SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 22, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1871 Neil Flaherty, Index 805433/13
Plaintiff-Appellant,

-against-

Paul Kantrowich, O.D., et al.,
Defendants-Respondents.

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Landers & Cernigliaro, P.C., Carle Place (Frank G. Cernigliaro of counsel), for appellant.

Spiegel Leffler, PLLC, New York (Marc R. Leffler of counsel), for Paul Kantrowich, O.D., respondent.

Hannum Feretic Prendergast & Merlino, LLC, New York (John E. Hannum of counsel), for Madison Avenue Eye Care, Ltd., respondent.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about September 25, 2015, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In 2005, plaintiff presented to the offices of defendant Paul Kantrowich, an optometrist, who noted that plaintiff's vision in his right eye was "20/400," or legally blind in that eye. Thereafter, from 2005 to February 10, 2012, plaintiff

presented to Dr. Kantrowich approximately once a year for an examination and a prescription for contact lenses. On each occasion, Dr. Kantrowich noted the continued existence of nerve pallor and optic neuropathy. On February 16, 2012, plaintiff saw a neuro-ophthalmologist, who diagnosed him with a meningioma which, he stated, had caused right eye blindness. Plaintiff contends that Dr. Kantrowich's failure to diagnose the condition sooner, or to refer him to an ophthalmologist or a neuro-ophthalmologist, constituted malpractice.

Supreme Court properly dismissed plaintiff's action on the ground that his claims based on all visits prior to February 10, 2012 were barred by the applicable three-year statute of limitations (CPLR 214[6]; *see Boothe v Weiss*, 107 AD2d 730, 731 [2d Dept 1985]). The continuous treatment doctrine does not operate to toll the statute of limitations because Dr. Kantrowich was not engaged in treatment of plaintiff's optic neuropathy, but performed only "routine . . . or diagnostic examinations," which, even when conducted repeatedly over a period of time, are not "a course of treatment" (*Massie v Crawford*, 78 NY2d 516, 520 [1991]). The measurement of plaintiff's nerve pallor annually did not itself amount to continuous treatment (*see McDermott v Torre*, 56 NY2d 399, 405-407 [1982]), or reflect any agreement to monitor the condition, but was part of the routine examination

(*see Massie* at 520; *Cassara v Larchmont-Mamaroneck Eye Care Group*, 194 AD2d 708 [2d Dept 1993]; *cf. Martens v St. Luke's-Roosevelt Hosp. Ctr.*, 128 AD3d 487 [1st Dept 2015]).

With respect to the sole date within the statute of limitations, February 10, 2012, there is no contention that the failure to diagnose or refer plaintiff on that date proximately caused any further loss of vision or prevented a better outcome (*see e.g. Bullard v St. Barnabas Hosp.*, 27 AD3d 206 [1st Dept 2006]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2063 Berger & Associates Attorneys, P.C., et al., Plaintiffs-Respondents, Index 160693/14

-against-

Reich, Reich & Reich, P.C., et al., Defendants-Appellants.

Steinberg & Cavaliere, LLP, White Plains (Benjamin Zelermyer of counsel), for appellants.

Andrew Lavoott Bluestone, New York, for respondents.

Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about March 22, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion for summary judgment dismissing the breach of contract cause of action, and otherwise affirmed, without costs.

The motion court correctly denied defendants' motion for summary judgment dismissing the complaint on statute of limitations grounds, because issues of fact exist whether the continuous representation doctrine applied to work performed by defendants in February 2012, and thus whether the statute of limitations was tolled until then (CPLR 214[6]; *see Shumsky v Eisenstein*, 96 NY2d 164, 167-168 [2001]; *Waggoner v Caruso*, 68 AD3d 1, 6-7 [1st Dept 2009], *affd on other grounds* 14 NY3d 874

[2010]; *CLP Leasing Co., LP v Nessen*, 12 AD3d 226, 227 [1st Dept 2004]). Plaintiffs' legal malpractice claim was based on defendants' representation of plaintiffs in an adversary proceeding in bankruptcy court, which defendants argue ended by July 2011 at the latest, when they completed work on an appeal in that proceeding. However, in February 2012, defendants reviewed and commented on a lien avoidance matter, in which they represented plaintiffs against the same individual (Alexander Kran, III) as in the adversary proceeding, to collect on the same judgment that prompted the adversary proceeding. In addition, plaintiffs asked defendants about any possible impact that the then pending appeal in the adversary proceeding would have on the lien. Thus, especially in view of the written retainer agreement's definition of the scope of the representation as "services in consulting with you [plaintiffs] concerning your interests as a creditor in the Chapter 7 bankruptcy case of Alexander Kran, III," there are triable issues of fact whether the adversary proceeding and the lien avoidance matter are sufficiently related so as to apply the continuous representation doctrine (*see Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 114-115 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]; *see also CLP Leasing* at 227).

Nevertheless, plaintiffs' breach of contract claim should

have been dismissed as duplicative of the legal malpractice claim, as it was based on the same factual allegations underlying the malpractice claim and alleged similar damages (*Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept 2013], *lv denied* 22 NY3d 853 [2013]; *see also Fross, Zelnick, Lehrman & Zissu, P.C. v Geer*, 120 AD3d 1157, 1158 [1st Dept 2014]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniel, Webber, JJ.

2163 Randall Henriksen, et al., Index 159053/14
Plaintiffs-Appellants,

-against-

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

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Manuel, J. Mendez, J.), entered April 05, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 11, 2016,

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2199 In re Ronald C.,
Petitioner-Appellant,

-against-

Sherry B.,
Respondent-Respondent.

_____

Anne Reiniger, New York, for appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

Tennille M. Tatum-Evans, New York, attorney for the children.

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Order, Family Court, New York County (Monica Shulman, Referee), entered on or about October 27, 2015, which, to the extent appealed from as limited by the briefs, denied petitioner father's petition for an order of visitation with his twin daughters, unanimously reversed, on the facts and in the exercise of discretion, without costs, and the matter remanded to Family Court for further proceedings for the purpose of fixing reasonable rights of visitation consistent herewith.

After having carefully reviewed the record, including the in camera testimony of the children, the testimony of the parents and the forensic social worker's reports, we find that the court improvidently exercised its discretion when it found that visitation with petitioner is not in the best interests of the

children and that petitioner forfeited his right to visitation with them. At a minimum, the court should have considered reinstating the therapeutic supervised visitation that had proved successful, rather than terminating all visitation.

Petitioner is the father of 13-year-old twin daughters, born in 2003. Although the twins lived with respondent mother on a different floor in the same apartment building as he did, petitioner did not cultivate a relationship with them.

In 2005, petitioner began paying child support for the twins pursuant to a court order. In 2006, he filed his first petition for visitation. However, after several adjournments, the petition was dismissed, without prejudice, because petitioner was unable to locate and serve respondent, who had moved from the building without giving him her forwarding address.

Over the next seven years, petitioner did not see the twins. In February 2013, when the twins were 10, he petitioned for visitation for a second time. After respondent was located by an investigator hired by petitioner's attorney, she cross-petitioned for custody.

Initially, the court directed petitioner to contact the twins by letter. After some confusion as to the procedure he was to follow, petitioner wrote many letters to the twins, which the attorney for the children characterized as "very appropriate."

By orders dated October 28, 2014 and January 28, 2015, the court ordered therapeutic visitation supervised by a forensic social worker. A May 2015 report by the social worker indicated that while the children continued to be ambivalent about seeing petitioner and allowing him into their lives, they were opening up more to him and becoming more talkative and receptive.

By order dated May 4, 2015, the court ordered unsupervised visitation. At the next court appearance on June 23, 2015, the attorney for the children made an application to suspend visitation, asserting that the twins found the visits stressful. While continuing the unsupervised visitation, the court agreed to an in camera interview with the twins and adjourned the matter for a hearing on custody and visitation.

After conducting the hearing, which included the children's in camera testimony, on October 27, 2015, the court held that it is not in the children's best interest to be compelled to have visitation with petitioner and that he had forfeited his right to visitation. Giving "substantial weight" to the twins' strong opposition to being forced to visit with petitioner, the court found, inter alia, that as a result of petitioner's absence from their lives, for which petitioner alone was responsible, "these children believe this man to be a stranger to them . . . . [W]hile not physically unsafe in his care, they are emotionally

harmed by continuing to force a relationship [with him] just because he has now determined it is time to do so . . . causing them to feel unhappy and depressed." Thus, while recognizing that "at some point these girls may decide that they wish to get to know their father," the court concluded that "any attempt at visitation should now be on their terms."

The determination as to whether or not a court should award visitation to a noncustodial parent lies within the sound discretion of the trial court, and must be based upon the best interests of the child (*see Matter of David V. v Rosalind W.*, 62 AD3d 717 [2d Dept 2009]). Generally, a child's best interest lies in being nurtured by both parents (*Matter of Rought v Palidar*, 6 AD3d 1112 [4th Dept 2004]) and a noncustodial parent should have reasonable rights of visitation unless there is substantial evidence that visitation would be detrimental to the welfare of the child (*see Weiss v Weiss*, 52 NY2d 170, 174-175 [1981]; *Matter of Nathaniel T.*, 97 AD2d 973, 974 [4th Dept 1983]). Thus, there is a rebuttable presumption that visitation by a noncustodial parent is in the child's best interest and should be denied only in exceptional circumstances (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]).

Here, the presumption that petitioner and the twins should visit with each other was not rebutted and the court should not

have terminated all visitation. As the court acknowledged, visitation with petitioner did not place the children in any physical danger and there is no substantial evidence that visitation would harm the twins by producing serious emotional strain or disturbance. Nor are there exceptional circumstances to support a finding that petitioner, despite his current efforts to foster a relationship with the twins, forfeited his right to visitation.

The record establishes that petitioner's name is on the twins' birth certificates, that he signed an acknowledgment of paternity and that he gave them his surname. Although he did not establish a relationship with them, he supported the twins financially for 10 years and his initial effort to obtain visitation when they were three years old was frustrated by his inability to locate respondent. The record further establishes that petitioner has remarried and matured and that he wants to establish a relationship with the twins, and for them to establish relationships with their half siblings.

When supervised visits were ordered, petitioner did not miss a visit. Although the court stated that there was a "clear disconnect" between petitioner and the twins and that "visits were often difficult to get through," the forensic social worker supported visitation and reported that petitioner was attentive

and loving during the visits and "appears interested in learning about [the twins]," who "appear[ed] to be opening up to him . . . they are more talkative and receptive to him . . . ." During the unsupervised visits, petitioner brought the twins to the park to play with their friends. While the court criticized petitioner for not interacting more with the twins on these visits, petitioner explained that he did not want to push them too much and went along with what they wanted to do.

The court placed too much weight on the expressed wishes of the twins, which are not determinative (*see Matter of Anthony C. v Kristine Z.*, 38 AD3d 1317 [4th Dept 2007]). This is so because of "the foreseeable changes that occur in children as they mature [and their] periodic reorientations toward one or another parent" (*Dintruff v McGreevy*, 34 NY2d 887, 888 [1974]). Although the twins told the court that they did not want visits with their father, there was no substantial evidence to support the conclusion that they would be harmed by visits (*see Matter of Crowell v Livziey*, 20 AD3d 923 [4th Dept 2005]). While the twins each raised matters of legitimate concern during their respective in camera interviews concerning their interactions with petitioner, which we have carefully reviewed and taken into account, they were insufficient reasons to terminate petitioner's visitation rights (*see Matter of McCauliffe v Peace*, 176 AD2d

382, 383-384 [3d Dept 1991]). At most they bespeak the need for more therapeutic support and perhaps more time to try to help petitioner gain the children's trust and affection.

The court's reliance on *Matter of Heyer v Heyer* (112 AD2d 539 [3d Dept 1985]) is misplaced. In *Heyer*, a finding that the father had forfeited his rights was supported by testimony that he would appear for visits drunk, that the children were afraid of him and that he required psychiatric counseling. Here, petitioner demonstrated that he financially supported the twins for over 10 years, that he filed two petitions seeking visitation, that he abided by court orders, and that he participated in therapeutic visitation with positive results. He also accommodated respondent's busy schedule by visiting the twins in their neighborhood. While we do not condone petitioner's failure to have contact with his children for a long period of time, we do not believe, under the facts of this case, that his behavior amounts to a forfeiture of his rights.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2242N Thomas F. Devlin, Index 158432/13
Plaintiff-Appellant,

-against-

Raymond Desamours,
Defendant-Respondent,

Chester Cab Corp., et al.,
Defendants.

_____

Oshman & Mirisola, LLP, New York (David L. Kremen of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about March 4, 2016, which denied plaintiff's motion to strike the answer of defendant Raymond Desamours, and ordered him to appear for deposition within 30 days or be precluded from testifying, unanimously affirmed, without costs.

It is within the trial court's discretion to determine the appropriate penalty for noncompliance with discovery orders, "and

the sanction will remain undisturbed unless there has been a clear abuse of discretion" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013]). The record on appeal does not indicate a clear abuse of discretion.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2244 The People of the State of New York, Respondent, Ind. 584/11

-against-

Robert Williams, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered March 25, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 30 points for defendant's prior violent felony conviction, notwithstanding its remoteness in time (*see People v Oginski*, 35 AD3d 952, 953 [3d Dept 2006]). In any event, even without those points defendant remains a level two offender, and we find no basis for a downward departure

(*see generally People v Gillotti*, 23 NY3d 841 [2014]). The egregiousness of the underlying crime against a child, and the evidence of predatory sexual misconduct against other children, outweigh the mitigating factors cited by defendant.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2245 Nicolaos Legakis, et al., Index 302509/13
Plaintiffs-Respondents,

-against-

New York Westchester Square Medical Center,
Defendant,

Premier Orthopedics & Sports Medicine, P.C., et al.,
Defendants-Appellants.

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Costello, Shea & Gaffney LLP, New York (Steven E. Garry of counsel), for appellants.

Cobert, Haber & Haber LLP, Garden City (Eugene F. Haber of counsel), for respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about October 9, 2015, which granted plaintiffs' motion for partial summary judgment on the issue of liability as against defendant Sanjiv Bansal, M.D., unanimously modified, on the law, upon a search of the record, to also grant partial summary judgment as against defendant Premier Orthopedics & Sports Medicine, P.C. (Premier), and otherwise affirmed, without costs.

In this medical malpractice action, plaintiffs established entitlement to judgment as a matter of law on the issue of liability by relying on the medical records and on Dr. Bansal's deposition testimony in which he admitted that during

arthroscopic surgery on the injured plaintiff's knee, he committed "an error" by placing a hot mallet on plaintiff's left thigh and abdomen, resulting in burns to those body parts. Under the circumstances, plaintiffs were not obliged to come forward with an expert opinion to establish their prima facie case (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 496-497 [1997]).

In opposition, defendants failed to raise a triable issue of fact. In an affidavit, Bansal attempted to explain that, although he had testified during his deposition that he made an "error" in laying the mallet down on plaintiff during the surgery, he did not commit malpractice because the ultimate responsibility was on the operating room staff. However, Dr. Bansal also acknowledged that the mallet was "exceedingly hot" and he felt it was warm, and thus, knew, or in the exercise of reasonable care, should have known, not to place the mallet onto plaintiff.

Defendants' argument that summary judgment should not have been granted based on the doctrine of res ipsa loquitur is unavailing (*cf. Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]), since plaintiffs moved for summary judgment based on Dr. Bansal's testimony and the medical records, without invoking the doctrine. In any event, this is the rare case in which the "prima facie proof is so convincing that the inference of

negligence arising therefrom is inescapable and unrebutted," so that summary judgment on liability is proper (*Thomas v New York Univ. Med. Ctr.*, 283 AD2d 316, 317 [1st Dept 2001] [internal quotation marks omitted]).

Although the order on appeal only granted partial summary judgment as against Dr. Bansal, plaintiffs also sought the same relief against Premier, and all parties on appeal treat the order as having granted relief against both Dr. Bansal and Premier, who have both appealed therefrom. Since summary judgment was properly granted as against Dr. Bansal, it should likewise be granted as to his corporation, Premier (*see Tart v New York Bronx Pediatric Medicine, P.C.*, 116 AD3d 515, 516 [1st Dept 2014]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2246 In re Kayshawn W.,
Respondent-Appellant,

A Person Under Sixteen Years
of Age, etc.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about October 20, 2015, unanimously affirmed, without costs.

Application by appellant'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]; *Matter of Benjamin C.*, 44 AD3d 535 [1st Dept 2007]). We have reviewed this record and agree with appellant's assigned counsel that there are no nonfrivolous points that could be raised on this appeal.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2247 Steven Gidumal, Index 152774/15
Plaintiff-Appellant-Respondent,

-against-

Jolantyna J. Cagney, et al.,
Defendants-Respondents-Appellants.

_____

O'Brien, LLP, New York (Sean R. O'Brien of counsel), for appellant-respondent.

Sean E. Stanton, New York, for respondents-appellants.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 7, 2015, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and denied their request for sanctions against plaintiff for engaging in frivolous litigation pursuant to 22 NYCRR 130-1.1, unanimously affirmed, with costs.

This action arises from the service of documents on plaintiff in an unrelated divorce proceeding and the resulting service affidavit filed by defendants, which plaintiff claims to contain material falsehoods. Specifically, the affidavit of service contained a statement that defendant Cagney, a licensed process server, knew plaintiff from effecting a previous personal service upon him on "11/3/14." In fact, the service affidavit should have reflected that the earlier service had taken place on

"10/3/14." Plaintiff also claims that Cagney reported in the "Additional Information" section of the service affidavit that he had verbally abused her, calling her a "f . . . bitch" and "f . . . whore," when in fact he had not made these statements Plaintiff alleges that these false statements violated Administrative Code of City of NY § 20-409.2 and that defendants' actions were an abuse of process. He claims to have been damaged in the amount of $1 million.

In recent years, the New York City Council amended the Administrative Code to grant a private right of action against process servers and process agencies for injuries suffered as a result of their "failure . . . to act in accordance with the laws and rules governing service of process in New York [S]tate" (Administrative Code § 20-409.2). The statute allows for recovery in the form of compensatory and punitive damages, provided that punitive damages are awarded only in the case of "willful failure to serve process," in addition to injunctive and declaratory relief, attorneys' fees and costs and any other relief the court may deem appropriate (*id.*). Plaintiff's allegations that the service affidavit filed by defendants incorrectly recorded an earlier service date and other superfluous information, however, does not support a cause of action under this provision. Notably, plaintiff has failed to

allege with any specificity how these purportedly false statements have injured him. Plaintiff has failed to allege that he was not served with process.

Nor has plaintiff stated a claim for an abuse of process. The elements of an abuse of process cause of action are (1) regularly issued process, (2) an intent to do harm without excuse or justification, and (3) the use of process "in a perverted manner to obtain a collateral objective" (*Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010] [internal quotation marks omitted]). Plaintiff has failed to allege facts to support these elements. First, plaintiff's allegations rest primarily on the purportedly false statements contained in the service affidavit, and not the actual process at issue – the order to show cause papers that were served on plaintiff in the divorce action. Further, because the order to show cause undoubtedly had a legitimate purpose, the IAS court correctly held that plaintiff failed to state a claim for abuse of process. "If process has a legitimate purpose, the allegation that it was misused does not suffice to state a claim for abuse of process" (*id.*).

With respect to the IAS court's refusal to impose sanctions, the IAS court did not "clear[ly] abuse" its discretion in denying

this branch of defendants' motion, and we find no reason to disturb this portion of the court's order (*Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2248 Steven Dwyer, Index 115086/06
Plaintiff, 590503/07
590895/07

-against-

Central Park Studios, Inc., et al.,
Defendants,

Michael Slosberg,
Defendants-Respondents.

- - - - -

Central Park Studios, Inc., et al.,
Third-Party Plaintiffs,

-against-

DSA Builders,
Third-Party Defendant.

- - - - -

Michael Slosberg, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

DSA Builders,
Second Third-Party Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Steven H. Rosenfeld of counsel), for appellant.

Mischel & Horn, P.C., New York (Naomi Taub of counsel), for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered March 28, 2016, which, to the extent appealed from as limited by the briefs, granted second third-party plaintiffs' (the Slosbergs) motion for summary judgment on their claim for

contractual indemnification by second third-party defendant DSA Builders (DSA), and denied DSA's cross motion for summary judgment dismissing that claim, unanimously modified, on the law, to deny the Slosbergs' motion, and otherwise affirmed, without costs.

The record presents issues of fact as to whether the parties intended to be bound by the several unsigned documents that the Slosbergs assert comprise their agreement with DSA (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]). These documents include an AIA "Standard Form of Agreement Between Owner and Contractor for a Small Project," "General Conditions of the Contract for Construction of a Small Project," a cost breakdown, applications and certificates for payment, and a change order. The "General Conditions" document contains an indemnification provision.

While DSA admitted that it performed work in accordance with the cost breakdown, applications and certificates for payment, and change orders, both its representative and Michael Slosberg testified that they could not remember reviewing the AIA Agreement or the General Conditions. Every page of the AIA Agreement and the General Conditions is stamped DRAFT, and both documents include proposed changes. While the documents appear to work together, the cost breakdown does not explicitly refer to

the AIA Agreement or the General Conditions, and the reference to the identical deposit amount in all the documents does not alone evince DSA's agreement to be bound by the terms of the AIA Agreement or the General Conditions. Moreover, DSA submitted testimonial evidence that the parties had worked together 10 to 15 times over a 15-year period and usually did not have a formal written agreement, only a cost breakdown and change orders.

Although the issue of DSA's liability on the Slosbergs' contractual indemnification claim was raised on the Slosbergs' prior motion for summary judgment, Supreme Court did not decide it against DSA. Therefore, DSA is not barred by the doctrine of collateral estoppel from arguing that the indemnification provision is unenforceable (*see Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2249 Jordan Bardach, et al., Index 101661/12
Plaintiffs-Appellants,

-against-

Matthew G. Weber, et al.,
Defendants,

Citrin Cooperman & Company, LLP,
Defendant-Respondent.

_____

Robert W. Georges, New York, for appellants.

Zuckerman Gore Brandeis & Crossman, LLP, New York (John K. Crossman of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Debra A. James, J.), entered July 23, 2015, deemed appeal from judgment, same court and Justice, entered August 7, 2015, dismissing the complaint as against defendant Citrin Cooperman & Company, LLP (CPLR 5501[c]), and, so considered, said judgment unanimously reversed, on the law, with costs, and the complaint reinstated.

The record fails to demonstrate as a matter of law that defendant Weber did not have apparent authority to enter into the transactions at issue (*see FDIC v Providence Coll.*, 115 F3d 136, 140 [2d Cir 1997]; Restatement [Second] of Agency § 27). Defendant Citrin, a full-service accounting firm, made Weber a partner. The services that Weber purported to perform for plaintiffs were within the purview of a Citrin partner. Weber

met with plaintiffs at Citrin's office and communicated with them via his office email (i.e., the firm's email system and domain name). These facts raise the inference that Citrin conferred apparent authority on Weber for the transactions at issue (*see General Overseas Films, Ltd. v Robin Intl., Inc.*, 542 F Supp 684, 689 [SD NY 1982], *affd* 718 F2d 1085 [2d Cir 1983]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2250 The People of the State of New York, Respondent, Ind. 3806/12 156/13 1450/13

-against-

Jesus Ramos also known as Jose Rodriguez, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered April 4, 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 22, 2016

CLERK

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

2251 In re Tribeca Equity Partners, L.P., Petitioner-Appellant, Index 100191/15

-against-

New York State Division of Housing and Community Renewal, et al., Respondents-Respondents.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Mark Lee Tyler, New York, for New York State Division of Housing and Community Renewal, respondent.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for Michael Anglin, respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered October 6, 2015, denying the petition seeking to annul the final determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated December 8, 2014, which denied petitioner's application for high income deregulation of the subject apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

RPTL 421-a(2)(f)(i) expressly provides that units subject to rent regulation pursuant to its provisions may be decontrolled pursuant to the Rent Regulation Reform Act of 1993, which

provides for high income rent deregulation (*see* Administrative Code of City of NY §§ 26-403.1 [rent control], 26-504.3 [rent stabilization]). RPTL 421-a(2)(f)(ii), on the other hand, makes no provision for high income deregulation for units enjoying tax benefits thereunder beginning after the effective date of July 3, 1984. Instead, under subsection (ii), units are deregulated upon expiration of the tax benefit, provided the requisite notices have been provided to the tenant, or else when the unit becomes vacant. Petitioner concedes that, since it failed to provide the requisite notice (*see* 9 NYCRR 2520.11[p][2]), under RPTL 421-a(2)(f)(ii), the apartment will not be subject to deregulation until the tenant vacates.

Petitioner maintains that it is nonetheless entitled to seek deregulation under the generally applicable high income deregulation provisions. Petitioner is incorrect, as the Rent Stabilization Law high income and high rent deregulation provisions mirror RPTL 421-a(2)(f)(ii) in expressly excluding from high income and high rent deregulation apartments (like the subject apartment) that became regulated under RPTL 421-a after the effective date of July 3, 1984 (*see* Administrative Code §§ 26-504.1, 26-504.2[a]).

Our decision in *Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal* (96 AD3d 524 [1st Dept 2012]),

in which we stated that RPTL 421-a(2)(f)(i) "provides that after the expiration of the benefit, the building remains regulated but the owner may seek to deregulate apartments based on luxury decontrol" (*Warren St.*, 96 AD3d at 529-530), is consistent with this plain reading of the statute, as providing for luxury deregulation of apartments regulated under RPTL 421-a prior to July 3, 1984, but not for those regulated by it thereafter (*see Matter of RAM I LLC v New York State Div. of Hous. & Community Renewal*, 123 AD3d 102, 105 [1st Dept 2014], *appeal dismissed* 26 NY3d 1068 [2015]).

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 22, 2016

CLERK

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

2252-
2252A-
2252B-
2252C-
2252D

Index 154934/15

Robert Seigel,
Plaintiff-Appellant,

-against-

The Dakota, Inc.,
Defendant-Respondent.

Law Offices of Jay Goldberg, P.C., New York (Jay Goldberg of counsel), and Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Steven D. Sladkus of counsel), for appellant.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (John Van Der Tuin of counsel), for respondent.

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 7, 2015, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered November 9, 2015, and December 10, 2015, respectively, deemed appeals from orders denying reargument, and, so considered, said appeals unanimously dismissed, without costs, as taken from nonappealable orders. Order, same court and Justice, entered on or about December 22, 2015, which denied plaintiff's motion for recusal, unanimously affirmed, with costs. Order, same court and Justice, entered April 14, 2016, which denied plaintiff's "second" motion for

recusal, deemed an appeal from an order denying reargument, and, so considered, said appeal unanimously dismissed, without costs, as taken from a nonappealable order.

The complaint was correctly dismissed as time-barred (*see* CPLR 3211[a][5]). Plaintiff purchased shares in defendant cooperative corporation and entered into a proprietary lease for the occupancy of Apartment 1A in 1999. The apartment included lower-level space, used by the previous tenant as an art studio, that plaintiff planned to convert into bedrooms. Plaintiff alleges that defendant was aware of and approved his plan, but later took actions to thwart it, specifically, by improperly refusing to allow him to put a new air conditioning unit in the building's common area "moat" and by improperly amending the building's certificate of occupancy to list the lower level of Apartment A as a basement instead of a cellar. As plaintiff was aware of defendant's position on these issues no later than in 2006 but did not bring suit until 2012, the action is barred by the applicable statutes of limitations.

The continuing wrong doctrine is inapplicable to this case (*see generally Kaymakcian v Board of Mgrs. of Charles House Condominium*, 49 AD3d 407 [1st Dept 2008]). Nor does the doctrine of equitable estoppel apply to bar the assertion of the statute of limitations defense, since plaintiff failed to allege that

specific subsequent acts by defendant kept him from timely bringing suit (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 789 [2012]). Indeed, the allegations in the complaint demonstrate that plaintiff had all the information he needed to bring an action before the limitations period expired (*see Close-Barzin v Christie's, Inc.*, 51 AD3d 444 [1st Dept 2008]).

The breach of the warranty of habitability and breach of an easement claims also fail to state causes of action (CPLR 3211[a][7]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiff alleges not that the apartment he purchased is uninhabitable but that he cannot create additional inhabitable space as he planned – a claim not encompassed by the protections of Real Property Law § 235-b ("Warranty of habitability"). His claim fails on the additional ground that he never made any bona fide attempt to reside in the building (*see Halkedis v Two E. End Ave. Apt. Corp.*, 161 AD2d 281 [1st Dept 1990], *lv denied* 76 NY2d 711 [1990]). The cause of action for breach of an easement fails to allege the existence of a writing containing plain and direct language unequivocally evincing the grantor's intent to create an easement (*see Willow Tex v Dimacopoulos*, 68 NY2d 963 [1986]; *London Terrace Gardens v London Terrace Towers Owners*, 203 AD2d 145 [1st Dept 1994]).

The motion court properly denied plaintiff's motion for

recusal. The record is devoid of evidence that the court showed any bias, and plaintiff's claims of connections between the Justice and members of defendant's board are rank speculation.

Since plaintiff failed to demonstrate that his motions to renew defendant's motion to dismiss were based on any new facts not offered on the prior motion (CPLR 2221[e][2]), the appeals from the orders deciding those motions are deemed appeals from the denial of reargument (CPLR 2221[d][2]), which are not appealable (*see Forbes v Giacomo*, 130 AD3d 428 [1st Dept 2015], *lv dismissed in part, denied in part* 26 NY3d 1047 [2015]). The appeal from the denial of plaintiff's second motion to recuse must also be dismissed, since the second recusal motion was in fact a motion for reargument of the first recusal motion (*see Rockowitz v Huntington Town House*, 283 AD2d 630 [2d Dept 2001]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2253 The People of the State of New York, Respondent, Ind. 3118/13

-against-

Scott Tyler, 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 (Joshua L. Haber of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 12, 2014, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously modified, on the law, to the extent of vacating the second violent felony offender adjudication and sentence, and remanding for resentencing, and otherwise affirmed.

Defendant's conviction of burglary under South Carolina Code Annotated § 16-11-312(A) did not qualify as a predicate felony to enhance defendant's sentence because the South Carolina statute does not contain all of the essential elements of a comparable New York felony. To be guilty of burglary in the second degree in New York, a defendant must knowingly enter or remain

unlawfully in a dwelling with the intent to commit a crime therein (Penal Law § 140.25[2]). The absence of the term "knowingly" from the South Carolina statute precludes its use as a predicate felony conviction (*People v Helms*, 141 AD3d 1138 [4th Dept 2016], *lv granted* 28 NY3d 939 [2016]; *People v Cardona*, 9 AD3d 337 [1st Dept 2004], *lv denied* 3 NY3d 739 [2004]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2255 Gentry T. Beach, et al., Index 603611/08
Plaintiffs-Respondents-Appellants,

-against-

Touradji Capital Management, LP, et al.,
Defendants-Appellants-Respondents.

- - - - -

Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Appellants-Respondents,

-against-

Gentry T. Beach, et al.,
Counterclaim Defendants-Respondents-Appellants.

- - - - -

Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Appellants-Respondents,

-against-

Vollero Beach Capital Partners LLC, et al.,
Counterclaim Defendants-Respondents-Appellants,

Gary Beach,
Counterclaim Defendant.

_____

O'Brien LLP, New York (Sean O'Brien of counsel), for appellants-respondents.

Liddle & Robinson, LLP, New York (Matthew J. McDonald of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 7, 2015, which granted in part and denied in part the motion of plaintiffs/counterclaim defendants Gentry T. Beach (Gentry), Robert A. Vollero (Mr. Vollero), and

counterclaim defendants Vollero Beach Capital Partners LLC, Vollero Beach Capital Fund, LP, Vollero Beach Associates LLC, and Vollero Beach Capital Offshore, Ltd. (the Vollero Beach Funds) for summary judgment dismissing the counterclaims, unanimously modified, on the law, to (1) deny the motion as to (a) so much of the first counterclaim as alleges that Mr. Vollero breached his fiduciary duty to defendant/counterclaim plaintiff Touradji Capital Management, LP (TCM) by destroying documents and remaining at TCM in an attempt to collect information for use in plaintiffs' lawsuit and to concoct a lawsuit, (b) so much of the first counterclaim as alleges that Gentry breached his fiduciary duty to TCM and counterclaim plaintiff DeepRock Venture Partners, LP (DeepRock) by misrepresenting counterclaim defendant Gary Beach's (Gary) contribution to Playa Oil & Gas LP, conspiring with Gary to steal investor funds from Playa, and withholding information about Madagascar Oil and Gas, Ltd., (c) so much of the first counterclaim as alleges that plaintiffs breached their fiduciary duty to TCM by misappropriating its proprietary research, positions, etc., (d) so much of the second counterclaim as alleges that plaintiffs and Vollero Beach Capital Partners engaged in unfair competition against TCM and defendant/counterclaim plaintiff Paul Touradji (Mr. Touradji) by misrepresenting plaintiffs' track record and misappropriating

TCM's proprietary research, etc., (e) so much of the third counterclaim as alleges that plaintiffs stole TCM's proprietary research, etc., (f) the fifth counterclaim, with respect to Gentry's involvement in the statements to Amaranth about TCM and Mr. Touradji, and (g) the sixth counterclaim by TCM against plaintiffs; and (2) grant the motion as to (a) so much of the first counterclaim as is asserted by Mr. Touradji, (b) so much of the first counterclaim as alleges that plaintiffs breached their fiduciary duties when Mr. Vollero spoke to Gentry's counsel, and (c) so much of the seventh counterclaim as is asserted by Mr. Touradji and TCM, and otherwise affirmed, without costs.

The motion court did not have the benefit of our decision on the most recent prior appeal (the prior decision), in which we concluded that the breach of fiduciary duty counterclaim based on destruction of documents stated a cause of action as against Mr. Vollero but not as against Gentry (142 AD3d 442, 444 [2016]). Thus, the counterclaim should be reinstated as against Mr. Vollero. Our reasoning as to Mr. Vollero's destruction of his notes also applies to the part of the first counterclaim alleging that Mr. Vollero breached his fiduciary duty by remaining at TCM in an attempt to collect and fabricate information for use in plaintiffs' lawsuit against the firm and to concoct a lawsuit against the firm. Thus, that part of the first counterclaim

should be reinstated as against Mr. Vollero.

We concluded, in the prior decision, that Mr. Vollero's conversation with Gentry's lawyer, which the referee determined was for his own representation, was privileged and that, in engaging in it, Mr. Vollero did not violate his fiduciary duty to TCM (*id.* at 445). Therefore, the counterclaim based on Mr. Vollero's conversation with Gentry's lawyer should be dismissed.

Other aspects of the prior decision support the order appealed from. For example, we concluded that since plaintiffs' violation of a securities regulation caused their employer (TCM) to incur penalties, it was directly against TCM's interests; we also concluded that the securities regulation counterclaim related back to the complaint (*id.* at 444). Hence, the portion of the fiduciary duty counterclaim based on plaintiffs' violation of a securities regulation was correctly sustained.

In the prior decision, we affirmed the denial of the motion to amend the defamation counterclaim (*id.* at 445). Thus, the operative defamation counterclaim is the original one, which alleged that plaintiffs stated to TCM investors, and other businesses in the financial industry, that TCM "'broke its word' and breached a supposed contract with them" regarding their compensation. However, the amended counterclaim omitted this allegation, which, on appeal, counterclaim plaintiffs do not

address. Hence, the "broke its word" part of the defamation counterclaim was correctly dismissed.

With respect to the part of the defamation counterclaim that deals with Amaranth Advisors LLC, the court erroneously looked at the original pleading, rather than at the evidence submitted on the summary judgment motion (*see e.g. Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 280-281 [1978]). Counterclaim plaintiffs submitted evidence that Gary went to Amaranth's office in Greenwich, Connecticut, in June 2009, and at that meeting told Josh Goldstein of Amaranth that TCM "either traded against Amaranth's book or used that information to benefit it[self] to the detriment of Amaranth." Gary also gave Goldstein a report by Fortress Global. There is sufficient evidence that Gentry conspired with Gary, as the motion court found in addressing a cause of action not at issue on this appeal (tortious interference with contract). By contrast, there is no evidence that either Mr. Vollero or the Vollero Beach Funds conspired with Gary. Indeed, in the prior decision, we found that "the amended counterclaims lack factual allegations that [Mr.] Vollero induced [former TCM employee] [Benjamin] Bram to breach his contract with [TCM] or that [Mr.] Vollero conspired with [Gentry] with regard to this deed," and dismissed the new tortious interference counterclaim as against Mr. Vollero (142 AD3d at 443).

Gentry is not entitled, as a matter of law, to judgment dismissing the Amaranth portion of the defamation counterclaim as against him, except to the extent that DeepRock is not a proper plaintiff on this counterclaim (since there is no evidence that defamatory statements were made about it). As to his assertion of the litigation privilege, counterclaim plaintiffs presented evidence that the Beaches duped Amaranth into bringing a sham lawsuit that defamed TCM and Mr. Touradji (*see Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]). Nor did Gentry meet his burden of showing, as he contends, that TCM and Mr. Touradji are involuntary limited public figures (*see Krauss v Globe Intl.*, 251 AD2d 191, 192 [1st Dept 1998]). Of the articles cited by plaintiffs, the few that mention Amaranth at all merely report on its lawsuit, which is insufficient (*see Dameron v Washington Mag., Inc.*, 779 F2d 736, 741 [DC Cir 1985], *cert denied* 476 US 1141 [1986]).[1] Moreover, the dispute between Amaranth and TCM was merely a private one (*see Waldbaum v Fairchild Publs., Inc.*, 627 F2d 1287, 1296 [DC Cir 1980], *cert denied* 449 US 898 [1980]).[2]

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[1] We adopted *Dameron*'s analysis in *Daniel Goldreyer, Ltd. v Dow Jones & Co.* (259 AD2d 353 [1st Dept 1999], *appeal withdrawn* 92 NY2d 1013 [1999]).

[2] In *Goldreyer*, we also adopted *Waldbaum*'s analysis.

Since we are reinstating the defamation counterclaim, the sixth counterclaim (tortious interference with business relationships) should also be reinstated to the extent of allowing TCM (but not the other counterclaim plaintiffs) to assert this claim against plaintiffs (but not against the Vollero Beach Funds). Malice on plaintiffs' part need not be shown, because there is evidence that plaintiffs used improper or illegal means, i.e., defamation (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]). As to injury to TCM's relationship with its clients (*see id.*), Mr. Touradji's affidavit raises an issue of fact as to whether any client ceased doing business with TCM as a result of plaintiffs' remarks. Resolution of the conflict between Mr. Touradji's affidavit and the deposition testimony of David Mooney is for the trier of fact.

Based on *Ashland Mgt. Inc. v Altair Invs. NA, LLC* (14 NY3d 774 [2010]), the court correctly found that the contact list that Mikolaj Sibila sent to Gentry at the latter's request was not a trade secret, and thus correctly dismissed the portion of the second and third counterclaims based on this contact list.

By contrast, *Ashland* does not require dismissal of the part of the second counterclaim based on performance data. In *Ashland*, the relevant performance data was available to the

public (59 AD3d 97, 107 [1st Dept 2008], *mod* 14 NY3d 774 [2010]). In this case, Mr. Touradji submitted an affidavit saying that, "to the extent that [TCM's] performance data was ever shared with investors or others, [TCM] would only do so when those parties were also subject to confidentiality agreements." Moreover, in *Ashland*, the defendants used the performance data as is in their solicitation materials (59 AD3d at 100). In this case, the unfair competition counterclaim is based on counterclaim defendants' falsely (1) claiming TCM's track record as their own and (2) attributing any negative attributes of that record to Mr. Touradji.

With respect to the part of the second and third counterclaims based on TCM's proprietary research, positions, etc., Mr. Touradji submitted an affidavit identifying the aspect of the files taken by Mr. Vollero that constituted trade secrets. He also said that Mr. Vollero did not engage in any significant trading in the mining and agriculture sectors during his employment with TCM and therefore did not need to take those files to work at home. On this motion for summary judgment, the court erred in accepting movant Mr. Vollero's explanation instead of nonmovant Mr. Touradji's statement. Counterclaim defendants failed to establish prima facie that TCM's proprietary research, etc. was not confidential; parts of Mr. Vollero's deposition

testimony, which counterclaim defendants submitted in support of their motion, support counterclaim plaintiffs' position on confidentiality. Hence, the motion for summary dismissal as to this part of the second and third counterclaims must be denied regardless of the sufficiency of the opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We note in any event that counterclaim plaintiffs submitted evidence that TCM considered its research and positions confidential.

Although the evidence shows that only Mr. Vollero took TCM's proprietary files, there is sufficient evidence to raise a triable issue as to whether Gentry conspired with Mr. Vollero on this point. However, there is no evidence that the Vollero Beach Funds stole any trade secrets or conspired with Mr. Vollero; they were not created until months after Mr. Vollero left TCM. Furthermore, there is no evidence that Mr. Touradji's personal trade secrets (as opposed to TCM's) were stolen. DeepRock is not a proper counterclaim plaintiff, because it is merely a pool of capital; TCM is its investment manager.

However, the second counterclaim is properly brought by Mr. Touradji as well as TCM, since counterclaim plaintiffs maintain that the successful performance numbers for TCM's funds are the result of both Mr. Touradji's and TCM's labor, skill, and experience. The second counterclaim should be reinstated as

against Vollero Beach Capital Partners, an investment manager and competitor of TCM, but was correctly dismissed as against the remaining Vollero Beach Funds, which are not TCM competitors.

Although plaintiffs were at-will employees, they could be found to have breached a fiduciary duty to their employer if they "acted directly against the employer's interests" (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011], *lv dismissed* 17 NY3d 778 [2011]). Plaintiffs do not dispute that they were employed by TCM. As for DeepRock, plaintiffs were listed as its portfolio managers. However, there is no evidence that plaintiffs owed a fiduciary duty to Mr. Touradji personally.

Counterclaim plaintiffs' contention that the court erred in excessively parsing their fiduciary duty claim is unavailing (*see Ashland*, 14 NY3d 774).

In his affidavit in support of the motion, Gentry did not deny making misrepresentations about Gary's contributions to Playa. Hence, he failed to make his prima facie case. There are triable issues of fact as to Gentry's involvement with Playa. By contrast, there is no evidence that Mr. Vollero was involved in making any misrepresentations that induced DeepRock to invest in Playa. Indeed, counterclaim plaintiffs claim only that plaintiffs conspired from 2008 on; DeepRock invested in Playa

well before then.

The evidence that Gentry was supposed to revise the Playa agreement and failed to do so does not demonstrate a breach of his duty of loyalty and good faith to his employer (*Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011]).

The court erroneously said that Gary's September 5, 2007 emails were sent to several other members of TCM besides Gentry. In fact, they were sent to only one other TCM employee besides Gentry, namely, Chuck Ray. Since Ray was Gentry's close friend and someone whom Gentry had recruited to work at TCM, the fact that Gary sent emails to Ray as well as to Gentry does not negate the possibility that Gentry was scheming to withhold information from TCM. There are triable issues of fact as to whether Gentry was involved with Madagascar Oil.

Plaintiffs contend that the breach of fiduciary duty counterclaim should have been dismissed in its entirety because TCM failed to show that their actions caused it damage. They submitted evidence that investors withdrew from TCM for reasons other than their actions. However, counterclaim defendants' damages are not limited to the loss of investors. For example, under the faithless servant doctrine, TCM could seek to recover the compensation it paid to plaintiffs (*see Feiger v Iral Jewelry*, 41 NY2d 928 [1977]).

We have considered the parties' remaining arguments as to the breach of fiduciary counterclaim and find that the order appealed from should be modified to the extent indicated in the decretal paragraph.

The motion court correctly declined to dismiss the seventh counterclaim insofar as it alleges that Gentry aided and abetted Gary's breach of fiduciary duty. There is evidence that Gentry "knowingly induced" Gary's breach (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Gary himself testified that, one day before Gentry quarreled with Mr. Touradji and left TCM, Gentry told Gary that Gary needed to distribute money from Playa. The proper counterclaim plaintiff is DeepRock, which invested in Playa.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2256 The People of the State of New York, Ind. 698/14
Respondent,

-against-

Demetrius Edwards,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Anthony J. Ferrara, J.), rendered June 24, 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 22, 2016

CLERK

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

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

2257 Jin Chung, Index 151744/13
Plaintiff-Appellant,

-against-

Jonathan P. Lehmann, et al.,
Defendants-Respondents.

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

Law Office of Andrea G. Sawyers, Melville (Scott W. Driver of counsel), for respondents.

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about August 21, 2015, which granted so much of defendants' motion as sought summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law based on the doctrine of primary assumption of the risk. Defendants submitted evidence showing that plaintiff, an experienced watersports instructor, was injured when, while tubing behind defendants' boat on a 60-foot towrope and simultaneously filming a skilled wakeboarder pulled by the same boat from a 65-foot towrope, he fell from the tube when the boat allegedly turned sharply away from the approaching shoreline and another nearby boat, and as the boat crossed its own wake, plaintiff was propelled into the water where he was struck by the

wakeboarder. Defendants' evidence showed that plaintiff's injuries arose from commonly appreciated risks inherent in the recreational activities in which he was engaged (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's argument that the doctrine is inapplicable because the filming activity he was engaged in amounted to horseplay, as opposed to socially valuable recreation, is unavailing. Plaintiff assumed the risks of the watersports activity he was filming on the lake, which was a known venue for such recreational activity (*see Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658-659 [1989]; *Ticha v OTB Jeans*, 39 AD3d 310 [1st Dept 2007]).

Similarly unavailing is plaintiff's argument that even assuming the application of the doctrine of primary assumption of the risk, he could not be deemed to have assumed certain increased risks beyond those inherent in the recreational activity, including risks created by defendants' purported reckless conduct in operating the boat at a very fast speed, the sharp turning of the boat, the inadequate attention given to the

individuals towed behind the boat, and the utilization of disparate towrope lengths at the same time (*see Morgan* at 485-486). These contentions are conclusory and otherwise unsupported by expert opinion.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2258 Dexter Manswell, etc., et al., Index 308201/08
Plaintiffs-Respondents,

-against-

Montefiore Medical Center,
Defendant-Appellant.

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Ekblom & Partners, LLP, New York (Deborah I. Meyer of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 9, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action for negligence and medical malpractice, plaintiff alleges that his wife died while a patient at defendant hospital as a result of defendant's negligent delay in performing an intubation when decedent was discovered unresponsive and hypoxic.

Defendant met its initial burden of demonstrating its entitlement to judgment as a matter of law with its expert's opinion (*see Pullman v Silverman*, 125 AD3d 562, 562 [1st Dept 2015]). Defendant's expert opined that defendant's staff responded timely and properly to decedent being found

unresponsive and hypoxic. He further opined that decedent's death was caused by complications stemming from her multiple medical problems, and not by any action or inaction by defendant.

In opposition, plaintiff submitted a nonconclusory opinion from a qualified expert, which was sufficient to preclude summary judgment (*Pullman*, 125 AD3d at 562). Plaintiff's expert, a pathologist, is indisputably qualified to opine on decedent's cause of death - the primary focus of his opinion. While defendant is correct that plaintiff's expert is not qualified to opine as to the standard of care applicable to a critical care physician presented with a live patient who is unresponsive and hypoxic (*see Romano v Stanley*, 90 NY2d 444, 452 [1997]; *Udoye v Westchester-Bronx OB/GYN, P.C.*, 126 AD3d 653, 654 [1st Dept 2015]; *Nguyen v Dorce*, 125 AD3d 571, 572 [1st Dept 2015]), defendant does not dispute that the alleged delay of 45 minutes to an hour, if in fact there was such a delay (a fact the parties heavily dispute), would be a departure from the relevant standard of care. As such, plaintiff's failure to present expert testimony on this point is immaterial.

Defendant's remaining criticisms of plaintiff's expert opinion are likewise unavailing, as they merely highlight issues of fact and credibility for the jury to resolve (*Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2259 The People of the State of New York, Ind. 5377/12
Respondent,

-against-

Erick Aquino,
Defendant-Appellant.

_____

Seymour W. James, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about June 11, 2013, unanimously affirmed.

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

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

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

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2262 Edwin Lebron, Index 307049/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

Bronx Lebanon Medical Center,
Defendant-Respondent.

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Law Office of Stephen B. Kaufman, P.C., Bronx (John V. Decolator of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered on or about March 24, 2016, which granted defendant Bronx Lebanon's motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs.

Although a landowner is responsible for maintaining abutting sidewalks (*see* Administrative Code of City of NY § 7-210), it is not responsible for the curbs or ramps (*see Gary v 101 Owners Corp.*, 89 AD3d 627 [1st Dept 2011]; Administrative Code § 19-101[d]), unless a defect thereon was created by the landowner or occurred because of a special use (*see Trent-Clark v City of New York*, 114 AD3d 558 [1st Dept 2014]). The duty to maintain an area of special use is not dependent on a finding that the

landowner actually installed or repaired the area, only that it derived the special benefit (*see Karr v New York*, 161 AD2d 449 [1st Dept 1990]).

The court properly concluded that Bronx Lebanon did not derive a special benefit from the curb cut and handicapped ramp area where plaintiff fell because the area was accessible and used by the general public, and there was no evidence that the curb cut and ramp were installed by Bronx Lebanon or its predecessor or at its behest (*see Trent-Clark*, 114 AD3d at 558-559).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2263 Sebastian Pane, Index 162093/14
Plaintiff-Appellant,

-against-

Pablo Cisilino, et al.,
Defendants-Respondents.

_____

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered March 1, 2016, which denied plaintiff's motion for summary judgment on the issue of liability with leave to renew upon the completion of discovery, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established his entitlement to judgment as a matter of law in this action for personal injuries sustained in a motor vehicle accident. Plaintiff submitted, inter alia, his affidavit averring that this was a one-car accident which occurred when defendant Cisilino lost control of the vehicle he was driving, and in which plaintiff was a passenger (*see e.g. Al-Nashash v Soutra Limousine Inc.*, 115 AD3d 534 [1st Dept 2014]; *Mughal v Rajput*, 106 AD3d 886, 888 [2d Dept 2013]).

In opposition, defendants failed to raise an issue of fact.

Cisilino's averment in his affidavit that he could not recall the accident does not constitute a nonnegligent explanation for the accident (*see e.g. Soto-Maroquin v Mellet*, 63 AD3d 449, 450 [1st Dept 2009]). Furthermore, the mere hope that evidence sufficient to defeat the summary judgment motion may be uncovered during discovery is an insufficient basis upon which to deny the motion (*see Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2264 The People of the State of New York, Ind. 344N/15
Respondent,

-against-

Junior Colin,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Weinberg, J.), rendered March 23, 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 22, 2016

CLERK

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

2265N Joseph Calpo-Rivera, et al., Index 653370/14
Plaintiffs-Appellants,

-against-

Robert Siroka, et al.,
Defendants-Respondents.

_____

The Nolan Law Firm, New York (William Paul Nolan of counsel), for appellants.

Altschul & Goldstein, PC, New York (Joyce M. Goldstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered August 21, 2015, which denied plaintiffs' motion to dismiss defendants' second, third, and seventh affirmative defenses and third, fourth, and fifth counterclaims, unanimously affirmed, without costs.

Where, as here, dismissal of counterclaims and affirmative defenses are sought on the basis of documentary evidence, such relief is warranted, in the case of counterclaims, "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]; CPLR 3211 [a][1]) or similarly, in the case of an affirmative defense, only where such evidence shows the defense to be "without merit as a

matter of law" (*see* CPLR 3211[b]; *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]).

Emails can suffice as documentary evidence for purposes of CPLR 3211(a)(1); however, the emails, factual affidavits, and contract in this case do not constitute documentary evidence within the meaning of the statute (*see Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Sprung v Command Sec. Corp.*, 38 AD3d 478, 479 [1st Dept 2007]). The letter agreement contained a list of documents to be "procured" by plaintiff Calpo Studio, 11 of which were designated architectural. The letter agreement also includes a section for additional services "performed by Calpo," and includes hourly fees for acting, inter alia, as a project architect. The invoices and emails are also not conclusive, and do not preclude a finding, upon further discovery, that plaintiffs held themselves out as performing architectural services for the defendants, even if a licensed architect was needed for filing, expediting, and approval of the construction document.

At this juncture, it cannot be said that the claims against

defendant Jacqueline Siroka, whether asserted as a breach of contract claim, or a claim for quantum meruit, are frivolous, thereby warranting dismissal.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2267 In re Derrick Harris, Ind. 4541/11
[M-3055] Petitioner, 4786/11

-against-

Hon. James Burke, etc., et al.,
Respondents.

_____

Law Office of Stephen N. Preziosi, P.C., New York (Stephen N. Preziosi counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg of counsel), for Hon. James Burke, respondent.

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

_____

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

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

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

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2268 The People of the State of New York, Respondent, Ind. 4228/09 1381/12

-against-

Waldy Mena-Lopez,
Defendant-Appellant.

_____

Seymour W. James, The Legal Aid Society, New York (Joshua Norkin of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Patricia DiMango, J.), rendered July 31, 2013,

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 22, 2016

CLERK

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

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

2269-
2270 In re Mya Malaysha W.,

A Dependent Child Under Eighteen
Years of Age, etc.,

Debora D. M., et al.,
Respondents-Appellants,

The Children's Aid Society,
Petitioner-Respondent,

The Commissioner of the Administration for
Children's Services of the City of New York,
Petitioner.

_____

Thomas R. Villecco, Jericho, for Debora D. M., appellant.

Andrew J. Baer, New York, for Anthony W., appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about March 9, 2015, which, upon findings of permanent neglect, terminated respondents' parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence demonstrated that the agency

made diligent efforts to strengthen the parental relationship with the child by establishing a visitation schedule and referring respondents to individual counseling, drug treatment programs, parenting skills classes, and assigning a visiting coach when they had issues with visitation (*see Matter of Precious W. [Carol R.]*, 70 AD3d 486 [1st Dept 2010]). The agency also referred respondent mother to an anger management program and twice attempted to have respondent father speak with the child's therapist to assist him in understanding why the child was refusing to see or speak with him, which he refused (*see Matter of Gina Rachel L.*, 44 AD3d 367 [1st Dept 2007]). The mother's refusal to comply with drug treatment and drug screenings and the father's refusal to meet with the child's therapist or allow caseworkers to view the condition of his home prior to the petitions being filed rendered the agency's diligent efforts on these issues unavailing (*see Matter of Kimberly C.*, 37 AD3d 192 [1st Dept 2007], *lv denied* 8 NY3d 813 [2007]).

Despite the agency's diligent efforts, the fact that the mother failed to complete a drug treatment program before the child had been in foster care for at least one year established by clear and convincing evidence that she permanently neglected the child (*see Matter of Dade Wynn F.*, 291 AD2d 218 [1st Dept 2002], *lv denied* 98 NY2d 604 [2002]). Furthermore, the mother

twice tested positive for drugs, and refused to submit to drug screenings during the statutory look-back period (*see Matter of Davon Jamel W.*, 303 AD2d 213 [1st Dept 2003], *lv denied* 100 NY2d 503 [2003]). She failed to address her anger issues which frequently affected her visitation with the child.

Although the father completed many of the services required by his service plan, he failed to adequately plan for the child's future. He never gained insight into his parenting problems and consistently refused to separate from the mother, who actively used drugs and caused the removal of the child in the first instance (*see Matter of Janell J. [Shanequa J.]*, 88 AD3d 512 [1st Dept 2011]; *Matter of Jaquone Emiel B.*, 288 AD2d 57 [1st Dept 2001], *lv denied* 97 NY2d 608 [2002]).

Furthermore, the record shows that a number of the visits between respondents and the child did not go well, as respondents argued with each other while they were in front of the child (*see Matter of Jeremiah Emmanuel R. [Sylvia C.]*, 101 AD3d 571 [1st Dept 2012], *lv denied* 20 NY3d 863 [2013]). Even if the visits had gone well, the fact that respondents visited their daughter did not preclude a finding of permanent neglect given their failure to plan for her future (*see Matter of Emanuel N.F.*, 22 AD3d 288 [1st Dept 2005]).

A preponderance of the evidence establishes that it is in

the best interests of the child to terminate respondents' parental rights. The child has been in and out of foster care her entire life and wants to be adopted by her foster parents, who provide for her needs and want to adopt her (*see Matter of Jada Serenity H.*, 60 AD3d 469 [1st Dept 2009]). A suspended judgment so as to provide respondents with additional time to demonstrate that they can be fit parents is not warranted under the circumstances.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2271 Rafael Perez, et al., Index 302081/09
Plaintiffs-Appellants,

-against-

Gateway Realty LLC,
Defendant-Respondent,

BP Elevator Co.,
Defendant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 24, 2015, which granted the motion of defendant property owner Gateway Realty LLC (Gateway) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Rafael Perez, who was the superintendent at Gateway's building, sustained neck and back injuries after following a directive from Gateway's principal to move an elevator motor, which weighed between 500 and 600 pounds, and which rested atop a dolly, from the freight elevator to the street. As plaintiff pushed the old motor out of the building with the assistance of another worker, a wheel of the dolly

became stuck in a sidewalk crack. Plaintiff was injured when he lifted the dolly just enough, as the other worker pulled the dolly with a rope, to free the dolly wheel and to move the motor to the curbside.

Notwithstanding that the trial court did not reach the workers' compensation issue, because the issue is determinative and the record on appeal is sufficient to permit our review, we reach it (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405 [1st Dept 2009]).

Dismissal of the action as against Gateway is warranted, since it is barred by the Workers' Compensation Law. The record shows that plaintiff received workers' compensation benefits. Moreover, other evidence, including Gateway's payroll records, the relevant employment tax documents (including plaintiff's W-2 form), Gateway's reimbursement of a purported employer of plaintiff (the building's property manager) for workers' compensation premiums the property manager paid on plaintiff's behalf, and plaintiff's receipt of work instructions from Gateway's principal, combined to demonstrate an employee/employer relationship between Gateway and plaintiff (*see Clifford v Plaza Hous. Dev. Fund Co., Inc.*, 105 AD3d 609 [1st Dept 2013]). For

purposes of plaintiff's employment, Gateway and the property manager "functioned as one company" in managing and paying him, notwithstanding that Gateway and the property manager had distinct business purposes (*Privette v Precision El.*, 140 AD3d 591, 591 [1st Dept 2016]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2272-
2273 Index 805240/15

Marie Jose Clermont,
Plaintiff-Appellant,

-against-

Sahar Abdelrehim, et al.,
Defendants,

Intra-Op Monitoring Services, LLC,
Defendant-Respondent.

_____

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for appellant.

Litchfield Cavo LLP, New York (Michael R. L'Homme of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered March 29, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to strike the affirmative defense of lack of personal jurisdiction interposed by defendant Intra-Op Monitoring Services, LLC (IOM), and granted the cross motion of IOM to dismiss the action as against it, unanimously reversed, on the law, without costs, plaintiff's motion to strike granted and IOM's cross motion to dismiss the complaint as against it denied.

The complaint should not have been dismissed as against IOM, since IOM failed to move to dismiss on the grounds of lack of personal jurisdiction within 60 days after serving its answer

(CPLR 3211[e]). Although defense counsel had hired an investigator to determine whether IOM was still in business, there was sufficient information within the 60-day time limit upon which to move. Thus, counsel failed to make a showing of undue hardship so as to extend the statutory deadline (*see Wiebusch v Bethany Mem. Reform Church*, 9 AD3d 315 [1st Dept 2004]; *Aretakis v Tarantino*, 300 AD2d 160 [1st Dept 2002]).

In view of the foregoing, we do not reach the issue of whether service was properly effected.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2275 The People of the State of New York, Ind. 1213/14
Respondent,

-against-

Anthony Mayrant,
Defendant-Appellant.

_____

Seymour W. James, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Ronald A. Zweibel, J.), rendered October 16, 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 22, 2016

CLERK

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

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

2274 The People of the State of New York, Ind. 3310/12
Respondent,

-against-

Timothy Nesmith,
Defendant-Appellant.

_____

Seymour W. James, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Elizabeth Kamens of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Eugene Oliver Jr., J.), rendered December 3, 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 22, 2016

CLERK

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

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

2278-
2279 Index 652447/13

Jeffrey L. Doppelt, etc.,
Plaintiff-Appellant,

-against-

Wellington J. Denahan, et al.,
Defendants-Respondents,

Annaly Capital Management, Inc.,
Nominal Defendant-Respondent.

_____

CSS Legal Group, Great Neck (Carol S. Shahmoon of counsel), for appellant.

K & L Gates LLP, New York (Peter N. Flocos of counsel), for Wellington J. Denahan, Kevin G. Keyes, John A. Lambiase, Annaly Management Company LLC and Annaly Capital Management, Inc., respondents.

King & Spalding, LLP, New York (Richard A. Cirillo of counsel), for Kevin P. Brady, Jonathan D. Green, Michael Haylon, E. Wayne Nordberg, John H. Schaefer, Donnell A. Segalas, respondents.

_____

Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 1, 2015, which granted defendants' motions to dismiss the complaint, unanimously affirmed, with costs.

Contrary to the argument advanced by plaintiff, a shareholder who seeks to bring a derivative action on behalf of nominal defendant Annaly Capital Management, Inc., the employees of the company were not an asset that could be monetized, sold or spun off (*see Barry & Sons, Inc. v Instinct Prods. LLC*, 15 AD3d 62, 69 [1st Dept 2005]). Therefore, the fact that the employees

were free to leave the company to form their own business is not equivalent to the company's giving up an asset in entering into a management contract with them. Nor does the plan to allow management of the company to be thus "externalized" constitute a breach of fiduciary duty. Absent a cause of action for breach of fiduciary duty, there can be no cause of action for aiding and abetting breach of fiduciary duty.

Contrary to plaintiff's contention, two prior transactions whereby the company paid for and acquired asset management firms are not relevant to the moving of employees to their own new firm.

Because there was no bad faith or improper knowledge on their part, the independent directors are not liable for breach of fiduciary duty and are protected by the business judgment rule (*see Shenker v Laureate Educ., Inc.*, 411 Md 317, 344, 983 A2d 408, 424 [2009]). Because there was no "asset" of the company being wasted, merely the free alienation of the employees, there was no corporate waste (*see Werbowsky v Collomb*, 362 Md 581, 610, 766 A2d 123, 139 [2001]). Nor was there any usurpation of a corporate opportunity, both because the employees could leave anyway and because the interested directors had presented the opportunity to the board (*see Shapiro v Greenfield*, 136 Md App 1, 16, 764 A2d 270, 278 [2000]). For the same reasons, there is no

basis for a claim of unjust enrichment. Nor can the transaction be challenged on the ground that some directors were interested, given the approval by the independent directors and shareholders (West's Md Code Ann, Corporations and Associations § 2-419).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2280 The People of the State of New York, Ind. 3974/13
Respondent,

-against-

Matthew Solomon,
Defendant-Appellant.

_____

Seymour W. James, The Legal Aid Society, New York (Heidi Bota 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 (Gregory Carro, J.), rendered on or about December 18, 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 22, 2016

CLERK

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

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

2281 Francisco Rodriguez, Index 154450/15
Petitioner-Appellant,

-against-

City of New York,
Respondent-Respondent.

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

Zachary W. Carter, Corporation Counsel, New York (Rosemary Yogiaveetil of counsel), for respondent.

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about September 16, 2015, which, upon vacating a prior order dismissing as abandoned the petition for leave to file a late notice of claim, denied petitioner's renewed application, unanimously affirmed, without costs.

We affirm on the alternate ground that the court lacked discretion to grant the renewed application for leave to file a late notice of claim since the application was made after the expiration of the one-year-and-90-day limitations period for bringing suit against the City (General Municipal Law § 50-i[1][c]; *Pierson v City of New York*, 56 NY2d 950, 955-956 [1982]; *Fornabaio v City of New York*, 41 AD3d 125 [1st Dept 2007]).

Were we to reach the merits, we would find that the court

providently exercised its discretion in denying the application. Petitioner demonstrated that a clerical error by his counsel's law firm resulted in the notice of claim being inadvertently served on the wrong entity, which is not necessarily an unacceptable excuse (*see Matter of Soto v New York City Hous. Auth.*, 180 AD2d 570 [1st Dept 1992]). However, petitioner did not demonstrate either that the City had received actual notice of the facts constituting the claim against it within 90 days after the accident or a reasonable time thereafter (General Municipal Law § 50-e[5]; *see Chattergoon v New York City Hous. Auth.*, 161 AD2d 141 [1st Dept 1990], *affd* 78 NY2d 958 [1991]) or that the delay did not prejudice the City's ability to investigate (General Municipal Law § 50-e[5]; *see Harris v City of New York*, 297 AD2d 473, 474 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2282 William E. Stokely, III, etc., et al., Plaintiffs-Respondents, Index 160896/14

-against-

UMG Recordings, Inc., et al., Defendants,

Universal Music Publishing Inc., Defendant-Appellant.

_____

Sidley Austin LLP, New York (Eric G. Hoffman of counsel), for appellant.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 28, 2016, which denied defendant Universal Music Publishing Inc.'s motion to dismiss the second amended complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On behalf of himself and others similarly situated, plaintiff William E. Stokely, III, seeks unpaid minimum wage and overtime compensation from defendants Universal Music Publishing Inc. and UMG Recordings, Inc., which entities the complaint refers to "collectively" as "Defendant." Plaintiff alleges that he worked as an unpaid intern for "Defendant." In support of his

allegation that defendants are single and/or joint employers, plaintiff asserts bare legal conclusions (*see Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]). There are no factual allegations that would support a finding of joint- or single-employer liability against Universal (*see e.g. Shiflett v Scores Holding Co., Inc.*, 601 Fed Appx 28, 30 [2d Cir 2015]; *Batilo v Mary Manning Walsh Nursing Home Co., Inc.*, 140 AD3d 637 [1st Dept 2016]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2283 Aleyanesh Sebhat, Index 301202/08
Plaintiff-Respondent,

-against-

MTA New York City Transit also known as
New York City Transit Authority,
Defendant-Appellant.

_____

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

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Fernando Tapia, J.), entered May 6, 2014, upon a jury verdict, awarding plaintiff the total sum of $1,507,765, unanimously reversed, on the law, without costs, and the matter remanded for a new trial of liability.

On defendant's motion for summary judgment dismissing the complaint, the motion court correctly found that an issue of fact existed as to whether the movement of the train was extraordinary and violent.

A new trial of liability is required because of erroneous evidentiary rulings. The court erred in admitting into evidence portions of defendant's internal rules, which imposed a higher standard of care than required by common law (*Williams v New York*

City Tr. Auth., 108 AD3d 403, 404 [1st Dept 2013]; *Lesser v Manhattan & Bronx Surface Tr. Operating Auth.*, 157 AD2d 352, 355-356 [1st Dept 1990], *as amended* 176 AD2d 463 [1st Dept 1991], *affd* 79 NY2d 1031 [1992]). Moreover, the prejudice to defendant was heightened by plaintiff's expert's reading of those internal rules to the jury.

The court also erred in allowing plaintiff's counsel to question defendant's train operator about his discussions with counsel.

We see no basis for disturbing the damages award, which should stand if the jury finds liability on retrial (*see Harrison v New York City Tr. Auth.*, 113 AD3d 472, 476 [1st Dept 2014]).

An award of zero damages for future pain and suffering would have been irrational since it was uncontroverted that the range of motion in plaintiff's left hip was limited and the condition permanent. We do not find the award of $300,000 for future pain and suffering excessive.

We have considered defendant's remaining contentions and find them unavailing, or moot in view of the remand for a new trial of liability.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2286 The People of the State of New York, Ind. 2379/12
Respondent,

-against-

Karlo Ramos,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (William Terrell III of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered April 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 22, 2016

CLERK

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

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

2287 The People of the State of New York, Respondent, Ind. 1259/12

-against-

Malik Tague, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

Cyrus R. Vance, Jr., Distrit Attorney, New York (Oliver McDonald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 24, 2014, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly found that defendant violated the no-arrest condition of his plea agreement, and thus forfeited the opportunity to have his conviction replaced by a misdemeanor conviction. To support such a finding, the evidence at an *Outley* hearing is required to satisfy the court "not of defendant's guilt of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge" (*People v Outley*, 80 NY2d 702, 713 [1993]). Here, the legitimate basis for defendant's witness-tampering arrest was amply established

through "reliable and accurate" evidence (*id.* at 712), consisting primarily of defendant's Internet and phone communications. Defendant's various challenges to the process by which the court reached its determination are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the alleged procedural irregularities were not prejudicial. We have considered and rejected defendant's ineffective assistance of counsel claims.

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2288 Jeffrey Boolbol, Index 101287/09
Plaintiff-Appellant,

-against-

Paradigm Management Group, LLC,
et al.,
Defendants-Respondents,

RN Realty LLC,
Defendant.

_____

Ateshoglou & Aiello, P.C., New York (Steven D. Ateshoglou of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondents.

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Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered February 3, 2015, upon a jury verdict, in defendants' favor, unanimously affirmed, without costs.

The trial court properly ruled that the statement in an ambulance report that plaintiff "lost his footing going down the steps" was inadmissible as a prior consistent statement (*see People v McDaniel*, 81 NY2d 10, 18 [1993]). There was evidence at trial that plaintiff's fall was the result not of an accident but of a voluntary leap down the stairs, but plaintiff's motive to fabricate had arisen at the moment that he landed and hurt himself.

The trial court properly declined to give a missing document

charge as to a claimed surveillance videotape and photographs taken by an employee of defendant the Mansion (*see Martelly v New York City Health & Hosps. Corp.*, 276 AD2d 373 [1st Dept 2000]). Plaintiff failed to show that the videotape ever existed. He failed to show that the photographs would be relevant to any disputed factual issue.

In its verdict interrogatories, the trial court properly limited defendants' liability to the absence of handrails on the stairs since there was no evidence to support any other theory of liability (*Fallon v Damianos*, 192 AD2d 576 [2d Dept 1993], *lv denied* 83 NY2d 751 [1994]).

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

ENTERED: NOVEMBER 22, 2016

CLERK

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

2289 The People of the State of New York, Ind. 663/14
Respondent,

-against-

Virgidio Galindo,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Laura A. Ward, J.), rendered October 14, 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 22, 2016

CLERK

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

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

2296 In re Manuel Keith, Ind. 4853/15
[M-4320] Petitioner,

-against-

Hon. Neil E. Ross, etc., et al.,
Respondent.

_____

Manuel Keith, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Neil E. Ross, respondent.

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

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

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

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

ENTERED: NOVEMBER 22, 2016

CLERK