SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 23, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4856-
4857 The People of the State of New York,
Appellant,

-against-

Jamal Cox,
Defendant-Respondent.

Ind. 2944/11

_____

Cyrus R. Vance, Jr., District Attorney, New York (Allen Gadlin of counsel), for appellant.

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

_____

Appeal from judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered September 8, 2015, resentencing defendant, as a second violent felony offender, to a term of 10 years, and bringing up for review an order (same court and Justice), entered on or about September 10, 2014, which granted defendant's CPL 440.20 motion to set aside his sentence as a persistent violent felony offender and directed that he be resentenced as a second violent felony offender, held in abeyance, and the matter remitted for a determination of the additional issue raised in defendant's motion.

The court granted defendant's motion on a ground later rejected by the Court of Appeals (*see People v Smith*, 28 NY3d 191 [2016]). The parties agree that the appeal should be held in abeyance for a determination of the remaining issue raised in the motion but not reached by the motion court (*see e.g. People v Simmons*, 151 AD3d 628 [1st Dept 2017]), specifically, whether defendant's 2003 Queens County conviction was unconstitutionally obtained because defendant was never informed during the plea proceeding in that case of the term of his incarceratory sentence.

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

ENTERED: JANUARY 23, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4858 Electron Trading, LLC, Index 651370/15
Plaintiff-Appellant,

-against-

Morgan Stanley & Co. LLC,
Defendant-Respondent.

_____

Mandell Bhandari LLP, New York (Evan Mandel of counsel), for appellant.

Milbank, Tweed, Hadley & McCloy LLP, New York (Scott A. Edelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 24, 2017, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the fraud and negligent misrepresentation claims and the breach of contract claim to the extent it seeks damages above the amount allowed under the contractual limitation of liability clause, and to strike plaintiff's jury demand, unanimously affirmed, without costs.

Plaintiff, a developer of intellectual property relating to "spread" trading, a type of electronic securities trading, entered into two agreements with defendant: an Exclusive License Agreement (ELA) whereby it granted defendant an exclusive license for its alternative trading system (ATS) and a Consulting Services Agreement (CSA) whereby it agreed to perform related

consulting services. The ELA required defendant to use commercially reasonable efforts to develop and implement necessary software and systems, to operate and market the ATS, and to launch the ATS by a defined deadline. Defendant concedes, for purposes of this motion, that it breached the ELA by not performing any of its obligations. The contested issue at the heart of this appeal is whether plaintiff's damages are limited by the ELA's limitation of liability provision. Defendant is willing to make full payment of any damages that would be due under the limitation of liability provision. Plaintiff contends, however, that it sufficiently alleged intentional wrongdoing on defendant's part to render the limitation of liability provision unenforceable.

The complaint alleges that plaintiff designed the ATS to be operated through a "dark pool," a private exchange where investors can make trades anonymously. It further alleges that institutional investors would use the product only if assured of total anonymity, because technologically advanced high frequency traders (HFT) could exploit the leakage of information from dark pools to execute transactions nanoseconds ahead of investors' trades and thereby siphon off the investors' anticipated profits. Plaintiff alleges that it contracted with defendant because of defendant's public statements about its scrupulous maintenance of

the anonymity of dark pools and its focus on eliminating pre-trade information leakage – priorities that defendant allegedly reiterated during the negotiations leading up to the ELA and the CSA. Neither the ELA nor the CSA refer to HFTs or dark pools, or otherwise expressly contain these representations. Plaintiff claims that not only did defendant fail to perform its obligations under the ELA, but it also told plaintiff that it would perform only if plaintiff either allowed defendant's HFTs to "feast" on spread traders using the ATS or modified the ATS so that HFTs could "prey on" other customers. Plaintiff claims that defendant stood to earn hundreds of millions of dollars by catering to HFTs.

The limitation of liability provision in the ELA provides, in pertinent part, that "neither party's total liability under this agreement will exceed the total amounts previously paid by [defendant] to [plaintiff] under this agreement and the [CSA] prior to the date of the applicable claim." The CSA contains a similar provision. The ELA provides that "[t]he parties acknowledge that these limitations of liability and exclusions of potential damages were an essential element in setting consideration under this agreement" (all caps deleted).

It was not error for Supreme Court to rule on the enforceabilty of the liability limitation provision, although it

is an affirmative defense, on a motion to dismiss. In the ordinary course of deciding motions, courts consider whether documentary evidence establishes an asserted defense, in this case a defense concerning the limitation of liability provisions in the parties' contracts *(see e.g. Zanett Lombadier, Ltd v Maslow*, 29 AD3d 495 [1st Dept 2006]).

New York courts routinely enforce such liability-limitation provisions, especially when negotiated by sophisticated parties. The Court of Appeals has recognized that

> "[a] limitation on liability provision . . . represents the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor.
>
> * * *
>
> [The parties] may later regret their assumption of the risks of non-performance in this manner, but the courts let them lie on the bed they made"(*Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 436 [1994]).

However, such clauses are unenforceable when,

> "[i]n contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit" (*Kalish-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-85 [1983]; *see Abacus Fed. Sav.*

Bank v ADT Sec. Servs., Inc., 18 NY3d 675, 683 [2012]).

The "type of intentional wrongdoing that could render a limitation in [a contract] unenforceable is that which is 'unrelated to any legitimate economic self-interest'" (*Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 77 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]; *Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP*, 60 AD3d 434 [1st Dept 2009]). Stated otherwise, a party can intentionally breach a contract to advance a "legitimate economic self-interest" and still rely on the contractual limitation provision (*Devash*, 104 AD3d at 77).

Plaintiff contends that defendant's insistence that it allow the ATS to be used for the benefit of HFTs impermissibly exceeded the contemplated scope of the ELA and CSA. However, the ELA gave defendant discretion to modify the ATS, and neither agreement refers to "dark pools" or protection from predatory HFTs. Thus, in demanding that plaintiff permit use of the ATS by HFTs, defendant was not seeking any benefit that was in conflict with what it was entitled to under the agreement (*see Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 243 [1st Dept 2007], *appeal withdrawn* 16 NY3d 796 [2011]).

Plaintiff's broad allegations that defendant insisted that

plaintiff undertake acts constituting securities fraud as a precondition to defendant's performance under the parties' contracts does not meet the heightened pleading requirements for fraud (*see* CPLR 3016[b]; *SNS Bank v Citibank*, 7 AD3d 352, 355 [1st Dept 2004]). Although the allegations globally raise issues that have recently come under legal scrutiny about how HFTs operate within dark pools (*see e.g., People v Barclays Capital Inc.*, 47 Misc 3d 862 [Sup Ct, NY County 2015]; *see also Waggoner v Barclays PLC,* (__ F3d __, 2017 WL 5077355, 2017 US App Lexis [2d Cir 2017]), the complaint is devoid of specific factual instances of fraud by defendant.[1] Plaintiff also fails to provide any explanation of how defendant's alleged acts actually violate the securities laws. Without more, the factual allegations in the complaint are insufficient to avoid the liability-limitation provisions in the parties' agreements. At most, the allegations support a claim of intentional breach, which is insufficient to void the limitation of liability provision (see Metropolitan Life, supra; *Devash, supra*).

Supreme Court correctly ruled that the jury waiver in the CSA is applicable to the breach of the ELA claim, given its

[1] In *Waggoner*, the plaintiffs relied on specific examples of public statements made by the defendant regarding the steps taken to protect its investors from HFTs.

express applicability to "related documents" (*see e.g. Franklin Natl. Bank of Long Is. v Capobianco*, 25 AD2d 445 [2d Dept 1966]; *see also Bank of China, New York Branch v N.B.M., LLC*, 2002 WL 1072235, 2002 US Dist LEXIS 9468 [SD NY May 28, 2002]).

The fraud and negligent misrepresentation claims fail to allege "actual pecuniary loss sustained as the direct result of the wrong" (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996] [internal quotation marks omitted]; *Serino v Lipper*, 123 AD3d 34, 42 [1st Dept 2014]). Moreover, even if the alleged loss in the ATS's value could be construed as the requisite out-of-pocket loss, plaintiff's alleged damages are inherently speculative; a factfinder would have to engage in conjecture (*see Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538 [1st Dept 2016], *affd* 29 NY3d 137 [2017]; *Rather v CBS Corp.*, 68 AD3d 49, 58 [1st Dept 2009] ["loss of an alternative contractual bargain . . . was 'undeterminable and speculative'"] [internal quotation marks omitted]). The complaint fails to allege facts showing that the ATS actually lost value. It does not allege that plaintiff was defrauded into relinquishing to defendant the

ATS for value less than its worth; nor does it allege subsequent developments that would show that plaintiff can no longer license the ATS at the price it could command when it executed the ELA and the CSA.

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

ENTERED: JANUARY 23, 2018

CLERK

CORRECTED ORDER - FEBRUARY 1, 2018

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5243-
5244 Index 152560/15

Michael Harrington,
Plaintiff-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Amanda Sue Nichols of counsel), for respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered October 13, 2016, which, to the extent appealed from as limited by the briefs, upon plaintiff's motion for reargument and renewal of defendants' motion to dismiss the claims for employment discrimination and retaliation under the New York State and City Human Rights Laws (HRLs) or, in the alternative, leave to amend the complaint, granted reargument and adhered to the original determination granting defendant's motion, and denied renewal and leave to amend, unanimously modified, on the law, to grant the motion for renewal, and, upon reargument and renewal, to deny defendants' motion, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered November 12, 2015, which granted defendants' motion to

dismiss the complaint, unanimously dismissed, without costs, as academic in light of the foregoing.

In this employment discrimination and retaliation action, plaintiff alleges that defendants discriminated against him on the basis of his sexual orientation by refusing to employ him as a police officer and that they also retaliated against him for a previous lawsuit plaintiff filed against defendants in 2007. The 2007 action alleged discrimination, retaliation and harassment.

Plaintiff was employed as an auxiliary police officer from 1997 to 2000, and as police officer from 2002 until 2009, with the NYPD. In February 2009, plaintiff voluntarily resigned from the NYPD to take a police officer position in California. He then sought to be reinstated as a police officer with the NYPD in June 2009, passing the psychological exam. After plaintiff's request for reinstatement was denied, he directly applied for employment with the NYPD, passing the written exam in 2010. While plaintiff's 2010 application was pending, he accepted law enforcement positions with sheriffs' departments in Arizona and Missouri, passing at least one more psychological evaluation for those positions. In September 2013, plaintiff began working as a correction officer for the New York City Department of Correction, passing yet another psychological evaluation. He remains employed as a correction officer.

In 2007, at a time when plaintiff was employed as a NYPD officer, he filed an action against defendants under the State and City Human Rights Laws (HRLs). The parties settled the 2007 lawsuit on December 12, 2013, with plaintiff signing a general release of all claims accruing up to the settlement date, in exchange for a $185,000 payment from defendants.

After settlement, the NYPD instructed plaintiff to proceed with his then-pending 2010 application, and plaintiff underwent another psychological evaluation. Thereafter, plaintiff was informed that his application was being held on a psychological review. It remained on hold for nearly one year before the NYPD found plaintiff not psychologically suited to serve as a police officer. The disqualification was based on the police psychologist's finding that plaintiff "relied chiefly on litigation to resolve issues," and cited plaintiff's 2007 action as evidence of his "poor stress tolerance." Plaintiff administratively appealed the finding, and submitted a report from his own clinical psychologist, who opined that plaintiff had no psychological characteristics that would prevent him from serving as a police officer. Plaintiff's own psychological report also noted that the police psychologist failed to include psychometric data results that indicated plaintiff met or exceeded requirements in every area of the "Job Suitability

Snapshot," a series of psychological analytic tests, as well as failed to include the police psychologist's own notes that confirmed that plaintiff's thought processes were "coherent" and "WNL" (within normal limits).

After the appeal was denied, plaintiff filed the instant action, asserting, as relevant on appeal, causes of action for discrimination and retaliation under the State and City HRLs. Plaintiff sought damages and an order directing defendants to appoint him to the NYPD. Supreme Court dismissed the causes of action. It then denied renewal but granted reargument. Upon reargument, the motion court adhered to its prior decision to dismiss the complaint. We now reinstate the causes of action. The complaint, as amplified by plaintiff's affidavit and psychological report, states claims for both discrimination and retaliation.

A plaintiff states a claim of invidious discrimination under the State and City HRLs by alleging (1) that he/she is a member of a protected class, (2) that he/she was qualified for the position, (3) that he/she was subjected to an adverse employment action (under State HRL) or he/she was treated differently or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination (*Santiago-Mendez v*

City of New York, 136 AD3d 428 [1st Dept 2016]; *Rollins v Fencers Club, Inc.*, 128 AD3d 401 [1st Dept 2015], *appeal withdrawn* 27 NY3d 990 [2016]; *Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449 [1st Dept 2013]; Executive Law § 296; Administrative Code of City of NY § 8-107).

The parties do not dispute that plaintiff has sufficiently pleaded the first three elements of discrimination, to wit, plaintiff is part of a protected class due to his sexual orientation, he was qualified for the position of police officer, having previously served for seven years before voluntarily resigning, and he was treated adversely by having a psychological hold placed on his application and then being found to have failed the evaluation. However, defendants contend that plaintiff has not pleaded facts from which discrimination can be inferred. We disagree. Plaintiff alleged that he had passed six prior law enforcement psychological evaluations, in New York, California, Arizona, and Missouri, before defendants deemed him psychologically unfit for a position with the NYPD, and that in finding others psychologically fit defendants had given preferential treatment to similarly situated heterosexual applicants. Plaintiff further alleged that he was the only applicant whose application had been placed on a psychological review for over 15 months.

In his renewal motion, plaintiff provided further support from which to infer discrimination. He submitted the psychological report of his independent clinical psychologist demonstrating his fitness to serve. This report, which did not exist when defendants moved to dismiss, was properly before the court on renewal. Moreover, the report did not need to be in admissible form at this point because the underlying motion was to dismiss (*see Lindbergh v SHLO 54, LLC*, 128 AD3d 642, 644-645 [2nd Dept 2015]).

The foregoing, taken together, and affording plaintiff the benefit of every favorable inference, establishes prima facie that defendants discriminated against plaintiff on account of his sexual orientation in finding him psychologically unfit to serve.

To make out a prima facie claim of retaliation under the State HRL, a plaintiff must show that (1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; Executive Law § 296[7]). Under the City HRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant "took an action that disadvantaged" him or her

(*Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]; *see also Albunio v City of New York*, 67 AD3d 407, 413 [1st Dept 2009], *affd* 16 NY3d 472 [2011]).

Plaintiff alleges that in retaliation for his having commenced the 2007 action against defendants, they placed a psychological hold on his present application for employment in 2014, and ultimately found him psychologically unfit for the position.

As an initial matter, plaintiff's retaliation claims are not barred either by his settlement of the 2007 action, or by the general release of all claims that plaintiff could have asserted against defendants until that time. The alleged facts underlying the retaliation claims occurred in February 2014, and were not, therefore, precluded by the general release executed before that date, which waived only causes of action "up to . . . and including the date of the execution of this General Release" (*see Hughes v Long Is. Univ.*, 305 AD2d 462 [2d Dept 2003]; *see also Swift v Ki Young Chloe*, 242 AD2d 188, 194 [1st Dept 1998]).

In finding plaintiff psychologically unfit, defendants' police psychologist relied on plaintiff's 2007 action against defendants. Specifically, the police psychologist's report stated that plaintiff had "poor stress tolerance" and relied "chiefly on litigation to resolve issues." The 2007 litigation

serving as the psychological disqualifier is sufficient to plead the causal connection between the protected activity and the adverse action in this case.

Defendants contend that the 2007 action is not sufficiently temporally proximate to the alleged adverse action to support the causal connection necessary for plaintiff's retaliation claim. While temporal proximity between a protected activity and an adverse employment action may, under some circumstances, be sufficient in itself to permit the inference of a causal connection necessary for a retaliation claim, the fact that actions are not temporally proximate is not necessarily fatal to a retaliation claim. The absence of temporal proximity will not defeat the claim, where, as here, there are other facts supporting causation *(see Noho Star Inc. v New York State Div. Of Human Rights*, 72 AD3d 448 [1st Dept 2010]; *see also Ostrowski v Atlantic Mut. Ins. Cos.*, 968 F2d 171 [2d Cir 1992]; *but see Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528 [1st Dept 2013], *lv denied* 23 NY3d 903 [2014]). Plaintiff's allegations are sufficient to permit the inference that the reason plaintiff was found psychologically unfit to serve was because he brought the 2007 action against defendants. This, along with the extensive history of having been found psychologically fit to serve as a police officer and in similar

positions, supports an inference that the disqualification was retaliation for bringing the 2007 action.

Inasmuch as we are reinstating the discrimination and retaliation causes of action, we find that the appeal from the denial of the motion to amend the complaint is academic.

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5495 Xiang Fu He, Index 111331/09
Plaintiff-Respondent,

-against-

Troon Management, Inc., et al.
Defendants-Appellants.
- - - - -
[And a Third Party-Action]

_____

Rosenbaum & Taylor, P.C., White Plains (Scott Taylor of counsel), for appellants.

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 23, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants cannot be held liable for injuries allegedly sustained by plaintiff when he slipped on snow and ice on the sidewalk adjacent to their property, because they were out-of-possession landlords with no contractual obligation to keep the sidewalks clear of snow and ice, and the presence of snow and ice

does not constitute a significant structural or design defect (*Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]; *accord Cepeda v KRF Realty LLC*, 148 AD3d 512 [1st Dept 2017]).

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5496 In re Angelica D., and Another,

Dependent Children Under the Age of Eighteen Years, etc.,

Deborah D.,
Respondent-Appellant,

Sheltering Arms Children & Family Services,
Petitioner-Respondent.

_____

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

Dawn M. Shammas, New York, for respondent.

Seymour W. James, Jr., The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for children.

_____

Orders of fact-finding and disposition (one paper each), Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 1, 2016, which, after a hearing, determined that respondent mother had permanently neglected the subject children, terminated her parental rights, and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that despite the agency's diligent efforts to encourage and strengthen the parental relationship, the mother

failed to plan for the children's future (*see* Social Services Law § 384-b[7][a]). The agency made diligent efforts by, among other things, referring the mother for a mental health evaluation, parenting skills and anger management classes, and by scheduling and facilitating visitation with the children (*see* Social Services Law § 384-b[7][f]; *see also Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512, 512 [1st Dept 2015]). Throughout this period, however, the mother repeatedly rejected the agency's efforts. She insisted that she did not need services and accused the agency of wrongfully taking the children away. She also refused to provide her home address, and the agency was unable to conduct an essential home visit.

The mother's refusal to participate in services and take steps to correct the conditions that led to the removal of the children from their home clearly amounts to a failure to plan for the children's future (*see Matter of Cerenithy B. [Ecksthine B.]*, 149 AD3d 637, 638 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]; *Matter of Dante Alexander W. [Norman W.]*, 148 AD3d 492, 493 [1st Dept 2017]). She also failed to visit the children consistently, attending less than half of the permitted visits, which in itself constituted a ground for the finding of permanent neglect (*Matter of Angelica S. [Cynthia C.]*, 144 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 1128 [2017]).

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interests of the children (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment is not appropriate, given the mother's lack of insight into her behavior and the special needs of the children, and given the fact that the children's needs are being met in their foster home, where they have resided since August 2013 and where they are well-bonded with the foster parents, who wish to adopt them (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]).

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5498 39E67th LLC, et al., Index 161316/14
Plaintiffs-Appellants,

-against-

Oliver Bivins, Jr., et al.,
Defendants-Respondents.

_____

Kriss & Feuerstein LLP, New York (Michael J. Bonneville of counsel), for appellants.

Vernon & Ginsburg, LLP, New York (Bari Wolf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 18, 2016, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the breach of contract cause of action and denied plaintiffs' cross motion for summary judgment on that cause of action, unanimously affirmed, with costs.

In the 2013 "Summary of Terms" (the contract on which plaintiffs sue), defendants Oliver Bivins, Jr. (Oliver Jr.) and Estate of Lorna Bivins agreed to transfer 20% of 39 East 67th Street to plaintiff Beachton Tuxedo LLC in exchange for, inter alia, Beachton's release of its claim to 40% of 808 Lexington Avenue, which claim was based on an October 2012 agreement between Beachton and Oliver Jr. The motion court found that this consideration was illusory because Oliver Jr. could not have

conveyed any interest in 808 Lexington Avenue as of October 2012. However, Lorna (Oliver Jr.'s mother) owned at least 50%, and possibly 100%, of the Lexington Avenue property. When she died intestate in February 2011, title to that property vested in Oliver Jr., her only child and heir (*see Matter of Kingsland v Murray*, 133 NY 170, 174 [1892]; *see also Matter of Ramsdill*, 190 NY 492, 495 [1908]). Thus, as the owner of at least 50% of 808 Lexington Avenue, Oliver Jr. had the power in October 2012 to agree to give 40% of the property to Beachton.

We affirm the dismissal of the contract claim. First, the only proper plaintiff on this claim is Beachton; none of the other plaintiffs were parties to the Summary of Terms. Second, as to Beachton, reading the Summary of Terms together with the October 2012 agreement to which it refers (*see e.g. Nolfi Masonry Corp. v Lasker-Goldman Corp.*, 160 AD2d 186, 187 [1st Dept 1990]), it is clear that Beachton had the right to convert its mortgage note into equity as long as the note had not been paid in full. However, in December 2014, Beachton was paid in full. In opposition to plaintiffs' cross motion, Oliver Jr. submitted an affidavit saying, "I never agreed to give [plaintiff Edward Kuhnel, a member and organizer of Beachton] both the 808 Lexington mortgage and equity to exchange for equity in 67th Street . . . . [I]t was *either* one *or* the other." The affidavit

that plaintiffs submitted in reply on their cross motion did not dispute this.

We have considered plaintiffs' remaining contentions, and find them unavailing.

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5499 The People of the State of New York, Respondent, Ind. 1392/13

-against-

Henry Peguro, Defendant-Appellant.

_____

Goldstein & Weinstein, Bronx (Barry A. Weinstein of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered December 8, 2015, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 12 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence supports the inference that when defendant stabbed the victim in the chest he did so with intent to cause serious physical injury.

Defendant has not preserved any of his challenges to the court's charge, and we decline to review them in the interest of justice. As an alternative holding, we find that each of the instructions at issue, when viewed as a whole, conveyed the proper standards (*see generally People v Umali*, 10 NY3d 417, 427 [2008]). The court correctly instructed the jury on prior inconsistent statements, reasonable doubt and the presumption of innocence, and there was nothing in the charge that was constitutionally deficient.

Defendant's challenges to the prosecutor's summation are likewise unpreserved, and we decline to review them in the interest of justice. 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 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

To the extent the 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 failure to object to portions of the People's summation and the court's charge fell below an objective

standard of reasonableness, or that defendant was prejudiced by the lack of these objections (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5500 Betty Sebrow, Index 151818/15
Plaintiff-Appellant,

-against-

Joe & Mike Taxi, Inc.,
Defendant-Respondent,

Md N. Mia, etc.,
Defendant.

_____

The Berkman Law Office LLC, Brooklyn (Brian Lance Gotlieb of counsel), for appellant.

Thomas Torto, New York (Jason Levine of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 22, 2016, which granted defendant Joe & Mike Taxi, Inc.'s (J&M) motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff alleges that she hailed a taxicab owned by J&M and operated by codefendant Mohammed N. Mia, and that Mia made anti-Semitic remarks to her, threatened her safety, and misled police officers as to whether she had paid the fare.

J&M made a prima facie showing that Mia was not its employee, but rather was an independent contractor, and that it therefore could not be held liable for Mia's acts (*see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381 [1995]). In

particular, J&M showed that it leased the taxi to Mia, who received no salary, retained his own fares, and had the sole responsibility and control over the manner and means of providing taxi services (*see Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]; *see also Marino v Vega*, 12 AD3d 329, 330 [1st Dept 2004]; *Irrutia v Terrero*, 227 AD2d 380, 381 [2d Dept 1996]).

Plaintiff's speculation that discovery could lead to relevant evidence was insufficient to overcome J&M's prima facie showing (*see Zuckerman v City of New York*, 49 NY2d 557, 563-564 [1980]).

Plaintiff failed to preserve her contention that the daily taxi lease agreement submitted in support of J&M's motion expired by its terms before the incident.

There is no basis to hold J&M vicariously liable under Vehicle and Traffic Law § 388 for Mia's intentional actions (*see Gomez v Singh*, 309 AD2d 620, 621 [1st Dept 2003]).

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5501 The People of the State of New York, Ind. 1479/14
Respondent,

-against-

Davon Suber,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Julia 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 (Edward McLaughlin, J.), rendered September 15, 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: JANUARY 23, 2018

CLERK

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

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5502 Efrain Galicia, et al., Index 24973/15E
Plaintiffs-Appellants,

-against-

Donald J. Trump, et al.,
Defendants-Respondents,

John Does 1-4,
Defendants.

_____

Roger J. Bernstein, New York, and Eisner & Dictor, P.C., New York (Benjamin N. Dictor of counsel), for appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Jeffrey L. Goldman of counsel), respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about August 31, 2016, which, insofar as appealed from, granted defendants' motion to dismiss plaintiff's third cause of action for tortious interference with political speech/prima facie tort, unanimously affirmed, without costs.

The court properly dismissed the third cause of action, which was not brought as a tort claim under 42 USC § 1983 for

interference with plaintiffs' constitutional rights to free speech, but as a claim for tortious interference with political speech, which is not recognized under New York law

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5503 Gerard Palionis, Index 150016/13
Plaintiff-Appellant,

-against-

Jakobson Properties, LLC, et al.,
Defendants-Respondents.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 4, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this case, defendants owed no duty, statutory or otherwise, to plaintiff to provide continuous illumination in the stairway upon which plaintiff slipped during the ongoing blackout resulting from Hurricane Sandy (*see e.g. Kopsachilis v 130 E. 18 Owners Corp.*, 11 NY3d 512 [2008]; *Viera v Riverbay Corp.*, 44 AD3d 577 [1st Dept 2007]). Plaintiff's reliance on *Goldstein v Consolidated Edison Co. of N.Y.* (115 AD2d 34 [1st Dept 1986], *lv denied* 68 NY2d 604 [1986]), is misplaced as the defendant in *Goldstein* created a dangerous situation by encouraging the tenants to use the unlighted stairways to fetch water from the

fire hydrant that the building superintendent had opened up for them. Here, nothing in the record shows that defendants encouraged plaintiff or other tenants to use the unlighted stairs in any way. To the extent plaintiff is arguing that defendants voluntarily assumed a duty of care by taking affirmative acts to alleviate the hazardous condition, and that he relied on such acts to his detriment, the record does not demonstrate that he relied on the actions taken by defendants in deciding to use the stairs to leave the building (*see Heard v City of New York*, 82 NY2d 66, 72-73 [1993]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 523 [1980]).

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5504 The People of the State of New York, Ind. 4823/12
Respondent,

-against-

Rosemond Bottex,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 31, 2014, convicting defendant, after a jury trial, of grand larceny in the fourth degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that defendant committed larceny as to customers of the fraudulent security guard training business where he was employed. The jury could reasonably have concluded that defendant was accessorially

liable for false representations and promises made by other participants in the scheme, that he personally made statements that he knew to be false to the customers and that he displayed a consciousness of guilt.

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5505 In re Kenny J.M.,

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

John M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

John R. Eyerman, New York, for appellant.

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

_____

Order of fact-finding and disposition, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about November 17, 2015, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence that the father's actions posed an imminent danger to the child's emotional and physical well-being (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The mother testified that the father assaulted her in the presence of the child, who cried and attempted to assist her, and the child's out-of-court statements also described the father attacking the mother (*see Matter of*

Serenity H. [Tasha S.], 132 AD3d 508 [1st Dept 2015]).

The father's assertion that the child was not in imminent danger of harm since he witnessed only a single incident of violence is unavailing (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]; *Matter of Madison M. [Nathan M.]*, 123 AD3d 616, 617 [1st Dept 2014]). The record shows that when the father perpetrated the act of violence against the mother, not only did the child witness it, he became involved in the altercation. He asked his father to stop striking his mother and attempted to assist her, all to no avail, leaving him in tears, which demonstrates an imminent risk of impairment (*see Matter of Tavene H. [William G]*, 139 AD3d 633 [1st Dept 2016]; *Matter of Serenity H. [Tasha S.]*, 132 AD3d at 509). Contrary to the father's assertions, no expert testimony was needed for a showing of impairment (*see Matter of Enrique V. [Jose U.V.]*, 68 AD3d 427 [1st Dept 2009]).

Furthermore, there exists no basis to disturb the court's evaluation of the evidence, including its credibility determinations (*see Matter of Ilene M.*, 19 AD3d 106 [1st Dept 2005]).

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5506 Donald Thomas, et al., Index 157528/12
Plaintiffs-Appellants,

-against-

Denise Slaton, et al.,
Defendants-Respondents.

_____

Busson & Sikorski, P.C., New York (Robert S. Sikorski of counsel), for appellants.

Schwartzman Garelik Walker & Troy, P.C., New York (Donald A. Pitofsky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 22, 2017, which, to the extent appealed from, in this action for adverse possession, denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs.

Triable issues of fact exist as to whether plaintiffs' possession of the subject property was hostile and exclusive for

the statutory period of 10 years (*see generally Brand v Prince*, 35 NY2d 634, 636 [1974]).

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5507 Ralph Zamboli, etc., et al., Index 304661/11
Plaintiffs-Respondents,

-against-

Eleni Dilos-Rogu, et al.,
Defendants,

Anibal Puente,
Defendant-Appellant.

_____

KL Rotondo & Associates, Rye (Kathi Libby Rotondo of counsel), for appellant.

Meagher & Meagher, P.C., White Plains (Keith J. Clarke of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about November 1, 2016, which, insofar as appealed from as limited by the briefs, denied defendant Anibal Puente's motion for summary judgment dismissing the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established prima facie, through an affirmation by an expert surgeon, that he did not deviate from the accepted standard of medical practice in performing laparoscopic surgery on plaintiffs' decedent to repair a ventral hernia and in treating the decedent post-operatively and that there was no

causal relationship between the care he rendered and the conditions later suffered by the decedent, including the ileus, bowel perforation and infection (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]).

In opposition, plaintiffs failed to raise an issue of fact as to either of these elements through his expert's affirmation, which was speculative and unsupported by evidence (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). Plaintiffs' expert opined that defendant departed from accepted practice by performing the surgery laparascopically despite having inadequate visualization of the surgical field and that, as a result, he failed to appreciate that the decedent's bowel was strangulated. However, there is no support in the record for the expert's underlying assumptions that defendant did not have adequate visualization of the surgical field and that the decedent had a strangulated hernia at the time of surgery. Plaintiffs' expert opined that defendant departed from accepted practice by failing to perform a physical exam or order any tests during the decedent's two follow-up visits, which would have revealed the presence of an ileus. However, the record reflects that the symptoms of an ileus did not present until after the decedent was no longer under defendant's care. Plaintiffs' expert also failed

to link defendant's hernia repair surgery and follow-up treatment to any of the conditions diagnosed upon the decedent's subsequent admissions to another hospital.

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5508- Index 653812/15
5509 First Advantage LNS, Inc., et al.,
Plaintiffs-Appellants,

-against-

LexisNexis Risk Solutions, Inc.,
Defendant-Respondent.

_____

Mayer Brown LLP, New York (Evan M. Tager and Daniel F. Fisher of counsel), for appellants.

Morrison & Foerster LLP, New York (Joseph R. Palmore of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Kathryn E. Freed, J.), entered February 17, 2017, which, among other things, dismissed the amended complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 2, 2017, which granted defendants' motion to dismiss the amended complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court correctly dismissed plaintiffs' indemnification claims for the cases *Freckleton* and *Baker,* as neither is within defendant's indemnification obligations under the Purchase Agreement. Neither case is among the specific "matters set forth below" in Schedule 9.1(j) of the agreement. Nor were the *Freckleton* and *Baker* cases "resulting from,

attributable to, based upon or arising out of" *Goode and Goodman v LexisNexis Risk & Information Analytics Group, Inc.* (the G&G Action), one of the matters "set forth below" on Schedule 9.1(j). The *Freckleton* and *Baker* suits could have been brought even had the G&G Action never been commenced, and they result from, and are based on, defendant's alleged conduct, not the G&G Action.

Plaintiffs' construction of 9.1(j)(i) renders 9.1(j)(ii) redundant. Were the phrase in 9.1(j)(i) "[t]hose matters set forth below" read to include anything *other* than the specific matters listed, there would have been no need to include the provision at 9.1(j)(ii) involving the same or similar parties, with the same or similar legal issues applied to the same or similar facts or subject matter. We reject plaintiffs' efforts to fit *Baker*, which postdated the limitations period of 9.1(j)(ii), into 9.1(j)(i). A contrary holding would impermissibly strip that provision of all force and effect (*see Nautilus Ins. Co. v Matthew David Events, Ltd.*, 69 AD3d 457, 460 [1st Dept 2010]).

We also reject plaintiffs' efforts to fit *Freckleton* into Schedule 9.1(j)(ii), as plaintiffs disregard or contort that subsection's caveat: "to the extent such matters below are claims by a Governmental Entity or private class-action." To fit within (j)(ii), *Freckleton's* claims needed to be the same or similar to

the class-action claims asserted in the G&G Action, which they are not.

The class-wide claims in G&G are based on different statutory provisions, and do not depend on the accuracy of information in an individual's screening report. In contrast, *Freckleton's* claim, like the G&G Action individual claims, depends on the accuracy of the reported information (*see* 15 USC § 1681g). Moreover, the facts in the G&G Action class-wide claims are not "substantially similar" to *Freckleton*'s. *Freckleton's* claim turns on circumstances specific to each individual employee. In contrast, the G&G Action's class-wide claims concern defendant's alleged systemic failures to provide advance notice or disclose requested information.

We disagree that *Freckleton* and the G&G class claims are substantially similar because both concern Fair Credit Reporting Act violations in the context of the Esteem database. Were this general category the intended scope of indemnification, the parties, sophisticated corporate entities on both sides, could have so indicated. However, the specific language of Schedule 9.1(j) shows that they did not, and we should not read the

agreement to imply what they chose not to include (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]).

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: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5510 The People of the State of New York, Ind. 1123/15
Respondent,

-against-

Victor Sanchez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey Richards 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 (Maxwell Wiley, J.), rendered November 24, 2015,

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

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

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

ENTERED: JANUARY 23, 2018

CLERK

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

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5511 The People of the State of New York, Respondent, Ind. 4855/13

-against-

Peter Almestica, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered June 2, 2015, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 23, 2018

CLERK

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5512N Francisco Garcia, Index 307341/12
Plaintiff-Respondent,

-against-

Habacus Construction, Inc., et al.,
Defendants-Appellants.

Robert L. Dougherty, Garden City, for appellants.

Kevin J. Abruzzese, Garden City, for respondent.

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered October 6, 2016, which, to the extent appealed from, denied defendant Habacus Construction, Inc. (Habacus) summary judgment dismissing the breach of contract cause of action, and denied the branch of defendants' motion seeking sanctions and costs, unanimously affirmed, without costs.

The motion court correctly ruled that the alleged oral agreement between plaintiff and Habacus for a share of the company's profits during the duration of plaintiff's employment did not violate the statute of frauds. Plaintiff testified that the profit-sharing agreement was for the duration of his employment, which was at will and thus could have been terminated within one year of his hiring (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). In addition, issues of fact exist concerning the nature of plaintiff's employment agreement with defendants.

The motion court providently exercised its discretion in denying defendants' motion for sanctions and costs (*see* 22 NYCRR 130-1.1).

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

ENTERED: JANUARY 23, 2018

CLERK