SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 11, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7834 The People of the State of New York, Respondent, Ind. 2394/09

-against-

Charles Raspa,
Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Winston & Strawn LLP, New York (Kelly A. Librera of counsel), for appellant.

Barbara D. Underwood, Attorney General, New York (Alyson J. Gill of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered May 2, 2012, convicting defendant, after a jury trial, of enterprise corruption, securities fraud (14 counts), criminal possession of stolen property in the third degree (two counts), criminal possession of stolen property in the fourth degree (five counts), grand larceny in the second degree (two counts) and grand larceny in the third degree (four counts), and sentencing him to an aggregate term of 3½ to 10½ years and $253,169 in restitution, unanimously affirmed.

The court properly permitted two of defendant's accomplices

to give testimony regarding the fraudulent securities scheme in which they participated, and they did not provide expert testimony. When these witnesses interpreted documents involved in the scheme and explained certain terms, they were employing their personal knowledge of the particular scheme rather than general expertise, and they used the records to provide specific examples of the conduct they described. Given the complexity of the scheme, the jury might not have understood the significance of the information in those records without these explanations. By way of contrast, general background information was provided by actual expert witnesses.

In this case prosecuted by the Attorney General because of the District Attorney's recusal, several assistant district attorneys were properly permitted to participate in the prosecution as special assistant attorneys general. At an early stage of this prosecution, several of defendant's codefendants were represented, for a period of five days, by a firm that included Cyrus Vance. Nearly four years later, Vance became District Attorney and sought to withdraw from the case, despite having no recollection of meetings or conversations with the codefendants his former firm had represented. The Attorney General's Office was appointed, and certain New York County prosecutors who had already been working on this highly complex

case were cross-designated so they could continue to participate. The Attorney General's Office instituted extensive firewall protocols to isolate the District Attorney's office from the cross-designated prosecutors. Defendant does not claim that he was prejudiced by any conflict, but only that his motion to disqualify the cross-designated prosecutors should have been granted on the ground of appearance of impropriety. However, this was not one of the "rare situations" where, even in the absence of prejudice, "the appearance of impropriety itself is a ground for disqualification" (*People v Adams*, 20 NY3d 608, 612 [2013]). The conflict was remote to begin with, it did not directly involve defendant himself, there was a legitimate reason for the cross-designation of the prosecutors already involved in the case, and there were suitable protective measures.

The court providently exercised its discretion in its handling of a situation involving a distraught juror. After a suitable inquiry (*see People v Buford*, 69 NY2d 290, 299 [1987]), the court ascertained that the juror's inability to deliberate was the result of a crisis in which he was being evicted from his apartment and faced homelessness. However, a lengthy, previously-scheduled break in the jury's deliberations was about to begin. During that break, the juror informed court personnel that he had temporarily resolved his housing issue. Shortly

after deliberations resumed, the court also had a brief colloquy with the juror. The court providently concluded that no further inquiry was required, because the juror gave no indication that he was still unable to participate in deliberations.

We find that a preponderance of the evidence supports the restitution awarded by the court.

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7787 William Pendergast, Index 157554/12
Plaintiff-Appellant-Respondent,

-against-

Mutual Redevelopment Houses, Inc.,
Defendant-Respondent,

RC Dolner LLC,
Defendant-Respondent-Appellant.

- - - - -

[And a Third-Party Action]

- - - - -

RC Dolner LLC,
Second Third-Party Plaintiff-Appellant-Respondent,

-against-

Miller Mechanical Systems LLC,
Second Third-Party Defendant-Respondent-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Sherry Klein Heitler, J.), entered on or about March 31, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 27, 2018,

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

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7835 Yisela Morales, Index 305470/14
Plaintiff-Appellant,

-against-

Consolidated Bus Transit, Inc., et al.,
Defendants-Respondents,

Hambone Management Corp., et al.,
Defendants.

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Elefterakis, Elefterakis & Panek, New York (Jordan A. Jodre of counsel), for appellant.

Silverman Shin & Byrne PLLC, New York (Sahil Sharma of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about July 24, 2017, which granted the motion of defendants Consolidated Bus Transit, Inc. (CBT) and Dileny Abreu for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff, a passenger in a livery cab owned by defendant Hambone Management Corp., and operated by defendant Rafael Mejia, was allegedly injured when the livery cab rear-ended a yellow school bus owned by defendant CBT and operated by defendant Dileny Abreu. The cab driver's lone excuse for rear-ending the bus, namely, that it made a sudden stop, mid-block, is insufficient to rebut the presumption of negligence (*see Profita v Diaz*, 100 AD3d 481 [1st Dept 2012]). Sworn testimony and

statements, including the testimony of the cab driver and plaintiff, although differing as to the movements of the bus immediately prior to the accident, were consistent to the extent they established, without contradiction, that the cab rear-ended the bus, that the cab driver was traveling too close to the rear of the bus to stop in time to avert a collision with it, and that the cab driver failed to offer a non-negligent explanation for rear-ending the bus or evidence showing that he maintained a safe distance between his vehicle and the bus (*see generally Chame v Kronen*, 150 AD3d 622 [1st Dept 2017]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7836 In re Fatima K.,
Petitioner-Respondent,

-against-

Ousmane F.,
Respondent-Appellant.

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Ethan J. Steward, New York, for appellant.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for respondent.

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

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Appeal from order, Family Court, New York County (Gail A. Adams, Referee), entered on or about October 5, 2016, which granted petitioner mother sole legal and physical custody of the subject children, and granted respondent father liberal visitation, unanimously dismissed, without costs.

The court correctly considered the father's untimely appearance at the custody hearing, without explanation, and entered its order on default (*see Matter of Nyree S. v Gregory C.*, 99 AD3d 561, 562 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]; *Matter of Anita L. v Damon N.*, 54 AD3d 630, 631 [1st Dept 2008]). As the father did not avail himself of the opportunity to vacate his default, and no appeal lies from an order entered upon the aggrieved party's default, the appeal is dismissed (*see* CPLR 5511; *Nyree S.*, 99 AD3d at 562).

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

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7837 St. Marks Assets, Inc., Index 653682/16
Plaintiff-Appellant,

-against-

Elliot Sohayegh,
Defendant-Respondent.

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The Abramson Law Group, PLLC, New York (Howard Wintner of counsel), for appellant.

The Price Law Firm, LLC, New York (Joshua C. Price of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered June 18, 2018, which denied plaintiff's motion for summary judgment seeking a declaration that two contracts of sale between the parties are void and dismissal of defendant's counterclaim for specific performance, unanimously affirmed, with costs.

Plaintiff seeks to rescind two contracts, executed by its president, for the sale of two Manhattan properties to defendant. Summary judgment was precluded by triable issues as to whether Business Corporation Law § 909(a) applies to the circumstances here, due to conflicting evidence as to whether the sale of real property is outside the scope of defendant's regular course of business, and whether the sale of the properties at issue here would dispose of substantially all of plaintiff's assets. Further, while there is no dispute that the sale was not formally

approved by shareholder vote, there is evidence that all shareholders informally approved of the properties' sale, and that plaintiff's directors regularly dispensed with corporate formalities, such as shareholder meetings. "If corporate formalities are customarily dispensed with and the affairs of a close corporation are carried on through informal conferences, decisions reached by all the directors and shareholders at informal conferences bind the corporation" (*Leslie, Semple & Garrison v Gavit & Co.*, 81 AD2d 950, 951 [3d Dept 1981]).

Plaintiff's argument that defendant's factual averments that the sales were approved by all shareholders are fabrications requires a credibility determination, which is not appropriate on summary judgment (*DeSario v SL Green Mgt. LLC*, 105 AD3d 421 [1st Dept 2013]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7838 Michael Cook, Index 150911/13
Plaintiff-Respondent,

-against-

EmblemHealth Services Company, LLC, et al.,
Defendants-Appellants,

Laura Albert,
Defendant.

_____

Cozen O'Connor, New York (Michael C. Schmidt of counsel), for appellants.

Ziegler, Ziegler & Associates LLP, New York (Christopher Brennan of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about March 20, 2018, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the cause of action for retaliation under the New York City Human Rights Law as against EmblemHealth Services Company, LLC, and Benjamin Nodar, unanimously affirmed.

The temporal proximity between plaintiff's complaints to his employer that he was subjected to racial stereotyping and discrimination and the termination of his employment in close succession to his last complaint is sufficient to raise an inference of a causal connection between plaintiff's protected activity and the disadvantaging employment action taken against him (*see Harrington v City of New York*, 157 AD3d 582, 585-586

[1st Dept 2018]; *Krebaum v Capital One, N.A.*, 138 AD3d 528, 528-529 [1st Dept 2016]; Administrative Code of City of NY § 8-107[7]). Viewed in the light most favorable to plaintiff, the record provides additional support for an inference of retaliation in the fact that defendants never investigated, or even acknowledged, plaintiff's final complaint and the fact that plaintiff was terminated for conduct comparable to his supervisee's conduct, for which the supervisee only received a mild reprimand.

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Oing, Moulton, JJ.

7839 The People of the State of New York, Respondent, Ind. 3616/09

-against-

Joseph Pabon, Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered June 5, 2012, convicting defendant, after a jury trial, of murder in the second degree and kidnapping in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). We reject defendant's argument that the present record is sufficient to establish the absence of reasonable strategic explanations for the conduct by counsel of which defendant complains. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims 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]). Defendant has not shown that counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. We note that the People presented overwhelming circumstantial evidence that was independent of the DNA evidence and police testimony underlying the ineffective assistance claims.

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7840-
7841 CitiMortgage, Inc.,
Plaintiff-Respondent,

-against-

Trevor Moran,
Defendant-Appellant,

Board of Managers with the
Heritage at Trump Place, et al.,
Defendants.

Index 810292/11

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Rozario & Associates, P.C., New York (Rovin R. Rozario of counsel), for appellant.

David A. Gallo & Associates, LLP, Roslyn Heights (Jonathan M. Cohen of counsel), for respondent.

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Orders, Supreme Court, New York County (Shlomo Hagler, J.), entered July 18, 2017, which, to the extent appealed from, granted plaintiff's motion to reject, and denied defendant Moran's motion to confirm, the referee's report concluding that plaintiff failed to demonstrate proper service upon Moran of pre-foreclosure notice pursuant to RPAPL 1304, and granted plaintiff's motion for summary judgment on its complaint, unanimously reversed, on the law, without costs, plaintiff's motions denied, and defendant's motion granted. The Clerk is directed to enter judgment dismissing the complaint as against defendant Moran without prejudice.

Plaintiff failed to establish a presumption that it properly

served defendant with RPAPL 1304 notice through proof either of actual mailing or of a standard office practice or procedure for proper addressing and mailing (*see American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013]). Its business operations analyst testified at the hearing on this issue that she was familiar with plaintiff's record keeping practices and procedures. However, she did not testify either that she was familiar with plaintiff's mailing procedures or that she was personally aware that RPAPL 1304 notices had been mailed to defendant (*see HSBC Bank USA v Rice*, 155 AD3d 443, 444 [1st Dept 2017]; *HSBC Bank USA, N.A. v Gifford*, 161 AD3d 618 [1st Dept 2018]). Nor does the fact that some of the RPAPL 1304 notices admitted into evidence at the hearing bear a certified mail number suffice to raise the presumption of proper service (*Nationstar Mtge., LLC v Cogen*, 159 AD3d 428, 429 [1st Dept 2018]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7842 Buffalo Emergency Associates, LLP, et al., Plaintiffs-Appellants, Index 651937/17

-against-

Aetna Health, Inc. (New York), et al., Defendants-Respondents.

Arent Fox LLP, Washington, DC (Caroline Turner English of the bar of the District of Columbia and the State of Virginia, admitted pro hac vice, of counsel), for appellants.

Connell Foley LLP, New York (Patricia A. Lee of counsel), and Elliot Greenleaf, P.C., Blue Bell, PA (Gregory S. Voshell of the bar of the State of New Jersey and the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 27, 2017, which granted defendants' motion to dismiss the amended complaint, unanimously affirmed, without costs.

The New York Emergency Services and Surprise Bills Act (the Act) does not provide for a private right of action to enforce its provisions, and the court properly dismissed the complaint as an improper effort to "circumvent the legislative preclusion of private lawsuits" for violation of the Act (*Han v Hertz Corp.*, 12 AD3d 195, 196 [1st Dept 2004]). In any event, plaintiffs' claim for unjust enrichment was also deficient in that the complaint did not allege an equitable obligation running from defendants to

plaintiffs, a required element of this cause of action (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791 [2012]). Plaintiffs similarly failed to state a cause of action for declaratory relief, as this cause of action "is intended to declare the respective legal rights of the parties based upon a given set of facts, not to declare findings of fact," such as the amount that plaintiffs are entitled to be reimbursed for their services (*Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679 [1st Dept 2017]).

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: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7843 In re Elba Brigade, Index 102179/15
Petitioner-Appellant,

-against-

Shola Olatoye, etc., et al.,
Respondents-Respondents.

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Adriene Holder, The Legal Aid Society, Brooklyn (Perry McCall of counsel), for appellant.

Kelly D. MacNeal, New York City Housing Authority, New York (Andrew M. Lupin of counsel), for respondents.

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Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered May 24, 2017, denying the petition to annul respondent New York City Housing Authority's determination, dated March 12, 2014, which terminated petitioner's tenancy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the matter remanded to Supreme Court for a hearing to determine whether petitioner's mental condition entitles her to a tolling of the statute of limitations.

The medical records submitted on the petition present an issue of fact as to whether petitioner possessed "an over-all ability to function" during the relevant period (*see McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548 [1982]). Thus, a hearing must be held to determine whether the statute of limitations on this untimely filed proceeding should be tolled for insanity

(CPLR 208; *see Santana v Union Hosp. of Bronx*, 300 AD2d 56, 58 [1st Dept 2002]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7844 The People of the State of New York, Respondent, Ind. 1073/13

-against-

Damique Fennell, Defendant-Appellant.

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Stanley Neustadter, Cardozo Criminal Appeals Clinic, New York (Agatha Cole of counsel), for appellant.

Damique Fennell, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 9, 2014, as amended October 28 and November 24, 2014, convicting defendant, after a jury trial, of burglary in the first degree as a sexually motivated felony (two counts), burglary in the first degree (two counts), robbery in the first and second degrees as sexually motivated felonies, and robbery in the first and second degrees, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The jury's verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's testimony was extensively corroborated by circumstantial evidence.

Defendant did not preserve his claim that the court should

have permitted him to recall the victim for further cross-examination based on matters raised in the testimony of a defense witness, and we decline to review it in the interest of justice. Defendant only requested to conduct a further cross-examination based on grand jury minutes, a ground he abandons on appeal. As an alternative holding, we find that there was no basis for recalling the victim, because defendant had a full opportunity to cross-examine her about all relevant matters. Defendant's constitutional claim is likewise unpreserved, and without merit in any event.

Defendant did not preserve any of his arguments regarding events that transpired during jury deliberations, or any of his pro se claims, 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: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7845 In re Hiliana R.,
Petitioner-Respondent,

-against-

Cesar A.P.J.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

Law Office of Bruce A. Young, New York (Bruce A. Young of counsel), for respondent.

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

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Order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about March 16, 2018, which, after a fact-finding hearing, granted the petition to modify a prior custody order to award petitioner sole legal and physical custody of the subject child, with respondent to have visitation, "as agreed and arranged by the parties" and facilitated by the paternal uncle, unanimously affirmed, without costs.

Although the father did not give written consent to have the referee determine the petition, as required by CPLR 4317(a), the father implicitly consented by actively participating in the proceedings before the referee, including by testifying and cross-examining the mother, without challenging the referee's jurisdiction (*see Matter of Hui C. v Jian Xing Z.*, 132 AD3d 427 [1st Dept 2015]*; Matter of Carlos G. [Bernadette M.]*, 96 AD3d

632, 633 [1st Dept 2012]).

There is a sound and substantial basis in the record for the referee's determination that a change of circumstances had occurred since the prior custody order was entered when the child was an infant, that joint custody was no longer feasible, and that awarding the mother sole legal and physical custody was in the child's best interests (*see Matter of David H. v Khalima H.*, 111 AD3d 544 [1st Dept 2013], *lv dismissed* 22 NY3d 1149 [2014]; *Sendor v Sendor*, 93 AD3d 586 [1st Dept 2012]).

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

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7846 The People of the State of New York, Respondent, Ind. 4375/15

-against-

Wilfredo Sosa-Campana, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Robin Nichinsky of counsel), and White & Cox LLP, New York (Andrea Amulic of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered January 25, 2017, convicting defendant, after a jury trial, of identity theft in the second degree, falsifying business records in the first and second degrees and aggravated unlicensed operation of a motor vehicle in the third degree, and sentencing him to an aggregate term of seven days, unanimously affirmed.

The evidence was legally sufficient to establish the element of intent to defraud, as required for the convictions of identity theft and falsifying business records. When defendant was stopped for a traffic violation and presented a fraudulent driver's license in the name of another actual person, defendant acted with at least two forms of fraudulent intent, each falling within the plain meaning of "defraud." Defendant intended to

escape responsibility for the violation by causing the officer to issue a summons to the wrong person, and also intended to conceal his additional offense of unlicensed driving. In order to prove intent to defraud, the People did not need to make a showing of an intent to cause financial harm (*see People v Kase*, 76 AD2d 532, 537-38 [1st Dept 1980][construing intent-to-defraud element of analogous statute], *affd* 53 NY2d 989, 991 [1981]; *see also Morgenthau v Khalil*, 73 AD3d 509, 510 [1st Dept 2010]). Defendant did not preserve his sufficiency claim regarding the aggravated unlicensed operation conviction, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant's challenge to the court's charge is also unpreserved, and we likewise decline to review it in the interest of justice. With rare exceptions not applicable here, charging errors require preservation, and we do not find any mode of proceedings error exempt from preservation requirements (*see People v Thomas*, 50 NY2d 467, 472 [1980]). As an alternative

holding, we find that the court's slight misstatement in defining the charges was harmless and could not have affected the verdict.

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

ENTERED: DECEMBER 11, 2018

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Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7847 The People of the State of New York, SCI 3311/15
Respondent,

-against-

Kevin Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered December 9, 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.

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

ENTERED: DECEMBER 11, 2018

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

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7848 The People of the State of New York, Respondent, Ind. 4184N/15

-against-

Andrew McFaline, Defendant-Appellant.

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Law Office of Barry A. Weinstein, P.C., Bronx (Barry A. Weinstein of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered June 29, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's CPL 30.30 speedy trial motion. The motion turned on certain adjournments attributable to the unavailability of a retired detective, for reasons relating to his relocation to Florida, his own medical condition, and his need to visit his seriously ill father in Puerto Rico. These adjournments were correctly excluded as "occasioned by exceptional circumstances" (CPL 30.30[4][g]; *People v Goodman*, 41 NY2d 888, 889 [1977]). We have considered defendant's other arguments concerning the court's determination of the CPL 30.30 motion, including defendant's challenges to the sufficiency of

the People's showing in support of their claims, and find them unavailing (*see People v Alcequier*, 15 AD3d 162, 163 [1st Dept 2005], *lv denied* 4 NY3d 851 [2005]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The police witness's testimony about interactions between the person who sold drugs to the undercover officer, and defendant, who delivered the drugs to the seller, supports an inference that "defendant intentionally and directly assisted in ... the illegal sale of a narcotic drug" (*People v Bello*, 92 NY2d 523, 526 [1998]).

The court properly denied, without granting a hearing, defendant's motion to suppress physical evidence. Defendant's conclusory denial of selling cocaine to an undercover officer did not contradict the felony complaint's allegation that defendant supplied drugs to another person, who sold them to an undercover officer, and this denial was insufficient, in the context of the information available to defendant, to require a hearing (*see People v Jones*, 95 NY2d 721 [2001]).

The court providently exercised its discretion in limiting the cross-examination of a police witness about past lawsuits against him alleging misconduct (*see People v Smith*, 27 NY3d 652 [2016]). Defendant received ample scope in which to impeach the

officer's credibility, and the lines of inquiry that the court restricted would have delved into collateral issues and matters that would have required the jury to understand aspects of civil practice. In any event, we find that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The prosecutor's summation argument that defendant characterizes as unfairly denigrating defense counsel "did not exceed the broad bounds of rhetorical comment permissible in closing argument" (*see People v Galloway*, 54 NY2d 396, 399 [1981]). Defendant's remaining challenges to the prosecutor's summation are unpreserved, since defense counsel either failed to raise a timely objection or did not object on the same grounds raised on appeal (*see People v Romero*, 7 NY3d 911 [2006]). Defendant's postsummation mistrial motion was ineffective to preserve these arguments (*see id.*). As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v*

D'Alessandro, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). In any event, any error involving the prosecutor's summation was harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Moulton, JJ.

7849 D. Penguin Brothers Ltd., et al., Index 158949/14
Plaintiffs-Appellants-Respondents,

-against-

City National Bank, et al.,
Defendant,

NBUF Development Ltd., et al.,
Defendants-Respondents-Appellants.

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Gordon & Haffner, LLP, Harrison (David Gordon of counsel), for appellants-respondents.

Dentons US LLP, New York (Charles E. Dorkey, III of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about September 13, 2017, which granted defendants James Robert Williams, NBUF Development Ltd., Black United Fund of New York, Inc., Inner City Strategies, and First Pro Group, Inc.'s (the Williams defendants) motion to dismiss the complaint as against them with respect to the conversion claims and the claims for fraud, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty as against NBUF Development, Black United Fund, and First Pro, and denied the motion with respect to the accounting, specific performance, and breach of contract claims, unanimously modified, on the law, to deny the motion with respect to the conversion claims and the claims for fraud, breach of fiduciary duty, and aiding and abetting breach

of fiduciary duty as against NBUF Development, Black United Fund and First Pro, and otherwise affirmed, without costs.

The claims against the Williams defendants are not barred by the doctrine of res judicata, because the Williams defendants' alleged liability is in no way derivative of or affected by the liability of defendant National Black United Fund, Inc. in the prior action, and there is no other indicator of privity between the Williams defendants and National Black United Fund (*see Israel v Wood Dolson Co.*, 1 NY2d 116, 119-120 [1956]).

The fraud claim is the gravamen of this case; it is not, as the Williams defendants contend, merely incidental to the conversion claim. Thus, the claims for conversion are governed by the six-year, rather than the three-year, statute of limitations (*see D. Penguin Bros. Ltd. v City Natl. Bank*, 158 AD3d 432 [1st Dept 2018]).

The fraud, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty claims against NBUF Development, Black United Fund, and First Pro are timely because of the tolling effect of the federal action commenced by plaintiffs in January 2013 (*see* CPLR 205).

The doctrine of collateral estoppel does not bar the claims against defendants Williams and Inner City Strategies, because the issue decided in the prior action is not identical to the issue in this action (*see Buechel v Bain*, 97 NY2d 295, 303-304

[2001], *cert denied* 535 US 1096 [2002]). In the prior action, the issue was whether plaintiffs' allegations against National Black United Fund were sufficient to warrant equitably tolling the statute of limitations. In this action, the issue is the sufficiency for purposes of equitable tolling of plaintiffs' very different allegations against Williams and Inner City Strategies.

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7850 Securitized Asset Funding 2011-2, Ltd., Plaintiff-Appellant, Index 653911/15

-against-

Canadian Imperial Bank of Commerce, Defendant-Counterclaim Plaintiff-Respondent,

-against-

Securitized Asset Funding 2011-2, Ltd., et al. Counterclaim Defendants-Appellants.

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Selendy & Gay PLLC, New York (Philippe Z. Selendy of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jay B. Kasner of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about April 6, 2018, which, insofar as appealed from, denied plaintiff and counterclaim defendants' motion for summary judgment on liability and dismissing defendant's counterclaims for a declaratory judgment, mutual mistake, and unilateral mistake, unanimously affirmed, without costs.

This is an action for breach of two contracts, the A Note and the B Certificate. These contracts refer to certain credit default swap agreements, which refer to notes collateralized by mortgage-backed securities issued by nonparty Altius IV Funding,

Ltd. (the Altius IV notes). Defendant Canadian Imperial Bank of Commerce (CIBC) had entered into credit default swaps with a purchaser of Altius IV notes seeking to protect its investment therein. CIBC then entered into the A Note and later the B Certificate with plaintiff and counterclaim defendants (all affiliates of Cerberus Capital Management, L.P., and hereinafter, collectively, Cerberus) to reduce its exposure on the credit default swaps. CIBC issued the original A note in exchange for a loan to be repaid in four monthly payments streams based on the performance of specified assets. The B Certificate provided an additional loan to CIBC in exchange for its agreement to make certain payments to Cerberus if the A Note were repaid or terminated.

As relevant here, the "Synthetic Assets" generated three payment streams: the Synthetic Asset Interest Proceeds Amount (Synthetic Interest), the Synthetic Asset LIBOR Amount (Synthetic LIBOR), and the Synthetic Asset Principal Proceeds Amount (Synthetic Principal).

We agree with the motion court that the relevant Synthetic Assets under the A Note and B Certificate are the Altius IV *swaps*, not the Altius IV *notes*. We also agree that the termination of the Altius IV notes does not affect Cerberus's right to payment under the A Note and B Certificate. That payment depends on the terms of the Altius IV swap documents,

which do not depend on whether or not the Altius IV notes have been terminated. We further agree that Cerberus was entitled to Synthetic LIBOR even after the Altius IV swaps were terminated.

Unlike the motion court, we find that the terms "Relevant Notional Amount" and "Scheduled Payments" are not ambiguous (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Cerberus's interpretation of the terms, which is based on the plain language of the contract, is reasonable. CIBC's interpretation – that Scheduled Payments include payments of Synthetic Principal and proceeds from the liquidation of the Altius IV notes – is unmoored from the contractual language.

Nevertheless, we affirm the denial of Cerberus's motion, because CIBC's defenses and counterclaims raise triable issues of fact (*see Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 483 [1st Dept 2015]). For example, the second counterclaim seeks to reform the A Note and B Certificate based on mutual mistake. Although the counterclaim does not "show in no uncertain terms ... exactly what was really agreed upon between the parties" (*Chimart*, 66 NY2d at 574 [internal quotation marks omitted]; *see* CPLR 3016[b]), the affirmations that CIBC submitted in opposition to Cerberus's motion show that – according to CIBC – the parties agreed that the Relevant Notional Amount for the Altius IV synthetic assets would be reduced by payments of Synthetic Principal. Viewed in the light most

favorable to CIBC (the nonmovant), the evidence shows that, for more than four years, between June 2010 and October 2014, the parties reduced the Relevant Notional Amount of the Altius IV synthetic assets by CIBC's payments of Synthetic Principal (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 85 [1st Dept 2009]). A factfinder could reasonably conclude that a sophisticated financial entity such as Cerberus, which was reviewing monthly reports about the reduction of the Relevant Notional Amount, had some "internal controls . . . to ensure that the substantial amounts it receive[d] . . . [were] consistent with the terms of the underlying contracts" (*id.* at 87).

The fact that the A Note and B Certificate contain merger/integration and no-waiver clauses does not foreclose CIBC's reformation counterclaim (*see Chimart*, 66 NY2d at 573; *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 245 [1st Dept 2013]).

Cerberus contends that CIBC's counterclaim for reformation or rescission of the B Certificate based on unilateral mistake plus fraud should be dismissed because CIBC cannot establish justifiable reliance. However, the issue of reasonable reliance is not subject to summary disposition (*see e.g. Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]).

Because Cerberus is not entitled to summary judgment on its claims for breach of the A Note and B Certificate, it is not

entitled to summary judgment dismissing CIBC's counterclaim for a declaratory judgment.

Summary judgment was also correctly denied because discovery had not been completed (*see Groves v Land's End Hous. Co.*, 80 NY2d 978 [1992]) and CIBC's defense of estoppel raises issues of fact (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 107 [2006]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Moulton, JJ.

7851 Kevin B. Davis, Index 300536/15
Plaintiff-Appellant,

-against-

Prestige Management Inc.,
Defendant-Respondent.

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Kevin B. Davis, appellant pro se.

Wade Clark Mulcahy, New York (Lauren A. Tarangelo of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about March 8, 2018, which, in effect, granted plaintiff's motion to reargue a prior order denying his motion for a default judgment and, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR.

The appendix submitted on this appeal, which does not contain, inter alia, the underlying motion papers, is patently

insufficient for reviewing plaintiff's contentions (*see* CPLR 5528[a][5]; *Kenan v Levine & Blit, PLLC*, 136 AD3d 554 [1st Dept 2016]; *Reiss v Reiss*, 280 AD2d 315 [1st Dept 2001]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7852 The People of the State of New York, Ind. 1457/16
Respondent,

-against-

Richard Harvin,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered June 9, 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.

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

ENTERED: DECEMBER 11, 2018

CLERK

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

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7853- Ind. 2318/13
7853A The People of the State of New York, 2470/14
Respondent,

-against-

Alvaro Iglesias-Ortega,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Tandra Dawson, J.), rendered November 18, 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.

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

ENTERED: DECEMBER 11, 2018

CLERK

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

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7854 The People of the State of New York, Respondent, Ind. 2283/16

-against-

Merlin Moreno-Grantini, Defendant-Appellant.

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Robert DiDio & Associates, Kew Garden (Danielle Muscatello of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 6, 2017, convicting defendant, after a jury trial, of attempted murder in the second degree and assault in the first degree, and sentencing him to an aggregate term of six years, unanimously affirmed.

Defendant's challenge to the court's purported restriction of counsel's voir dire of prospective jurors is unpreserved (*see People v Sewnarine*, 156 AD3d 459 [1st Dept 2017], *lv denied* 31 NY3d 1087 [2018]), and we decline to review it in the interest of justice. As an alternative holding, we find that after its own thorough examination, the court permitted counsel to question panelists, provided that their inquiries would be brief and avoid repetitious questions or matters of law already covered by the court, and it did not improperly curtail any inquiries (*id.* at 459). The record fails to demonstrate that defense counsel's

decision not to ask questions on voir dire was compelled by the court, and defendant has not established any prejudice.

Defendant did not preserve his claim that the admission, as an excited utterance, of a nontestifying declarant's statements violated the Confrontation Clause (*see People v Kello*, 96 NY2d 740, 743-744 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we find that the statements at issue, which were made to an officer shortly after she had arrived at the scene within three minutes of receiving a report of a knife assault in progress, encountered a frantic victim with a stab wound, and was told that defendant was the perpetrator and was on the loose, were nontestimonial, because they were made to an officer whose primary purpose was to determine what had happened and to ensure the safety of other persons (*see Davis v Washington*, 547 US 813, 822 [2006]; *People v Nieves-Andino*, 9 NY3d 12, 15-16 [2007]). Regardless of whether other officers may have already arrested defendant, there is no evidence that the officer who questioned the declarant at issue was aware of that fact.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, relating to counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]), and we reject defendant's argument that the

unexpanded record is sufficient to review these claims. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims 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]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or had a reasonable probability of affecting the outcome of the case.

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7855N Bernadette Palmiero, etc., Index 106138/10
Plaintiff-Respondent, 590242/12

-against-

417 East 9th Street Associates, LLC, et al.,
Defendants-Appellants,

Thomas C. Tung, et al.,
Defendants.

- - - - -

[And a Third Party Action]

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

Wilkofsky Friedman, Karel & Cummins, New York (Jonathan J. Wilkofsky of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 26, 2018, which denied defendants 417 East 9th Street Associates, LLC, Jakobson Properties, LLC, Peter Jakobson and Peter Jakobson, Jr.'s motion to vacate the note of issue and granted plaintiff's motion to quash a nonparty subpoena, unanimously affirmed, without costs.

Defendants failed to establish that unusual or unanticipated circumstances developed after the note of issue was filed that require additional discovery to prevent substantial prejudice to them (*see* 22 NYCRR 202.21[d]). Plaintiff has not converted this action into a wrongful death action, claimed any new or additional injuries, or served a supplemental bill of particulars

(*see Nikqi v Dedona Contr. Corp.*, 117 AD3d 620 [1st Dept 2014]; *Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005]).

The court properly granted plaintiff's motion to quash the nonparty subpoena, which sought to obtain an unredacted copy of the death certificate (*see Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012]; *see also Ciancio v Woodlawn Cemetery Assn.*, 210 AD2d 9 [1st Dept 1994]). The cause of the decedent's death has not been placed at issue by the filing of a wrongful death claim or allegations of new or additional injuries. Moreover, defendants do not deny that they received the decedent's entire medical file, deposed him twice, and conducted medical examinations of him, and they have not shown that the death certificate is material and necessary in the defense of this action (*compare Capati v Crunch Fitness Intl.*, 295 AD2d 181 [1st Dept 2002] [where no autopsy performed and cause of death not established by

medical records or death certificate, subpoenas for depositions of nonparty treating physicians should not have been quashed]).

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

ENTERED: DECEMBER 11, 2018

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Oing, Moulton, JJ.

7856N Carmen Ortiz, Index 25261/15
Plaintiff-Appellant,

-against-

Hector Rivera III, et al.,
Defendants-Respondents.

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DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for appellant.

Lewis Brisbois Brisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about September 20, 2017, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendants' motion to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

The court properly granted the motion, since defendants established, through the affidavit of defendant Rivera and other documentary proof, that Rivera lived in Westchester County, not Bronx County, on the date that the action was commenced (*see*

Herrera v A. Pegasus Limousine Corp., 34 AD3d 267 [1st Dept 2006]), and plaintiff failed to rebut defendants' showing (*cf. Singh v Empire Intl., Ltd.*, 95 AD3d 793 [1st Dept 2012]).

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

ENTERED: DECEMBER 11, 2018

CLERK