SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 9, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P. Richter, Gesmer, Kern, Moulton, JJ.

8001N Doris Garcia, Index 158778/15
Plaintiff-Appellant,

-against-

2728 Broadway Housing Development Fund Corp., et al.,
Defendants-Respondents.

_____

Thomas S. Fleishell & Associates, P.C., New York (Thomas S. Fleishell of counsel), for appellant.

Andrea Shapiro, PLLC, New York (Andrea Shapiro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 15, 2017, which, insofar as appealed from, denied plaintiff's cross motion for a protective order with respect to her 2014 and 2015 tax returns, and to compel defendants to appear for a deposition and produce unredacted copies of their emails, unanimously affirmed, with costs.

Under the unusual circumstances of this case, the court did not improvidently exercise its discretion in directing plaintiff to produce the 2014 and 2015 tax returns (*see generally Brooklyn*

Union Gas Co. v American Home Assur. Co., 23 AD3d 190 [1st Dept 2005]). Article X of the certificate of incorporation and § 5.05(b)(i) of the proprietary lease restricted transfers to persons who do not meet the income eligibility restriction, and article V, § 4 of the bylaws adopted the provisions of the certificate of incorporation. Thus, as the motion court found, "arguably," even if plaintiff was viewed as an initial shareholder, the transfer of her father's interest from his estate to her may require a showing that she meets the income requirement. Accordingly, defendant made a sufficient showing, in the context of this discovery motion, that the tax returns are "necessary to the litigation" (*Sachs v Adeli*, 26 AD3d 52, 56 [1st Dept 2005]; *compare Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]).

The court did not improvidently exercise its discretion in declining to order depositions of the individual defendants since they asserted that they were ready and willing to be deposed, but plaintiff's then counsel was unavailable. Furthermore, plaintiff failed to show why she required unredacted copies of the emails or that relevant emails were withheld by defendants.

The Decision and Order of this Court entered herein on January 3, 2019 (168 AD3d 417) is

hereby recalled and vacated (*see* M-844 decided simultaneously herewith).

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

ENTERED: APRIL 9, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Kahn, Oing, JJ.

6908 Optimal Strategic U.S. Equity Ltd., Index 653693/14
Plaintiff-Appellant,

-against-

SPV OSUS Ltd. formerly known as
SPV Optimal SUS Ltd.,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about March 24, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed March 20, 2019,

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8929 The People of the State of New York, Ind. 2329/11
Respondent,

-against-

Michael Lopez,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at hearing; Charles H. Solomon, J. at plea and sentencing), rendered February 28, 2012, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). An officer's testimony that he saw a revolver in defendant's waistband was not so implausible as to warrant rejection of the

hearing court's findings of fact.

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8930 Andrew Berliner, et al., Index 151345/13
Plaintiffs-Appellants,

-against-

Consolidated Edison, Inc., et al.,
Defendants-Respondents,

Verizon New York, Inc.,
Defendant.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellants.

Clark, Gagliardi & Miller, P.C., White Plains (John S. Rand of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered April 24, 2017, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Consolidated Edison Company of New York, Inc. (Con Ed) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

During Superstorm Sandy, plaintiffs and others went outside to see whether fallen trees in their neighborhood could be cleared from the roadway. As they were returning to one of their homes, another tree fell across the roadway and onto a series of overhead utility wires, causing a utility pole to snap, fall

over, and strike plaintiffs.

Con Ed, which was responsible for installing and maintaining the pole, established entitlement to judgment as a matter of law by showing that it neither created nor had actual or constructive notice of a dangerous or defective condition in the utility pole (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Con Ed submitted affidavits of its operating supervisor, field supervisor, and engineering manager, as well as an expert engineer, stating that the pole that was installed was either a class 2 or class 3 pole, which complied with all applicable government and industry standards for that location and anticipated forces, but the extreme forces created by the falling tree exceeded all industry standards (*see Ward v Atlantic & Pac. Tel. Co.*, 71 NY 81, 84-85 [1877]; *see also* PJI 2:207). Furthermore, no defect was found when the pole was inspected about four months before the storm, and none was evident in photographs taken of the fallen pole.

In opposition, plaintiffs failed to raise a triable issue of fact as to whether Con Ed was negligent in installing or maintaining the subject pole. Plaintiffs submitted the affidavit of an expert who opined that the pole was about two inches smaller in circumference than a standard class 2 pole, which made

it weaker than such a pole should have been. However, plaintiffs offered no evidence that Con Ed was required to install a class 2, as opposed to a class 3 pole, at the subject location, or that maintaining a two-inch thinner or class 3 pole at that location did not comply with the applicable standard of care.

Since such an accident may occur absent negligence, and the pole was on a public highway, not within the exclusive control of Con Ed, when subjected to hurricane conditions, plaintiffs cannot rely on the doctrine of res ipsa loquitur to raise an issue of fact as to negligence (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-228 [1987]).

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8931 In re Alyssa-Marie D., and Others,

Children Under Eighteen Years of Age, etc.,

Richard Luke D.,
Respondent-Appellant,

Commissioner of Social Services of the City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

Karen Freedman, Lawyers For Children, Inc., New York (Brenda Soloff of counsel), attorney for the children.

_____

Order of fact-finding, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about December 13, 2017, which, after a hearing, found that respondent father neglected the subject child Danny D. by inflicting excessive corporal punishment upon him, and derivatively neglected Danny's siblings, unanimously affirmed, without costs.

A preponderance of the evidence supports the determination that respondent inflicted excessive corporal punishment upon Danny (Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The child's out-of-court statements made during his interview with an

investigator from the Child's Advocacy Center were corroborated by his mother's testimony and by photographs depicting the child's injuries (*see Matter of Krystopher D'A. [Amakoe D'A.]*, 121 AD3d 484 [1st Dept 2014]). The fact that the child's injuries were the result of a single incident does not preclude a finding of excessive corporal punishment (*see Matter of Rachel H.*, 60 AD3d 1060, 1061 [2d Dept 2009]).

The finding of derivative neglect with respect to the remaining children was supported by the record. It is not necessary for a sibling to suffer physical injury in order for the court to find derivative neglect (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 76 [1st Dept 2012]). Rather, the evidence of neglect of Danny "demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in [respondent's] care" (*Matter of Joshua R.*, 47 AD3d

465, 466 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

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

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

ENTERED: APRIL 9, 2019

CLERK

Richter, J.P., Tom, Kahn, Moulton, JJ.

8932 Richard Hobish, etc., et al., Index 650315/17
Plaintiffs-Respondents,

-against-

AXA Equitable Life Insurance Company
Defendant-Appellant.

_____

Milbank, Tweed, Hadley & McCloy LLP, New York (Robert C. Hora of counsel), for appellant.

Constantine Cannon LLP, New York (Gary J. Malone of counsel), for respondents.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about February 8, 2018, which, to the extent appealed from, denied defendant's motion to dismiss plaintiffs' General Business Law § 349 claim, unanimously affirmed, without costs.

The complaint sufficiently alleges that defendant's purported deceptive conduct, allegedly misleading elderly consumers into believing that they would not be targeted for premium increases, and subsequently substantially increasing such premiums, impacted plaintiff Toby Hobish's estate planning by forcing her to surrender the face value of the policy purchased from defendant. This injury is distinct from injuries sustained by her trust, and thus sufficient to confer standing upon her to

assert a General Business Law § 349 claim (*see North State Autobahn, Inc. v Progressive Ins. Group. Co.*, 102 AD3d 5, 16 [2d Dept 2012]).

Given that plaintiff has alleged both a monetary loss stemming from defendant's deceptive practices and an independent loss derived from defendant's failure to deliver contracted for services, we agree with the motion court that the General Business Law claim is not duplicative of plaintiffs' breach of contract claim.

The complaint also sufficiently alleges deception. It contends that the policy at issue does not define the term "a given class," the group for which defendant is contractually permitted to raise insurance rates. It also asserts that the policy does not address whether, when, or how an insured person can be reclassified. Finally, it asserts that defendant targeted elderly individuals and raised their premiums to a degree that they were forced to surrender their insurance. Such collective conduct meets the standard for deception, because the insurer's

acts were "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]; *see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999]).

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8933 In re Gary Bien-Aime, Index 100494/16
Petitioner-Appellant,

-against-

Vicki Been, etc., et al.,
Respondents-Respondents.

_____

Law Office of Harry Kresky, Riverdale (Harry Kresky of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for Vicki Been, respondent.

Armstrong Teasdale LLP, New York (Jose Saladin of counsel), for G.R. Housing Corporation, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carmen Victoria St. George, J.), entered December 1, 2017, denying the petition to annul the determination of the New York City Department of Housing Preservation and Development (HPD), dated December 23, 2015, which denied petitioner's claim for succession rights to the subject apartment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

HPD had a rational basis for concluding that petitioner did not establish that the subject apartment was his primary residence from 2005 to 2007, the two years before his mother's

death (*see Matter of Jacobowitz v New York City Dept. of Hous. Preserv. & Dev.*, 160 AD3d 417 [1st Dept 2018]; *Matter of Jian Min Lei v New York City Dept. of Hous. Preserv. & Dev.*, 158 AD3d 514 [1st Dept 2018]). Although petitioner submitted some documentation supporting his residency at the subject apartment, "HPD was entitled to consider . . . inconsistencies among the documents that were submitted" (*Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288, 289 [1st Dept 2008]). Petitioner's submissions showed that between 2005 and 2007 he was the tenant of record in a rent stabilized apartment, which, by law, required him to reside in that apartment (Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-504[a][1][f]), and that he paid rent on a second rent stabilized apartment.

Petitioner also failed to file New York City resident income tax return for 2006, as required to support his succession claim (28 RCNY 3-02[n][4][iv]; *see Matter of Girigorie v New York City Dept. of Hous. Preserv. & Dev.*, 75 AD3d 430, 431 [1st Dept 2010]), and his contention that he had no income is belied by record evidence that was paying rent on one of the apartments during the relevant period.

Petitioner was not entitled to an evidentiary hearing because the regulation under which he claimed succession rights does not provide for a hearing (*Matter of Quan v New York City Dept. of Hous. Preserv. & Dev.*, 70 AD3d 528, 528 [1st Dept 2010], *lv denied* 17 NY3d 703 [2011]).

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8935- Index 154005/15
8936 JK Two LLC,
Plaintiff-Respondent,

-against-

Simon Garber,
Defendant-Appellant.

_____

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

Kishner Miller Himes P.C., New York (Elizabeth Tobio of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Erika M. Edwards, J.), entered March 26, 2018, bringing up for review an order, same court and Justice, entered on or about January 24, 2018, which awarded plaintiff attorneys' fees and costs in the amount of $18,575.00, unanimously affirmed, with costs. Appeals from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment and as abandoned, respectively.

Defendant's arguments that the affirmation of counsel submitted in support of plaintiff's application for an award of reasonable attorneys' fees was insufficient and sought excessive fees are unpreserved for appellate review (*see Zacharius v Kensington Publ. Corp.*, 167 AD3d 452, 453 [1st Dept 2018]; *1199*

Hous. Corp. v Jimco Restoration Corp., 77 AD3d 502 [1st Dept 2010]). In any event, defendant fails to show that the court improvidently exercised its discretion in determining the amount of attorneys' fees to be awarded. The court based its award upon review of appropriate factors, including the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]), and reduced the amount requested to eliminate work that was duplicative or was unnecessarily performed by an attorney, rather than a secretary or paralegal. A hearing was not required, since the court "possess[ed] sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" (*Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376, 378 [1st Dept 1996]).

Although the amount awarded in fees exceeded the amount recovered, plaintiff demonstrated that the litigation was necessitated and prolonged by defendant's unexplained refusal to return its security deposit, as required by the condominium lease, even after entry of judgment and until plaintiff moved for and obtained an order holding defendant in contempt for failing to comply with a postjudgment subpoena. The determination of

reasonable attorneys' fees can take into account "whether a party has engaged in conduct or taken positions resulting in delay or unnecessary litigation" (*Cohen-McLaughlin v McLaughlin*, 132 AD3d 716, 718 [2d Dept 2015]).

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

ENTERED: APRIL 9, 2019

CLERK

Richter, J.P., Tom, Kahn, Moulton, JJ.

8937 The People of the State of New York, Respondent, Ind. 6351/08

-against-

Jason Hart, Defendant-Appellant.

_____

Tina M. Luongo, The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about October 24, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed defendant 15 points under the risk factor for drug or alcohol abuse. Defendant's admissions of his extensive history of substance abuse provided clear and convincing evidence, satisfying the standard set forth in *People v Palmer* (20 NY3d 373, 378-379 [2013]). The court also properly assessed 10 points under the risk factor for conduct while confined, based on defendant's lengthy record of disciplinary infractions (*see People v Chabrier*, 38 AD3d 355 [1st Dept 2007]

lv denied 9 NY3d 801 [2007]).

However, defendant was improperly assessed 15 points under the risk factor for acceptance of responsibility. The case summary noted that defendant was removed from a sex offender treatment program due to poor progress and participation, which under the SORA Guidelines is "not tantamount to refusal to participate in treatment" (*People v Ford*, 25 NY3d 939, 941 [2014]). Nevertheless, without those points defendant remains a level two offender, and even with the corrected point score we find no basis for a downward departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8938 The People of the State of New York, Ind. 611/17
Respondent,

-against-

Marvin Smith,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Scott Henney 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 a judgment of the Supreme Court, New York County (James Burke, J.), rendered August 23, 2017,

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: APRIL 9, 2019

CLERK

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

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8940 Michele E. Hess, et al., Index 160494/17
Plaintiffs-Respondents,

-against-

EDR Assets LLC, et al.,
Defendants-Appellants.

_____

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for appellants.

Newman Ferrara LLP, New York (Roger Sachar of counsel), for respondents.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered September 7, 2018, which denied defendants' motion to dismiss the complaint or, in the alternative, to dismiss the class action allegations of the complaint, unanimously affirmed, without costs.

The court properly found that the second and third causes of action of the complaint were not moot because there was a justiciable issue regarding the proper method of calculating the amount of the rent overcharges, which, based on the record before the court, DHCR did not determine.

The court did not improvidently exercise its discretion in denying plaintiffs' cross motion for class action status with leave to renew following discovery, based on issues raised by

defendants concerning the typicality of a named representative. The court correctly determined that there were common questions of law and fact that predominated over individual issues, such as the proper method of calculating the amount of the rent overcharges and whether defendants engaged in a fraudulent scheme to deregulate the apartments. Moreover, the Court of Appeals has found that class action treatment was superior to individual adjudication in similar situations (*see Borden v 400 E. 55th St Assoc., L.P.*, 24 NY3d 382, 400 [2014].

We reject respondent's request for dismissal of this action on the ground that DHCR has primary jurisdiction since the action raises legal issues, including class certification, that must be addressed in the first instance by the court (*See Kresiler v B-U Realty Corp.*, 164 AD3d 1117 [1st Dept 2018], *lv dismissed* 32 NY3d 1090 [2018]; *Dugan v London Terrace Gardens, L.P.*, 101 AD3d 648

[1st Dept 2012]).

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

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8941 In re 936 Second Avenue L.P., Index 656401/16
Petitioner-Appellant,

-against-

Wilson Evans 50th LLC,
Respondent-Respondent.

_____

Rivkin Radler, LLP, New York (Henry Mascia of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered January 12, 2018, which denied the petition to vacate the arbitration award dated August 30, 2016, and confirmed the award, unanimously affirmed, without costs.

The court properly found that there is no basis to disturb the award. The appraisal was made pursuant to the procedures set forth in the lease, and the appraisers stated that the net lease was taken into consideration when valuing the premises. Petitioner failed to establish by clear and convincing evidence that the arbitration award should be vacated on the ground that it was irrational, or in violation of the terms of the lease (*see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15

NY3d 530 [2010]). The motion court correctly rejected petitioner's claim that the appraisers could not have logically reached the result they did, as they were not required to set forth a detailed explanation of the determination (*see Finley v Manhattan Dev. Ctr., Off. of Mental Retardation*, 119 AD2d 425, 426 [1st Dept 1986]). Furthermore, petitioner did not object to the appraiser appointed by respondent, or substantiate, by clear and convincing evidence, that the appraiser was, in fact, biased. In any event, petitioner was purportedly aware of any alleged bias of respondent's appraiser at the time of the arbitration, and has therefore waived any alleged prejudice (*see 1000 Second Ave. Corp. v Rose Trust*, 171 AD2d 429 [1st Dept 1991]).

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

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8942 The People of the State of New York, Respondent, Ind. 2641/15

-against-

Frederic Badji, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered April 1, 2016, convicting defendant, after a jury trial, of attempted grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, and three counts of grand larceny in the fourth degree, and sentencing him to an aggregate term of six months, with 4½ years' probation, unanimously affirmed.

Regarding defendant's unauthorized use of the victim's Uber account, defendant failed to preserve his challenges to evidence of the victim's communications with the Uber driver regarding defendant's identity, and we decline to review them in the interest of justice. As an alternative holding, we find these arguments unavailing, except that to the extent the victim

testified that the driver confirmed that he recognized defendant's photo, that testimony was inadmissible hearsay. The error, however was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We have considered defendant's remaining evidentiary rulings and find them unavailing. We also find that defendant's challenge to the sufficiency of his larceny conviction based on his theft of the victim's credit card is unavailing, notwithstanding the absence of proof that defendant was in possession of the physical credit card when he used intangible credit card information to make purchases (*see People v Barden*, 117 AD3d 216, 230-236 [1st Dept 2014], *revd on other grounds* 27 NY3d 550 [2016]).

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8943 In re Frank Lopez, Index 101341/16
Petitioner-Respondent,

-against-

The Port Authority of New York
and New Jersey,
Respondent-Appellant.

_____

Port Authority Law Department, New York (Allen F. Acosta of counsel), for appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered September 8, 2017, which, insofar as appealed from, granted the petition to the extent of directing respondent to turn over certain psychometric testing results to petitioner, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

In this article 78 proceeding, petitioner seeks to annul The Port Authority's determination that he was not qualified to serve as a police officer in its public safety department due to the results of petitioner's psychological evaluation, and seeks to require The Port Authority to provide all records pertaining to petitioner's psychological evaluation. In its final judgment, Supreme Court granted The Port Authority's cross motion to

dismiss the portion of the petition seeking to annul and set aside The Port Authority's determination that petitioner was not qualified for the position of police officer and granted the portion of the petition seeking to order The Port Authority to provide petitioner with his psychometric testing results related to his psychological evaluation pursuant to New York's Public Health Law § 18. We now reverse the judgment insofar as it ordered the release of the requested documents to petitioner pursuant to Public Health Law § 18.

The Port Authority is an interstate compact agency and as such is not subject to New York legislation governing "internal operations," e.g. employer-employee relations (*see Matter of Agesen v Catherwood*, 26 NY2d 521, 525-526 [1970]), unless both New York and New Jersey have enacted legislation providing that the same is applicable to The Port Authority, which is not the case here. However, the Port Authority, "albeit bistate, is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public" (*Matter of Agesen v Catherwood*, 26 NY2d at 525-526 [1970]); *Salvador-Pajaro v Port Auth. of N.Y. & N.J.*, 52 AD3d 303 [1st Dept 2008]).

We find that petitioner was not entitled to his psychometric testing results pursuant to New York's Public Health

Law § 18. While the law involves health and safety, the statute is not implicated in this case. Public Health Law § 18 was intended to give individuals enhanced access to their medical records "to obtain necessary information about their medical treatment and condition and to make fully informed choices about their medical care" (*Matter of Mantica v New York State Dept of Health*, 94 NY2d 58, 62 [1999], quoting Mem, New York State Dept of Health, Bill Jacket, L 1986, ch 497).

Here, petitioner is not seeking to procure the psychological testing results as "necessary information about [his] medical treatment and condition . . . to make fully informed choices about [his] medical care" (*Mantica*, 94 NY2d at 62). Instead, The Port Authority's psychological testing results relate solely to its hiring practices, a wholly internal matter. As aptly described by The Port Authority, the process used to

recruit, screen, and evaluate candidates seeking to serve as police officers is a quintessential example of an internal operation and a core employer-employee relations matter (*see Matter of Agesen v Catherwood*, 26 NY2d at 525-526).

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8944-
8945 Index 651733/13

Stanley Jonas, et al.,
Plaintiffs-Appellants,

-against-

National Life Insurance Company, et al.,
Defendants,

Certain Underwriters at Lloyd's of London subscribing to or otherwise liable for Certificate Number 0721963, otherwise known as Risks PE 08/08 and PE 0620/09, including Syndicate 5000 and Syndicate 510,
Defendant-Respondent.

_____

The Law Offices of Neal Brickman, P.C., New York (Ethan Leonard of counsel), for appellants.

Nicholas Goodman & Associates, PLLC, New York (H. Nicholas Goodman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 7, 2018, which granted the motion of defendants Certain Underwriters at Lloyd's of London subscribing to or otherwise liable for Certificate Number 0721963, otherwise known as Risks PE 08/08 and PE 0620/09, including Syndicate 5000 and Syndicate 510 (Underwriters) and dismissed plaintiffs' amended complaint as untimely, unanimously affirmed, with costs. Appeal from order, same court and Justice,

entered on or about January 11, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Parties may contract for shorter limitations periods than those provided by statute, as long as the contractual limitations period is "reasonable and in writing" (*Carat Diamond Corp. v Underwriters At Lloyd's, London*, 123 AD2d 544, 546 [1st Dept 1986]). In *Carat*, the 12-month limitations period in the subject policy was found to be "a reasonable, valid and enforceable provision" (*id.*). In this case, the certificate of insurance provided:

> "No action may be brought more than one year after the date of the original claim or administrative decision. Legal Action shall not take place prior to a Formal Review."

Underwriters' first written claim denial was forwarded to plaintiffs on June 29, 2009, which would have compelled any action to be brought by June 28, 2010. On December 2, 2010, Underwriters advised Jonas that no new information had been

submitted that would change its original determination, and the "formal review process" was considered to be completed. Even considering the later date, the original complaint, filed May 13, 2013, was untimely by at least 17 months.

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8946 Dr. Chinwe Offor, Index 152365/17
Plaintiff-Appellant,

-against-

Mercy Medical Center, et al.,
Defendants-Respondents,

New York State Department of Health,
Defendant.

_____

Ike Agwuegbo & Co. P.C., New York (Ike Agwuegbo of counsel), for appellant.

Nixon Peabody LLP, Jericho (Tony G. Dulgerian of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered June 12, 2018, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss the complaint as against them, unanimously affirmed, without costs.

The majority of the alleged defamatory statements, including the National Practitioner Data Bank (NPDB) report, were made outside the one-year statute of limitations (*see* CPLR 215[3]; *Smulyan v New York Liquidation Bur.*, 158 AD3d 456, 457 [1st Dept 2018]). We reject plaintiff's argument, based on a 20-year-old, unreported Tennessee case applying Tennessee law (*Swafford v*

Memphis Individual Practice Assn., 1998 WL 281935, 1998 Tenn App LEXIS 361 [Ct App, June 2, 1998]), that the NPDB website is not subject to the single publication rule (*see Firth v State of New York*, 98 NY2d 365 [2002]; *Rare 1 Corp. v Moshe Zwiebel Diamond Corp.*, 13 Misc 3d 279, 282 [Sup Ct, NY County 2006]).

The more recent statements are not actionable because plaintiff failed to set forth the "exact words" complained of (*see Gardner v Alexander Rent-A-Car*, 28 AD2d 667, 667 [1st Dept 1967]) and the "time, place and manner of the purported defamation" (*see Buxbaum v Castro*, 104 AD3d 895, 895 [2d Dept 2013], *appeal dismissed* 21 NY3d 1061 [2013]; *Murphy v City of New York*, 59 AD3d 301 [1st Dept 2009]; *Manas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [1st Dept 2008]; CPLR 3016[a]).

The intentional infliction of emotional distress claim is time-barred insofar as it is directed toward conduct that occurred before March 13, 2016 - the vast majority of the conduct alleged (*see* CPLR 215[3]; *Bridgers v Wagner*, 80 AD3d 528 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]). The only conduct that even arguably occurred after that date does not meet the threshold for outrageousness (*see e.g. Schottenstein v Silverman*, 128 AD3d 591 [1st Dept 2015]; *Lewittes v Blume*, 18 AD3d 261, 261 [1st Dept 2005]; *Krawtchuk v Banco Do Brasil*, 183 AD2d 484 [1st

Dept 1992]).

The allegations underlying the negligent infliction of emotional distress claim all involve intentional, not negligent, conduct (*see James v Flynn*, 132 AD3d 1214, 1216 [3d Dept 2015]; *Santana v Leith*, 117 AD3d 711, 712 [2d Dept 2014]). In addition, plaintiff failed to allege the requisite "guarantee of genuineness" (*see Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008] [internal quotation marks omitted]; *Taggart v Costabile*, 131 AD3d 243, 253 [2d Dept 2015]). Nor did she allege that defendants owed her any duty separate from their general obligations as an employer (*see Hernandez v Weill Cornell Med. Coll.*, 2015 NY Slip Op 51022[U], *2 [Sup Ct, Bronx County 2015]; *People v Conlin*, 2013 NY Slip Op 32895[U], *5, *7 [Sup Ct, NY County 2013]; *Day v City of New York*, 2015 US Dist LEXIS 161206, *57 [SD NY Nov. 30, 2015]; *Alexander v Westbury Union Free Sch. Dist.*, 829 F Supp 2d 89, 112 [ED NY 2011]).

Absent any underlying substantive causes of action to which they may attach, plaintiff's requests for injunctive relief and punitive damages must be dismissed (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]; *Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58-59 [1st Dept 2012]).

Under the circumstances, vacatur of the order is not

warranted, notwithstanding that it appears to have been entered after the case was administratively reassigned to a different Justice. The motion was fully briefed before the original judge prior to reassignment.

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

ENTERED: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8947 The People of the State of New York, Ind. 2933/17
Respondent,

-against-

Tyleek McGee,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Megan DeMarco 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 (Laura Ward, J.), rendered January 22, 2018,

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: APRIL 9, 2019

CLERK

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

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8948N Jose Reyes, et al., Index 306541/10
Plaintiffs-Appellants,

-against-

BSP Realty Corp.,
Defendant-Respondent.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellants.

Hertz, Cherson & Rosenthal, P.C, Forrest Hills (Jeffrey M. Steinitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about April 25, 2018, which, to the extent appealed from, denied plaintiffs' motion to amend the complaint to assert a claim for an equitable easement, unanimously affirmed, without costs.

While leave to amend should be freely granted under CPLR 3025(b), where the proposed amendment is devoid of merit, leave should be denied (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). An amendment is devoid of merit where the allegations are legally insufficient (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]).

Here, plaintiffs' proposed amendment to add a cause of action for an equitable easement could not be established as a

matter of law. Plaintiffs' proposed amendment alleged facts in support of an affirmative easement to use and occupy the disputed parcel for their auto body repair shop. An equitable easement, however, applies to restrictive covenants or negative easements (*see Nissen v McCafferty*, 202 App Div 528, 533 [2d Dept 1922]). Rather, plaintiffs asserted allegations relating to an implied easement or easement by implication, for which the motion court permitted leave to amend (*see Monte v DiMarco*, 192 AD2d 1111, 1112 [4th Dept 1993], *lv denied* 82 NY2d 653 [1993]).

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: APRIL 9, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8949 OP 165/18
[5721
M-351
M-361] &
M-6520
M-6521
M-33
M-472
M-709 In re AES, et al.,
Petitioners,

-against-

Arthur M. Diamond, etc.,
Respondents.

_____

Jeffrey L. Solomon, PLLC, Jericho (Jeffrey L. Solomon of counsel), for petitioners.

Letitia James, Attorney General, New York (Monica Schwartz Hanna of counsel), for Hon. Arthur M. Diamond, Hon. Hope S. Zimmerman, Hon. Thomas Adams, Hon. Randy Sue Marber, Hon. Alan D. Scheinkman and Hon. Harriet Weinberger, respondents.

Wand & Goody, LLP, Huntington (Jennifer H. Goody of counsel), for Mark B. Lew, respondent.

Beth Ross, respondent pro se.

G. S., respondent pro se.

_____

The above-named petitioners having presented a petition in the Second Department, transferred to this Court by order dated November 14, 2018, praying for an order, pursuant to article 78 of the Civil Practice Law and Rules, now, upon reading and filing

the papers in said proceeding, and due deliberation having been had thereon, it is unanimously ordered that the petition hereby is denied and the motions to dismiss the petition (M-361; M-351) are granted to the extent of dismissing the petition. Since petitioners failed to meet their burden of demonstrating a "clear legal right" to the relief sought, neither mandamus nor prohibition is available (*see Matter of Holtzman v Goldman*, 71 NY2d 564 [1988]; *Matter of Rush v Mordue*, 68 NY2d 348 [1986]).

In re AES v Hon. Arthur Diamond

M-6521, M-33, M-472, M-709 Motions for disqualification of counsel and related relief denied.

M-6520 Motion to stay proceedings denied.

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

ENTERED: APRIL 9, 2019

CLERK