SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 5, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4590 In re Peggy M.,
Petitioner-Appellant,

-against-

Michael O'L.,
Respondent-Respondent.

Richard L. Herzfeld, P.C., New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Larry S. Bachner, New York, attorney for the child.

Order, Family Court, Bronx County (Diane Keisel, J.), entered on or about December 16, 2014, which dismissed the petition to modify a visitation order, unanimously affirmed, without costs.

A full evidentiary hearing on the petition to modify a visitation order less then four months after the order, was not required, because petitioner made no offer of proof of a change in circumstances, and the court possessed sufficient information for a determination of the child's best interests (*see Matter of Martha V. v Tony R.*, 151 AD3d 653 1st Dept 2017]). Respondent

was awarded custody in September 2011, based, inter alia, on petitioner's campaign to undermine the child's relationship with him (*Matter of Michael O. v Peggy M.*, 110 AD3d 499 [1st Dept 2013]). In July 2014, the court denied respondent's petition to suspend all visitation, but modified the 2011 custody order to limit petitioner to two supervised visits per month.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4591-
4592

Index 805213/13

Jacqueline A. Gillern, as administrator of the estate of John J. Gillern, Jr., et al.,
Plaintiffs-Respondents,

-against-

Ed Mahoney, et al.,
Defendants,

Memorial Sloane Kettering,
Defendant-Appellant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

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

_____

Order, Supreme Court, New York County, (Joan M. Kenney, J.), entered January 7, 2016, which, to the extent appealed from, denied defendant Memorial Sloane Kettering's (MSK) motion to dismiss plaintiff's causes of action for negligence and wrongful death, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same Court and Justice, entered on or about August 8, 2016, which denied the motion of MSK seeking leave to amend its answer to assert the worker's compensation affirmative defense, unanimously dismissed, without costs, as academic.

Decedent, plaintiff's husband and an employee of MSK, became intoxicated at a holiday party organized by workers in MSK's facilities department. The party was not sanctioned by MSK, held on MSK property, or paid for by MSK, and all employees there were off duty. Coworker friends of the decedent contacted plaintiff, a registered nurse at MSK, and then helped decedent into her car. Plaintiff drove home and left decedent in the car, parked in their driveway, to sleep off his condition. Approximately one hour later, plaintiff checked on decedent, and found him now on the floor of the back seat, unresponsive. The autopsy report lists the cause of the death as alcohol intoxication and positional asphyxia.

The motion court erred in denying summary judgment to MSK. Their employees, in assisting decedent and placing him in his wife's care, did not assume a duty, and nothing they did placed him in a worse or different position of danger (*see Malpeli v Yenna*, 81 AD3d 607 [2d Dept 2011]; *compare Seeger v Marketplace*, 101 AD3d 1691 [4th Dept 2012]). Any opinions rendered about medical attention being unnecessary were nonactionable gratuitous commentary (*see Feeney v Manhattan Sports Club*, 227 AD2d 293 [1st Dept 1996]). Moreover, placing decedent into the car was not the proximate cause of his death; it merely furnished the occasion for the unfortunate occurrence (*see Sheehan v City of New York*,

40 NY2d 496 [1976]; *see also Bonomonte v City of New York*, 79 AD3d 515 [1st Dept 2010], *affd* 17 NY3d 866 [2011]).

Our findings render MSK's remaining arguments, including those regarding the affirmative defense of workers' compensation, academic.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4593 Ute Linhart, Index 111627/11
Plaintiff-Respondent,

-against-

Jose Rojas, et al.,
Defendants,

New York City Transit Authority,
Defendant-Appellant,

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Lerner, Arnold & Winston., LLP, New York (Jesse Michael James Roehling of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 2, 2016, which denied defendant New York City Transit Authority's (NYCTA) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff's notice of claim and complaint, as amplified by her bill of particulars, asserted claims against defendant NYCTA for failing to provide proper security, failing to prevent the assault by defendant Jose Rojas, who pushed plaintiff into an oncoming train, and the negligent operation of the train in traveling at an excessive speed and failing to bring the train to a stop before it struck plaintiff. While NYCTA addressed the

security and assault issues in its motion for summary judgment, it failed to sufficiently address plaintiff's claims for negligent operation of the train. Thus, it failed to demonstrate its entitlement to judgment as a matter of law, and the court properly denied the motion without regard to the sufficiency of plaintiff's opposition (see *Chapman v City of New York*, 139 AD3d 507 [1st Dept 2016]; *Lee v New York City Tr. Auth.*, 138 AD3d 579 [1st Dept 2016]). Moreover, based on the train operator's own testimony, issues of fact exist as to whether there was sufficient time to stop the train prior to hitting plaintiff, although there was ample time to do so (see *Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 [2006]; *Herrera v New York City Tr. Auth.*, 269 AD2d 212 [1st Dept 2000]). Insofar as plaintiff's testimony would appear to negate any possibility of the train operator's testimony being accurate, resolution of these conflicting versions of the incident are for the trier of fact.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4595-
4596 The People of the State of New York, Ind. 2824/14
Respondent,

-against-

Ruben Diaz,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered June 22, 2015, as amended September 25, 2015, convicting defendant of sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Defendant's constitutional challenge to the 1996 predicate conviction supporting his second violent felony offender adjudication is unavailing (*see People v Harris*, 61 NY2d 9, 15-16 [1983]). The Court of Appeals has "never held that a plea is effective only if a defendant acknowledges committing every element of the pleaded-to offense, or provides a factual exposition for each element of the pleaded-to offense" (*People v*

Seeber, 4 NY3d 780, 781 [2005] [citations omitted]). Since nothing in defendant's 1996 plea allocution negated an element of first-degree manslaughter or cast doubt on defendant's guilt or the voluntariness of the plea, there was no basis to invalidate it (*see id.*). Moreover, the elements of the crime, and defendant's accessorial liability (*see* Penal Law § 20.00), could be readily inferred from his responses during the allocution (*see People v McGowen*, 42 NY2d 905 [1977]).

We perceive no basis for reducing the sentence, including the 15-year term of postrelease supervision.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4599 In re New York City Asbestos Litigation — Index 190087/14

- - - - -

Walter Miller,
Plaintiff-Respondent,

-against-

BMW of North America, LLC, et al.,
Defendants,

Hennessy Industries,
Defendant-Appellant.

_____

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel), for appellant.

The Karst & Von Oiste Law Firm, New York (Kyle A. Shamberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 13, 2016, after a jury trial, awarding plaintiff $5 million for past pain and suffering and $4 million for future pain and suffering, unanimously affirmed, without costs.

In this asbestos litigation arising from plaintiff's use of a grinder manufactured and designed by defendant Hennessy Industries' subsidiary, Ammco, plaintiff's expert testimony was sufficient to establish that plaintiff's use of that grinder on automobile brake linings caused his exposure to asbestos dust in sufficient quantities to cause his mesothelioma (*see Sean R. v*

BMW of N. Am., LLC, 26 NY3d 801, 808 [2016]; *cf. Matter of New York City Asbestos Litig. [Juni]*, 148 AD3d 233, 236 [1st Dept 2017]). Moreover, because the asbestos-laden dust was created by plaintiff's use of defendant's grinder and defendant knew its grinder would be used on asbestos-containing products, defendant had a duty to warn plaintiff of the latent danger arising from the foreseeable use of its product (*see e.g. Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 [1992]).

We find the damages award, as reduced by the trial court and stipulated to by plaintiff, to be appropriate. Moreover, based on the evidence adduced at trial, the jury properly apportioned 86% of the fault to defendant (*see* CPLR art 16).

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

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4600 In re Omobolanle O.,
Petitioner-Respondent,

-against-

Kevin J.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

Debevoise & Plimpton LLP, New York (Ann Marie Domyancic of counsel), for respondent.

_____

Order, Family Court, Bronx County (Llinet M. Rosado, J.), entered on or about May 11, 2016, which determined that respondent Kevin J. committed the family offenses of reckless endangerment in the second degree, menacing in the third degree, criminal mischief in the fourth degree, harassment in the second degree and disorderly conduct, and awarded petitioner a five-year order of protection directing respondent to, inter alia, stay away from her and the parties' child, and not contact them except as necessary to effectuate court-ordered visitation, unanimously affirmed, without costs.

Contrary to petitioner's contention, the appeal is timely because the order, which was served in open court, does not contain the language required by Family Court Act § 1113 notifying respondent that he had 30 days to appeal.

Having reviewed the record, and finding no grounds to disturb Family Court's credibility determinations (*see Matter of Lisa W. v John M.*, 132 AD3d 459, 460 [1st Dept 2015]), we conclude that the allegations in the petition were established by a fair preponderance of the evidence (*see* Family Ct Act § 832). The record establishes that respondent's actions during a July 2013 incident constituted the family offense of reckless endangerment in the second degree, as petitioner testified that he shoved her head against a wall, put his hands around her neck and squeezed until she could not breathe, and punched her repeatedly with his fists, demonstrating a disregard of the substantial risk that he could have seriously injured her (*see Matter of Rebecca M.T. v Trina J.M.*, 134 AD3d 551 [1st Dept 2015]).

The family offense of criminal mischief in the fourth degree is supported by respondent's own testimony that he purposefully destroyed petitioner's speaker and cell phone. Contrary to respondent's contention, it was not necessary to demonstrate the value of the destroyed property (*see Matter of Michael M.*, 201 AD2d 288, 289 [1st Dept 1994]; *People v Cunningham*, 95 AD2d 680, 680 [1st Dept 1983], *lv denied* 60 NY2d 615 [1983]).

The family offense of menacing in the third degree is supported by petitioner's testimony that respondent forcibly

removed her from his vehicle, then told her she would have to "go through him" if she tried to take the child with her, causing her to be frightened for her and the child's safety (*see Matter of Sonia S. v Pedro Antonio S.*, 139 AD3d 546, 547 [1st Dept 2016]; *Matter of Daniel R.*, 49 AD3d 266, 267 [1st Dept 2008]).

The family offense of disorderly conduct was established by testimony that the parties' neighbors appeared during an altercation and yelled that if disruptions did not cease, they would contact the police (*see Matter of Tamara A. v Anthony Wayne S.*, 110 AD3d 560, 560-561 [1st Dept 2013]).

Finally, the family offense of harassment in the second degree was established by testimony that respondent grabbed the child from petitioner, pushed her to the floor, stomped on her with his boots, and punched her all over her body, causing injury (*see Matter of Jessica C. v Esteban B.*, 13 AD3d 183, 183 [1st Dept 2004]).

The finding that aggravated circumstances existed warranting a five-year order of protection is supported by a preponderance

of the evidence showing that respondent engaged in a series of violent and threatening actions directed at petitioner while in the presence of the child (*see Matter of Pei-Fong K. v Myles M.*, 94 AD3d 675, 676 [1st Dept 2012]).

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4601 The People of the State of New York, Ind. 150/14
Respondent,

-against-

Ashley Ventura,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen 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 (Laura A. Ward, J.), rendered December 15, 2014,

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: OCTOBER 5, 2017

CLERK

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

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

4602 The People of the State of New York, Respondent, Ind. 591/14

-against-

Brian Harley, Defendant-Appellant.

_____

Koos Law Office, New York (Gary Koos of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Maxwell Wiley, J.), entered on or about February 11, 2016, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered March 26, 2014, unanimously affirmed.

By pleading guilty in the underlying proceeding, defendant automatically forfeited appellate review of his claim, based on *People v Zinke* (76 NY2d 8 [1990]), that he had an ownership interest in the stolen property, and thus could not be guilty of larceny (*see People v Plunkett*, 19 NY3d 400 [2010]; *see also People v Levin*, 57 NY2d 1008 [1982]; *People v Mendez*, 25 AD3d 346 [1st Dept 2006]). While defendant styles his claim as one of "actual innocence," the gist of his claim is that, as a matter of statutory interpretation, his conduct does not constitute larceny. Since such a claim is based on the record that was, or

could have been, made before Supreme Court, it is not the proper subject of a CPL 440.10 motion. To the extent defendant's argument could be construed as alleging ineffective assistance of counsel in connection with the guilty plea, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4603- Index 650777/15
4604-
4605 Car Park Systems of New York Inc., et al.,
Plaintiffs-Appellants,

-against-

Richard Ull, et al.,
Defendants-Respondents.

_____

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Anna M. Plazza of counsel), for appellants.

Moritt Hock & Hamroff LLP, Garden City (Robert S. Cohen of counsel), for Richard Ull, respondent.

Rosenberg Calica & Birney LLP, Garden City (John S. Ciulla of counsel), for Jeffrey Ull, respondent.

Smith, Gambrell & Russell, LLP, New York (Donald L. Rosenthal of counsel), for Jennifer Ull, respondent.

_____

Judgments, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 19 and 29, 2016, dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly found that the order dismissing a prior complaint barred the instant complaint on the ground of res judicata, because the determination in the first action that plaintiffs could not demonstrate reasonable reliance to support their fraud claim was a determination on the merits (*see Coutsodontis v Peters*, 39 AD3d 274, 275 [1st Dept 2007]). In

addition, we find that dismissal of the conversion claim as time-barred in the prior action also barred the fraud claim in the instant action (*see Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1 [1st Dept 2000]). The fraud claim is merely incidental to the conversion claim, as the gravamen of the wrong is the alleged diversion of funds (*see Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 119-121 [1st Dept 1985], *affd* 67 NY2d 981 [1986]).

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

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4606 The People of the State of New York, Respondent, Ind. 5913N/11

-against-

Mariel Javier, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 18, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fifth degree and criminal diversion of prescription medications and prescriptions in the fourth degree, and sentencing him to a term of five years' probation and a conditional discharge, unanimously affirmed.

The court properly denied defendant's speedy trial motion. Defendant's argument concerning the first of two periods at issue is unpreserved (*see People v Beasley*, 16 NY3d 289, 292-293 [2011]); his argument to the contrary under CPL 470.05(2) is unavailing (*see People v Newland*, 138 AD3d 611 [1st Dept 2016], *lv denied* 28 NY3d 934 [2016]), and we decline to review this claim in the interest of justice. As an alternative holding, we

find that the period at issue was properly excluded as a reasonable delay resulting from pretrial motions (*see* CPL 30.30[4][a]; *People v Wells*, 16 AD3d 174 [1st Dept 2005], *lv denied* 5 NY3d 796 [2005]). As to the second period in dispute, even if the People should have followed the court's direction to advance the case to an earlier calendar date, their failure to do so did not affect their actual readiness, which was all that was required by CPL 30.30. Accordingly, since the periods in dispute were excludable, the People were ready within the statutory time limit, irrespective of whether another period of delay was excludable on the ground of extraordinary circumstances, and thus there is no need to conduct a hearing on that issue.

The court properly permitted the prosecutor to introduce, as evidence of a text message conversation between the undercover officer and defendant, an email created by the undercover officer by copying the text message conversation and pasting it into an email, which the officer sent to his personal account and then printed out. The admission of the email, which was properly authenticated by the officer's testimony that he copied and pasted the entirety of the text message conversation (*see People v Agudelo*, 96 AD3d 611 [1st Dept 2012], *lv denied* 20 NY3d 1095 [2013]), did not violate the best evidence rule, which "requires the production of an original writing where its contents are in

dispute and sought to be proven" (*Schozer v William Penn Life Ins. Co.*, 84 NY2d 639, 643 [1994]). Here, the best evidence rule did not apply because there was no genuine dispute about the contents of the underlying text messages (*see People v Dicks*, 100 AD3d 528 [1st Dept 2012]). In any event, the undercover officer adequately explained the unavailability of the original, in that it was his routine practice to erase the original text messages from his phone, particularly since his cell phone automatically deleted text messages once the memory became full.

The court properly declined to instruct the jury that it could draw an adverse inference from the fact that a photocopy of prerecorded buy money was missing. The photocopy was not a prior statement of a witness, and therefore was not discoverable on that basis (*see* CPL 240.45[1][a]; *People v Malone*, 88 AD3d 586 [1st Dept 2011], *lv denied* 18 NY3d 959 [2012]). Furthermore, to the extent that the photocopy could be viewed as a photograph (*see* CPL 240.20[1][d]), it was irrelevant because no buy money was recovered from defendant or otherwise at issue at trial, and any error in denying an adverse inference charge was harmless.

Since defendant expressly limited his request for a sanction to the issue of the photocopy of the buy money, he waived such a claim as to police memo books that were destroyed as a result of the flooding of a police facility during Hurricane Sandy, and we

decline to review that claim in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Reyes*, 149 AD3d 478 [1st Dept 2017], *lv denied* 29 NY3d 1085 [2017]).

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4607 Juan Reynoso, Index 302133/14
Plaintiff, 83997/14

-against-

Global Management Enterprises, LLC,
Defendant.

- - - - -

Global Management Enterprises, LLC,
Third-Party Plaintiff-Respondent,

-against-

Rent-A-Center, Inc.,
Third-Party Defendant-Appellant.

_____

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr.), entered on or about March 3, 2017, which, to the extent appealed from as limited by the briefs, denied so much of third-party defendant's motion for summary judgment as sought dismissal of the claims for contractual indemnification and attorneys' fees, and granted third-party plaintiff's cross motion for conditional summary judgment on those claims, unanimously affirmed, without costs.

General Obligations Law § 5-321 does not render the indemnification provisions of the parties' lease void. The lease

was negotiated at arm's length by sophisticated business entities and the parties used insurance to allocate between themselves the risk of liability to third persons (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]).

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

Third-party plaintiff's request for reinstatement of its third-party claim for breach of contract is not properly before us, because third-party plaintiff failed to file a notice of appeal from the order dismissing that claim (*see Hecht v City of New York*, 60 NY2d 57, 63 [1983]; *Caputo v Koenig*, 147 AD3d 649, 650 [1st Dept 2017]).

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4608 Cushman & Wakefield of Connecticut, Inc., Plaintiff-Respondent, Index 652308/14

-against-

Access Private Duty Services at HJDOI, Inc, doing business as Access Healthcare Services, et al., Defendants-Appellants.

_____

Nicholas J. Mundy, PLLC, Brooklyn (Michael T. Carr of counsel), for appellants.

Arthur R. Lehman, LLC, New York (Arthur R. Lehman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 25, 2016, which granted plaintiff's motion for summary judgment, denied defendants' cross motion for summary judgment, and directed the Clerk to enter judgment in plaintiff's favor in the amount of $190,023.65, unanimously affirmed, with costs.

Plaintiff and defendants entered into an exclusive broker's agreement for the period of February 16, 2011 to December 31, 2011. Under the agreement, defendants agreed to refer all inquiries or offerings regarding a lease or purchase of property, regardless of the source, to plaintiff. It also provided that all negotiations would be conducted or supervised by plaintiff,

subject to defendants' review and final approval. It is undisputed that defendants' principal, Louise Weadock, entered into direct negotiations to lease a property with the property's landlord, SG Chappaqua B, LLC, in September 2011. It is also undisputed that she failed to involve plaintiff in such negotiations, and ultimately signed a lease on defendants' behalf in January 2012.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on its breach of contract claim. Plaintiff submitted the agreement and an affidavit by plaintiff's employee who was involved in the transaction, Joshua Goldman, who averred that plaintiff performed its brokerage duties under the agreement, defendants failed to refer its lease negotiations with SG Chappaqua to plaintiff, and as a result plaintiff lost its commission (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]; *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 478 [1st Dept 2007]). Plaintiff also established its lost commission as proximate and certain damages that flowed directly from defendants' breach (*see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008]; *Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 [1st Dept 2003]). Plaintiff submitted evidence of the standard schedule of brokerage commissions for Westchester County, and, applying such standard, calculated that

the damages for the lost commission were $190,023.65. While defendants assert that this calculation was speculative, plaintiff submitted evidence that SG Chappaqua and plaintiff had previous interactions and had agreed upon the standard schedule of brokerage commissions for Westchester County. SG Chappaqua's representative also testified at his deposition that, had he known that plaintiff was defendants' exclusive broker, SG Chappaqua would have paid the $190,023.65 to plaintiff.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4609
4609A The People of the State of New York, Respondent, Ind. 3906/11 5118/11

-against-

Jai Ortiz,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 8, 2012, as amended May 15, 2012, convicting defendant, upon his pleas of guilty, of two counts of burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 7½ years, unanimously reversed, on the law, the pleas vacated, and the matter remanded for further proceedings.

The preservation requirement for challenges to guilty pleas does not apply in this "rare case" where "defendant's factual recitation negate[d] an essential element of the crime pleaded to" and the court "accept[ed] the plea without making further inquiry to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered." Depending

on the particular facts, the burglary of a store in a mixed commercial and residential building may, or may not, constitute second-degree burglary (*see People v Joseph*, 28 NY3d 1003 [2016]; *People v McCray*, 23 NY3d 621, 627-29 [2014]). Viewing the plea allocution as a whole, we conclude that defendant's responses consistently asserted that he only committed commercial burglaries, notwithstanding that other portions of the buildings were residential, and that these responses thus tended to negate the "dwelling" element of second—degree burglary. The court's followup questions failed to establish that defendant understood he was admitting that the dwelling requirement was satisfied, and that he was giving up his right to litigate that factual issue.

The fact that defendant attempted to raise this issue in an unsuccessful motion under CPL article 440 and failed to obtain leave to appeal does not foreclose review on direct appeal, but only limits it to review of the plea allocution record itself (*see People v Evans*, 16 NY3d 571, 574-75, *cert denied* 565 US 912 [2011]). The issue is amply reviewable on the plea minutes

themselves, and neither expansion of the record nor resort to anything extrinsic to the plea colloquy is necessary.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4610 The People of the State of New York, Respondent, Ind. 21937/15

-against-

Nelson Pagan, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 21, 2015, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a term of 15 days, unanimously affirmed.

The court properly exercised its discretion in admitting evidence of defendant's prior threatening or violent acts against the victim, his wife. This evidence was relevant to defendant's anger and motive to control his wife (*see People v Frankline*, 27 NY3d 1113, 1115 [2016]; *People v Dorm*, 12 NY3d 16, 19 [2009]), and defendant's argument that prior acts of domestic abuse must rise to a certain level of violence or frequency to be deemed relevant is unpersuasive. Any prejudicial effect was outweighed by probative value, and, in any event, the court at this nonjury trial is "presumed capable of disregarding the prejudicial aspect

of the evidence" (*People v Tong Khuu*, 293 AD2d 424, 425 [1st Dept 2002], *lv denied* 98 NY2d 714 [2002]).

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4611 The People of the State of New York, Respondent,

Ind. 4418/13

-against-

Vali Gelzer,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 8, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her to a term of five years' probation, 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 amply supported the conclusion that when defendant

severely beat, kicked and stomped her 83-year-old mother, including the use of the mother's walker as a weapon, defendant intended to cause physical injury and did not act in self-defense.

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4612 The People of the State of New York, Ind. 609/15
Respondent,

-against-

Craig Newkirk,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Ellen Biben, J.), rendered on or about March 1, 2016,

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: OCTOBER 5, 2017

CLERK

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

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

4613 The People of the State of New York, Respondent, Ind. 4004/10

-against-

Abraham Monroy, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Richard D. Carruthers, J.), rendered, October 17, 2012, 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: OCTOBER 5, 2017

CLERK

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

4614N Suzanne Mangold Zacharius, Index 652460/12
Plaintiff-Appellant,

-against-

Kensington Publishing
Corporation, et al.,
Defendants-Respondents.

_____

Law Office of William S. Beslow, New York (Wiiliam S. Beslow of counsel), for appellant.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 3, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for spoliation sanctions to the extent of directing plaintiff to pay the attorneys' fees and costs incurred by defendants in reviewing plaintiff's Yahoo account and in preparing the motion, unanimously affirmed, with costs.

Spoliation sanctions were providently granted. The record demonstrated that plaintiff was in control of her own email account; was aware, as an attorney, of her obligation to preserve it at the time it was destroyed, with or without service of defendants' litigation hold notice upon her, since she commenced the action; and had a "culpable state of mind," as she admitted

that she intentionally deleted well over 3,000 emails during the pendency of the action (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33 [1st Dept 2012]). Destroyed evidence is automatically presumed "relevant" to the spoliator's claims when it is intentionally deleted (*VOOM*, 93 AD3d at 45, citing *Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]). While plaintiff asserted that she only intentionally deleted irrelevant emails, her own emails evidenced intentional deletion of thousands of emails, and defendants recovered at least one email that was pertinent to the allegations in the complaint.

Under the circumstances, the court providently exercised its discretion in limiting the sanction against plaintiff to costs and attorneys' fees, rather than the "drastic remedy" of striking plaintiff's complaint (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 24 [1st Dept 2013]). While plaintiff's actions were intentional, defendants were "not entirely bereft of

evidence tending to establish [its] position" (*id.*, quoting *Cohen Bros. Realty v Rosenberg Elec. Contrs.*, 265 AD2d 242, 244, *lv dismissed* 95 NY2d 791 [2000]; *see Schantz v Fish*, 79 AD3d 481 [1st Dept 2010]).

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

ENTERED: OCTOBER 5, 2017

CLERK

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

4615 In re Keith Haywood, Ind. 456/16
[M-4180] Petitioner, OP 116/17

-against-

Cyrus R. Vance, Jr., etc.,
Respondent.

_____

Keith Haywood, petitioner pro se.

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

_____

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

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

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

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

ENTERED: OCTOBER 5, 2017

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, JJ.

550 Verlene Gause, Index 303876/12
Plaintiff-Respondent,

-against-

2405 Marion Corp.,
Defendant-Appellant,

Rosario Marino,
Defendant.

_____

Babchik & Young LLP, White Plains (Matthew J. Rosen of counsel), for appellant.

Eric H. Green, New York (Marc Gertler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 10, 2015, which, to the extent appealed from, granted plaintiff's motion for a default judgment as against defendant 2405 Marion Corp. (Marion), and denied Marion's cross motion to dismiss the action as abandoned pursuant to CPLR 3215(c), unanimously modified, on the law, to deny plaintiff's motion, and to grant Marion's cross motion solely to the extent of permitting Marion to file a late answer within 30 days from service of a copy of this order with notice of entry, and otherwise affirmed, without costs.

Supreme Court did not abuse its discretion in finding that plaintiff had made a sufficient showing of law office failure to

excuse its failure to move for a default judgment within one year (*see Riccardi v Otero*, 33 AD3d 571 [1st Dept 2006]). However, as the record reflects that Marion promptly responded to correspondence from plaintiff and sought to investigate the claim, and there being reason to believe that it did not receive the summons and complaint, we believe that Marion should be permitted to file a late answer.

The Decision and Order of this Court entered herein on March 22, 2016 is hereby recalled and vacated (*see* M-4942 decided simultaneously herewith).

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

ENTERED: OCTOBER 5, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4491N Miguel Santana, et al., Index 300905/13
Plaintiffs-Respondents,

-against-

Curtis Johnson, Jr., et al.,
Defendants-Appellants.

_____

Cheven Keely & Hatzis, New York (Thomas Torto of counsel), for appellants.

Trivella & Forte, LLP, New York (Arthur J. Muller, III of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 10, 2016, which granted defendants' motion to preclude plaintiffs from offering at trial the testimony of nonparties IME Watchdog, Inc., Jamal Aaron and Shawn Jerrick, only in the event that those witnesses failed to appear for a deposition within 60 days, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting defendants' preclusion motion only in the event that the nonparty witnesses failed to appear for depositions concerning their observations at physical examinations of plaintiffs (*see* CPLR 3126). Plaintiffs are entitled to have a representative present at their physical examinations as long as the representative does not interfere with the examinations conducted by defendants' designated physician or prevent defendants'

physician from conducting a meaningful examination (*see Guerra v McBean*, 127 AD3d 462 [1st Dept 2015]; *Henderson v Ross*, 147 AD3d 915 [2d Dept 2017]; *Marriott v Cappello*, 151 AD3d 1580 [4th Dept 2017]. In the present case, there is no contention that the observers interfered with the examinations and the physicians issued thorough reports without indicating that any further examinations were required.

To the extent that this Court has implicitly suggested that a representative can be barred from an examination if the plaintiff fails to demonstrate special and unusual circumstances (*see Kattaria v Rosado*, 146 AD3d 457 [1st Dept 2017]), that is not the current state of the law in either the First, Second or Fourth Departments and is inconsistent with the general principle that plaintiffs are entitled to have a representative present at their medical examinations (*Guerra* at 462; *Henderson* at 916; *Marriott* at 1582.

To the extent defendants sought a pretrial order precluding testimony of the observers as cumulative of plaintiffs'

anticipated testimony, the order denying that request is not appealable (*see Casler Masonry, Inc. v Barr & Barr, Inc.*, 118 AD3d 609, 610 [1st Dept 2014]; *Santos v Nicolas*, 65 AD3d 941 [1st Dept 2009]).

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

ENTERED: OCTOBER 5, 2017

CLERK