SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 29, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1826 Cheri Restaurant Inc., et al., Index 650886/14
Plaintiffs-Respondents,

-against-

Alain Eoche,
Defendant-Appellant.

_____

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

Law Office of Suzan D. Sacks, Huguenot (Suzan D. Sacks of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 25, 2015, which, to the extent appealed from as limited by the briefs, denied defendant's motion to vacate an order, entered May 6, 2015 on default, striking his answer, and granted plaintiffs' cross motion for sanctions for making a frivolous motion, unanimously reversed, on the law and the facts, without costs, the motion granted, the cross motion denied, and the case remanded to Supreme Court for further proceedings, including a decision on the discovery issues raised in defendant's motion.

Defendant failed to respond to plaintiff's untimely discovery demands, appear for a scheduled deposition, or attend a scheduled compliance conference. By order entered May 6, 2015, the motion court issued an order on default, which, among other things, struck defendant's answer and directed the Clerk to place the case on the trial calendar for a hearing on damages. On May 8, 2015, defendant filed an order to show cause to vacate the order entered on default. On May 12, 2015, the motion court held oral argument on the order to show cause and ultimately refused to sign the order. The court also issued a written order, entered May 12, 2015, denying defendant's application on the record to vacate the order entered on default. On July 15, 2015, defendant moved by notice of motion to vacate or modify the default order, the denial of which is before us on this appeal.

Defendant properly moved by notice of motion to vacate the order entered on default, and the denial of that motion is an order appealable as of right (*see* CPLR 5701[a][3]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 187 [1st Dept 2006]). The prior orders granting a default and striking the answer, refusing to sign the order to show cause, and denying defendant's application were not orders appealable as of right (CPLR 5511 [order entered on default]; *see also* 5701[a] [appeals as of right]; *Kalyanaram v New York Inst. of Tech.*, 91 AD3d 532, 532

[1st Dept 2012] [order that does not determine a motion made on notice]). Moreover, since there was no prior motion to vacate the order entered on default, the July 15, 2015 motion to vacate cannot be construed as a motion to reargue and was not identified as such (*see* CPLR 2221), and the motion court's conclusion that the motion to vacate was an untimely motion to reargue was in error. Thus the motion court also erred in granting plaintiffs' cross motion for sanctions for the filing of a frivolous motion.

"To obtain relief from a default judgment, a party is required to demonstrate both a reasonable excuse for the default and a meritorious claim or defense to the action" (*Bobet v Rockefeller Ctr., N., Inc.*, 78 AD3d 475, 475 [1st Dept 2010]; *see also* CPLR 5015[a][1]). Here, defendant has adequately demonstrated a reasonable excuse, namely, "inadvertent law office failure" (*Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597, 598 [1st Dept 2010]). Defendant's new counsel, in an affirmation submitted to the motion court, stated that there was a misunderstanding between her and defendant's former counsel, and that she was unaware of the scheduled deposition and the compliance conference when she took over representation in early April 2015, approximately a month before the May 5th conference date, which she missed. Shortly after receiving part of defendant's case file - which only contained plaintiff's

discovery responses and discovery demands - defendant's new counsel became very ill and lost approximately two weeks from work. Additionally, new counsel affirmed that she was informed by defendant's former counsel that he had received an extension of time to respond to plaintiff's discovery demands. In fact, plaintiff's counsel confirmed that she agreed to the extension. Lastly, defendant's new counsel affirmed that she was unaware that this was an e-filed case as she had never appeared in the New York County Supreme Court, Commercial Division, before, and her practice involved cases mainly in Queens and Kings County, where e-filing was not mandated.

Additionally, the record does not show a "pattern of dilatory behavior" by the defendant or his counsel, or indicate that the "default was willful" (*Bobet v Rockefeller Ctr., N., Inc.*, 78 AD3d at 475). Nor is this a case in which defense counsel was "fully aware" of her obligations and "intentionally and repeatedly failed to attend to them" (*cf. Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539, 540 [1st Dept 2016]).

Moreover, based on defendant's affidavit denying the existence of any written agreement providing plaintiff with a 51%

interest in the company, as well as plaintiff's acknowledged failure to provide a written agreement supporting such a claim, defendant has stated a meritorious defense.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Richter, JJ.

2290- Index 302436/02
2291-
2292 Dalia Genger,
Plaintiff-Appellant,

-against-

Arie Genger,
Defendant-Respondent.

_____

Judith L. Bachman, New City, for appellant.

Dobrish Michaels Gross LLP, New York (Robert Z. Dobrish of counsel), for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered June 6, 2016, which, inter alia, declared Arie Genger the owner of the stock purchase agreement at issue, unanimously affirmed, with costs.

Plaintiff Dalia Genger argues that this Court's prior order (*Genger v Genger*, 123 AD3d 445 [1st Dept 2014], *lv denied* 24 NY3d 917 [2015]), rendered the stock purchase agreement a marital asset subject to the coin toss procedure. We find her argument unpersuasive, and reject her contention that defendant Arie Genger is estopped from arguing that this is his separate property because of one sentence in an earlier appeal. Further, Dalia's current claim was raised long after the deadline for utilizing the coin toss provision as outlined in the parties'

divorce settlement.

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

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

2293 Index 651089/10

Arie Genger, et al.,
Plaintiffs-Respondents,

-against-

Sagi Genger, et al.,
Defendants-Respondents,

Dalia Genger,
Defendant-Appellant.

- - - - -

Sagi Genger, etc., et al.,
Cross Claimants, Counterclaimants,
and Third-Party Claimant-Respondents,

-against-

Arie Genger, et al.,
Cross-Claim, Counterclaim, and/or
Third-Party Defendants-Respondents.

_____

Law Offices of Judith Bachman, New York (Judith Bachman of counsel), for Dalia Genger, appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Eric Herschmann of counsel), for Arie Genger and Orly Genger, respondents.

Thomas J. Arlington II, Wilmington, DE, of the bar of the State of Delaware, admitted pro hac vice of counsel), for TR Investors, LLC, New TR Equity I, LLC, New TR Equity II, LLC, Jules Trump, Eddie Trump, Mark Hirsch and Trans-Resources, Inc., respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 25, 2014, which, to the extent appealed from as limited by the briefs, upon the parties' stipulation, dismissed

the complaint, unanimously affirmed, with costs.

Defendant Dalia Genger, as Trustee for the Orly Genger 1993 Trust (Orly Trust), failed to articulate any objection to the court's entry of the November 25, 2014 order dismissing plaintiff Orly Trust's breach of fiduciary duty and unjust enrichment claims against certain defendants, and her claim is not properly before this Court (*Horizon Asset Mgt., LLC v Duffy*, 106 AD3d 594, 595 [1st Dept 2013]). In any case, that order did not dismiss any claims; rather, it recognized that all claims had previously been dismissed or discontinued by prior court orders, dismissed the complaint, and severed other viable third party claims, cross claims, and counterclaims unrelated to the Orly Trust.

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

ENTERED: NOVEMBER 29, 2016

CLERK

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

2294-
2295N

Index 100697/08

Orly Genger,
Plaintiff-Respondent,

-against-

Sagi Genger,
Defendant-Appellant.

- - - - -

Urban Justice Center Mental Health Project and NAMI-NYC Metro,
Amici Curiae.

- - - - -

Orly Genger,
Plaintiff-Respondent,

-against-

Sagi Genger,
Defendant-Appellant,

- - - - -

David A. Parnes,
Nonparty Appellant.

_____

Kelly Drye & Warren LLP, New York (John Dellaportas of counsel), for Sagi Genger, appellant.

Dunnington, Bartholow & Miller LLP, New York (Thomas V. Marino of counsel), for David A. Parnes, appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Eric D. Herschmann of counsel), for respondent.

Mary Elizabeth Hennen-Anderson, New York, for amici curiae.

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Order (denominated decision and judgment), Supreme Court, New York County (Barbara Jaffe, J.), entered February 10, 2016,

which, after a nonjury trial on the issues of liability as to plaintiff's cause of action for fraud in the inducement and for an award of punitive damages, found defendant liable for fraud in the inducement and denied plaintiff's claim for punitive damages, unanimously modified, on the law, to vacate the finding of liability, and the matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs. Order, same court and Justice, entered October 23, 2015, which denied defendant's motions pursuant to CPLR 3104(d) to review the Special Referee's orders dated May 5, 2015, and May 7, 2015, and denied nonparty David A. Parnes's motion to review the May 7, 2015 order, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, the May 7, 2015 order vacated, and the matter remanded for further proceedings consistent herewith.

In this action, plaintiff Orly Genger alleges that her brother, defendant Sagi Genger, made false representations that induced her to sell to him her interest in a family real estate venture. Prior to trial, the court bifurcated the issues of liability and damages. The court also granted Orly's motion to preclude Sagi from presenting expert testimony at the liability trial on the issue of whether Orly suffered any injury, believing that such testimony would only be relevant to damages. After a

bench trial, the court found Sagi liable for fraud in the inducement, denied Orly's claim for punitive damages, and referred the matter to a special referee to hear and report on the amount of damages.

"To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]; *see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). A claim of fraud in the inducement requires proof of "actual pecuniary loss" (*McDonald v McBain*, 99 AD3d 436, 437 [1st Dept 2012], *lv denied* 21 NY3d 854 [2013] [internal quotation marks omitted]; *see PVM Oil Futures v Banque Paribas*, 161 AD2d 220, 221 [1st Dept 1990]).

Because injury is a required element of fraudulent inducement, the court should not have precluded Sagi from introducing expert testimony on the issue of whether Orly suffered an injury. Accordingly, the court's finding of liability is vacated and the matter remanded for a reopening of the trial on the limited issue of whether Orly suffered actual pecuniary loss. In the event the court finds such a loss, it shall, in the same proceeding, determine the amount of Orly's

damages. The evidence otherwise supported the court's finding that Orly had satisfied her burden of proving the remaining elements of her cause of action for fraud in the inducement. We find no basis to disturb the court's factual findings and credibility determinations (*see Schron v Grunstein*, 105 AD3d 430 [1st Dept 2013]).

There was no change in the theory of fraud at trial. The trial theory was that Sagi told Orly the property sales created a tax liability, whereas the complaint alleged that Orly did not know of the allegedly profitable property sales, and omits the tax rationale. Nevertheless, the primary allegation in the complaint was that Sagi misled Orly about the value of her interest, and how easily she could get it back, which was consistent with the trial theory. Nor was Sagi unfairly surprised at trial, because he testified about the tax issue in detail.

Sagi's complaints about the court's response to the scheduling recommendations proposed by his doctor provide no basis for reversal. The record shows that the court worked with Sagi and his counsel to ensure that Sagi's health did not impair his ability to meaningfully participate in his defense, and Sagi does not cite to any incident where he ultimately was denied a break in the proceedings. Nor does the record reflect that the

court was insensitive to his health concerns.[1]

We have considered Sagi's remaining complaints about the February 10, 2016 order and find them unavailing.

We perceive no abuse of discretion in denying Orly's claim for punitive damages (*17 E. 80th Realty Corp v 68th Assoc.*, 173 AD2d 245, 249 [1st Dept 1991]).

Sagi moved, pursuant to CPLR 3104(d), to review the Special Referee's May 5, 2015 order directing production of certain materials purportedly protected by the attorney-client privilege. Sagi and nonparty David Parnes, Sagi's attorney, each separately moved to review the Special Referee's May 7, 2015 order authorizing the replication of and search for responsive documents from Parnes's computer, which was located in Israel. In an order entered October 23, 2015, the motion court denied the motions.

The trial court has broad discretion in supervising disclosure and its determinations will not be disturbed unless there is an abuse of that discretion (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845

[1]In the event future accommodations are requested at the reopened trial based on a disability under the Americans with Disabilities Act, the court shall either provide the requested accommodations or make a finding that the request is not reasonable.

[2008]). "The deference afforded to the trial court regarding disclosure extends to its decision to confirm a referee's report, so long as the report is supported by the record" (*id.* [internal quotation marks omitted]).

Here, the court improvidently exercised its discretion in summarily denying the motions to review the Special Referee's orders. With respect to May 5 order, the court should not have denied Sagi's motion without reviewing the entire record before the Referee, including the documents the Referee determined to be nonprivileged. Accordingly, the matter is remanded to the motion court for an in camera review of the documents the Referee directed to be produced and a new determination on Sagi's motion. With respect to the May 7 order, Orly has not made a sufficient showing to warrant the replication and search of Parnes's computer (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244, 245 [1st Dept 2008] [court improperly directed cloning of the plaintiff's hard drives because, inter alia, there was an absence of proof that the plaintiff intentionally destroyed or withheld evidence]). Orly has failed to clearly articulate what alleged missing documents prompted such a search, and why those documents could not be obtained from Sagi or other sources. Although Parnes acknowledged that he had not yet looked for responsive documents, he offered to do so, and it is unclear why

this was not a viable option. In addition, neither the Referee nor the court determined the extent to which any resulting search would comply with Israeli law (*see Ayyash v Koleilat*, 115 AD3d 495 [1st Dept 2014]). Accordingly, the May 7 order should be vacated.[2]

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

ENTERED: NOVEMBER 29, 2016

CLERK

[2] The parties have not fully briefed how these discovery issues might relate to any potential reopening of the trial. This issue is best addressed by the trial court.

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2297 The People of the State of New York, Respondent, Ind. 2332/11

-against-

Malachi Alexis, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Michael J. Obus, J. at plea and sentence), rendered October 29, 2013, convicting defendant of murder in the second degree, and sentencing him to a term of 19 years to life, unanimously affirmed.

The court's oral colloquy with defendant, viewed in conjunction with a written waiver, establishes a valid waiver of defendant's right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]). This waiver forecloses review of defendant's suppression and excessive sentence claims.

Regardless of whether defendant validly waived his right to appeal, we find that the court properly denied his suppression motion, because the record establishes the lawfulness of an

automobile stop and accompanying police conduct, as well as the voluntariness of defendant's statement. We also perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2298 490-492 Amsterdam Avenue Housing Development Fund Corporation, Plaintiff-Respondent, Index 156161/12

-against-

Hector P. O'Neal, Defendant-Appellant.

_____

Jose Luis Torres, White Plains, for appellant.

Barry Mallin & Associates, P.C., New York (Matthew Maline of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered April 29, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to renew defendant's motion to dismiss and, upon renewal, denied the motion to dismiss, unanimously affirmed, with costs.

Even if the "new facts not offered on the prior motion" were available to plaintiff at the time (CPLR 2221[e][2], [3]), the court exercised its discretion providently in granting plaintiff's motion for renewal in the interest of justice (*see Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597, 598 [1st Dept 2010]). Plaintiff demonstrated that it was unaware of the January 2014 90-day notice, since it had discharged its former counsel in June 2013, it was not informed by former counsel of his receipt of that notice, and, despite several requests, was

unable to obtain its case file from former counsel. Moreover, plaintiff demonstrated a meritorious cause of action (*see Bustamante v Green Door Realty Corp.*, 69 AD3d 521 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2299 In re Saiah Isaiah C., also known as Baby Boy C.,

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

Tanisha C.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Joseph T. Gatti, New York, for respondent.

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

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about August 6, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the determination that termination of respondent's parental rights was in the best interests of the child, who had been in foster care for his entire life and required permanency (*see Matter of Star Leslie*

W., 63 NY2d 136, 147-148 [1984]). The record establishes that the child has bonded and thrived with his foster parents, who are able to address his special needs.

A suspended judgment was not warranted since respondent had not made significant progress in overcoming the problems that led to placement of the child. The child needed stability, which he has obtained in the foster home where he is doing well (*see Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]). Even if respondent were to continue on a path to recovery from substance abuse, there has been no showing that it would be in the child's best interests to be returned to her care, since there is no evidence that she had a realistic plan to provide an adequate and stable home for the child (*see Matter of Lorenda M. [Lorenzo McG.]*, 2 AD3d 370, 371 [1st Dept 2003]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2302-
2303 The People of the State of New York,
Respondent,

Ind. 1814/12
2324/13

-against-

Hakim Brunson, also known
as Shakim Brunson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Jill Konviser, J.), rendered July 29, 2014, convicting defendant, upon his guilty pleas, of burglary in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to vacate his guilty plea under his burglary indictment (*see generally People v Frederick*, 45 NY2d 520 [1978]). Defendant's claims of innocence were contradictory or unfounded, and his claim that he was mentally unfit to take the plea due to his alleged failure to take prescribed antipsychotic

medication was refuted by the plea allocution and the court's recollection of defendant's demeanor.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2304 In re Himan Brown, Index 2056/10
Deceased.

- - - - -

Barry Brown,
Objectant-Appellant,

-against-

Richard L. Kay,
Proponent-Respondent.

_____

Davidoff Hutcher & Citron LLP, New York (Howard B. Presant of counsel), for appellant.

Greenfield Stein & Senior, LLP, New York (Gary B. Freidman of counsel), for respondent.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered February 23, 2015, which, insofar as appealed from as limited by the briefs, admitted a will dated October 20, 2004 to probate, unanimously affirmed, without costs.

The will bequeaths decedent's entire estate to nonparty Radio Drama Network, Inc. Thus, the only way objectant can argue that Richard L. Kay (the proponent of the will) tricked decedent is by challenging the October 20, 2004 restatement of the Himan Brown Revocable Trust. However, as the Surrogate noted, objectant lacks standing to contest the 2004 restatement because he had no beneficial interest in any prior version of the trust (*see Matter of Ramm v Allen*, 118 AD3d 708, 709-710 [2d Dept

2014]). Accordingly, the objections of fraud and undue influence were properly dismissed.

The objections that decedent lacked capacity to make a will and that the will was not duly executed can exist independent of objectant's challenges to the restatement of the trust. However, this issue is not properly before us on this appeal.

Objectant objects to the uncertified visiting nurse report submitted by proponent. However, this does not create a triable issue of fact as to capacity. Proponent did not rely solely on the report. Rather, he submitted transcripts of depositions of an attesting witness and of people who knew decedent. This type of testimony is acceptable (*see Matter of Kumstar,* 66 NY2d 691, 692 [1985]; *Matter of Fiumara,* 47 NY2d 845, 847 [1979]).

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2305 Luver Plumbing and Heating, Inc., et al., Plaintiffs-Respondents, Index 300898/09

-against-

Mo's Plumbing and Heating, et al., Defendants-Appellants,

Juan Martinez, Defendant.

_____

Law Offices of James W. Badie, Tarrytown (James W. Badie of counsel), for appellants.

Bruce L. Steinowitz, White Plains, for respondents.

_____

Judgment, Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about August 26, 2015, which, following a nonjury trial, awarded plaintiffs the total sum of $101,164.00, unanimously affirmed, without costs.

Defendants and plaintiff Verges entered into a contract whereby Verges was to receive $800.00 per week and 10% of any "profits" from defendant Mo's Plumbing and Heating (Mo's), primarily for the use of Verges's Master Plumber's license to permit Mo's to operate its plumbing business and obtain permits to perform work on various projects. Defendant Osias A. Puello admitted that he signed the contract as CFO/OWNER of Mo's, but denied any involvement in the company, asserting that he was

merely asked to "participate" in signing the agreement, from which he hoped to receive some work.

Puello's testimony was not credible and the court properly rejected it. While defendants argue that the court improperly granted plaintiff Verges 10% of Mo's profits, asserting that there was insufficient evidence of any such profits, in fact the court did not award any "profits" to plaintiffs, and defense counsel's argument on this point is frivolous. Equally frivolous is counsel's argument that the court did not have personal jurisdiction over defendant Puello. Puello admits that the summons and complaint were served on his daughter when he was not home, and counsel makes no argument in response to plaintiff's assertion that Puello was properly served pursuant to CPLR 308(2). Assuming, arguendo, that Puello was not properly served, he has waived any such argument by not moving to dismiss the complaint within 60 days of service of his answer, in which he raised the improper service issue (CPLR 3211[e]).

Defendants' only colorable argument is that the contract, which stated that it would become "void" after defendants failed to pay Verges for 14 days, in fact did become void based on such nonpayment, thus plaintiffs may not seek any recovery for lost wages or profits. The court, however, properly rejected defendants' interpretation of the contract, as such a reading

would require Verges to remain bound for the three-year term of the contract, while permitting defendants to void it any time they chose, by operation of their own breach. "[A] contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010] [internal quotation marks and citation omitted]). "It is a longstanding principle of New York law that a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided" (*ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 503 [1st Dept 2012]; *see also Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994]). It is clear that the voiding of the contract upon defendants' nonpayment for 14 days was meant to protect Verges, not to give defendants an absurd advantage under the agreement.

Thus, the court properly interpreted the provision to mean that the contract was voidable, at Verges's discretion, once defendants breached the agreement by failing to pay him.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2306 The People of the State of New York, Ind. 2750/10
Respondent,

-against-

Lamont Green,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jonathan Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 28, 2011, convicting defendant, after a jury trial, of burglary in the third degree, criminal mischief in the second degree, resisting arrest and two counts of aggravated unlicensed operation of a motor vehicle in the second degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence demonstrated that defendant deliberately backed his car through the showroom window of a car dealership, which was closed at the time, after which he entered through the broken window and walked to a part of the premises containing valuable, movable property. Defendant's

intent to commit a crime could be inferred from the circumstances of his entry and the absence of any evidence to suggest a noncriminal purpose for entering (*see People v Castillo*, 47 NY2d 270, 277-278 [1979]; *People v Gilligan*, 42 NY2d 969 [1977]). While there was some evidence to suggest that defendant was under the influence of drugs, this evidence did not show that he was intoxicated to the point of negating the intent required for burglary and criminal mischief (*see* Penal Law § 15.25).

The court gave defendant ample scope in which to argue in summation that he was under the influence of drugs during the crime, and the court only precluded a few assertions that were unsupported by any evidence (*see People v Washington*, 21 AD3d 253 [1st Dept 2005], *lv denied* 5 NY3d 834 [2005], *cert denied* 546 US 1004 [2006]).

The prosecutor's summation comment was inappropriate and he should have avoided making the summation remark to which defendant objected on the ground of burden-shifting. However, the court's thorough instructions on the presumption of innocence and burden of proof were sufficient to prevent any undue prejudice (*see generally People v Davis*, 58 NY2d 1102, 1104 [1983]). Defendant's remaining challenges to the prosecutor's

summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2307 Veton Celaj, Index 309652/11
Plaintiff-Respondent,

-against-

Henry Cornell,
Defendant,

SMI Construction Management, Inc.,
Defendant-Appellant.

_____

Carol R. Finocchio, New York, for appellant.

The Dauti Law Firm, P.C., New York (Ylber Albert Dauti of counsel), for respondent.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered April 21, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) claims as against defendant SMI Construction Management, Inc., unanimously affirmed, without costs.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim by presenting undisputed evidence that he "fell off a scaffold without guardrails that would have prevented his fall" (*Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]; *accord Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]). Plaintiff's alleged "failure to use the locking wheel devices and his

movement of the scaffold while standing on it" were at most comparative negligence, which is not a defense to a Labor Law § 240(1) claim (*Crespo*, 294 AD2d at 147; *see Vergara*, 21 AD3d at 280; *cf. Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003] [affirming finding that plaintiff was sole proximate cause of accident where he failed to use properly the proper protection afforded him]).

Contrary to defendant's argument, the record does not contain any admissible evidence that safety railings were provided. The construction manager's affidavit raises only a feigned issue of fact since it contradicts his earlier deposition testimony (*see Mermelstein v East Winds Co.*, 136 AD3d 505 [1st Dept 2016]).

Nor do any inconsistencies in plaintiff's accounts of the accident raise issues of fact, because in any event he was not afforded proper protection (*see Lipari v AT Spring, LLC*, 92 AD3d 502, 504 [1st Dept 2012]; *Vergara*, 21 AD3d at 280).

Defendant's expert's opinion that the lack of safety railings accorded with industry customs and regulations is irrelevant under Labor Law § 240(1) (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]; *see also Bonaerge v Leighton House Condominium*, 134 AD3d 648, 649 [1st Dept 2015]).

The motion court also properly refused to dismiss

plaintiff's Labor Law § 241(6) claim insofar as it is predicated on Industrial Code (12 NYCRR) § 23-5.18(b), which requires safety rails on manually propelled scaffolds without regard to the height of the scaffold (*Vergara*, 21 AD3d at 280-281).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2308 Ying Choy Chong, Index 110836/11
Plaintiff-Respondent, 590589/12

-against-

457 West 22nd Street Tenants Corp.,
Defendant,

Bulson Management LLC,
Defendant-Appellant.
- - - - -
[And a Third-Party Action]

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Carol R. Finocchio, New York, for appellant.

Morelli Law Firm PLLC, New York (Sara A. Strickland and David Sobiloff of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 11, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim against defendant Bulson Management LLC (Bulson), and denied Bulson's motion for summary judgment dismissing the complaint, except to the extent of dismissing plaintiff's Labor Law § 241(6) claim insofar as predicated on certain Industrial Code violations, unanimously affirmed, without costs.

Plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim where he fell from a six-foot-high Baker's scaffold, which he was directed to use in order to plaster a

ceiling. The record shows that the scaffold "had no side rails, and no other protective device was provided to protect him from falling off the sides" (*Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]; *see also Crespo v Triad, Inc.*, 294 AD2d 145, 146-147 [1st Dept 2002]). Although the transcript of plaintiff's deposition testimony that he submitted in support of his motion was unsigned, because the transcript was certified by the court reporter and Bulson does not challenge its accuracy, it is properly considered in support of plaintiff's motion (*Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]). In any event, plaintiff adopted it as accurate by submitting it in support of his motion (*id.*).

Bulson's contention that plaintiff's action in remaining on the scaffold as it was moved was the sole proximate cause of the accident is unavailing. Although plaintiff testified that he and his coworker had discussed moving the scaffold, he further testified that he screwed a plank into the ceiling after that discussion, the coworker did not say anything when he moved the scaffold, and plaintiff did not realize that his coworker was going to move the scaffold until he felt it move.

The affidavit of Bulson's owner stating that Bulson had provided a lifeline, belt, and harness with the scaffold contradicted his deposition testimony that he did not know

whether any safety equipment was provided to workers using the scaffold and that safety equipment is not used for a scaffold. Accordingly, the affidavit presents only a feigned factual issue insufficient to defeat the motion (*see e.g. Garcia-Martinez v City of New York*, 68 AD3d 428 [1st Dept 2009]).

In any event, the statement in the affidavit of Bulson's owner that a subcontractor had assured him that the subcontractor had instructed all his employees to use the lifeline, belt and harness is insufficient raise a triable issue of fact as to whether plaintiff may be the sole proximate cause for disregarding such an instruction (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]). While hearsay may be considered in opposition to defeat a summary judgment motion if it is not the only evidence upon which opposition to the motion is predicated, because it was the only evidence establishing that plaintiff disregarded an instruction to use the safety devices, it is insufficient to defeat plaintiff's motion (*see Narvaez v NYRAC*, 290 AD2d 400 [1st Dept 2002]).

The motion court also properly refused to dismiss plaintiff's Labor Law § 241(6) claim insofar as it is predicated on Industrial Code (12 NYCRR) § 23-5.18(b), which requires safety rails on manually propelled scaffolds without regard to the height of the scaffold (*Vergara*, 21 AD3d at 280-281).

Furthermore, the court properly denied Bulson's motion insofar as it sought dismissal of plaintiff's Labor Law § 200 and common-law negligence claims, since Bulson provided the scaffold lacking safety rails (*see Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 225 [1st Dept 1999]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2309-
2309A-
2310-
2311 In re Essence J.,

A Child Under Eighteen Years
of Age, etc.,

Shawn N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Elijah J., and Others,

Children Under Eighteen Years
of Age, etc.,

Shawn N.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Laverne J.,
Respondent.

_____

Davis Polk & Wardwell LLP, New York (David J. Robles of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child Essence J.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children Elijah J., Danisia N. and Darius S.

_____

Order of disposition, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about January 7, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about December 15, 2014, which found that respondent father neglected his child and two children he was legally responsible for by failing to protect them from their respondent mother's drug and alcohol use, and derivatively neglected them by failing to complete a sex-offender program as mandated by two prior court orders, unanimously affirmed, without costs. Order of disposition, same court (Alma M. Gomez, J.), entered on or about March 26, 2015, to the extent it brings up for review a fact-finding order of the same court (Erik S. Pitchal, J.), entered on or about February 27, 2015, which granted petitioner-agency's motion for summary judgment and found that respondent-father neglected and derivatively neglected another daughter, unanimously affirmed, without costs. Appeals from the fact-finding orders, unanimously dismissed, without costs, as subsumed in the appeals from the orders of disposition.

A preponderance of the evidence supports the Family Court's finding that respondent knew or should have known that the mother was drinking to the point of intoxication while she was caring for the children (*see* Family Ct Act § 1046[b][i]). Respondent testified that he would see the mother at least three times a

week during the same time period the Family Court determined that she was drinking to the point of intoxication almost every day and his testimony made clear that he was either unwilling or unable to recognize the danger she posed to the children (*see Matter of Darcy Y. [Christopher Z.]*, 103 AD3d 955, 956-957 [3d Dept 2013], *citing Matter of Bianca P. [Theodore A.P.]*, 94 AD3d 1126, 1126-1227 [2d Dept 2012]; *Matter of Miyani M. [George T.]*, 4 AD3d 430, 431 [2d Dept 2004]).

In addition, respondent's failure to accept responsibility for his actions and his lack of understanding of his behavior by failing to complete a sexual rehabilitation program in violation of court orders render it of no moment that the finding that he sexually abused another sibling when she was ten years old and entrusted to his care occurred approximately thirteen years before the petitions regarding the children at issue were filed against him (*see Matter of Cashmere S. [Rinell S.]*, 125 AD3d 543, 544-545 [1st Dept 2015], *lv denied* 26 NY3d 909 [2015]; *Matter of Ahmad H.*, 46 AD3d 1357, 1357-1358 [4th Dept 2007], *lv denied* 12 NY3d 715 [2009]).

Petitioner made a prima facie showing that respondent neglected and derivatively neglected the youngest child based on the 2014 finding of neglect regarding the other children because it was entered against him just fifteen days after the youngest

child's birth, which was sufficiently close in time to the derivative proceeding to support the conclusion that his parental judgment remained impaired (*see Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]; *Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2312 The People of the State of New York, Respondent, Ind. 10090/88

-against-

Bienvenido Castillo, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered October 13, 2015, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion for resentencing (*see People v Sosa*, 18 NY3d 436, 442-443 [2012]; *People v Paulin*, 17 NY3d 238, 244 [2011]). Defendant was involved in a drug trafficking operation, murdered a police officer to avoid arrest, and is serving very lengthy state and federal sentences in addition to the sentence at issue. In

addition, he has committed numerous and increasingly serious prison disciplinary infractions.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2313 Bronxwood Home for the Aged, Inc., Index 300672/12
Plaintiff-Respondent,

-against-

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

Haks Engineers Architects and
Land Surveyors, P.C.,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 5, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 1, 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 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2314 The People of the State of New York, Ind. 1744/13
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ 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 (Charles Solomon, J.), rendered November 6, 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 29, 2016

CLERK

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

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2316-
2316A Index 651668/14

City Trading Fund, et al.,
Plaintiffs-Appellants,

-against-

C. Howard Nye, et al.,
Defendants-Respondents.

_____

Mintz & Gold LLP, New York (Howard Miller of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Sandra C. Goldstein of counsel), for respondents.

_____

Order and judgment (one paper denominated an order), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 22, 2015, dismissing the action with prejudice as to the named plaintiffs and without prejudice as to other members of the proposed class, and order, same court and Justice, entered January 9, 2015, which denied plaintiffs' motion for preliminary approval of the parties' settlement and preliminary certification of the class, unanimously reversed, on the law and the facts, without costs, the judgment vacated, the motion granted, and the matter remanded for a hearing to determine whether the settlement should receive the final approval of the court and whether plaintiffs' counsel should be awarded attorneys' fees and expenses in the sum of $500,000.

As a result of the proposed settlement, the shareholders obtained a number of additional disclosures reflected in the supplemental proxy statement, including disclosures of additional information regarding the investment banks' conflicts of interest and the projections upon which they relied in rendering their fairness opinions, that were arguably beneficial (*see West Palm Beach Police Pension Fund v Gottdiener*, 2014 NY Slip Op 32777[U], *5 [Sup Ct, NY County 2014]). The motion court's finding otherwise was, at the very least, premature, and should have awaited a fairness hearing during which opposition from shareholders could have been expressed (*see e.g. Gordon v Verizon Communications, Inc.*, 2014 NY Slip Op 33367[U], *3 [Sup Ct, NY County 2014]).

The court reached its conclusion only in conjunction with its premature primary finding that the supplemental disclosures were so inadequate as to render the settlement not fair and adequate; on the record before us, the evidence of the tactics of

the named plaintiffs and their counsel is not sufficient to warrant denial of preliminary class certification and preliminary approval of the settlement.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, JJ.

2317 The People of the State of New York, Respondent, SCI 14991/90

-against-

Kevin James,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Angela M. Mazzarelli, J. at plea; Richard M. Weinberg, J. at sentencing), rendered June 13, 2013, convicting defendant of attempted criminal possession of a controlled substance in the third degree, and sentencing him to a term of four months, unanimously affirmed.

The sentencing court properly exercised its discretion when it declined to adjudicate defendant a youthful offender (*see generally People v Drayton*, 39 NY2d 580 [1976]). At the time of defendant's guilty plea in 1990, the court promised YO treatment and probation on the conditions that defendant return for sentencing and avoid additional arrests. However, defendant absconded, was convicted of a felony and numerous other offenses in another state, and did not return for sentencing until

approximately 22 years after the plea. Because defendant violated the plea conditions, the plea court's promise of YO treatment was no longer in effect, and the sentencing court's initial statement, made before receiving and considering an updated presentence report, that it was still inclined to grant YO treatment did not constitute an enforceable promise.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2318 The People of the State of New York, Respondent,

-against-

Pedro Montanez, Defendant-Appellant.

Ind. 5656/11
52/12
769/12
4974/12
3925/14

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda K. Regan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Robert Stolz, J.), rendered February 18, 2015, as amended March 31, 2015,

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

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

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2319 Stephanie Marie Rozon, Index 305547/12
Plaintiff-Respondent,

-against-

Marino Rosario, et al.,
Defendants-Appellants.

_____

McCabe, Collins, McGeough, Fowler, Levine & Nogan, LLP, Carle Place (Teresa Campano of counsel), for appellants.

Richard C. Bell, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 21, 2015, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff established her entitlement to judgment as a matter of law by showing that she was crossing the intersection within the crosswalk and with the light in her favor, when defendants' vehicle struck her while making a left turn. In opposition, defendants failed to raise a triable issue of fact as to comparative negligence. Plaintiff testified that as she was in the middle of the intersection, she saw defendants' vehicle about one to two seconds prior to being struck (*see Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489 [1st Dept 2013]; *Hines v New York City Tr. Auth.*, 112 AD3d 528 [1st Dept 2013]).

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2320N BDC Management Services, LLC, et al., Plaintiffs-Respondents, Index 652217/15

-against-

Scott Singer, et al., Defendants-Appellants.

_____

Tarter Krinsky & Drogin LLP, New York (Anthony D. Dougherty of counsel), for appellants.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Maryann C. Stallone of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about January 7, 2016, which granted plaintiffs' motion for a preliminary injunction, unanimously affirmed, with costs.

Plaintiffs demonstrated the requisite likelihood of success on the merits, irreparable injury absent the injunction, and a balance of the equities in their favor (*see Manhattan Real Estate Equities Group LLC v Pine Equity, NY, Inc.*, 16 AD3d 292 [1st Dept 2005]). Defendants do not dispute that they agreed to non-competition and non-solicitation covenants in connection with the sale of their business and good will to plaintiffs and that they later acted in violation of those covenants. Irreparable injury is presumed from the breach of such restrictive covenants, since

they are intended to protect the purchase of a business and the accompanying goodwill (*id.*; *see Purchasing Assoc. v Weitz*, 13 NY2d 267 [1963]; *Lund v Agmata Washington Enters.*, 190 AD2d 577, 578 [1st Dept 1993]). In fact, the parties agreed in the sale agreement that a breach of the non-compete provision would cause irreparable injury and that injunctive relief would be appropriate in the event of such a breach.

We have considered defendants' remaining arguments, including that the court lacked personal jurisdiction over the nonparty employer Shared Services LLC, its employees, and defendant Scott Singer's law practice, and find them unavailing.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2321N In re Geo-Group Communications, Inc., Index 652219/14
Petitioner-Respondent,

-against-

Jaina Systems Network, Inc.,
Respondent-Appellant.

_____

Law Office of Edward J. Troy, Greenlawn (Edward J. Troy of counsel), for appellant.

Loree & Loree, New York (Philip J. Loree Jr. of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about December 8, 2014, which, insofar as appealed from as limited by the briefs, denied the motion of respondent Jaina Systems Network, Inc. (Jaina) to vacate an arbitrator's award, and granted the petition to confirm the award, deemed an appeal from judgment, same court and Justice, entered April 3, 2015, awarding petitioner the aggregate amount of $2,712,175.51, and so considered, the judgment is unanimously affirmed, with costs.

Although Jaina appealed from the order and not the ensuing judgment, we deem the notice of appeal from the order to be a valid notice of appeal from the judgment (*see* CPLR 5520[c]; *Robertson v Greenstein*, 308 AD2d 381 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]).

The provisions of CPLR article 75, and not the Federal Arbitration Act, are applicable, because the parties' contract provided that the dispute would be governed by New York law, except with respect to arbitrability, which is not an issue here (*see Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154 [1995]).

The court properly upheld the arbitrator's award because Jaina failed to demonstrate any of the grounds for vacating the award set forth in CPLR 7511(b). Judicial review of arbitration awards is extremely limited (*see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]), and "will not be overturned merely because the arbitrator committed an error of fact or law" (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). An arbitral award may only be overturned where it "violates a strong public policy, is irrational, or exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]).

Here, the arbitrator's reliance on an email in which Jaina's CEO acknowledged the debt did not violate New York's public policy, or CPLR 4547, which provides that documents reflecting settlement negotiations are inadmissible. No evidence was

presented that at the time the initial email was sent the parties were engaged in settling a dispute. Indeed, in his affidavit, Jaina's CEO stated that he sent the email as a courtesy to petitioner to assist its CEO in connection with an external audit.

Although the award provided petitioner with options, it was definite and final because it resolved all of the disputes between the parties and provided a clear method for the computation of damages by referring to the parties' contract.

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2322 In re Gilberto Diaz, Ind. 6205/09
[M-4571] Petitioner,

-against-

Hon. Ellen Biben, etc.,
Respondent.

- - - - -

Cyrus R. Vance, Jr.,
Nonparty Respondent.

_____

Gilberto Diaz, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Jonathan D. Conley of counsel), for Hon. Ellen Biben, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee of counsel), for nonparty 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 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2323 The People of the State of New York, Respondent, Ind. 2333/12

-against-

Steven Leiva, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael J. Gross, J. at suppression motion; John S. Moore, J. at plea and sentencing), rendered June 13, 2014, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 2016]), we find that the motion court properly denied defendant's suppression motion, without granting a hearing. Defendant failed to offer any facts that would support an allegation that he had an objectively reasonable expectation of privacy in a bag containing a pistol and ammunition, and the prosecution's version of the incident did not support such a

claim (*see People v Burton*, 6 NY3d 584, 587 [2006]; *People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]). Furthermore, aside from the issue of standing, defendant failed to offer any facts to rebut the assertions in the felony complaint, voluntary disclosure form and the People's response to his motion, demonstrating that the police conduct was lawful, and that the codefendant abandoned the bag (*see e.g. People v Velez*, 281 AD2d 311 [1st Dept 2001], *lv denied* 96 NY2d 908 [2001]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2324- Index 101284/13
2324A In re Shahnawaz Khan, 158058/14
Petitioner/Plaintiff-Appellant,

-against-

New York City Health and
Hospitals Corp., et al.,
Respondents/Defendants-Respondents.

_____

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Judgment (denominated an order), Supreme Court, New York County (Cynthia S. Kern, J.), entered July 18, 2014, denying the petition, inter alia, to annul a determination of respondent New York City Health and Hospitals Corp. (HHC), dated May 17, 2013, which terminated petitioner's appointment as Director of Pharmacy at Harlem Hospital Center, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court (Donna M. Mills, J.), entered April 29, 2015, which granted defendants' motion pursuant to CPLR 3211(a)(5) to dismiss the complaint, unanimously affirmed, without costs.

The termination of petitioner's appointment as Director of Pharmacy did not violate a constitutional or statutory provision or a policy established by decisional law (*see Matter of*

Bergamini v Manhattan & Bronx Surface Tr. Operating Auth., 62 NY2d 897 [1984]; *Matter of Stanziale v Executive Dept., Off. of Gen. Servs.*, 55 NY2d 735 [1981]). In response to complaints from a number of his subordinates that petitioner favored employees of his own national origin, including his brother-in-law, giving them more favorable schedules and faster promotions, and discriminated against women and persons not of his own national origin, HHC conducted an investigation, which substantiated the complaints. Petitioner's contentions notwithstanding, the investigation was not unduly abbreviated or one-sided; HHC's investigating agent engaged in extensive interviews of departmental employees, including petitioner himself (*cf. Tenenbaum v State Div. of Human Rights*, 50 AD2d 257, 259 [1st Dept 1975] ["there were unresolved factual issues which could not be determined without according petitioner a complete and unequivocal right to be present at the preliminary conference" on his petition]). Notably, during his interview with HHC's agent and in a written response to HHC's written inquiry, petitioner continued to falsely deny that he had any familial relationship with any HHC employee, although his brother-in-law was a member of his department.

Petitioner failed to support his contention that he was discriminated against on account of his race, religion, and

national origin with evidence of discriminatory animus on the part of any respondent. Nor did petitioner point to evidence that the investigation itself was a pretext for discrimination. Under settled law, the substantiated, nonpretextual complaints of petitioner's subordinates comprise a legitimate, nondiscriminatory, nonretaliatory reason for his termination as Director of Pharmacy, and are fatal to the claims raised in the amended petition of unlawful discrimination and retaliation in violation of the New York State and City Human Rights Laws (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202 [1st Dept 2015]; *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 25 [1st Dept 2014]) and Labor Law § 741 (*see* Labor Law § 741[5]; *Blashka v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 126 AD3d 503, 504 [1st Dept 2015]).

Respondents did not violate their internal policy of giving managerial employees two weeks' notice of any adverse employment action, since the policy permitted HHC to take "immediate action" if it determined that a delay would jeopardize HHC or its employees or clients; HHC's determination that a delay would have that effect was rational. Moreover, in view of the fact that many months elapsed between the notice of termination and petitioner's reassignment to a pharmacy post, petitioner failed

to show that HHC's "immediate action" caused him "substantial prejudice" (*see Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 535 [1992]).

Petitioner is barred by the doctrine of collateral estoppel from relitigating in the plenary proceeding the core issue decided in the article 78 proceeding, whether he was wrongfully terminated as Director of Pharmacy (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349-350 [1999]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). The article 78 court concluded that petitioner was lawfully terminated following an investigation that found that he had engaged in misconduct. The court rejected petitioner's argument that the investigation was a pretext for discrimination or retaliation. Indeed, as discussed, a review of the record before the article 78 court reveals that petitioner submitted no evidence in support of his contention that respondents had discriminatory or retaliatory motives for terminating him. It thus being established conclusively that respondents terminated him for a legitimate, nonpretextual reason, petitioner cannot litigate in another proceeding his discrimination or retaliation claims under the City or State Human Rights Laws or 42 USC § 1981 (*see Vivenzio v City of Syracuse*, 611 F3d 98, 106 [2d Cir 2010] [employment discrimination claims under 42 USC § 1981 are governed by the

standards applicable to claims under the State Human Rights Law]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2325 In re Jesus F.,

A Person Alleged to be
A Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 30, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the first degree, attempted grand larceny in the fourth degree, criminal possession of a weapon in the fourth degree, and menacing in the second degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determination that the victim's testimony, including her account of being threatened by appellant with a

knife while he demanded money, was credible.

The knife taken by the victim after it was dropped by appellant, which she then gave to the police, was properly admitted into evidence (*see People v Julian*, 41 NY2d 340, 342-343 [1977]). In any event, the victim's testimony established each of the charges involving possession and use of a dangerous instrument, independently of the knife that was in evidence.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2326 In re Astoria General Contracting Corp., et al., Petitioners, Index 41/15

-against-

Scott Stringer, etc., et al., Respondents.

Giaimo Associates, LLP, New York (Roya Namvar of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Scott Glotzer of counsel), for respondents.

Determination of the Office of the Comptroller of the City of New York (Comptroller), dated September 2, 2015, adopting in its entirety the report and recommendation of an administrative law judge, dated July 20, 2015, following a hearing, which found that petitioners (AGC) falsified relevant payroll records and willfully failed to pay prevailing wages to three employees, and recommended that AGC be barred from bidding on public contracts for a period of five years, and be required to pay the three employees unpaid wages of $735,185.21, plus sixteen percent interest, as well as a twenty-five percent civil penalty, for a total sum of $1,158,168.11, unanimously modified, on the law, to vacate the calculation of the amount of the underpaid wages, interest, and penalty, the matter remanded for further

proceedings to recalculate the amount of the underpaid wages, interest, and penalty, and otherwise confirmed, without costs.

When reviewing whether an administrative agency's determination was supported by substantial evidence, the touchstone of our review is whether there was a rational basis underlying the determination (*see Whitten v Martinez*, 24 AD3d 285, 286 [1st Dept 2005]). Here, initially we agree with the Comptroller that substantial evidence supported the determination that AGC falsified payroll records and willfully failed to pay prevailing wages to the three employees. However, the determination that the three employees were underpaid a sum of $735,185.21 does not find support in the record.

AGC entered into three contracts with the Department of Education to repair and install metal shutters for various schools over a period of five years. Under the terms of the agreements, AGC would receive $150,000 annually for five years. The contracts required AGC to pay its workers prevailing wages, based upon a schedule of prevailing wages annexed to the contracts.

This proceeding centers around whether AGC underpaid its three employees during the final two years of the contracts. To determine the underpaid wages, the Comptroller first calculated the amount of hours each employee worked during those two years,

and next calculated the total prevailing wages for each employee. The Comptroller then subtracted the wages AGC actually had paid the three employees over the two years and determined that AGC had underpaid its three employees $735,185.21.

AGC persuasively asserts that it was irrational for the Comptroller to determine that AGC's employees, to fulfill a contract for which AGC received a total of $300,000, worked sufficient hours to require wages of $735,185.21, in addition to the amounts they were actually paid by AGC. Even if AGC had entered into a bad deal with the DOE, it stretches the limits of credulity to believe that the three employees worked sufficient hours to be contractually entitled to wages greater than twice the total consideration received by AGC. Accordingly, we remand this proceeding to the Comptroller for a new calculation of the three employees' underpaid wages that is supported by substantial evidence.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2329 The People of the State of New York, Ind. 3624/13
Respondent,

-against-

Jose Ortega,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle J.), rendered July 17, 2014, as amended August 21, 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 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2330-
2331-
2332 In re Nassair S., and Others,

Children under Eighteen Years
of Age, etc.,

Chareshma T.,
Respondent-Appellant,

Administration of Children's Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

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

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Order of disposition, Supreme Court, Bronx County (Joan L. Piccirillo, J.), entered on or about October 6, 2014, to the extent it brings up for review fact-finding orders, same court and Judge, entered on or about March 20, 2014, which found that respondent mother neglected the subject children, unanimously affirmed, without costs.

A preponderance of the admissible evidence supports the court's finding that the mother neglected the subject children by leaving them with their grandmother, who agreed to care for them for just one day, and then failing to return for the next ten

days, at which point the grandmother left the children in the hallway outside of another relative's home (*see Matter of Clarissa S.P. [Jaris S.]*, 91 AD3d 785 [2d Dept 2012]; *see also Matter of Charisma D. [Sandra R.]*, 115 AD3d 441 [1st Dept 2014]; *Matter of Victor V.*, 261 AD2d 479 [2d Dept 1999], *lv denied* 93 NY2d 819 [1999]). The caseworker's testimony that the mother told her that she had not seen the children for those ten days, despite having asked the grandmother to watch them for one day, was admissible as an admission against interest of a party (*see Matter of Jermaine J. [Howard J.]*, 121 AD3d 437, 438 [1st Dept 2014]). The mother made no offer of proof concerning the remainder of her statement to the caseworker, which she sought to elicit under the rule of completeness, so that the issue is not preserved for appeal (*see People v Berlin*, 39 AD3d 351, 352-353 [1st Dept 2007], *lv denied* 9 NY3d 840 [2007]). Based on the mother's failure to testify concerning the neglect allegations against herself, the court was entitled to draw the strongest inference against her that the opposing evidence permits (*see*

Matter of Michael P. (Orthensia H.), 137 AD3d 499, 500 [1st Dept 2016]; *Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855 [4th Dept 2010]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2333 The People of the State of New York, Respondent, Ind. 3681/11

-against-

James Garlick,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered November 1, 2013, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 20 years, unanimously affirmed.

The court properly denied defendant's midtrial request for a protective order pursuant to CPL 240.50(1) as to a surveillance videotape of the incident. That provision was inapplicable, because discovery had already concluded. In any event, the risk that jurors might view media coverage of the case, in violation of the court's thorough admonitions against doing so, did not present circumstances sufficiently compelling to rebut the presumption of the public's right to access a trial exhibit pursuant to the common law (*see In re Application of Natl.*

Broadcasting Co. [United States v Myers], 635 F2d 945, 952-953 [2d Cir 1980]) and the First Amendment (*see Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]). The prosecutor did not make the videotape available to the news media until after it had been received in evidence and played for the jury in open court. We have considered and rejected arguments concerning preservation and the scope of our review.

The court properly exercised its discretion in declining to conduct individual inquiries of two jurors as to whether they had violated the court's repeated instructions against viewing news coverage of the case, following the revelation that a local TV news station had aired part of the video with inflammatory commentary. The court asked the entire jury panel if anyone had seen any media coverage, and it dismissed the only juror who admitted to having done so, after the court conducted an individual inquiry of that juror and then asked the entire panel about this matter a second time, before the jurors were able to see that the one juror was dismissed. Defense counsel's statement that the facial expressions of the two jurors at issue, which the court had not perceived, suggested they might have violated the instructions did not compel individual inquiries under the circumstances (*see People v Joaquin*, 138 AD3d 422, 422 [1st Dept 2016], *lv denied* 28 NY3d 931 [2016]; *see also People v*

Mejias, 21 NY3d 73, 79-80 [2013]).

"Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v Acevedo*, 112 AD3d 454, 455 [1st Dept 2013], *lv denied* 23 NY3d 1017 [2014]), since the report, which "d[id] not link the commission of the crime to a particular person," was not testimonial (*People v John*, 27 NY3d 294, 315 [2016]). Defendant's contention that *People v Freycinet* (11 NY3d 38 [2008]) has been undermined by subsequent decisions of the United States Supreme Court is unavailing (*see Acevedo*, 112 AD3d at 455).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2334 Aspen Specialty Insurance Company, Index 160353/14
Plaintiff-Respondent,

-against-

Ironshore Indemnity Incorporated,
Defendant-Appellant,

Transel Elevator, Inc.,
Defendant.

_____

Vogrin & Frimet LLP, New York (George J. Vogrin of counsel), for appellant.

Connell Foley LLP, New York (William D. Deveau of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 9, 2015, which, to the extent appealed from, granted plaintiff's cross motion for summary judgment declaring that, with respect to the underlying personal injury action, its named insured is an additional insured under the policy issued by defendant Ironshore Indemnity Incorporated to defendant Transel Elevator, Inc., unanimously affirmed, with costs.

While the policy issued by Ironshore to Transel refers, with respect to coverage for additional insureds, to "losses 'caused by' [Transel's] 'acts or omissions' or 'operations,' the existence of coverage does not depend upon a showing that [Transel's] causal conduct was negligent or otherwise at fault"

(*Burlington Ins. Co. v NYC Tr. Auth.*, 132 AD3d 127, 135 [1st Dept 2015] [citing cases], *lv granted* 27 NY3d 905 [2016]). Thus, plaintiff's named insured (the hotel) is entitled to coverage as an additional insured under the Ironshore policy with respect to the claim of injuries sustained by Transel's employee when he lost his footing on the hotel stairway, which resulted from his "acts or omissions" while performing his work (*see Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662, 663 [1st Dept 2015]). Given the breadth of the duty to defend, the fact that the injured claimant fell in a stairway, and not in the elevator itself, during the course of his elevator repair work, does not change this result.

Ironshore's remaining arguments are unavailing. The cases cited in *Burlington* (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530 [1st Dept 2012]; *National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473 [1st Dept 2013]; and *Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 105 AD3d 512 [1st Dept 2013], *mod on other grounds* 24 NY3d 578 [2014]), harmonized together, support the conclusion that a finding of negligence against Transel is not required to trigger additional insured coverage for the hotel, in view of the policy language of "acts or omissions." *Crespo v City of New York* (303 AD2d 166 [1st Dept 2003]) is distinguishable, since the additional insured

endorsement in that case provided coverage "'only to the extent [the additional insured] is held liable for [the named insured's] acts or omissions,'" which language "suggest[s] that the wrongful conduct of the named insured must provide the basis for the imposition of liability on the additional insured" (*Burlington*, 132 AD3d at 137).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2335-
2335A Index 650838/12

Stanley Barry,
Plaintiff-Appellant,

-against-

Clermont York Associates
LLC, et al.,
Defendants-Respondents.

_____

Manatt, Phelps & Phillips, LLP, New York (Andrew L. Morrison of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Joseph S. Allerhand of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 22, 2015, which denied plaintiff's motion for leave to amend the complaint, granted defendants' motion for summary judgment dismissing the complaint, and declared that the protocol governing plaintiff's books and records request set forth in defendant Clermont York Associates LLC's October 2011 letter did not contravene its operating agreement, unanimously modified, on the law, to delete the declaration, and otherwise affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion for leave to amend, since the motion was unsupported by evidentiary proof (*see e.g. Bag Bag v Alcobi*, 129 AD3d 649 [1st Dept 2015]). Moreover, plaintiff failed to

establish a reasonable excuse for his years-long delay in moving for leave to amend (*see e.g. Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 [1st Dept 2004]). Finally, some of the proposed causes of action, such as conspiracy to commit fraud, are legally insufficient (*see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968 [1986]).

Since the court properly denied plaintiff's motion for leave to amend, the operative declaratory judgment claim is the original one. The original first cause of action did not seek a declaration regarding the protocol imposed by defendant Jeffrey Feil. Furthermore, the October 2011 letter has been superseded by a November 2012 letter. The original complaint sought a judgment declaring that plaintiff is entitled to immediate access to and inspection of Clermont's books and records. At the time plaintiff commenced this action in March 2012, there was a live dispute on this issue. However, by the time defendants moved for summary judgment (July 15, 2015), there was no longer such a dispute. Therefore, the declaratory judgment claim was moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]; *Caraballo v Art Students League of N.Y.*, 136 AD3d 460, 461 [1st Dept 2016]).

Under the unusual circumstances of this case, the court properly dismissed the claim for an accounting, a form of

equitable relief (*see e.g. Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845 [1st Dept 1990]), because it would be inequitable to the minority members of Clermont who are affiliated with neither plaintiff nor Feil to force the LLC to continue expending money on legal fees (*see McClure v Leaycraft*, 183 NY 36, 41 [1905] ["A court of equity will not do an inequitable thing"]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2336 The People of the State of New York, Respondent, Ind. 5659/02

-against-

Domingo Paredes, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Steven L. Barrett, J.), entered September 2, 2015, adjudicating defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court correctly assessed 10 points for unsatisfactory conduct while confined. The assessment, which was based on a recent tier III disciplinary violation, was supported by clear and convincing evidence (*see* Correction Law § 168-n[3]; *People v Mingo*, 12 NY3d 563, 571 [2009]). The existence of the violation was undisputed and it was set forth in the case summary. To the extent defendant challenges the evidence underlying the violation, we conclude that the record fails to support his claim that he was medically unable to comply with a direction to

produce a urine sample for drug testing.

The court properly exercised its discretion in denying defendant's request for a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were either adequately accounted for in the risk assessment instrument or were outweighed by the seriousness of the underlying conduct and defendant's significant criminal history.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2337 In re Ronald Grassel, Index 100162/15
Petitioner-Appellant,

-against-

Department of Education
of The City of New York, et al.,
Respondents-Respondents.

_____

Warren S. Hecht, Forest Hills, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered May 8, 2015, granting respondent Board of Education of the City School District of the City of New York's (sued herein as Department of Education of the City Of New York, School District of the City of New York) cross motion to dismiss the petition to direct respondent to credit petitioner with salary and a "Cumulative Absence Reserve," in accordance with the collective bargaining agreement, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to allege any final determinations of respondent made within four months of commencement of the instant proceeding. Accordingly, the proceeding is barred by the applicable statute of limitations (*see* CPLR 217[1]; *Matter of*

Carter v State of N.Y., Exec. Dept., Div. of Parole, 95 NY2d 267, 270 [2000]). 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 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2339 In re Arcenia K.,
Petitioner-Respondent,

-against-

Lamiek C.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Cravath, Swaine & Moore LLP, New York (Alexandra N. Rothman of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Rohan Grey of counsel), attorney for the children.

_____

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about July 6, 2015, which modified the order of visitation to grant the father agency-supervised visits with the subject children to be paid for by the father, unanimously affirmed, without costs.

The Supreme Court's determination that supervised visitation is in the best interests of the subject children has a sound and substantial basis in the record and should not be disturbed (*Linda R. v Ari Z.*, 71 AD3d 465, 466 [1st Dept 2010], citing *Matter of Custer v Slater*, 2 AD3d 1227, 1228 [3d Dept 2003]). The court relied upon the mother's testimony, a prior order of protection for the mother and children against the father, and prior incidents during supervised visits where the father was

volatile, insistent, and intimidating when challenged. All of these demonstrate that father poses a risk of having a negative impact on the girls' emotional well-being if the visits are not supervised (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]; *Karen K. v Kenneth Z.*, 239 AD2d 159 [1st Dept 1997]). Moreover, there is a sound basis in the record for court's determination that an agency, and not the paternal grandmother, supervise the visits, as evinced by the father's statements on social media regarding his evasion of a prior court order. "[S]upervised visitation is not a deprivation [of] meaningful access [to a child]" (*Lightbourne v Lightbourne*, 179 AD2d 562, 562 [1st Dept 1992]).

That branch of the order directing the father to pay for agency-supervised visitation was also an appropriate exercise of the trial judge's discretion as there is no statutory basis for directing the city to pay the cost of agency-supervised

visitation once all proceedings are completed, as County Law §722-c only authorizes the payment of investigative and other services while a proceeding is pending.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2340-
2341 Index 651863/12

Culligan Soft Water Company, et al.,
Plaintiffs-Respondents,

-against-

Clayton Dubilier & Rice, LLC. et al,
Defendants-Appellants,

Angelo, Gordon & Co., L.P.,
Defendants-Respondents,

John Does 1-50,
Defendants,

Culligan Ltd.,
Nominal Defendant-Appellant.

_____

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel), for appellants.

Singler Professional Law Corporation, Sebastopol, CA (Peter A. Singler of the bar of the State of California, admitted pro hac vice, of counsel), for Culligan Soft Water Company, Cecil R. Hall, C&D of Rochester, LLC, Driessen Water Inc., Michael A. Bannister, T&B Enterprises, Inc., California Water & Filter, Inc., Shar Sher I. Inc., Water Quality Improvement, Inc., Culligan Southwest, Inc., Carey Water Conditioning, Inc., Michael Carey, Eric B. Clarke, Culligan Water Conditioning (Barrie) Ltd., Arthur H. Cooksey Jr., Corbett's Water Conditioning, Inc., Glen Craven, Culligan Water Conditioning-Horicon LLP, Henry T. Wood, Mayer SoftWater Co., Inc, Timothy Fatheree and Sue Fatheree, Cleanwater, Inc., Catherine Gilby, Canatxx, Inc., Quality Water Enterprises, Inc., Robert R. Heffernan, Charles F. Hurst, Karger Enterprises, Inc., Keppler Water Treatment, Inc., Robert Kitzman and Tracy Kitzman, Ladwig Enterprises, Inc., Richard Lambert and Marianne Conrad, Low Country Water Conditioning, Inc., Gina Larson, Michael G. Macaulay, Vetter's, Inc., Robert W. McCollum and Barbara N. McCollum, Richard C. Meier, Donald E. Meredith, Cleanwater Corporation of America, John Mollman and Janette Mollman, the Good Water Company Ltd., E&H Parks,Inc., Maumee Valley Bottlers, Inc., Schry Water Conditioning, Inc., Schry

Water Treatment, Inc., Winslow Stenseng, Stewart Water Conditioning, Ltd., Bret P. Tangley, B.A.R. Water Corporation, Trilli Holdings, Inc., Bruce Van Camp, Walter C. Voigt and Charlotte P. Voigt, Marin H20, Inc., Allan C. Windover, Everett Windover, Culligan Soft Water Service (QUE) Inc., G.R. McCoy, Richard N. Wendt, Richard Sample and Marie Sample, the Water Meister, Inc., Alex Connelly, Go Water Inc., Van D. Waugh, Melissa Grill, Petro's Water Conditioning of John County, Inc., Water Treatment Services of Shelbyville, Inc., Countryside Management, Inc., Gulf Coast Water Conditioning, Inc., Adrian Water Conditioning, Inc., and Canney's Water Treatment, Inc., respondents.

Simpson Thacher & Bartlett LLP, New York (Peter E. Kazanoff of counsel), for Angelo, Gordon & Co., L.P. and Silver Oak Capital, L.L.C., respondents.

Akin Gump Strauss Hauer & Feld LLP, New York (Abid Qureshi of counsel), for Centerbridge Special Credit Partners, L.P., CCP Acquisition Holdings, L.L.C., CCP Credit Acquisiton Holdings, L.L.C., respondents.

Order and final judgment (one paper), Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 8, 2015, approving the partial settlement of the derivative action, unanimously reversed, on the law, without costs, and the judgment vacated.

The settlement does not provide for payment to the company (*see Glenn v Hoteltron Sys.*, 74 NY2d 386, 392 [1989]). Plaintiffs are to receive the bulk of the $4 million settlement in reimbursement for their legal fees in this case, and the remainder is to be turned over to their franchisee organization for future legal fees or for distribution, at the organization's

discretion, to plaintiffs. Moreover, because they have not obtained a substantial benefit for the company, but have accomplished only getting their lawyers paid, plaintiffs, who, after four attempts, have yet to plead properly that they have standing to sue derivatively, are not entitled to legal fees (*see Seinfeld v Robinson*, 246 AD2d 291, 294 [1st Dept 1998]). It was an abuse of discretion to approve the settlement of a derivative action purporting to bind the company and all shareholders that was obtained by plaintiffs who had not established – and may never establish – their standing to bring the action. Contrary to plaintiffs' argument, defendants, as shareholders in the company who received notice of the settlement and had an opportunity to and did object to the settlement, have standing (*see Posen v Cowdin*, 267 App Div 158, 160 [1st Dept 1943]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2342 The People of the State of New York, Ind. 3550/12
Respondent, 1735/13
1765/13

-against-

Datwan Elliot,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered September 23, 2015,

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

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

ENTERED: NOVEMBER 29, 2016

CLERK

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

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2343 Charles K. Ampofo, Index 304085/12
Plaintiff-Appellant,

-against-

Leonie M. Brydson,
Defendant-Respondent.

_____

Sacco & Fillas, LLP, Astoria (Jeremy S. Ribakove of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered January 14, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

In this action for personal injuries sustained in a motor vehicle accident, the record shows that while plaintiff's approach into the intersection was regulated by a stop sign and no traffic control devices regulated defendant's approach, issues of fact preclude summary judgment. That there are issues of fact is highlighted by the parties' deposition testimony as well as the point of contact between the vehicles. Such issues include whether plaintiff had stopped before entering the intersection, which of the vehicles entered the intersection first, which driver had the right-of-way, and whether the driver with the

right-of-way exercised reasonable care to avoid the accident (*see e.g. Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2344 The People of the State of New York, Ind. 1355/13
Respondent,

-against-

Timothy Ferreira,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J. at hearing; Martin Marcus, J. at plea and sentence), rendered March 23, 2015, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 2016]), we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gesmer, JJ.

2345 Bank of America, N.A. Index 35173/13
Successor by Merger to BAC
Home Loans Servicing, LP formerly known
as Countrywide Home Loans Servicing, LP,
Plaintiff-Respondent,

-against-

Aletha Angel,
Defendant-Appellant,

Thomas Munro, et al.,
Defendants.

_____

Aletha Angel, appellant pro se.

Bryan Cave LLP, New York (Elizabeth Goldberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 15, 2014, which, in this mortgage foreclosure action, denied the motion of defendant Aletha Angel for sanctions against plaintiff, unanimously affirmed, without costs.

The court properly denied defendant's motion to impose sanctions upon plaintiff absent any showing that plaintiff's conduct was frivolous or without a good faith basis (*see* 22 NYCRR 130-1.1).

We perceive no basis for imposing sanctions against defendant at this time.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2346N- Index 107586/11
2346NA Noah H. Silverman,
Plaintiff-Respondent,

-against-

Mary Jo D'Arco,
Defendant-Appellant.

_____

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 10, 2014, in favor of plaintiff, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 13, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court has subject matter jurisdiction over this dispute (*see Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011]). The court properly directed defendant to pay for her past and current use and occupancy for the unit while the matter was pending (*see 35 Lispenard Partners, Inc. v 35 Smoke & Grill, LLC*, 74 AD3d 496 [1st Dept 2010]). Since defendant failed to comply with the orders entered January 8,

2013 and Apri1 15, 2013 directing her to pay use and occupancy, the award of possession to plaintiff is appropriate (*see Park Terrace Gardens, Inc. v Penkovsky*, 100 AD3d 577 [1st Dept 2012]).

The court properly struck the answer since defendant's repeated failure to pay use and occupancy constituted willful and contumacious behavior (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]).

Defendant's argument that plaintiff failed to meet his initial burden to establish the amount owed for use and occupancy is raised for the first time on appeal and therefore unpreserved (*see Pulliam v Deans Mgt. of N.Y., Inc.*, 61 AD3d 519, 520 [1st Dept 2009]). Were we to review it, we would find that plaintiff met his burden by affidavit setting forth the amount that defendant owed (which defendant failed to rebut).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2347- Index 156432/14
2347A Frank Beni, et al.,
Plaintiffs-Respondents,

-against-

Green 485 TIC LLC, et al.,
Defendants-Appellants.
- - - - -
[And a Third-Party Action]

_____

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants.

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

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Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about April 14, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motion to strike the note of issue and certificate of readiness and to extend the time to file dispositive motions, unanimously affirmed, without costs.

The motion court properly declined to strike the note of issue because, contrary to defendants' contention, the certificate of readiness did not contain any erroneous facts about the state of discovery (*see 11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 96 AD3d 699 [1st Dept 2012]; *Pannone v Silberstein*, 40 AD3d 327 [1st Dept 2007]).

The court also properly declined to extend defendants' time to move for summary judgment, because the delays in the discovery process were caused largely by defendants' own dilatory conduct and therefore did not constitute "good cause" for an extension (*see Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 521 [2005], citing, inter alia, *Brill v City of New York*, 2 NY3d 648 [2004]; *Gaffney v BFP 300 Madison II, LLC*, 18 AD3d 403 [1st Dept 2005] [defendant's failure to produce witness for deposition in timely fashion constituted good cause for plaintiff's late summary judgment motion]).

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

ENTERED: NOVEMBER 29, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Kapnick, Gesmer, JJ.

2348 In re Robert Scott Index 75/16
[M-4907] Petitioner,
[M-5394]
[M-5395] -against-
[M-5396]
Hon. Ulysses B. Leverett, et al.,
Respondents.

_____

Robert Scott petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Hon. Ulysses B. Leverett, respondent.

Zachary W. Carter, Corporation Counsel, New York (E.K. Montcalm of counsel), for Adult Protective Services, respondent.

Northern Manhattan Improvement Corporation Legal Services, New York (Matthew J. Chachére of counsel), for Alan Gary Morley, resopondent.

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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.

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

ENTERED: NOVEMBER 29, 2016

CLERK

Tom, J.P., Mazzarelli, Richter, Manzanet, Webber, JJ.

2016 CIFG Assurance North America, Inc., Index 654074/12
Plaintiff-Appellant,

-against-

J.P. Morgan Securities LLC (formerly known as "Bear Stearns & Co. Inc."),
Defendant-Respondent.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Sanford I. Weisburst of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Bryce L. Friedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2015, modified, on the law and in the exercise of discretion, to grant plaintiff leave to replead, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Rosalyn H. Richter
Sallie Manzanet-Daniels
Troy K. Webber, JJ.

2016
Index 654074/12

_____x

CIFG Assurance North America, Inc.,
Plaintiff-Appellant,

-against-

J.P. Morgan Securities LLC (formerly known as "Bear Stearns & Co. Inc."),
Defendant-Respondent.
_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the claim for material misrepresentation in the inducement of an insurance contract (pursuant to Insurance Law § 3105) with prejudice.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Sanford I. Weisburst, Richard I. Werder, Jr., Sean P. Baldwin and Ben Cornfeld of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Bryce L. Friedman, Thomas C. Rice, Joshua M. Slocum and William T. Pilon of counsel) for respondent.

RICHTER, J.

In this action, plaintiff CIFG Assurance North America, Inc., a stock insurance company, alleges that Bear Stearns & Co. Inc., a predecessor of defendant J.P. Morgan Securities LLC, made material misrepresentations that induced CIFG to provide financial guaranty insurance in connection with two collateralized debt obligations (CDOs). According to CIFG, Bear Stearns had on its books a large number of high-risk residential mortgage-backed securities (RMBSs), and embarked on a scheme to rid itself of these toxic assets by offloading them into the two CDOs, and marketing the CDOs' securities to investors.

The complaint alleges the following facts. In or about 2006, Bear Stearns created the two CDOs. In order to make the CDOs marketable, Bear Stearns needed to find an entity that would insure the CDOs' senior tranches. In August and November 2006, Bear Stearns approached CIFG to solicit financial guaranty insurance on two credit default swaps that would guarantee certain senior notes issued by the CDOs. To induce CIFG to issue the insurance, Bear Stearns repeatedly represented, both orally and in written pitchbooks and offering circulars, that the CDOs' assets would be selected by reputable collateral managers acting independently of Bear Stearns and in good faith in the interest of "long" investors. Based on these representations, CIFG agreed

to issue the requested insurance, without which the CDOs would not have closed.

According to the complaint, Bear Stearns's representations were false because the collateral for the CDOs was not independently selected by the collateral managers. Instead, Bear Stearns persuaded the managers, through the promise of large fees and future business, to allow Bear Stearns itself to choose the collateral. CIFG alleges that Bear Stearns loaded the CDOs with toxic RMBSs from its own books, and also profited from short positions it took against the CDOs' portfolios. Because of the large volume of toxic RMBSs in the portfolios, both CDOs collapsed within approximately one year after closing. As a result, CIFG had to pay over $100 million to discharge its liabilities under the insurance. CIFG alleges that had it known that the purportedly independent managers would be taking direction from Bear Stearns, it would never have issued the insurance.

The complaint asserts two causes of action: material misrepresentation in the inducement of an insurance contract (pursuant to Insurance Law § 3105), and fraud. Defendant moved to dismiss, arguing, among other things, that the misrepresentation claim fails to state a cause of action, is barred by the statute of limitations, and is not pleaded with the

requisite specificity (CPLR 3016[b]). In a decision entered June 26, 2015, the motion court dismissed the misrepresentation claim with prejudice for failure to state a cause of action, and dismissed the fraud claim with leave to replead. The court did not reach the statute of limitations issue. CIFG now appeals solely from the dismissal of the misrepresentation claim.

It is well settled that a misrepresentation claim must be pleaded with particularity (*see ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008]; CPLR 3016[b] ["(w)here a cause of action . . . is based upon misrepresentation, . . . the circumstances constituting the wrong shall be stated in detail"]). CPLR 3016(b) "imposes a more stringent standard of pleading" than otherwise applicable (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]). The purpose of this strict pleading requirement is to clearly inform a defendant as to the complained-of incidents (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). Thus, "conclusory allegations are insufficient" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]).

Judged by these standards, the misrepresentation claim was properly dismissed. The complaint contains insufficient information about the insurance policies CIFG was allegedly fraudulently induced to issue, and the circumstances under which

those policies were issued. As noted earlier, CIFG did not directly insure the CDOs, but rather, issued financial guaranty insurance on two separate credit default swaps that would, in turn, guarantee certain notes issued by the CDOs. A credit default swap is a commonly used type of credit protection somewhat analogous to an insurance policy (*see generally HSH Nordbank AG v UBS AG*, 95 AD3d 185, 189-190 [1st Dept 2012]). There are two parties to a credit default swap: the buyer of the credit protection (analogous to the insured) and the seller of the credit protection (analogous to the insurer) (*id.* at 189). "[T]he 'protection buyer' pays a periodic fee (resembling an insurance premium) to the 'protection seller' to cover the credit risk on an underlying security or group of securities" (*id.*). If a "credit event" occurs, such as a payment default on the underlying financial product, the protection seller is obligated to compensate the protection buyer (*id.*).[1]

The complaint asserts only that CIFG issued financial guaranty insurance on two credit default swaps, but contains no other information about the policies. It does not describe the

[1] In general, the protection buyer has a "short" position, because it would be entitled to payment if the underlying financial product defaults. Concomitantly, the protection seller has a "long" position because it would not be required to pay where there is no default.

terms of the insurance, the amount of the insurance, the dates the insurance was issued, or the time period the policies covered. The complaint also fails to identify the parties to the insurance contracts and the names of the insureds and/or beneficiaries. Although the complaint alleges that Bear Stearns "solicited" the insurance from CIFG, it does not contain any detail as to how Bear Stearns made the solicitation. Nor does the complaint provide any information about the underlying credit default swaps. It does not identify either the protection buyer or the protection seller, fails to describe the terms of the swaps, and does not explain the circumstances underlying the decision to utilize credit default swaps, including whether or not Bear Stearns had any involvement in that decision. Finally, the complaint merely states that CIFG paid over $100 million to discharge its liabilities under the insurance, but does not identify to whom those payments were made, or the events that triggered the payments. In light of these deficiencies, CIFG's misrepresentation claim does not clearly inform defendant as to the complained-of incidents, and it was properly dismissed.

However, the claim should not have been dismissed with prejudice, but rather, CIFG should be given the opportunity to replead. A request for leave to amend a complaint should be "freely given, and denied only if there is prejudice or surprise

resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). Further, "[a] party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]" (*id.* [internal quotation marks omitted]).

In its appellate briefs, CIFG sets forth the following additional facts that it would include in an amended complaint. The insurance provided by CIFG took a "transformer" structure under which CIFG issued an insurance policy directly to the senior noteholders. Under the credit default swaps, special purpose entities, known as "transformers," were obligated to pay the noteholders in the event the CDOs failed to make payments on the notes. In other words, the senior noteholders were the protection buyers of the credit default swaps, and the transformers were the protection sellers.[2] Instead of directly insuring the CDOs' obligation to pay the senior noteholders, CIFG insured the obligations of the transformers to make the payments

[2] CIFG asserts that it will provide the names of the transformers and senior noteholders in an amended complaint.

to the noteholders under the terms of the credit default swaps.[3] CIFG further alleges that Bear Stearns specifically requested the transformer insurance structure used here.

Defendant contends that the complaint, even if amended to include these additional allegations, is insufficient to state a cause of action for material misrepresentation in the inducement of an insurance contract pursuant to Insurance Law § 3105. That statute provides that a material misrepresentation "shall avoid [a] contract of insurance" and "defeat recovery thereunder" (Insurance Law § 3105[b][1]). "A misrepresentation is a false representation," and "[a] representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law § 3105[a]). This section makes clear that the misrepresentation must be made by, or by the authority of, either the "prospective insured" or the "applicant for insurance."

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[3] According to the New York State Department of Financial Services, the Insurance Law, under certain conditions, "expressly permits [financial guaranty insurers such as CIFG] to issue insurance policies that guarantee payments by transformers or other parties pursuant to [a credit default swap]" (Department of Financial Services Circular Letter No. 19 § IV B [Sept 22, 2008]).

It is defendant's position that CIFG's allegations do not establish that Bear Stearns was an "applicant for insurance" under Insurance Law § 3105.[4] "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Because the term "applicant" is not defined in Insurance Law § 3105, "it should be construed in accordance with its common, everyday meaning" (*Matter of New York Skyline, Inc. v City of New York*, 94 AD3d 23, 27 [1st Dept 2012], *lv denied* 19 NY3d 809 [2012]). The term "applicant" is broadly defined as "[o]ne who requests something" (Black's Law Dictionary 115 [9th ed 2009]).

Here, CIFG alleges that: (i) Bear Stearns created the CDOs to transfer high risk assets from its own books to other investors; (ii) Bear Stearns knew that the market would require that the senior notes issued by the CDOs be insured; (iii) to ensure that marketability, Bear Stearns approached CIFG and asked it to issue financial guaranty insurance policies covering the CDOs senior noteholders; (iv) Bear Stearns specifically requested the transformer insurance structure that CIFG used; and (v) to

[4] The parties agree that Bear Stearns is not the "prospective insured."

induce CIFG to issue the insurance, Bear Stearns made repeated written and oral false representations that the CDOs' portfolios would be selected by collateral managers independent from Bear Stearns. At this early stage of the proceedings, before an amended complaint has been served, we cannot conclude, as a matter of law, that these allegations are palpably insufficient to show that Bear Stearns was an "applicant," within the meaning of Insurance Law § 3105 and the ordinary understanding of that term, for the insurance CIFG issued.[5]

Defendant suggests that in order to be an "applicant," there must be a written application for insurance. However, Insurance Law § 3105 contains no requirement that the misrepresentation be contained in a formal application.[6] Nor is there any evidence in the record that a written application was required in order to obtain the insurance provided by CIFG. In any event, CIFG

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[5] The fact that CIFG insured the obligations of the transformers in the credit default swaps, instead of the obligations of the CDOs themselves, does not change the analysis. Simply because the insurance product issued took this particular form does not make Bear Stearns any less an "applicant" for purposes of Insurance Law § 3105, particularly in light of the allegation that Bear Stearns specifically asked CIFG to utilize the transformer structure.

[6] We note that the portion of the trial court's decision in *MBIA Ins. Corp. v J.P. Morgan Sec., LLC* (45 Misc3d 1202[A] [Sup Ct, Westchester County, Sept 18, 2014), relied upon by defendant, was reversed on appeal (— AD3d —, 2016 NY Slip Op 07162 [2d Dept 2016]).

alleges that the misrepresentations were contained, inter alia, in various offering documents, and that Bear Stearns specifically requested the precise type of insurance CIFG issued. To accept defendant's myopic reading of the term "applicant" would render an insurance misrepresentation claim meaningless, because it would leave CIFG without a remedy against the very entity that is alleged to have made the misrepresentations that induced CIFG to issue the insurance.

We reject defendant's alternative claim that the misrepresentation cause of action is time-barred. The statute of limitations for misrepresentation is six years, rendering the claim timely (*see* CPLR 213[1]; *Santiago v 1370 Broadway Assoc., L.P.*, 96 NY2d 765, 766 [2001]; *Bokara Rug Co., Inc. v Kapoor*, 93 AD3d 583, 584 [1st Dept 2012]; *Catanzano v Warren Rosen & Co.*, 19 AD3d 250, 250 [1st Dept 2005] [Insurance Law § 2123 misrepresentation claim governed by six year statute of limitations]). Although *Colon v Banco Popular N. Am.* (59 AD3d 300, 300-301 [1st Dept 2009]) applied a three-year statute of limitations to a misrepresentation cause of action, that case recognized that if a misrepresentation claim alleges fraud, as CIFG's claim here does, a six-year period applies (*id.* at 301; *see CIFG Assur. N. Am., Inc. v Credit Suisse Sec. [USA] LLC*, 128 AD3d 607, 608 [1st Dept 2015], *lv denied* 27 NY3d 906 [2016]

[applying six-year limitations period to Insurance Law § 3105 claim sounding in fraud]).

There is no merit to defendant's argument that CIFG's Insurance Law § 3105 claim is time-barred under CPLR 214(2), which imposes a three-year statute of limitations for "action[s] to recover upon a liability . . . created or imposed by statute." CPLR 214(2) applies "only where liability would not exist but for a statute," and "does not apply to liabilities existing at common law which have been recognized or implemented by statute" (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 208 [2001] [internal quotation marks omitted]). Insurance Law § 3105 does not, by its terms, create a cause of action, but merely codifies common law principles (*see* Kaplan & Gross, Commentaries on the Revised Insurance Law of New York § 149 at 338 [1940] ["(predecessor statute to Section 3105) restates generally, . . . in codified form, common law principles long established in the field of insurance"]). Thus, CPLR 214(2) does not bar the misrepresentation claim.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered June 26, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the claim for material misrepresentation in the inducement of an insurance contract

(pursuant to Insurance Law § 3105) with prejudice, should be modified, on the law and in the exercise of discretion, to grant plaintiff leave to replead, and otherwise affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 29, 2016

CLERK