SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

October 19, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4588 The People of the State of New York, Ind. 640/12
Respondent,

-against-

Randy Swinson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 25, 2013, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the second degree, criminal mischief in the third degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of nine years, unanimously modified, on the law, to the extent of vacating the burglary conviction and dismissing that count of the indictment, and otherwise affirmed.

The evidence adduced at trial was legally insufficient to support defendant's conviction of burglary in the first degree.

Even viewed in the light most favorable to the People, the evidence did not support an inference that defendant harbored the intent to commit a crime "contemporaneous with the entering or remaining" in the premises (*see People v Jones*, 184 AD2d 383, 384 [1st Dept 1992]).

Testimony established that defendant and complainant wife married in August 2008. While the couple listed the residence as their address, defendant did not reside there on a permanent basis and was not a tenant of record. On the day of the incident, after being allowed into the premises the night before, when asked to leave the premises, defendant refused to do so, assaulted the complainant and damaged property in the premises.

Defendant does not assert that he had a right to be in the marital residence and concedes that his prior license to be in the premises is not dispositive of his right to be there at the time of the incident. Defendant argues, however, that he could not be deemed to have committed burglary where the request to leave and subsequent assault was part of an escalating dispute. We agree.

A person is guilty of burglary in the first degree when he or she "knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein" and "[c]auses physical injury to any person who is not a participant in the crime" (Penal Law §

140.30[2]).

"The purpose of the burglary statute is to protect against the specific dangers posed by entry into secured premises of intruders bent on crime" (*People v Thompson*, 116 AD2d 377, 380 [2d Dept 1986]). The "'remains unlawfully' language" was "principally intended to address circumstances involving an 'unauthorized remaining in a building after lawful entry'" (*People v Konikov*, 160 AD2d 146, 152 [2d Dept 1990], *lv denied* 76 NY2d 941 [1990], citing *People v Gaines*, 74 NY2d 358, 362 [1989]).

Here, the evidence, viewed in the light most favorable to the People, does not support the inference that defendant harbored the intent to assault the complainant when she ordered him to leave. Rather, a reasonable inference to be drawn from the events surrounding the assault is that defendant spontaneously committed violence, which does not fall within the

intended scope of the burglary statute (*see People v Green*, 24 AD3d 16, 18-19 [3d Dept 2005]; *People v Bowen*, 17 AD3d 1054, 1055 [4th Dept 2005], *lv denied* 5 NY3d 759 [2005]). In light of the foregoing, we need not reach defendant's remaining argument.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4713 The People of the State of New York, Respondent-Respondent, Ind. 3877/11

-against-

Odell B.-P., Defendant-Appellant.

_____

Michael D. Neville, Mental Hygiene Legal Service, Orangeburg (Laura Rothschild of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about April 1, 2015, which found that defendant currently suffers from a dangerous mental disorder and committed him to the custody of the Commissioner of Mental Health for confinement in a secure psychiatric facility for six months, unanimously affirmed, without costs.

After defendant was charged with possession of ammunition and criminal possession of a weapon in the second, third and fourth degrees, he was examined by a psychiatrist hired by the prosecutor and a psychologist hired by the defense. Based on their reports, the trial court accepted a plea of not responsible by reason of mental disease or defect. Thereafter, in accordance with CPL 330.20(2), the court immediately issued an examination order for defendant to be examined by two qualified psychiatric

examiners. Both doctors concluded that defendant was dangerously mentally ill and required confinement in a secure facility.

We find that defendant received the effective assistance of counsel at the initial hearing, which was properly conducted in accordance with CPL 330.20(6). At the hearing, defense counsel explained that she would not challenge the findings that defendant was dangerously mentally ill because the defense psychologist who examined defendant before his plea had told counsel that he would not contest the findings. Defense counsel's decision not to challenge the findings did not deny defendant of "meaningful representation" at the initial hearing, as counsel cannot be deemed ineffective for failing to make an argument that had little or no chance of success (*People v Caban*, 5 NY3d 143, 152 [2005]).

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4714 In re Alberto Baudo, Index 159283/16
Petitioner-Appellant,

-against-

New York State Industrial
Board of Appeals, et al.,
Respondents-Respondents.

_____

Meyers Fried-Grodin LLP, New York (Jonathan Meyers of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Donya Fernandez of counsel), for respondents.

_____

Determination of respondent Industrial Board of Appeals (IBA), dated September 14, 2016, which, after a hearing, directed respondent Commissioner of Labor to recalculate a wage order, dated November 14, 2014, and issue an amended wage order, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Barbara Jaffe, J.], entered January 9, 2017), dismissed, without costs.

Petitioner commenced this proceeding seeking to annul a determination of the IBA, which affirmed an order of the Commissioner of Labor insofar as it directed him to pay unpaid wages, interest, and liquidated damages in regard to four former employees of a restaurant in which he formerly held an ownership

interest. Petitioner bore the burden of proof to demonstrate error before the IBA (*see* 12 NYCRR 65.30; *Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD3d 1120, 1121 [1st Dept 2014]). Where an employer fails to keep contemporaneous records of employees', inter alia, hours worked, rate of pay, and wages earned or to provide employees with wage statements showing such information with each payment of wages, the employer bears the burden of proving paid wages (Labor Law §§ 195[3],[4]; 196-a[a]). Here, where petitioner failed to do so, the IBA is entitled to rely on other evidence, even though the results may be an approximation (*see Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169 [1st Dept 1998]).

The conflict in the evidence here, including the hours worked by the claimants, presented a question of credibility, which, once resolved against petitioner, provided substantial evidence to support the IBA's findings (*see Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 819 [3d Dept 1989]). Other than setting forth flawed calculations based on his own testimony regarding the hours claimants worked, which fails to account for overtime and spread pay, petitioner does not identify any alleged error made by the IBA in its calculation of underpayments to claimants. Furthermore, as petitioner bore the evidentiary burden before the IBA, we reject his contention that because

claimant Garcia did not testify at the hearing, his claim should have been dismissed. In this regard, we note that "[h]earsay evidence can be the basis of an administrative determination and, if sufficiently probative, it alone may constitute substantial evidence" (*Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007] [internal quotation marks omitted]; *see Matter of Aldeen v Industrial Appeals Bd.*, 82 AD3d 1220 [2d Dept 2011]).

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

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4715 In re Aniyah G.,

- - - - -

Derik G., et al.,
Petitioners-Respondents,

-against-

Anthony T.,
Respondent-Appellant,

Nakel B.,
Respondent.

_____

Bruce A. Young, New York, for appellant.

Paul Hastings LLP, New York (Molly L. Leiwant of counsel), for respondents.

George E. Reed, White Plains, attorney for the child.

_____

Order, Family Court, Bronx County (Llinet Rosado, J.), entered on or about May 9, 2016, which, after a consent hearing, determined that respondent father was not a consent father as defined in Domestic Relations Law (DRL) § 111(1)(d), and that he abandoned the child as per DRL § 111(2)(a), unanimously affirmed, without costs.

Clear and convincing evidence supports Family Court's determination that respondent failed to maintain substantial and continuous or repeated contact with the child, and therefore was a notice only parent for the purposes of the child's adoption by petitioners (Domestic Relations Law § 111(1)(d). Contrary to

respondent's contention, there exists no basis to disturb the court's finding that respondent's unsubstantiated accounts of financial support were not credible, and, even by the respondent's own account, his contact with the child over the years was minimal (*see Matter of Michael M. [Michael M., Sr.]*, 103 AD3d 423, 423 [1st Dept 2013]). As such, there was no need for the Family Court to further determine whether respondent forfeited his right to consent to the adoption under DRL § 111(2)(a)(*see Matter of Andrew Peter H.T.*, 64 NY2d 1090, 1091 [1985]).

The order appealed from did not dismiss respondent's petitions for an order providing for sibling visitation, so that issue is not before this Court on this appeal. We have considered respondent's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4716 In re Jonathan Coleman, Index 101143/15
Petitioner-Respondent,

-against-

The New York City Department of Education Division of Human Resources, et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for appellants.

Neighborhood Defender Service of Harlem, New York (Emily Ponder of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered June 1, 2016, which granted the petition to annul the determination of respondent Department of Education (DOE), dated February 12, 2015, denying petitioner's application for security clearance for a position as a public school cleaner, and remanded the matter for further proceedings, unanimously reversed, on the law, the determination confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

The denial of petitioner's application for security clearance for a position as a public school cleaner has a rational basis in the record and was not arbitrary and capricious (*see Matter of Dempsey v New York City Dept. of Educ.*, 25 NY3d

291, 300 [2015]; *see also Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363-364 [1999]). The finding that petitioner's misdemeanor conviction caused grave concern when considering his moral character, and indicated poor judgment and reckless behavior, is supported by the facts surrounding his 2009 conviction for petit larceny in violation of Penal Law § 155.25. This conviction bears a direct relationship to petitioner's application for security clearance (Correction Law § 752[1]), and DOE rationally concluded that petitioner's employment would pose an unreasonable risk to property or the safety and welfare of specific individuals or the general public (Corrections Law § 752[2]).

The record demonstrates that DOE properly considered the factors enumerated in article 23-A of the Correction Law (*see Matter of Arrocha*, 93 NY2d at 364-365; *Matter of Persaud v New York State Off. of Children & Family Servs.*, 114 AD3d 492 [1st Dept 2014]), and the fact that DOE afforded greater weight to factors unfavorable to petitioner than to those favorable to him does not warrant the conclusion that it did not consider the favorable factors (*see Arrocha* at 366-367). Furthermore, while petitioner's certificate of relief from disabilities creates "a presumption of rehabilitation" (Correction Law § 753[2]), it does not establish an entitlement to employment (*see Matter of*

Bonacorsa v Van Lindt, 71 NY2d 605, 614 [1988]).

Petitioner's separate failures to disclose his prior termination and criminal record, in violation of DOE's rules and regulations, provide independent and rational bases for denying security clearance (*see e.g. Matter of Sindone v City of N.Y.*, 2 AD3d 125, 126 [1st Dept 2003]).

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4717 Luis Cortes, Index 107042/10
Plaintiff-Appellant,

-against-

Skanska USA Civil Northeast, Inc.,
Defendant-Respondent,

Silverstein Properties, Inc.,
Defendant.

_____

Sobo & Sobo, LLP, Middletown (Gregory M. Sobo of counsel), for appellant.

Segal McCambridge Singer & Mahoney, Ltd., New York (Robert R. Rigolosi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 6, 2016, which, upon reargument, granted defendant Skanska USA Civil Northeast, Inc.'s motion to dismiss and for summary judgment dismissing the complaint as against it, and denied as academic plaintiff's motion for partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims, unanimously affirmed, without costs.

As it is undisputed that plaintiff's fall off a stair tower occurred during the scope of his employment with Phoenix Constructors, a joint venture, and that defendant Skanska is a member of the joint venture, plaintiff's exclusive remedy against Skanska is workers' compensation (*see Burlew v American Mut. Ins.*

Co., 63 NY2d 412, 416 [1984]; *Felder v Old Falls Sanitation Co.*, 39 NY2d 855 [1976]).

Plaintiff's reliance upon *Samuel v Fourth Ave. Assoc., LLC* (75 AD3d 594 [2d Dept 2010]) and *Mournet v Educational and Cultural Trust Fund of Elec. Indus.* (303 AD2d 474 [2d Dept 2003]) is misplaced, since these cases turned on whether the defendant was an alter ego of the employer so as to be entitled to invoke the exclusivity provisions of the Workers' Compensation Law. To the extent plaintiff argues that the exclusivity provisions do not apply here because Skanska purportedly owed him a duty independent of its capacity as a member of the joint venture, the Court of Appeals has rejected this argument as "fundamentally unsound" (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 159 [1980]). "[A]n employer remains an employer in his relations with his employees as to all matters arising from and connected with their employment. He may not be treated as a dual legal personality, 'a sort of Dr. Jekyll and Mr. Hyde'" (*id.* at 160).

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4720 The People of the State of New York, Respondent, Ind. 2251/10

-against-

Eric Jackson, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

_____

Order, Supreme Court, Bronx (Megan Tallmer, J.), entered on or about May 31, 2013, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant, such as those relating to the facts of the crime and defendant's subsequent good behavior, were adequately taken into account by the risk assessment instrument. Even accepting defendant's argument that the assessment of 30 points for a prior violent felony involving no actual violence may have been excessive, we note that in denying a departure the court properly considered defendant's multiple misdemeanor weapon possession convictions

and his prior misdemeanor assault conviction.

We find no basis to conclude that the court employed the wrong standard in analyzing defendant's request for a downward departure.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4721-
4722-
4723

File 914/09

In re Will of
Miriam Schwartz, Deceased.

- - - - -

Gloria Schwarz,
Objectant-Appellant,

-against-

Andrea Namanworth,
Proponent-Respondent.

_____

Marzano Lawyers PLLC, New York (Naved Amed of counsel), for appellant.

McLaughlin & Stern, LLP, New York (Alan E Sash of counsel), for respondent.

_____

Decree, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered on or about September 6, 2016, admitting the decedent's will into probate, unanimously affirmed, without costs. Appeals from orders, same court and Surrogate, entered November 2, 2016, and on or about July 25, 2016, which granted proponent's motion for summary judgment dismissing the objections and denied objectant's motion and, insofar as appealed from, denied objectant's motion for reargument, unanimously dismissed, without costs, as subsumed in the appeal from the decree and nonappealable, respectively.

Proponent established prima facie that the decedent's will

was duly executed by submitting the attesting witnesses' affidavits and the statements of the attorney who supervised the execution ceremony (*see* SCPA 1408; *Matter of Halpern*, 76 AD3d 429, 431 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). Objectant failed to raise an issue of fact, citing no evidence of a material irregularity in the proceeding or of a lack of testamentary capacity on the decedent's part (*see Matter of Korn*, 25 AD3d 379 [1st Dept 2006]).

Nor did objectant raise an issue of fact as to undue influence or fraud (*see Matter of Schuman*, 132 AD3d 551 [1st Dept 2015]). The close familial relationship between the decedent and proponent counterbalances any inference of undue influence. Moreover, in light of the evidence that the decedent relied on proponent for assistance with daily living for a long time, her grant to proponent of a power of attorney does not shift the burden to proponent to explain the challenged bequests. In any event, proponent fully explained the bequests as a product of the decedent's grievances against objectant. As to fraud, objectant failed to present evidence of any false statements made to the decedent by proponent or her agents that caused the decedent to change her will.

No appeal lies from the denial of a motion for reargument (*see Lopez v Post Mgt. LLC*, 68 AD3d 671 [1st Dept 2009]).

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

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4724 The People of the State of New York, Respondent, Ind. 1913/11

-against-

Sammy Sampson, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered March 28, 2014, convicting defendant, after a jury trial, of assault in the second degree as a hate crime, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant's arguments concerning the sufficiency and weight of the evidence, in which he highlights discrepancies in the victim's account of the crime, and defendant's challenge to the admissibility of an alleged prior consistent statement, are substantially similar to arguments this Court rejected on a codefendant's appeal (*People v Coney*, 146 AD3d 429 [1st Dept 2017]). We find no significant difference in the evidence against the two defendants, and no reason to reach a different result on this defendant's appeal.

Defendant did not preserve his claim that the court failed to respond to a jury note requesting the readback of testimony (*see People v Mack*, 27 NY3d 534 [2016]), and we decline to review in the interest of justice. As an alternative holding, we find that, after the court advised the jury that it would begin the process of arranging for the readback, the jury instead reached a verdict, and thus "[b]y promptly reaching a verdict without any further inquiry, the jury implicitly indicated that it no longer needed the information requested" (*People v Cornado*, 60 AD3d 450, 451 [1st Dept 2009], *lv denied* 12 NY3d 913 [2009]; *see also People v Fuentes*, 246 AD2d 474, 475 [1st Dept 1998], *lv denied* 91 NY2d 941 [1998]).

Defendant's claim that his trial counsel rendered ineffective assistance by failing to object to the court's taking of the verdict without providing the readback is unreviewable on direct appeal because it involves matters of strategy not reflected in, or fully explained by, the record (*see People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal

standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4725-
[M-4533] In re Aetna Inc., Petitioner, -against- The New York City Tax Appeals Tribunal, et al., Respondents. OP 70/16

_____

McDermott Will & Emery, New York (Peter L. Faber of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Martin Nussbaum of counsel), for respondents.

_____

Decision of respondent New York City Tax Appeals Tribunal, dated June 3, 2016, which reinstated Notices of Disallowance for petitioner's New York City General Corporation Tax (GCT) returns for the calendar years 2005 and 2006, unanimously confirmed, the petition denied and the proceeding, commenced in this Court pursuant to CPLR 506(b)(4) and article 78, dismissed, without costs.

The Tribunal's decision that under the relevant statutory scheme, petitioner's subsidiary health maintenance organizations were subject to the GCT during the period in issue is rational and supported by substantial evidence, and is thus entitled to

deference (*see 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]).

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4726 In re Aliah F.,

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

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for presentment agency.

_____

Appeal from order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about October 21, 2016, which, upon appellant's admission to violation of probation, revoked a prior order of disposition that had placed appellant on probation, and instead placed her with the Administration for Children's Services Close to Home program for a period of 12 months, less her time spent in detention pending disposition, unanimously dismissed, without costs, as moot.

Appellant's challenge to the court's dispositional order is moot because she has already completed her placement (*see e.g. Matter of Omari W.*, 104 AD3d 460 [1st Dept 2013]). Although appellant asserts that this appeal is not moot because a juvenile delinquency adjudication has collateral consequences, she is not actually challenging the underlying adjudication. Instead, she

is claiming that the dispositional hearing following her admission that she had violated her probation was procedurally defective, and that the ensuing dispositional order failed to give her proper credit for time in detention. Both of those claims were rendered moot by the completion of the placement and are, in any event, unavailing.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4729- Ind. 1947/14
4729A The People of the State of New York, 3127/14
Respondent,

-against-

Malik Mathis,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about October 8, 2015,

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

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

ENTERED: OCTOBER 19, 2017

CLERK

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

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

4730 The People of the State of New York, Respondent, Ind. 6436/06

-against-

Karejaah Cornelius, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered February 29, 2008, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 17½ years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis

for disturbing the jury's credibility determinations, including its evaluation of alleged inconsistencies and the fact that some witnesses received benefits for their testimony.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4731 Charles Foster, Index 302861/08
Plaintiff-Appellant,

-against-

Port Authority of New York & New Jersey,
Defendant-Respondent.

_____

Hofmann & Schweitzer, New York (Timothy F. Schweitzer of counsel), for appellant.

Karla Denalli, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 8, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the claim under the Federal Employers' Liability Act (FELA) (45 USC § 51 *et seq.*) and the claim for common-law negligence, unanimously modified, on the law, to deny the motion as to the FELA claim, and otherwise affirmed, without costs.

Defendant is not entitled to summary judgment dismissing the FELA claim. In its capacity as the operator of an interstate railway transit system, defendant may be subject to liability as an interstate "common carrier by railroad" within the meaning of FELA if the alleged negligent act is committed in connection with defendant's interstate railway commerce operations (*see*

Zuckerberg v Port Auth. of N.Y. & N.J., 75 AD3d 503, 505 [2d Dept 2010]). It cannot be said as a matter of law that the alleged negligent act here — namely, defendant's decision to continue plaintiff's employment as a machinist despite plaintiff's disability — is divorced from defendant's railway operations. In addition, there is evidence that defendant had significant supervisory control over plaintiff's employment, because defendant's doctors evaluated plaintiff's physical condition and determined the restrictions to be applied to plaintiff's job duties; such supervisory control may be sufficient to bring plaintiff within the ambit of FELA (*see Smith v Metropolitan Transp. Auth.*, 226 AD2d 168 [1st Dept 1996], *lv denied* 89 NY2d 803 [1996], *cert denied* 520 US 1186 [1997]).

As to any statue of limitations argument, we note that defendant did not plead that defense. In any event the last injury plaintiff attributed to defendant's negligence manifested around June 2005, and the complaint was filed in April 2008, which is within the three-year statute of limitations (*see Anderson v BNSF Ry.*, 380 Mont 319, 337 [2015], cert denied _US_, 136 S Ct 1493 [2016]).

Because FELA "wholly preempts State-law remedies for railway employees injured in the course of employment" (*Ganci v Port Auth. Trans-Hudson Corp.*, 258 AD2d 386 [1st Dept 1999], *appeal*

dismissed 93 NY2d 965 [1999]), and because the standards applied when deciding a FELA claim are similar to those applied in common-law negligence actions, but "are substantially relaxed" (*Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 [1st Dept 2005]), plaintiff's duplicative common-law negligence claim is not reinstated.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4732 The People of the State of New York, Respondent, Ind. 4305/14

-against-

Joseph Giacchi, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 2, 2015, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree (three counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

Defendant did not preserve his claim that the court failed to apprehend and exercise its discretion to depart from a promised sentence (*see People v McHale,* 165 AD2d 800 [1st Dept 1990], *lv denied* 76 NY2d 1023 [1990]). While defendant characterizes his claim as one of unlawful sentencing, he is essentially arguing that a substantively lawful sentence was imposed by way of a defective procedure, and such claims require preservation (*People v Samms*, 95 NY2d 52, 58 [2000]). As a

result of the lack of preservation, the court was never called upon to clarify its statement as to sentence, which is subject to several interpretations. We decline to review this argument in the interest of justice.

As an alternative holding, we find that to the extent the court may be viewed as expressing an erroneous belief that it lacked sentencing discretion after defendant's negotiated plea, remand for resentencing is unwarranted because the record fails to indicate any possible harm flowing from the court's alleged error, such as an indication of reservation about the fairness of the sentence to be imposed (*see People v Farrar*, 52 NY2d 302, 305 [1981]; *People v Diaz*, 304 AD2d 468 [1st Dept 2003], *lv denied* 100 NY2d 561 [2003]).

We do not find that defendant made a valid waiver of his right to appeal. In any event, we perceive no basis for reducing his sentence.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4733 The People of the State of New York, Ind. 2390/14
Respondent,

-against-

Moises Reyes,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen 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 (Robert Torres, J.), rendered on or about March 23, 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 19, 2017

CLERK

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

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

4734-		Ind. 3498/14
4734A-		2010/15
4734B-		2404/15
4734C	The People of the State of New York, Respondent,	2247/15

-against-

James Cabral,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Alvin Yearwood, J.), rendered on or about June 27, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: OCTOBER 19, 2017

CLERK

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

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

4735 The People of the State of New York, Respondent, Ind. 950/13

-against-

Arnold Moye, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered November 10, 2015, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 11 years, with five years' postrelease supervision, unanimously affirmed.

Viewed as a whole, including the supplemental instructions, we find that the court's instructions conveyed the correct standard on the crime of first-degree robbery, including the element of the threatened use of a dangerous instrument (*see* Penal Law § 160.15[3]; *People v Ladd*, 89 NY2d 893, 895-896 [1996]; *see also People v Melendez*, 242 AD2d 493, 494 [1st Dept 1997]). The court properly explained that display of an instrument alone is not enough, and that display of the

instrument must be accompanied by circumstances that convey a threat of immediate use (*see People v Pena*, 50 NY2d 400, 407 n 2 [1980], *cert denied* 449 US 1087 [1981]; *People v Sharma*, 112 AD3d 494, 495 [1st Dept 2013], *lv denied* 23 NY3d 1025 [2014]).

The positioning of a court officer behind defendant when he testified was minimally intrusive and did not deprive defendant of a fair trial (*see People v Gamble*, 18 NY3d 386, 397 [2012]). In any event, if there was error involving the court's decision on courtroom security, it was harmless given the overwhelming evidence of guilt (*see People v Clyde*, 18 NY3d 145, 153-154 [2011], *cert denied* 566 US 944 [2012]; *People v Lucas*, 131 AD3d 875, 876 [1st Dept 2015], *lv denied* 26 NY3d 1090 [2015]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 19, 2017

CLERK

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

4736 The People of the State of New York, Respondent, Ind. 2704/13

-against-

David Priester, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Steven Barrett, J.), rendered on or about March 5, 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 19, 2017

CLERK

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

4737N-
4737NA Trust Mortgage, LLC, Index 650699/15
Plaintiff-Appellant,

-against-

Peter Andrews, et al.,
Defendants-Respondents,

Stelis, LLC,
Defendant.

_____

Levi Huebner & Associate, PC, Brooklyn (Levi Huebner of counsel), for appellant.

Paul W. Verner, New York, for respondents.

_____

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 1, 2015, which, for the reasons stated on the hearing record, granted the motion of defendants Peter Andrews, Gregory Palmer a/k/a Greg Palmer, DBI Coinvestment Fund VIII, LLC, DBI Coinvestor Fund VIII LLC and Dreambuilder Investments, LLC to have their late-filed answer deemed timely, and denied plaintiff's motion for a default judgment, unanimously affirmed, without costs.

As it is clear from the record that defendants intended to contest this matter, and in fact submitted two answers, albeit with technical defects, prior to plaintiff filing the amended complaint, and in light of the lack of prejudice caused to

plaintiff by defendants' brief delay in answering the amended complaint, Supreme Court did not abuse its discretion in granting the cross motion to compel plaintiff to accept service of the late answer (*see Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417 [1st Dept 2016]). We have considered appellant's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4738 The People of the State of New York, Ind. 470/14
Respondent,

-against-

Harry Hicks,
Defendant-Appellant.

_____

Rosemary Herbert,, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about March 4, 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 19, 2017

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4739 In re Christina McK.
Petitioner-Respondent,

-against-

Kyle S.,
Respondent-Appellant.

_____

Neal D. Futerfas, White Plains, for appellant.

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

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the child.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 10, 2016, which denied respondent's motion to vacate an order of filiation entered upon his default, unanimously affirmed, without costs.

The court properly exercised its discretion in denying the motion to vacate the default (*see Matter of Tyieyanna L. [Twanya McK.]*, 94 AD3d 494, 494-495 [1st Dept 2012]; *Matter of Jones*, 128 AD2d 403, 404 [1st Dept 1987]). Respondent's claim that he did not appear at the December 11, 2015 hearing because he was under a mistaken belief as to the next hearing date was insufficient to establish a reasonable excuse and belied by the transcript of the October 2, 2015 hearing, which showed he was present when the next hearing date was selected and told by his counsel that he

was required to appear (*see Matter of Brittany J.*, 235 AD2d 310, 311 [1st Dept 1997], *lv dismissed* 89 NY2d 1086 [1997]; *Bicknell v Bicknell*, 214 AD2d 598, 598-599 [2d Dept 1995]). Respondent's failure to maintain contact with his attorney and to keep himself apprised of the status of the hearing date demonstrated that his default was due to his overall lack of attention to the proceeding (*see Sheikh v New York City Tr. Auth.*, 258 AD2d 347, 348 [1st Dept 1999]).

Because respondent failed to proffer a reasonable excuse for his default, we need not determine whether there existed a meritorious defense to the petition (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 429 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]).

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4740- Index 103612/12
4741 In re United Federation 401937/12
of Teachers, etc.,
Petitioner-Appellant,

-against-

City of New York,
Respondent-Appellant,

New York City Board of Collective
Bargaining, et al.,
Respondents-Respondents.

- - - - -

In re The City of New York, et al.,
Petitioners-Appellants,

-against-

The United Federations of Teachers, etc.,
Respondent-Appellant,

Jose E. Morales, et al.,
Respondents-Respondents,

Michael Mulgrew,
Respondent-Respondent.

_____

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for The United Federation of Teachers, appellant, and Michael Mulgrew, respondent.

Zachary W. Carter, Corporation Counsel, New York (Megan E. K. Montcalm of counsel), for the City of New York appellants.

Michael T. Fois, New York, for New York City Board of Collective Bargaining, New York City Office of Collective Bargaining and Marlene Gold, respondents.

Law Office of Noah A. Kinigstein, New York (Noah A. Kinigstein of counsel), for Jose Morales, respondent.

_____

Judgments, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 21, 2016, denying the petitions seeking, among other things, to annul a determination of respondent New York City Board of Collective Bargaining (the Board), dated July 10, 2012, which found that petitioner United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) breached the duty of fair representation it owed to respondent Jose Morales, and directed UFT and the City to take all necessary steps to process Morales's grievance pursuant to the contractual grievance process without accepting any defense based on the untimeliness of the appeal from the Step II decision dated July 15, 2009, and dismissing the proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Board's determination is not arbitrary and capricious, inconsistent with lawful procedures, or an abuse of discretion. The Board had a reasonable basis for concluding that UFT breached the duty of fair representation it owed to Morales by, among other things, failing to file a timely appeal from the July 15, 2009 decision terminating his employment with the New York City Police Department, following a Step II hearing under the applicable collective bargaining agreement, in the absence of any apparent excuse for UFT's failure to do so until December 11, 2009, more than four months after the expiration of the

contractual 10-business-day deadline to file an appeal from a Step II determination (*compare Young v U.S. Postal Service*, 907 F2d 305, 307-309 [2d Cir 1990], *with Matter of Civil Serv. Empls. Assn. v Public Empl. Relations Bd.*, 132 AD2d 430 [3d Dept 1987], *affd* 73 NY2d 796 [1988]).

UFT was not deprived of an opportunity to establish an excuse for its conduct, because it was obligated to set forth a statement of facts and legal arguments in its answer to Morales's second improper practice petition, and UFT had the right to submit evidence in support of that answer (*see* 61 RCNY § 1-07[c][3]). The court properly declined to consider a UFT representative's affidavit concerning his involvement in the failure to timely appeal, because it was not part of the administrative record (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

The Board reasonably rejected the argument that UFT was not required to pursue the appeal under a provision of the collective bargaining agreement stating: "If the grievant is not satisfied with the determination of the agency head or designated representative *the grievant or the Union* may appeal to the Commissioner of Labor Relations in writing within ten (10) workdays of the determination" (emphasis added). The Board interpreted that emphasized language to permit the union to

decline to pursue a grievance in the first place, but not to excuse a union from exercising diligence in appealing from an adverse Step II determination once the union has begun to represent an employee, and we must defer to this reasonable interpretation (*see Matter of Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 114 AD3d 510, 514 [1st Dept 2014], *lv denied* 23 NY3d 904 [2014]).

The Board did not violate a lawful procedure by declining to hold a hearing (*see* 61 RCNY § 1-07[c][8]).

The City's arguments that the Board's decision granted an improper remedy and exceeded the Board's authority by effectively vacating an arbitration award that had already been confirmed by a court are unpreserved, and this Court has "no discretionary authority" to "reach[] an unpreserved issue in the interest of justice" in an article 78 proceeding challenging an administrative determination (*Matter of Khan v New York State*

Dept. of Health, 96 NY2d 879, 880 [2001] [internal quotation marks omitted]). We have considered and rejected the City's arguments concerning preservation.

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4742 Wing Hon Precision Industry Ltd., Index 652952/13
Plaintiff-Appellant,

-against-

Diamond Quasar Jewelry, Inc.
doing business as Jacob & Co., et al.,
Defendants-Respondents.

_____

Murphy & James, LLC, Pearl River (Jonathan T. Uejio of counsel), for appellant.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered May 5, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff summary judgment on its account stated cause of action, and denied plaintiff summary judgment dismissing the sixth and seventh counterclaims, and the third, sixth, seventh, and ninth through seventeenth affirmative defenses, unanimously modified, on the law, to grant plaintiff summary judgment on the account stated claim, except with respect to the three invoices seeking payment for defective cufflinks; grant plaintiff summary judgment dismissing the sixth and seventh counterclaims and the third, sixth, seventh, ninth, sixteenth and seventeenth affirmative defenses, except with respect to the defective cufflinks; grant plaintiff summary judgment dismissing

the tenth through fifteenth affirmative defenses and the first through fifth counterclaims, and as so modified, affirmed, without costs.

Defendants raised a triable issue of fact as to the account stated claim insofar as it is directed to the three invoices seeking payment for the cufflinks. They produced an email showing that they objected to these products, which were defective and in need of repair.

Defendants concede in their answer that they did not object to 33 separate invoices, representing an unpaid balance of $245,368.08. Further, the affidavit of Jacob Arabov, the president of defendant Jacob & Company Watches, Inc., fails to raise a triable issue of fact as to Arabov's alleged oral objections to the remaining invoices (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]). Thus, plaintiff is entitled to summary judgment on the account stated claim, except with respect to the three invoices seeking payment for the defective cufflinks.

For the same reasons, the sixth counterclaim/sixteenth affirmative defense (breach of contract) and seventh counterclaim/seventeenth affirmative defense (breach of warranty) and the third, sixth, seventh, and ninth affirmative defenses are dismissed, except with respect to the defective cufflinks.

The eleventh through fifteenth affirmative defenses,

alleging various violations of defendants' intellectual property rights, are dismissed. Plaintiff made a prima facie showing that defendants were aware as early as May 2010 that plaintiff was manufacturing certain watches in collaboration with two overseas companies, yet failed to object. Defendants failed to raise a triable issue of fact concerning their allegation that they did not authorize the manufacture of the watches. Although plaintiff did not separately move to dismiss the first through fifth counterclaims, they are identical to, and asserted together with, the eleventh through fifteenth affirmative defenses. Therefore, we dismiss those counterclaims as well.

The tenth affirmative defense, asserting a violation of Business Corporation Law § 1312, is dismissed as abandoned by the defendants as they have failed to address the dismissal of such affirmative defense in their appellate briefs (*see Derico v City of New York*, 66 AD2d 740 [1st Dept 1978]).

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4745 The People of the State of New York, Ind. 805N/15
Respondent,

-against-

Orson Valdez-Allen,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Oliver McDonald 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 (Abraham Clott, J.), rendered April 13, 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 19, 2017

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4746 AIG Property Casualty Company as subrogee of Donstev, LLC, etc., Plaintiff-Respondent, Index 152390/15

-against-

Shweta Modi, Defendant-Appellant.

_____

Cerussi & Spring, P.C., White Plains (Christopher B. Roberta of counsel), for appellant.

Frenkel Lambert Weiss Weisman & Gordon LLP, New York (Lawrence Lambert of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 26, 2016, which, to the extent appealed from, granted plaintiff's motion to amend the complaint, unanimously reversed, on the law, without costs, and the motion denied. The Clerk is directed to enter judgment dismissing the complaint.

This subrogation action to recover payment for water damage to plaintiff's insureds' condominium unit as a result of leaks from frozen pipes in defendant's unit is precluded by the insureds' failure to procure a waiver of subrogation in the policy issued by plaintiff, as required by the condominium by-laws (*see Agostinelli v Stein*, 17 AD3d 982 [4th Dept 2005], *lv dismissed* 5 NY3d 824 [2005]). The proposed amendment to add a

cause of action premising the occurrence on defendant's breach of the unit owners' maintenance obligation under the by-laws was a mere subterfuge designed to evade the effect of the insureds' failure to obtain a subrogation provision (*see Gap v Red Apple Cos.*, 282 AD2d 119, 125-126 [1st Dept 2001]). We note that plaintiff does not point to language in the by-laws similar to the language in the commercial lease relied upon in *Viacom Intl. v Midtown Realty Co.* (193 AD2d 45 [1st Dept 1993]) in which we held that the waiver of subrogation provision did not bar a subrogation claim based on breach of contract.

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4747 The People of the State of New York, Ind. 4982/15
Respondent,

-against-

Reginald Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer 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 (Larry Stephen, J.), rendered on or about January 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 19, 2017

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4748-
4749 Martin Stoner,
Plaintiff-Appellant,

-against-

Atlantic Realty Apts.,
LLC, et al.,
Defendants-Respondents.

Index 101399/14

Martin Stoner, appellant pro se.

Horing, Welikson & Rosen, P.C., Williston Park (Jillian N. Bittner of counsel), for Atlantic Realty Apts., LLC, respondent.

Mark F. Palomino, New York (Jeffrey G. Kelly of counsel), for The New York State Division of Housing and Community Renewal, respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 23, 2015, which, to the extent appealed from, denied plaintiff's motion for an injunction, for sanctions, and for leave to amend an amended complaint, and granted defendants' cross motions to dismiss the amended complaint, and order, same court and Justice, entered on or about February 8, 2016, which, to the extent appealable, denied plaintiff's motion to renew the prior motion and cross motions, unanimously affirmed, without costs.

The motion court correctly granted the cross motions to dismiss the amended complaint, because plaintiff failed to

exhaust his administrative remedies (*see Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012], *cert denied* 568 US 1213 [2013]). Moreover, the amended complaint did not seek any relief against defendant the New York State Division of Housing and Community Renewal (DHCR).

The motion court correctly denied plaintiff's motion for injunctive relief because he failed to show a probability of success on the merits, the danger of irreparable injury, and a balance of equities in his favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

The motion court providently exercised its discretion in denying plaintiff leave to amend the amended complaint to assert a claim under 42 USC § 1983 against Woody Pascal, a DHCR official. The proposed claim is "palpably insufficient" as a matter of law (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]), since neither a state nor its officials acting in their official capacities, such as Pascal, are "person[s]" within the meaning of 42 USC § 1983 (*see Will v Michigan Dept. of State Police*, 491 US 58 [1989]).

Plaintiff's motion for renewal was properly denied because he failed to present a reasonable excuse for not presenting the new facts on the prior motion and he failed to show that the new facts would have changed the prior determination (*see* CPLR

2221[e][2], [3]; *American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006], *appeal dismissed* 2007 NY App Div LEXIS 5367 [2007]).

No appeal lies from the denial of plaintiff's motion to reargue (*see Lopez v Post Mgt. LLC*, 68 AD3d 671 [1st Dept 2009]).

We have considered plaintiff's remaining arguments, including his request for sanctions, and find them unavailing.

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4750 The People of the State of New York, Respondent, Ind. 2887/12

-against-

Malcolm McNeil, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression hearing; Robert Stolz, J. at plea and sentencing), rendered July 17, 2013, convicting defendant of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant did not preserve his argument that a photo array was unduly suggestive because he was allegedly the only person in the array not looking at the camera and because his image allegedly appeared "15 to 20%" larger than those of the fillers, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant, like the fillers in the photo array, was looking straight ahead and any difference in the photographs was not sufficient to create a substantial

likelihood that defendant would be singled out for identification (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Moreover, although suggestiveness does not turn solely on this factor (*People v Perkins*, 28 NY3d 432 [2016]), we note that the alleged deficiencies in the photo array had nothing to do with the description that had been provided by the identifying witness.

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4751 In re Victor M. N. III,
Petitioner-Appellant,

-against-

Norma G. C.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

_____

Appeal from order, Family Court, Bronx County (Annette Louise Guarino, Referee), entered on or about August 30, 2016, which modified a visitation order, unanimously dismissed, without costs, and assigned counsel's motion to withdraw granted.

We have reviewed the record and agree with assigned counsel that there are no viable arguments to be raised on appeal (*Matter of Weems v Administration for Children's Servs.*, 73 AD3d 617 [1st

Dept 2010]). The parties' child has turned 18 and thus is no longer subject to Family Court's visitation order (*see* Family Ct Act § 651[b]; *Matter of Lozada v Pinto*, 7 AD3d 801 [2d Dept 2004]).

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4752 The People of the State of New York, Ind. 394/14
Respondent,

-against-

Michael Virdree,
Defendant-Appellant.

_____

Rosemary Herbert,, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J.), rendered August 20, 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 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4753- Index 654314/12
4753A Panattoni Development Company, Inc.,
Plaintiff-Respondent,

-against-

Scout Fund 1-A, LP, et al.,
Defendants/Third-Party
Claimants-Appellants,

-against-

Panattoni Development Company, Inc., et al.,
Third-Party Defendants-
Respondents.

_____

Baker Botts L.L.P., Dallas, TX (David M. Genender of the bar of the State of Texas, admitted pro hac vice, of counsel), for appellants.

Baker & McKenzie, LLP, Chicago, IL (Daniel J. O'Connor of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 29, 2016, which granted the motion of counterclaim and third-party defendants (together, Panattoni) to dismiss the sixth counterclaim and third-party claim (fraud) pursuant to CPLR 3211, unanimously affirmed. Order (same court, Justice, and entry date), which granted Panattoni's motion for summary judgment, unanimously modified, on the law, to deny so much of the motion as sought summary judgment on the complaint and dismissal of the first and second counterclaim and third-

party claims (declaratory judgment and breach of contract, respectively), and otherwise affirmed, without costs.

Defendants/counterclaim and third-party plaintiffs (Scout) raised a triable issue of fact as to whether California State Teachers Retirement System (CalSTRS) used Principal Real Estate Investors LLC as an investment manager with respect to two joint ventures (PanCal and CP) between CalSTRS and Panattoni. Panattoni's argument that Scout has no standing to challenge CalSTRS' and Principal's interpretation of the investment management contract between them is unavailing, as it looks at the wrong contract. Scout alleges that plaintiff breached a contract – the Limited Liability Company Agreement of PI Management, LLC (LLC Agreement) – to which Scout and plaintiff are parties. The LLC Agreement includes the clause, "where the investor [CalSTRS or the subsidiaries it used for the PanCal and CP joint ventures] ... has not engaged and is not utilizing with respect to such investment [PanCal and CP] a third party investment manager." Thus, the issue of whether CalSTRS used Principal as its investment manager with respect to PanCal and CP is a question of interpreting the LLC Agreement, to which Scout is a party.

Panattoni points out that "investment manager" is not a defined term in the LLC Agreement. However, as Scout notes, an

Investment Management Agreement was entered into on the same day as the LLC Agreement. Therefore, it is appropriate to look at the Investment Management Agreement to see what the parties meant by "investment manager" (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985]).

It is not true that Scout relied solely on testimony from its expert and representatives from its parent to oppose Panattoni's summary judgment motion. On the contrary, to cite just two examples, a report of CalSTRS' Investment Committee listed Principal as an "Independent Fiduciary" with respect to PanCal, and an email from plaintiff to CalSTRS and Principal compared the services it provided to PanCal with those it provided to a fund of which it was undisputedly the investment manager.

Scout contends that its claim for breach of the duty of good faith and fair dealing (third counterclaim/third-party claim) is not duplicative of its contract claim. It argues that even if PanCal and CP were not PI Programs (*i.e.*, even if CalSTRS used Principal as its investment manager with respect to PanCal and CP), Panattoni acted in bad faith by not structuring them under PI Management, LLC (PIM). However, in its contract claim, Scout alleges that Panattoni breached the Scout Fund Master Agreement for PI Management, LLC (Master Agreement), which prohibits

Panattoni from conducting any investment management business other than through PIM. Hence, the good faith and fair dealing claim *is* duplicative of the contract claim.

Scout contends that its unjust enrichment claim (fourth counterclaim/third-party claim) should survive until trial so that it can be considered in the alternative if the factfinder determines that the parties' contracts do not cover their dispute. This argument is unavailing. No one claims that the LLC and Master Agreements do not cover the parties' dispute. Therefore, the court properly dismissed the unjust enrichment claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 388-389 [1987]).

Scout contends that its fiduciary duty claim (fifth counterclaim/third-party claim) is not duplicative of its contract claim. We are not persuaded.

The contract claim alleges breaches of two contracts: the LLC Agreement, which is governed by Delaware law, and the Master Agreement, which is governed by New York law. Scout alleges that plaintiff owes it a fiduciary duty as the managing member of PIM, a Delaware limited liability company. Therefore, we consider Delaware law on the issue of whether Scout's fiduciary duty claim is duplicative of its claim that plaintiff breached the LLC Agreement.

"[W]here a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous" (*Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010]). That is the case here: Scout's fiduciary duty claim arises out of the same facts that underlie its claim that plaintiff breached the LLC Agreement, *viz.*, plaintiff's failure to disclose the scope of PanCal and failing to timely disclose CP.

As for the Master Agreement, the parties have not briefed which law applies to the issue of whether a breach of fiduciary duty under Delaware law is duplicative of a contract claim under New York law. If Delaware law applies, Scout's claim that plaintiff breached its fiduciary duty as managing member of PIM is duplicative of its claim that plaintiff breached the Master Agreement: both are based on plaintiff's conducting investment business outside of PIM.

If New York law applies, Scout relies on *Bullmore v Ernst & Young Cayman Is.* (45 AD3d 461 [1st Dept 2007]), which says, "conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such

contract" (*id.* at 463). Immediately thereafter, however, *Bullmore* said, "*Professionals such as investment advisors, who owe fiduciary duties to their clients,* may be subject to tort liability ..., since in these instances, it is policy, not the parties' contract, that gives rise to a duty" (*id.* [emphasis added; internal quotation marks omitted]). Scout is not suing plaintiff *qua* professional investment advisor; rather, Scout is suing it as managing member of PIM, a relationship that was created by the parties' contract (the LLC Agreement).

The fraud claim alleges that Panattoni omitted to tell Scout about the CP transaction, intending for it to issue a buy-out notice omitting that transaction. However, as Panattoni pointed out below, Scout could have obviated its damages by amending the notice to include CP. More fundamentally, "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick,* 70 NY2d at 389). Panattoni's duty to disclose CP arose from contract (the LLC and Master Agreements). Furthermore, "where plaintiff is essentially seeking enforcement of the

bargain, the action should proceed under a contract theory" rather than a tort theory (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992]).

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kern, JJ.

4756 EVUNP Holdings LLC, et al., Index 650841/14
Plaintiffs-Respondents,

-against-

Jacob Frydman, et al.,
Defendants-Appellants,

Suneet Singal, et al.,
Defendants.

_____

Lewis S. Fischbein, P.C., New York (Lewis S. Fischbein of counsel), for appellants.

Asher C. Gulko, New York, for respondents.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered June 20, 2016, in plaintiffs' favor in the total sum of $29,658.43, bringing up for review an order, same court and Justice, entered November 2, 2015, which fixed the amount of attorneys' fees and costs awarded to plaintiffs as $28,033.99, unanimously reversed, on the law, without costs, the award vacated, and the matter remanded to Supreme Court for a hearing on the amount of attorneys' fees and costs, in conformance with this Court's decision.

On a prior appeal, this Court affirmed an order which, to the extent appealed from, awarded plaintiffs their costs in replying to, and moving to strike, defendants' defective motions (138 AD3d 607 [1st Dept 2016]). At that time, this Court

declined to consider defendants' challenge to the reasonableness of plaintiffs' fees, which had been awarded in a subsequent order, finding that "[w]hether the sum the court awarded was proper is not before us on this appeal" (*id.* at 607). We now determine the issue. Contrary to plaintiffs' contention, defendants' appeal from the ensuing judgment, after issuance of the underlying order, is proper (*see* CPLR 5501[a]; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

"[T]he [trial] court [] has the authority and responsibility to determine that the claim for fees is reasonable" (*Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005]). "[T]he burden of showing the 'reasonableness' of the fee lies upon the claimant" (*Matter of Karp [Cooper]*, 145 AD2d 208, 216 [1st Dept 1989][citing *Matter of Potts*, 213 AD 59, 61 [4th Dept 1925], *affd* 241 NY 593 [1925]).

Plaintiffs' failure to address any of the *Matter of Freeman* (34 NY2d 1, 9 [1974]) factors used to determine the reasonableness of attorneys' fees, other than time and labor, which was supported by invoices with block-billed entries, some

of which contained redactions, warrants remand for a hearing (*see S.T.A. Parking Corp. v Lancer Ins. Co.*, 128 AD3d 479, 480 [1st Dept 2015]; *135 E. 57th St., LLC v 57th St. Day Spa, LLC*, 126 AD3d 471, 472 [1st Dept 2015]).

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P. Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4757-
4758 The People of the State of New York, Respondent,

Ind. 1285/13
1281/13

-against-

Kenneth Beachum,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, Bronx County (Martin Marcus. J.), rendered June 26, 2014, as amended December 13, 2016, convicting defendant, upon his pleas of guilty, of criminal possession of a forged instrument in the second degree and grand larceny in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

Defendant was properly adjudicated a second felony offender based upon a New Jersey drug conviction. The court properly consulted the accusatory instrument (*see People v Jurgins*, 26 NY3d 607, 613-614 [2015]), which established that the predicate crime involved possession with intent to distribute heroin (*see People v Santiago*, 143 AD3d 545 [1st Dept 2016], *lv denied* 28

NY3d 1127 [2016]*; People v West*, 58 AD3d 483 [1st Dept 2009], *lv denied* 12 NY3d 822 [2009]). We decline to revisit our prior holdings on this issue.

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4759 The People of the State of New York, Ind. 338/91
Respondent,

-against-

Sherman Walker,
Defendant-Appellant.

_____

Rosemary Herbert,, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about September 3, 2014, which denied defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

The record on appeal is insufficient to permit review of defendant's assertion that the People failed to disclose whether any DNA-testable biological material relating to the underlying 1991 robbery exists. In any event, even if such material exists, the court properly denied the motion because, given the facts of the case, there is no reasonable probability that DNA testing of fingerprint evidence recovered from the crime scene (which was matched to defendant's fingerprints) would have led to a verdict

more favorable to defendant (*see People v Concepcion*, 104 AD3d 442 [1st Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *People v Figueroa*, 36 AD3d 458, 459 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]).

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

ENTERED: OCTOBER 19, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Moskowitz, Kahn, Kern, JJ.

4760 The People of the State of New York, Ind. 305/14
Respondent,

-against-

Sean Charles Hernandez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered February 4, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of 1½ years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, 140 AD3d 401 [1st

Dept 2016], *lv denied* 28 NY3d 1074 [2016]), we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 19, 2017

CLERK

Richter, J.P., Webber, Kern, Moulton, JJ.

4850N JSC VTB Bank, etc., Index 652516/16
Plaintiff-Appellant-Respondent,

-against-

Igor Mavlyanov, et al.,
Defendants-Respondents-Appellants,

Jasper Partner Inc. et al.,
Defendants.

_____

Morgan, Lewis & Bockius LLP, New York (Susan F. DiCicco of counsel), for appellant-respondent.

Tarter Krinsky & Drogin LLP, New York (Richard C. Schoenstein of counsel), for Igor Mavlyanov, respondent.

Rheem Bell & Mermelstein LLP, New York (Richard E. Freeman III of counsel), for Ilio Mavlyanov, Hanan Mavlyanov, Stella Mavlyanova, 18016 Boris Properties, LLC, 2710 Bowman, LLC, 364 West 119th Street Realty, LLC and Jasper Venture Group LLC, respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 9, 2017, which, to the extent appealed from, granted plaintiff's motion for an attachment and preliminary injunction, fixed the undertaking at $25 million, and denied defendants Ilio Mavlyanov (Ilio), Stella Mavlyanova (Stella), Hanan Mavlyanov (Hanan), 18016 Boris Properties LLC (Boris LLC), 2710 Bowman LLC (Bowman LLC), 364 West 119th Street Realty LLC (119th St. LLC), and Jasper Venture Group LLC's cross motion to dismiss the complaint as against Boris LLC and Bowman LLC and to dismiss all claims related to real estate located in California pursuant to

CPLR 3211(a)(4), unanimously modified, on the law and the facts and in the exercise of discretion, to deny plaintiff's motion for a preliminary injunction, vacate the attachment of the California properties, 364 West 119th Street, and the house located in Fresh Meadows, Queens, reduce the undertaking to $1 million, direct that the temporary restraining order issued on May 10, 2016 be dissolved unless plaintiff posts the undertaking within 30 days after entry of this order, and grant the cross motion to the extent of staying all claims relating to the California properties pending the California action, and otherwise affirmed, without costs.

Although plaintiff failed to submit an affidavit in its motion, the court was permitted to consider the affirmation by counsel, which, although not made on personal knowledge, attached documentary exhibits (*Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 147 AD3d 644 [1st Dept 2017]).

Nevertheless, on the merits, the court should not have granted a preliminary injunction, because the primary relief sought in this action is money damages (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 548 [2000]). Plaintiff has no specific right to the properties at issue; it seeks to enjoin defendants from transferring, encumbering, or otherwise disposing of their properties so that it will be able to satisfy

the judgments it obtained in Russia on defendant Igor Mavlyanov's (Igor) guaranties.

Even if this were an appropriate case for an injunction, the injunction should not be granted, because the fact that plaintiff can be fully compensated by damages shows that he would not suffer irreparable injury absent the injunction (*see e.g. Somers Assoc. v Corvino*, 156 AD2d 218 [1st Dept 1989]; *Scotto v Mei*, 219 AD2d 181, 184 [1st Dept 1996]).

The court should not have ordered attachment of real estate located in California, i.e., outside its jurisdiction (*see Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101 [1st Dept 2000]; *see also Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 31 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008]). *Hotel 71 Mezz Lender LLC v Falor* (14 NY3d 303, 312 [2010]) is distinguishable. It involved uncertificated ownership/membership interests in limited liability companies and a corporation, which could be attached by serving the manager of the entities in New York (*see id.* at 308). By contrast, a sheriff levies on real property "by filing with the clerk of the county in which the property is located a notice of attachment" (CPLR 6216).

Even if a New York court could attach real estate located in California, we would stay all claims related to the California

properties, because, only about a month after plaintiff sued here, it brought an action in that state against many of the same defendants as in the case at bar, alleging fraudulent conveyance with respect to the California properties. The California action "offers more" than the case at bar (*see Continental Ins. Co. v Polaris Indus. Partners*, 199 AD2d 222, 223 [1st Dept 1993]), because, as plaintiff admits, a notice of pendency against the California properties can be filed only in that state, not here. It also appears that the California action will go to trial before the case at bar (*see e.g. Belopolsky v Renew Data Corp.*, 41 AD3d 322, 323 [1st Dept 2007]).

With respect to the New York properties, plaintiff failed to show that Igor intended to defraud it when he and Stella gave their former marital home in Fresh Meadows to their son Hanan incident to their divorce. This transfer occurred in December 2013, at a time when Igor's company, Yashma Trade and Production Company OJSC, was repaying plaintiff's loans in full and on time. Hence, it cannot be inferred that, at the time of the transfer, Igor knew of his inability to pay plaintiff's claim (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). It is sheer speculation that, in December 2013, Igor foresaw that Russia would invade Crimea in 2014 and would be sanctioned as a result and that the Russian economy would collapse in 2015 due to

the sanctions, causing Yashma to default on its loans (*see Rosenthal v Rochester Button Co.*, 148 AD2d 375, 376 [1st Dept 1989]).

By contrast, Igor gave nonparty Ilio Trans, Inc. to Hanan in April 2015, after the Russian ruble collapsed in 2014 and after plaintiff increased the interest rate on its loans to Yashma from 11.5% to 24.33% (in the case of the July 2013 loan) and 18.96% (in the case of the October 2013 loan). Thus, by April 2015, Igor may very well have known of his inability to pay plaintiff's claim. Moreover, other "badges of fraud" are present, such as "a close relationship between the parties to the alleged fraudulent transaction" (*see Wall St.*, 257 AD2d at 529), zero consideration, and possible "retention of control of the property by the transferor after the conveyance" (*id.*), because Igor was still listed in New York State Department of State records as Ilio Trans's CEO as of July 22, 2016.

The initial transactions involving 364 West 119th Street bear no badges of fraud: 119th St. LLC, which was then owned by defendant Pyotr Yadgarov, contracted to buy the property from nonparty New York State Office of General Services on June 19, 2013, and the transaction closed on January 13, 2014. Both of those dates precede the economic problems in Russia. Ilio bought 119th St. LLC from Yadgarov, in exchange for assuming the LLC's

debts, on April 1, 2015 – i.e., after problems had begun to surface. However, plaintiff is not a creditor of Yadgarov, the transferor (*see* CPLR 6201[3] [attachment available if "the defendant, with intent to defraud his creditors ..., has ... disposed of ... property"]; *Wall St.*, 257 AD2d at 529 [badges of fraud include "the transferor's knowledge of the creditor's claim and the inability to pay it"]), and plaintiff does not allege that Ilio (the debtor) and Yadgarov (the transferor) are alter egos.

Because the only attachment we are upholding is Ilio Trans, we reduce the amount of the undertaking to $1 million. A $1 million valuation of that corporation is supported by objective evidence; indeed, even plaintiff assigns it that value. Hanan's assertions that the value of Ilio Trans, which owns two taxi medallions, is declining due to competition from Uber and Lyft and that he cannot sell the corporation due to the attachment are credible, and plaintiff offered no evidence to the contrary.

Competition will probably not reduce the value of Ilio Trans to zero, but, since CPLR 6212(b) allows for the recovery of attorneys' fees if an attachment is found to be unwarranted, $1 million is "rationally related to the potential damages in the event the [attachment] is found to have been unwarranted" (*Medical Bldgs. Assoc., Inc. v Abner Props. Co.*, 103 AD3d 488,

488 [1st Dept 2013]).

The order on appeal says that the TRO issued on May 10, 2016, which did not require plaintiff to post an undertaking, "shall be dissolved upon Plaintiff paying the undertaking" for the preliminary injunction. Since plaintiff has not yet paid that undertaking, it has continued to enjoy the benefit of a "temporary" order for more than a year. The TRO has "become[], in effect, a preliminary injunction" (*Honeywell, Inc. v Technical Bldg. Servs.*, 103 AD2d 433, 434 n * [3d Dept 1984]). Given that we have reduced the undertaking from $25 million to $1 million, we expect plaintiff to post it. If plaintiff does not post the undertaking within 30 days after the date of entry of this order, the TRO granted in May 2016 shall be dissolved.

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

ENTERED: OCTOBER 19, 2017

CLERK