SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Karla Moskowitz
Judith J. Gische
Marcy L. Kahn, JJ.

4074
OP 82/16

_____x

GKK 2 Herald LLC,
Petitioner,

-against-

The City of New York Tax Appeals Tribunal, et al.,
Respondents.

_____x

Petitioner challenges the decision of respondent City of New York Tax Appeals Tribunal, dated July 15, 2016, which upheld the determination of the Administrative Law Judge, dated April 1, 2015, sustaining the determination of respondent Commissioner of Finance of the City of New York that the $111,375,000 of consideration petitioner received for its interest in real property was subject to the Real Property Transfer Tax.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Amy H. Bassett of counsel), for respondents.

KAHN, J.

In this article 78 proceeding, invoking this Court's original jurisdiction under CPLR 506(b)(4), we are asked to decide whether the determination of respondent City of New York Tax Appeals Tribunal that petitioner's receipt of $111,375,000 was a taxable event was rationally based and supported by substantial evidence. For the reasons that follow, we find that it was.

I. *Statement of Facts*

A. Factual Background

On April 9, 2007, petitioner GKK2 Herald LLC acquired a 45% tenant-in-common (TIC) interest in real property located at 2 Herald Square in Manhattan, while nonparty SLG LLC (SLG) acquired the remaining 55% TIC interest in the property.

On December 14, 2010, 2 Herald Owner LLC (Herald LLC) was formed. On December 22, 2010, pursuant to a "TIC Contribution Agreement," petitioner and SLG contributed their respective 45% and 55% interests in the property to Herald LLC and in return received a 45% and 55% membership interest, respectively, in Herald LLC. The agreement also asserted that petitioner would pay "any and all" transfer taxes arising out of transactions. Furthermore, SLG had the sole right to terminate the TIC Contribution Agreement and sole conditional obligation to close.

That same day, petitioner and SLG executed an operating agreement that provided that available profits and cash flow of the LLC would be "jointly determine[d] by members in their sole discretion," notwithstanding the set 45 percent and 55 percent membership interest. Petitioner and SLG also executed and delivered their respective deeds to their TIC interests in the property to Herald.

Also on December 22, 2010, the parties entered into a Membership Interest Purchase Agreement (Purchase Agreement) under which petitioner agreed to sell and SLG agreed to purchase petitioner's 45 percent membership interest in Herald for $25,312,500, in addition to petitioner's release of its pro rata mortgage obligation, in the amount of $86,062,500 (totaling $111,375,000). Petitioner thereupon withdrew as a member of Herald LLC. Recitals in the Purchase Agreement describe the various separate but related transactions: the formation of Herald LLC, execution of LLC's Operating Agreement, acquisition of real property interest by Herald LLC and sale of petitioner's membership interest to SLG.

Petitioner timely filed a Real Property Transfer Tax (RPTT) return reporting the sale of its membership interest in Herald LLC to SLG. The return reported no RPTT due, claiming that the transaction qualified for the "mere change of form of ownership"

exemption to imposition of the RPTT (Administrative Code of the City of NY § 11-2106[b][8]). Under the Administrative Code's "mere change in form of ownership" exemption, "a deed, instrument or transaction conveying or transferring real property or an economic interest" is exempt "to the extent that the beneficial ownership of such real property or economic interest therein remains the same. . ." (Administrative Code § 11-2106[b][8]). For the purpose of the exemption, a determination of whether the beneficial ownership of the real property or economic interest remains the same before and after the transaction "will be based on the facts and circumstances." (19 RCNY § 23-05[b][8][iv]).

Respondent Commissioner of Finance of the City of New York (the Commissioner) audited the transactions and concluded that the entire $111,375,000 consideration paid for petitioner's interest was taxable because the individual transactions resulting in the transfer of property interest should be treated as a single, taxable transaction not subject to the "mere change in form" exemption, however.

B. Procedural History

Petitioner challenged the Commissioner's ruling before an administrative law judge (ALJ) of the Tribunal, who sustained the Commissioner's ruling.

Petitioner then appealed the decision of the ALJ to the full

Tribunal, which affirmed the decision of the ALJ. The Tribunal reasoned that, pursuant to the step transaction doctrine, the series of separate but related events taken by petitioner to transfer its interest may be treated as a single taxable transaction (*see Gregory v Helvering*, 293 US 465, 469 [1935]; *Associated Wholesale Grocers, Inc. v United States*, 927 F2d 1517, 1527-1528 [10th Cir 1991]). The Tribunal found that the series of steps taken by petitioner met the criteria of both alternative tests for application of the doctrine. The Tribunal determined that the transactions met the "end result test," pursuant to which the doctrine may be applied if a series of apparently separate transactions were prearranged parts of what was actually a single transaction cast from the outset to achieve the ultimate result (*see Greene v United States*, 13 F3d 577, 583-584 [2d Cir 1994]), in that after all steps were completed, petitioner no longer held any interest in the property directly or indirectly, was relieved of any liability under the mortgage and was entitled to receive $25,312,500.

Alternatively, the Tribunal found that the series of transactions in question satisfied the "interdependence test," under which the doctrine may be applied because the transactions in question were "so interdependent that the legal relations created by one transaction would have been fruitless without a

completion of the series" (*King Enters. v United States*, 418 F2d 511, 516 [Ct Cl 1969]), in that the various agreements described each of the steps taken by the parties, all of which were interrelated and completed within one day. The Tribunal noted that nothing in the record suggested that any of the steps would have been taken independently of the others.

Additionally, the Tribunal found that the "mere change in form of ownership" exemption did not apply, since the one step in the series that had to be substantive was the receipt by petitioner of a beneficial interest in Herald LLC, yet it was the most ephemeral step in the transaction. The Tribunal found that the "facts and circumstances" analysis of the RPTT Rules, which determines the extent to which the beneficial ownership of real property remains the same following the transaction, represents an independent basis for concluding that petitioner's conveyance of its TIC interest did not satisfy the "mere change" exemption. In the Tribunal's view, the "facts and circumstances," including the simultaneous occurrence of various steps in the overall conveyance process, established that neither petitioner nor SLG had any intention of petitioner retaining a beneficial ownership in the property following the parties' transactions of December 22, 2010. Furthermore, the Tribunal noted that the Herald LLC agreement failed to identify the interests of the petitioner and

SLG in the LLC such as profits, losses and cash flow, further evincing a change in beneficial ownership. The Tribunal observed that other provisions of the TIC Contribution Agreement were more typical of a sale than the formation of a joint venture, including the fact that the petitioner was released from obligations under the mortgage loan and received back its collateral.

Petitioner also argued that it was entitled to the "mere change in form" exemption applied because the circumstances of this case were similar to those presented in "Example C" of 19 RCNY § 23-05(b)(8)(ii), which regulation includes several examples of scenarios in which the "mere change" exemption would be applicable. Example C reads as follows:

> "Example C: X Company is a New York general partnership composed of two equal partners, A and B. X Company owns unencumbered real property located in New York City with a fair market value of $1,000,000. On January 1, 1995, X Company is converted to a limited liability company through the filing of articles of organization under applicable state law. After the conversion, B sells a 49% interest in X Company to A so that A owns a 99% interest and B owns a 1% interest. If under the applicable state law, X Company is considered to be the same entity as before the conversion, the conversion will not be considered a transfer of real property or an economic interest in real property. Immediately after the conversion, the beneficial ownership of

> X Company is deemed identical to the beneficial ownership of the old general partnership and no transfer of an economic interest has occurred. B's transfer of a 49% interest in X Company to A will not constitute a controlling economic interest transfer subject to tax. However, the transfer of the 49% interest may be aggregated with a subsequent related transfer within three years so as to constitute a transfer of a controlling economic interest. See § 23-02(2) definition of 'Controlling interest' governing aggregation of related transfers."[1]

The Tribunal also found that Example C was not relevant to the overall transaction at hand. The Tribunal found Example C to be wholly distinguishable, because the question presented was not whether the contribution should be aggregated with the sale of petitioner's interest in Herald to SLG to comprise a controlling economic interest transfer, but whether the facts and circumstances of that sale caused the initial contribution to be

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[1] This citation evidently refers to 19 RCNY § 23-02(4)(2), which provides, in pertinent part:

> "Controlling interest" shall mean:
>
> "(2) Aggregation. A transfer of a controlling economic interest made by one or several persons, or in one or several related transfers, is subject to the transfer tax. Related transfers are aggregated in determining whether a controlling economic interest has been transferred. Related transfers include transfers made pursuant to a plan to either transfer or acquire a controlling economic interest in real property."

taxable.

Finally, the Tribunal rejected petitioner's claim that a New York State ALJ's finding that petitioner was exempt from taxes in these transactions under New York state law warranted a different result in this case (*see Matter of GKK 2 Herald*, 2016 WL 3131497 [NY Div. Tax App. DTA No. 826402, May 26, 2016]). The Tribunal found that the issues addressed by the State ALJ differed from those before the Tribunal. Specifically, the Tribunal noted, in the case before the State ALJ, the New York State Department of Taxation and Finance had conceded that petitioner's initial contributions of its TIC interest in the property to Herald qualified for the "mere change in form" exemption from the New York State Real Estate Transfer Tax (RETT) (*see id.* at *3). Thus, as the Tribunal observed, the State ALJ examined only the issue of whether SLG acquired a controlling economic interest in Herald. On that issue, as the Tribunal noted, the State ALJ concluded that, in determining whether SLG had acquired a 100 percent controlling interest in Herald, the State RETT regulations do not authorize the aggregation of nontaxable transfers with taxable transfers (*id.* at *4). Moreover, the issue of the applicability of the step transaction doctrine, relied upon by the Tribunal in these proceedings, was not addressed in the State ALJ's decision.

II. *Standard of Review*

This Court's review of the Tribunal's determination is limited to whether the determination rendered by the Tribunal is rationally based and supported by substantial evidence (*Matter of Stork Rest. v Boland*, 282 NY 256, 273-274 [1940]*; Matter of National Bulk Carriers, Inc. & Affiliates v New York City Tax Appeals Trib.*, 61 AD3d 522 [1st Dept 2009], *lv denied* 12 NY3d 716 [2009]). A finding is supported by substantial evidence when there is such relevant proof as a "reasonable mind might accept as adequate to support a conclusion" (*see Stork*, 282 NY at 274, citing *Consolidated Edison Co. v National Labor Relations Bd.*, 305 US 197, 229 [1938]). Even if petitioner's construction of the tax law is reasonable, petitioner cannot prevail if he fails to prove that such construction is the "only reasonable construction" (*National Bulk Carriers*, 61 AD3d at 522, quoting *Matter of Bamberger Polymers v Chu*, 111 AD2d 589, 591 [3rd Dept 1985], *lv denied* 66 NY2d 603 [1985]). Exemption provisions "must be construed against the taxpayer" (*Matter of Mobil Oil Corp. v Finance Adm'r of City of N.Y.*, 58 NY2d 95, 99 [1983]; *Matter of CBS Corp. v Tax Appeals Tribunal of State of NY*, 56 AD3d 908, 909-910 [3rd Dept 2008], *lv denied* 12 NY3d 703 [2009]).

The construction of exemption provisions against the

taxpayer must be taken into consideration in determining whether the taxpayer has met its burden of proof to overcome tax assessments (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 195 [1975]). Thus, the taxpayer must establish entitlement to the exemption and must show "that its interpretation of the statute is . . . the only reasonable construction" (*CBS Corp.*, 56 AD3d at 909-910 [involving the application of the "mere change in form" exemption to State RETT], citing *Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.*, 83 NY2d 44, 49 [1993]), *see also Grace*, 37 NY2d at 197 ["'a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms'"].

III. *Discussion*

A. Step Transaction Doctrine

As a threshold matter, this Court must determine whether respondents had the authority to apply the step transaction doctrine. Petitioner argues that because the Tribunal is not a court of law, it has no such authority. Petitioner's argument fails for the following reasons.

The Commissioner has the power to "assess, determine, revise and adjust [real property transfer] taxes" (Administrative Code § 11-2112[7]). In addition, the Commissioner may "make, adopt,

and amend rules and regulations" appropriate to implement the RPTT (*see* 19 RCNY § 23-01[a]).

The New York City Charter confers upon the Tribunal "the same power and authority as the commissioner of finance to impose, modify or waive any taxes within its jurisdiction, interest thereon, and any applicable civil penalties" (NY City Charter § 168[a]). The "tribunal may, based upon the record of the hearing before the administrative law judge, make its own findings of fact and conclusions of law and issue a decision either affirming, reversing or modifying the determination of the administrative law judge" (NY City Charter § 169[d]).

Further, "[t]he tribunal shall follow as precedent the prior precedential decisions of the tribunal . . ., the New York State Tax Appeals Tribunal or of any federal or New York state court or the U.S. Supreme Court insofar as those decisions pertain to any substantive legal issues currently before the tribunal" (NY City Charter § 170[d]). Here, application of the step transaction doctrine to the RPTT is a substantive legal issue. Thus, the Tribunal had the authority to follow precedent governing the application of that doctrine.

The step transaction doctrine has deep common-law roots, having originated 82 years ago in *Gregory v Helvering* (293 US 465, 469 [1935]). It has been repeatedly applied over the years

by the United States Supreme Court (*see e.g. Commissioner v Court Holding Co.*, 324 US 331, 334 [1945]) and other federal courts (*see e.g. Barnes Group, Inc. & Subsidiaries v Commissioner of Internal Revenue*, 593 Fed Appx 7, 9-10 [2d Cir 2014]; *Greene v United States*, 13 F3d 577, 583 [2d Cir 1994]; *Crenshaw v United States*, 450 F2d 472 [5th Cir 1971], *cert denied* 408 US 923 [1972]).

The New York State Tax Appeals Tribunal has also applied the doctrine in *Matter of Waterman Inv. Co.* (1997 WL 519543 [NY Div Tax App DTA No. 813224 (Aug 7, 1997)]). "The step transaction doctrine treats the steps in a series of separate but related transactions involving the transfer of property as a single transaction, if all the steps are substantially linked. Rather than viewing each step as an isolated incident, the steps are viewed together as components of an overall plan . . . ." (*Waterman*, at 9, citing *Greene, supra*). The State Tribunal in *Waterman* explained, again following *Greene*, that "the step transaction doctrine will be invoked if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result . . ." (*id.*). In applying the step transaction doctrine, the State Tribunal found it appropriate to ignore each individual step in the chain of transactions and instead viewed the

transaction as an integrated whole in determining its tax ramifications. It upheld the decision of an administrative law judge finding that a series of transactions transferring partnerships constituted a single property transfer, effectively conveying two parcels of land for a noncontrolling interest in a partnership.

Other New York decisional law, both in this Court and others, has adopted a similar approach. In *Matter of Exchange Plaza Partners v City of New York* (159 AD2d 333 [1st Dept 1990], *lv denied* 76 NY26 702 [1990]), this Court found that the purchase of a building and subsequent release and assignment of a mortgage obligation should be viewed in its entirety as one transaction and incorporated as consideration for purposes of the RPTT, stating that "[i]t is the substance of a transaction, viewed in its entirety, which is material to a determination of its tax consequences" (*id.* at 334, citing *Commissioner v Court Holding Co.*, 324 US at 334). At least one other intermediate appellate court of this state has repeatedly applied a similar approach in aggregating multiple transfers of real property when conveyed separately in order to attain a tax exemption (*see Matter of Von-Mar Realty Co. v Tax Appeals Trib. of State of N.Y.*, 191 AD2d 753 [3rd Dept 1993], *lv denied* 82 NY2d 655 [1993]; *Matter of Brooks v Tax Appeals Trib. of State of N.Y.*, 196 AD2d 140 [3rd

Dept 1994]). And in *Matter of Fleetwood Realty Co.* [TAT (H) 93-294 (RP), 1995 WL 124269 (NYC Tax Tribunal Feb 28, 1995]), an administrative law judge of the New York City Tax Appeals Tribunal relied on the Supreme Court's application of the step transaction doctrine in *Court Holding* as well as this Court's decision in *Exchange Plaza Partners* to reject any "formalistic distinction" between related transactions to view "the true substance" of an integrated multistep transaction in finding RPTT liability. There, the ALJ held that the release of a mortgage lien held by the taxpayer, followed by the merger of a leasehold interest (also held by the taxpayer) with a fee interest constituted a single, taxable transfer of interest. The ALJ concluded that the merger of the leasehold and fee interests was clearly contemplated by all parties at the time the debt was released in order to legally convert the property into a condominium form of ownership (*Matter of Fleetwood Realty Co.*, 1995 WL 124269, at p. *6 -*7).

In sum, the Tribunal had the authority to invoke the step transaction doctrine, following longstanding precedent in the United States Supreme Court, other federal courts, New York courts, and the New York State Tax Appeals Tribunal, as well as its own precedent (*see* NY City Charter § 170[d]).

Although petitioner correctly observes that the City

withdrew a proposed regulation which would have incorporated the step transaction doctrine into the agency's determination of whether the change of form exemption should be applied and instead adopted a substitute regulation (*see* 19 RCNY § 23-05[b][8][iv]), that fact is not determinative. The substitute regulation as promulgated provided that application of the change of form exemption "will be based on facts and circumstances" of the case (*id.*), and here, the Tribunal rationally determined that that provision of the regulation was broad enough, in this case, to include application of the step transaction doctrine in determining whether the change of form exemption should apply. As we have previously observed, "respondents were not required to promulgate a rule pursuant to the City Administrative Procedure Act" but "could, instead, develop guidelines in the course of adjudicating individual cases" (*Matter of Murphy & O'Connell v Tax Appeals Trib.*, 93 AD3d 530, 531 [1st Dept 2012], citing *Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 109 AD2d 140, 148 [3rd Dept 1985] [Levine, J., dissenting in part], *revd* 66 NY2d 948 [1985]), so long as those guidelines are "consistent with the statutory framework" (*Diocese of Albany*, 109 AD2d at 148 [Levine, J., dissenting]). As then-Justice Levine explained, "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that

lies primarily in the informed discretion of the administrative agency" (*id.*).

Having established that the Tribunal was empowered to apply the doctrine, we now turn to the question of whether the Tribunal had a rational basis for applying the doctrine in this case. This Court's review of the Tribunal's determination is limited "solely to the grounds invoked by the [Tribunal], and if those grounds are insufficient or improper, [this Court] is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis" (*see Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 593 [1982]). Based on our review of the Tribunal's determination, as limited by *Gliedman*, we find that the Tribunal's affirmation of the ALJ's determination, based upon its conclusion that the step transaction doctrine was applicable to the transactions in question because they satisfied both the end result and interdependence tests, was both rationally based and supported by substantial evidence for the following reasons.

As the Tribunal rationally found, the end result test was satisfied because after all the steps to be taken to effect the transfer of petitioner's interest were completed, petitioner only intended to transfer its 45 percent TIC interest to Herald LLC for cash and debt relief. Once all of the transactions had

occurred, petitioner no longer held any interest in the property directly or indirectly, was relieved of any liability under the mortgage and was entitled to receive $25,312.50. Furthermore, the TIC Contribution Agreement contained various provisions that were structured for the sale and not the formation of a joint venture of any kind. For example, petitioner was released from all obligations under the mortgage loan and received back collateral. Moreover, the parties' rights to terminate the overall transaction were not reciprocal, as SLG had the sole right to terminate the TIC Contribution Agreement and sole conditional obligation to close.

Furthermore, the Tribunal rationally found that the interdependence test was satisfied as the various agreements (TIC Contribution Agreement, Herald LLC Agreement and Purchase Agreement) describe each of the interrelated steps, all of which were completed in one day. Even the transfer of petitioner's and SLG's interests to Herald LLC (Herald LLC Agreement), the most pivotal step of the series of transactions, was rationally found by the Tribunal to be ephemeral, as all that petitioner received was a transitory interest, lacking in both substance and independent significance. Moreover, the Herald LLC Agreement lacked explicit determinations of profits, cash flows and other important aspects of the agreement. Given that there was a

failure to specify the nature and amount of the components of the interest to be transferred, it would have been rational for the Tribunal to infer that it was never petitioner's intention to remain a member of Herald LLC. Additionally, the Tribunal correctly noted that nothing in the record suggested that any of the steps would have been taken independently of the others. Thus, the Tribunal's conclusion that, upon its application of both the end result and interdependence tests to the transactions in question, both tests were satisfied, the step transaction doctrine should be applied and the transactions should be deemed a single taxable transaction, was both rationally based and supported by substantial evidence.

B. "Mere Change in Form of Ownership" Exemption

Even if this Court were to view the Tribunal's application of the step transaction doctrine as both irrational and lacking in evidentiary support, and conclude that the Tribunal should have treated the series of transactions in question as separate, independent transactions, it would be unavailing to petitioner.

Petitioner argues that the "mere change in form of ownership" exemption applies because in the transfer of petitioner's real property interest for a membership interest in Herald LLC, its beneficial ownership remained the same, regardless of whether or not petitioner's rights under the TIC

and LLC regimes remained the same. Petitioner thus faults the Tribunal's refusal to apply the exemption to the transactions in question as irrational and not based upon substantial evidence. This argument fails for the following reasons.

In *Matter of CBS Corp. v Tax Appeals Trib. of State of N.Y.* (56 AD3d 908, *supra*), the Appellate Division, Third Department, held that beneficial ownership encompasses "command and control over property" in addition to financial or economic interest (at 910). Beneficial ownership also includes entitlement to profits, dividends and bonuses (*Yelencscis v Commissioner*, 74 TC 1513, 1527-1528 [1980]). In *CBS Corp.*, the Third Department held that the petitioner corporation was not entitled to a "mere change in form" exemption, as the corporation's shareholders had exchanged their voting stock for nonvoting stock, thereby relinquishing their command and control of real property owned by the corporation and changing their beneficial ownership (56 AD3d at 909-910). Here, petitioner and SLG contributed their respective 45 percent and 55 percent interests in the property to Herald LLC, and then, on the same day, petitioner sold its membership interest in Herald, LLC to SLG. The record indicates that there was no express agreement with respect to petitioner's entitlement to profits and cash flow subsequent to the transactions in question. Thus, here, as in *CBS Corp.*, petitioner relinquished

command and control of its property interests (*id.* at 910), and failed to carry its burden of proof that there was no change in beneficial ownership (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d at 195).

In any event, at the conclusion of the transactions in question, all of which took place in one day, petitioner had neither any interest in the real property in question nor any membership interest in Herald LLC. From these "facts and circumstances," the Tribunal rationally inferred that petitioner had no intention of retaining any beneficial ownership of the real property in question or of rights to profits and cash flow derived from that real property or from Herald LLC. Thus, petitioner has failed to demonstrate that the Tribunal's determination that the inapplicability of the "mere change in form of ownership" exemption to the transactions in question was neither rationally based nor supported by substantial evidence (*cf. Matter of Schrier v Tax Appeals Trib. of State of N.Y.*, 194 AD2d 273, 275-276 [3d Dept 1993] ["mere change of identity or form of ownership" exemption applied where joint tenants exchanged respective shares of corporate stock for same proportionate share of interest in real property and thus retained same beneficial ownership of their respective interests], *lv dismissed*, 83 NY2d 944 [1994]; *Matter of the*

Petitioner of Trump Vil. Section 4, Inc., 2013 WL 3778024, at *8 [NYC Tax Trib. July 11, 2013] ["mere change in form" exemption applied where no change in shareholders' interests in housing cooperative corporation notwithstanding increased value of what shareholders owned subsequent to dissolution-reconstitution of corporation]).

We also reject petitioner's argument that the Tribunal irrationally failed to find that petitioner is entitled to the "mere change" exemption from paying the RPTT under the hypothetical presented in Example C. Example C is a hypothetical example discussing controlling interests under the "Pan Am" amendments.[2] It demonstrates the distinction drawn under those amendments between transfers of noncontrolling ownership interests directly in real property, which are to be taxable, and transfers of noncontrolling interests in intermediary entities

[2] In 1981, the sale of shares of the entity that owned what was then known as the Pan Am Building was deemed a transfer of shares rather than a sale of a direct ownership interest in the building, thereby rendering the transaction not subject to the RPTT. In response, in 1986, the City amended the Administrative Code to define "'Transfer' or 'Transferred'" as limited to transfers where the "shares of stock or interest or interests constitute a controlling interest in such . . . entity" (Administrative Code §§ 11-2101[7]) and to define "Controlling interest" as "fifty percent or more" of the equity of an entity owning real property (Administrative Code §§ 11-2101[8]). Thus, these two "Pan Am" amendments rendered transfers of controlling interests (50 percent or more) in entities owning real property subject to the RPTT.

that themselves own the real property, which are not to be taxable under the amendments. Example C exemplifies how, in a single transaction, beneficial ownership may remain the same. It addresses a situation in which a *partnership* (X Company) that owns real property, and that is composed of two equal partners (A and B), at the outset, converts itself into an LLC. Upon that conversion, neither a transfer of real property nor a transfer of any economic interest in the real property owned by X Company has occurred. The situation described in Example C is wholly different from that in the instant case, where petitioner and SLG directly owned the real property as tenants in common, and transferred ownership of that real estate to Herald LLC in the initial transaction here at issue. Here, at this point, a real estate transfer had occurred, while in Example C no such transfer was occasioned by the conversion of X company, the owner of the real estate, from a general partnership to a limited liability company.

The hypothetical example then provides that when Partner A purchases a 49%, noncontrolling interest in X Company LLC from Partner B, that single transfer of an economic interest will not become taxable, so long as X Company (the owner of the real property) is considered the same entity both before and after the change in its own legal form. In the instant case, by contrast,

GKK, which held title to a 45% TIC interest in the property, transferred that ownership interest to the newly formed Herald LLC. Notwithstanding GKK's receipt of a 45% interest in Herald LLC, which it immediately sold to SLG, GKK and Herald LLC are not "the same entity" as contemplated in Example C. Accordingly, neither Example C nor the change of form exemption applies in these circumstances.

Although Example C further discusses how a transfer of a noncontrolling interest (49%) in a company with an economic interest in real property may be aggregated with other subsequent related transfers of interests within a three-year period to constitute a transfer of a controlling interest, here, as the Tribunal found, there is no issue of aggregation of transfers.

Thus, the Tribunal rationally found that Example C is wholly inapplicable to the instant case.

C. Effect of State ALJ Ruling

We agree with the Tribunal that the State ALJ's decision (*Matter of GKK 2 Herald*, 2016 WL 3131497, at *3 [NY Div. Tax App. DTA 826402, May 26, 2016]) on the State RETT consequences of these transactions is not binding upon this Court (*see* NY City Charter § 170[d]; 20 NYCRR 3000.15[e][2]). We further agree with the Tribunal that the issues presented to it differed from those raised before the State ALJ, for the reasons there stated.

At the outset, the State ALJ's decision is distinguishable, because the State ALJ did not have occasion to consider the issue of whether petitioner's initial contribution of its TIC interest in the property to Herald qualified for the "mere change in form" exemption. Prior to the issuance of the State ALJ's decision, the New York State Department of Taxation and Finance, unlike the Commissioner here, had conceded that petitioner's contribution did qualify for that exemption, rendering consideration of that issue unnecessary. Because the "mere change" exemption issue had been resolved by stipulation of the parties, the State ALJ examined only the issue of whether petitioner's and SLG's tax-exempt initial transfers of their TIC interests to Herald could be combined with petitioner's subsequent taxable transfer of its noncontrolling interest in Herald to SLG to render the entire transaction taxable.

Further, the State ALJ held that 20 NYCRR 575.6(d), a state regulation, does not authorize the aggregation of a nontaxable "mere change in form of ownership" transfer with a taxable transfer to achieve a single taxable transaction (*id.*, at *4). That holding is irrelevant to the factual scenario presented here, however. In this case, the initial transfers of petitioner's and SLG's TIC interests for membership interests in Herald were both taxable, whether considered individually or as

parts of a multistep unitary transaction, for the reasons stated. These transfers were followed by a transfer of petitioner's noncontrolling interest in Herald to SLG, which transfer was also taxable.

Finally, the approach taken in the proceedings before the State ALJ, where the initial TIC transaction was conceded to be a "mere change in form" transaction prior to the State ALJ's consideration of whether all of the transactions could be aggregated and deemed a controlling interest transfer, would be procedurally barred here. Under the Rules of the City of New York, a determination of whether the "mere change" exemption may be applied cannot be made until after it has been determined whether a controlling interest transfer has occurred (*see* 19 RCNY § 23-05[b][8][ii]).[3] Thus, the State ALJ's determination is inapposite, both factually and procedurally, and cannot serve as

[3] As explained by the Tribunal, the City rule governing the applicability of the "mere change of ownership" exemption from the City RPTT differs from the State Tax Law provision concerning the "mere change" exemption to the State RETT, in that under the City rule, the "mere change" exemption is applied only after it has been determined whether a controlling interest transfer has occurred, but there is no such prerequisite to application of the "mere change" exemption from the State RETT under any State statute or regulation (*compare* 19 RCNY § 23-05[b][8][ii] ["the determination of whether a controlling economic interest has been transferred is made prior to the application of [the "mere change of ownership"] exemption"] *with* Tax Law § 1405[b][6] [providing for "mere change of ownership" exemption without any prerequisite to its application]).

either binding or persuasive authority for purposes of this decision.

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

Accordingly, the decision of respondent City of New York Tax Appeals Tribunal, dated July 15, 2016, which upheld the determination of the Administrative Law Judge, dated April 1, 2015, sustaining the determination of respondent Commissioner of Finance of the City of New York that the $111,375,000 of consideration petitioner received for its interest in real property was subject to the Real Property Transfer Tax, should be confirmed, the petition denied and the proceeding pursuant to CPLR article 78, commenced in this Court pursuant to CPLR 506(b)(4), dismissed, without costs.

All concur.

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

ENTERED: OCTOBER 10, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 10, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3963 D. J., et al., Index 13377/02
Plaintiffs-Appellants,

-against-

636 Holding Corp., et al.,
Defendants,

Department of Social Services,
Non-Party Respondent.

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Gentile & Associates, New York (Laura Gentile of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered December 29, 2015, which denied plaintiffs' motion to vacate a Medicaid lien or, in the alternative, to reduce the lien amount by the same proportion by which the full value of the case was compromised, and thereby allowed the Department of Social Services of the City of New York (DSS) to recover the full amount of the Medicaid lien, unanimously affirmed, without costs.

D. J. (plaintiff), then age 16, was shot by an intruder at defendants' premises and rendered a paraplegic. After his family's insurance coverage was exhausted, his medical care was paid by Medicaid for nine years.

The minor plaintiff and his mother sued the owners of the apartment complex for negligently failing to maintain the premises in reasonably safe condition, and nonparty DSS filed a lien pursuant to Social Services Law section 104-b for recovery of its past medical expenses on plaintiff's behalf totaling $250,070. Although plaintiffs' counsel had been served with notice of the lien on April 23, 2010, during the pendency of the action, and was informed by DSS to notify DSS of any pending settlement discussions or face a subrogation action, counsel neither informed DSS of its ongoing negotiations with defendants nor sought to negotiate the lien amount with DSS.

In May 2010, plaintiffs, then claiming damages in the amount of $25,000,000,[1] settled the premises liability action with the defendant landlords for $4,350,000. After unsuccessful efforts between plaintiffs and DSS to resolve the lien, plaintiffs moved

[1] In the complaint, plaintiff sought damages in the amount of $50,000,000 which included the expenses he "was caused . . . to incur . . . for medical care and attention."

in December 2010 to vacate the lien entirely, contending, without supporting documentation, that the entire settlement was ascribed to plaintiff's pain and suffering, and no portion of it was attributable to payment of past medical expenses. In the alternative, plaintiffs sought to reduce the amount of the Medicaid lien to the same proportion of the settlement as the settlement bore to the $25,000,000 damages plaintiffs claimed during settlement discussions, which they characterized as constituting the true value of the case. Plaintiffs' counsel averred that "[t]he low settlement value reflects the potential for a defense verdict in this premises liability case."

DSS sought to enforce the full amount of its lien for medical expenses, based in part upon plaintiffs' failure to allow them to participate in the settlement negotiations. DSS also argued that the settlement amount constituted the full value of the case, in view of plaintiffs' concession that negligent security cases are difficult to prove. The agency further contended that public policy prohibited parties to a personal injury suit from avoiding Medicaid liens by allocating a settlement entirely to pain and suffering, and noted plaintiffs' failure to provide the stipulation of settlement or any other proof of the parties' allocation of damages in determining the

amount of the settlement.

On or about June 30, 2011, Supreme Court ordered a hearing to determine the full value of the case and the value of the various items of damages, and ordered related discovery. By October 2014, however, the parties had waived a hearing, agreeing to have the matter decided on the papers submitted.

In a December 17, 2015 decision and order on plaintiffs' motion, Supreme Court determined DSS to be entitled under Social Services Law § 104-b to enforce its full lien amount of $250,070, rejecting plaintiffs' requests for relief. In doing so, the court found that the settlement amount represented the actual value of the plaintiff's case; that DSS was not a party to the settlement, and that DSS had notified the plaintiffs and their counsel prior to the settlement of the existence of the lien. The motion court further found that plaintiffs had attempted to allocate the entire settlement amount to conscious pain and suffering, thereby unlawfully depriving DSS of any ability to enforce its Medicaid lien against the settlement. The court further noted that the DSS lien amounted to 5.79% of the plaintiff's overall settlement. The motion court thus effectively denied plaintiffs' motion to vacate the lien or, in the alternative, a reduction of the lien amount in proportion to

the relation the settlement amount bore to plaintiff's claimed full value of the case (*see Arkansas Dept. of Health & Human Servs. v Ahlborn*, 547 US 268 [2006]; *see also Harris v City of New York*, 16 Misc 3d 674 [Sup Ct, NY County 2007, Feinman, J.]; *Lugo v Beth Israel Med. Ctr.*, 13 Misc 3d 681 [Sup Ct, NY County 2006, Schlesinger, J.]).

On this appeal, the parties disagree as to the proper application of *Ahlborn* and its progeny in the present circumstances. On the record presented, we find that Supreme Court properly awarded DSS the full amount of its lien and properly declined to employ the formula used in *Ahlborn.*

Federal law provides that under Medicaid, the jointly funded federal and state medical assistance program for low income individuals, agencies which serve as its local administrators, such as DSS here, must comply with all federal requirements of the program or risk losing their federal funding (*see Ahlborn*, 547 US at 275-276). Among such requirements is the obligation of the state or local agency administering the program to "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan" and to seek reimbursement from them for such services "to the extent of such legal liability" (42 USC § 1396a[a][25][A],

[B]). In furtherance of these requirements, Medicaid recipients are required to assign their rights to claims against third parties as a condition to their eligibility to receive program benefits (42 USC § 1396k[a][1][A]; Social Services Law § 366[1][d][2]), and the Medicaid lien created in such circumstances enables the program to remain "the payer of last resort" (*Cricchio v Pennisi*, 90 NY2d 296, 305 [1997]).

Federal law requires the state or local agency to recoup Medicaid funds from the responsible third parties and set up procedures for doing so (*Cricchio* at 305). DSS is authorized to impose a lien in a personal injury action against a third party who is legally liable for the Medicaid recipient's injury (Social Services Law § 104-b; *Calvanese v Calvanese*, 93 NY2d 111, 117 [1999]), and is subrogated to the Medicaid recipient's right to reimbursement from the liable third party (Social Services Law § 367-a[2][b]).

DSS is entitled to recover reimbursement only for the amount of medical expenses it paid, and not for other damages amounts, such as pain and suffering or lost wages (*Wos v EMA ex rel. Johnson*, 568 US 627, 638 [2013]; *Ahlborn* at 280-282). The Supreme Court has recognized, however, "that Medicaid beneficiaries and tortfeasors might collaborate to allocate an

artificially low portion of a settlement to medical expenses" (Wos at 684), to manipulate the settlement to "allocate away the State's interest" (*Ahlborn* at 288).

The Supreme Court had no occasion in *Ahlborn* to prescribe any particular method for determining the portion of a personal injury settlement attributable to medical care, as there the parties, including the state, stipulated that 6% of the settlement would be ascribed to past medical expenses. Although the Supreme Court in *Ahlborn* found the formula advanced by the plaintiff in that case (and urged by plaintiffs here), of applying the agreed proportion that medical expenses bore to the full value of the case to the amount of the settlement, to be an acceptable method of allocation, it did not adopt it as the exclusive method of making the determination. Indeed, in *Wos*, the Court rejected any "one-size-fits-all" approach to making the calculation (*Wos* at 639). Rather, in *Ahlborn* and later in *Wos*, the Court merely made clear that where the amount of a lump sum settlement attributable to medical expenses was not established by a verdict or by a stipulation binding on all parties, a judicial resolution of the issue was required (*Wos* at 638; *Ahlborn* at 288).

In New York, it has long been recognized that a Medicaid

lien will not be defeated by the mere declaration of a plaintiff's attorney that the settlement does not relate to medical expenses (*Matter of Homan v County of Cattaraugus Dept. of Social Servs.*, 74 AD3d 1754, 1755 [4th Dept 2010]; *Carpenter v Saltone Corp*, 276 AD2d 202, 211 [2nd Dept 2000]; *Simmons v Aiken*, 100 AD2d 769, 770 [1st Dept 1984]). As we have explained, the court's determination

> "is not foreclosed by the form of the settlement documents or the language used by the attorneys in the settlement stipulation, if that form and language do not truly reflect the consideration of the settlement, or are chosen merely as a means to defeat DSS' recovery."

(*Simmons* at 770). Among the factors we found relevant to the court's determination was whether the pleadings asserted a claim for medical expenses (*id.*).

In this case, after the parties declined the opportunity for a hearing, the motion court properly considered all of the surrounding facts and circumstances in making its determination of the portion of plaintiffs' $4.3 million settlement attributable to the medical expenses paid by Medicaid. Plaintiffs never proffered any breakdown of the settlement amount, nor disclosed its terms. Rather, plaintiffs characterized the entire payment as attributable to plaintiff's pain and suffering, notwithstanding the fact that in their

complaint, plaintiffs had sought recompense for the medical care and attention he had incurred. The motion court reasonably rejected this characterization as an effort to deprive DSS of its Medicaid lien.

Further, plaintiffs had ignored the request by DSS that it be permitted to participate in settlement discussions. As noted, although the court ordered a hearing on the *Ahlborn* issue, plaintiffs waived their right to it. And the court noted that the Medicaid lien, representing $250,070 paid over nine years, constituted less than 6% of the total settlement and thus did not unduly prejudice plaintiff's recovery.

Under these circumstances, the motion court fairly determined that DSS was entitled to recoupment of its entire lien.

Plaintiffs' reliance on *Lopez v Daimler Chrysler Corp.* (179 Cal App 4th 1373 [Cal App 3d Dist 2009]), is misplaced. Social Services Law section 104-b differs in its requirements from its counterpart California statute. In any case, in *Lopez*, the parties disagreed as to the amount of the lien and the state agency had failed to submit any evidence in support of its claim. Here, by contrast, plaintiffs conceded the amount of the expenditures DSS made under Medicaid for plaintiff's past medical

expenses. Neither does *Miraglia v H&L Holding Corp.*, 36 AD3d 456 (1st Dept 2007), help plaintiffs here, given its disparate facts.

Finally, plaintiffs failed to preserve any argument as to proper notice of the lien, not having raised it below, so it cannot be considered by this Court. If we were to consider it, we would reject it, as any failure to adhere to the statutory notice requirements for the lien would not void the lien, even under prior law. In any case, plaintiffs received sufficient notice in the April 23, 2010 letter to enable them to identify the injured party and the occurrence on which the claim was based for purposes of Social Services Law § 104-b.

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4617- Index 850125/15
4618 Goldstein Group Holding, Inc., etc.,
Plaintiff-Appellant,

-against-

310 East 4th Street Housing Development Fund Corporation,
Defendant-Respondent,

Howard Brandstein,
Defendant-Intervenor-Respondent,

New York City Department of Taxation and Finance, et al.,
Defendants.

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Marc Wohlgemuth & Associates, P.C., Spring Valley (Jeremy M. Doberman of counsel), for appellant.

Barry Mallin & Associates, P.C., New York (Matthew Maline of counsel), for 310 East 4th Street Housing Development Fund Corporation, respondent.

Howard Brandstein, respondent pro se.

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Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 16, 2015, which granted defendant 310 East 4th Street Housing Development Fund Corporation's (defendant) motion to dismiss the complaint for lack of personal jurisdiction, and denied as moot plaintiff's motion to appoint a receiver, unanimously affirmed, with costs.

Supreme Court correctly dismissed the complaint for lack of

personal jurisdiction, because plaintiff failed to serve defendant within 120 days after commencement of the action and failed to show that its time for service should be extended for good cause or in the interest of justice (CPLR 306-b). Plaintiff was the substituted plaintiff in a prior foreclosure action against defendant that, three months before plaintiff filed the instant complaint, was dismissed for lack of personal jurisdiction over defendant because defendant-intervenor Howard Brandstein, who had been served on defendant's behalf, was no longer defendant's president and was not authorized to accept service on its behalf (*see* CPLR 311[a]). Nevertheless, in the instant action, plaintiff initially chose again to try to serve defendant by serving Brandstein, based on its rank speculation that Brandstein might have again become defendant's president. Plaintiff did not detail its efforts, if any, to learn the identity of defendant's current president or any other officer whom it might properly serve. While ultimately plaintiff served defendant's actual president, it did so after expiration of the 120-day period.

Plaintiff then requested an extension of time for service in opposition to defendant's motion to dismiss, instead of formally cross-moving for an extension (CPLR 306-b). We need not reach

the disputed procedural issue regarding whether a formal cross motion was required because the court providently exercised its discretion in denying the request for an extension on its merits (*see Gilkes v New York Wholesale Paper Corp.*, 89 AD3d 534, 534 [1st Dept 2011]). By attempting service on Brandstein, who plaintiff should have known was not authorized to receive service, and making no effort to learn the identity of the current officers, plaintiff failed to act with reasonable diligence in trying to effect service, and thus failed to establish good cause in support of its request (*see* CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 103-104 [2001]; *see also Johnson v Concourse Vil., Inc.*, 69 AD3d 410 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]). Nor is an extension of time to serve warranted in the interest of justice, given plaintiff's failure to act with any due diligence to ensure that the instant action was not dismissed for exactly the same reason for which the prior action was dismissed. While the statute of limitations on plaintiff's claim may have expired, defendant's low-income tenants have lived through two foreclosure actions and beyond the statute of limitations with the uncertainty whether they may remain in their homes, and plaintiff waited until after expiration of the 120-day period to serve defendant or seek an

extension of time (*see Leader v Maroney*, 97 NY2d at 105-106).

There is no need for a traverse hearing since the court was able to observe, at oral argument, that the description of the person served in the affidavit of service, who purportedly claimed to be Brandstein and to have authorization to accept service, did not match Brandstein's appearance.

Having properly dismissed the foreclosure action for lack of personal jurisdiction, the court also properly dismissed plaintiff's motion for an appointment of a receiver as moot.

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

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4619 In re Jackie Ann W.,

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

Leticia Ann W.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

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

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Douglas Hoffman, J.), entered on or about March 22, 2016, which, upon findings of mental illness, abandonment and permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including expert testimony from a court-appointed psychologist who examined the mother on

two occasions and reviewed her available medical records, supported the determination that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child (*see* Social Services Law [SSL] § 384-b[3][g][i]; [4][c]; *Matter of Lashawn Shanteal R.*, 14 AD3d 467, 467 [1st Dept 2005]).

The psychologist testified that the mother suffers from schizophrenia. The psychologist also found that the mother lacked insight into her illness, as demonstrated by her stated belief that continued treatment was unnecessary. The fact that, at the time of the hearing, the mother's illness was in remission is immaterial, given the psychologist's unrefuted testimony that the mother's prognosis was "poor" and that her symptoms were likely to recur. This testimony was supported by the mother's history of noncompliance with treatment and resulting decompensation, which was previously demonstrated in proceedings brought to terminate her parental rights to her two older children (*Matter of Justin Javonte R. [Leticia W.]*, 103 AD3d 524, 525 [1st Dept 2013]).

Clear and convincing evidence also supported the determination that the mother had abandoned the child by failing to visit or communicate with the child or the agency for the six

months immediately prior to the filing of the petition, although she was able to do so and not prevented or discouraged from doing so by the agency (*see* SSL § 384-b[3][g][i]; [4][b]; [5][a]; *Matter of Jordan Anthony H. [Melissa Ann S.]*, 103 AD3d 465, 465 [1st Dept 2013], *lv denied* 21 NY3d 854 [2013]). The mother's three contacts with the agency during this period were not sufficient to negate the inference of abandonment (*see Matter of Jasiaia Lew R. [Aylyn R.]*, 101 AD3d 568, 569 [1st Dept 2012]; *Matter of Stephen Sidney W.*, 283 AD2d 153, 154 [1st Dept 2001]). The mother's hospitalization for some portion of the six-month period does not automatically excuse her from maintaining contact before and after that hospitalization (*Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785-1786 [4th Dept 2017]; *see also Matter of Isaiah Johnathan S.*, 33 AD3d 459, 459 [1st Dept 2006]). Additionally, the record reflects that the agency responded appropriately to the mother's inquiries, but was unable to locate her for much of the relevant period. The agency was not required to demonstrate "diligent efforts" to encourage the mother to maintain contact (SSL § 384-b[5][b]; *Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003]).

Lastly, clear and convincing evidence supported the determination that the mother permanently neglected the child by

failing for at least one year to "maintain contact with or plan for the future of the child, although physically and financially able to do so" (SSL § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 380 [1984]). The agency was not required to prove that it made "diligent efforts to encourage and strengthen the parental relationship," because the mother failed for a period of over six months to keep the agency apprised of her location (SSL § 384-b[7][a], [e][i]; *Matter of Kimberly Vanessa J.*, 37 AD3d 185, 185-186 [1st Dept 2007]). In any event, the agency demonstrated that it made diligent efforts under the circumstances. The agency scheduled regular supervised visitation, created planning goals, and ensured that the mother had access to mental health services; it cannot be faulted for the mother's failure to take advantage of these efforts or to maintain contact with the agency (*see Matter of Alexis Alexandra G. [Brandy H.]*, 134 AD3d 547, 548 [1st

Dept 2015]; *Matter of Piery Vinette D.*, 15 AD3d 223, 223 [1st Dept 2005]).

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

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4620 Jean Philippe Cadichon, etc., Index 16878/03
Plaintiff-Appellant,

-against-

Thomas Facelle, M.D.,
Defendant-Appellant,

Good Samaritan Hospital, et al.,
Defendants,

Louis May, M.D.,
Defendant-Respondent.

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

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Thomas Facelle, M.D., appellant.

Clausen Miller PC, New York (Melinda S. Kollross of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered September 24, 2015, which granted defendant Louis May, M.D.'s motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion denied.

In July 2002, plaintiff's decedent had two medical procedures, the first performed by defendant Thomas Facelle, M.D., and the second by defendant Louis May, M.D. Plaintiff

alleges that the doctors performed the procedures negligently, resulting in the perforation of the decedent's hepatic and/or common bile duct and, eventually, acute renal insufficiency and liver failure.

Following the first procedure, a laparoscopic cholecystectomy (gall bladder removal operation), the decedent returned to the hospital with pain and was admitted. Several bile duct scans came back showing that there was no extravasation (leakage) and thus no evidence of a bile duct perforation. However, Dr. May testified that another physician, who initially reviewed one of the studies and found no leak, on further review, found a leak, indicating a perforation. Agreeing with this finding on review of the study, Dr. May thus performed an endoscopic retrograde cholangiopancreatography (ERCP) to take X-rays of the area through the endoscope and possibly repair the leak. During the ERCP, which involved using a catheter containing a guidewire, Dr. May encountered an obstruction and summoned Dr. Facelle. A bile duct perforation was discovered.

The parties' accounts diverge as to who perforated the duct. Dr. Facelle's records indicate that Dr. May advised him that his catheter had perforated the duct and entered into the abdominal cavity. Dr. May testified that he advised Dr. Facelle of leakage

from an existing perforation. However, the parties agree that, after the catheter was advanced, a guide wire went through a perforation in the bile duct into the abdominal cavity, where Dr. Facelle left it to facilitate his finding the actual perforation in a subsequent exploratory laparoscopic surgery.

As an initial matter, Dr. May established his prima facie right to summary judgment dismissing the complaint on the grounds that he did not cause or exacerbate decedent's injuries. In support of his motion for summary judgment, Dr. May provided his deposition testimony, decedent's medical records and the affirmations of two experts who opined that there is no evidence of any departure from the standard of care by Dr. May, that Dr. May's actions were in accordance with good and accepted medical standards of care and that the care and treatment of decedent by Dr. May was not the cause of decedent's alleged injuries. Specifically, Dr. John Poneros, an expert in gastroenterology, opined that the perforation of the common bile duct occurred before Dr. May performed the ERCP based on decedent's complaint of abdominal pain and tenderness, jaundice and shoulder pain days before the ERCP was performed, the fluid seen on the CT scan dated July 23, 2002 and the fact that extravasation of contrast was evident before any instruments were introduced during the

ERCP. A second expert, Dr. Jeffrey H. Newhouse, who also reviewed decedent's films and deposition transcripts, opined that any perforation of bile duct occurred before Dr. May performed the ERCP based on a review of the fluoroscopic spot films taken during the ERCP procedure which demonstrated extravasation of contrast on initial injection of the bile duct before any instrument was introduced. Thus, Dr. Newhouse opined that decedent sustained a leak before the ERCP was performed and that none of her alleged injuries were caused by any of Dr. May's actions.

However, plaintiff and Dr. Facelle raised triable issues of fact as to whether Dr. May caused the bile duct perforation when he conducted the ERCP or exacerbated decedent's injuries by advancing the catheter and performing excessive manipulation when passing the catheter up the bile duct given decedent's condition. Plaintiff's expert opines that Dr. May departed from the accepted standard of care when he advanced the catheter knowing the decedent was at high risk for duct injury due to her post-

surgical inflammation, and record evidence demonstrates that her bile duct was not healthy. Additionally, Dr. Facelle testified that he was summoned to the ERCP procedure by Dr. May because it was Dr. May who perforated the bile duct.

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4621 In re Marisol Realty Corp., Index 100906/14
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

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

Mark F. Palomino, New York (Jeffrey G. Kelly of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered July 14, 2015, denying the petition to annul a final order of respondent New York State Division of Housing and Community Renewal (DHCR), dated July 3, 2014, which denied the Petition for Administrative Review (PAR) and affirmed the order of the DHCR Rent Administrator, dated December 7, 2012, which found that Apartment #3 in the subject building was rent-stabilized, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's denial of the PAR had a rational basis and was neither arbitrary nor capricious. Documentary evidence submitted by the tenant established that the building, which was

constructed before 1974, had at least six housing accommodations, and was therefore subject to rent stabilization (*see* 9 NYCRR 2520.11[d]; *see Wilson v One Ten Duane St. Realty Co.*, 123 AD2d 198 [1st Dept 1987]). Petitioner did not respond to the tenant's submissions.

Contrary to petitioner's argument, DHCR properly refused to accept evidence submitted for the first time by petitioner at the PAR, where the scope of review was limited to facts or evidence before the Rent Administrator (9 NYCRR 2529.6). Moreover, DHCR rationally determined that petitioner did not meet its burden of demonstrating good cause to warrant a remand to the Rent Administrator to consider the additional evidence (9 NYCRR 2529.6; *see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002]). Petitioner's denial of the receipt of DHCR's notices requesting a response to the tenant's submission was unsworn, and there was not an affidavit or affirmation from counsel denying receipt of DHCR's notices. Petitioner's claim of law office failure was speculation.

The Rent Stabilization Code permitted, but did not require, DHCR to inspect the premises before making a determination (9 NYCRR 2527.5[b]). DHCR's decision not to inspect the premises was not an abuse of discretion, given that petitioner did not

respond to the Rent Administrator's notices requesting a response to the tenant's submissions. Although petitioner disputed the accuracy of the documents at the PAR, it was for DHCR to weigh the evidence that the parties submitted (*Matter of Jane St. Co. v State Div. of Hous. & Community Renewal*, 165 AD2d 758 [1st Dept 1990], *lv denied* 77 NY2d 801 [1991).

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: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4622 The People of the State of New York, Ind. 3955/13
Respondent,

-against-

Wendell Belle,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered June 17, 2015,

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

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

ENTERED: OCTOBER 10, 2017

CLERK

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

Richter, J.P., Gische, Kahn, Kern, JJ.

4623 IMAX Corporation, Index 650342/13
Petitioner-Appellant,

-against-

The Essel Group,
Respondent,

Subhash Chandra, et al.,
Respondents-Respondents.

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Kelley Drye & Warren LLP, New York (Jonathan K. Cooperman of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for Subhash Chandra, Zee TV USA, Inc., Asia TV USA Ltd. and Natural Wellness USA, Inc., respondents.

Law Offices of Megha D. Bhouraskar, P.C., New York (Megha D. Bhouraskar of counsel), for Atul Goel, Amit Goenka and Laxmi Goel, respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about October 9, 2015, which denied the petition for an order pursuant to CPLR 5201 and 5225(b) directing respondents to deliver funds or property sufficient to satisfy a judgment, unanimously affirmed, with costs.

Petitioner, a Canadian company, seeks to satisfy a judgment entered in its favor against nonparty E-City Entertainment I Pvt. Ltd. with funds or property owned by respondents, whom it identifies as "The Essel Group, an Indian conglomerate that owns

and controls E-City, certain companies that are part of the Essel Group, and individuals in control of the Essel Group (referred to in India as 'Promoters')." Petitioner alleges that the Essel Group and the individual respondents collectively perpetrated a fraud against it by fraudulently demerging E-City during the arbitration proceedings that resulted in the judgment and transferring assets out of E-City and into other Essel Group companies, including the corporate respondents, to avoid paying damages.

Initially, petitioner failed to establish that New York courts have personal jurisdiction over the Essel Group and the individual respondents on the basis of a tortious act committed without the state "causing injury to person or property within the state" (CPLR 302[a][3]). As the original event that caused the economic injury was the demerger of E-City in India, the situs of the injury is India (*see e.g. Cotia [USA] Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]). Petitioner's executive offices in New York do not alone constitute a sufficient predicate for jurisdiction (*see Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 326 [1980]; *Peters v Peters*, 101 AD3d 403, 404 [1st Dept 2012]). Nor does it avail petitioner that respondent Subhash Chandra, chairman of the Essel Group,

traveled to New York to negotiate the agreement with petitioner, since the injury petitioner alleges arose not from the breach of the agreement but from the demerger. These facts do not constitute a sufficient start in showing that jurisdiction could exist to justify pretrial jurisdictional disclosure (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]).

Additionally, petitioner failed to establish that New York courts have general jurisdiction over respondent Chandra individually pursuant to CPLR 301. New York courts may not exercise general jurisdiction against a defendant under the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state (*Daimler AG v Bauman*, __ US __, 134 S Ct 746, 760-761 [2014]; *Magdalena v. Lins*, 123 AD3d 600, 601 [1st Dept 2014]) or in an exceptional case where "an individual's contacts with a forum [are] so extensive as to support general jurisdiction notwithstanding domicile elsewhere" (*Reich v Lopez*, 858 F3d 55, 63 [2d Cir 2017]). In the present case, movant has failed to show either that Chandra was domiciled in New York or that Chandra's contacts with New York were so extensive as to support general jurisdiction. Initially, the purchase of the apartment, even if attributable to him personally, is

insufficient to establish that Chandra was domiciled in New York (*see Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]; *see also Chen v Guo Liang Lu*, 144 AD3d 735, 737 [2d Dept 2016]). Further, the evidence submitted by petitioner demonstrates that Chandra's business activities in New York were undertaken on behalf of a corporate entity (*see Laufer v Ostrow*, 55 NY2d 305, 313 [1982]). No pretrial jurisdictional disclosure is warranted.

To the extent respondents concede that New York courts may exercise general jurisdiction over respondent Asia TV USA, Ltd. ("Asia TV"), petitioner argues that it can recover against Asia TV as well as the other respondents on the ground that respondents should be treated as a "single personality" for purposes of enforcing the judgment against E-City. However, the evidence does not show that the individual Essel Group promoters used their "domination and control over [E-City] to transfer assets of [E-City] to [Asia TV] so as to make [E-City] incapable of honoring its obligation to [petitioner]" (*Solow v Domestic Stone Erectors*, 269 AD2d 199, 200 [1st Dept 2000]; *see e.g. Winchester Global Trust Co. Ltd. v Donovan*, 22 Misc 3d 1119[A], 2009 NY Slip Op 50190[U] [Sup Ct, Nassau County 2009]). Rather, the argument that Asia TV should be treated as a "single personality" with the other companies is without basis as it is

undisputed that Asia TV was not in existence at the time E-City was demerged and thus, there is no evidence that any assets were ever transferred from E-City to Asia TV so as to make E-City incapable of honoring its obligations to petitioner. For the same reason, there is no basis for issuing a turnover order against Asia TV as there is no evidence that any assets of E-City were ever transferred to Asia TV (*see* CPLR 5225[b]; *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55 [2013]). No pretrial jurisdictional disclosure is warranted.

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4624 Jean F. Donsimoni, Index 155621/14
Plaintiff-Respondent,

-against-

Serigne M. Fall,
Defendant-Appellant.

_____

Bruno, Gerbino & Soriano, LLP, Melville (Nathan M. Shapiro of counsel), for appellant.

Mitchell Dranow, Sea Cliff, for respondent.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about January 19, 2017, which granted plaintiff's motion to reargue its prior order, entered on or about August 3, 2016, granting defendant's motion for summary judgment dismissing the complaint and, upon reargument, denied the motion, unanimously affirmed, without costs.

The fact that plaintiff's lone affidavit of merit in opposition to defendant's summary judgment was acknowledged by a vice-consul in the U.S. Embassy in Paris, France, yet was submitted without a requisite certificate of conformity (see CPLR 2309[c]; Real Property Law § 301, *et seq.*), constituted an irregularity that could be corrected nunc pro tunc, if necessary (*see DaSilva v KS Realty, L.P.*, 138 AD3d 619 [1st Dept 2016];

Gyamfi v Citywide Mobile Response Corp., 146 AD3d 612 [1st Dept 2017]), and the affidavit otherwise raised both factual and credibility issues as to the cause of the accident, warranting denial of summary judgment (*see e.g. Redlich v Stone*, 152 AD3d 432 [1st Dept 2017]).

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

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4625-
4625A-
4625B

Index 654039/13

Barton Mark Perlbinder, et al.,
Plaintiffs-Appellants,

-against-

Board of Managers of the 411 East 53rd Street Condominium,
Defendant-Respondent.

_____

Granger & Associates LLC, New York (Raymond R. Granger of counsel), for appellants.

Meyers Tersigni Feldman & Gray LLP, New York (Anthony L. Tersigni of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 24, 2016, bringing up for review an order, same court and Justice, entered April 21, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment on its first, second, third and fifth counterclaims; ordered and declared that plaintiffs have an immediate obligation to repair existing damage in the garage unit at 411 East 53rd Street in Manhattan, to cure all issued and outstanding violations, and to maintain the garage unit; denied plaintiffs' motion to amend their answer to defendant's counterclaims; and, upon renewal, denied plaintiffs'

prior motion for summary judgment on their complaint and on the first, second, third and fifth counterclaims; and bringing up for review an order, same court and Justice, entered on or about July 21, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment, unanimously affirmed, with costs. Appeal from the aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This appeal was timely filed, despite the fact that the initial notice of appeal was returned by the Clerk due to an error and was not refiled until more than 30 days later. The initial filing was sufficient for jurisdictional purposes, and the correction was not consequential (*see* CPLR 5520[c]). Moreover, plaintiffs filed their pre-argument statement and the orders that are the subject of the appeal at the same time as the initial notice of appeal, thus providing defendant with notice (*see* 22 NYCRR 202.5-b[f][2][ii]).

Supreme Court correctly concluded that plaintiffs were responsible for maintenance of the garage, given their judicial admission in their answer to the counterclaims that they were the sole owners of the unit and were entitled to exclusive possession of it; an August 13, 2012 letter from their counsel to defendant

asserting their ownership of the garage; and article 6(c) of the Declaration and section 5.1(A)(i) of the bylaws.

Supreme Court also correctly found that, based on plaintiffs' admissions, the damages to the garage resulted from salt and chlorides tracked into it by vehicles, and that plaintiffs had made minimal effort over the years to maintain or repair it.

Plaintiffs' request for leave to amend their answer to defendant's counterclaims is denied as moot.

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

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4626-
4627 The People of the State of New York, Ind. 1733/12
5448/12
Respondent,

-against-

Derrick Hughes,
Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 14, 2014, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, and also convicting him of violation of probation, revoking a prior sentence of probation and resentencing him to a concurrent term of one year, and judgment, same court (Maxwell Wiley, J.), rendered September 19, 2012, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing to a term of six months concurrent with five years' probation, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an

alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence. There is no basis for disturbing the jury's credibility determinations. Regardless of whether it is viewed as a legal insufficiency claim or a repugnant verdicts claim, defendant's argument that his acquittal of robbery rendered his burglary conviction legally defective was not raised at a time when it could have been cured by resubmission to the jury, and it is thus unpreserved (*see generally People v Gray*, 86 NY2d 10, 20-21 [1995]). In any event, the verdict was not legally repugnant (*see People v Muhammad*, 17 NY3d 532, 540 [2011]), because, under the court's charge, the jury could have found defendant guilty of burglary (under a theory of intent to commit an unspecified crime), but not guilty of robbery, and the factually mixed verdict does not result in legal insufficiency (*see People v Abraham*, 22 NY3d 140, 146-147 [2013]). While we may consider an alleged factual inconsistency in a verdict in performing our weight of the evidence review (*see People v Rayam*, 94 NY2d 557, 563 n [2000]), and weight of the evidence arguments do not require preservation (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), we find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v*

Horne, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

The court properly declined defendant's request to charge the jury that the People were required to prove that defendant entered unlawfully with the intent to commit robbery. The People did not limit their theory of the case to any particular intended crime (*compare People v Barnes*, 50 NY2d 375, 379 n 3 [1980]). While the People argued in summation that robbery was the crime that defendant intended to commit, that did not constitute a limitation on the theory of prosecution (*see People v Ramadhan*, 50 AD3d 339 [1st Dept 2008]; *People v Bess*, 107 AD2d 844, 846 [3d Dept 1985]). The record does not support defendant's assertion that, at a presummations conference, the court itself expressly limited the People to a robbery theory. In any event, there was no unfairness, because it was clear to the jury that if it accepted defendant's theory of the case, it would be required to acquit him of both burglary and robbery.

With regard to defendant's 2012 conviction of second-degree assault, his challenges to his guilty plea are unpreserved *(see*

People v Conceicao, 26 NY3d 375, 382 [2015]) and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see People v Monk*, 21 NY3d 27, 32-33 [2013]).

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4628 Dulce Figueroa, Index 309801/09
Plaintiff-Appellant,

-against-

Skillman Realty Co.,
Defendant-Respondent.

- - - - -

Skillman Realty Co.,
Third-Party Plaintiff-Respondent,

-against-

Brooks Brothers Inc., et al.,
Third-Party Defendants-Respondents,

Jerrold M. Sonet, etc.,
Defendant.

_____

Diamond & Diamond, LLC, Brooklyn (Stuart Diamond of counsel), for appellant.

Varvaro, Cotter & Bender, White Plains (Julie C. Hellberg of counsel), for Skillman Realty Co., respondent.

London Fischer LLP, New York (Tracy J. Weinstein of counsel), for Brooks Brothers Inc., respondent.

Savona, D'Erasmo & Hyer LLC, New York (Raymond M. D'Erasmo of counsel), for Donghia International, Ltd., respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 23, 2015, which, to the extent appealed from as limited by the briefs, granted the motions of defendant/third-party plaintiff Skillman Realty Co. (Skillman) and of third-party

defendant Brooks Brothers, Inc. for summary judgment dismissing the complaint as against Skillman, unanimously affirmed, without costs.

Under the terms of the lease, third-party defendant Brooks Brothers had sole responsibility for maintaining the area where plaintiff sustained her injuries. Skillman was an out-of-possession landlord with no obligation to perform repairs, and thus, cannot be liable, since the wet floor that allegedly caused plaintiff to slip and fall was not a significant structural or design defect contrary to a specific statutory safety provision (*see Bing v 296 Third Ave. Group, LP*, 94 AD3d 413, 414 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]).

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

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4629 HSBC Bank USA, etc., Index 850117/13
Plaintiff-Respondent,

-against-

Leo Tsimmer,
Defendant-Appellant,

Angelika Lee, et al.,
Defendants.

_____

Jack L. Lester, New York, for appellant.

Hogan Lovells US LLP, New York (Ryan Sirianni of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about November 29, 2016, which granted plaintiff's motion for a final judgment of foreclosure and sale, deemed appeal from judgment of foreclosure and sale, same court, Justice, and entry date, and so considered, said judgment unanimously affirmed, without costs.

The appeal from judgment entered in this case brings up for review "any non-final judgment or order which necessarily affects the final [order and] judgment," provided that such non-final judgment or order has not been previously reviewed by this Court (CPLR 5501[a][1]). Thus, defendant Leo Tsimmer's arguments that plaintiff failed to negotiate a loan modification in good faith,

which were addressed by Supreme Court's March 28, 2016 order and not reviewed by this Court, may be considered. These arguments are unavailing.

CPLR 3408(f) states that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, . . . if possible." Although the term "good faith" is not defined by the statute, the determination of good faith is based on the "totality of the circumstances" (*Citibank, N.A. v Barclay*, 124 AD3d 174, 176, 177 [1st Dept 2014] [internal quotation marks omitted]). "[T]here are situations in which the statutory goal is simply not financially feasible for either party" and "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith" (*id.*).

The totality of the circumstances here shows that plaintiff negotiated in good faith with Tsimmer, but ultimately denied the loan modification as unaffordable based on Tsimmer's annual income and the unpaid principal balance of the loan. There is no

basis to disturb that determination.

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

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4631 In re James K. T.,
Petitioner-Appellant,

-against-

Laverne W.,
Respondent-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Andrew J. Baer, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about September 16, 2016, which, after a hearing, inter alia, granted petitioner father supervised day-visitation only, upon two weeks' notice to respondent mother, unanimously affirmed, without costs.

The testimony of the expert forensic psychologist and both parties provides a sound and substantial evidentiary basis for Family Court's determination that there has been no change in circumstances warranting modification of existing orders and that it is not in the best interests of the subject child for petitioner to have unsupervised visitation with him (*see Matter of Mohamed Z.G. v Mairead P.M.*, 129 AD3d 516 [1st Dept 2015]).

Following a history of domestic violence, in 2012, two orders of protection were in place prohibiting petitioner from being in contact with the child for five years; petitioner had twice been convicted of violating orders of protection. The forensic evaluation concluded that petitioner was unable to place the child's needs above his own anger against respondent, and that he is unable to control his rage and maintains the belief that respondent, Family Court and the New York Police Department have colluded against him to deny him access to the child. He was unable to control his behavior during the forensic evaluation and in court, when he knew he was being observed (*see Matter of Arcenia K. v Lamiek C.*, 144 AD3d 610 [1st Dept 2016]). In addition, the then-16-year-old child had expressed a desire to remain in respondent's care and visit petitioner only in New York, supervised by a maternal relative. Petitioner, who has

rejected the supervised visitation he has been granted over the years, has seen or communicated with the child only a few times in the past decade.

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4632 The People of the State of New York, Ind. 2351/13
Respondent,

-against-

Anthony Crump,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (David Loftis of counsel) and Davis Polk & Wardwell LLP, New York (Ilan Stein of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered April 28, 2015, as amended June 4, 2015, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 10 years, unanimously affirmed.

The court properly denied defendant's motion to suppress a showup identification. Contrary to defendant's contention, the testimony of an officer who did not personally detain defendant was sufficient in this case to meet the People's burden of going forward with respect to the issues raised at the suppression hearing. The evidence permits no other inference than that the nontestifying officer who detained defendant acted upon the

victim's description of his assailants (*see People v Gonzalez*, 91 NY2d 909, 910 [1998]; *People v Williams*, 52 AD3d 526 [1st Dept 2008], *lv denied* 11 NY3d 743 [2008]). At the hearing, defendant did not raise any issue that might require the testimony of the uncalled witness. In particular, defendant did not claim that the actions of the nontestifying officer constituted a full-blown arrest, or raise any question about the level of intrusion; in any event, even assuming, as defendant asserts, that the nontestifying officer may have handcuffed defendant, this would not necessarily elevate a seizure based on reasonable suspicion to an arrest requiring probable cause in view of the need to protect the safety of the officers and bystanders (*see People v Foster*, 85 NY2d 1012, 1014 [1995]; *People v Allen*, 73 NY2d 378, 379-380 [1989]).

None of defendant's other challenges to the showup warrant suppression. Defendant matched a description of one of the robbers that was sufficiently specific to provide at least reasonable suspicion, notwithstanding that defendant's apprehension did not occur immediately after the robbery (*see e.g. People v Applewhite*, 298 AD2d 136 [1st Dept 2002], *lv denied* 99 NY2d 625 [2003]; *People v Harmon*, 293 AD2d 303 [1st Dept 2002], *lv denied* 98 NY2d 676 [2002]). The showup was conducted

as part of a continuous ongoing investigation, within the constitutionally permissible range of temporal and spatial proximity to the incident (*see People v Howard*, 22 NY3d 388, 402 [2013]; *People v Brisco*, 99 NY2d 596, 597 [2003]). The procedure was not unduly suggestive, because "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" (*People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]).

The court providently exercised its discretion in receiving relevant background evidence about the investigative steps taken by the police in attempting to arrest another participant in the crime. Defendant's general objections, or objections on the sole ground of relevance, failed to preserve his present hearsay and Confrontation Clause arguments, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits (*see Tennessee v Street*, 471 US 409 [1985]).

Defendant's remaining contentions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: OCTOBER 10, 2017

CLERK

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4635 The People of the State of New York, Ind. 3612/15
Respondent,

-against-

Ramell Drayton,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Meaghan L. Powers of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam Best, J.), rendered July 11, 2016,

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

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

ENTERED: OCTOBER 10, 2017

CLERK

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

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4636 The People of the State of New York, Ind. 4208/12
Respondent,

-against-

Jonathan Velez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Stephen J. Kress of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 6, 2015,

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

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

ENTERED: OCTOBER 10, 2017

CLERK

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

Richter, J.P., Gische, Kapnick, Kahn, Kern, JJ.

4637 The People of the State of New York, Respondent, Ind. 3527/13

-against-

Marvin Roberts, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered on or about November 25,2014, as amended January 2, 2015, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 10, 2017

CLERK

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

4074 & M-5645 In re GKK 2 Herald LLC, Petitioner,

-against-

The City of New York Tax Appeals Tribunal, et al., Respondents.

OP 82/16

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Amy H. Bassett of counsel), for respondents.

Determination of respondent City of New York Tax Appeals Tribunal, dated July 15, 2016, confirmed, the petition denied, and the proceeding pursuant to CPLR article 78, dismissed, without costs.

Opinion by Kahn, J. All concur.

Order filed.