SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 27, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Tom, Kapnick, JJ.

3085 Hanover Insurance Company, et al., Index 154006/14
Plaintiffs-Appellants,

-against-

Philadelphia Indemnity Insurance Co.,
Defendant-Respondent.

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Crisci, Weiser & McCarthy, New York (Roy Itzkowitz of counsel), for appellants.

Marshall, Conway & Bradley P.C., New York (Christopher T. Bradley of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Kelly O'Neill Levy, J.), entered on or about November 9, 2015, to the extent appealed from as limited by the briefs, declaring that defendant is obligated to contribute equally with plaintiff Hanover Insurance Company to the cost of defending plaintiff Manhattan School of Music in the underlying action and that defendant is only obligated to indemnify Manhattan School to the extent the latter is held vicariously liable for the negligent acts of the named insured, unanimously reversed, on the law, without costs, and it is declared that defendant is not

required to defend and indemnify Manhattan School in the underlying action.

Plaintiff Manhattan School is an additional named insured under a policy issued by defendant to nonparty Protection Plus Security Corporation. In an additional insured endorsement, the policy provides that the Manhattan School is an additional named insured "only with respect to liability for 'bodily injury'. . . caused, in whole or in part, by" the acts or omissions of Protection Plus in the performance of its operations for the Manhattan School. In the underlying personal injury action, a security guard employed by Protection Plus alleges that he slipped and fell on a recently mopped floor while working at the Manhattan School.

When "an insurance policy is restricted to liability for any bodily injury 'caused, in whole or in part,' by the 'acts or omissions' of the named insured, the coverage applies to injury proximately caused by the named insured" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 317 [2017]). Such language in a policy does not equate to "but for" causation and is not the same as policies containing the phrase, "arising out of" (*id.* at 321, 323-325). Fundamentally, "'arising out of' is not the functional equivalent of 'proximately caused by'" (*id.* at 324). Thus, it is not enough to merely establish a causal link to the injury.

Notably, the language in the endorsement was "intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence" (*id.* at 326).

Accordingly, when a policy limits coverage to an injury "caused, in whole or part" by the "acts or omissions" of the named insured, coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission (*id.* at 323).

Here, the acts or omissions of Protection Plus were not a proximate cause of the security guard's injury. Rather, the sole proximate cause of the injury was the additional insured, and thus coverage is not available to the Manhattan School under defendant's policy (*id.* at 320).

Our holding makes it unnecessary to address the issue of which policy was primary and which policy was excess.

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

ENTERED: MARCH 27, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Andrias, Kapnick, Moulton, JJ.

5643 The Related Companies, L.P., Index 650778/15
Plaintiff-Respondent,

-against-

Tesla Wall Systems, LLC,
Defendant-Appellant.

_____

Eversheds Sutherland (US) LLP, New York (Lawrence A. Dany, III of counsel), for appellant.

Boies Schiller Flexner LLP, New York (Nicholas A. Gravante, Jr. and Demetri Blaisdell of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered June 21, 2017, against defendant in plaintiff's favor in the amount of $15,356,464.60, subject to offsets, unanimously reversed, on the law, without costs, the judgment vacated, and plaintiff's motion for summary judgment as to the first cause of action denied.

On November 28, 2012, plaintiff, the Related Companies, L.P., and Skye Holdings, Ltd., initialed a "Tentative Term Sheet" outlining the ownership and operation of defendant, Tesla Wall Systems, LLC, which was to provide curtain and window wall systems for real estate projects being developed by affiliates of Related. The term sheet, which the parties agree governs the joint venture, provides in relevant part:

"2. Available Cash Distributions - Waterfall:

"First, payment of taxes;

"Next, repayment of all project cash advances/member loans with accrued interest @ 9% per annum;

"Next, 60% to Related until existing loan (approx. $6.08mm) together with accrued interest thereon; 40% to Skye [a holding company formed by Tesla's principal];

Next, 25% to Related and 75% to Skye."

"Available Cash" is not defined. Tesla contends that it refers to any after-tax profits available to the company after the payment of all costs and expenses. Related contends that "available cash" includes any money that Tesla has or is able to obtain, irrespective of whether Tesla operates at a profit or loss.

Related, by its wholly owned subsidiary MBM Supply, advanced $17,371,060.73 to Tesla to fund its operations in connection with certain Related projects. The sum of $6,617,744.69 was recovered, leaving a balance of $10,753,316.04. After unsuccessful wind-down negotiations, during which a draft close-out agreement was exchanged but not signed, Tesla ceased active business operations, leading to numerous lawsuits in state and federal court.

In this action, Related seeks to recover the unpaid cash advances of $10,753,316.04, which it characterizes as unconditional loans, plus interest at 9% per annum. Tesla denies

liability, asserting that the advances are not unconditional loans and that it does not possess any "available cash," a condition precedent to repayment of the advances under the term sheet. Tesla also asserts affirmative defenses, including waiver, estoppel, and unclean hands, and that Related breached its fiduciary duty and legal obligations to Tesla and engaged in fraudulent conduct.

Tesla currently does not have the cash on hand needed to repay the advances. However, it may receive certain funds in the future. This includes value added tax (VAT) refunds and the proceeds of a federal court litigation against its former president, Michael Budd, in which it has obtained a liability verdict and awaits a retrial on damages. The *Budd* action, as well as Tesla's affirmatives defenses herein, are based, in part, on allegations that Budd, while employed by Tesla, "secretly met with Related to propose the formation of a competing curtain wall company," "secretly secured millions of dollars in projects from Related that Tesla also pursued," and "secretly hired Tesla's employees to work for either Related or the competing venture." Related is also challenging "fraudulent transfers" by Tesla in another action, and contends that, if successful, that too may result in "available cash."

Both parties moved for summary judgment. In an order

entered April 17, 2017, the motion court, stating that "[i]t is undisputed both that defendant presently has no funds to repay Related and that defendant has the potential to received certain funds that could possibly result in some recovery by Related," determined that "the only relief Related is entitled to receive is a determination that if, as, and when Tesla recovers any sums in excess of the offsets established at trial, those sums will be paid to Related . . . in accordance with the terms of the contract." Accordingly, the court granted Related's motion with respect to the first cause of action for breach of contract to the extent of determining "that if Tesla recovers funds that exceed the offsets for which provision is made in the contract between the parties, Related is entitled to its rights under the contract." Tesla's cross motion for summary judgment dismissing the breach of contract claim was denied.

Subsequently, on June 21, 2017, the court entered judgment in Related's favor, pursuant to the parties' stipulation, in the amount of $15,356,464.60, subject to the prior payment by Tesla of offsets of not less than $2,353,323.47 in unpaid legal fees and costs, as well as other liabilities related to legal fees in amounts to be determined. The court stayed the judgment until further order, and the parties preserved the right to appeal from the judgment, which brings up for review the order granting

Related summary judgment on its breach of contract claim and denying Tesla's motion to dismiss that claim.

Although the motion court correctly determined that "[p]assing funds through the waterfall is the only condition precedent to the repayment of the loan," it erred in granting summary judgment to Related on its breach of contract claim. A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995] [internal quotation marks omitted]). The term sheet does not contain an unconditional promise by Tesla to repay the cash advances, distinguishing the transactions from the typical loan arrangement, which involves an unconditional promise to repay the amount advanced. Rather, pursuant to the waterfall provision, Tesla was to repay the cash advances from cash that was available for distribution after the payment of taxes. Related failed to establish that this condition precedent was satisfied, and its motion for summary judgment should have therefore been denied once the court determined that Tesla presently had no "available cash" to repay Related (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645-646 [2009]).

Furthermore, insofar as Related argues that it is

appropriate for it to seek immediate repayment of the cash advances because Tesla repudiated the contract, an issue of fact exists as to whether Tesla "frustrated or prevented the occurrence of the condition" by refusing to use VAT refunds to repay the advances or by stating that it would not repay the balance due to Related in the future (*see ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006] [internal quotation marks omitted]). This issue also precludes the grant of summary judgment to Tesla dismissing Related's breach of contract claim.

Related's reliance on cases in which courts have held that financial difficulties do not excuse the performance of contractual duties is misplaced, because the term sheet made "available cash" a condition precedent to repayment (*see Stasyszyn v Sutton E. Assoc.*, 161 AD2d 269, 271 [1st Dept 1990] [economic distress does not excuse compliance "absent an express contingency clause in the agreement allowing a party to escape performance under certain specified circumstances"]). In any event, summary judgment in Related's favor must be denied because Related failed to meet its burden "to demonstrate the absence of genuine issues of material fact on every relevant issue raised by

the pleadings, including any affirmative defenses" (*Hoffman v Wyckoff Hgts. Med. Ctr.*, 129 AD3d 526, 526 [1st Dept 2015]).

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

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

ENTERED: MARCH 27, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5941 The People of the State of New York, Respondent, Ind. 3958/14

-against-

Troy Steinbergin, Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 30, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously reversed, on the law, the motion to suppress granted, and the matter remanded for a new trial preceded by an independent source hearing.

During a buy and bust operation, the police made what the suppression court found to be an investigatory stop of defendant, based on reasonable suspicion, followed by a confirmatory identification that provided probable cause to arrest defendant for selling drugs. However, during the stop, but before the identification, the police handcuffed defendant because defendant

was "a little irate" and the officer wanted to "make sure nothing escalated."

"Although the use of handcuffs is not dispositive of whether an investigatory detention on reasonable suspicion has been elevated to an arrest, handcuffing is permissible in such a detention only when justified by the circumstances" (*People v Blanding*, 116 AD3d 498, 499 [1st Dept 2014]). Here, defendant was not suspected of anything more than a street-level drug sale, the police had no reason to believe that he was armed, dangerous or likely to flee, and there was no indication on the record that defendant offered any resistance before he was handcuffed. That defendant was "a little irate" does not establish dangerousness or resistance that would justify the use of handcuffs during an investigatory stop (*see id.*).

The People maintain that the specificity of the description and the temporal and spatial proximity to the crime provided probable cause to arrest defendant (*see People v Rodriguez*, 199 AD2d 181, 182 [1st Dept 1993]). However, as defendant notes, the trial court explicitly ruled that the detective lacked probable cause to arrest defendant at the time of his handcuffing. Even assuming the People are correct that probable cause to arrest existed, this Court does not have power to review issues decided in an appellant's favor by the trial court (*see People v*

Concepcion, 17 NY3d 192, 195 [2011]; *People v Blanding*, 116 AD3d at 499 [refusing to reach the merits of the People's argument, made to but rejected by the hearing court, that the arresting officer had probable cause to arrest the defendant when he was stopped and before the confirmatory identification]).

Since we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: MARCH 27, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5942 Miriam Y. Gutierrez, Index 154318/14
Plaintiff-Respondent,

-against-

Hal L. Reiser,
Defendant-Appellant.

_____

Brand Glick Brand, P.C., Garden City (Kenneth Finklestein of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered February 16, 2017, which denied defendant's motion for sanctions on grounds of spoliation of evidence, unanimously affirmed, with costs.

Plaintiff, while driving her minivan, was involved in two motor vehicle accidents -- on April 10, 2013 she was rear-ended by defendant, and on April 29, 2013, 19 days later, she struck another vehicle. Notwithstanding that the parties entered into a so-ordered stipulation that granted plaintiff's motion for summary judgment on liability, the issue of which accident was the cause of plaintiff's personal injuries is unresolved (*see e.g. Williams v State of New York*, 308 NY 548, 554 [1955]). Defendant contends that plaintiff's disposal of her minivan before his insurance carrier had an opportunity to inspect it is

sanctionable because the inspection of the minivan is crucial to determining whether plaintiff's alleged injuries are attributable to the April 10 or the April 29 accident.

Defendant had the burden of establishing that plaintiff had a duty to preserve the minivan at the time it was destroyed, that plaintiff had a culpable state of mind, and that the destroyed evidence was relevant to and supported defendant's claim or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543 [2015]). Defendant failed to satisfy this burden. Plaintiff testified that before she had the second accident the minivan was examined at an auto body repair shop at the request of an insurance company. She testified that it was not her insurance company. Plaintiff also identified the auto body repair shop to which she took the vehicle after the second accident, and testified that this shop inspected damage to the minivan from both accidents. Defendant failed to proffer an affidavit to controvert this testimony. Indeed, defendant failed to detail any follow-up investigations his insurance carrier conducted concerning the named auto body repair shop. In any event, other evidence, such as the parties' deposition testimony, photographs

taken by plaintiff and defendant at the accident scene of the damage to their vehicles, and the police report from both accidents are sufficient substitutes for another inspection of the vehicle.

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6094 The People of the State of New York, Ind. 2793/14
Respondent,

-against-

David Meck,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered April 29, 2015, as amended July 2, 2015, convicting defendant, upon his plea of guilty, of robbery in the third degree and operating a motor vehicle while under the influence of alcohol, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

Defendant's other claims having been withdrawn at oral argument, we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6095 Norma Andrade, et al., Index 306417/08
Plaintiffs-Appellants,

-against-

Agapito Perez, et al.,
Defendants-Respondents.

_____

The Frankel Law Firm, New York (Reuven S. Frankel of counsel), for appellants.

Natalie Gonzalez, P.C., Melville (Natalie Gonzalez of counsel), for respondents.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about December 7, 2017, which denied plaintiffs' motion to vacate a sua sponte order directing them to provide certain disclosure to defendants, unanimously reversed, on the law, without costs, and the motion granted.

The motion court should have granted plaintiffs' motion to vacate the sua sponte order directing them to produce disclosure to defendants, as defendants' answer had been stricken by prior order of the court. Accordingly, defendants were not entitled to any further discovery, including discovery in preparation for an inquest (*see Servais v Silk Nail Corp.*, 96 AD3d 546, 547 [1st Dept 2012]).

To the extent the motion court ordered plaintiffs to provide disclosure already submitted to defendants' former counsel, a

different result is not warranted. Assuming defendants are unable to access their case file due to a retaining lien, the court improperly facilitated a "work around" of such lien (*see Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532 [1st Dept 2010]; *Warsop v Novik*, 50 AD3d 608 [1st Dept 2008]; *see also Artim v Artim*, 109 AD2d 811, 812 [2d Dept 1985]). If there is no retaining lien, defendants should seek an order to compel former counsel's production of the discovery.

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6096 In re Michael K.,
Petitioner-Appellant,

-against-

Pamela D.W.,
Respondent-Respondent.

Friedman & Friedman, Garden City (Andrea B. Friedman of counsel), for appellant.

Jill M. Zuccardy, New York, for respondent.

Order, Family Court, New York County (Adetokunbo Fasanya, J.), entered on or about March 21, 2017, denying petitioner father's objections to an order, same court (Karen D. Kolomechuk, Support Magistrate) entered on or about January 6, 2017, which, inter alia, dismissed his petition for a downward modification of child support, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in denying the father's objections to the Support Magistrate's dismissal of his petition (*see Matter of Michelle F.F. v Edward J.F.*, 50 AD3d 348, 349 [1st Dept 2008], *appeal denied* 11 NY3d 708 [2008]). Contrary to the father's argument, the Support Magistrate considered the testimony and documentary evidence and made appropriate findings, and such findings are entitled to deference (*see Matter of Moore v Blank*, 8 AD3d 1090, 1091 [1st

Dept 2004], *lv denied* 3 NY3d 606 [2004]). Among other things, the Magistrate found that the income reported on the father's tax returns did not present a complete picture of his finances (*see Michelle F.F.*, 50 AD3d at 349; *see e.g. Peri v Peri*, 2 AD3d 425, 426 [2d Dept 2003]). Additionally, the father failed to demonstrate that he diligently sought to obtain employment commensurate with his earning capacity (*see Michelle F.F.* at 349; *Matter of Virginia S. v Thomas S.*, 58 AD3d 441, 442-443 [1st Dept 2009]; *see also Cristina M. v Kevin S.M.*, 91 AD3d 437, 438 [1st Dept 2012], *lv denied* 19 NY3d 805 [2012]). Thus, the Support Magistrate providently concluded that the father failed to show a substantial change in circumstances to warrant a downward modification (*id.*).

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: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6097 In re B & M Nachos Corp., Index 101075/17
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

Christopher R. Riano, New York (Alexandra S. Obremski of counsel), for respondent.

_____

Determination of respondent, dated July 31, 2017, which cancelled petitioner's on-premises liquor license and imposed a $1,000 bond forfeiture, upon a finding of violations of the Alcoholic Beverage Control Law and Rules of the State Liquor Authority, unanimously confirmed, without costs, the petition denied, and the proceeding, brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Nancy M. Bannon], entered on about August 30, 2017), dismissed.

Substantial evidence supports respondent's finding that on April 19, 2016 petitioner allowed the premises to become disorderly in violation of Alcoholic Beverage Control Law § 106(6), and failed to exercise adequate supervision in violation of Rules of the State Liquor Authority (9 NYCRR) § 48.2.

Specifically, there is substantial evidence that the security guards on duty exercised lax supervision, which was tolerated by management to the extent that an assault occurred (*see Matter of Moonwalkers Rest. Corp. v New York State Liq. Auth.*, 250 AD2d 428 [1st Dept 1998]; *Matter of Warehouse Entertainment v New York State Liq. Auth.*, 269 AD2d 278 [1st Dept 2000], *lv denied* 95 NY2d 762 [2000]; *Matter of Petillo v State of N.Y. Liq. Auth.*, 248 AD2d 541 [2d Dept 1998], *lv denied* 92 NY2d 814 [1998]).

Substantial evidence also supports respondent's finding that petitioner violated Rules of the State Liquor Authority (9 NYCRR) § 53.1(q), which provides for, inter alia, cancellation of a liquor license when "any noise, disturbance, misconduct, disorder, act or activity occurs in the licensed premises, or in the area in front of or adjacent to the licensed premises, or in any parking lot provided by the licensee for use by licensee's patrons, which, in the judgment of the authority, adversely affects or tends to affect the protection, health, welfare, safety or repose of the inhabitants of the area in which the licensed premises are located." We reject petitioner's contention that disturbances and disorder emanating from its bar were not "in the area in front of or adjacent to the licensed premises" (9 NYCRR § 53.1[q]). In any event, there was testimony in the record of fights directly in front of the bar.

Given petitioner's adverse licensing history, failures to supervise, underage activity, and deleterious effects on the neighborhood, the penalty of cancellation of its liquor license does not shock the conscience (*see Matter of MGN, LLC v New York State Liq. Auth.*, 81 AD3d 492, 493-494 [1st Dept 2011]; *Matter of Le Cave LLC v New York State Liq. Auth.*, 107 AD3d 447, 448 [1st Dept 2013]).

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6098-
6099 Index 654427/16

Edward Hughey, etc.,
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority,
et al.,
Defendants-Respondents.

_____

Law Office of Edgar Pauk, Brooklyn (Edgar Pauk of counel), of counsel), for appellant.

Proskauer Rose LLP, New York (Myron D. Rumeld of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered March 16, 2017, dismissing the complaint, pursuant to an order, same court and Justice, entered on or about February 17, 2017, which granted defendants' motion to dismiss the complaint as time-barred pursuant to CPLR 217(1), unanimously affirmed, without costs. Appeal from order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff retired at age 63.49 in 2013, from a position with the Long Island Rail Road, an MTA subsidiary. Commuter rail employees, such as plaintiff, receive Tier II pension benefits after the requisite years of service under the Railroad Retirement Act. In addition, MTA employees receive pension

benefits from the MTA Pension Plan. The MTA Pension Plan, at Article 3.07(a)(ii), had an offset provision that reduced the amount of benefits payable under the Plan by the benefits "which would be payable to the Member involved at age 62 under 'Tier II.'"

Article 6.02 of the Plan conferred on its Board of Managers "sole and absolute discretionary authority to [interpret the Plan, decide any dispute and all matters arising in connection with the operation or administration of the Plan, and] decide questions, including legal and factual questions, relating to the calculation and payment of benefits under the Plan."

Plaintiff sought review of the Board's determination of his pension benefits because his actual retirement age of 63.49 was used in the calculation, rather than the benefits that would be payable if he had retired at age 62, a difference of $160.83 per month.

The Board denied plaintiff's appeal in a letter dated February 29, 2016, noting that Article 3.07(ii) of the Plan provided that the offset commenced when the Tier II benefit became payable. Since plaintiff's Tier II benefit was not payable at age 62, because he was still an active employee, the amount of the offset was determined when he actually retired.

While plaintiff originally brought this matter as a plenary

action asserting that defendants breached a contract to provide him with the pension benefits that he was entitled to under the MTA's Pension Plan, the gravamen of plaintiff's claim as ultimately presented to the motion court was a review of the Board's administrative determination interpreting the pension plan. Consequently, the motion court properly concluded that this matter was in the nature of an article 78 proceeding, and subject to the four-month statute of limitations (*see Purcell v City of New York*, 110 AD3d 535, 535-536 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]; *Leon v New York City Employees' Retirement Sys.*, 240 AD2d 186 [1st Dept 1997], *lv denied* 90 NY2d 812 [1997]; *Frontier Ins. Co. v State of New York*, 87 NY2d 864, 868 [1995]; *Foster v City of New York*, 157 AD2d 516, 518 [1st Dept 1990]).

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

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6100 The People of the State of New York, Respondent, Ind. 3880/13

-against-

Kendreth Smith, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered August 4, 2016, convicting defendant, after a jury trial, of reckless endangerment in the first degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 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]). The fact that defendant was acquitted of arson but convicted of reckless endangerment relating to the multiple fires in his apartment does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). Defendant's conduct supported the inference that he

acted with depraved indifference to whether other residents of his building would die as a result of these fires (*see People v Barboni*, 21 NY3d 393, 400-402 [2013]).

The court properly denied defendant's request for an intoxication charge. The evidence, viewed in the light most favorable to defendant, was insufficient to allow a reasonable person to entertain a doubt as to whether defendant was so intoxicated at the time of the fires as to negate the mental state of depraved indifference (*see People v Sirico*, 17 NY3d 744, 746 [2011]; *People v Gaines*, 83 NY2d 925, 927 [1994]).

The court providently exercised its discretion in admitting into evidence video recordings obtained from surveillance cameras located inside defendant's apartment building, because witnesses provided sufficient authentication under the circumstances (*see People v Patterson*, 93 NY2d 80, 84 [1999]; *People v McEachern*, 148 AD3d 565, 566 [1st Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

Defendant was not deprived of his right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]) by the court's preclusion of evidence relating to a fire that occurred the day after the events for which defendant was charged. Defendant's theory that this evidence tended to show that the additional fire occurred spontaneously, and that the charged fires, in turn, also

occurred spontaneously rather than being set by defendant, was entirely speculative, and the court providently exercised its discretion in excluding it (*see People v Powell*, 27 NY3d 523, 531 [2016]; *People v Primo*, 96 NY2d 351, 357 [2001]).

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 (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). 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]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6101 In re Toussaint E.,

A Child Under Eighteen Years of Age, etc.,

Allen E.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Angeline M.,
Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

Dawne Mitchell, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 19, 2017, to the extent it brings up for review a fact-finding order, same court (Susan K. Knipps, J.), entered on or about March 14, 2016, which found, inter alia, that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding of neglect against respondent father is supported by a preponderance of the evidence (see Family Court Act §§ 1012[f][i][B]; 1046[b][i]). As we found in the mother's

appeal from the fact-finding order (*Matter of Toussaint E. [Angeline M.]*, 151 AD3d 417, 417 [1st Dept 2017]), the record shows that "the child was subject to actual or imminent danger of injury or impairment to his emotional and mental condition from exposure to repeated incidents of domestic violence between his parents, occurring in close proximity to the child." In addition, respondent, who suffers from a form of schizoaffective disorder, displayed a lack of insight into the effect of his illness on his ability to care for the child (*see Matter of Lakiyah M. [Shacora M.]*, 136 AD3d 424 [1st Dept 2016]). He left the two-year-old home alone on many occasions, rationalizing his action on one such occasion by citing his (delusional) belief that the mother had a terminal illness and needed pizza. Moreover, respondent did not take his prescribed medication consistently, and repeatedly denied to medical professionals that he suffered from any form of mental illness (*see Matter of Ruth*

Joanna O.O. [Melissa O.], 149 AD3d 32, 42 [1st Dept 2017], *affd* 30 NY3d 985 [2017]; *Matter of Karma C. [Tenequa A.]*, 122 AD3d 415 [1st Dept 2014]).

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6102-
6103 Index 602921/07

PSKW, LLC, etc.,
Plaintiff-Appellant,

-against-

McKesson Specialty Arizona, Inc.,
Defendant-Respondent.

_____

Hodgson Russ LLP, Buffalo (Robert J. Lane, Jr. of counsel), for appellant.

Covington & Burling LLP, New York (Clara J. Shin of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 10, 2017, deemed an appeal from judgment (CPLR 5520[c]), same court and Justice, entered March 9, 2017, after a nonjury trial, dismissing the complaint, and so considered, said judgment unanimously affirmed, with costs.

Since a fair interpretation of the evidence supports the determination of the fact-finding court, based largely on its assessment of the credibility of the witnesses, that defendant

did not misappropriate plaintiff's purported trade secrets concerning multi-payer coordination of benefits prescription drug loyalty cards, we are obliged to defer to it (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]).

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6104 Project Cricket Acquisition, Inc., Index 652524/15
Plaintiff-Respondent,

-against-

FCP Investors VI, L.P., et al.,
Defendants-Appellants,

Florida Capital Partners, Inc.,
et al.,
Defendants.

_____

Michael Q. English, Port Chester, for Felix J. Wong, FCP Investors VI, L.P., FCP Investors VI (Parallel Fund), L.P., and Cricket Stockholder Rep, LLC, appellants.

Akin Gump Strauss Hauer & Feld LLP, New York (Brian T. Carney of counsel), for Gregory Johnson, appellant.

Wollmuth Maher & Deutsch LLP, New York (Michael C. Ledley of counsel), for Barry J. Thibodeaux, Thomas P. Bayham, Thomas R. Sumner, George T. Malvaney, Larry N. Lee, Robert Williams, Eric Hoffman, David Zachary, and Clay Cox, appellants.

Karl Huth Law Office, Port Washington (Karl C. Huth of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 28, 2017, which, insofar as appealed from as limited by the briefs, denied defendant Gregory Johnson's motion to dismiss the complaint as against him for lack of personal jurisdiction and to dismiss the causes of action for fraudulent inducement and civil conspiracy as against him for failure to state a claim, denied defendants Felix J. Wong, FCP Investors VI,

L.P. and FCP Investors VI (Parallel Fund), L.P. (the FCP defendants), and Cricket Stockholder Rep, LLC's (seller representative) motion to dismiss the complaint as against Wong for lack of personal jurisdiction and to dismiss the causes of action for fraudulent inducement and civil conspiracy as against Wong and the cause of action for breach of section 2.3 of the stock purchase agreement (SPA) as against the FCP defendants and the seller representative, and denied defendants Barry J. Thibodeaux, Thomas P. Bayham, Thomas R. Sumner, George T. Malvaney, Larry N. Lee, Robert Williams, Eric Hoffman, David Zachary, and Clay Cox's (selling shareholders) motion to dismiss the cause of action for breach of section 2.3 of the SPA as against them, unanimously modified, on the law, to grant the motions to the extent of dismissing the causes of action for fraudulent inducement and civil conspiracy as against Johnson and Wong, and the cause of action for breach of section 2.3 of the Stock Purchase Agreement (SPA), and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

This action arises from plaintiff's purchase of nonparty USES Holding Corp. from the FCP defendants and the selling shareholders pursuant to a stock purchase agreement (SPA). Defendants Johnson and Wong were directors or officers of USES or the defendant entities. Plaintiff alleges that defendants made

false and misleading representations about USES's financial health with the intention and effect of inflating the purchase price.

We decide the substantive legal issues pursuant to Delaware law in accordance with the SPA's choice of law provision. The fraudulent inducement claim against Johnson and Wong is dismissed as duplicative of the breach of contract claims to the extent it is based on the falsity of the representations and warranties made in the SPA (*see Bean v Fursa Capital Partners, LP*, 2013 WL 755792, *4, 2013 Del Ch LEXIS 56, *12-13 [Del Ch Feb. 28, 2013]). To the extent it is based on statements external to the SPA, it is barred by the SPA's disclaimer of reliance on information "not expressly represented and warranted to in this Agreement" (*see RAA Mgt., LLC v Savage Sports Holdings, Inc.*, 45 A3d 107, 118-119 [Del 2012]*; Prairie Capital III, L.P. v Double E Holding Corp.*, 132 A3d 35, 50 [Del Ch 2015]).

Civil conspiracy is not recognized as a cause of action in New York (*see Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]). However, Delaware does recognize such a claim. Nevertheless, the civil conspiracy claim against Johnson and Wong is dismissed because it was predicated upon the fraudulent inducement claim that is dismissed herewith (*see Kuroda v SPJS Holdings, L.L.C.*, 971 A2d 872, 892 [Del Ch 2009]).

As we are dismissing the only remaining claims against Johnson and Wong, we need not reach the issue of personal jurisdiction over these defendants.

The claim of breach of section 2.3 of the SPA is predicated upon the refusal of the FCP defendants, the seller representative, and the selling shareholders to accept plaintiff's "corrected" net working capital statement, which was based on updated financial data allegedly revised to be compliant with "Generally Accepted Accounting Principles" (GAAP). However, these defendants were not obligated to accept the corrected statement because it was not delivered within the 90-day period specified in SPA § 2.3(b)(i).

Moreover, plaintiff's challenge to the working capital calculations is improper, because it is broader than the scope of working capital adjustments permitted under section 2.3. The adjustment process, like the process at issue in *Chicago Bridge & Iron Co. N.V. v Westinghouse Elec. Co. LLC*, 166 A3d 912 [Del 2017]), is best understood as a "True Up" to the purchase price to reflect changes between the date of the preliminary working capital calculations and the closing date (*see* 166 A3d at 914, 916 [Del 2017]). It is thus "an important, but narrow, subordinate, and cabined remedy," and does not permit the purchaser "to challenge the historical accounting practices used

in the represented financials" (*id.* at 916), as plaintiff now seeks to do. Plaintiff's attempt to distinguish the text of the instant provision from that of the provision at issue in *Chicago Bridge* is unavailing. In any event, however, plaintiff's claim for breach of the SPA's express warranty of GAAP-compliance is still pending.

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6105 The People of the State of New York, Respondent, Ind. 1268/10 5180/12

-against-

Ernest Brown, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered February 26, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of six 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]). Moreover, we find the evidence of defendant's guilt to be overwhelming. There is no basis for disturbing the jury's credibility determinations. The two people who had shared an apartment with defendant

testified that the bedroom and locked safe where the weapons at issue were found were exclusively used by defendant, and their testimony was corroborated by other evidence.

Defense counsel's cross-examination of prosecution witnesses, suggesting that the police investigation was less than thorough because the police proceeded entirely on the basis of information from allegedly unreliable witnesses, created a misleading impression about the amount of information the police actually had. Defendant thus opened the door to carefully limited evidence that defendant was named in the search warrant for the apartment, whose execution led to the recovery of the weapons. Furthermore, the court thoroughly instructed the jury that this evidence was being received only to explain why the police went to the apartment and not as evidence of defendant's guilt. Accordingly, we find no violation of defendant's right of confrontation (*see Tennessee v Street*, 471 US 409 [1985]; *People*

v Reid, 19 NY3d 382 [2012]). In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6106 James Cassell, Index 22935/15
Plaintiff- Appellant,

-against-

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

_____

Umoh Law Firm, PLLC, Brooklyn (Uwem Umoh of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered October 26, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he sustained personal injuries during the course of two encounters with police officers. Plaintiff concedes that timely service of process was not effected on the individual officers (*see* CPLR 306-b; *Property Clerk, N.Y. City Police Dept. v Ford*, 92 AD3d 401 [1st Dept 2012]). Plaintiff's claim of municipal liability under 42 USC § 1983 is abandoned because, in the motion court, he did not oppose the City's argument that the complaint had failed to state a section 1983 claim (*see Kronick v L.P. Thebault Co., LLC*, 70 AD3d 648, 649 [2d Dept 2010]).

Regarding plaintiff's state law claims alleging municipal

liability, no notice of claim was filed regarding the alleged December 5, 2012 incident (*see Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 467 [1st Dept 2012], *affd* 21 NY3d 983 [2013]). Nevertheless, with respect to both that incident and the alleged incident that occurred on January 30, 2013, the complaint was filed well after the expiration of the one year and 90-day statute of limitations (*see* General Municipal Law § 50-i).

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6107 The People of the State of New York, Ind. 1507/15
Respondent,

-against-

Paula Destine,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jonathon Krois 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 (Jill Konviser, J.), rendered October 14, 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: MARCH 27, 2018

CLERK

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

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6110 The People of the State of New York, Ind. 604/13
Respondent,

-against-

Javon Grant,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered January 26, 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: MARCH 27, 2018

CLERK

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

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6111 James Anthony, etc., Index 21215/13E
Plaintiff-Respondent,

-against-

Mihai Smina, M.D., et al.,
Defendants,

St. Barnabas Hospital,
Defendant-Appellant.

_____

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

Finz & Finz, P.C., Mineola (Ameer Benno of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 8, 2016, which denied defendant St. Barnabas Hospital's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court correctly found that plaintiffs did not attempt to assert a new theory of liability in opposition to defendant's motion for summary judgment by submitting evidence of the acts and omissions of two nonparty physicians, Dr. Butros Bazo and Dr. Tamara Erlikh, whom they identified by name for the first time in their opposition papers (*compare Atkins v Beth Abraham Health Servs.*, 133 AD3d 491 [1st Dept 2015], *with Rhymes v Patel*, 139 AD3d 543 [1st Dept 2016]). It is undisputed that

Dr. Bazo and Dr. Erlikh were employees of defendant during the relevant time. In the complaint and the bill of particulars, plaintiff articulated a theory of vicarious liability against defendant for the acts and omissions of its employees, which included a failure to timely detect or diagnose the decedent's lung cancer. In their opposition, plaintiffs presented a more detailed picture of this alleged failure using information obtained during discovery, which included Dr. Erlikh's deposition. They submitted evidence that Dr. Bazo failed to order a recommended CT scan and that Dr. Erlikh ordered a CT scan without the recommended contrast.

Defendant not only attended Dr. Erlikh's deposition, but also knew of her involvement in the decedent's treatment before it moved for summary judgment; in its motion it submitted a physician expert's affirmation opining that Dr. Erlikh's treatment of the decedent was in keeping with accepted standards of care (*cf. Harty v Lenci*, 294 AD2d 296 [1st Dept 2002] [plaintiff improperly asserted at a late stage vicarious liability against hospital based on negligence of two physicians not named as defendants or identified in bill of particulars or during prior proceedings]). Although the record before us does not indicate that defendant similarly appreciated the extent or nature of Dr. Bazo's involvement in the decedent's treatment

before plaintiff opposed its motion, we find that the court adequately addressed any element of unfair surprise as to Dr. Bazo by inviting defendant to depose him, notwithstanding the filing of the note of issue, and to move to renew or reargue based on any new information obtained during that deposition.

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6112 Ashley Morales, Index 22888/14E
Plaintiff-Appellant,

-against-

Richard Chuquillanqui,
Defendant,

Kenneth Dominguez,
Defendant-Respondent.

_____

Yadgarov & Associates, PLLC, New York (Ronald S. Ramo of counsel), for appellant.

Adams & Kaplan, Yonkers (Hannah Whiteker of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 20, 2016, which granted the motion of defendant Kenneth Dominguez for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Dominguez established entitlement to judgment as matter of law by demonstrating the applicability of the emergency doctrine in this action for personal injuries sustained by plaintiff in a motor vehicle accident; plaintiff was a passenger in defendant Chuquillanqui's vehicle. Dominguez submitted evidence showing that the accident occurred when Chuquillanqui attempted an illegal U-turn from the far-right lane of a two-way road that had two lanes traveling in each direction. Dominguez was operating a

vehicle traveling in the same direction as Chuquillanqui's vehicle, but in the left lane at some distance back from Chuquillanqui's vehicle. Dominguez testified that he had only had a couple of seconds to react when Chuquillanqui abruptly began the U-turn across his right of way in the left lane, and that he unsuccessfully attempted to avoid the collision by turning his vehicle to the left (*see e.g. Ward v Cox*, 38 AD3d 313 [1st Dept 2007]).

Plaintiff's opposition was insufficient to raise factual issues as to whether an emergency situation existed prior to the collision, and as to whether Dominguez's actions before the accident were reasonable under the circumstances. While the "reasonableness of a defendant driver's reaction to an emergency is normally left to the trier of fact," in "egregious circumstances," as here, the issue may be resolved on summary judgment (*Maisonet v Roman*, 139 AD3d 121, 125 [1st Dept 2016], *appeal dismissed* 27 NY3d 1062 [2016]).

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

ENTERED: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6114- Ind. 4145/13
6115 The People of the State of New York, 793/14
Respondent,

-against-

Racine Bell also known as Racine Ball,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Richard Carruthers, J.), rendered May 7, 2014,

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

It is unanimously ordered that the 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: MARCH 27, 2018

CLERK

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

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6116 The People of the State of New York, Ind. 4152N/14
Respondent,

-against-

Barry Lee,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Neil Ross, J.), rendered June 29, 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: MARCH 27, 2018

CLERK

Mazzarelli, J.P., Andrias, Webber, Oing, Moulton, JJ.

6117N Miriam A. Hyman, Index 154435/15
Plaintiff-Respondent,

-against-

400 West 152nd Street Housing
Development Fund Corporation,
Defendant-Appellant.

_____

David M. Harrison, Brooklyn, for appellant.

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered August 7, 2017, which, in this action for personal injuries, denied defendant's motion to vacate a default judgment and inquest against it, unanimously affirmed, without costs.

Defendant failed to establish a reasonable excuse for its default, since its assertion that it did not receive notice of the action until May 24, 2017, when its officer was contacted by the City Marshal about enforcement of the default judgment, is not credible. The record contains properly executed affidavits of service for the correspondence of the action including the summons and complaint, the motion for default, and the default judgment with notice of entry, sent to defendant's designated address, and defendant acknowledges that it received the judgment after inquest, which had been mailed by plaintiff to that same

address (*see Colucci v Zeolla*, 138 AD2d 286 [1st Dept 1988]). Defendant's mere denial of service is insufficient to rebut the presumption of proper service created by the affidavit of service reflecting service through the Secretary of State (*see Gourvitch v 92nd & 3rd Rest Corp.*, 146 AD3d 431 [1st Dept 2017]).

Defendant's failure to provide a reasonable excuse for its default renders it unnecessary to consider whether it has a potentially meritorious defense to the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). In any event, plaintiff's inquest testimony, the affidavit from defendant's treasurer and the reply affidavit of defendant's president do not establish that defendant has a potentially meritorious defense. Defendant's claims that it was not responsible to maintain the sidewalk where the accident happened were conclusory (*see JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362, 364 [1st Dept 2008]).

Finally, defendant failed to preserve its contention that

plaintiff failed to comply with CPLR 3215(g)(4)(i), and we decline to review it (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]). Were we to review it, the record establishes that there was compliance with the statute.

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

ENTERED: MARCH 27, 2018

CLERK

Andrias, J.P., Gesmer, Kern, Singh, Moulton, JJ.

5827 In re 530 Second Ave. Co., LLC, Index 570431/14
Petitioner-Respondent,

-against-

Lillian Zenker,
Respondent-Appellant.

_____

The Price Law Firm LLC, New York (Heather Ticotin of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondent.

_____

Order, Appellate Term, First Department, entered March 2, 2017, reversed, on the law, without costs, the final judgment of possession vacated, and the proceeding dismissed.

Opinion by Moulton, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Ellen Gesmer
Cynthia S. Kern
Anil C. Singh
Peter H. Moulton, JJ.

5827
Index 570431/14

_____x

In re 530 Second Ave. Co., LLC,
Petitioner-Respondent,

-against-

Lillian Zenker,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Appellate Term, First Department, entered March 2, 2017, which affirmed a final judgment of the Civil Court, New York County (Sabrina B. Kraus, J.), entered on or about February 10, 2014, after a nonjury trial, awarding possession of the rent-stabilized apartment to petitioner landlord.

The Price Law Firm LLC, New York (Heather Ticotin, Joshua C. Price and Jennifer Zirojevic of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Sherwin Belkin and Brian Clark Haberly of counsel), for respondent.

MOULTON, J.

Respondent (Zenker) in this appeal argues that she is entitled to succession rights in the rent-stabilized apartment which has been her home since 2003. She contends that she was a "family member," as that term is defined in the Rent Stabilization Code, of the tenant of record (Montgomery). Montgomery died in 2011. Petitioner landlord (landlord) contends that Zenker was a mere licensee at the apartment and the death of the tenant of record terminated her right to reside there. After a trial, Housing Court found that Zenker had not carried her burden to prove that she has a right to succeed to the tenancy. Appellate Term affirmed, with one Justice dissenting. We granted leave to appeal and now reverse.

Approximately 30 years ago, in *Braschi v Stahl Assoc. Co.* (74 NY2d 201 [1989]), the Court of Appeals recognized the rights of nontraditional family members to succeed to rent-regulated apartments and held:

> "[W]e conclude that the term family, as used in 9 NYCRR 2204.6(d) should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but should find its foundation in the reality of family life" (*id.* at 211).

The *Braschi* Court cited eight factors to aid in that

determination, but stressed that "the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis control" (*id.* at 213). In response to *Braschi*, the rent stabilization regulations were amended to list certain factors that may be considered in determining whether a person qualifies as a family member for succession purposes.[1]

---

[1]Those factors include, but are not limited to:

> "(i) longevity of the relationship;
> "(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
> "(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
> "(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
> "(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;
> "(vi) holding themselves out as family members to other family members, friends,

The totality of the circumstances in this case demonstrates that Zenker qualifies as a family member of Montgomery and thus qualifies for succession rights.[2]

The conclusion of Housing Court that Zenker failed to establish that she was a family member could not be reached under any fair interpretation of the record. While the factual findings of the trial court are given deference, particularly because such findings often rest on the credibility of witnesses (*see WSC Riverside Dr. Owners LLC v Williams*, 125 AD3d 458 [1st Dept 2015]), the trial court did not make any credibility findings against Zenker. Instead, in its terse decision, Housing Court held that Zenker did not meet her burden of proof and,

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> members of the community or religious institutions, or society in general, through their words or actions;
> "(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;
> "(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship" (9 NYCRR 2520.6[o][2]).

[2]In this appeal, landlord does not contest that Zenker lived in the apartment with Montgomery as her primary residence for the requisite two-year period prior to his death on July 21, 2011. Therefore, the only issue is whether Zenker established that she was a nontraditional family member during this period.

without articulating its reasoning or discussing the statutory factors, the court concluded that the couple were merely "friends, roommates and business colleagues." Housing Court also improperly focused on Zenker's "own admission" that she and Montgomery were not "romantically involved" after the end of their nine year "romantic relationship." It was error for the trial judge to consider this testimony as "[i]n no event would evidence of a sexual relationship . . . be required or considered" (9 NYCRR 2520.6[o][2]).[3]

Landlord maintains that the Housing Court decision should be upheld given the "absence" of evidence and the "deficient documentation." However, the evidence received paints a picture of a couple who exhibited many of the behaviors associated with a traditional marriage. Moreover, the absence of documentary evidence does not undermine a succession rights claim when the totality of the testimonial evidence, as here, establishes the

[3]Landlord attempts to diminish the significance of Housing Court's reference to the lack of a "romantic relationship" because the judge did not use the words "sexual relationship." The judge's description however, stems from Zenker's testimony. Zenker described when she first met Montgomery and "just started kind of hanging out sometimes as friends" but within a few months "kind of became romantically involved." However, when Zenker moved back in to the apartment in 2003, she testified that "I moved back in just platonically." Thus, the trial judge's reference to Zenker's "own admission" can only refer to their lack of a sexual relationship after 2003.

requisite emotional and financial commitment (see *Arnie Realty Corp. v Torres*, 294 AD2d 193 [1st Dept 2002]).

Zenker was unrepresented during the two day trial. Nearly the entire 151 page transcript reflects Zenker's efforts to have documents admitted into evidence in order to establish that she lived with Montgomery in the apartment, as her primary residence, for at least two years prior to his death. The record is cluttered with landlord's counsel's objections to nearly every single piece of evidence that she sought to introduce.[4] When it came time for Zenker to provide narrative testimony, her account of the nature of her relationship with Montgomery spanned only 3 1/2 pages of the 151 page transcript.

Zenker testified that she met Montgomery, who was her fencing instructor, on January 26, 1979. Within a few months of "kind of hanging out," they became romantically involved and she moved into the apartment in July 1979. She testified that after "about nine and one half years, we kind of broke up" and she moved to her own apartment in 1988. However, she testified that

[4]Landlord objected over 65 times to Zenker's attempts to admit documents into evidence. Counsel even made repetitive objections to admission of evidence as uncontroversial as copies of photographs of the couple. The trial judge suggested to counsel that it might be a waste of time to spend "weeks" on Zenker's proof of cohabitation if landlord had no evidence to contradict that claim.

they "stayed friends" and she visited him two or three times per week for the next 15 years. She moved back into the apartment in 2003 because she was living in an illegal basement apartment and Montgomery offered her shelter.

Once she moved back the couple exhibited many of the behaviors associated with a traditional marriage. Zenker testified that she took care of all of the domestic chores (cooking, cleaning and laundry), while Montgomery took care of the household expenses (rent, utilities and food). He also paid for dinner at restaurants once a week. Zenker was financially dependent on Montgomery for her employment as she testified that she worked solely for him in his home business from 2003 until his death - as one might do in a family business. Zenker testified that they also accompanied each other to doctor appointments - much like a married couple might do.[5]

The couple's living arrangements also reflected their

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[5]On appeal, landlord heavily relies on Zenker's deposition testimony - the very same testimony to which it objected at trial, and which the trial judge excluded. For instance, landlord highlights that Zenker testified at her deposition that she and Montgomery introduced themselves to others as "friends" or "good friends." However, Zenker also testified that they considered themselves "married" and that her sister considered Montgomery as part of the "family." In any event, the trial judge could not have relied on any aspect of the deposition, because she excluded that evidence at trial. Therefore, we may not consider the deposition on appeal.

dedication, caring and sacrifice. When counsel cross-examined Zenker, she explained that Montgomery slept in the living room on the couch, while she slept in the bedroom. Montgomery's sacrifice in moving to the couch in the living room, despite being the sole rent-payer, is inconsistent with a mere roommate relationship.

While the record shows that Zenker had her own checking account at GreenPoint Bank in 2005 and maintained her own credit cards and cell phone during the two year period before Montogmery's death, other evidence demonstrates that the couple intermingled funds. The record contains joint bank account statements from Capital One Bank for the period July 22, 2009 through August 20, 2010. Although the evidence reflects that some checks from that account were printed in Montgomery's name, the Capital One Bank account was nevertheless a joint account.

The record also includes an itemized funeral home document bearing the signature "Lillian Zenker." The handwritten word "Wife" appears below the signature "Lillian Zenker" and next to the typed words "Relation to Deceased." Additionally, initials appear between the typed words "Initial and state your relation to deceased" and the handwritten word "Wife" in two other places on the document. In response to counsel's cross-examination about this document "The two of you weren't married, were you?"

Zenker responded, "No, no. And it was just a mistake." Zenker's cryptic reference to a "mistake" however, does not negate the fact that the designation "Wife" was used in three separate instances. True, Zenker and Montgomery were not married, but as *Braschi* held years ago, family "should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate" (*Braschi*, 74 NY2d at 211).[6]

The couple's dedication, caring and sacrifice are also reflected by Zenker's chance testimony in response to landlord's counsel's voir dire.[7] Because Zenker had sought to introduce only copies of photographs, counsel questioned Zenker about the location of original photographs. Zenker explained that the photographs (which were from the relationship's early years) were in her closet at home because she did not want "them to be thrown around or get bent or damaged in any way." One would not ordinarily expect that a "friend, roommate and business colleague" would so carefully guard and retain such photographs

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[6]While landlord acknowledges *Braschi*, as it must, it also contradicts the holding of that case by faulting Zenker for not formalizing her relationship through marriage, parenting a child, or entering into a domestic partnership.

[7]The trial judge referred to the document phase of the trial and the nondocument phase of the trial. Zenker was under oath, and allowed to testify, during both phases.

for over 30 years.

Landlord correctly points out that the record contains no evidence that the couple executed wills. Nonetheless, there was uncontradicted evidence that Montgomery wanted to provide for Zenker after he died. Zenker testified that before she moved back into the apartment, Montgomery had sent her a list of the location of the "valuable stuff" in the apartment so she could "have everything" and he could "do right" by her. Zenker also testified that she believed that she was the beneficiary of Montgomery's 401(k) account and thought that she received a check from his IRA, but was not successful in having any documents admitted on this point.

The fact that Zenker moved back into the apartment in 2003 because of her own housing problems, and the couple's lack of sexual intimacy, does not diminish their relationship to that of roommates. The unrefuted evidence establishes that this couple shared decades of dedication, caring and self-sacrifice. Consideration of the factual record in light of the factors listed in the Rent Stabilization Code demonstrates that Zenker was family to Montgomery.

Accordingly, the order of the Appellate Term, First Department, entered March 2, 2017, which affirmed a final judgment of the Civil Court, New York County (Sabrina B. Kraus,

J.), entered on or about February 10, 2014, after a nonjury trial, awarding possession of the rent-stabilized apartment to petitioner landlord, should be reversed, on the law, without costs, the final judgment of possession vacated, and the proceeding dismissed.

All concur.

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

ENTERED: March 27, 2018

CLERK