SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 15, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1811 The People of the State of New York, Ind. 1150/14
Appellant,

-against-

Tamira Mobley,
Defendant-Respondent.

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Cyrus R. Vance, Jr., District Attorney, New York (Susan Gliner of counsel), for appellant.

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for respondent.

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about April 7, 2015, which granted defendant's motion to dismiss the first and fourth counts of the indictment charging her with assault in the first degree, unanimously affirmed.

Defendant, who does not hold a medical license, performed bodily "enhancement" procedures on two persons. The first procedure resulted in serious physical injury to the victim; the

second procedure resulted in the victim's death. Defendant was charged with two counts of the unauthorized practice of medicine (Education Law § 6512[1]) and two counts of first-degree assault (Penal Law § 120.10[4] [felony assault]). The felony assault counts were predicated upon the theory that the victims' injuries were caused in the course of the commission of the felony of unauthorized practice of medicine. In addition, defendant was charged with one count of manslaughter in the second degree and one count of second-degree assault.

Supreme Court dismissed the two charges of felony assault, holding that the felony of the unauthorized practice of medicine is a strict liability crime with no mens rea element and, therefore, cannot serve as a predicate felony to support felony assault charges. Upon the People's appeal, we affirm.

An assault committed during the course of a felony that causes serious physical injury to the victim may be charged as felony assault under Penal Law § 120.10(4). The Court of Appeals has explained that, under the doctrine of constructive malice, the mens rea element of the assault charge is satisfied by the

mens rea element of the predicate felony (*see People v Fonseca*, 36 NY2d 133, 136-137 [1975] [discussing constructive malice in the context of the second-degree felony assault statute, Penal Law § 120.05(6)]; *see also People v Berzups*, 49 NY2d 417, 427-428 [1980] [discussing constructive malice in the context of the felony murder statute, Penal Law § 125.25(3)]).

The People contend that the felony predicating felony assault need not have a mens rea element. In so arguing, they rely on *Fonseca*, in which the Court of Appeals held that a defendant who had injured victims while driving a stolen automobile could be charged with felony assault, with the felony of criminal possession of stolen property serving as the predicate felony. It is true that the *Fonseca* Court stated that any felony can theoretically serve as a predicate felony for felony assault charges and distinguished the felony murder statute from the felony assault statute on the ground that the former statute specifically enumerates the permissible predicate felonies. However, the *Fonseca* Court, applying the doctrine of constructive malice, held that the mens rea element of the predicate felony in that case (criminal possession of stolen property) provided the mens rea element for the felony assault charges (36 NY2d at 136-137).

Defendant contends that a strict liability crime cannot serve as a predicate felony to support felony assault charges, relying on *People v Snow* (138 AD2d 217 [4th Dept 1988], *affd* 74 NY2d 671 [1989]), in which the Fourth Department held that the felony of driving while intoxicated could not serve as a predicate felony. The *Snow* Court explained that, because driving under the influence is a strict liability crime with no mens rea element, it cannot provide the required mens rea element for the felony assault charge.

The People attempt to distinguish *Snow* as limited to the facts of that case, where driving under the influence was only upgraded from a misdemeanor to a felony due to the defendant having a previous conviction for driving under the influence. However, the *Snow* decision makes plain that the Court held that, like any strict liability felony, driving under the influence cannot serve as a predicate for felony assault because it lacks a mens rea element and therefore cannot satisfy the doctrine of constructive malice (138 AD2d at 221).

In this case, the felony of the unauthorized practice of medicine is a strict liability crime with no mens rea element.

Education Law § 6512(1) does not contain a mens rea element and solely requires a voluntary act of the unauthorized practice of medicine (*see generally People v Kleiner*, 174 Misc 2d 261 [Sup Ct, Richmond County 1997]). Accordingly, Supreme Court correctly held that the felony of the unauthorized practice of medicine cannot serve as a predicate felony to support the felony assault charges.

Further, although the Penal Law states that a "statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability" (Penal Law § 15.15[2]), the felony of unauthorized practice of medicine was created by the legislature as part of a comprehensive regulatory scheme to require licensing for occupations that pose safety risks to the public. These malum prohibitum crimes are generally construed as

strict liability crimes, as a mens rea element would negatively affect enforcement of these statutes and minimize their impact (*see People v Merriweather*, 139 Misc 2d 1039, 1043-1044 [Sup Ct, Nassau County 1988]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2039 The People of the State of New York, Ind. 4098/12
Respondent,

-against-

Carlo Giurdanella,
Defendant-Appellant.

_____

Ernest H. Hammer, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered October 29, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 30 days, unanimously affirmed.

The People made the requisite showing that it was necessary for the complainant to testify by videoconferencing, given the highly unusual circumstance that the complainant had returned to his native country, whose government then prevented him from leaving, after defendant's trial had already commenced.

In late August 2012, approximately two months after he was allegedly assaulted by defendant, the complainant, a dual citizen of the United States and Egypt, returned to Egypt for rehabilitation of his fractured wrist and knee. The record

reflects that at the time the complainant was to return to the United States to testify at defendant's trial, Egypt was in a state of political upheaval. The prosecutor had conscientiously arranged for and monitored the complainant's return, communicating with him and confirming his intent to return, providing him with a plane ticket, and communicating with the United States Department of State, the United States Embassy in Cairo, and the Egyptian consulate in New York to ensure that there would be no obstacles. Nevertheless, when the complainant sought to board a plane on June 26, 2013, he was prohibited from doing so by Egyptian immigration officials who told him that he could not leave the country because he had not fulfilled his legal requirement of serving in the Egyptian military.

The prosecutor learned this from an email message he received from a State Department attaché, and informed the court of it, on the afternoon of June 26, shortly after the trial had begun and jeopardy had attached. While the prosecutor told the court that he was looking into whether the complainant could get on a plane "tomorrow or the next day," he also proposed the possibility that the complainant testify by remote, two-way closed circuit television from Egypt. Defense counsel objected to the proposal on Confrontation Clause grounds. After hearing

from both sides on the issue, the court ultimately ruled that the People were not at fault for the complainant's absence and had done all they could, and that they had established the required necessity for allowing the remote video testimony.

Before the complainant's televised testimony commenced, defense counsel told the court that he had found information on the Internet regarding Egyptian military conscription requirements, indicating that the complainant was exempted from service because he was a dual citizen. Counsel produced two documents on this subject, apparently printouts from the Internet, and these documents were placed in the record. The court stated, "Your objection is noted, you have made your record." The complainant's televised testimony by Skype followed.

We conclude that, given the unusual circumstances of this case, and the prosecutor's good faith, the People made the specific, individualized showing necessary to justify remote video testimony. The Confrontation Clause's general guarantee of face-to-face testimony is not absolute (*Maryland v Craig*, 497 US 836, 844 [1990]). Video testimony is permissible "provided there is an individualized determination that denial of physical, face-to-face confrontation is necessary to further an important public

policy and the reliability of the testimony is otherwise assured" (*People v Wrotten*, 14 NY3d 33, 38-39 [2008] [internal quotation marks omitted]). Moreover, in *Wrotten*, the Court of Appeals recognized that video testimony could be employed in circumstances other than those involving a vulnerable child witness or a witness who was too ill to appear in court, as was the case in *Wrotten* (*id.* at 39-40).

Defendant concedes that the two-way video testimony at issue "preserve[d] the essential safeguards of testimonial reliability" (*id.* at 39). The dispositive question is whether the testimony was "'necessary to further an important public policy'" (*id.* at 39, quoting *Maryland v Craig*, 497 US at 850), which, in this case, is "the public policy of justly resolving criminal cases" (*id.* at 40), a showing that must be made by clear and convincing evidence (*id.* at 39).

At the outset, we reject defendant's argument that a full-blown evidentiary hearing, featuring sworn testimony, is an absolute prerequisite to making the required showing. Here, moreover, the facts as to the complainant's inability to appear were uncontested.

In this case, the prosecutor represented to the court that he had been in steady contact with the complainant, but on the

weekend before the commencement of the trial, a State Department attaché in Cairo told the prosecutor that the United States government was shutting down its embassy at that moment and that the political situation in Egypt was not stable. Further, on the morning of June 26, 2013, prior to the twelfth juror at the trial being sworn, in response to Supreme Court's request for an update on the complainant's travel arrangements from Egypt to New York to testify, the prosecutor reported to the court that he had received unverifiable information that the complainant was onboard an airplane leaving Egypt. The twelfth juror was then sworn and the trial commenced. It was not until later that same day that the prosecutor received the email message from the State Department attaché with the corrected information that the Egyptian authorities had blocked the complainant from boarding the airplane. Upon receiving the email message, the prosecutor spoke to the attaché by telephone. The attaché told the prosecutor he would contact the Egyptian Ministry of Justice about releasing the complainant but that the prosecutor should "not . . . hold [his] breath." That afternoon, the prosecutor reported to Supreme Court about the substance of the email message he had received from the State Department attaché and their subsequent telephone conversation. In response, defense

counsel stated, "I have the highest respect for [the prosecutor], I am sure he has made good faith efforts here," and merely argued that the State Department should have done more to make the complainant available to testify in person. Supreme Court then ruled that the complainant's testimony by live, two-way television was necessary, the People having done all that they could to secure the complainant's personal appearance in court and the prosecutor having made his record as an officer of the court, which Supreme Court correctly accepted.

We find that the prosecutor's representations to the court constituted clear and convincing proof that the complainant was prevented from boarding the plane to the United States on June 26 on the stated ground that he had not fulfilled his military service commitment and that the complainant's in-person appearance had become a practical impossibility at that point.[1] Thus, the People made the required demonstration that the complainant's videoconferencing testimony was necessary to further the public policy of justly resolving this criminal case

[1] At that time, the twelfth juror having already been sworn, jeopardy had already attached. (*See People v Ferguson*, 67 NY2d 383, 388 [1986] ["In a jury trial, once the jury is impaneled and sworn, jeopardy attaches"].)

(*People v Wrotten*, 14 NY3d at 40).

Although the complainant's video testimony was made after Supreme Court's ruling, and therefore could not have been considered by that court in making its ruling, we note that the necessity of the complainant's testimony by videoconferencing is further demonstrated by the complainant's sworn trial testimony, via Skype, that two days after he was prevented from boarding the plane the Egyptian government informed him that his dual citizenship exempted him from military service, but that "[he] ha[d] to get [a] minister of defense decision before [he] [sic] exempt from that, and that takes [a] couple of months at least and he can say yes and he can say no."[2]

The prosecutor's isolated comment in summation regarding the

[2] The Court takes judicial notice, however, pursuant to CPLR 4511(d), that on July 1, 2013, the date that this testimony was given, the Egyptian Minister of Defense was then-General Abdul-Fattah el-Sisi, who was then leading the government coup and seizing power in Egypt. (*See* Kareem Fahim, *Egypt General Has Country Wondering About Aims*, NY Times, Aug. 2, 2013, available at http://www.nytimes.com/2013/08/03/world/middleeast/egypts-general-sisi.html [accessed Oct. 20, 2016]; David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi Is Taken Into Military Custody*, NY Times, July 3, 2013, available at http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html [accessed Oct. 20, 2016].)

defendant's "high paid hacks," while inappropriate, was immediately stricken from the record by Supreme Court and is an insufficient basis for a mistrial to have been granted or for reversal of the judgment.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2171-
2172 The People of the State of New York,
Respondent,

-against-

Erick Rivera,
Defendant-Appellant.

Ind. 3643/13
SCI 1326/13

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

Judgments, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 19, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and also convicting him, upon his plea of guilty, of assault in the second and third degrees, and sentencing him to an aggregate term of five years, unanimously affirmed.

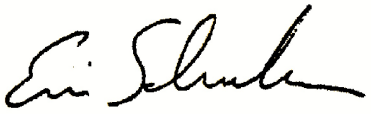
The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports an inference that the victim's injuries were more than

mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). The victim's description of his injuries amply established the requisite degree of pain, and the fact that he treated his injuries with ice and a homeopathic remedy rather than obtaining professional treatment does not warrant a different conclusion (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 15, 2016



DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2173 Kenneth J. McCarthy, Index 452594/15
Plaintiff-Appellant,

-against-

Art Van Lines USA Inc., et al.,
Defendants-Respondents.

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Greenstein & Milbauer, LLP, New York (Frank Trief of counsel), for appellant.

Goldberg Segalla LLP, Garden City (Robert W. Berbenich of counsel), for respondents.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about March 21, 2016, which denied plaintiff's motion for partial summary judgment on the issue of liability and dismissing the third, fourth, fourteenth and fifteenth affirmative defenses, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law on the issue of liability. He submitted an affidavit in which he stated that he was slowing down in heavy traffic when his vehicle was hit in the rear by defendants' vehicle (*see e.g. Brown v Smalls*, 104 AD3d 459 [1st Dept 2013]; *Rosario v Vasquez*, 93 AD3d 509 [1st Dept 2012]). Plaintiff also submitted a certified copy of the police accident report, which was

consistent with plaintiff's sworn statement (*see Santana v Danco Inc.*, 115 AD3d 560 [1st Dept 2014]).

In opposition, defendants failed to provide a nonnegligent explanation for the accident. Their speculation that plaintiff may have been comparatively negligent, by stopping suddenly, does not raise a triable issue of fact (*see Chowdhury v Matos*, 118 AD3d 488 [1st Dept 2014]). Nor does defendants' speculation that discovery might disclose some basis for a defense render the grant of summary judgment on the issue of liability premature (*see Santana v Danco Inc.*, 115 AD3d at 560; *Soto-Maroquin v Mellet*, 63 AD3d 449 [1st Dept 2009]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2174-
2175-
2176 In re Angelica S., and Others,

Children Under the Age of Eighteen Years, etc.,

Cynthia C. (Anonymous),
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

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Orders of disposition (one for each subject child), Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about September 16, 2015, which, among other things, found that respondent mother had permanently neglected the subject children, terminated the mother's parental rights to the children, and transferred the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The mother failed to preserve her contention that the

petitions failed to satisfy the specificity requirements of Family Court Act § 614(1)(c), and, in any event, the argument lacks merit (*Matter of Kevin J.*, 55 AD3d 468, 468 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009]).

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7], [3][g][i]). The evidence shows that the agency exercised diligent efforts to encourage and strengthen the parent-child relationship by, among other things, scheduling visits between the mother and the children, providing the mother with referrals for court-ordered programs, and advising her of the importance of complying with the court's directives (*see* § 384-b[7][f]; *Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576, 576-577 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]). Further, the evidence shows that agency caseworkers monitored her progress with obtaining housing and that her case with the Department of Homeless Services was closed after she failed to attend her appointments with that agency.

Despite the agency's efforts, the mother failed to consistently visit the children during the statutorily relevant time period, which alone is sufficient to support the finding of

permanent neglect (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538, 539 [1st Dept 2012]). In addition, during the statutorily relevant period, the mother failed to plan for the children's future, since she never completed mental health treatment, a parenting class, or a drug treatment program (*see Matter of Mandju S.K. [Aliyah B.D.]*, 120 AD3d 1133, 1133 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]).

A preponderance of the evidence supports the finding that termination of the mother's parental rights is in the children's best interest (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]), since the mother failed to ameliorate the conditions that led to the children's removal from her care (*see Matter of La'Asia Lanae S.*, 23 AD3d 271 [1st Dept 2005]). A suspended judgment is not warranted, even though the mother belatedly attempted to comply with her service plan. At the time of the dispositional hearing, the mother had no realistic, feasible plan for the children's care and there was no indication that she was successfully treating her drug addiction (*see Matter of Antoine M.*, 7 AD3d 399, 399 [1st Dept 2004]).

Family Court providently exercised its discretion in not, sua sponte, ordering a forensic evaluation of the mother and the children (*see* Family Ct Act § 251[a]). The record does not

indicate that such evaluations were necessary for the court to determine the appropriate disposition.

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

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2177 Alexander Sanchez, Index 307184/10
Plaintiff-Respondent,

-against-

Mohammed Alam, et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Law Offices of Eric H. Green and Associates, New York (Hiram Anthony Raldiris of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about September 25, 2015, which granted plaintiff's motion to set aside the jury verdict in favor of defendants and direct a new trial, unanimously reversed, on the law, without costs, and the motion denied. The Clerk is directed to enter judgment in favor of defendants.

The verdict is based on a fair interpretation of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493 [1978]). Although plaintiff established through the testimony and reports of his radiologist that he sustained a herniated lumbar disc as a result of the motor vehicle accident, the jury could rationally have found that he did not sustain a "permanent consequential" or "significant" limitation in the use of his lumber spine as a

result of the accident (*see* Insurance Law § 5102[d]). Plaintiff relied on his chiropractor's findings of limitations during examinations conducted in February 2012 and July 2014. However, the records from plaintiff's last day of treatment for the accident, in July 2009, reflect only a minor limitation in flexion (*see Licari v Elliott*, 57 NY2d 230, 236 [1982]; *Nakamura v Montalvo*, 137 AD3d 695 [1st Dept 2016]; *Dieujuste v Kiss Mgt. Corp.*, 60 AD3d 514 [1st Dept 2009]), and plaintiff presented no proof reconciling the 2012 and 2014 findings with the 2009 findings (*see Acosta v Vidal*, 119 AD3d 408 [1st Dept 2014]; *Colon v Torres*, 106 AD3d 458 [1st Dept 2013]).

As to plaintiff's claimed 90/180-day injury, the testimony of his chiropractor that he was disabled from work for six months is belied by the chiropractor's own office records, and plaintiff presented no other objective medical proof in support of this

claim (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357-358 [2002]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2179 The People of the State of New York, Ind. 5220/12
Respondent,

-against-

Sean Davis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Boyd 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 (Renee White, J.), rendered January 28, 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: NOVEMBER 15, 2016

DEPUTY CLERK

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

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2180-
2181 &
M-5183 Index 101452/13

Maria Yolanda Lopez-Reyes,
Plaintiff-Respondent,

-against-

Emile Heriveaux, et al.,
Defendants,

HCACC-Hispanic, et al.,
Defendants-Appellants.

_____

Robert W. Napoles, Astoria, for appellants.

Van Leer & Greenberg, New York (Evan Van Leer Greenberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Kathryn Freed, J.), entered April 2, 2015, in favor of plaintiff and against, inter alia, defendants HCACC-Hispanic and Chinese American Chamber of Commerce, Inc., and Natural Foods Supermarket, Inc. (together defendants), unanimously affirmed. Appeal from order, same court (Louis B. York, J.), entered July 28, 2014, which denied defendants' motion to vacate an order granting plaintiff a default judgment against them, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants failed to demonstrate a reasonable excuse for their nonappearance (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). The excuse proffered, that their principal, defendant Emile Heriveaux, acting pro se, had mistakenly believed that he could appear on their behalf, was not supported by an affidavit by a person with personal knowledge and did not address why no appearance was made on their behalf even after the additional notice required by CPLR 3215(g) was served on them (*see World on Columbus v L.C.K. Rest. Group*, 260 AD2d 323, 324 [1st Dept 1999]; CPLR 321[a]). Defendants also failed to demonstrate a meritorious defense (*see Eugene Di Lorenzo, Inc.*, 67 NY2d at 141).

The record shows that defendants' counsel was served with notice of the inquest (CPLR 2103[b][2]), and indeed appeared at the inquest on defendants' behalf. The court properly ordered the inquest with respect to defendants (CPLR 3215[d]), and plaintiff's uncontroverted testimony established the amount of her damages.

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

M-5183 - ***Maria Yolanda Lopez-Reyes v HCACC - Hispanic and Chinese American Chamber of Commerce, Inc., et al.***

Defendants' motion, on consent by all parties, to supplement the record is granted.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2183 Alexander Komolov, et al., Index 651626/11
Plaintiffs-Appellants,

-against-

David Segal, et al.,
Defendants-Respondents.

_____

Budd Larner P.C., New York (Philip C. Chronakis of counsel), for appellants.

Frankfurt Kurnit Klein & Selz, P.C., New York (Jeremy S. Goldman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 1, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs seek injunctive relief and damages in connection with defendants' alleged sale of counterfeit art, theft of paintings, and failure to pay the balance owed for the purchase of a condominium.

The motion court properly dismissed plaintiffs' claims for unjust enrichment, conversion, and fraudulent misrepresentation in connection with the sales of allegedly counterfeit art. These quasi-contractual and tort claims were duplicative of underlying,

unenforceable contractual claims and thus constituted an impermissible attempt to circumvent the statute of frauds (*see Komolov v Segal*, 117 AD3d 557 [1st Dept 2014] [unjust enrichment]; *Kocourek v Booz Allen Hamilton Inc.*, 71 AD3d 511, 512 [1st Dept 2010] [same]; *Priolo Communications v MCI Telecom. Corp.*, 248 AD2d 453, 454 [2d Dept 1998] [conversion]; *Massey v Byrne*, 112 AD3d 532, 533-534 [1st Dept 2013] [fraud]; *see also generally Dung v Parker*, 52 NY 494, 497 [1873]; *Wings Assoc. v Warnaco, Inc.*, 269 AD2d 183, 184 [1st Dept 2000], *lv denied* 95 NY2d 759 [2000]; *Lilling v Slauenwhite*, 145 AD2d 471, 472 [2d Dept 1988]).

The motion court likewise properly dismissed plaintiffs' claims for conversion in connection with the alleged theft of paintings from plaintiffs' office. "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [internal citations omitted]). Plaintiffs failed to submit evidence sufficient to raise a triable issue of fact with respect to plaintiffs' "dominion over" or "interference with" the painting alleged to be by Pablo Picasso and with respect to

plaintiffs' "possessory right or interest" in the painting alleged to be by Maurice Vlaminck.

We respectfully decline plaintiffs' suggestion, at the motion court's invitation, that we reconsider our prior order finding that plaintiffs were precluded from relitigating their breach of contract claim in connection with the purchase of the condominium (96 AD3d 513 [1st Dept 2012]). In a prior action, that claim was dismissed on the merits for noncompliance with the statute of frauds and plaintiffs allowed that determination to become final without taking an appeal. Although the written purchase agreement was subsequently discovered, plaintiffs did not move to renew in the prior action (CPLR 2221) and have never sought to be relieved from the judgment in the prior action based on newly discovered evidence (CPLR 5015[a][2]), and we decline to revisit the prior order in this new action.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2184 The People of the State of New York, Ind. 7526/01
Respondent,

-against-

Freddie Perez,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 25, 2012, resentencing defendant to a term of five years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

Defendant's challenge to the voluntariness of the underlying plea is not properly before this Court on this appeal from the

judgment of resentence (*see People v Toney*, 116 AD3d 607 [1st Dept 2014], *lv denied* 23 NY3d 1043 [2014]; CPL 450.30[3]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2185 The People of the State of New York, Ind. 5073/10
Respondent,

-against-

Raymond Rizzo,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph Nursey of counsel), and Debevoise & Plimpton LLP, New York (Elizabeth Nielsen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 15, 2013, as amended September 18, 2013, convicting defendant, after a jury trial, of murder in the second degree, burglary in the first degree (three counts), robbery in the first degree (three counts), robbery in the second degree (three counts), criminal possession of a weapon in the second degree and assault in the second degree, and sentencing him to an aggregate term of 32 years to life, unanimously affirmed.

Defendant validly waived his right under *People v Antommarchi* (80 NY2d 247 [1992]) to be present at bias-related bench conferences with prospective jurors (*see People v Velasquez*, 1 NY3d 44 [2003]). The court indicated that, at an

off-the-record bench conference, defense counsel had expressed his client's intention to waive his *Antommarchi* rights, whereupon defense counsel acknowledged that fact in open court by saying, "Yes." While the "better practice" would have been to make a fuller record, "nothing in the record calls into question the effectiveness of defendant's waiver as announced by counsel," and defendant has "failed to rebut the presumption of regularity that the waiver was neither offered by defense counsel nor accepted by the trial court without first ascertaining that defendant voluntarily, knowingly and intelligently waived his right to be present at sidebar conferences" (*id.* at 50). Defendant's attempt to distinguish *Velasquez* is unavailing.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the comments at issue, while better left unsaid, were generally responsive to defense arguments and fell within the broad leeway afforded prosecutors on summation (*see People v Galloway*, 54 NY2d 396 [1981]), and that, in any event, any improprieties were harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). We have considered and rejected defendant's ineffective assistance of counsel claim relating to

the lack of objection (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2186 Three Amigos SJL Rest., Inc., Index 162228/14
Plaintiff-Respondent,

-against-

250 West 43 Owner LLC, et al.,
Defendants-Appellants,

Alphonse Hotel Corp.,
Defendant.

_____

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellants.

Rex Whitehorn & Associates, P.C., Great Neck (Rex Whitehorn of counsel), for respondent.

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Order, Supreme Court, New York County (Carol Edmead, J.), entered September 29, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for a *Yellowstone* injunction, and denied defendant Alphonse Hotel Corp.'s, the then landlord's, cross motion for partial summary judgment declaring in its favor on the first, third, fourth, and fifth causes of action in the amended complaint, and dismissing the second cause of action in that complaint except the portion related to a 2011 letter agreement, unanimously reversed, on the law, without costs, plaintiff's motion denied, and defendant's cross motion granted. The Clerk is directed to enter judgment

accordingly.

Although the current landlord defendants were not parties to the action at the time of issuance of the order on appeal or at the time the former landlord filed the notice of appeal, we, sua sponte, deem the notice of appeal dated October 19, 2015 to be a notice of appeal by the current landlords (*see* CPLR 2001; *Matter of Tagliaferri v Weiler*, 1 NY3d 605 [2004]; *Matter of Ahmad C.*, 65 AD3d 1141 [2d Dept 2009]). The current landlords are "aggrieved part[ies]" within the meaning of CPLR 5511, and therefore have standing to appeal.

Plaintiff's admitted failure to procure retroactive umbrella coverage was a material breach allowing for termination of the lease (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900 [1987]; *C & N Camera & Elecs. v Farmore Realty*, 178 AD2d 310, 311 [1st Dept 1991]).

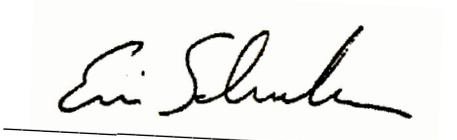
Plaintiff is not entitled to a *Yellowstone* injunction, since it sought such relief after the expiration of the cure period specified in the lease and the notice to cure. A tenant is not entitled to a *Yellowstone* injunction after the expiration of the cure period (*see 166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011]; *see also KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [1st Dept

2010]). Although this Court has recognized a limited exception in certain circumstances (*see Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219 [1st Dept 2012]), plaintiff does not so argue that it sought to cure the default. Rather, plaintiff claims that it cured the default within the specified period. Accordingly, it needed to move for *Yellowstone* relief before the expiration of the specified period (*see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]), which it failed to do.

We have considered plaintiff's arguments in support of its motion and in opposition to the former landlord's cross motion, and find them unavailing.

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

ENTERED: NOVEMBER 15, 2016



DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2189 The People of the State of New York, Ind. 4514/10
Respondent,

-against-

Eddie Moise,
Defendant-Appellant.

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Stanley Neustadter, Cardoza Appeals Clinic, New York (Anthony Faranda of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered May 28, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, criminal sale of a firearm in the third degree and unlawful possession of ammunition, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The evidence at the *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom during an undercover officer's testimony, consisting of a screening procedure, and this procedure did not violate defendant's right to a public trial (*see Waller v Georgia*, 467 US 39 [1984]). Although the officer's duties in undercover firearms purchases

extended over a large geographic area, the People made a strong showing of other factors, not necessarily tied to geography, supporting the requisite overriding interest (*see People v Jones*, 96 NY2d 213, 220 [2001]), most notably the enhanced danger involved in the purchase of firearms.

Defendant's arguments concerning the exclusion, or alleged exclusion, of particular persons are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the record fails to support his claim that two of his relatives were excluded, and it supports the court's exclusion of two of defendant's friends.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2190 Vincent Odoardi, et al., Index 805226/12
Plaintiffs-Respondents,

-against-

Jodi Abramson, M.D., et al.,
Defendants,

Benjamin Liberatore, M.D.,
Defendant-Appellant.

_____

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Thomas K. Wittig of counsel), for appellant.

The Jacob D. Fuschberg Law Firm, LLP, New York (Christopher M. Nyberg of counsel), for respondents.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about June 4, 2015, which, insofar as appealed from, denied the motion of defendant Benjamin Liberatore, M.D. for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

Following Dr. Liberatore's prima facie showing of entitlement to summary judgment on the ground that nothing at the time of plaintiff Vincent Odoardi's pre-Lasik surgery exam should have alerted the ophthalmologist to plaintiff having the disease Retinitis Pigmentosa (RP), plaintiff's expert raised questions of

fact as to the accuracy of that assertion (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). The nonspeculative opinion of plaintiff's expert was based upon plaintiff's complaints pre-surgery concerning problems with his vision, and the relatively stable condition of plaintiff's RP after its diagnosis, an indicator that the disease was not of sudden onset and had already expressed itself at the time of Dr. Liberatore's exam (*see e.g. Feldman v Levine*, 90 AD3d 477 [1st Dept 2011]).

Dr. Liberatore's argument that he cannot be liable on a claim for lack of informed consent because he was merely a referring physician, is unpersuasive in light of the evidence that he comanaged plaintiff's care and that the Lasik surgeon specifically relied upon Dr. Liberatore's examination to clear plaintiff for the surgery (*see Datiz v Shoob*, 71 NY2d 867 [1988]). Nor was Dr. Liberatore entitled to summary judgment on proximate cause grounds. While Lasik surgery does not cause or accelerate RP, both plaintiff's expert and his nonparty treating physician averred that Lasik surgery in individuals with RP can cause a patient's visual perceptions to worsen, as if they were looking through a tunnel.

Regarding that portion of Dr. Liberatore's motion seeking dismissal of the lost earnings claim on the ground that it is speculative, he failed to make a prima facie showing of entitlement to such relief, rendering the sufficiency of the opposition irrelevant (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2191 Carlos Velez, Index 303950/14
Plaintiff-Respondent,

-against-

2420 Davidson, et al.,
Defendants-Appellants.

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Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for appellants.

Joel Zuckerberg, Ossining, for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 19, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly found that triable issues of fact exist as to whether defendants created the dangerous condition of ice, on which plaintiff slipped and fell, or had actual or

constructive notice of it (*see generally Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [1st Dept 2010]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2192 The People of the State of New York, Ind. 4747/13
Respondent,

-against-

Alvin Velez,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered July 1, 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: NOVEMBER 15, 2016

DEPUTY CLERK

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

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2193 Rhonda Wittorf, Index 103233/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 5, 2015, which, inter alia, denied plaintiff's motion to set aside the jury verdict to the extent it found her 40% comparatively negligent for the subject accident, unanimously affirmed, without costs.

Plaintiff's argument that the evidence was insufficient to warrant a comparative negligence charge, let alone support a comparative negligence finding, is not preserved since she failed to move for a directed verdict on the issue at the close of the evidence (*see Miller v Miller*, 68 NY2d 871 [1986]), and did not object to the comparative negligence charge (*see Ganaj v New York City Health & Hosps. Corp.*, 130 AD3d 536 [1st Dept 2015]).

Plaintiff's argument that the comparative negligence finding

was against the weight of the evidence, is unavailing. Plaintiff was an experienced cyclist and just prior to her fall in a pothole in the roadway beneath a Central Park overpass, she had been traveling at moderate speed with a fellow cyclist notwithstanding quick changing light and visibility conditions as they headed into morning sun glare, and then suddenly into the darkened roadbed area beneath the overpass. Plaintiff testified that everything "happened so fast" as she encountered the potholes under the overpass. The trial evidence supported a reasonable inference that plaintiff's bike speed at the time of her accident left her with insufficient time to adequately adjust to any potential road hazards that might exist under the overpass.

As to the apportionment of fault for the accident, a fair interpretation of the evidence supported the verdict (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]). The jury found that the City was not given written notice of the specific offending pothole, and that there was no evidence to show the City had created it. While there was evidence that a Department of Transportation (DOT) supervisor had learned of the potholes beneath the subject overpass shortly before the accident, that city worker was in the process of closing a park

entrance to traffic so as to permit road repairs to begin when plaintiff's fellow cyclist inquired of the worker whether it was okay to enter and travel the subject roadway. The city worker allowed the cyclists to use the road before there was a reasonable opportunity for the City to effect the necessary repairs. Thus, the City's negligence arose with the failure of the DOT supervisor to impart his knowledge of the unsafe road conditions ahead and/or with his failure to completely bar the cyclists from using the road.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2195N BBCN Bank formerly known as Nara Bank, Index 159880/13
Plaintiff-Appellant,

-against-

12th Avenue Restaurant Group, Inc., doing business as Hudson River Café, et al.,
Defendants-Respondents,

Hamlet Peralta, et al.,
Defendants.

_____

Harfenist Kraut & Perlstein LLP, Lake Success (Andrew C. Lang of counsel), for appellant.

Robert A. Siegel, New York, for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 5, 2015, which granted defendants 12th Avenue Restaurant Group, Inc., d/b/a Hudson River Café, and Rafael Cepeda's motion to vacate a default judgment, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the motion denied. The Clerk is directed to enter judgment accordingly.

To vacate the default judgment, defendants were required to show a reasonable excuse for the default and a meritorious defense (*see John Harris P.C. v Krauss*, 87 AD3d 469 [1st Dept 2011]). The court abused its discretion in finding that defendants made these showings. With regard to reasonable excuse, defendants relied on law office failure. However, they failed to show that they even retained counsel for this, as opposed to another action. Further, while counsel passed away some two years into the case (or to take defendants' view, six months after he was retained) from a "long illness," defendants offered no evidence at all as to when counsel took ill or how and when that illness affected his ability to put in an answer. This speculation is insufficient to establish law office failure (*see Herbstein v Herbstein*, 44 AD3d 311 [1st Dept 2007]).

Defendants failed to establish a meritorious defense. Their claim that Cepeda never knew of the debt to plaintiff is belied

by the asset purchase agreement which Cepeda signed and in which 12th Avenue acquired all of HRC's assets, and pursuant to which one half of the purchase price ($225,000) was to be conveyed by the assumption by 12th Avenue of the debt owed to plaintiff.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2196N Sean Mark Corrigan, et al., Index 106473/11
Plaintiffs-Appellants,

-against-

New York City Transit Authority,
et al.,
Defendants-Respondents.

_____

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for appellants.

Lawrence Heisler, Brooklyn, for respondents.

_____

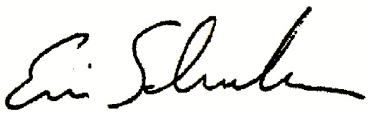
Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 15, 2014, which granted plaintiffs' motion to strike the answer and for sanctions pursuant to 22 NYCRR 130-1.1 or, in the alternative, to dismiss the affirmative defenses, preclude defendants from offering evidence, and grant summary judgment in plaintiffs' favor, only to the extent of directing defendants to produce certain discovery items within 90 days and granting plaintiffs a missing witness or evidence charge in the event defendants fail to do so, unanimously affirmed, without costs.

While defendants failed to respond to certain discovery requests and to comply with certain aspects of discovery orders, upon our review of the record, we agree with the motion court's

conclusion that these failures were not wilful or contumacious or in bad faith and therefore did not warrant the drastic sanction of striking the answer or precluding defendants from offering evidence at trial (*see Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222 [1st Dept 2003]). In response to plaintiffs' discovery demands, defendants produced, inter alia, photographs, reports, and correspondence prepared by both their employees and police officers who responded to the scene, maintenance and repair records and employee logs for 14 months preceding the accident, and 10 employees for depositions.

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

ENTERED: NOVEMBER 15, 2016



DEPUTY CLERK

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

2197 The People of the State of New York, Ind. 3008/12
Respondent,

-against-

Norman Moncrieffe,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered December 11, 2013, convicting defendant, upon his plea of guilty, of promoting prostitution in the second degree, and sentencing him to a term of three to nine years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal (*see People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2013]), we perceive no basis for reducing the sentence. Defendant claims that the court erroneously promised to recommend shock incarceration (Penal Law § 60.04[7]), where defendant was ineligible for that program. However, defendant does not seek to vacate his plea as induced by

an invalid promise, but only seeks a sentence reduction, and we decline to grant that remedy. In any event, the court repeatedly emphasized to defendant that it would only recommend shock incarceration, but that it was up to the Department of Correction to decide whether to accept that recommendation.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2198 Nuno Martins, Index 155308/14
Plaintiff-Respondent,

-against-

511 Properties, LLC,
Defendant-Appellant,

The West Paces Hotel Group, et al.,
Defendants.

_____

Wade Clark Mulcahy, New York (Cheryl D. Fuchs of counsel), for appellant.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for respondent.

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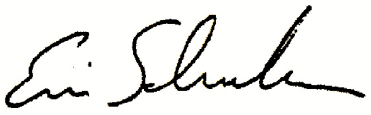
Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 7, 2016, which, to the extent appealed from as limited by the briefs, denied defendant 511 Properties, LLC's motion to renew plaintiff's motion to strike the answer, unanimously reversed, on the law and the facts, with costs, the motion to renew granted, the answer reinstated and defendant directed to pay plaintiff discovery sanctions in the amount of $2,500.

The new facts offered by defendant provide a basis for renewal of plaintiff's motion for discovery sanctions (CPLR 2221[e]). While defendant certainly should have been more

attentive, the missing discovery was ultimately provided by November of 2015. Before that time, neither party had provided any discovery by as late as May 2015, defendant had substituted new counsel and defendant had some personnel changes within its own organization. Under these circumstances, while a discovery sanction in the form of a fine in the amount indicated herein was warranted, the level of willfulness required for the striking of the answer was not present.

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

ENTERED: NOVEMBER 15, 2016



DEPUTY CLERK

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

2200 Scarlet Diaz, an Infant by Her Father and Natural Guardian, Rene Diaz, et al., Plaintiffs-Appellants, -against- Yaw Barimah, et al., Defendants-Respondents. Index 350465/11

_____

Goidel & Siegel, LLP, New York (Andrew B. Siegel of counsel), for appellants.

Maroney O'Connor LLP, New York (Ross T. Herman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 18, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claims of serious psychological injury and a 90/180-day injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie that the infant plaintiff did not suffer a serious psychological injury as a result of the accident in which she was struck by defendants' vehicle, through an affidavit by a psychologist who examined her and found no objective symptoms of posttraumatic stress disorder or any other

psychological illness (*see Hill v Cash*, 117 AD3d 1423, 1425-1426 [4th Dept 2014]; *Krivit v Pitula*, 79 AD3d 1432, 1434 [3d Dept 2010]).

In opposition, plaintiffs failed to raise an issue of fact (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Their expert did not consider or address the evidence in the infant plaintiff's own medical records suggesting that her psychological symptoms were causally related to her parents' ongoing divorce and custody dispute, and thus her opinion that the accident caused the psychological injuries is impermissibly conclusory (*see id.*).

Defendants also established prima facie that the infant plaintiff did not suffer a 90/180-day injury, through her own testimony that she missed only one day of school and the absence of any evidence of a "medically determined" injury, in opposition

to which plaintiffs failed to raise an issue of fact (*see Melo v Grullon*, 101 AD3d 452, 453 [1st Dept 2012]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2202 The People of the State of New York, Ind. 4812/12
Respondent,

-against-

Edwin Rodriguez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression hearing; Cassandra M. Mullen, J. at plea and sentencing), rendered January 13, 2014, convicting defendant of two counts of robbery in the first degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The suppression court properly exercised its discretion in denying defendant's request for assignment of new counsel, since defendant did not establish good cause for such substitution (*see People v Linares*, 2 NY3d 507 [2004]). To the extent there was a breakdown in communication between defendant and his attorney, the court's thorough inquiry revealed that the source of any breakdown was defendant's unjustified dissatisfaction with the attorney, and that defendant's complaints about the attorney at

issue were actually complaints about the conduct of a different attorney, who had already been relieved, or were unfounded (*see People v Sawyer*, 57 NY2d 12, 19 [1982], *cert denied* 459 US 1178 [1983]; *People v Medina*, 44 NY2d 199, 208-209 [1978]).

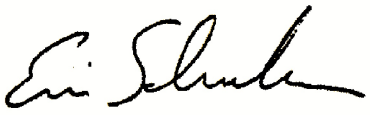
The court properly denied defendant's motion to suppress. The stop of defendant was supported by, at least, reasonable suspicion, where defendant met a detailed description whose most distinctive feature (missing teeth) was far more significant than any discrepancies regarding ethnicity and skin tone. The showup identification was not unduly suggestive, because "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" (*People v Reed*, 137 AD3d 438, 439 [1st Dept 2016], *lv denied* 27 NY3d 1138 [2016]), including "the likelihood that an identifying witness will realize that the police are displaying a person they suspect of committing the crime, rather than a person selected at random" (*People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). We have considered and rejected defendant's remaining arguments concerning the suppression proceedings.

Defendant's claim that his plea was invalid because the court failed to inquire about a possible affirmative defense to

first-degree robbery does not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375 [2015]; *People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review this unpreserved claim in the interest of justice. As an alternate holding, we find no basis for reversal. During the plea allocution itself, defendant admitted his guilt and said nothing that raised any defense (*see People v Toxey*, 86 NY2d 725 [1995]). "The court's duty to inquire was not triggered by statements defendant may have made at junctures other than the plea proceeding itself" (*People v Sands*, 45 AD3d 414, 414 [1st Dept 2007], *lv denied* 10 NY3d 816 [2008]), or by other information extrinsic to the plea allocution (*see People v Blackwell*, 41 AD3d 121 [2007], *lv denied* 9 NY3d 989 [2007]).

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

ENTERED: NOVEMBER 15, 2016



DEPUTY CLERK

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

2203 Charnise Coaker, Index 309030/12
Plaintiff-Appellant,

-against-

Eddie R. Mulet, et al.,
Defendants-Respondents.

_____

Robert G. Goodman P.C., New York (Robert G. Goodman of counsel), for appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for Eddie R. Mulet, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Andres F. Salazar-Salazar and UB Distributors, LLC, respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered May 14, 2015, which granted the motion of defendants Andres F. Salazar-Salazar and UB Distributers LLC (collectively Salazar) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Salazar established entitlement to judgment as a matter of law in this action for personal injuries sustained in a motor

vehicle accident. Salazar submitted deposition testimony and acopy of a photograph depicting the position of the vehicles at the scene, which show that defendant Mulet, who was driving the car in which plaintiff was a passenger, changed lanes before determining that it was safe to do so (*see* Vehicle and Traffic Law § 1128[a]; *Cascante v Kakay*, 88 AD3d 588 [1st Dept 2011]; *Zummo v Holmes*, 57 AD3d 366 [1st Dept 2008]). Indeed, Mulet admitted that he "took the chance and went" into the left lane, despite having received no acknowledgment from, and not being able to see, the other driver.

Plaintiff has not identified any evidence that Salazar-Salazar, who was within his lane of travel, was comparatively negligent. Mulet's belief that the truck did not move quick enough after the traffic light turned green is not evidence of comparative negligence, and plaintiff's speculation that Salazar-Salazar was operating a cell phone at the time of the collision,

fails toraise a triable issue of fact (*see e.g. Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]; *Velasquez v MTA Bus Co.*, 132 AD3d 485 [1st Dept 2015]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2204 In re Palmore Clarke, etc., Index 652634/13
Petitioner-Respondent,

-against-

New York City Department of Education,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for appellant.

Kousoulas & Associates, P.C., New York (Antonia Kousoulas of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 22, 2014, which, to the extent appealed from as limited by the briefs, summarily granted the petition to vacate the arbitrator's opinion and award finding that petitioner engaged in serious misconduct, and remitted the case for a hearing before a different hearing officer, unanimously reversed, on the law, without costs, the grant of the petition vacated, the opinion and award reinstated, and the matter remanded with instructions that respondent be permitted to serve an answer.

The order appealed from should be reversed insofar as it granted the petition without affording respondent the opportunity to serve and file an answer pursuant to CPLR 404(a), in which it

may address allegations that, inter alia, the arbitration award was procured through fraud or misconduct (*see Matter of Cline v Donovan*, 72 AD3d 471 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2206 The People of the State of New York, Ind. 122/14
Respondent,

-against-

Kenneth Young,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Robert Stolz, J.), rendered April 1, 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: NOVEMBER 15, 2016

DEPUTY CLERK

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

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

2207 Gilbert Hernandez, Index 301327/09
Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant,

Danella Construction of NY Inc.,
Defendant-Respondent.

- - - - -

[And a Third Party Action]

_____

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

Cozen O'Connor, New York (Eric J. Berger of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 24, 2015, which granted defendant Danella Construction of NY, Inc.'s motion to reduce the damages portion of the verdict and order a new trial of damages unless plaintiff stipulated to accept the reduced damages, unanimously affirmed, without costs.

The jury's award for pain and suffering deviated materially

from reasonable compensation for the injuries sustained by plaintiff (CPLR 5501[c]). The award for future medical expenses was not supported by the trial evidence (*see e.g. Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 219 [1st Dept 2005]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2208-
2208A Index 602761/09

Bayerische Hypo-Und Vereinsbank AG,
Plaintiff-Appellant,

-against-

HSBC Bank USA, N.A., et al.,
Defendants-Respondents,

Trowers & Hamlin, etc.,
Intervenor Defendant-Respondent.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Jake M. Shields of counsel), for appellant.

Locke Lord LLP, New York (Gregory T. Casamento of counsel), for HSBC Bank USA, N.A., respondent.

Morgan, Lewis & Bockius LLP, New York (Joshua Dorchak of counsel), for Deutsche Bank AG and Trowers & Hamlins, as the external administrator of the International Banking Corporation, B.S.C., respondents.

_____

Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about July 21, 2015, which denied plaintiff's motion for summary judgment, and granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to declare that the subject funds do not belong to plaintiff, and otherwise affirmed, without costs.

Because the mistaken payment at issue was effected by wire

transfer, this action is governed by UCC article 4-A. While plaintiff is correct that, to the extent a particular claim as to a wire transfer does not contravene or alter the rights and obligations created under article 4-A, a common-law claim may be asserted (*see e.g. Sheerbonnet, Ltd. v American Express Bank, Ltd.*, 951 F Supp 403, 413-414 [SD NY 1995]), this is not such a case. Plaintiff's attempt to cancel the payment order is directly governed by UCC 4-A-211(1), which provides that, where, as here, a payment order has been accepted, a communication cancelling it is not effective without the agreement of the receiving bank, here, defendant HSBC Bank USA. Further, once the order was accepted, the funds became the property of the beneficiary, here, intervenor-defendant (TIBC) (*see* UCC 4-A-104[a]; *Bank of N.Y. v Norilsk Nickel*, 14 AD3d 140, 145 [1st Dept 2004], *lv dismissed* 4 NY3d 846 [2005]), and it was permissible

for HSBC to set off the overdraft owed to it by TIBC against the funds (*see* UCC 4-A-502). Similarly, because title had passed to TIBC, TIBC's other creditors were then able to attach the funds.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2209 The People of the State of New York, Ind. 577/12
Respondent,

-against-

Urselina King,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered March 14, 2012, as amended March 29, 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: NOVEMBER 15, 2016

DEPUTY CLERK

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

2210 25 Avenue C New Realty, LLC, Index 156186/12
Plaintiff-Respondent,

-against-

Law Offices of Jeffrey Samel & Partners, et al.,
Defendants-Appellants.

_____

Marks, O'Neill, O'Brien, Doherty & Kelly, PC, New York (Karen M. Lager of counsel), for appellants.

Epstein & Weil, LLC, New York (Judith H. Weil of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 7, 2016, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion as to the breach of contract causes of action, and otherwise affirmed, without costs.

Accepted as true, the allegations in the complaint establish that this action was commenced within three years after defendant Bigelow was relieved of his continuous representation of plaintiff by court order in January 2010 (*see Booth v Kriegel*, 36 AD3d 312, 314 [1st Dept 2006]; CPLR 214[6]). The court properly

declined, on this motion to dismiss pursuant to CPLR 3211(a), to consider the affidavit by defendant law firm's principal saying that Bigelow ceased to be employed by the firm in April 2009 (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

The causes of action alleging breach of contract should be dismissed, since they are merely "a redundant pleading of the malpractice claim" (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1st Dept 1998]).

The "Release and Settlement Agreement" on which defendants rely unambiguously releases nonparty Alea North American Insurance Company "and its representatives, insurers, sureties, guarantors, [and] attorneys . . ., and all other persons, firms or corporations, if any, who are or may be liable in any way to [plaintiff]" from all claims against it arising out of claims that were or could have been asserted in the declaratory judgment action. As the instant complaint is asserted against defendants,

and not against Alea, the release is not a basis for dismissal.

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

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2212 The People of the State of New York, Ind. 446/12
Respondent,

-against-

Paul Giordano,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered January 9, 2015, 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: NOVEMBER 15, 2016

DEPUTY CLERK

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

2213 Lujanny Lopez, Index 302723/12
Plaintiff-Appellant,

-against-

Ariosto Morel-Ulla, et al.,
Defendants-Respondents.

_____

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

Baker, McEvoy, Morrissey & Moskovitz, P.C., Brooklyn (Robert D. Grace of counsel), for Ariosto Morel-Ulla and Castillo Auto Corp., respondents.

Varvaro, Cotter & Bender, White Plains (Patricia A. Mooney of counsel), for Gail P. Fernandez, respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about February 9, 2015, which granted the motion of defendants Ariosto Morel-Ulloa and Castillo Auto Corp. (Castillo defendants) for summary judgment dismissing the complaint as against them based on their lack of liability for the motor vehicle accident, and granted defendant Gail Fernandez's cross motion for summary judgment dismissing the complaint as against her based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to deny defendant Fernandez's cross motion and reinstate plaintiff's complaint to the extent based on claims of serious

injury to her lumbar spine and within the 90/180-day category, and otherwise affirmed, without costs.

Plaintiff alleges she suffered serious injuries to her knees, back and neck as the result of an accident that occurred when defendant Fernandez's car collided with the Castillo defendants' livery cab in which she was a passenger.

The Castillo defendants established their absence of fault in connection with the accident. Defendant Morel-Ulloa testified that Fernandez's vehicle backed up into the cab while it was stopped to discharge plaintiff, even though he honked his horn in warning; plaintiff testified that Fernandez's car backed into the cab while it was slowing down; and Fernandez did not believe there was an accident, but testified that she rolled back slightly to let a truck pass and was informed that she made contact with another vehicle. While these versions differ, none of them provide any basis for finding that Morel-Ulloa was at fault. Fernandez did not oppose the motion, and thus did not offer any further explanation for her action in rolling back into the Castillo vehicle, which is negligent as a matter of law (*see* Vehicle and Traffic Law § 1211[a]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339 [1st Dept 2004]). Plaintiff's assertion that Morel-Ulloa could have done something to avoid the accident does not

raise an issue of fact, since it is speculative (10 AD3d at 340; *Mendez v City of New York*, 110 AD3d 421 [1st Dept 2013]).

Defendants made a prima facie showing of a lack of serious injury through the reports of their radiologist, who found MRI evidence of preexisting degenerative disease in the claimed injured body parts, and their orthopedist, who found normal to near normal ranges of motion and no evidence of orthopedic injury caused by the subject accident (*see Clementson v Price*, 107 AD3d 533 [1st Dept 2013]).

In opposition, plaintiff raised an issue of fact as to whether she sustained serious injuries to her lumbar spine, by submitting the affirmation of her treating physician, who rendered a nonconclusory opinion adequately addressing the defense claims that the spine injury was degenerative, and found limitations caused by the subject accident (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350, 353 [2002]).

Plaintiff's treating surgeon also adequately addressed the evidence of degeneration in her knees, which was acknowledged by her own radiologist's report, and explained why he believed the accident caused the meniscal tears that he observed in both knees during surgery. However, the limitations that the surgeon measured in both knees were minor, and therefore insufficient to

raise an issue of fact as to significant or permanent consequential limitations in use of her knees (*see Pantojas v Lajara Auto Corp.*, 117 AD3d 577, 578 [1st Dept 2014]). As to the cervical spine claim, plaintiff's doctor rebutted the defense claims of degeneration, but did not provide any evidence of limitations. Absent limitations, there is no serious injury (*see Mayo v Kim*, 135 AD3d 624, 625 [1st Dept 2016]). In any event, if plaintiff establishes a serious injury to her lumbar spine at trial, she will be entitled to recover damages for all injuries caused by the accident, even those that do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549–550 [1st Dept 2010]).

As to plaintiff's 90/180-day claim, plaintiff argues that defendants failed to make a prima facie showing that she cannot demonstrate such a claim. Defendants make no argument in

opposition, and the claim is therefore reinstated.

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

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2214 In re New York Independent Contractors Alliance, etc., et al., Petitioners-Respondents, Index 110714/10 111918/11 101450/13

-against-

John C. Liu, Jr., etc., Respondent-Appellant,

Highway and Street Laborers Local Union 1010, et al., Respondents.

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

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (John D. D'Ercole of counsel), for respondents.

Order, Supreme Court, New York County (Lucy Billings, J.), entered January 6, 2015, which granted the three petitions brought pursuant to CPLR article 78 seeking an order annulling respondent Comptroller's determinations establishing the trade classification and corresponding prevailing wage schedules for pavers and roadbuilders-laborers employed in public works projects in New York City during fiscal years 2010, 2011, and 2013, to the extent of annulling the trade classifications and prevailing wage schedules, and remanding the proceeding to the Comptroller to formulate a new trade classification and

prevailing wage schedule in accordance with Labor Law § 220(5), unanimously reversed, on the law, without costs, the trade classification and corresponding prevailing wage schedules reinstated, the petitions denied, and the proceedings dismissed.

The Comptroller's determination to combine the formerly separate trade classifications into a single trade was rational and not arbitrary or capricious (*see* CPLR 7803[3]; *Matter of West Irondequoit Teachers Assn. v Helsby*, 35 NY2d 46, 50 [1974]). Formerly, in classifying asphalt and concrete pavers as distinct trades, the Comptroller had historically relied on not only the nature of the work — differing materials and techniques — but also the collective bargaining agreements (CBAs) entered into by the two unions which represented most, if not all, unionized asphalt and concrete pavers in New York. Those two unions merged and entered into a single CBA covering all pavers, albeit substantially retaining the historical job titles covering concrete pavers and production asphalt pavers. Given this change in the landscape for unionized workers in those fields, it was reasonable for the Comptroller to reconsider the trade classification framework for those workers (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519 [1985]).

Having so reconsidered the trade classifications, the

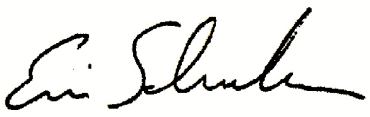
Comptroller rationally decided to join the two formerly separate trades of asphalt and concrete pavers into the single trade classification of Paver and Roadbuilder, with two subclassifications reflecting historically distinct divisions of duties and job titles. The Comptroller's determination was rationally guided by the unitary CBA of the single union which now represents the overwhelming majority of workers in those fields, as well as the logically conjoined nature of road work, albeit with job titles differentiated by task and material (*see Matter of Lantry v State of New York*, 6 NY3d 49, 55-56 [2005]; *Matter of General Elec. Co. v New York State Dept. of Labor*, 76 NY2d 946 [1990], *affg for reasons stated at* 154 AD2d 117, 120 [3d Dept 1990]).

The Comptroller rationally concluded here, based on review of CBAs in place for workers in the relevant fields, and the fact that Local 1010's CBA set wage rates for the overwhelming majority of unionized workers in the combined paver and roadbuilder trade, that that CBA covered the requisite 30% of workers in that trade (*see Matter of Suit-Kote Corp. v Rivera*, 137 AD3d 1361, 1364-1365 [3d Dept 2016], *appeal dismissed, lv denied* 27 NY3d 1054 [2016]). Petitioners failed to meet their burden of rebutting the statutory presumption that the 30%

threshold is met "until final determination" to the contrary (Labor Law § 220[6]; *see Suit-Kote*, 137 AD3d at 1364-1365; *Matter of Liquid Asphalt Distribs. Assn. v Roberts*, 116 AD2d 295, 298 [3d Dept 1986]). Petitioner's contention that the Comptroller must numerically establish that the 30% threshold had been met through, in effect, a census of all workers employed in the trade in New York City, unionized and nonunionized, would contravene the purpose of the 1983 overhaul of Labor Law § 220, which was to free fiscal officers from the heavy administrative burden of performing industry surveys of actual wages received by trade workers, and substitute for such surveys the more expedient proxy of reliance on CBAs (*see Lantry*, 6 NY3d at 54-55; *Suit-Kote*, 137 AD3d at 1364-1365).

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

ENTERED: NOVEMBER 15, 2016



DEPUTY CLERK

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

2215 The People of the State of New York, Ind. 1956/12
Respondent,

-against-

Angel Ortega,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered March 7, 2014, as amended April 3, 2014, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2216 Hojun Hwang, Index 22279/13E
Plaintiff-Appellant,

-against-

"John Doe," etc., et al.,
Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered October 19, 2015, which, to the extent appealed from as limited by the briefs, granted defendant Wanda Mendez's motion for summary judgment dismissing plaintiff's claim that he suffered a serious injury to his right knee as a result of a motor vehicle accident, unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not sustain a serious injury to his right knee, by submitting the report of their orthopedic surgeon who found full range of motion, and opined, upon review of intraoperative photographs, that plaintiff's knee surgery was not causally related to the accident (*see Hernandez v Cespedes*, 141 AD3d 483 [1st Dept 2016]; *Acosta v Zulu Servs., Inc.*, 129 AD3d 640 [1st Dept 2015]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff presented no medical evidence concerning his alleged right knee injury, and thus failed to show any significant or permanent limitations in use of his knee, or that his knee condition was causally related to the accident (*see Hernandez* at 484). Plaintiff's failure to raise an issue of fact as to whether his right knee condition was causally related to the accident means that he cannot recover for any right knee injury, regardless of whether he meets the serious injury threshold with respect to his cervical and lumbar spine claims (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2217N Buchanan Capital Markets, LLC, formerly known as Marcum Buchanan Associates, LLC, Plaintiff-Appellant, Index 651913/16

-against-

Joanne DeLucca, et al., Defendants-Respondents.

_____

The Roth Law Firm, PLLC, New York (Richard A. Roth of counsel), for appellant.

Nixon Peabody LLP, Jericho (James W. Weller of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 17, 2016, which denied plaintiff's application for a preliminary injunction, unanimously affirmed, without costs.

Plaintiff sought an injunction enforcing covenants not to compete in employment agreements between its predecessor and defendants. Thus, to show a likelihood of success on the merits, plaintiff had to show that the restrictive covenants were enforceable. However, such covenants are not enforceable if the employer (plaintiff) does not demonstrate "continued willingness to employ the party covenanting not to compete" (*Post v Merrill Lynch, Pierce, Fenner & Smith*, 48 NY2d 84, 89 [1979]), i.e., defendants. The motion court did not improvidently exercise its

discretion (*see e.g. Matter of Prospect Park E. Network v New York State Homes & Community Renewal*, 125 AD3d 435 [1st Dept 2015]) in denying the injunctive relief sought since the "conflicting affidavits raise[d] sharp issues of fact" (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 123 [1st Dept 1991]).

Plaintiff also sought an injunction ordering defendants to return its proprietary information. It is not entirely clear from plaintiff's briefs what this information consists of. To the extent the allegedly confidential information is information about plaintiff's clients, plaintiff failed to make a showing of a likelihood of success on the merits (*see Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 14 NY3d 774, 775 [2010]; *see also 1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 503 [1st Dept 2011]).

Even assuming plaintiff had shown a likelihood of success on the merits, it would also have to show irreparable injury. Plaintiff essentially complains that it has lost customers to defendants' new firm. However, "[l]ost profits . . . are clearly compensable with money damages" (*Sterling Fifth Assoc. v Carpentille Corp.*, 5 AD3d 328, 329 [1st Dept 2004]; *see Derfner Mgt. Inc. v Lenhill Realty Corp.*, 105 AD3d 683 [1st Dept 2013]).

Plaintiff further failed to show that the balance of the

equities weighed in its favor. The preliminary injunction that it sought would have changed the status quo (*see Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 93 AD3d 570, 571 [1st Dept 2012]). Unless plaintiff's predecessor's clients signed agreements to use plaintiff's predecessor for a set period of time – and there is no indication in the record that they did – the clients should be free to pick the firm they want, be it plaintiff or defendants' new firm (*see generally Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 370 [2015]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, JJ.

2218N W. Robert Curtis, Esq., Index 102071/15
Plaintiff-Respondent,

-against-

Tabak is Tribeca, LLC, et al.,
Defendants-Appellants.

_____

Law Office of Gregory Sheindlin PLLC, New York (Gregory Sheindlin of counsel), for appellants.

The Law Office of Walter Jennings, P.C., New York (Walter Jennings of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 1, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion for sanctions, attorneys' fees and/or costs against plaintiff pursuant to 22 NYCRR 130-1.1, unanimously affirmed, with costs.

There is no support in the record for defendants' contention that plaintiff's conduct was "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1[c][2]; *compare Pickens v Castro*, 55 AD3d 443 [1st Dept 2008], *with Lusker v 85-87 Mercer Street Assoc.*, 272 AD2d 278 [1st Dept 2000]). The only document that plaintiff filed in this action was the initiating summons and notice in December of 2015. He decided not to prosecute his claims, and the complaint was

dismissed upon defendants' unopposed motion after several months. Defendants point out that plaintiff has been sanctioned in other actions, including by this Court. However, the fact that he has been sanctioned before is not alone a basis for imposing sanctions against him in this case.

Nor is there support in the record for defendants' contention that plaintiff's conduct in this case was "completely without merit in law" (22 NYCRR 130-1.1[c][1]), involved false material statements (*id.* subd [c][3]), or was undertaken to "harass or maliciously injure another" (*id.* subd [c][2]). As indicated, the only document plaintiff filed in this case is the summons with notice. As the motion court observed, the issue of plaintiff's misconduct will be fleshed out, upon a more complete record, in the separate action brought by defendants, where the parties are represented by counsel. Defendants will be

entitled to recover damages for plaintiff's misconduct if they are successful in that action.

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK

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

2233 Gary Ganzi, et al., Index 653074/12
Plaintiffs-Respondents-Appellants,

-against-

Walter Ganzi, Jr., et al.,
Defendants-Appellants-Respondents,

Just One More Restaurant Corporation, et al.,
Nominal Defendants.

_____

Cooley LLP, New York (Ian Shapiro of counsel), for appellants-respondents.

Hoguet Newman Regal & Kenney, LLP, New York (Fredric S. Newman of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 8, 2016, which denied so much of defendants' motion for summary judgment as sought dismissal of plaintiffs' first and fourth causes of action on statute of limitations and laches grounds, granted so much of the motion as sought dismissal of the fifth, eighth and tenth causes of action as derivative claims, and denied defendants' separate motion for leave to amend the answer to include the affirmative defense of lack of derivative standing, unanimously affirmed, without costs.

Defendants failed to establish that plaintiffs' derivative claims asserted in their first and fourth causes of action were

time-barred. Plaintiffs raised triable issues relating to the harm they suffered from the allegedly improper licencing agreements that defendants had executed within the limitations period. Issues of fact concerning the reasonableness of plaintiffs' delay in bringing this action similarly preclude summary judgment on defendants' laches defense (*see Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 321 [1991]).

Plaintiffs' direct claims asserted in the fifth, eighth and tenth causes of action for breach of fiduciary duty, oppression of minor shareholders and unjust enrichment were properly dismissed as derivative since the harm is alleged to be directly to the subject corporation and indirectly to plaintiffs (*see Yudell v Gilbert*, 99 AD3d 108, 113-114 [1st Dept 2012]).

The court properly denied the motion for leave to amend the answer to add the affirmative defense of lack of standing for the

derivative claims. Plaintiffs' shares devolved upon them by operation of law under Business Corporation Law § 626 (*see Pessin v Chris-Craft Indus.*, 181 AD2d 66, 71 [1st Dept 1992]).

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

ENTERED: NOVEMBER 15, 2016

DEPUTY CLERK