SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 11, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8969 The People of the State of New York, Ind. 3806/10
Respondent,

-against-

Travis Hunt,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 27, 2011, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of six months, with five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence, viewed as a whole, supported the conclusion that

defendant was accessorially liable (*see* Penal Law § 20.00) for injuries inflicted by defendant's brother. The jury could have reasonably concluded that defendant assisted his brother by participating in the attack, while acting with a shared intent and community of purpose (*see People v Degraffenreid*, 138 AD3d 456, 456-457 [1st Dept 2016], *affd* 29 NY3d 935 [2017]; *Matter of Tatiana N.*, 73 AD3d 186, 191 [1st Dept 2010]).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8970 Humberto Rivera, Index 300823/12
Plaintiff-Respondent,

-against-

11 West 42 Realty Investors, L.L.C., et al.,
Defendants-Respondents,

NTT Services LLC, et al.,
Defendants,

Americon Construction, Inc.,
Defendant-Appellant.

- - - - -

11 West 42 Realty Investors, L.L.C.,
Third-Party Plaintiff-Respondent,

-against-

Americon Construction, Inc.,
Third-Party Defendant-Appellant.

- - - - -

[And Another Third-Party Action]

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Kennedys CMK LLP, New York (Sean T. Burns of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for Humberto Rivera, respondent.

Law Office of Lori D. Fishman, Tarrytown (Louis H. Liotti of counsel), for 11 West 42 Realty Investors, L.L.C. and Tishman Speyer Properties, L.P., respondents.

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Order, Supreme Court, Bronx County (Donna M. Mills, J.),

entered on or about January 19, 2018, which denied the motion of

defendant Americon Construction, Inc. (Americon) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff was injured when wooden materials stacked in a freight elevator fell over and struck him. At the time, Americon had been retained by the building owner to perform renovation work in corridors and restrooms on two floors. Contrary to Americon's contention that it owed no duty of care to plaintiff, it can be held liable to plaintiff and others using the freight elevator if its performance of its contractual obligations "create[d] an unreasonable risk of harm to others, or increase[d] that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *see Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 [1st Dept 2010]). Furthermore, issues of fact exist as to whether Americon was responsible for the materials that were in the elevator and

injured plaintiff (*see Arias v Skyline Windows, Inc.*, 89 AD3d 460 [1st Dept 2011]; *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337-338 [1st Dept 2004]).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8971 In re David W.,

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

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Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ashley R. Garman of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 23, 2018, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, attempted robbery in the second degree, grand larceny in the fourth degree, attempted grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's determinations concerning identification and credibility. The suggestive features of the victim's showup identification of appellant did not render the identification unreliable in view of the prolonged interactions between appellant, the victim and an eyewitness. In any event, the victim's testimony was corroborated by that of an eyewitness, who had reliably identified appellant by pointing him out during a police canvass. The evidence also established appellant's accessorial liability (*see* Penal Law § 20.00).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8972- Index 154027/16
8973 Amy Miller, 595436/16
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

- - - - -

[And A Third-Party Action]

- - - - -

Amy Miller,
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Law Offices of Devon M. Radlin, New York (Devon M. Radlin of counsel), for respondent.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered December 11, 2017, which denied defendant's motion to stay the proceedings until the completion of the criminal case against third-party defendant, unanimously affirmed, without costs. Order, same court and Justice, entered October 12, 2018, which denied defendant's motion to renew, unanimously affirmed, without costs.

Plaintiff alleges that defendant's failure to maintain a lock on the main front entrance of the premises where plaintiff lived resulted in someone entering the building and assaulting her. Police later arrested a suspect for the crime, and his criminal case is still pending. Defendant seeks to stay the proceedings in this civil action until the criminal case is concluded, asserting that criminal files are sealed during the pendency of the criminal action, and as a result it will not be able to defend itself.

The court properly concluded that a stay was not warranted as this action is a negligence action, where plaintiff alleges that defendant knew the front-door lock at the premises was broken yet allowed the condition to continue without repair, thus creating a hazard for building residents and for her specifically. Such allegations are distinct from the question of whether the alleged assailant committed the crimes charged in the indictment, and defendant would not be prejudiced by proceeding with discovery. Accordingly, the motion court properly exercised its discretion in denying the motion for a stay, as well as the

motion to renew (*see Fortress Credit Opportunities I LP v Netschi*, 59 AD3d 250 [1st Dept 2009]; *Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352 [1st Dept 2006]; *compare Britt v International Bus Servs.*, 255 AD2d 143 [1st Dept 1998]).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8974 Wilhelmia Christina Oliver, Index 154950/16
Plaintiff-Respondent,

-against-

Central Park Sightseeing, LLC,
Defendant-Appellant.

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Einbinder & Dunn LLP, New York (Stephanie J. Blumstein of counsel), for appellant.

Mitchell Dranow, Sea Cliff, for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 12, 2017, which, insofar as appealed from, denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff was injured when she fell from a bicycle that she rented from defendant. Plaintiff sufficiently alleged that the bicycle's brakes malfunctioned after defendant had negligently inspected and maintained the bicycle, and defendant failed to establish as a matter of law that it has no liability to plaintiff for the negligent maintenance of its bicycle. The bicycle rental agreement relied upon by defendant did not reflect a clear and unequivocal intent to limit its liability for its own

negligence (*see Gross v Sweet*, 49 NY2d 102 [1979]; *Kim v Harry Hanson, Inc.*, 122 AD3d 529 [1st Dept 2014]).

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

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8975- Index 651668/14
8976 City Trading Fund, et al.,
Plaintiffs-Appellants,

-against-

C. Howard Nye, et al.,
Defendants.
- - - - -
Chapter IV Investors, LLC, et al.,
Objectors-Respondents.

_____

Mintz & Gold LLP, New York (Howard Miller of counsel), and The Brualdi Law Firm, P.C., New York (John F. Keating, Jr. of counsel), for appellants.

Dewey Pegno & Kramarsky, LLP, New York (David S. Pegno of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 12, 2018, revoking preliminary settlement class certification and dismissing the action with prejudice as to the named plaintiffs and without prejudice as to other members of the proposed class, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about February 8, 2018, which denied plaintiffs' motion for final approval of the settlement, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs seek approval of a disclosure-only settlement of litigation arising in connection with defendant Martin Marietta Materials, Inc.'s (MMM) acquisition of defendant Texas Industries, Inc. (TXI).

Plaintiffs place undue reliance on this Court's decision in *City Trading Fund v Nye* (144 AD3d 595 [1st Dept 2016]), which concerned preliminary approval of the disclosure-only putative class action settlement and thus involved a different and more lenient standard than that applicable to final approval (*see Saska v Metropolitan Museum of Art*, 53 Misc 3d 1212[A], 2016 NY Slip Op 51628[U], *10 [Sup Ct, NY County, Nov. 10, 2016]).

Plaintiffs failed to show that the supplemental disclosures obtained in the settlement (which contained no corporate governance reforms) were of "some benefit" to shareholders voting on the MMM/TXI transaction (*see Gordon v Verizon Communications, Inc.*, 148 AD3d 146, 158-159 [1st Dept 2017]). At the fairness hearing, plaintiffs offered no evidence that MMM advisors' ownership of TXI shares had any bearing on the advisors' assessment of the transaction. Nor is there any evidence that the advisors engaged in manipulative conduct affecting the transaction or stood to reap significant economic benefits beyond

potentially enhanced share value (*cf. In re Del Monte Foods Co. Shareholders Litig.*, 25 A3d 813 [Del Ch 2011]; *In re John Q. Hammons Hotels Inc. Shareholder Litig.*, 2009 WL 3165613, 2009 Del Ch LEXIS 174 [Del Ch, Oct 2, 2009], *appeal refused* 984 A2d 124 [Del 2009]; *David P. Simonetti Rollover IRA v Margolis*, 2008 WL 5048692, 2008 Del Ch LEXIS 78 [Del Ch, June 27, 2008]). In *In re Columbia Pipeline Group, Inc. Shareholder Litig.* (2017 Del Ch LEXIS 123 [Del Ch, Mar. 7, 2017]), the court expressed a personal preference for greater disclosure of bankers' holdings in companies they were advising in transactions, but acknowledged that greater disclosure was not required where such holdings "[did] not rise to the level of an actual conflict" (*id.* at *9). Moreover, the court recognized that the disclosures at issue were in the bankers' Forms 13-F, as the instant supplemental disclosures also state (*id.*).

Plaintiffs failed to show that the disclosure of fees earned by a JPMorgan affiliate for services previously rendered to a major TXI shareholder was of some benefit to shareholders. At the fairness hearing, plaintiffs' counsel did not dispute the court's assertion that the fees were earned in an unrelated context. Their arguments about the possible impact of that prior relationship on JPMorgan's judgment about the TXI/MMM transaction

are entirely speculative. The supplemental disclosures related to earnings before interest, taxes, depreciation, and amortization (EBITDA) are very limited additions to the original proxy disclosures; the only new information is the actual dollar amounts of the consensus estimates for each of TXI's and MMM's EBITDA for calendar years 2014 and 2015. However, as the proxy itself stated, these estimates were publicly available. In any event, plaintiffs do not explain the effect these estimates may have had on the advisors' recommendations.

In failing to demonstrate that the supplemental disclosures are of some benefit to shareholders, plaintiffs failed to show that MMM's payment of $500,000 in fees to plaintiffs' counsel for obtaining them is in MMM's or its shareholders' best interests (*see Gordon*, 148 AD3d at 158). Given the strength of these factors when weighed against the fairness of the settlement,

consideration of the remaining *Gordon* factors (*see* 148 AD3d at 156-158) is academic.

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

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8978 The People of the State of New York, SCI 210/17
Respondent,

-against-

Rondell McCorkle,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert Myers of counsel), for respondent.

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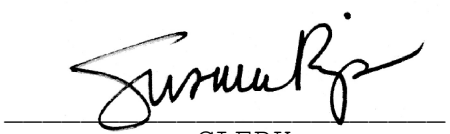
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Julio Rodriguez, III, J. at plea; Steven Hornstein, J. at sentencing), rendered April 13, 2017,

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 11, 2019



CLERK

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

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8979 Taboola, Inc., Index 654462/18
Plaintiff-Respondent,

-against-

Newsweek Media Group, Inc. formerly known as IBT Media, Inc., et al.,
Defendants-Appellants.

_____

Becker & Poliakoff LLP, New York (Glenn H. Spiegel of counsel), for appellants.

Sher Tremonte LLP, New York (Mark Cuccaro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about September 28, 2018, which, to the extent appealed from, denied defendants' motion to vacate the judgment against them, unanimously affirmed, with costs.

Defendants failed to present any basis for vacating the judgment in light of their admitted default under the settlement agreement. Absent any factual basis in the record to relieve defendants from enforcement of the judgment, where a stipulation of settlement is unambiguous, "literal enforcement of its terms is not unjust" (*Cadlerock Joint Venture, L.P. v Rubenstein*, 26 AD3d 219, 220 [1st Dept 2006]). Here, defendants have provided no facts to justify the invocation of the Court's inherent

discretionary powers to relieve a party from judgment. Thus, strict enforcement of the second settlement agreement was warranted (*see Mill Rock Plaza Assoc. v Lively*, 224 AD2d 301, 301 [1st Dept 1996]).

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

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8980 XpresSpa Holdings, LLC, et al., Index 650040/17
Plaintiffs-Appellants,

-against-

Cordial Endeavor Concessions of Atlanta, LLC (formerly known as Montclair Douglass, LLC), et al.,
Defendants-Respondents.

_____

Thompson Hine LLP, New York (Barry M. Kazan of counsel), for appellants.

Gebo Law LLC, Atlanta, GA (Carl A. Gebo of the bar of the State of Georgia, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about November 13, 2017, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the causes of action for breach of contract and for breach of the implied covenants of good faith and fair dealing to the extent based on defendant Cordial Endeavor Concessions of Atlanta, LLC's (Cordial) alleged baseless complaints, as against Cordial only, and to deny the motion as to the causes of action for breach of fiduciary duty to the extent based on Cordial's alleged baseless complaints, tortious interference with business relations, and a declaratory judgment as against all defendants, and to vacate the

finding that plaintiff XpresSpa Holdings, LLC lacks standing to sue and that personal jurisdiction was not acquired over defendant Shelia Edwards, and otherwise affirmed, without costs.

Plaintiff XpresSpa Atlanta Terminal A, LLC (XpresSpa Atlanta) operates an airport spa concession. Plaintiff XpresSpa Holdings, LLC (XpresSpa Holdings) is alleged to be its majority owner. Defendant Cordial was its minority owner during the relevant period. Defendants Shelia Edwards and Steven White are two of Cordial's five owners. Pursuant to its lease agreement with the airport operator, XpresSpa Atlanta was required to maintain continuous participation in the Airport Concession Disadvantaged Business Enterprise (ACDBE), which it had historically done by partnering with an ACDBE. During the relevant time period, XpresSpa Atlanta sought to fulfill the ACDBE requirement by partnering with Montclair Douglass, LLC (Montclair), a certified ACDBE and the predecessor of Cordial.

The allegations in the complaint are insufficient to support piercing Cordial's corporate veil (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 [2011]). As a result, defendants Shelia Edwards and Steven White may not be held individually liable on the contract-based claims (*see Vandashield Ltd v Isaacson*, 146 AD3d 552, 554 [1st Dept 2017]).

However, individual liability may still be appropriate on the remaining claims (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]).

The allegations that Edwards transacted business in New York and that the claims arose directly out of that business are sufficient to support a finding of personal jurisdiction at this stage (*see* CPLR 302[a][1]). The complaint alleges that Edwards attended three meetings in New York, accepted regular payments and operational support from plaintiffs in New York, and maintained an ownership interest in an entity (Cordial) that was partnered with and had an interest in a New York entity (XpresSpa Atlanta) (*see Paradigm Mktg. Consortium, Inc. v Yale New Haven Hosp., Inc.*, 124 AD3d 736, 737 [2d Dept 2015]; *Schomann Intl. Corp. v Northern Wireless, Ltd.*, 35 F Supp 2d 205, 208-211 [ND NY 1999]).

The record reflects that plaintiff XpresSpa Holdings is a member of plaintiff XpresSpa Atlanta. It thus has standing to bring suit. It is undisputed that XpresSpa Holdings acquired a membership interest from a former XpresSpa Atlanta member. Although XpresSpa Holdings never physically signed the governing Operating Agreement, it expressly assumed all of the former member's obligations and liabilities thereunder pursuant to the

Contribution Agreement. This is sufficient to satisfy the Operating Agreement's requirement that all members become "signator[ies] . . . thereby agreeing to all of the terms and conditions set forth herein."

The complaint states causes of action for breach and willful breach of the Purchase and Operating Agreements. It alleges that Cordial breached these agreements by failing to obtain an affirmation of certification as an ACDBE within 90 days of closing and failing to promptly notify plaintiffs of any "material change" to its ACDBE certification. The fact that Cordial's predecessor (Montclair) had a valid, existing ACDBE certification at the time of closing is irrelevant, as the agreement specifically called for affirmation "*following* submission of the required legal documentation regarding Seller's change in ownership" (emphasis added).

Although the impact of these breaches is unclear - the agency responsible for approving ACDBE applications subsequently determined that Cordial had been continuously certified during the entire relevant period - even a "technical" or "minimal" breach may nonetheless yield damages (*see Denker v Twentieth Century-Fox Film Corp.*, 45 AD2d 675, 675-676 [1st Dept 1974]). The complaint alleges that, as a result of these breaches,

plaintiffs were required to expend time and money investigating Cordial's ACDBE status and finding a new ACDBE partner. Plaintiffs are not required to prove these damages at this stage (*see Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009]).

The unjust enrichment claim fails because the relationship between the parties is governed by two written agreements (*see Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts.*, 119 AD3d 136, 148 [1st Dept 2014]).

The tortious interference with contract claim fails because Edwards and White were not "stranger[s]" to these agreements (*see Ashby v ALM Media, LLC*, 110 AD3d 459, 459 [1st Dept 2013], *lv denied* 22 NY3d 860 [2014]; *Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990], *lv denied* 76 NY2d 714 [1990]). The complaint's conclusory allegations are insufficient to trigger the exception to this rule (*see generally Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]; *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228-230 [1st Dept 1998]).

The allegations that defendants made repeated, baseless complaints about plaintiffs and that, as a result, plaintiffs were prevented from opening other spa locations are sufficient to state a cause of action for tortious interference with business

relations (*see generally 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]). Although defendants assert an economic justification defense (*see Foster v Churchill*, 87 NY2d 744, 750 [1996]), the applicability of this defense is incapable of determination as a matter of law, as the documentary evidence is inconclusive with respect to the merit of defendants' complaints, which are still being litigated.

To the extent the breach of fiduciary duty claim is based on Cordial's failure to obtain an affirmation of ACDBE certification, it is duplicative of the breach of contract claims (*see William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]). In addition, the complaint's allegations of improper management are too vague and conclusory (*see* CPLR 3016[b]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). However, to the extent this claim is based on defendants' alleged baseless complaints, it is sufficiently alleged and is not duplicative of the breach of contract claims. While defendants had the right to make complaints generally, they did not have the right to make false complaints or to do so maliciously.

Similarly, to the extent the breach of the implied covenant of good faith and fair dealing claims are premised on Cordial's

failure to maintain its ACDBE status, they are either conclusively refuted by the documentary evidence, which shows that Cordial was continuously ACDBE certified, or else redundant of the breach of contract claims (*see Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]). However, to the extent these claims are premised on Cordial's alleged baseless complaints, they are not redundant.

The fraudulent inducement claim fails because the documentary evidence conclusively establishes that defendants' representation that they would always be organized as an ACDBE was not false (*see generally Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009], *appeal withdrawn* 12 NY3d 780 [2009]). It does not matter whether the certification decision was based on a determination that Cordial affirmatively satisfied the ACDBE requirements or on a recognition that the relevant government agency failed to timely take the necessary steps to decertify Cordial; either way, Cordial was always an ACDBE.

The fraudulent concealment claim fails because the allegations are insufficient to raise an inference that the alleged omission "directly caused the loss about which plaintiff complains" (*see Vandashield*, 146 AD3d at 553 [internal quotation marks omitted]). The complaint alleges that, but for the

omission, plaintiffs would never have entered into the governing Purchase and Operating Agreements. However, the claimed damages resulted not from the fact of plaintiffs' entering into these agreements, but from defendants' subsequent conduct (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]; *Friedman v Anderson*, 23 AD3d 163, 167 [1st Dept 2005]).

The complaint states a cause of action for a declaration that plaintiffs properly terminated the Purchase Agreement by October 2014 at the latest and do not owe defendants any additional monies. While these claims are hotly contested, defendants did not conclusively refute them.

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8981 In re Commissioner of Social Services
on behalf of Julissa Y. S.-C.,
Petitioner-Respondent,

-against-

George N.,
Respondent-Appellant.

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Kleyman & Associates, P.C., New York (Catherine McKinney of counsel), for appellant.

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

Andrew J. Baer, New York, attorney for the child.

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Order, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about August 3, 2017, which, to the extent appealed from, after an estoppel hearing, directed that respondent submit to genetic marker testing, unanimously affirmed, without costs.

In this paternity proceeding under article 5 of the Family Court Act, respondent failed to establish by clear and convincing evidence that the mother's husband acted as the child's father to such an extent that a biological paternity test "is not in the best interests of the child on the basis of . . . equitable

estoppel" (Family Court Act § 532; *see Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1 [2010]; *Matter of Cecil R. v Rachel A.*, 102 AD3d 545 [1st Dept 2013]). There is no evidence that the husband has played a significant role in raising, nurturing or caring for the child, let alone that he ever had an operative parent-child relationship with him (*see Matter of Gutierrez v Gutierrez-Delgado*, 33 AD3d 1133, 1135 [3d Dept 2006]). Indeed, at the estoppel hearing, respondent did not even attempt to elicit any testimony from the mother about the child's relationship with her husband. Instead, his entire case was focused on his own relationship with the mother and the fact that he had no relationship with the child.

Respondent failed to demonstrate that the husband, who married the mother after the child was born and was not named on the child's birth certificate, was a necessary party (*see Matter of Commissioner of Social Servs. v Dimarcus C.*, 94 AD3d 538 [1st Dept 2012]).

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 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8982 Maria A. Calderon, Index 100348/17
Plaintiff-Appellant,

-against-

Kenga Roo Realty LLC, et al.,
Defendants-Respondents.

_____

Maria A. Calderon, appellant pro se.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 4, 2018, which granted defendants Donald Zucker Co. (DZC) and Manhattan Skyline Co.'s (MSC) motion to dismiss the complaint, unanimously affirmed, without costs.

The court correctly dismissed plaintiff's first cause of action for breach of the warranty of habitability, brought pursuant to Real Property Law § 235-b(1), because DZC and MSC were not plaintiff's landlord or the lessor of plaintiff's apartment. The second and third causes of action for breach of the covenant of quiet enjoyment and breach of contract, respectively, were similarly correctly dismissed based upon the absence of a contractual or landlord tenant relationship between plaintiff and the moving defendants (*Wright v Catcendix Corp.*, 248 AD2d 186, 186 [1st Dept 1998]). The negligence claim was correctly dismissed because the complaint did not allege any duty

owed by DZC or MSC to plaintiff, without which there can be no liability (*Pasternack v Laboratory Corp of Am. Holdings*, 27 NY3d 817, 824 [2016]). In light of the dismissal of all of plaintiff's substantive claims, its claim for injunctive relief must likewise be dismissed, as it does not constitute an independent cause of action (*see Carlyle LLC v Quick Park 1633 Garage LLC*, 160 AD3d 476, 478 [1st Dept 2018]).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8983-
8983A The People of the State of New York, Ind. 1609/13
Respondent, 2127/14

-against-

Maximillia Cordero,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Juan M. Merchan, J.), rendered July 2, 2015, convicting defendant, upon her pleas of guilty, of burglary in the third degree and violation of probation, and sentencing her, as a second felony offender, to a term of two to four years, with a concurrent term of one year for the probation violation, unanimously affirmed.

The court properly adjudicated defendant a second felony offender. Defendant did not meet her burden of establishing that her 2013 plea conviction was unconstitutionally obtained (*see People v Harris*, 61 NY2d 9, 15 [1983]).

When, during the 2013 plea allocution, defendant answered affirmatively to a question about "using drugs or medication of

any kind at this time," the court ascertained that defendant was not aware of any effect that the medication had on her ability to understand the proceedings. Furthermore, there was nothing in her interactions with the court and counsel to cast any doubt on her ability to enter a guilty plea knowingly, intelligently and voluntarily (*see People v Ambroise*, 161 AD3d 584 [1st Dept 2018];

The record also fails to support defendant's contention that the 2013 plea was the product of ineffective assistance of counsel (*see generally People v Ford*, 86 NY2d 397, 404 [1995]).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8984 The People of the State of New York, Ind. 1225/13
Respondent,

-against-

Bismark Lithgow,
Defendant-Appellant.

_____

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

Bismark Lithgow, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered April 1, 2015, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 21 years to life, unanimously affirmed.

Defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. To the extent that parts of the summation contained misstatements of law, "any prejudice was avoided by the court's charge, which the jury is presumed to have followed" (*People v Ramos*, 162 AD3d 453, 454 [1st Dept 2018]). The other comments challenged by defendant on appeal were

generally responsive to defense counsel's attacks on the credibility of prosecution witnesses, and to the extent that a few isolated comments crossed the line of propriety and thus constituted error, there was no pattern of inflammatory remarks, nor any conduct so egregious as to warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

We have considered the arguments raised in defendant's pro se supplemental brief and find them unavailing.

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8985 Sevenson Environmental Services, Inc.,
Plaintiff-Appellant,

-against-

Manhattan Telecommunications Corp., doing business as MetTel,
Defendant-Respondent.

Index 652331/17

_____

Novak Juhase & Stern, LLP, Cedarhurst (Kim Steven Juhase of counsel), for appellant.

Klein Law Group PLLC, Albany (Allen C. Zoracki of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered February 27, 2018, which granted defendant's motion for summary judgment to the extent of precluding plaintiff's recovery for overcharges occurring prior to February 21, 2015, unanimously reversed, on the law, without costs, and the motion denied.

At issue in this case are two sentences of a tariff addressing recovery for objections to overcharges in the defendant's billings to plaintiff. The tariff at section 2.4.3 states: "If objection is not received by the Company [defendant] within three months after the bill is rendered, the items and charges appearing thereon shall be determined to be correct and binding upon the customer. A bill will not be deemed correct and

binding upon the customer if the Company has records on the basis of which an objection may be considered, or if the customer has in his or her possession such Company records." Defendant asserts that the first sentence is a "shot clock" limitation period after which no recovery may be had. Plaintiff asserts that the second sentence modifies the first sentence, and permits recovery for objections preceding the three-month period where the company or the customer has records supporting the objection. Plaintiff is correct.

The first sentence clearly states that the bills which are more than three months old at the time the objections are made will be deemed "to be correct and binding upon the customer." This "correct and binding" language does not refer to those bills falling within three months of the objections. Therefore, the second sentence, which states that "bill[s] will not be deemed correct and binding upon customer" where either party has supporting records, clearly addresses only those bills which had otherwise been deemed "correct and binding" in the first sentence, i.e., the bills older than three months. If, as the defendant and the court below have asserted, this second sentence was merely meant to require that the bills falling within the three-month period were to be supported by records, it could

simply have said: "objections to bills falling within the three-month period must be supported by records." This Court's reading of this tariff's language is also supported by the Public Service Commission (PSC)'s decision in the administrative appeal, of which we take judicial notice, as the PSC has a strong interest in seeing language based on its model tariff interpreted in the same way, as a matter of public interest (*see e.g. New York Tel. Co. v County of Nassau*, 122 AD2d 124, 125 [2d Dept 1986]).

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

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8986 In re Monique McLaughlin, Index 101456/16
Petitioner,

-against-

The New York City Housing Authority,
Brownsville Houses,
Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Anne Simons of counsel), for appellant.

Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent, dated June 13, 2016, which terminated petitioner's tenancy on the grounds of nondesirability and breach of respondent's rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered November 20, 2017), dismissed, without costs.

The transfer of the proceeding to this Court was proper insofar as petitioner raised an issue of substantial evidence by challenging certain factual findings made by the Hearing Officer (*see* CPLR 7804[g]).

Respondent's determination is supported by substantial

evidence. The evidence showed that illegal drugs were recovered from petitioner's apartment upon execution of a search warrant, which was issued after a confidential informant made controlled buys, targeting her (*see Matter of Coleman v Rhea*, 104 AD3d 535 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see e.g. Matter of Prado v New York City Hous. Auth.*, 116 AD3d 593 [1st Dept 2014]; *Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630 [1st Dept 2011]).

We have considered petitioner's remaining arguments, including that respondent violated her due process rights, and find them unavailing.

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8987 The People of the State of New York, SCI 1519/16
Respondent,

-against-

Michael Morales,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert Myers of counsel), for respondent.

_____

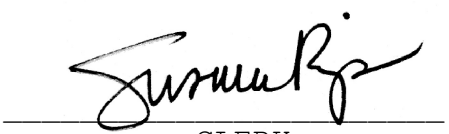
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Marc J. Whiten, J.), rendered August 18, 2016,

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: APRIL 11, 2019



CLERK

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

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8988-
8989 Connie B. Stewart, et al., Index 302677/12
Plaintiffs-Appellants,

-against-

163rd Street Improvement Council, Inc., et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

Simon, Eisenberg & Baum, LLP, New York (Sagar Shah of counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 11, 2017, which, upon renewal, adhered to its prior determination granting defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 23, 2017, unanimously dismissed, without costs, as moot.

The court correctly concluded that plaintiffs' expert reports, admitted on renewal, were conclusory and speculative.

Accordingly, they were insufficient to rebut defendants' prima facie showing that they discharged their duty to plaintiffs' decedent as a matter of law (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252-253 [2002]).

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

ENTERED: APRIL 11, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Tom, Oing, JJ.

8990N Flossie Henry, Index 152559/14
Plaintiff-Respondent,

-against-

Tyett D. Phelps,
Defendant.
- - - - -
Motor Vehicle Accident Indemnification Corporation,
Nonparty Appellant.

_____

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for appellant.

Siegel & Coonerty LLP, New York (Michael Peters of counsel), for respondent.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered March 8, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to compel non-party appellant the Motor Vehicle Accident Indemnification Corporation (MVAIC) to defend defendant Tyett D. Phelps, unanimously affirmed, without costs.

We find that the Supreme Court properly determined that plaintiff timely filed a notice of intention to make a claim with MVAIC (*see* Insurance Law § 5208[a][3][A]). In 2012, plaintiff first commenced a timely action in Kings County against the operators of the motor vehicles, including Phelps, for injuries

she sustained as Phelps' passenger on November 30, 2011, as a result of a motor vehicle collision. In March 2014, plaintiff commenced the underlying action against Phelps. In October 2014, plaintiff was granted a default judgment on liability against Phelps. After Phelps failed to appear for the inquest of the underlying action, the court entered a money judgment in March 2017 in favor of plaintiff. By letter dated May 12, 2017, Phelps's insurance carrier denied coverage, stating that Phelps, a New Jersey resident, did not elect bodily injury coverage in her policy of insurance. By the instant motion dated August 14, 2017, plaintiff moved to compel MVAIC to defend Phelps in the action. The court vacated the money judgment entered on default against Phelps, and granted plaintiff's motion to compel MVAIC to defend the action.

Here, plaintiff demonstrated that she was a "qualified person" under Insurance Law article 52. Plaintiff also showed that she complied with the three requirements under Insurance Law § 5208(a)(3)(A). First, in an affirmation in support of plaintiff's motion, plaintiff's counsel outlined the cause of action. The evidence plaintiff submitted established a meritorious case, since she was granted a default judgment on liability against Phelps. Second, plaintiff submitted a letter,

dated May 12, 2017, from Phelps' insurance carrier denying coverage, because the insurance policy did not cover bodily injuries. Plaintiff showed that the May 2017 letter was the first instance she received notice that bodily injury coverage was denied, since Phelps had never responded or appeared in court. Last, plaintiff notified MVAIC that she was making a claim for damages and submitted proof that she had obtained a money judgment in her favor.

Contrary to MVAIC's argument, plaintiff showed that she had made reasonable efforts to ascertain insurance coverage. Plaintiff obtained Phelps' identity and vehicle information in 2011. She also had discovered that Phelps' vehicle was insured on the date of the accident. Although plaintiff was unable to ascertain liability coverage, we find that plaintiff was not required to. Here, the denial of coverage did not occur because of a "lack of a policy of insurance in effect at the time the cause of action arose" (Insurance Law § 5208[a][3][A][ii]). We also find that it would be inconvenient to narrow the interpretation of the statute, because plaintiff is an innocent victim (*see Motor Veh. Acc. Indem. Corp. v Eisenberg*, 18 NY2d 1, 3 [1966]).

Finally, we find that plaintiff timely filed a notice of

claim (Insurance Law § 5208[a][3][B]). The time period from the date of the denial of coverage (May 12, 2017) to the date of the motion (August 14, 2017) was 95 days.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 11, 2019

CLERK

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

8726-
8727-
8728N

Index 23247/15E

John Pirraglia,
Plaintiff-Respondent,

-against-

Jofsen, Inc., et al.,
Defendants-Appellants.

_____

Herrick, Feinstein LLP, New York (Raymond N. Hannigan and Janice I. Goldberg of counsel), for appellants.

Maldonado & Cruz, PLLC, Bronx (Angel Cruz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about November 27, 2017, which found, after a framed-issue hearing directed by this Court (148 AD3d 648 [1st Dept 2017]), that Jofsen did not have a valid agreement to arbitrate, and denied its motion to compel arbitration, unanimously affirmed, without costs. Order, same court and Justice, entered on or about March 8, 2018, which granted plaintiff's motion to strike Jofsen's answer, counterclaims, and affirmative defenses, and denied defendants' cross motion to compel discovery and for a default judgment on the counterclaims of defendants Jofsen and Carl D. Madsen, unanimously modified, on the law, to deny plaintiff's motion, and otherwise affirmed,

without costs. Order, same court and Justice, entered on or about June 18, 2018, insofar as it denied Madsen's motion to renew, unanimously affirmed, without costs. Appeal from so much of the June 18, 2018 order as (1) denied Jofsen's motion to renew and (2) denied defendants' motion to reargue, unanimously dismissed, without costs, as (1) academic in light of our disposition of the March 2018 order, and (2) as taken from a nonappealable paper, respectively.

Jofsen contends that paragraph 21 of the 2001 lease between itself and plaintiff, which says, "Any disputes will be settled in a court of law," does not supersede the 1986 agreement between itself and plaintiff's parents, which provides for arbitration. Jofsen does not dispute that by agreeing to paragraph 21 it intended to supercede the arbitration provision in the 1986 agreement and to litigate all issues involving the properties (as opposed to narrower issues involving the 2001 lease). Instead, Jofsen argues that defendant John P. Jorgenson was not authorized by Jofsen in writing to execute the lease on Jofsen's behalf and therefore, the 2001 lease was void. This argument is unavailing. The statutes on which Jofsen relies – General Obligations Law §§ 5-703, 5-1103, and 5-1111 – are inapplicable because the 2001 lease does not exceed a term of one year.

Moreover, Jofsen ratified the 2001 lease because it failed to repudiate it for more than 16 years (*see Matter of Silicone Breast Implant Litig.*, 306 AD2d 82, 85 [1st Dept 2003]; *Matter of Cologne Life Reins. Co. v Zurich Reins. [N. Am.]*, 286 AD2d 118, 126 [1st Dept 2001]). Accordingly, the 2001 lease is not unenforceable under General Obligations Law §§ 5-703, 5-1103 and 5-1111 because Jofsen's ratification of the lease was sufficient to take the lease out of the statute of frauds (*see e.g. Richter v Zabinsky*, 257 AD2d 397, 398 [1st Dept 1999]; *Garfunkel v Malcolmson*, 217 AD 632, 634 [1st Dept 1926]; *Barnum v Frickey*, 115 AD2d 977 [4th Dept 1985]).

Although the court properly denied Jofsen's motion to compel arbitration, it erred by granting plaintiff's motion to strike Jofsen's answer, affirmative defenses, and counterclaims. First, plaintiff's motion was untimely (*see* CPLR 3012[a] and 3211[e]). Second, a corporation – like Jofsen – that continues to carry on its affairs after it is dissolved for nonpayment of taxes is "a *de facto* corporation" (*A.A. Sutain, Ltd. v Montgomery Ward & Co.*, 22 AD2d 607, 610 [1st Dept 1965], *affd* 17 NY2d 776 [1966]; *see also Garzo v Maid of Mist Steamboat Co.*, 303 NY 516, 524 [1952]). "[A] dissolved corporation may sue or be sued on its obligations,

including contractual obligations" (*MMI Trading, Inc. v Nathan H. Kelman, Inc.*, 120 AD3d 478, 479 [2d Dept 2014] [internal quotation marks omitted]). The statutes on which plaintiff relies – Business Corporations Law §§ 1509 and 1510 and Surrogate's Court Procedure Act § 2108 – are inapplicable. Third, "the ultimate penalty" of striking Jofsen's answer was unwarranted because it did not engage in "[e]xtreme conduct" (*Dauria v City of New York*, 127 AD2d 459, 460 [1st Dept 1987]). Plaintiff did not meet his "burden of coming forward with . . . a clear-cut showing of willfulness" (*Orlando v Arcade Cleaning Corp.*, 253 AD2d 362, 363 [1st Dept 1998]).

Jofsen and Madsen were not entitled to a default judgment on their counterclaims, as they failed to comply with CPLR 3215(f). Similarly, on their cross motion to compel disclosure, defendants failed to comply with 22 NYCRR § 202.7(a) and (c).

It is well established that the denial of reargument is not appealable (*see e.g. Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 433 [1st Dept 2010]).

In light of our reversal of the portion of the March 2018

order that struck Jofsen's pleading, its appeal from the denial of its renewal motion is academic. As for Madsen's renewal motion, he still failed to submit either an affidavit or his verified counterclaim on his motion to renew that would establish his entitlement to a judgment on his counterclaim.

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8950 The People of the State of New York, Ind. 5177/14
Respondent,

-against-

Robert Smith,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered December 1, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of six years, unanimously affirmed.

With the exception of one instance, discussed below, the court providently exercised its discretion in precluding cross-examination of two detectives regarding allegations of misconduct against them in civil lawsuits in which they were named as defendants, because defendant did not identify "specific allegations that are relevant to the credibility of the law

enforcement witness[es]" (*People v Smith*, 27 NY3d 652, 662 [2016]). As to each of these lawsuits, the "complaint did not allege, or even support an inference, that [the] detective personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers" (*id.* at 663 [internal quotation marks omitted]). These complaints failed to sufficiently specify how the detective at issue was involved in the alleged misconduct of other officers, or, where the detective's own conduct was described, the complaint did not set forth conduct that was relevant to credibility.

However, the court should have permitted the defense to cross-examine one of the detectives about a lawsuit in which it was alleged that he fabricated evidence. Defendant had a good faith basis for impeaching the detective with this allegation, which was specific to the detective at issue and relevant to his credibility. The court's only rationales for precluding impeachment were that such questioning would be "incendiary," and that the detective denied the misconduct when he was questioned about it out of the presence of the jury. The first rationale would appear to be inconsistent with the requirement that cross-examination be based on specific, good faith allegations that implicate the officer's credibility. The second rationale was an

insufficient basis in this case for denying defendant the opportunity to have the jurors assess the officer's denial for themselves.

Nevertheless, we find that this error, as well as any error with regard to any of the lawsuits proffered by the defense, was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The the evidence of guilt was generally overwhelming and the testimony of the officers involved in the lawsuits was significantly corroborated by the testimony of a third officer (*cf*. *People v Holmes*, __AD3d__, 1019 NY Slip Op 02033 [1st Dept 2019]).

The court properly denied defendant's suppression motion. The relevant facts supported a "specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity" (*People v Hall*, 10 NY3d 303, 311 [2008]), and therefore justified a visual body cavity

inspection. Among other things, the police saw defendant reach into the private area of his body for drugs that he sold to an apprehended buyer, and it was a reasonable inference that defendant was continuing to sell drugs at that location.

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8952 In re Latava P.,
Petitioner-Appellant,

-against-

Charles W.,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

_____

Order, Family Court, Bronx County (Aija Tingling, J.), entered on or about June 5, 2017, which granted respondent's motion to dismiss the family offense petition, unanimously affirmed, without costs.

Construing the petition liberally and giving it the benefit of every favorable inference (*see Matter of Christine P. v Machiste Q.*, 124 AD3d 531, 532 [1st Dept 2015]), we find that the allegations in the petition concerning incidents that occurred in January 2017 were insufficient to allege the family offense of harassment in the second degree because they do not involve a "course of conduct" or repeated acts that would "seriously annoy" the petitioner and serve no legitimate purpose (Penal Law § 240.26[3]; *see McGuffog v Ginsberg*, 266 AD2d 136 [1st Dept 1999]). There is no allegation of damage to physical property to support a finding of criminal mischief in the fourth degree

(Penal Law § 145.00[1]), and the allegations were too vague to allege stalking in the fourth degree (Penal Law § 120.45[1]; *Matter of Kimberly O. v Jahed M.*, 152 AD3d 441 [1st Dept 2017], *lv denied* 30 NY3d 902 [2017]).

The allegations concerning an incident that occurred four years earlier also were properly dismissed because, although a family offense petition cannot be dismissed "solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition" (Family Court Act § 812[1]), the petition failed to sufficiently plead conduct constituting a pattern of imminent and ongoing danger to the mother (*see Matter of Opray v Fitzharris*, 84 AD3d 1092, 1093 [2d Dept 2011]; *cf. Matter of Monwara G. v Abdul G.*, 153 AD3d 1174 [1st Dept 2017]).

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8953-
8953A Kassin Sabbagh Realty, LLC,
Plaintiff-Appellant,

-against-

Carol Pendroff, et al.,
Defendants-Respondents,

Shalev Shoshani, et al.,
Defendants.

Index 654403/13

Goldberg Weprin Finkel Goldstein LLP, New York (Zachary D. Kuperman of counsel), for appellant.

Ginsburg & Misk, LLP, Queens Village (Hal R. Ginsburg of counsel), for respondents.

Judgment, Supreme Court, New York County (Ellen M. Coin, J.), entered April 24, 2017, dismissing the first through third causes of action as against defendants Carol Pendroff, Alan Markowitz, and Steven Pendroff (incorrectly s/h/a Steve Markowitz), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 7, 2017, which granted the above-named defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to plaintiff's contention, there are no triable issues of fact precluding summary judgment. Arzt testified that

plaintiff's commission was going to be based on any excess over a purchase price of $5 million. However, the complaint alleges that the property sold for only $4,925,000. Plaintiff's argument that the actual sales price could have reached or exceeded $5 million is unpreserved (*see Ta-Chotani*, 276 AD2d at 313) and speculative (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 327 [1986]).

Moreover, plaintiff's contention that defendants frustrated a condition precedent (the $5 million) by selling at a lower price is unavailing. The owners did not enter into a contract to sell the property until July 24, 2013, more than a year after plaintiff's last contact with the owners of the property (*see Helmsley-Spear, Inc. v 150 Broadway N.Y. Assoc.*, 251 AD2d 185, 186 [1st Dept 1998] [broker cannot recover on theory of seller's failure to perform condition if broker's "efforts were not about to prove effectual at the time they ceased"] [internal quotation marks omitted]).

Even crediting Arzt's affidavit, which said that defendants agreed to compensate plaintiff even if their property sold for less than $5 million, defendants-respondents are still entitled to summary judgment, as Arzt admitted that he was not involved in

the negotiations for the purchase of the property (see *Greene v Hellman*, 51 NY2d 197, 206 [1980]).

The causes of action for quantum meruit and unjust enrichment were correctly dismissed because, according to plaintiff, there was an actual agreement between the parties.

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: APRIL 11, 2019

CLERK

Sweeny, J.P., Webber, Gesmer, Singh, JJ.

8954 Magen David of Union Square, et al., Index 600573/08
Plaintiffs,

The Sixteenth Street Synagogue,
Plaintiff-Appellant,

-against-

3 West 16th Street, LLC,
Defendant-Respondent.

_____

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellant.

McLaughlin & Stern LLP, New York (Paul H. Levinson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about February 22, 2018, which granted defendant's motion to vacate the note of issue and for summary judgment on the third counterclaim for declaratory judgment that defendant is the fee simple owner of the property with the exclusive right of possession, unanimously affirmed, without costs.

On one of at least two prior appeals in this action, this Court expressly held that "[a]lthough the prior appeal did not specifically address [the third] counterclaim, the underlying issues were necessarily resolved in that appeal, and that

resolution constitutes the law of the case" (132 AD3d 503, 504 [1st Dept 2015], *lv dismissed* 28 NY3d 977 [2016] [internal quotation marks omitted]). This Court further held that "[t]he doctrine of res judicata also bars the Synagogue's claim of an equitable ownership interest in the Building," since the Synagogue's predecessor in interest, in discontinuing a prior action, gave up that claim (*id.* at 504).

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8955 The People of the State of New York, Ind. 5616/04
Respondent,

-against-

Luis Fiavachay,
Defendant-Appellant.

_____

Seymour W. James, Jr., 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 (Renee A. White, J.), entered on or about December 11, 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 providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's age of 65 at the time of the hearing does not establish that he has only a minimal risk of reoffense; we note that he was 54 when he committed the underlying sexual offenses (*see People v Rodriguez*, 146 AD3d 452 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]). Defendant's low

Static-99 score is insufficient to warrant a departure (*see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]). The remaining mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument.

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8956-
8957 Index 160061/13

Silvio Spallone,
Plaintiff-Respondent,

-against-

Frank Spallone,
Defendant-Appellant.

_____

Mahler & Harris, P.C., Kew Gardens (Stephen R. Mahler of counsel), for appellant.

Samuel E. Kramer, New York, for respondent.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 13, 2018, which, upon defendant's default, awarded plaintiff damages, interest, costs and disbursements totaling $1,083,622.22, unanimously affirmed, without costs. Order (same court and Justice), entered July 16, 2018, which denied defendant's motion to vacate the April 13, 2018 judgment, unanimously affirmed, without costs.

The court properly precluded Stephen Mahler, Esq. from participating in the inquest on damages. Because Mr. Mahler had not been properly substituted as attorney of record, he lacked standing to proceed on defendant's behalf (*see* CPLR 321[b]; *Elite 29 Realty LLC v Pitt*, 39 AD3d 264 [1st Dept 2007]).

The court's award of damages was supported by the record.

We reject defendant's challenge to the $150,000 portion of the award, attributable to the false murder charge held "over plaintiff's head." This award was recoverable under plaintiff's claim for intentional infliction of severe emotional distress. Moreover, defendant is precluded from challenging liability as the judgment was entered on default *(see Curiale v Ardra Ins. Co.*, 88 NY2d 268, 279 [1996]; *Henderson-Jones v City of New York*, 120 AD3d 1123, 1124 [1st Dept 2014]). Also, defendant's malicious, wilful, and wanton filing of false charges of attempted murder against plaintiff "just to see his brother suffer" justified the award of punitive damages (*see Chauca v Abraham*, 30 NY3d 325, 331-332 [2017]).

In denying defendant's motion to vacate the damages award, the court noted only "no appearance either side." Even assuming the parties had appeared, there was no basis to grant the motion. It was untimely made more than 15 days after the court's issuance

of the order awarding damages (CPLR 4405), and, in any event, defendant was attempting to raise the same arguments raised and rejected on that appeal from the judgment.

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8958 The People of the State of New York, Ind. 3979/10
Respondent,

-against-

Solomon Corbett,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appelate Defender, New York (Anastasia Heeger of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith Lieb, J.), rendered November 12, 2013,

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 11, 2019

CLERK

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

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8959 Candice Hightower, Index 161024/15
Plaintiff-Respondent,

-against-

EXG 332 W44 LLC, et al.,
Defendants-Appellants.

_____

Cozen O'Connor, New York (Vincent P. Pozzuto of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 25, 2018, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that, while working in a garage owned or leased by defendants, she was struck on the head by a parking gate arm that had been stuck in an upright position and descended as she was walking under it. Defendants demonstrated that they did not create or have actual notice of the particular defective condition by submitting evidence that the parking gate complied with applicable standards and that there was no record of similar previous malfunctions with the gate (*see Bazne v Port Auth. of N.Y. and N.J.*, 61 AD3d 583, 583-84 [1st Dept 2009]).

However, the record does not permit resolution of the issue of defendants' constructive knowledge of a defective condition as a matter of law. Defendants' facility manager acknowledged that the parking gate arm sometimes gets stuck in an upright position, and defendants' maintenance records reflect a call made to the repairs department and a request for service to the parking gate's controller two days before the accident, but there is no record of an attempt to address the service request for the parking gate until after the accident (*see Derouen v Savoy Park Owner, L.L.C.*, 109 AD3d 706, 707 [1st Dept 2013]; *Camaj v E. 52nd Partners*, 215 AD2d 150, 151 [1st Dept 1995]).

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 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8960 The People of the State of New York, SCI 1435/17
Respondent,

-against-

Alfredo Perez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Julio Rodriguez, III, J. at plea; Bahaati Pitt, J. at sentencing), rendered August 17, 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 11, 2019

CLERK

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

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8961 In re NYC Health + Hospitals, Index 152144/17
Petitioner-Appellant,

-against-

Organization of Staff Analysts, et al.,
Respondents-Respondents.

- - - - -

New York City Municipal Labor Committee,
Amicus Curiae.

_____

Proskauer Rose LLP, New York, (Rosanne Facchini and Nicole A. Eichberger, of the bar of the State of Louisiana, admitted pro hac vice, of counsel) for appellant.

Law Offices of Leonard A. Shrier, New York (Leonard A. Shrier of counsel), for Organization of Staff Analysts, respondent.

Steven Star, New York (Michael T. Fois of counsel), for NYC Office of Collective Bargaining and Susan Panepento, respondents.

Stroock & Stroock & Lavan LLP, New York (Alan M. Klinger of counsel), for amicus curiae.

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Judgment (denominated decision/order), Supreme Court, New York County (Erika M. Edwards, J.), entered on or about November 20, 2017, denying the petition seeking to annul a determination of the New York City Board of Certification (the Board), dated February 1, 2017, which granted an application by respondent Organization of Staff Analysts to add petitioner's Senior Auditor title to the Organization's collective bargaining unit, and dismissing the proceeding brought pursuant to CPLR article 78,

unanimously affirmed, without costs.

The court properly deferred to the Board's rational interpretation of the applicable statutes, including the Board's finding that the exemption to public employees' eligibility for collective bargaining under the Taylor Law is controlling. Since the Taylor Law is incorporated into the New York City Health and Hospitals Corporation Act and the exemptions are substantially consistent, the override provision of Unconsolidated Laws § 7405(5) "does not apply" (*Viruet v City of New York*, 97 NY2d 171, 177 [2001]).

The "exclusions for managerial and confidential employees are an exception to the Taylor Law's strong policy of extending coverage to all public employees and are to be read narrowly, with all uncertainties resolved in favor of coverage" (*Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, 904 [3d Dept 1999]; *see* Administrative Code of City of NY § 12-305). In this case, the Board had a rational basis for finding that Senior Auditors are not "managerial" employees within the meaning of the Taylor Law (Civil Service Law § 201[7][a]). The evidence showed that after an audit is assigned to a team of auditors, a Senior Auditor on the team creates a program specifying how the audit is to be conducted, drafts findings and may propose changes to be

made in light of the audit's findings. Notwithstanding the important nature of these responsibilities, the Board reasonably found that submitting such nonbinding recommendations does not constitute "formulat[ing] policy" (*id.*). The Board also rationally found that Senior Auditors are not "confidential" employees as defined in the Taylor Law (*id.*; *Matter of Lippman*, 263 AD2d at 902).

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8962 In re Rosen Livingston & Cholst, LLP, Index 159138/16
Petitioner-Appellant,

-against-

Alan Perez De Corcho, et al.,
Respondents,

L.A.L. Little Italy Mgmt. Co., LLC,
Respondent-Respondent.

_____

Anderson Kill P.C., New York (Devin W. Ness of counsel), for appellant.

Berkman Henoch Peterson Peddy & Fenchel, P.C., Garden City (Robert A. Carruba of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 28, 2017, which, to the extent appealed from, dismissed petitioner's second cause of action, to enforce its charging lien against respondent L.A.L. Little Italy Mgmt., Co., LLC, unanimously affirmed, without costs.

Where a claimed offset to a charging lien arises from the same "transaction or instrument" as the charging lien, the claims "share a common origin," and the attorney's charging lien is not afforded priority over the offset (*Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, 43 [2002]). Here, petitioner law firm's fees, awarded as a result of a January 5, 2016 order in

favor of its clients (tenants in a Housing Court proceeding), and respondent landlord's right of setoff, based upon a March 31, 2016 Housing Court order against the tenants, both arose out of the parties' rights and obligations under the subject lease. To find otherwise would require respondent landlord to pay petitioner's fees when respondent had already been awarded rent due under the lease in excess of the fees due counsel.

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8964 The People of the State of New York, Ind. 984/15
Respondent,

-against-

Nando Hernandez,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia 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 (Michael A. Gross, J.), rendered April 27, 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 11, 2019

CLERK

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

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8965 Lynne Harvey, Index 158576/14
Plaintiff-Appellant,

-against-

Henry 85 LLC,
Defendant-Appellant,

4G Data Systems, Inc.,
Defendant,

The City of New York,
Defendant-Respondent.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for Lynne Harvey, appellant.

Mauro Lilling Naparty LLP, Woodbury (Jennifer B. Ettenger of counsel), for Henry 85 LLC, appellant.

Zachary W. Carter, Corporation Counsel, New York (Desiree D. Alexander of counsel), for respondent.

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Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered February 9, 2018, which granted defendant City of New York's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The City established prima facie that it lacked prior written notice of the condition of the sidewalk pedestrian handicap ramp on which plaintiff tripped and fell, by submitting affidavits by two record searchers employed by the Department of

Transportation (DOT) showing that the City received no written complaints about the ramp in the two years preceding and including the day of the accident (*see* Administrative Code of the City of New York § 7-201[c][2]; *Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166, 167 [1st Dept 2003]). In opposition, plaintiff submitted a October 2013 service report that was the result of a verbal or telephonic communication received through the City's 311 system, which is insufficient to raise an issue of fact as to prior written notice (*see Kapilevich v City of New York*, 103 AD3d 548, 549 [1st Dept 2013]).

Nor do the preliminary report and eventual violation issued in 2007 against the property adjacent to the accident site establish prior written notice to the City, because they pertain to a different defect (*see Trentman v City of New York*, 162 AD3d 559 [1st Dept 2018]; *Abott v City of New York*, 114 AD3d 515 [1st Dept 2014]). Indeed, plaintiff testified that the ramp was not missing tiles when she traversed the area about a dozen times between September 2012 and the December 31, 2013 accident.

Plaintiff also failed to raise an issue of fact whether the City issued a written acknowledgment of the alleged defect. The DOT witnesses' testimony shows that DOT did not create a preliminary report or inspect the location after it received the

2013 service report because the 2007 violation against the adjacent property was still open. The affidavit by one of the witnesses does not conflict with his prior deposition testimony and indeed comports with the other witnesses' testimony.

Contrary to plaintiff's contention, the testimony of one of the DOT record searchers "that DOT people went and inspected the area" does not raise an issue of fact, because the witness also testified that none of the documents found during her search of DOT records indicated that DOT did anything after the City received the October 2013 service report, which is consistent with the other witnesses' testimony and the affidavit.

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

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8966 Trocom Construction Corp., Index 650148/12
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

Consolidated Edison Company
of New York, Inc.,
Defendant-Respondent.

_____

Goetz Fitzpatrick LLP, New York (Donald J. Carbone of counsel), for appellant.

Rubin Paterniti Gonzalez Kaufman LLP, New York (Juan C. Gonzalez of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 6, 2017, which, to the extent appealed from as limited by the briefs, granted defendant Consolidated Edison Company's motion for summary judgment dismissing the second cause of action for delay damages as against it, unanimously modified, on the law, to deny the motion as to claims 4, 5 and 16 in the bill of particulars, and otherwise affirmed, without costs.

As the motion court found, the construction contract between plaintiff and defendant City broadly precludes delay damages; the exception is delay damages associated with defendant Con Ed's failure to timely provide Specialty Contractors. In opposition

to Con Ed's motion, plaintiff submitted evidence sufficient to raise an issue of fact whether the delays outlined in claims 4, 5 and 16 of the 48 claims in its bill of particulars are attributable to the unavailability of Con Ed Specialty Contractors.

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: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8967 Chase Home Finance, LLC, Index 104723/09
Plaintiff-Respondent,

-against-

Joseph Adago,
Defendant-Appellant,

162 JDA, LLC, et al.,
Defendants.

_____

Petroff Amshen LLP, Brooklyn (Christopher Villanti of counsel), for appellant.

Gross Polowy, LLC, Westbury (Alexandria Kaminski of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 3, 2018, which, in this mortgage foreclosure action, granted plaintiff's motion to extend the time to serve the complaint upon defendant, unanimously affirmed, without costs.

Under the circumstances, we find that the motion court appropriately exercised its discretion when it extended plaintiff's time to serve the complaint in the interest of justice (*Petracca v Hudson Tower Owners, LLC*, 139 AD3d 518 [1st Dept 2016]). Although plaintiff delayed in seeking an extension, other relevant factors weighed in favor of granting plaintiff's

motion, including its demonstration of an alleged meritorious cause of action (*see Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430 [1st Dept 2011]; *US Bank N.A. v Saintus*, 153 AD3d 1380 [2d Dept 2017]) and the fact that defendant cannot demonstrate legal prejudice as he had actual knowledge of the claim since 2009 and participated in numerous court conferences, yet failed to serve an answer (*see Petracca v Hudson Towers Owners LLC*, 139 AD3d 518 [1st Dept 2016]). Furthermore, public policy favors adjudication of actions on the merits (*see Hernandez v Abdul-Salaam*, 93 AD3d 522 [1st Dept 2012]).

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

ENTERED: APRIL 11, 2019

CLERK

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

8968N Policy Administration Solutions, Inc., Plaintiff-Respondent, Index 652273/14

-against-

QBE Holdings, Inc., et al., Defendants-Appellants.

_____

von Briesen & Roper, S.C., Milwaukee, WI (Jason R. Fathallah, of the bar of the State of Wisconsin and the State of Michigan, admitted pro hac vice, of counsel), for appellants.

Butler, Fitzgerald, Fiveson & McCarthy, New York (David K. Fiveson and Claudia G. Jaffe of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about July 25, 2018, which granted plaintiff's motion to clarify a prior order so as to remand the subject arbitration to a different arbitrator, unanimously affirmed, without costs.

The court providently exercised its discretion in clarifying that the original arbitrator was not to hear the remanded

arbitration. That ruling had been appealed and affirmed by this Court (160 AD3d 572, 573 [1st Dept 2018]).

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

ENTERED: APRIL 11, 2019

CLERK