputes are decided. Moreover, assuming this otherwise constitutes a viable category of damages, they would be compensable monetarily. Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable" (*SportsChannel Am. Assoc. v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992] [emphasis omitted]). On appeal, he claims that if he defaults on his mortgage, his credit

rating will be diminished and that this cannot be cured by money damages. However, he did not say this in his affidavit; his counsel merely mentioned credit rating at oral argument.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3937 The People of the State of New York, Respondent, Ind. 3290/14

-against-

Andre Rosa, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 17, 2015, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 10 years, unanimously affirmed.

Regardless of the validity of defendant's waiver of the right to appeal, we perceive no basis for reducing the sentence, or remanding for resentencing. Defendant did not preserve his claim that his sentence was improperly based on a presentence report for which he was not interviewed (*see People v Pinkston*, 138 AD3d 431 [1st Dept 2016], *lv denied* 27 AD3d 1137 [2016]), and we decline to review it in the interest of justice. As an alternative holding, we find that defendant could not have been

prejudiced by any deficiency in the report. "Defendant received the precise sentence he bargained for" (*People v Davis*, 145 AD3d 623, 623 [1st Dept 2016], *lv denied* 28 NY3d 1183 [2017]), and "had he wished to be interviewed by the Probation Department, he could have called the court's attention to the fact that he had not been produced for such an interview" (*Pinkston*, 138 AD3d at 432). Moreover, there is no indication that defendant was inclined to ask the court to exercise its discretion to impose a more lenient sentence than the one the parties agreed upon, a request that, "if successful, ran the risk of undoing the plea agreement pursuant to *People v Farrar* (52 NY2d 302, 307-308 [1981])" (*People v Vaughn*, 4 AD3d 139, 139 [2004], *lv denied* 3 NY3d 649 [2004]; *see also People v Guerrero*, 27 AD3d 386, 387 [1st Dept 2006], *lv denied* 7 NY3d 756 [2006]). We note that in both *People v Harleston* (139 AD3d 412 [1st Dept 2016], *lv denied* 28 NY3d 971 [2016]) and *People v Breaux* (24 AD3d 261 [1st Dept 2005], *lv denied* 6 NY3d 809 [2006]), the error was preserved for

review as a question of law, and the error was prejudicial because there was no negotiated sentence.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3938 In re Richard Agbai, Index 101083/14
Petitioner-Appellant,

-against-

New York City Civil Service Commission, et al.,
Respondents-Respondents.

_____

Siskopoulos Law Firm, LLP, New York (Alexandra Siskopoulos of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

_____

Judgment (denominated an order), Supreme Court, New York County (Joan B. Lobis, J.), entered April 3, 2015, granting respondents' cross motion and dismissing the article 78 petition seeking, inter alia, to vacate respondents' determination, dated June 3, 2014, which terminated petitioner's employment as a correction officer, unanimously affirmed, without costs.

The determination of respondent New York City Civil Service Commission is subject to judicial review only if "the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction" (*Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78 NY2d 318, 323 [1991]). The court properly rejected petitioner's argument that the Administrative Law Judge did not have the authority and

jurisdiction to conduct the subject disciplinary hearing (*see e.g. Matter of Stapleton v Ponte*, 138 AD3d 751 [2d Dept 2016]).

Petitioner's remaining contentions are either improperly raised for the first time on appeal or unavailing.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3940 Daniel Almonte, Index 160230/14E
Plaintiff,

-against-

Citibank NMTC Corporation, et al.,
Defendants-Respondents,

2481 ACP Owner, LLC, et al.,
Defendants,

ABM Janitorial Services-Northeast, Inc.,
Defendant-Appellant.

_____

Jeffrey Samel & Partners, New York (Robert G. Spevack of counsel), for appellant.

White & McSpedon, P.C., New York (Michael J. Caulfield of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 4, 2016, which granted defendants-respondents' (collectively Citi) motion for summary judgment on their cross claim against defendant ABM Janitorial Services-Northeast, Inc. (ABM) for breach of contract to procure insurance, unanimously reversed, on the law, with costs, and the motion denied.

Citigroup Technology, Inc. (CTI) and ABM entered into a "Service Contractor Agreement," whereby ABM agreed to provide certain janitorial services for Citi. Under section 7 of the agreement, entitled "Insurance," ABM was required to obtain the

insurance set forth in Exhibit C "and in a form reasonably satisfactory to CTI." Exhibit C required commercial general liability insurance with a combined single limit of no less than $3,000,000 per occurrence, and that CTI, among others, be named as an additional insured. It also required ABM to "furnish to CTI Certificate(s) of Insurance evidencing the above coverage."

ABM procured a $2,000,000 policy with a $1,000,000 self-insured retention (SIR). It also furnished to Citi's insurance agent Certificates of Liability Insurance evincing the $1,000,000 SIR. Following the commencement of plaintiff's personal injury action, which implicates the required insurance, Citi moved for summary judgment on its cross claim against ABM for breach of contract for failing to procure the required insurance, arguing that ABM impermissibly obtained the SIR.

The motion court erred in granting the motion. Although neither section 7 nor Exhibit C in the agreement mention an SIR, section 8, entitled "Indemnification," provides, in pertinent part, that "[t]he obligations set forth in this section shall remain in effect regardless of whether [ABM] maintains or fails to maintain any insurance coverage required hereunder, or self-insures for any liability, and *any self-insured coverage shall be deemed insurance coverage hereunder*" (emphasis added). Accordingly, the contract is ambiguous as to whether an SIR is a

permissible form of insurance coverage. Issues of fact also exist as to whether Citi accepted the SIR or waived any objection to it, given the "reasonably satisfactory" language in section 7 of the agreement and the fact that Citi did not previously object to the SIR even though the Certificates of Liability Insurance evinced the $1,000,000 SIR.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3941 The People of the State of New York, Respondent, Ind. 4744/12

-against-

Rezo Tsiklauri, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered July 23, 2013, convicting defendant, after a jury trial, of assault in the second degree and resisting arrest, and sentencing him to an aggregate term of two 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. There was ample evidence of defendant's intent to resist arrest and prevent the injured officer from performing a lawful duty. Defendant repeatedly shouted "no," backed up against a wall, tried to keep his arms rigid at his sides so officers could not handcuff him, and grabbed and twisted one officer's wrist, causing torn ligaments in the officer's hand (*see e.g. People v*

Spencer, 95 AD3d 781, 782 [1st Dept 2012], *lv denied* 19 NY3d 977 [2012]).

Defendant's challenge to the court's definition of reasonable doubt, given in response to a question from a prospective juror during the voir dire of one panel of jurors, is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The court's charge, as delivered to all prospective jurors at the beginning of voir dire, and to the sworn jurors at the commencement of trial and prior to deliberations, accurately conveyed the concept of proof beyond a reasonable doubt, and the court's isolated misstatement during one round of voir dire does not warrant reversal (*see People v Drake*, 7 NY3d 28, 34 [2006]; *People v Javier*, 269 AD2d 182 [1st Dept 2000], *lv denied* 95 NY2d 798 [2000]). We have considered and rejected defendant's arguments that the misstatement interfered with his ability to

question the panel of prospective jurors who heard it, and that counsel rendered ineffective assistance by failing to object to the misstatement.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3943 IRX Therapeutics, Inc., Index 652614/16
Plaintiff-Appellant,

-against-

L. Zachary Landry,
Defendant-Respondent.

_____

Leichtman Law PLLC, New York (David Leichtman of counsel), for appellant.

Reid Collins & Tsai LLP, New York (Jeffrey E. Gross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about December 15, 2016, which, in effect, granted the branch of defendant's motion that sought dismissal of the action pursuant to CPLR 3211(a)(4), unanimously affirmed, with costs.

Defendant, a Texas resident, did not establish that his telephone and email contacts with plaintiff's chief executive officer in New York were, as a matter of law, insufficient to warrant exercise of personal jurisdiction over him pursuant to CPLR 302(a)(1) (*see Fischbarg v Doucet*, 9 NY3d 375 [2007]; *C. Mahendra [NY], LLC v National Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015]).

Nevertheless, the motion court providently exercised its discretion in dismissing this action based on the pendency of an

action in federal court in Texas concerning the same alleged contract (*see Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *see also* CPLR 3211[a][4]). In the Texas action, defendant and two other individuals not named as parties in this action allege that plaintiff breached a contract. The Texas action is thus more comprehensive than this declaratory judgment action and will address defendant's claim that the parties never entered into an enforceable contract; moreover, dismissal of this action in favor of the Texas action will avoid duplicative, vexatious litigation (*see White Light Prods. v On The Scene Prods.*, 231 AD2d 90 [1st Dept 1997]; *Continental Ins. Co. v Polaris Indus. Partners*, 199 AD2d 222, 223 [1st Dept 1993]). Further, the record shows that the dispute has a significant nexus with Texas since the three individuals seeking to enforce the alleged contract with plaintiff are Texas residents, all work contemplated under the alleged contract was to be done in Texas, and plaintiff reached out to defendant for the specific purpose of expanding its business into Texas and making use of defendant's connections there in an effort to raise capital.

Although this action was filed first, chronology is not dispositive, particularly since both actions are at the earliest stages of litigation (*see San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st Dept 2003]), and since the format of this action (i.e.,

a declaratory judgment action) suggests that it was responsive to defendant's threat of litigation (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 9 [1st Dept 2007]). The record also suggests that plaintiff commenced this action preemptively in an effort to gain a tactical advantage and deprive defendant of his choice of forum (*id.*; *Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167 [1st Dept 2005]).

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3944 In re Alberto A., Jr.,
Petitioner-Respondent,

-against-

Sasha A. R.,
Respondent-Appellant.

_____

Neal D. Futerfas, White Plains, for appellant.

Bruce A. Young, New York, for respondent.

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

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about January 19, 2016, which, following a hearing, awarded petitioner father sole legal and physical custody of the parties' children, with liberal visitation to respondent mother, unanimously affirmed, without costs.

After conducting a lengthy trial, the Family Court appropriately exercised its discretion in determining that it was in the children's best interest to award sole legal and physical custody to the father, with liberal visitation to the mother.

We reject the mother's request that we reverse in the light of events that allegedly occurred since the entry of the decision by the Family Court. We hold that our decision in *Matter of Jose F. v Rosa R.N.A.* (62 AD3d 413, 413 [1st Dept 2009]) does not

require that result, since, in that case, the alleged new events occurred before the Family Court had issued its decision, which is not the case here. Our decision is, of course, without prejudice to any proceedings now pending in the Queens County Family Court.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3945 Nora Arthur, Index 653800/15
Plaintiff-Appellant,

-against-

Carver Federal Savings Bank, et al.,
Defendants-Respondents,

1809-15 7th Avenue Housing Development
Fund Corporation, et al.,
Defendants.

_____

MFY Legal Services, Inc, New York (Ali Aghazadeh Naini of counsel), for appellant.

Hinshaw & Culbertson LLP, New York (Alan F. Kaufman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 16, 2016, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Carver Federal Savings Bank, Waterfall Victoria Master Fund Ltd., Waterfall Victoria REO 2013-01 LLC and Statebridge Company LLC to dismiss the complaint as against them, unanimously modified, on the law, the motion denied as to plaintiff's 12th, 13th and 15th causes of action, and otherwise affirmed, without costs.

The court improperly dismissed plaintiff's 12th cause of action because defendants' proof was insufficient to establish that they sent a notice to plaintiff 90 days prior to the sale of

her cooperative shares held as collateral (*see* UCC 9-611[f][1]).

The court improperly dismissed plaintiff's 13th cause of action because the notice of sale misidentified the secured party, and failed to state that "the debtor is entitled to an accounting of the unpaid indebtedness and . . . the charge, if any, for an accounting," as required by UCC 9-613.

The court erred in dismissing plaintiff's 15th cause of action on the ground that General Business Law § 349 only applies to the "soliciting, processing, placing or negotiating of mortgage(s)." There is nothing in the section that so limits it. The court also erred in dismissing that claim on the ground that plaintiff failed to come to court with a payment plan. Rather, plaintiff stated a claim under that statute in that she adequately alleged that defendant was engaged in a consumer oriented transaction, that was misleading and injured her, as required by *Oswego Laborers' Local 214 Fund v Marine Midland Bank* (85 NY2d 20, 25 [1995]).

The court properly dismissed the remaining causes of action. Plaintiff also failed to state a claim that the nonjudicial foreclosure sale was not conducted in a commercially reasonable manner (*see* UCC 9-610).

We have considered plaintiff's remaining arguments,

including that she should be permitted to replead her inadequate causes of action, and find them unavailing.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3946 The People of the State of New York, Respondent, 81919/10

-against-

Melvin Livingston, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered May 4, 2011, convicting defendant, after a nonjury trial, of attempted petit larceny and attempted possession of stolen property in the fifth degree, and sentencing him to concurrent terms of 45 days, unanimously affirmed.

The accusatory instrument was not jurisdictionally defective. Giving the instrument "a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]), we find that the instrument contained nonconclusory factual allegations establishing every element of the offenses (*People v Karlin*, 12 NY3d 225, 228-29 [2009]), including intent to steal.

First, the allegation that defendant "attempt[ed] to leave the store in possession of the property and without paying for

it" did not, as defendant suggests, require any further explanation, because it was not an allegation that "involves a conclusion . . . that involves the exercise of professional skill or experience" (*People v Jackson*, 18 NY3d 738, 746 [2012]). Furthermore, the allegation that defendant concealed store merchandise inside his jacket was similarly nonconclusory. Taken together, these allegations were facially sufficient to support the charged offenses (*see People v Gayle*, 54 Misc 3d 141[A]), 2017 NY Slip Op 50187[U] [App Term, 1st Dept 2017]).

Contrary to defendant's argument, the allegation that defendant "concealed" store merchandise was not vitiated by the fact that the store security employee who completed the supporting deposition selected the word "concealed" from a preprinted supported deposition form. The employee made that word part of his own statement by choosing it. In any event, even without the word "concealed," an allegation that a person placed store merchandise inside his or her jacket makes out a prima facie case, "as a matter of common sense and reasonable pleading" (*People v Davis*, 13 NY3d 17, 31 [2009]), that the

person exercised dominion and control over the merchandise inconsistent with the continued rights of the owner (*see People v Olivo*, 52 NY2d 309, 317-19 [1981]).

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3947-
3948 Index 16006/06

Jay H., etc.,
Plaintiff-Appellant,

James H., et al.,
Plaintiffs,

-against-

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

_____

Appeals having been taken to this Court by the above-named appellant from orders of the Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about April 7, 2015, and on or about October 14, 2015,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated April 13, 2017,

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3949 Aracelis Polanco, Index 309653/10
Plaintiff-Respondent,

-against-

Greenstein & Milbauer, LLP,
Defendant-Appellant.

_____

Winget, Spadafora & Schwartzberg, LLP, New York (Kenneth A. McLellan of counsel), for appellant.

Robert G. Spevack, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered April 5, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On a prior appeal, this Court reversed the grant of defendant's motion to dismiss, finding that the allegation "that defendant was negligent in urging her to settle the underlying personal injury action and in advising her that an MRI was not necessary and that its results would not lead to a more favorable outcome of her case," supported a cause of action for legal malpractice (96 AD3d 438, 439 [1st Dept 2012]).

Defendant law firm failed to meet its prima facie burden on the instant motion for summary judgment (*see Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010]). The firm's legal expert did not

address the stated basis for plaintiff's legal malpractice claim, ignored her testimony as to the nature of pre-settlement discussions with her attorney, and misstated that attorney's testimony. The firm's radiologist's opinion on causation, attributing plaintiff's injuries to degenerative changes, was equivocal, inter alia, conceding that causation as to a herniation was "uncertain" and that certain changes seen on an MRI, taken over one year after the accident, could have been formed in a matter of "months."

Even if the firm had met its initial burden on the motion, denial would be warranted based upon the existence of triable issues of fact raised by plaintiff. That plaintiff's expert may have committed improper acts or malpractice bears on his credibility and not the admissibility of his testimony (*see Williams v Halpern*, 25 AD3d 467, 468 [1st Dept 2006]) and plaintiff's surgeon's attribution of her injuries to a different, plausible cause, creates a triable issue of fact on causation (*see Linton v Nawaz*, 62 AD3d 434, 439-440 [2009], *affd* 14 NY3d 821 [2010]; *Norfleet v Deme Enter., Inc.*, 58 AD3d 499, 500 [1st Dept 2009]).

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

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3950 & M-1930 Index 651678/13

Lefkara Group, LLC,
Plaintiff-Appellant,

-against-

First American International Bank,
Defendant-Respondent.

_____

Siskopoulos Law Firm, LLP, New York (Alexandra Siskopoulos of counsel), for appellant.

Cullen and Dykman LLP, New York (Samit G. Patel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered April 28, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Pursuant to the Revolving Credit Master Note under which defendant bank extended to plaintiff a $300,000 line of credit to complete construction of a building plaintiff was developing, available funds could be reduced if the bank deemed the collateral insufficient. At the time the bank delayed or refused to make a disbursement under the line of credit, a problem with the connection to a sewer had been discovered but the scope, extent, or cost of correcting it was unknown. Moreover, the bank submitted evidence, including bank statements, debit slips, and

other documentation of every drawdown of the available loan and line of credit, which showed that, at the time, there were not enough funds available for plaintiff to complete construction, and by the time the cost of addressing the sewer issue became clear, the available funds were nearly depleted. In opposition to defendant's motion, plaintiff only made conclusory assertions that defendant erroneously calculated the remaining funds.

Given the unknown costs involved in unlocking the value of the collateral and given that insufficient funds remained for plaintiff to complete the project, the bank properly exercised its right under the Revolving Credit Master Note in delaying or refusing disbursement of funds while demanding additional collateral. Moreover, because there were insufficient funds available under the loan and line of credit to complete construction, any delay or failure by defendant to make the requested disbursements was not a proximate cause of plaintiff's damages. Accordingly, the motion court correctly dismissed the breach of contract claim and the duplicative claim for breach of the covenant of good faith and fair dealing (*see Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 433-434 [1st Dept 2013]).

M-1930 - ***Lefkara Group v First American International Bank***

Motion to strike reply brief
denied.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3951 In re Ira J. Benlevi, Index 100191/16
Petitioner-Appellant,

-against-

New York City Department of Buildings,
Respondent-Respondent.

_____

Ira J. Benlevi, appellant pro se.

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

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 28, 2016, which denied the petition to annul the determination of respondent New York City Department of Buildings (DOB), dated January 26, 2016, and dismissed the proceeding brought pursuant to CPLR article 78, on the grounds that petitioner's revised penalty of the suspension of his filing privileges for three years and seven months was not excessive, unanimously affirmed, without costs.

Given the circumstances of this case, that petitioner falsely represented that he was licensed to practice architecture when, during his six-month suspension from practice, he filed post-approval amendments with the DOB, petitioner's penalty of three years seven months was not "shocking to one's sense of fairness" (*Matter of Pell v Bd. Of Educ. of Union Free School*

Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 237 [1974]). Despite the fact that petitioner's violations related to post-approval amendments to filings, and not new plans (*cf. Matter of St. Clair Nation v City of New York*, 14 NY3d 452, 454-455, 458 [2010]), the Supreme Court properly considered petitioner's continued refusal to acknowledge any wrongdoing in upholding the revised penalty (*see Roman v New York City Dept. of Educ.*, 128 AD3d 590, 591 [1st Dept 2015]).

The article 78 proceeding was limited to petitioner's revised penalty, thus, his attempt to reargue the merits of his case are unavailing.

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3952 E.D. & F. Man Sugar, Inc., etc., Index 653963/12
Plaintiff-Appellant,

-against-

ZZY Distributors, Inc., etc., et al.,
Defendants-Respondents,

Mariana Deutsch,
Defendant.

_____

Franzino & Scher, LLC, New York (Frank J. Franzino, Jr. of counsel), for appellant.

Mark S. Friedlander, New York, for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about February 16, 2016, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on its claims for breach of contract, unjust enrichment and alter ego, unanimously affirmed, without costs.

We reject plaintiff's attempt to reclassify its cause of action for breach of contract as one for goods sold and delivered, which is not asserted in the complaint.

The court properly declined to consider plaintiff's unjust enrichment arguments, submitted for the first time in its reply papers (*see Matter of Erdey v City of New York*, 129 AD3d 546 [1st Dept 2015]; *All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 835-836 [1st Dept 2015]). Even if this Court were

to consider plaintiff's unjust enrichment claim, there are issues of fact as to whether and to what extent there is any unpaid balance in connection with the three shipments at issue.

Issues of fact also preclude summary judgment on plaintiff's alter ego claim. While plaintiff has established the fact of payments out of defendant ZZY Distributors, Inc.'s account to entities owned or controlled by its principals, it has not demonstrated that they were improper (*see Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]).

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

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

ENTERED: MAY 9, 2017

CLERK

Acosta, J.P., Renwick, Mazzarelli, Gische, Gesmer, JJ.

3953N Isaac Yamali, et al., Index 603116/97
Plaintiffs-Respondents,

-against-

Robert Felshman,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Martin Shulman, J.), entered July 11, 2016,

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 May 2, 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: MAY 9, 2017

CLERK

Sweeny, J.P., Richter, Andrias, Feinman, Kahn, JJ.

3975 Masso Kebe, Index 311410/11
Plaintiff-Respondent,

-against-

Greenpoint-Goldman Corp., et al.,
Defendants-Appellants,

Carlyle Realty V, L.P., et al.,
Defendants.

_____

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Edelman, Krasin & Jaye PLLC, Westbury (Allen J. Rosner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered August 18, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on his Labor Law § 240(1) claim as against defendants Greenpoint-Goldman Corp., Greenpoint Goldman SM LLC, GFI Development Company, LLC, Atara Vanderbilt, LLC and Triton Construction Company, LLC, unanimously affirmed, without costs.

As the Court of Appeals recently reiterated in *O'Brien v Port Auth. of N.Y. & N.J.* (_ NY3d _, 2017 NY Slip Op 02466, *2 [March 30, 2017]), "The fact that a worker falls at a construction site, in itself, does not establish a violation of

Labor Law § 240(1)." "Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). However, "[i]n cases involving ladders or scaffolds that collapse or malfunction for no apparent reason," the Court of Appeals has applied "a presumption that the ladder or scaffolding device was not good enough to afford proper protection" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]) – a presumption that the *O'Brien* Court recognized but found inapplicable to the facts before it, which involved a fall from an exterior stairway.

Here, plaintiff established prima facie that Labor Law § 240(1) was violated through his testimony that the ladder from which he fell wobbled during its use (*see e.g. Hill v City of New York,* 140 AD3d 568 [1st Dept 2016]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]; *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.* 118 AD3d 524 [1st Dept 2014]), that two of the ladder's rubber feet were missing (*see Orphanoudakis v Dormitory Auth. of State of N.Y.*, 40 AD3d 502 [1st Dept 2007]), and that the ladder spun and fell over (*see Blake*, 1 NY3d at 289, n 8).

In opposition, defendants failed to raise triable issues of

fact as to whether the ladder provided proper protection. The testimony of a superintendent that he saw the ladder standing when he arrived at the scene one-half to one hour after plaintiff's fall is insufficient to raise an issue of fact. In the absence of any evidence that the ladder was not moved or repositioned after plaintiff fell, it would be speculative to infer from the superintendent's testimony that the ladder did not fall over. Furthermore, the superintendent's testimony does not negate plaintiff's testimony that the ladder began to spin, causing him to fall. While a coworker submitted an affidavit disputing whether the ladder lacked its rubber feet, he did not address the happening of the accident in any way and did not deny that the ladder began to spin. Furthermore, unlike *O'Brien*, this case does not present a battle of the experts.

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

ENTERED: MAY 9, 2017

CLERK