SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 30, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Gische, Gesmer, Moulton, JJ.

8285-
8286 Residential Credit Solutions, Inc.,
Plaintiff-Respondent,

-against-

Leonard Jay Gould,
Defendant-Appellant,

New York City Environmental
Control Board, et al.,
Defendants.

Index 381264/10

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Jacqueline M.H. Bukowski, New York, for appellant.

Fein, Such & Crane, LLP, Syracuse (John A. Cirando of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 17, 2017, which, in this mortgage foreclosure action, deemed plaintiff's second motion for summary judgment a motion for renewal and, upon renewal, granted plaintiff summary judgment, reversed, on the law, without costs, and the motion denied. Appeal from order, same court and

Justice, entered on or about November 27, 2017, which denied defendant Leonard Jay Gould's motion for renewal, dismissed, without costs, as abandoned.

Plaintiff cannot establish that the note was assigned to it by a written assignment prior to commencement of foreclosure proceedings. Therefore, it must "adequately prove[] that it did, indeed, have possession of the note prior to commencement of this action" (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 362 [2015]). A conclusory statement in an affidavit will not suffice (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]), and where an affiant's knowledge is based on unidentified and unproduced records, "the affidavit lacks any probative value" and cannot be the basis for an award of summary judgment (*Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477, 479 [1st Dept 1987]; *see also Barraillier v City of New York*, 12 AD3d 168, 169 [1st Dept 2004]; *Great Am. Ins. Co. v Auto Mkt. of Jamaica, N.Y.*, 133 AD3d 631, 632-633 [2d Dept 2015]). Since plaintiff has failed to establish that it had physical possession of the note prior to commencement of this action, we reverse the motion court's award of summary judgment to plaintiff.

Defendant executed a note, dated January 3, 2008, payable to nonparty BankUnited, FSB as lender to secure a mortgage on a

Bronx residence. Defendant states that, in or about March 2009, he received a notice from BankUnited that plaintiff Residential Credit Solutions, Inc. would act as loan servicer commencing April 1, 2009.[1]

On July 1, 2010, plaintiff commenced this foreclosure action in its own name, alleging that defendant had defaulted as of November 1, 2009. Defendant challenged plaintiff's standing in his answer and amended answer.

On or about July 20, 2010, a written "Assignment of Mortgage" from BankUnited (executed by MERS as nominee) to plaintiff, dated June 24, 2010, was recorded. That document makes no mention of the note.

On January 29, 2013, plaintiff made a motion for summary judgment, relying on the affidavit of Virginia Magana, plaintiff's Assistant Vice President. She alleged that, "upon referring this matter to prior counsel, plaintiff provided a copy

[1]Although the notice was apparently an exhibit to defendant's opposition to plaintiff's 2014 motion to renew and reargue its earlier motion for summary judgment, it was not included in either plaintiff's or defendant's appendix on this appeal. As discussed below, by assignment dated October 17, 2014, plaintiff assigned the mortgage to Federal National Mortgage Association (Fannie Mae). The affidavit of Nathan Abeln, a Document Management Specialist employed by Seterus, Inc. (Seterus), which is the loan servicer for Fannie Mae, also states that plaintiff was a "prior servicer" of the loan.

of the indorsed-in-blank Note." She further claimed that "plaintiff holds the indorsed-in-blank Note" and had done so since April 1, 2009. She did not state that plaintiff possessed the original note, and did not state the specific basis for her knowledge of the facts alleged. Defendant opposed the motion. By order entered on May 13, 2013, the motion court denied the motion because Ms. Magana failed to clearly state that plaintiff had ever possessed the original note.

On February 21, 2014, plaintiff moved to renew and reargue its summary judgment motion. Defendant opposed this motion. By order dated June 9, 2014, the motion court denied the motion, finding that the affidavit of plaintiff's Vice President, Alicia Wood, was unsworn, and thus inadmissible. The court further found that, even if Wood's statement had been sworn, the court would have denied the motion to renew because Wood provided no "new" information that plaintiff could not have submitted on its summary judgment motion, and failed to explain why it had not submitted any "new" information earlier. The court also denied the motion to reargue, finding that plaintiff failed to demonstrate that the court had overlooked or misapprehended fact or law. The court adhered to its prior conclusion that Ms. Magana's affidavit "was conclusory as to transfer of the note and

thus insufficient to sustain [plaintiff's] burden on the summary judgment motion."

On June 16, 2017 plaintiff made a second summary judgment motion, and also moved to have Fannie Mae substituted as plaintiff. In support of its motion, plaintiff proffered the affidavit of Nathan Abeln, Document Management Specialist for Seterus, Inc., dated June 16, 2017. He alleged that: (1) Seterus became the loan servicer for Fannie Mae as of September 12, 2011; (2) plaintiff assigned the mortgage to Fannie Mae pursuant to an assignment of mortgage dated October 17, 2014; (3) servicing of defendant's loan was transferred to Seterus on September 1, 2014; and (4) based on "personal knowledge and/or" his review of business records maintained by or on behalf of Seterus, plaintiff "became the holder of the indorsed in blank Note on April 1, 2009." He did not unequivocally state that plaintiff had ever possessed the original note. He stated that plaintiff obtained physical possession of the "indorsed-in-blank Note" on April 1, 2009, but did not state that it was the original note, nor did he state any basis for his alleged knowledge as to when plaintiff obtained it. Although he alleged that Seterus's records included the records of "any prior servicer, including" plaintiff, he did not identify any particular document on which he relied, other

than the July 20, 2010 Assignment of Mortgage from the original lender to plaintiff, which made no mention of the note.[2] He further alleged that the "original indorsed in blank Note" is currently located with Fannie Mae's document custodian, BNY Mellon in Dallas, Texas.

Defendant opposed the motion, arguing, inter alia, that Abeln failed to identify the basis of his knowledge as to when plaintiff obtained the note, and that his knowledge of such facts was questionable, since Seterus was not involved with the loan at the time of the alleged transfer of the note from the original lender to plaintiff. Defendant also pointed out that he had received a "Notice of Assignment, Sale or Transfer of Ownership of Mortgage Loan" to the fourth entity to claim it owned his mortgage, MTGLQ Investors, L.P. (MTGLQ), as of April 25, 2017, seven weeks before Abeln signed his affidavit. Defendant further questioned the reliability of Abeln's claims about when plaintiff obtained physical possession of the note because he failed to mention the transfer to MTGLQ in his affidavit.

By order entered August 17, 2017, the motion court exercised

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[2]Specifically, Abeln stated, "[a]fter commencement of this action, the note was transferred and the Mortgage was assigned by [plaintiff] to [Fannie Mae] by Assignment of Mortgage recorded . . . on October 28, 2014. . . ."

its interest of justice discretion to deem plaintiff's second motion for summary judgment to seek renewal of plaintiff's prior motion, and granted plaintiff summary judgment, based on the Abeln affidavit. The motion court found that the transfer of the mortgage to Fannie Mae had no bearing on whether plaintiff had physical possession of the original note prior to commencement, and noted that Seterus was still the servicer when Abeln made his affidavit.[3] The motion court further determined that the basis of Abeln's conclusion that plaintiff "became the holder of the indorsed in blank Note on April 1, 2009" was his review of Seterus's business records, and noted that the Abeln affidavit alleged that Seterus's records "include and incorporate the records of prior servicers, including plaintiff, which are monitored for accuracy. . . ."[4] Defendant now appeals from the August 17, 2017 order.

No new information provided on plaintiff's second motion for

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[3]Defendant later received a notice stating that Shellpoint Mortgage Servicing was the loan servicer for his mortgage as of July 1, 2017. An Assignment of Mortgage from Fannie Mae to MTGLQ dated July 6, 2017 was recorded on July 10, 2017.

[4]On October 13, 2017, defendant moved to renew and reargue plaintiff's second summary judgment motion, which the motion court denied by order entered on November 27, 2017. Defendant abandoned his appeal of this order.

summary judgment supports an award of summary judgment. Where an affiant's knowledge of the facts alleged is obtained from "unnamed and unsworn employees or unidentified and unproduced work records, the affidavit lacks any probative value" and fails to fulfill the requirement of CPLR 3212(b) that the party seeking summary judgment present affidavits citing material facts from affiants with knowledge of those facts (*Dempsey v Intercontinental Hotel Corp.*, 126 AD2d at 479; *see also Barraillier v City of New York*, 12 AD3d at 169; *Great Am. Ins. Co.*, 133 AD3d at 632-633; *compare Nationstar Mtge. LLC v Accardo*, 159 AD3d 662 [1st Dept 2018] [summary judgment properly granted where the note was attached to the complaint, and the affidavit of plaintiff's vice president stating that plaintiff obtained possession of original note two years earlier was supported by "corroborating documentary evidence"]). Because the Abeln affidavit fails to state that plaintiff ever possessed the original note and is based upon unidentified and unproduced business records, it contains only conclusory statements, is of no probative value, and cannot be the basis for an award of summary judgment.

As our dissenting colleague concedes, Abeln could not have personal knowledge of the date when plaintiff obtained the

original note, since Abeln is not employed by plaintiff but by the loan servicer for Fannie Mae, and the mortgage was allegedly assigned to Fannie Mae more than five years after the date on which plaintiff claims to have obtained the original note and commenced this action.

Plaintiff argues that *Aurora Loan Servs., LLC v Taylor* (25 NY3d 355) supports its claim that the Abeln affidavit is sufficient to establish plaintiff's physical possession of the original note prior to commencement. We disagree for three reasons.

First, in *Aurora*, the affiant stated that she had personal knowledge of the date on which the plaintiff obtained physical possession of the note prior to commencement. She further stated that she had seen the original note and she attached a copy to her affidavit, establishing that the plaintiff continued to hold the original note as of the date of her affidavit (*id.* at 359-360). Unlike the affiant in *Aurora*, Abeln cannot have personal knowledge of when, if ever, plaintiff obtained physical possession of the original note.

Second, unlike the affiant in *Aurora*, Abeln failed to identify any documents supporting his claim that plaintiff obtained physical possession of the note prior to commencement.

In contrast, the affiant in *Aurora* submitted with her papers attachments that "clearly show the note's chain of ownership" (*id.* at 362).

Finally, in *Aurora*, it appears that the affiant was employed by the plaintiff at the time she claimed the plaintiff had obtained physical possession of the note and at the time of commencement. Here, Abeln is not plaintiff's agent, and his employer, Seterus, did not become Fannie Mae's agent until more than five years after plaintiff alleges it obtained the original note and commenced this action.

For the same reason, Abeln cannot rely on records prepared by Seterus to establish when plaintiff obtained possession of the original note, since Seterus's records were not made "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518[a]). While an assignee seeking to enforce a loan may rely on an original loan file prepared by its assignor when it relies on such records in the regular course of its business (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 521), Abeln failed to identify any document in the original loan file on which he relied in reaching the conclusion that plaintiff obtained the original note on April 1, 2009. Nor could he have relied on the Magana or Wood affidavits, both

because of the problems with each of those documents identified by the motion court, and because those affidavits were prepared in connection with this litigation, and thus do not qualify for the business record exception to the rule against hearsay (*id.* at 522). To the extent that he relied on business records created at or within a reasonable time after plaintiff obtained physical possession of the original note, his failure to identify those records renders his affidavit conclusory and of no probative value (*id.*; *Great Am. Ins. Co.*, 133 AD3d at 632-633). Therefore, it cannot be the basis for an award of summary judgment (*Barraillier*, 12 AD3d at 169; *Dempsey*, 126 AD2d at 479). Moreover, the Abeln affidavit, like the Magana affidavit previously rejected by the motion court, never clearly states that plaintiff ever had physical possession of the original note.

Our dissenting colleague argues that *Bank of America, N.A. v Brannon* (156 AD3d 1 [1st Dept 2017]) requires that we find the standing requirement in this case has been satisfied, based on the Abeln affidavit. There are three problems with this argument. First, in *Brannon*, the defendant had waived the defense of standing by failing to raise it in her answer or move to dismiss on that basis. Accordingly, the plaintiff's physical possession of the original note was not at issue in that case.

Rather, the issue there was whether the plaintiff had demonstrated the defendant's payment default. The dissent argues that the affidavit in *Brannon* had "as much detail, but [was] no more specific than Abeln's." However, the language quoted from the affidavit in the published opinion in *Brannon* does not address the issue of the plaintiff's possession of the original note prior to commencement. Accordingly, our opinion in that case does not reveal how detailed or specific the affidavit was regarding the issue in this case.

Second, in *Brannon*, the affidavit proffered by the plaintiff in support of its summary judgment motion stated that the affiant had reviewed the plaintiff's records of the defendant's payments of principal and interest to the plaintiff. Accordingly, the *Brannon* affiant identified the documents on which he relied in stating the relevant facts.

Finally, here, Abeln never stated the fact relevant to the issue of standing in this case: that plaintiff had possession of the original note prior to commencement.

Accordingly, we reverse the motion court's order, and plaintiff's second summary judgment motion is denied.

All concur except Gische, J. who dissents in a memorandum as follows:

GISCHE J. (dissenting)

I dissent and would vote to affirm the motion court's grant of summary judgment in favor of plaintiff. The central issue on this appeal is whether the affidavit and documentation provided by the movant satisfies the standing requirement for bringing this mortgage foreclosure action. I believe that our prior decision in *Bank of Am., N.A. v Brannon* (156 AD3d 1 [1st Dept 2017]) compels a conclusion that the standing requirement has been satisfied.

I do not disagree with the majority's recitation of the facts in this case. The following additional facts are also considered: The mortgage at issue here did not originate with the named plaintiff (Residential). Residential claims to have obtained the mortgage by assignment on June 24, 2010, recorded in the Office of the City Register on July 20, 2010. This action was commenced on or about July 1, 2010. Although the complaint alleges that Residential is the holder of the note, the complaint is unverified and no copy of the note is made a part thereof. The answer interposes an affirmative defense of lack of standing.

An earlier motion by Residential for summary judgment was denied because it failed to prove that the assignment or actual note was in its physical possession at the commencement of this

action (Order, Suarez J., entered May 13, 2013). The motion court likewise denied Residential's motion to renew and reargue (Order, same court, dated June 9, 2014).

In October 2014 Residential assigned the mortgage and note to the Federal National Mortgage Association (Fannie Mae), which became the owner. By subsequent order (dated March 2, 2015) the court denied Residential's motion to voluntarily discontinue this action. Thereafter, On April 25, 2017, MTGLQ Investors, L.P., acquired the mortgage and note.

This motion for summary judgment was brought by Residential on June 16, 2017.[1] The motion was now supported by the 2014 affidavit of Residential's vice president, which had previously been rejected by Supreme Court on the earlier summary judgment motion. It was also supported by a "new" affidavit, dated June 16, 2017, from Nathan Abeln the document management specialist for Seterus, Inc. Seterus was the loan servicer for Fannie Mae and also, until July 2017, the loan servicer for MTGLQ. A copy

[1]Notwithstanding that Residential in its August 11, 2017 order to show Cause sought to substitute Fannie Mae as the plaintiff, the motion court struck that requested relief, before signing and making the order to show cause returnable. In any event, MTGLQ is now the real party in interest.

of the actual note is attached to Abeln's affidavit as an exhibit.

Abeln concludes that at the time this action was commenced Residential had physical possession of the endorsed in blank note representing the mortgage at issue in this action. While Abeln clearly could not have personal knowledge of this fact, he claims to have relied upon the books and records of Residential that were received by Fannie Mae following the assignment and available to Seterus as the loan servicer to reach this conclusion. The affidavit claims that the business records of his employer, Seterus, as current servicer of the mortgage, include the business records of Residential, which are regularly relied upon. While the majority correctly points out that Abeln does not identify the specific records he relied upon to reach the conclusion that Residential had physical possession of the note at the time this action was commenced, the affidavit is virtually identical in scope and detail to the affidavit that this Court found sufficient in *Brannon* under similar circumstances. In addition to attaching a copy of the original note to his affidavit, Abeln's affidavit provides the actual location of the original note as of the date of his affidavit.

In the aftermath of the securitization of mortgages and the resulting mortgage default crisis, one of the many issues that courts grappled with was how to determine whether the party seeking foreclosure actually had the right to do so. Securitized mortgages largely designated the Mortgage Electronic Recording System (MERS) as nominee for otherwise unidentified owners and notes were endorsed in blank, making the notes bearer instruments. While this facilitated the transfer of mortgages from one owner to another, it also made it difficult to determine who really owned any particular mortgage, with standing to foreclose in the event of defaults.

In 2015, the Court of Appeals decided *Aurora Loan Servs., LLC v Taylor* (25 NY3d 355, 359–362 [2015]), which both streamlined and clarified the standing issue, particularly for bearer notes. In order to establish standing to foreclose a mortgage, the plaintiff is required to prove that it holds or is otherwise the assignee of the note. The holder (or assignee) of the note is deemed the holder of the underlying mortgage loan, because the mortgage passes with the note as an inseparable incident (*id.* at 362; *Wells Fargo Bank N.A. v Ho-Shing*, 168 AD3d 126, 133 [1st Dept 2019]). Consequently, the MERS nominee owner designation on the mortgage is largely irrelevant to the issue of

standing (*Wilmington Sav. Fund Soc.., FSB v Hayes,* 167 AD3d 440 [1st Dept 2018]). Where a mortgage note is endorsed in blank, the plaintiff must establish that it has physical possession of note at the commencement of the proceeding (*see also JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]). There is no requirement that an entity in possession of the endorsed in blank note be able to prove how the note came into its possession (*Nationstar Mtg. LLC v Islam*, 168 AD3d 583 [1st Dept 2019]; *JP Morgan, supra*). Nor is actual personal knowledge the only basis on which to establish physical possession of an endorsed in blank note. Business records of an entity claiming ownership of the mortgage may form the basis for such a conclusion, especially where a copy of the original note is provided by the employee attesting to the facts supporting standing (*Nationstar Mtg. LLC*, *supra*). A business entity may authenticate business records through a person without personal knowledge of the document, its history or its specific contents, where the person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and the document is from the entity's files (*DLJ Mtg. Capital v Mahadeo*, 166 AD3d 512, 513 [1st Dept 2018]). Morever, an assignee of a note is entitled to rely upon the business records of its

assignor, when it routinely does so in the regular course of its business (*Countrywide Home Loans, Inc. v Harris*, 162 AD3d 519 [1st Dept 2018]; *Brannon* at 8).

In order to recover in this action Residential is required to show that it had physical possession of the note at the time this action was commenced. Although the mortgage and note were assigned after this action was commenced, Residential's standing and its right to proceed is not affected (*Wells Fargo Bank, N.A. v Wine*, 90 AD3d 1216, 1217 [3d Dept 2011]).

Brannon addressed the proof problem raised by this action. The original petitioner had assigned its interest in the mortgage and note while the foreclosure action was pending. In making a motion for summary judgment the new owner had to establish that its predecessor in interest possessed the note at the time the foreclosure action was commenced. In meeting that proof, the successor relied upon the records that it had received from its assignor. In an affidavit with as much detail, but no more specific than Abeln's, the majority expressly held in *Brannon* that standing had been sufficiently established (*id.* at 6). Although the Court alternatively held in *Brannon* that the defendant had "also" waived any standing defense by failing to raise it in her answer (*id.* at 7), this does not detract from

this Court's express holding that "plaintiff established standing by virtue of its possession of the indorsed-in-blank note at the commencement of this action" (*id*. at 6).

Given Abeln's affidavit, attesting that he reviewed the business records of Fannie Mae, which include the records of its predecessor in interest (Residential), and that it routinely relies on such records in conducting its business, Abeln's further identification of the original note's current location, along with the production of a copy of the original note, it was sufficiently established that Residential had standing to commence this action. I would, therefore, affirm the motion court's order.

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

ENTERED: APRIL 30, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Tom, Gesmer, Kern, JJ.

7913- Index 150181/18
7913A In re Patrolmen's Benevolent
Association of the City of New York,
Petitioner-Appellant,

-against-

Bill De Blasio, et al.,
Respondents-Respondents.

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Reporters Committee for Freedom of the Press,
Hearst Corporation, The Associated Press, Inc.,
Buzzfeed, Inc., Cable News Network, Inc.,
The Center for Investigative Reporting, Daily News, LP,
Dow Jones & Company, Inc., Gannett Company, Inc.,
Gizmodo Media Group, LLC, New York Public Radio,
The New York Times Company, NYP Holdings, Inc., and
Spectrum News NY1,
Amici Curiae.

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Kasowitz Benson Torres LLP, Pelham (Michael J. Bowe of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondent.

Ballard Spahr LLP, New York (Thomas B. Sullivan of counsel), for amici curiae.

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Orders, Supreme Court, New York County (Shlomo Hagler, J.), entered May 7, 2018, which denied the petition and granted respondents' cross motion to dismiss the petition and complaint in this hybrid CPLR article 78 proceeding to challenge the City's public release of police department body-worn-camera footage

without a court order or the relevant officers' consent, pursuant to Civil Rights Law § 50-a, and denied petitioner's motion for a preliminary injunction, unanimously affirmed, without costs.

We affirm the denial of the petition and dismissal of the proceeding on grounds different from those of Supreme Court. The court held that petitioner could not maintain this hybrid action because there is no private right of action under Civil Rights Law § 50-a. We conclude that the fact that the statute does not provide a private right of action does not preclude review of petitioner's request for injunctive relief in an article 78 proceeding, because the statute creates protected rights (for police officers) and does not explicitly prohibit a private right of action or otherwise manifest a clear legislative intent to negate review (*see Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 10-11 [1975]; *Delgado v New York City Hous. Auth.*, 66 AD3d 607, 608 [1st Dept 2009]; *see also Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938 [2017]; *Patrolmen's Benevolent Assn. of the City of New York, Inc. v De Blasio*, 2015 NY Slip Op 32829[U] [Sup Ct, NY County 2015]).

Nevertheless, the petition must be denied. In order to determine whether something is a "personnel record" under Civil Rights Law § 50-a, the "threshold criterion" is whether the

documents (or a summary of the documents) are "of significance to a superior in considering continued employment or promotion" (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 19 [1st Dept 2017], *lv denied* 30 NY3d 908 [2017], quoting *Matter of Prisoners' Legal Servs. Of N.Y. v New York State Dept. Of Correctional Servs.*, 73 NY2d 26, 32 [1988]).

The Court of Appeals has further clarified that whether a document "containing personal, employment-related information about a public employee," that is under the control of the agency, and "relied upon in evaluating the employee's performance" is covered by Civil Rights Law § 50-a "depends upon its nature and use in evaluating an officer's performance" (*Matter of Prisoners' Legal Servs.*, 73 NY2d at 32). Moreover, the Court of Appeals has held that, in the context of a FOIL disclosure of an officer's personnel records, preventing such disclosure requires more than merely demonstrating that the document "may be used" to evaluate performance (*Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 157 [1999]).

Petitioner argues that the body-worn-camera was designed in part for performance evaluation purposes and is clearly "of significance" to superiors in considering employment or

promotion. Petitioner also suggests that a finding that body-worn camera footage is not a personnel record would result in an unprecedented invasion of privacy.

While we recognize petitioner's valid concerns about invasion of privacy and threats to the safety of police officers, we are tasked with considering the record's general "nature and use," and not solely whether it may be contemplated for use in a performance evaluation. Otherwise, that could sweep into the purview of § 50-a many police records that are an expected or required part of investigations or performance evaluations, such as arrest reports, stop reports, summonses, and accident reports, which clearly are not in the nature of personnel records so as to be covered by § 50-a.

We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a (*see Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 32 [1988]). The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building.

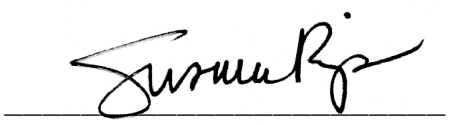
Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with, any pending disciplinary charges or promotional processes. *New York Civil Liberties Union v New York City Police Department* (__NY3d__, 2018 NY Slip Op 8423 [2018]), which involved disciplinary matters, does not constrain this analysis. The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability.

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

> The Decision and Order of this Court entered herein on February 19, 2019 is hereby recalled and vacated (*see* M-1112 decided simultaneously herewith).

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

ENTERED: APRIL 30, 2019



CLERK

Sweeny, J.P., Richter, Tom, Kapnick, Oing, JJ.

8787 Maggie C. Feutcher, Index 305847/14
Plaintiff-Appellant,

-against-

Composite Transit, et al.,
Defendants,

Jephte Guillame, et al.,
Defendants-Respondents.

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Caitlin Robin & Associates, PLLC, New York (Arjeta Albani of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Tuitt, J.) entered on or about March 23, 2018, which granted defendants' motion and cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion and cross motion denied.

Defendants met their prima facie burden on their motion and cross motion for summary judgment dismissing plaintiff's claim under the significant disfigurement category of Insurance Law § 5102(d), with the affidavit of a plastic surgeon, who found that the hematoma at plaintiff's right temple was an area of "slightly increased prominence" of the soft tissues at her right temple

that was "cosmetically acceptable," and with a photograph of the plaintiff, which showed a only a slight bump.

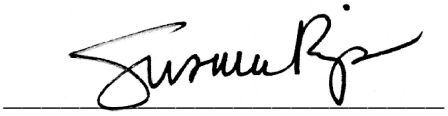
In opposition, however, plaintiff raised an issue of fact, by submitting photographs taken in the month or two after the accident showing severe swelling and discoloration at her right temple and eye, and additional photographs taken two years after the accident which show, according to the affidavit of plaintiff's plastic surgeon, "swelling to the right temp[oral] region of [her] face [which] continues and causes a visible 'bump' to be present." Plaintiff's plastic surgeon further opined that, "[g]iven the length of time this facial cosmetic deformity has existed, . . . it is [a] permanent condition." Moreover, plaintiff's doctor also advised plaintiff that it would be tricky to do surgery to reduce the bump because of the nerves in the area and because it would leave a scar.

After reviewing the photographs, and considering all relevant factors, such as the location of the injury (here, the face), and the injured plaintiff's background (*see Waldron v Wild*, 96 AD2d 190, 193-194 [4th Dept 1983]), we find that plaintiff demonstrated the existence of a factual issue requiring a trial on the question of "significant disfigurement," i.e. whether "a reasonable person would view the physical alteration

as unattractive, objectionable, or . . . the subject of pity and scorn" (*Abdulai v Roy*, 232 AD2d 229, 229 [1st Dept 1996] [internal quotation marks omitted]).

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

ENTERED: APRIL 30, 2019



CLERK

Friedman, J.P., Gische, Kapnick, Webber, Gesmer, JJ.

8915 In re Alan Gerson, et al., Index 156711/16
Petitioners-Respondents-Appellants,

-against-

New York City Campaign Finance Board,
Respondent-Appellant-Respondent.

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Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for appellant-respondent.

Law Offices of G. Oliver Koppell & Associates, New York (Oliver Koppell of counsel), for respondents-appellants.

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Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered November 22, 2017, annulling respondent's (the Board) determination, dated April 14, 2016, to the extent it denied petitioners' application for matching public funds under the New York City Campaign Finance Act (Administrative Code of City of NY § 3-701 *et seq.*), and directing the Board to reimburse petitioners the sum of $38,828, representing $88,550 in matching funds for properly documented campaign contributions less $49,722 in properly imposed penalties, unanimously modified, on the law, to vacate the $30,912 and $10,000 penalties imposed for exceeding expenditure limits and accepting over-the-limit contributions, respectively, and otherwise affirmed, without costs.

The court correctly found that the Board's decision to deny any matching funds to petitioners based on allegedly improper documentation of campaign contributions, pursuant to an informal rule that it could withhold all matching funds to any campaign whose contribution documentation was found to have at least a 20% error rate, was arbitrary and capricious. Apparently, any error, no matter how minor, in any aspect of the documentation submitted in support of a certain contribution would render the documentation wholly invalid for purposes of calculating the error rate; in other words, the 20% rule was a requirement that more than 80% of contributions must be supported by error-free documentation. This had no bearing on whether the correct documentation otherwise met the threshold numerical eligibility requirements for matching funds. As the Board failed to provide any reason for setting the threshold at 20%, rather than another percentage, or for not taking an approach other than cutting off all funds when the threshold is reached, the informal rule on which its determination was based is "so lacking in reason for its promulgation that it is essentially arbitrary" (*New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 166 [1991] [internal quotation marks omitted]; *see also Matter of Nicholas v Kahn*, 47 NY2d 24, 34 [1979]).

The court erred in upholding the Board's finding that petitioner Gerson's contribution of more than $30,912 to his campaign exceeded the $2,500 limit on expenditures by City Council candidates (*see* Administrative Code § 3-703[1][f][iii]). Petitioners made the expenditures at issue in an effort to counteract nonparty New York City Board of Educations' undisputed failure to comply with a court order issued in a proceeding brought by petitioners pursuant to Election Law § 16-102 directing that Gerson's name be reinstated on absentee ballots. As these expenses were incurred in responding to, and as a direct consequence of, the BOE's ongoing noncompliance with the court order, they are covered by the exemption for expenditures made for the purpose of "bringing" or "responding" to a "proceeding" or "claim" before a court concerning Gerson's "ballot status" (Administrative Code § 3-706[4][a]; 52 RCNY 1-08[d][4][i][A]).

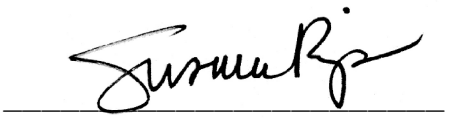
It does not avail the Board to invoke alternative grounds for denying matching funds to petitioners that it did not cite in its determination (*Matter of National Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]).

In light of the foregoing, and in view of the significant mitigating factors adduced by petitioners, including the need to

counteract the undisputedly improper omission of Gerson's name from absentee ballots and the illnesses and deaths of three campaign officials, including Gerson's mother, during the post-election audit, we find the denial of matching funds and the penalties imposed, other than the $9,036 for violations not challenged by petitioners, grossly disproportionate to any offenses committed by petitioners (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233-234 [1974]).

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

ENTERED: APRIL 30, 2019



CLERK

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

9109 The People of the State of New York, Ind. 1920/17
Respondent,

-against-

Mohammed Bezghoud,
Defendant-Appellant.

_____

Edelstein & Grossman, New York (Jonathan Edelstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 2, 2018, convicting defendant, after a jury trial, of sexual abuse in the first degree and forcible touching, and sentencing him to an aggregate term of 60 days and 5 years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury could have reasonably found that after the victim revoked any consent to sexual activity, defendant's body contact with the victim constituted the use of force to restrain her, and was not merely incidental to ordinary sexual behavior (*see e.g. People v*

Simmons, 278 AD2d 29 [1st Dept 2000], *lv denied* 96 NY2d 787 [2001]).

The court's charge on first-degree sexual abuse, viewed as a whole, conveyed the proper standard (*see People v Medina*, 18 NY3d 98, 104 [2011]). The court expressly instructed the jury that forcible compulsion was an essential element of the crime, and the jury could not have been misled to believe that lack of consent under a theory other than force would suffice.

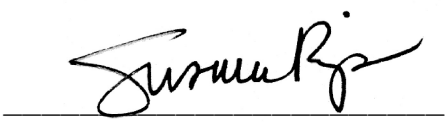
The court properly denied defendant's motion to suppress identification evidence. The People satisfied their burden of establishing that the victim's identification of defendant was confirmatory (*see People v Rodriguez*, 79 NY2d 445 [1992]). In any event, there is no basis for reversal because at trial defendant did not dispute the element of identity, relying instead on claims of consent and absence of force.

The court providently exercised its discretion in precluding certain evidence offered by defendant under a state of mind theory, because its probative value was minimal and it was cumulative to other evidence (*see generally People v Primo*, 96

NY2d 351, 355 [2001]). In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 30, 2019



CLERK

Gische, J.P., Webber, Kahn, Oing, JJ.

9110 Hertz Vehicles, LLC, Index 151486/16
Plaintiff-Respondent,

-against-

Darren T. Mollo, D.C.,
et. al.,
Defendants-Appellants,

Middle Village Diagnostic
Imaging, P.C., et. al.,
Defendants.

_____

The Rybak Firm, PLLC, Brooklyn (Maksim Leyvi of counsel), for appellants.

Rubin, Fiorella & Friedman LLP, New York (David F. Boucher, Jr. of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Ellen M. Coin, J.), entered September 6, 2017, which granted plaintiff's motion under CPLR 3215 for a default judgment, and denied defendants' cross motion for an extension of time to appear and to compel acceptance of their answer, unanimously reversed, on the law and the facts, without costs, the judgment vacated, plaintiff's motion denied, and defendants' cross motion granted.

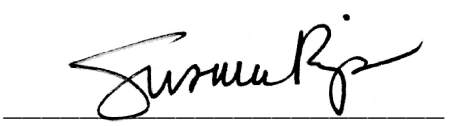
Defendants satisfied the requirements of CPLR 3012(d), which authorizes an extension of time to appear or plead "upon such

terms as may be just and upon a showing of reasonable excuse for delay or default." Here, the delay in filing an answer was occasioned by law office failure, which can constitute a reasonable excuse (*see Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]). Defendants' counsel explained that its failure to file its answer was due to an error in its office's case management system, which, upon the entry of a pre-answer motion to dismiss, marked the complaint answered. Notably, service of the pre-answer motion to dismiss revealed that defendants did not intend to abandon the action. Plaintiff does not argue that it has been prejudiced as a result of defendants' three month delay in submitting its answer (*Lamar v City of New York*, 68 AD3d 449 [1st Dept 2009]), and our determination comports with New York's strong public policy in favor of litigating matters on the merits (*Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 419 [1st Dept 2016]).

We have considered Hertz's remaining contentions and find them to be unavailing.

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

ENTERED: APRIL 30, 2019



CLERK

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

9111 In re Jose C.,
Petitioner-Respondent,

-against-

Janet V.,
Respondent-Appellant,

Kristina M.,
Respondent-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

John R. Eyerman, New York, for Jose C., respondent.

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for Kristina M., respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

_____

Order, Family Court, New York County (Ta-Tanisha D. James, J.), entered on or about December 7, 2017, which, after a hearing, awarded petitioner father sole physical and legal custody of the subject child, unanimously affirmed, without costs.

In a custody proceeding between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent

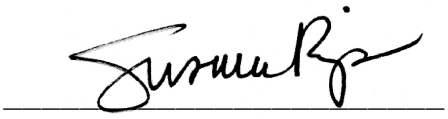
neglect, unfitness, or other like extraordinary circumstances (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]). The burden is on the nonparent to prove the existence of extraordinary circumstances (*see Matter of Darlene T.*, 28 NY2d 391, 394 [1971]). A grandparent of a minor child may demonstrate extraordinary circumstances where there was a prolonged separation of the parent and child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the grandparent's household. The court may find extraordinary circumstances exist even where the prolonged separation lasts for less than 24 months (Domestic Relations Law § 72 [2][a], [b]).

The court properly found that the grandmother failed to demonstrate the requisite extraordinary circumstances. Although the child continuously lived with her for approximately three years, she failed to demonstrate that the father voluntarily relinquished control of the child. Indeed, a large portion of the separation between the father and the child occurred during the father's formal attempts to obtain custody, which does not rise to the level of extraordinary circumstances (*Matter of Male Infant L.*, 61 NY2d 420, 429 [1984]; *Matter of Landaverde*, 95 AD2d 29, 31-32 [1st Dept 1983], *affd* 61 NY2d 420 [1984]).

In any event, the totality of the circumstances demonstrated that the award of custody to the father was in the best interests of the child. There was no evidence that the father could not properly care for the child. Moreover, despite the grandmother's frustration of his visitation, he was willing to foster a relationship between the grandmother, the mother and the child (*Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

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

ENTERED: APRIL 30, 2019



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

9112 TRC Master Fund, LLC, Index 654968/16
Plaintiff-Appellant,

-against-

AP Gas & Electric (TX) LLC,
Defendant-Respondent.

_____

Rubin LLC, New York (Paul A. Rubin of counsel), for appellant.

Bryan Cave Leighton Paisner LLP, New York (Thomas J. Schell of counsel), for respondent.

_____

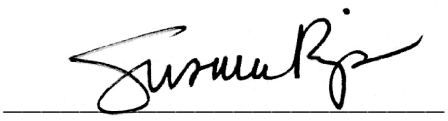
Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 13, 2018, which granted defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant's reading of the agreement, which the motion court accepted, requires a deviation from the express text, impermissibly rendering certain provisions without meaning or effect (see *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Plaintiff purchased a claim that defendant made in a bankruptcy proceeding filed by a third party. The purchase agreement gives plaintiff the option of demanding immediate payment if at any time prior to emergence from bankruptcy or liquidation the claim becomes impaired. The

bankruptcy trustee filed an objection to the claim, which was withdrawn 37 days later. The objection constitutes an impairment under the agreement, triggering plaintiff's right to demand immediate payment under the agreed-to formula, notwithstanding that the impairment was later removed. The complaint therefore states a valid cause of action and should be reinstated. Pursuant to the agreement, upon repayment the claim would belong to defendant.

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

ENTERED: APRIL 30, 2019



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

9113 Myrna Guzman, Index 304293/15
Plaintiff-Respondent,

-against-

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

Bronx Parking Development
Company, LLC,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Angele Chapman of counsel), for appellant.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for Myrna Guzman, respondent.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for The City of New York and New York City Economic Development Agency, respondents.

_____

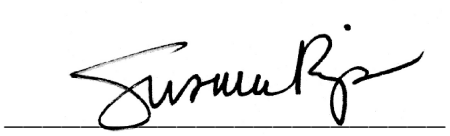
Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered on or about February 22, 2017, which, in this action for personal injuries, denied the motion of Bronx Parking Development Company, LLC (Bronx Parking) for summary judgment dismissing the complaint and all cross claims as against it, with leave to reargue/renew following discovery, unanimously affirmed, without costs.

The summary judgment motion was properly denied as premature. No discovery had been conducted before Bronx Parking

moved for summary judgment, thereby depriving plaintiff of the opportunity to depose the parties who would have knowledge concerning the relevant issues in this action including the negligence if any, of Bronx Parking (*see Rodriguez v Architron Envtl. Servs., Inc.*, 166 AD3d 505 [1st Dept 2018]; *Marabyan v 511 W. 179 Realty Corp.*, 165 AD3d 581 [1st Dept 2018]; CPLR 3212[f]).

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

ENTERED: APRIL 30, 2019



CLERK

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

9114 The People of the State of New York, Ind. 43704C/11
Respondent,

-against-

Paule-Sylvie Yonke,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Angie Louie of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Colleen D. Duffy, J.), rendered December 20, 2012, convicting defendant, after a nonjury trial, of attempted assault in the third degree, menacing in the third degree (three counts), harassment in the second degree and attempted criminal possession of a weapon in the fourth degree, and sentencing her to an aggregate term of time served and one year's 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 court's credibility determinations,

including its evaluation of issues relating to the timeliness of the victims' reports of defendant's conduct.

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

ENTERED: APRIL 30, 2019

CLERK

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

9115 In re Estate of Carol Singer, SCI 1950B/13
Deceased.

Richard E. Naumann, et al.,
Petitioners-Objectants-Respondents,

-against-

Edward T. Mazzola,
Petitioner-Appellant.

_____

Varcadipane & Pinnisi, P.C., New York (Jeffrey W. Varcadipane of counsel), for appellant.

The Law Firm of Fishlin & Fishlin, Mount Kisco (Todd A. Fishlin of counsel), for respondents.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about January 17, 2018, which, to the extent appealed from as limited by the briefs, denied cross petitioner's (Mazzola) motion for summary judgment dismissing the undue influence objection to probate, unanimously affirmed, without costs.

Mazzola established prima facie that the decedent was not subjected to undue influence in making her will. Drawing all reasonable inferences in favor of the nonmovants, we find that petitioners submitted sufficient evidence to raise an issue of fact as to undue influence by the decedent's neighbor, friend and

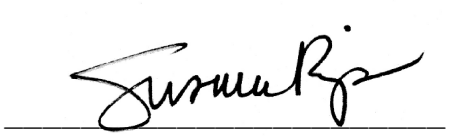
former employer, Robert Pellegrini, who is a primary beneficiary of the will (*see Children's Aid Socy. of City of N.Y. v Loveridge*, 70 NY 387, 394-395 [1877]; *Matter of Walther*, 6 NY2d 49, 53-54 [1959]). The decedent's health care aide testified that the decedent told her that Pellegrini wanted the decedent to leave all her money to him. She also testified that she overheard discussions between Pellegrini and the decedent in which Pellegrini loudly maligned the decedent's family and intimidated the decedent. This testimony, if believed, could demonstrate that Pellegrini wielded undue influence over the decedent by raising doubts as to her family's concern for her at a time when she might have been vulnerable.

Petitioners failed to raise an issue of fact as to whether Pellegrini and the decedent had a confidential or fiduciary relationship. Regardless, there is no evidence that Pellegrini

was involved in the drafting of the will (*see Matter of Bartel*, 214 AD2d 476 [1st Dept 1995]; *Matter of Bach*, 133 AD2d 455, 456 [2d Dept 1987]).

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

ENTERED: APRIL 30, 2019



CLERK

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

9116 Budow Sales Corp., et al., Index 650433/13
Plaintiffs-Appellants,

-against-

G. Holdings Corp., et al.,
Defendants,

Eli Dahan, etc., et al.,
Defendants-Respondents.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for appellants.

Law Firm of Jeffrey S. Dweck, P.C., New York (Jeffrey S. Dweck of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered on or about March 26, 2018, which, to the extent appealed from as limited by the briefs, granted defendant Eli Dahan's cross motion for summary judgment dismissing the complaint as against him, unanimously affirmed, with costs.

Contrary to plaintiffs' contentions, their cause of action for breach of contract was properly dismissed against Dahan. The evidence in the record establishes that there was no sub-sublease between them and Dahan, whose company had entered into a written sublease with defendant Acrex, Inc. USA expressly giving the company "no right" to further sublease the premises without the

written consent of Acrex. Only Acrex had the authority to waive this contractual provision (*see Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 590 [1st Dept 1992], *lv denied* 80 NY2d 754 [1992]). The emails proffered by plaintiffs do not show otherwise, as they evince at most an understanding that plaintiffs and Dahan would be co-subtenants and do not set forth "the total space to be covered by the sublease, . . . the term agreed upon," or "the necessity of obtaining the consent of the [sublandlord]" (*Harlow Apparel v Pik Intl.*, 106 AD2d 345, 345-346 [1st Dept 1984], *lv denied* 64 NY2d 609 [1985]; *see* General Obligations Law § 5-703[2]). Additionally, plaintiffs proffered no admissible evidence of Dahan's breach or causation of damages, but offered only hearsay and speculation (*see* CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiffs' fraud cause of action was also properly dismissed against Dahan. They do not identify any "material misrepresentation of an existing fact" on which they relied, and testified, at most, that Dahan "entered into a contract with the intent not to perform," which is insufficient to support a fraud claim (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]).

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 30, 2019

CLERK

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

9117 In re Alma Aroca, Index 101445/16
Petitioner-Appellant,

-against-

William J. Bratton, etc., et al.,
Respondents-Respondents.

_____

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eva L. Jerome of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered October 25, 2017, denying the petition to annul respondents' determination, dated June 14, 2016, which terminated petitioner's employment as a probationary police officer, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated and the petition granted to the extent of remanding the matter for further proceedings consistent herewith.

Petitioner was appointed as a probationary police officer in July 2012 following her service in the military. In February 2014, before her two-year probationary period had been completed, petitioner was placed on "restricted duty," after respondents became aware of facts suggesting she had not disclosed aspects of

her history of mental health diagnoses and treatment on application forms. While in that status, the term of petitioner's probationary period was extended (55 RCNY 5.2.8[b]).

In August 2014, petitioner was again deployed on military duty and was placed on military leave by respondent New York City Police Department. While petitioner was overseas, respondent Police Commissioner approved recommendations to terminate her probationary employment, and upon her return from military duty in June 2016, she was informed that her probationary employment was summarily terminated.

Petitioner contends that respondents could not summarily terminate her employment because she was entitled, under Military Law § 243(9), to receive credit for the time she was on military duty. Crediting her military service as satisfactory probationary service, she had completed her probation before she returned and became entitled to the Civil Service Law protections applicable to tenured police officers, including a hearing before being terminated.

Under New York City personnel rules, "[s]ubject to the provisions of the [M]ilitary [L]aw," the computation of a probationary period is based on time the employee is "on the job in a pay status" (55 RCNY 5.2.2[b]). The personnel rules further

provide that, notwithstanding rule 5.2.2, the probationary period will be extended while a probationer "does not perform the duties of the position" (55 RCNY 5.2.8[b]) for instance, while on limited duty status (*see Matter of Garcia v Bratton*, 225 AD2d 123, 125 [1st Dept 1996], *affd* 90 NY2d 991 [1997]; *see also Matter of Bifolco v Kelly*, 79 AD3d 544 [1st Dept 2010], *lv denied* 16 NY3d 710 [2011]). These rules are expressly subject to Military Law § 243(9), which provides, in pertinent part, that if a probationary employee is deployed on military duty before the expiration of his or her probationary period, "the time [she] is absent on military duty shall be credited as satisfactory service during such probationary period."

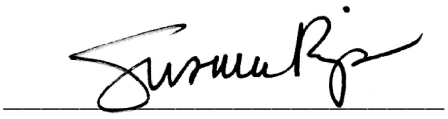
Military Law § 243(9) is unambiguous in providing that respondents are required to credit the period that probationary officers spend in military service as "satisfactory service" towards completion of the probationary period. The statute does not distinguish between probationers on restricted or modified duty and those on full duty status at the time of deployment, or give respondents discretion to distinguish between types of probationers (*see Matter of Woods v New York City Dept. of Citywide Admin. Servs.*, 16 NY3d 505, 509 [2011]).

Contrary to respondents' contentions, there is no inconsistency between rule 5.2.8(b), which applies when a probationer is still "on the job in a pay status," but has been placed on restricted duty, and Military Law § 243(9), which applies when a probationer is on military leave. If the personnel rules were to be read as respondents urge, in a manner inconsistent with the Military Law, then they would be unauthorized and preempted by the state law (*see Wholesale Laundry Bd. of Trade v City of New York*, 17 AD2d 327, 329-330 [1st Dept 1962], *affd* 12 NY2d 998 [1963]; *see also Eric M. Berman, P.C. v City of New York*, 25 NY3d 684, 690 [2015]).

We point out that our decision does not foreclose further action by respondents.

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

ENTERED: APRIL 30, 2019



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

9118-
9119 Index 650538/08EF

R. F. Schiffman Associates, Inc., et al.,
Plaintiffs-Appellants,

-against-

Baker & Daniels LLP,
Defendant-Respondent,

Weaver Popcorn Company, Inc.,
Defendant.

_____

Carey & Associates LLC, New York (Michael Q. Carey of counsel), for appellants.

Borg Law LLP, New York (Jonathan M. Borg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about February 28, 2018, which granted plaintiffs principal and interest to the date of defendants' CPLR 3219 tender, unanimously affirmed, with costs.

In this Court's February 10, 2017 decision (147 AD3d 482), late fees in the amount of 18% simple interest were granted to plaintiffs in lieu of, not in addition to, statutory 9% interest (*see Morningside Fuel Corp. v Lanius*, 244 AD2d 198 [1st Dept 1997]). "A prior decision on an appeal constitutes law of the case and is conclusive on subsequent appeals, except in

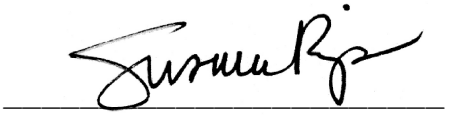
extraordinary circumstances" (*Feinberg v Boros*, 99 AD3d 219, 235 [1st Dept 2012, Moskowitz, J., concurring], *lv denied* 21 NY3d 851 [2013]). This Court's prior decision, therefore, constitutes law of the case, and was duly applied by Supreme Court in determining the amount due to plaintiffs up to the date of defendants' tender pursuant to CPLR 3219.

As defendants' tender was in excess of the amount awarded to plaintiffs, the accrual of interest was tolled as of that date, which Supreme Court properly calculated. As noted in this Court's prior decision and in Supreme Court's order, the 18% simple interest was imposed in lieu of the statutory interest. As such, it took the place thereof, and interest tolling pursuant to CPLR 3219 is warranted.

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 30, 2019



CLERK

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

9123-
9124 The People of the State of New York,
Respondent,

-against-

Adam Doctor,
Defendant-Appellant.

Ind. 3661/12

_____

Justine M. Luongo, The Legal Aid Society, New York (Robin V. Richardson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 8, 2013, convicting defendant, after a jury trial, of two counts of persistent sexual abuse, and sentencing him, as a predicate sex offender previously convicted of a violent felony, to concurrent terms of four years, unanimously affirmed. Order, same court and Justice, entered on or about July 21, 2016, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, we find that the court properly denied defendant's motion to suppress identification testimony. An officer witnessed the crime,

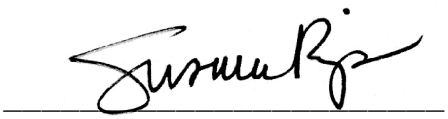
immediately arrested defendant, and conducted a showup only moments later, at nearly the same location. The showup was conducted in a manner that was not unduly suggestive, given the fast-paced chain of events (*see People v Duuvon*, 77 NY2d 541, 544-545 [1991]), and "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" (*People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]). In any event, even if the identification procedure were suggestive, any error was harmless because the arresting officer witnessed the incident. We perceive no basis for reducing the sentence.

As to defendant's civil appeal from his sex offender adjudication, we conclude that the court properly assessed 10 points under the risk factor for unsatisfactory conduct while confined. In any event, even if those points were deducted, defendant's prior felony sex crime conviction automatically resulted in an override to level three. The court also providently exercised its discretion in declining to grant a downward departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]) in light of, among other things, defendant's extensive criminal history, which included three prior sex offenses,

pursuant to one of which defendant had already been designated a level three sex offender.

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

ENTERED: APRIL 30, 2019



CLERK

Friedman, J.P., Gische, Webber, Kahn, JJ.

9126 D. Penguin Brothers Ltd., et al., Index 153494/15
Plaintiffs-Appellants,

-against-

City National Bank, et al.,
Defendants,

David Spiegelman, Esq.,
Defendant-Respondent.

_____

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

_____

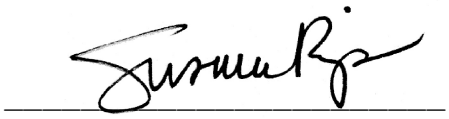
Order, Supreme Court, New York County (Nancy Bannon, J.), entered September 12, 2017, which, to the extent appealed from, granted defendant David Spiegelman's motion to dismiss the first through fourteenth causes of action as against him, unanimously reversed, on the law and per stipulation between the parties dated January 2, 2019, without costs, and the motion denied.

In a related action commenced in 2014, this Court reversed Supreme Court's grant of defendants James Robert Williams, NBUF Development Ltd., Black United Fund of New York, Inc., Inner City Strategies, and First Pro Group, Inc.'s motion to dismiss plaintiffs' first through fourteenth causes of action as against them (*see D. Penguin Bros. Ltd. v City Natl. Bank*, 167 AD3d 467 [1st Dept 2018]). Acknowledging that the first through

fourteenth causes of action in the instant action, commenced in 2015, are "nearly identical" to the first through fourteenth causes of action in the 2014 action, which were also asserted against him, defendant Spiegelman entered into a stipulation with plaintiffs, dated January 2, 2019, "consent[ing] to the relief sought by Appellants . . . in the 2015 Action, to wit: modification of the Order to deny dismissal of the [first through fourteenth] causes of action against [him] . . . and waiv[ing] the right . . . to oppose the appeal in the 2015 Action."

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

ENTERED: APRIL 30, 2019



CLERK

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

9127 The People of the State of New York, Ind. 3011/15
Respondent,

-against-

Ruben Obregon,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yan Slavinskiy 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 (Michael Sonberg, J.), rendered February 14, 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.

ENTERED: APRIL 30, 2019

CLERK

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

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

9128 The People of the State of New York, Ind. 847/12
Respondent,

-against-

Anthony Almonte,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jill Konviser, J.), entered on or about March 30, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 additional points, not sought by the People, based on the victim's correct age. Even assuming that this assessment implicates the 10-day notice provision of Correction Law § 168-n(3), defense counsel cited that provision but proceeded to waive an adjournment, which is the usual remedy for this type of notice violation, and did not seek any other remedy. Nor does defendant cite any prejudice from the lack of notice, or dispute on appeal that there was clear and convincing

evidence to establish that the victim was five years old when the abuse began.

In any event, even without the 10 contested points, defendant would remain a level three offender for two independent reasons. First, without these points, defendant's point score is 120. Second, defendant's prior felony sex crime conviction automatically resulted in an override to level three (*see People v Howard*, 27 NY3d 337, 342 [2016]).

We also find that defense counsel did not make it clear to the court that she was requesting a downward departure from defendant's presumptive risk level; therefore, that claim is unpreserved. In any event, we find no basis for a downward departure *see People v Gillotti*, 23 NY3d 841, 861 [2014]), regardless of whether the correct point score is 130 or 120. The mitigating factors cited by defendant are outweighed by factors presenting a risk of future recidivism, including defendant's

commission of the present offense while on probation for his conviction of a sex crime involving a 14-year-old girl.

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

ENTERED: APRIL 30, 2019

CLERK

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

9129- Index 155729/16
9130 Trustees of the Pavers and Road 155731/16
Builders District Council Welfare, Pension,
Annuity and Apprenticeship, Skill Improvement
and Safety Funds,
Plaintiffs-Respondents,

-against-

Arch Insurance Company,
Defendant-Appellant.

- - - - -

Trustees of the New York City District
Council of the Carpenters Pension
Fund, etc., et al.,
Plaintiffs-Respondents,

-against-

Arch Insurance Company,
Defendant-Appellant.

_____

Forchelli Deegan Terrana LLP, Uniondale (Peter B. Skelos of counsel), for appellant.

Virginia & Ambinder, LLP, New York (Marc A. Tenenbaum of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Melissa Crane, J.), entered May 25, 2018, which, to the extent appealed from, denied defendant's motion to dismiss the first cause of action in the complaints, unanimously affirmed, with costs.

Plaintiffs seek, pursuant to Labor Law § 220-g, to recover unpaid wages and benefit contributions for work performed by

their members on the "Gouverneur Project" under a labor and materials payment bond issued by defendant insurer. The statute provides that such an action may be brought without notice within one year of the date of the last alleged underpayment. The date of the last alleged underpayment was March 2014. On June 17, 2014, the bankruptcy court overseeing the voluntary Chapter 11 petition of nonparty Recine Materials Corp., which employed individuals who performed work on the project, entered an "Order Establishing Protocol by which the Trustee Shall Solely and Exclusively Collect and Administer Outstanding Accounts Receivable and Resolve Claims Disputes among New York Lien Law Article 3-A Creditors" (Receivables Protocol Order), stating that during a "Temporary Standstill Period" article 3-A creditors "may not . . . commence, continue, or otherwise take any actions to collect on account of their individual claims relating to the Receivables, whether from general contractors, property owners, bonding companies, or other liable entities or individuals."

Contrary to defendant's contention, plaintiffs were included within the scope of the Receivables Protocol Order, as section 105(a) of the Bankruptcy Code (11 USC § 105[a]) "has been construed liberally to [authorize bankruptcy courts to] enjoin suits that might impede the reorganization process" (*MacArthur*

Co. v Johns-Manville Corp., 837 F2d 89, 93 [2d Cir 1988], *cert denied* 488 US 868 [1988]).

Throughout the Temporary Standstill Period of the Receivables Protocol Order, the one-year deadline set forth in Labor Law § 220-g for commencing an action without notice against defendant was tolled by CPLR 204(a). The Temporary Standstill Period ended on December 7, 2015, and the one-year period began running again on that date. Having run for three months before the Receivables Protocol Order was issued, the period would have expired in September 2016. Thus, plaintiffs' adversary proceedings in the bankruptcy court, which were commenced January 15, 2016, were timely. The instant actions, commenced in July 2016, are timely within the limitations period as tolled by CPLR 204(a) ("Stay"). The one-year statutory period was further tolled, from January 15, 2016 through July 1, 2016, when the bankruptcy court abstained from hearing the adversary

proceedings, and for another six months, until January 1, 2017, by CPLR 205(a) ("New action by plaintiff").

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

ENTERED: APRIL 30, 2019

CLERK

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

9131 Roza Mirdita, Index 21759/15E
Plaintiff-Respondent,

-against-

Musovic Realty Corp., et al.,
Defendants-Appellants,

Super Laundry Equipment Corp., et al.,
Defendants.

- - - - -

[And a Third-Party Action]

_____

Mauro Lilling Naparty LLP, Woodbury (Melissa A. Danowski of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (Stephen Jacobson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered September 13, 2018, which denied the motion of defendants Musovic Realty Corp. and AAA Realty & Management, Inc. (defendants) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established entitlement to judgment as a matter of law by submitting the fire marshal's deposition testimony and his report. The report established that the fire marshal conducted an investigation at the subject premises and concluded

that the fire in defendants' building was caused by combustible clothing left in a dryer for too long, rather than any defect in the premises or dryer (*see Robertson v New York City Hous. Auth.*, 58 AD3d 535, 536 [1st Dept 2009]; *Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571 [1st Dept 2008] *lv denied* 11 NY3d 706 [2008]). Although the fire marshal did not have an independent recollection of his investigation, his report was admissible under the business record exception to the hearsay rule, and was sufficient to satisfy defendants' prima facie burden, since it noted that he independently inspected the premises and concluded that the accident was not due to defendants' negligence (*see Graham v New York City Hous. Auth.*, 42 AD3d 323, 324 [1st Dept 2007], *lv denied* 9 NY3d 816 [2007]).

In opposition, plaintiff failed to raise a triable issue of fact. Her expert failed to address the theories of liability raised in the complaint and bill of particulars and failed to rebut defendants' showing. Instead, plaintiff's expert raised a new theory, namely that plaintiff's injuries from smoke inhalation were caused by the absence of a self-closing door in the laundry room where the fire occurred, which caused smoke to permeate into plaintiff's apartment. A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability

for the first time in opposition papers (*see Keilany B. v City of New York*, 122 AD3d 424, 425 [1st Dept 2014]).

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

ENTERED: APRIL 30, 2019

CLERK

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

9132 Naci Uzeyiroglu, et al., Index 157947/15
Plaintiffs-Appellants,

-against-

Edler Estate Care Inc.,
Defendant-Respondent,

Jon P. Vaccari, et al.,
Defendants.

_____

The Law Offices of Edmond C. Chakmakian P.C., Hauppauge (Edmond C. Chakmakian of counsel), for appellants.

Gorton & Gorton, LLP, Garden City (John T. Gorton of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered June 18, 2018, which denied plaintiffs' motion for summary judgment on the issue of liability as to their Labor Law § 240(1) claim against defendant Edler Estate Care Inc. (Edler), unanimously affirmed, without costs.

Plaintiff Naci Uzeyiroglu was injured when, while performing construction work for his employer Tebbens Steel LLC (Tebbens) at a residential property, he fell off of a ladder. He commenced this Labor Law action against, among others, Edler, alleging that Edler was the general contractor of the construction. Pursuant to an agreement between Edler and the owners of the premises,

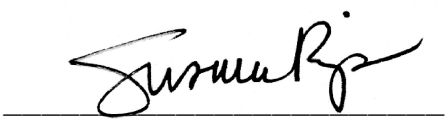
Edler was responsible for the "day to day operations of site, trade coordination, material delivery and handling, schedule required inspections, coordination with home owner on scheduling, material delivery, and quality control."

To be found a "general contractor" for purposes of establishing liability pursuant to Labor Law § 240(1), plaintiffs must show that Edler had the ability to control the activity bringing about the injury and the authority to correct unsafe conditions (*See DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 481 [1st Dept 2015]). Here, plaintiffs failed to establish, as a matter of law, that Edler had the ability to control Tebben's work at the premises or stop the work. The record reflects that although Edler was hired to "supervise" the project, Edler did not hire, retain or pay any of the contractors working at the premises (*see e.g. Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]*; Paulino v 580 8th Ave. Realty Co., LLC*, 138 AD3d 631 [1st Dept 2016]). Moreover, the homeowner testified that he "assume[d]" that Edler had safety responsibilities and that it was his understanding that Edler had the authority to stop work on the job site if an unsafe condition arose. However, Edler's principal denies that he had the authority to stop the work at the premises, and the agreement

between Edler and the homeowner does not specifically confer upon Edler the authority to stop the work if an unsafe condition was observed (*see DaSilva*, 125 AD3d at 481). Rather, it provides that part of Edler's "site supervision" responsibilities included supervising "day to day operations" of the site and trade. An issue of fact remains as to whether this includes supervision of the safety conditions.

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

ENTERED: APRIL 30, 2019



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

9133N Lisa Wolman, Index 306935/09
Plaintiff-Respondent,

-against-

Eli Shouela,
Defendant-Appellant.

_____

Lazar Grunsfeld Elnadav, LLP, Brooklyn (Gerry Grunsfeld of counsel), for appellant.

Teitler & Teitler, LLP, New York (Jaime L. Weiss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered January 2, 2018, which awarded plaintiff wife $325,000 in counsel fees to be paid by defendant husband, unanimously affirmed, without costs.

The relevant agreement between the parties provides, inter alia, that "the Husband shall pay all of his and the Wife's reasonable counsel fees in connection with" his motion to modify visitation. The wife's applications for counsel fees and the husband's application for court-appointed counsel would not have been made if the husband had not moved to modify visitation. Thus, those applications were connected or related to the husband's motions to modify, and the wife was entitled to recoup

reasonable counsel fees incurred on those applications (*see Rainbow v Swisher*, 72 NY2d 106, 109 [1988]).

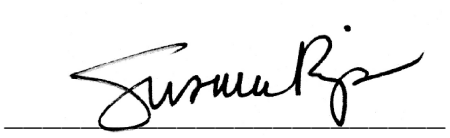
The husband's argument that he was entitled to a hearing on the issue of reasonable counsel fees because the billing statements submitted in support of the wife's motion for counsel fees were not reasonably detailed is unavailing. The trial court, being fully familiar with all of the underlying proceedings, appropriately determined that the fees sought were reasonable by reviewing the detailed billing statements and the motion papers. Notably, the court's award reflected a significant reduction to the amount originally sought by the wife. We also decline to consider the husband's arguments that some billing entries were improperly or excessively redacted and that the charges regarding photocopying were not reasonable, because those issues were not raised before the motion court.

We further decline to consider the husband's arguments, raised for the first time on appeal, that counsel fees should not have been awarded to the wife because her motion failed to comply with 22 NYCRR 1400.2 and 1400.3 and Domestic Relations Law §

237(b) (*see Matter of Sierak v Staring*, 124 AD3d 1397, 1398 [4th Dept 2015]; *Matter of Felix v Felix*, 110 AD3d 805, 806 [2d Dept 2013]).

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

ENTERED: APRIL 30, 2019



CLERK

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

9134N Aurea M. Stio, Index 22250/16
Plaintiff-Appellant,

-against-

Montefiore Medical Center,
also known as Montefiore
Medical Group,
Defendant-Respondent.

_____

Phillips Law Group, P.C., North Salem (Jeffrey E. Phillips of counsel), for appellant.

Yoeli Gottleib & Etra LLP, New York (Michael L. Burke of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 22, 2018, which denied plaintiff's motion pursuant to CPLR 2221 "to renew and to vacate" an order, same court and Justice, entered December 7, 2017, on default, dismissing the complaint for failure to comply with a prior discovery order, unanimously affirmed, without costs.

The motion court appropriately acknowledged that plaintiff satisfied a showing of excusable default, sufficient to vacate the underlying default. Plaintiff, however, did not show that her claim had merit. The bare-boned bill of particulars is

verified only by an attorney, and there is no other sworn account of the incident.

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

ENTERED: APRIL 30, 2019

CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9136 In re Cheryl Barlow, Index 101762/17
Petitioner,

-against-

New York City Housing
Preservation and Development,
Respondent.

_____

Cheryl Barlow, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Yasmin Zainulbhai of counsel), for respondent.

_____

Determination of respondent, dated August 17, 2017, which, after a hearing, terminated petitioner's Section 8 housing subsidy, 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 [Shlomo S. Hagler, J.], entered July 10, 2018), dismissed, without costs.

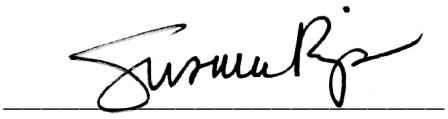
The Hearing Officer's finding that the father of petitioner's children resided in petitioner's apartment but was not reported as a household member is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Documents showed that the individual lived at the subject apartment and that he used the apartment's address to register to vote. Although the

Hearing Officer afforded petitioner additional time following the hearing to gather and submit additional documents to the Hearing Officer to rebut the documents entered into evidence by the agency, she failed to do so.

The decision to terminate petitioner's subsidy does not shock our sense of fairness, given that petitioner's testimony showed that it was not likely that she would become homeless (*see Matter of Perez v Rhea*, 20 NY3d 399 [2013]).

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

ENTERED: APRIL 30, 2019



CLERK

CORRECTED ORDER - JUNE 20, 2019

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9137 In re Orchid C. and Another,

Dependent Children Under
the Age of Eighteen, etc.,

Tiffany C.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

Salihah R. Denman, **Harrison**, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 23, 2017, which denied respondent mother's motion to vacate an order of fact-finding and disposition, same court and Judge, entered on or about July 7, 2016, upon her default, which, upon a finding of permanent neglect, terminated respondent's parental rights to the subject children, and freed them for purposes of adoption, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the mother's motion to vacate her default, since she failed to submit an affidavit setting forth a reasonable excuse for failing to appear and a meritorious defense. Moreover, the affirmation from the mother's counsel failed to demonstrate a reasonable excuse for her absence from the proceeding (*see Matter of*

Serenity Victoria M. [Allison B.], 150 AD3d 486 [1st Dept 2017]; *Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418, 419 [1st Dept 2013]). In particular, the mother failed to submit evidence in support of her argument that her chest pains prevented her from appearing in court during the fact-finding hearing, which occurred on two different dates, or to explain why she was unable to inform counsel or the court that she could not appear.

Since the mother failed to demonstrate a reasonable excuse for her default, this Court need not reach the issue of whether she presented a meritorious defense (*see Matter of Serenity Victoria M.*, 150 AD3d at 486). In any event, the mother failed to demonstrate a meritorious defense, since she failed to submit an affidavit in support of her motion, and her counsel only set forth general, unsubstantiated statements that are insufficient to establish a meritorious defense (*see Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514, 515 [1st Dept 2013]). Moreover, she failed to submit evidence that she had participated in mental health treatment, complied in taking her medication, or attempted

to secure housing and a source of income (*see Matter of Paul G.D.H. [Yvonne H.]*, 147 AD3d 699, 700 [1st Dept 2017]).

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

ENTERED: APRIL 30, 2019

CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9138 Evelina M. Berihuete, Index 154467/12
Plaintiff,

-against-

565 West 139th Street, L.P.,
Defendant.

- - - - -

565 West 139th Street, L.P.,
Third-Party Plaintiff-Respondent,

-against-

A & G Plastering and Tile Corp.,
Third-Party Defendant-Appellant.

_____

Cerussi & Spring, P.C., White Plains (Christopher B. Roberta of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (Eric P. Tosca of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered October 2, 2018, which, to the extent appealed from, denied third-party defendant's (AG) motion for summary judgment dismissing the common-law indemnification claim, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when the bathroom ceiling in her apartment fell on her. Both plaintiff and the building superintendent testified that there had previously been water damage to the bathroom ceiling in plaintiff's apartment,

due to water leaking from the apartment above. At the time of the incident, AG was removing and replacing the bathroom floor in the apartment above plaintiff's. In seeking the dismissal of the building owner's common-law indemnification claim, AG failed to demonstrate as a matter of law that the owner was negligent in failing to timely address the condition of the bathroom ceiling in plaintiff's apartment and that AG itself was not negligent in connection with the work it was performing in the apartment above (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

Contrary to AG's contention, the absence of a written contract between itself and the owner does not bar the latter's claim for common-law indemnification (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 565 n 2 [1973]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]).

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

ENTERED: APRIL 30, 2019

CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9139 The People of the State of New York, Ind. 2402/15
Respondent,

-against-

Frederick Young,
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 (Rebecca Hausner of counsel), for respondent.

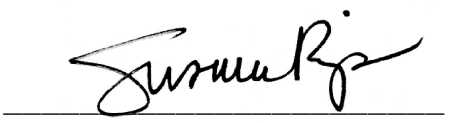
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J., at hearing; James Burke, J. at plea and sentencing), rendered May 3, 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.

ENTERED: APRIL 30, 2019



CLERK

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

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9140 Robert Rossi, Index 160467/15
Plaintiff-Respondent, 595164/16
595516/16

-against-

140 West JV Manager LLC, et al.,
Defendants-Appellants,

J. T. Magen & Company Inc.,
Defendant-Respondent.

- - - - -

140 West JV Manager LLC, et al.,
Third Party Plaintiff,

-against-

H & L Electric, Inc.,
Third Party Defendant.

- - - - -

[And Another Third-Party Action]

_____

O'Connor Redd Orlando LLP, Port Chester (Marie R. Hodukavich of counsel), for 140 West JV Manager LLC, appellant.

Furman, Kornfeld & Brennan LLP, New York (Peter C. Lucas of counsel), for Vanquish Contracting Corp., appellant.

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

Fabiani Cohen Hall, LLP, New York (Allison Snyder of counsel), for J.T. Magen & Company Inc., respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about January 31, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's

motion for partial summary judgment on the issue of liability as to Labor Law § 241(6) predicated on violations of Industrial Code (12 NYCRR) §§ 23-1.7(e)(1) and (2) as against defendants 140 West Street (NY), LLC, and Vanquish Contracting Corp. (Vanquish), unanimously affirmed, without costs.

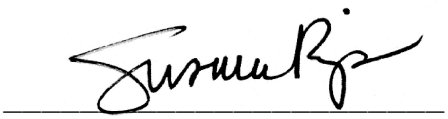
Summary judgment on the issue of liability was properly granted in this action where plaintiff was injured when he tripped and fell over construction debris at the work site. The area where plaintiff fell was, by definition, a passageway, as he tripped over Vanquish's demolition debris along the only route he could take to return to his work area with a ladder (*see Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 [1st Dept 2016]; *see also Harasim v Eljin Constr. of N.Y., Inc.*, 106 AD3d 642, 643 [1st Dept 2013]; 12 NYCRR 23-1.7[e][1]). Moreover, Vanquish left demolition debris on a floor where plaintiff was required to pass in the course of his work within the definition of a working area (*see Canning v Barneys N.Y.*, 289 AD2d 32, 34 [1st Dept 2001]; 12 NYCRR 23-1.7[e][2]). The debris, consisting of cables from elevator shaft demolition, was not inherent in, or an integral part of, the work being performed by either plaintiff electrician or Vanquish at the time of the accident (*see Pereira v New Sch.*, 148 AD3d 410, 412 [1st Dept 2017]), but rather constituted an

accumulation of debris from which Vanquish was required to keep work areas free (*see Lester v JD Carlisle Dev. Corp., MD.*, 156 AD3d 577 [1st Dept 2017]).

We decline to search the record to grant any party summary judgment on the Labor Law § 200 and common-law negligence claims.

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

ENTERED: APRIL 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9141 John Wolf, Index 101241/07
Plaintiff-Appellant,

-against-

St. Vincent's Catholic Medical
Centers of New York,
Defendant-Respondent.

- - - - -

St. Vincent's Catholic Medical
Centers of New York,
Third-Party Plaintiff-Respondent,

-against-

Sodexho America, LLC,
Third-Party Defendant-Respondent.

_____

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for appellant.

Costello, Shea & Gaffney, LLP, Rockville Centre (Steven E. Garry of counsel), for St. Vincent's Catholic Medical Centers of New York, respondent.

Wade Clark Mulcahy, LLP, New York (Dana Purcaro of counsel), for Sodexho America, LLC, respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 17, 2018, which granted plaintiff's motion for leave to renew and reargue, and upon reargument, adhered to its prior order granting defendant St. Vincent's Catholic Medical Centers of New York's motion for summary judgment dismissing the complaint as against it; and order, same court and Justice,

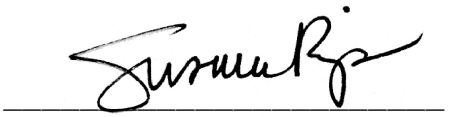
entered on or about March 20, 2018, which, insofar as appealed, granted plaintiff's motion for reargument as to the dismissal of the complaint, and upon reargument, adhered to its prior order granting defendant third-party defendant Sodexho America, LLC's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the complaint and third-party complaint reinstated, and the matter remitted for proceedings consistent with this decision.

Although it is undisputed that about 10 inches of snow fell about two hours before the January 28, 2004 accident, Supreme Court should have denied St. Vincent's and Sodexho summary judgment because their submissions failed to address the complaint's allegations that the ice was on the sidewalk before that storm and that they received notice that it was there. Specifically, they failed to present evidence from someone with knowledge as to whether either entity received a complaint about the location before the storm commenced and the area's condition before the new precipitation fell (*see Bojovic v Lydig Bejing Kitchen, Inc.*, 91 AD3d 517, 517-518 [1st Dept 2012]). Given St. Vincent's and Sodexho's failure to meet their initial burden to show that they lacked actual or constructive notice of the

alleged icy condition, the motion court should have denied their respective summary judgment motions without considering the sufficiency of plaintiff's opposition (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412, 413 [1st Dept 2013]).

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

ENTERED: APRIL 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9142- Ind. 4342/13
9142A The People of the State of New York, 2338/14
Respondent,

-against-

Jarell Cunningham,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Edward McLaughlin, J.), rendered January 8, 2015,

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

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

ENTERED: APRIL 30, 2019

CLERK

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

Renwick, J.P., Gesmer, Kern, Singh, JJ.

9143 & M-1725 — Index 100532/18

In re Sandy Reiburn, et al.,
Petitioners-Appellants-Respondents,

-against-

New York City Department of Parks and Recreation,
Respondent-Respondent-Appellant.

Michael S. Gruen, New York, for appellants-respondents.

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

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 17, 2018, which granted the petition to the extent of ordering respondent to produce an unredacted copy of the "Fort Greene Park Historic Resource and Management and Operations Study" report (the report) prepared for respondent by Nancy Owens Studio LLC (Owens Studio), unanimously modified, on the law, to remand the matter to Supreme Court for further proceedings to determine petitioners' request for counsel fees, and otherwise affirmed, without costs.

Supreme Court correctly held that respondent failed to meet its burden of showing that the intra-agency materials exemption applies, and properly directed respondent to produce an

unredacted copy of the subject report (*see* Public Officers Law [POL] § 87[2][g]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]). In particular, respondent failed to establish that it retained Owens Studio for purposes of preparing the report, a necessary prerequisite for invocation of the intra-agency materials exemption for documents prepared by an outside consultant (*see Matter of Xerox Corp. v Town of Webster*, 65 NY2d 131, 133 [1985]; *Matter of Rauh v de Blasio*, 161 AD3d 120, 125 [1st Dept 2018]). The affidavit submitted by respondent on this point is on its face conclusory. The fragmentary documents to which respondent's affiant points demonstrate only that Owens Studio was retained to perform some work. They do not on their face establish that respondent retained Owens Studio to prepare the subject study and report, nor establish what Owens Studio was retained to do, nor, in particular, establish that respondent itself, as opposed to some other entity, retained Owens Studio to prepare the report (*see Rauh*, 161 AD3d at 125; *Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 163 [1st Dept 2008], *affd sub nom West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882 [2009]).

However, the court failed to address petitioners' request for an award of reasonable attorneys' fees. As the Court of

Appeals has noted, the Freedom of Information Law (FOIL) "is based on a presumption of access in accordance with the underlying premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 73 [2017] [internal quotation marks omitted]). In a FOIL proceeding, the court

> "(i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (POL 89[4][c]).

The attorneys' fees provision of FOIL was amended, effective December 13, 2017, to provide that the court "shall" award counsel fees where the agency has no basis for denying access to the material sought. The legislative history of the recent amendment notes that "[o]ften, people simply cannot afford to take a government agency to trial to exercise their right to

access public information," and that an award of attorney's fees is intended to "encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding" (2017 New York Assembly Bill A2750, New York Two Hundred Fortieth Legislative Session).

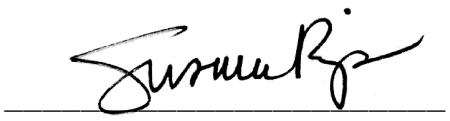
Here, Supreme Court failed to address petitioners' request for counsel fees at all, including making a finding as to whether respondent had a reasonable basis to deny access to an unredacted copy of the report at issue. Accordingly, we remit the matter to Supreme Court to address petitioners' request for counsel fees.

M - 1725 - *Sandy Reiburn v New York City Department of Parks & Recreation*

Motion to enlarge the record denied.

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

ENTERED: APRIL 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9144-
9144A In re Gabrielle N. N., And Others,

Children Under the Age Eighteen Years, etc.,

Jacqueline N. T.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

Dawne A. Mitchell, The Legal aid Society, New York (Diane Pazar of counsel), attorney for the children.

_____

Appeal from permanency hearing order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about February 24, 2016, unanimously dismissed, without costs, as moot. Appeal from permanency hearing order, same court and Judge, entered on or about February 28, 2018, upon consent, unanimously dismissed, without costs, as taken by a nonaggrieved party.

The appeal from the February 2016 permanency hearing order is moot because the order was superseded by a permanency hearing order issued in 2017 (*see Matter of Qualiayah J. [Taneka J.]*, 149 AD3d 495 [1st Dept 2017], *lv denied* 29 NY3d 913 [2017]; *Matter of*

Breeyanna S., 52 AD3d 342 [1st Dept 2008]). Respondent argues that the appellate issues are preserved because the order changed the permanency goal from that stated in the preceding order, issued on September 2, 2015. However, the permanency goal of "placement for adoption, including consideration of interstate options pending a parental rights termination petition already filed," set forth in the February 2016 order is identical to the goal stated in the September 2, 2015 order.

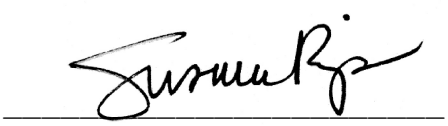
It is also not a ground for appeal that the court stated at the September 1, 2015 permanency hearing that the permanency goal was placement for adoption with concurrent planning for return to parent, which respondent argues constituted impermissible concurrent inconsistent goals (*see* Family Court Act § 1089[d][2][I]). The 2016 written order, which states that the approved permanency goal is placement for adoption, corrected the error (*see Matter of Timothy GG. [Meriah GG.]*, 163 AD3d 1065 [3d Dept 2018], *lv denied* 32 NY3d 908 [2018]).

The February 2018 permanency hearing order was entered upon respondent's consent. Therefore, respondent is not an aggrieved party within the meaning of CPLR 5511 (*see Matter of Nafees F.*, 162 AD3d 416 [1st Dept 2018]).

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

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

ENTERED: APRIL 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9145 Alan Dubrow, Index 651605/16
Plaintiff-Respondent,

-against-

Herman & Beinin, etc., et al.,
Defendants-Appellants.

_____

Herman & Beinin, Bellmore (Mark D. Herman of counsel), for appellants.

Law Office of Jonathan Strauss, New York (Jonathan Strauss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered on or about October 16, 2018, which denied defendants' motion for summary judgment dismissing the cause of action for breach of an oral agreement, unanimously affirmed, with costs.

Plaintiff alleges that defendants, who represented him in an employment discrimination action, failed to return the unexhausted portion of his $176,500 retainer pursuant to the parties' oral agreement.

Defendants failed to eliminate all factual disputes regarding the nonexistence of the oral agreement (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendant Mark D. Herman's affidavit, in which he denies the existence of

any oral retainer agreement, and plaintiff's deposition testimony, which establishes only the lack of a traditional payment schedule or total retainer amount, do not suffice to show that there was no oral agreement in light of plaintiff's claims to the contrary.

It is undisputed that defendants never provided plaintiff with a written agreement, as required under 22 NYCRR 1215.1. In addition, Herman, in his deposition testimony, admitted that he never provided any itemization of the time spent working on plaintiff's case, even when plaintiff's counsel requested it. Thus, defendants failed to show that the amount of plaintiff's payments was fair and reasonably related to the value of services rendered (*see Jacobson v Sassower*, 66 NY2d 991, 993 [1985]; *Dubrow v Herman & Beinin*, 157 AD3d 620, 621 [1st Dept 2018]).

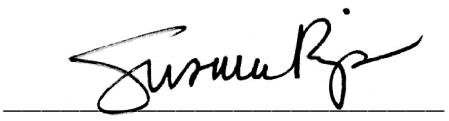
Defendants also failed to establish that plaintiff's claim is barred by the voluntary payment doctrine, which "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]). While defendants assert that plaintiff voluntarily made payments to compensate them for their services, rather than any "deposits" towards a retainer, they failed to establish that

plaintiff had full knowledge of the relevant facts, such as the number of hours spent by defendants in connection with their representation of him (*see id.; Dubrow*, 157 AD3d at 621). Plaintiff also averred that defendants told him that part of the payments would be used towards a trial and an appeal, which never occurred. Since defendants allegedly intended to keep the payments, regardless of any trial or appeal, there are material issues of fact whether plaintiff made the payments "with full knowledge of the facts" (*Dillon*, 100 NY2d at 526) or based on a mistake of material fact (*see e.g. Kirby McInerney & Squire, LLP v Hall Charne Burce & Olson, S.C.*, 15 AD3d 233 [1st Dept 2005]).

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 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9146-
9147 The People of the State of New York,
Respondent,

-against-

Randall Graves,
Defendant-Appellant.

Ind. 2120/13

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), and Justine M. Luongo, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered April 22, 2014, convicting defendant, after a jury trial, of criminal possession of stolen property in the fifth degree and petit larceny, and sentencing him to concurrent terms of 1 year, and judgment, same court (James M. Burke, J.), rendered November 12, 2014, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

The judgments on appeal both arise from a single incident in which defendant stole clothing from a store that he had been

prohibited from entering as the result of his prior acts of shoplifting. At the second trial, the jury convicted defendant of the burglary charge upon which the first jury failed to reach a verdict. We find no basis for reversal of either of the judgments.

Neither defense counsel's general motion to dismiss nor his argument for a lesser included offense charge preserved his contention that the evidence was legally insufficient to support the burglary conviction at the second trial, and we decline to review it in the interest of justice. As an alternative holding, we find that the verdicts following both trials were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the two juries' credibility determinations regarding a store employee's observations relating to the theft. With regard to the burglary conviction, the inference was inescapable that when defendant unlawfully entered the store, he did so with the intent to steal merchandise.

At each trial, the court properly admitted trespass notices barring defendant from entering the store. There was no Confrontation Clause violation because these business records were not testimonial (*People v Cox*, 63 AD3d 626 [1st Dept 2009],

lv denied 13 NY3d 859 [2009]). "[E]ven assuming that one purpose of such a notice is to prove, at a later trial, that the defendant knew his or her entry was unlawful" (*People v Liner*, 33 AD3d 479 [1st Dept 2006], *affd* 9 NY3d 856 [2007]), the notices were primarily used for the store's business purposes such as recording and deterring shoplifting. In any event, any error was harmless (*see People v Cornelius*, 20 NY3d 1089 [2013]).

At both trials, defendant failed to preserve any of his arguments relating to the issue of whether he voluntarily signed various documents while being detained by store security personnel, including his claims that he was entitled to certain hearings and jury instructions, and we decline to review them in the interest of justice. As an alternative holding, we find that any error at either trial was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's ineffective assistance of counsel claims relating to these matters are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we

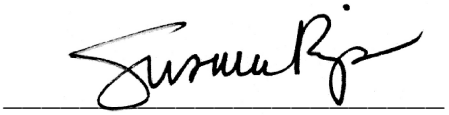
find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's contention that the court at the second trial should have charged criminal trespass in the third degree as a lesser included offense of burglary in the third degree is unpreserved, because defense counsel requested only the submission of second-degree rather than third-degree criminal trespass (*see People v Ware*, 303 AD2d 173 [1st Dept 2003], *lv denied* 100 NY2d 543 [2003]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Zokari*, 68 AD3d 578 [1st Dept 2009], *lv denied* 15 NY3d 758 [2010]).

Defendant's double jeopardy claim with regard to the retrial of the burglary charge is without merit.

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

ENTERED: APRIL 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9148 Francisco Molina, Index 300435/11
Plaintiff-Appellant,

-against-

Samuel L. Dimon, et al.,
Defendants-Respondents.

_____

Law Office of William A. Cerbone, Elmsford (Barry R. Strutt of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donald Miles, J.), entered on or about May 8, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that he slipped and fell on a slippery mold condition on a porch step at defendants' home when he was delivering a package. Defendants demonstrated through the testimony of defendant Samuel Dimon that they did not create or have actual or constructive notice of the alleged dangerous condition, as they and their invitees regularly used the steps without incident and were not aware of any slippery mold condition (*see Lovell v*

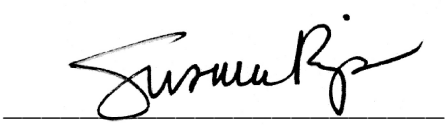
Thompson, 143 AD3d 511 [1st Dept 2016]). Defendants also relied on plaintiff's deposition testimony that before the accident, the porch step appeared safe, the porch area was dry, and there was no dirt or debris, which indicates that the alleged defective condition was not visible and apparent so as to constitute constructive notice (*see Vasquez v Nealco Towers LLC*, 160 AD3d 496 [1st Dept 2018]).

In opposition, plaintiff failed to raise a triable issue of fact. The conclusions of plaintiff's experts that there was mold, moss, and mildew on the steps were speculative and conclusory, as they were inconsistent with plaintiff's testimony regarding the condition of the steps (*see Feaster-Lewis v Rotenberg*, 93 AD3d 421, 422 [1st Dept 2012], *lv denied* 19 NY3d 803 [2012]). Moreover, the opinion of the experts that the moss was slippery is speculative, as they did not touch the step in question or attempt to recreate the circumstances surrounding plaintiff's fall (*see Sanders v Morris Hgts. Mews Assoc.*, 69 AD3d 432 [1st Dept 2010]). The photographs taken by the engineering expert over a year after the accident showing wood steps with a greenish tinge, does "not establish an apparent and visible slippery or otherwise dangerous condition on the stairs" (*Decker v Schildt*, 100 AD3d 1339, 1341 [3d Dept 2012]).

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 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9152 The People of the State of New York, Ind. 3708/12
Respondent,

-against-

Davon Jones,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

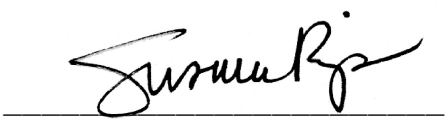
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 5, 2013, as amended March 6, 2013, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 1½ years, unanimously affirmed.

The court correctly adjudicated defendant a second felony offender based on a conviction under a South Carolina robbery statute that is facially the equivalent of a felony in New York. Defendant has not demonstrated that under South Carolina case law, unlike the rule in New York (*see People v Gordon*, 23 NY3d 643, 650 [2014]), a person can commit robbery where the only force used is to facilitate an escape after a nonforcible

larceny, even after abandoning the stolen property and making no effort to retain it. Defendant cites only to isolated phrases of dictum referring to escape (*see State v Mitchell*, 382 SC 1, 6-7, 675 SE2d 435, 438 [2009]; *State v Moore*, 374 SC 468, 478-479, 649 SE2d 84, 89 [2007]; *State v Keith*, 283 SC 597, 599, 325 SE2d 325, 326 [1985]), that, when read in context, do not support his position.

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

ENTERED: APRIL 30, 2019



CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9153 In re Randi Damesek, Index 101230/16
Petitioner-Appellant,

-against-

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

_____

Rutkin & Wolf PLLC, White Plains (Jason M. Wolf of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered February 1, 2018, which denied the petition challenging respondents' determination, dated April 18, 2016, upholding petitioner's unsatisfactory annual performance review rating for the 2012-2013 school year, and granted respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner has failed to show that the U-rating was arbitrary and capricious, or made in bad faith (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]). The record establishes a rational basis for the determination to uphold petitioner's U-rating, which was

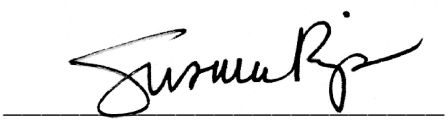
based on insubordination and unprofessional conduct during the 2012-2013 school year. A February 2013 letter to petitioner's personnel file stated that petitioner, who was an assistant principal, was "rude" and "resistant" to the hiring of a new assistant principal and allowed colleagues to "bad mouth" the principal, thus undermining her authority. A March 2013 letter stated that an encounter with a student who petitioner knew had been hospitalized due to a depressive disorder had left the student highly distressed. Furthermore, a June 2013 letter detailed petitioner's "improper escalation of internal school issues," including sending emails regarding internal matters to multiple recipients outside of the school, and continuously criticizing the principal's decisions.

Contrary to petitioner's argument, the record does not demonstrate procedural deficiencies in the performance review process resulting in the U-rating that undermined the integrity or fairness of the process (*see Matter of Francois v Walcott*, 136 AD3d 434 [1st Dept 2016]).

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 30, 2019



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Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9154-
9155-
9155A-
9155B-
9155C-
9155D-
9155E-
9155F

Index 652592/15

RKA Film Financing, LLC,
Plaintiff-Appellant,

-against-

Ryan Kavanaugh, et al.,
Defendants-Respondents.

_____

Latham & Watkins LLP, New York (Benjamin Naftalis of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jonathan L. Frank of counsel), for Ryan Kavanaugh, respondent.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel), for Colbeck Capital Management, LLC, Colbeck Capital LLC, Colbeck Partners IV, Jason Colodne, Jason Beckman and David Aho, respondents.

Greenberg Traurig, LLP, Chicago, IL (Gregory E. Ostfeld of the bar of the state of Illinois, admitted pro hac vice, of counsel), for Ramon Wilson, Andrew Matthews, Greg Shamo and Tucker Tooley respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered April 19, 2018, which dismissed the second amended complaint (SAC), unanimously affirmed, without costs. Appeal from the orders, same court and Justice, entered March 8, 2018

and March 12, 2018, which granted defendants' motions to dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court correctly dismissed the SAC because it did not adequately plead an actionable claim for fraud, fraudulent inducement, or negligent misrepresentation against any of defendants. The SAC did not attribute specific misrepresentations or wrongdoing to most defendants (*see Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 44-45 [1980]; *Fletcher v Dakota* Inc., 99 AD3d 43, 49 [1st Dept 2012]), but rather, impermissibly lumped those defendants together with the others against whom specific acts had been pleaded (*Jonas v National Life Ins. Co.*, 147 AD3d 610, 612 [1st Dept 2017]; *MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]).

Initially, the facts alleged in the SAC do not support a claim of fraud against Colbeck Capital Management, LLC (Colbeck) or David Aho (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Aho's alleged statement that plaintiff's investment was "low risk," was a non-actionable expression of hope (*see Zaref v Berk & Michaels*, 192 AD2d 346, 349 [1st Dept 1993]), and his presentation of slides prepared by Relativity is

insufficient to impute representations within the slides to him personally (*see Gregor v Rossi*, 120 AD3d 447, 447-448 [1st Dept 2014]). Plaintiff also waived any claims based upon representations by Aho by signing specific disclaimers in non-disclosure agreements which renounced any representations regarding the accuracy of any statements made in the introductory investment materials (*see Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts.*, 119 AD3d 136, 143 [1st Dept 2014]). The non-disclosure agreements also released Aho and Colbeck Capital Management from liability relating to or resulting from the use of those materials (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 277-278 [2011]).

The alleged misrepresentations attributed to defendants Ramon Wilson, Andrew Matthews, and Greg Shamo, officers of Relativity, are similarly insufficient to give rise to a fraud claim. The alleged misrepresentations attributed to these defendants were made after plaintiff had already invested in Relativity, precluding a conclusion that they induced plaintiff to engage in the transaction (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). To the extent plaintiff claims that these defendants' misrepresentations caused it to abstain from taking legal action, plaintiff has not demonstrated that it sustained

damages as a result of such forbearance, an essential element of its claim (*Laub*, 297 AD2d at 30-31).

To the extent the SAC has attributed specific misrepresentations to defendant Ryan Kavanaugh, the founder and chief executive officer of Relativity, they do not support a claim of fraud. Plaintiff could not have justifiably relied on the misrepresentations regarding Relativity's financial health in agreeing to engage in the investment, as plaintiff, a sophisticated investor, did not demonstrate that it fulfilled its affirmative obligation to verify the nature and quality of its investment (*see MP Cool Invs. Ltd.*, 142 AD3d at 287; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006]).

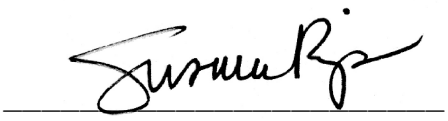
Insofar as plaintiff relies on the alleged insincere promise that its funds would be used for only print and advertising expenses, we dismiss the fraud claims as disguised claims for breach of contract (*see Cronos Group Ltd. v. XComIP, LLC*, 156 AD3d 54, 67-68 [1st Dept 2017]). Further, any misrepresentations made after plaintiff had already invested the funds are insufficient to give rise to fraud as there was no nexus between the alleged statements and plaintiff's losses (*see Laub*, 297 AD2d at 31).

The court properly dismissed the negligent misrepresentation claim, as plaintiff has not pleaded the existence of a special or privity-like relationship imposing a duty on defendants to speak with care (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). A special relationship may be established by "persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Relying on *Brass v Am. Film Tech., Inc.* (987 F2d 142, 150 [2d Cir 1993]), plaintiff contends that defendants' "superior knowledge" of their intention to use the funds invested by plaintiff for working capital transformed their relationship into a special one giving rise to a duty to disclose. However, we have held that "superior knowledge of . . . alleged wrongdoing . . . and ...admitted wrongdoing is not the type of unique or specialized expertise that would support a cause of action for negligent misrepresentation" (*Greentech Research LLC v Wissman*, 104 AD3d 540, 540-541 [1st Dept 2013]). Further, New York courts have held that arm's length borrower-lender transactions between sophisticated parties do not give rise to privity (*see Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 579 [2011];

Dobroshi v Bank of Am., N.A., 65 AD3d 882, 884 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]; *Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447 [1st Dept 2010]).

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

ENTERED: APRIL 30, 2019



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Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9156-
9157N Siras Partners LLC, et al.,
Plaintiffs-Respondents,

-against-

Activity Kuafu Hudson Yards LLC, et al.,
Defendants-Appellants,

Dai & Associates, P.C., et al.,
Defendants,

Reedrock Kuafu Development Company LLC, et al.,
Nominal Defendants.

- - - - -

462-470 11th Avenue LLC,
Plaintiff,

-against-

Bifrost Land LLC, et al.,
Defendants.

Index 650868/15
850216/15

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Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for appellant.

Cole Schotz P.C., New York (Leo V. Leyva of counsel), for respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered March 16, 2018, which granted plaintiffs Siras Partners LLC, Saif Sumaida and Ashwin Verma's motion for spoliation sanctions against defendants Activity Kuafu Hudson Yards LLC

(Kuafu), Shang Dai, and Dennis Shan (collectively, defendants) to the extent of ordering an adverse inference for dispositive motions and at trial and for a stay of the related foreclosure action until further order of the court, unanimously affirmed, with costs.

The motion court providently exercised its discretion in granting plaintiffs an adverse inference as a spoliation sanction. Plaintiffs established that defendants possessed an obligation to preserve the evidence at the time of its destruction and that the evidence was destroyed with a "culpable state of mind," i.e., gross negligence, which raises the presumption of relevance (*see Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]).

Plaintiffs served discovery requests, which explicitly included electronic communications regarding the parties' joint development project, upon defendants in May 2015. Shang Dai and Dennis Shan, principals of Kuafu, admitted that they used the social media application WeChat to discuss the project and failed to preserve those communications following the discovery requests. They assert that in separate incidents in May 2016 their phones were damaged and they replaced them with new phones.

When they downloaded the application to the new phones, the chat histories were lost. Even assuming that Shang Dai and Dennis Shan did not intentionally destroy the WeChat messages, defendants' failure to preserve the discussions for more than a year and to take timely actions to recover the damaged phones and data constitutes gross negligence (*see e.g. VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]; *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016]).

The court providently exercised its discretion in granting plaintiffs' motion for an injunction and staying the related foreclosure action commenced by defendant 462-470 11th Avenue LLC, an affiliate of the other defendants, until further order (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

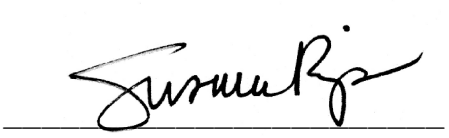
Plaintiffs demonstrated a likelihood of success on the merits of their claims by submitting evidence showing that Kuafu's main role in the project was to locate equity financing and that it ceased pursuing that role in February 2015, that Kuafu took numerous steps to hinder the progress of the project by alerting the lender to "potential events of default" because Kuafu was not directly involved with negotiating certain material

contracts, that Kuafu unilaterally filed for dissolution, and that Kuafu may have orchestrated the lack of funds and progress to ensure foreclosure by an entity related to defendants so as to cut plaintiffs out of this potentially lucrative project and retain all the profits itself (*see Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016] ["A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive"]). Plaintiffs also established that they will be irreparably harmed if 462-470 11th Avenue LLC proceeds with the foreclosure proceedings, which may or may not have been properly initiated, as they will no longer have the ability to develop their real property (*see Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 220-221 [4th Dept 2009]). The equities weigh in favor of plaintiffs based on the harm that will result by permitting foreclosure of valuable real property

before this lawsuit is adjudicated on its merits (*see id.* at 223). Finally, on this record, Supreme Court properly denied an undertaking.

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

ENTERED: APRIL 30, 2019



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Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9158-
9159-
9160-
9161N &
M-526

Index 655411/17

Board of Managers of the Colonnade Condominium,
Plaintiff-Respondent,

-against-

32F at 347 West 57th Street, LLC,
Defendant-Appellant.

_____

Scheyer & Stern, LLC, Nesconset (Fredrick P. Stern of counsel), for appellant.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Maria I. Beltrani of counsel), for respondent.

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Orders, Supreme Court, New York County (Nancy M. Bannon, J.), entered August 18, 2017, April 20, 2018, on or about June 1, 2018, and July 6, 2018 which, respectively, inter alia, granted plaintiff's motion for a temporary restraining order (TRO) prohibiting defendant from performing renovations in its apartment or allowing contractors to enter the apartment without plaintiff's authorization, extended the TRO until further order, granted plaintiff's motion to hold defendant in civil contempt to the extent of ordering a hearing, and denied defendant's motion

to vacate the TRO entered August 17, 2017, unanimously affirmed, with costs.

Plaintiff demonstrated the elements required for the issuance of a temporary restraining order (*see Segarra v Ashouin*, 253 AD2d 406, 407 [1st Dept 1998] [purpose of a temporary restraining order is to preserve the status quo]). There are disputed issues of fact as to the nature of the alterations being performed in the unit and whether article 5, section 14 of the bylaws has been breached by either party. The court shall hold a hearing to determine whether a preliminary injunction should issue (CPLR 6312[c]; *see Housing Works v City of New York*, 255 AD2d 209, 216 [1st Dept 1998]). Contrary to defendant's contention, the court has discretion as to whether or not to require an undertaking before granting a TRO (CPLR 6313[c]; *Slifka v Slifka*, 162 AD3d 530, 531 [1st Dept 2018]).

In ordering the contempt hearing, the court made no finding that defendant or its principal was in contempt of the August 17, 2017 TRO; it only determined that a hearing was warranted. Defendant's argument that its principal was not served with the papers that would subject her to a finding of contempt is unavailing. A party's nonparty principal can be held in contempt "upon such notice as the court deems appropriate and accords with

due process" (*Lipstick, Ltd. v Grupo Tribasa, S.A. de C.V.*, 304 AD2d 482, 483 [1st Dept 2003]). Moreover, defendant failed to demonstrate on its own or its principal's behalf a lack of notice or receipt of any papers that resulted in the order directing a hearing on contempt. The record shows that defendant's counsel agreed to accept service of the TRO application on behalf of defendant's principal, and defendant does not argue that its principal did not receive the resulting August 17, 2017 TRO or any subsequent papers. The record also shows that plaintiff's contempt motion was served both on counsel and at the address that defendant's principal used in her correspondence with plaintiff.

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

M-526 ***Board of Managers of the Colonnade Condominium v 32F at 347 West 57th Street, LLC***

Motion to strike denied as academic.

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

ENTERED: APRIL 30, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Peter Tom
Peter H. Moulton, JJ.

8575
Ind. 1787/14

_____x

The People of the State of New York,
Respondent,

-against-

Paris Brown also known as Steve Diop,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered June 22, 2015, as amended July 13, 2015, convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree, and imposing sentence.

Seymour W. James, Jr., The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott and Justine J. Braun of counsel), for respondent.

MANZANET-DANIELS, J.

The police lacked the requisite reasonable suspicion to frisk defendant based on the tip of an anonymous caller and what the People characterize as the officers' "confirmatory observations."

The police may not stop and frisk a person based solely on information furnished by an anonymous source that the person is carrying a gun (*see Florida v J.L.*, 529 US 266, 271 [2000]). Since an anonymous tip "seldom demonstrates the informant's basis of knowledge or veracity," it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability (*id.* at 270 [internal citation omitted]). The tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person" (*id.* at 272 [police lacked reasonable suspicion to stop and frisk the defendant based on a tip from an anonymous caller that a young black man in a plaid shirt standing at a specified bus stop possessed a firearm]).

Here, the police received an anonymous tip that a black man in a bodega wearing a black coat with a fur hood had a gun and drugs in his pocket. The radio run did not transmit the identity of the caller nor the basis for the caller's knowledge. The caller provided no "predictive information" to corroborate the tip, nor was it apparent that the caller possessed insider

knowledge or was in an excited condition so as to render the tip more reliable.[1]

When the police arrived on the scene, approximately one minute later, they observed someone fitting defendant's description inside the bodega. They observed one other black man, as well as two men of Middle Eastern descent behind the counter. The police observed no one selling drugs, and indeed, no furtive or suspicious behavior. The police did not see the outline of a gun in defendant's pocket, nor did they observe movements indicating that he was carrying a gun. The employees of the bodega responded "yes" when asked whether everything was okay. Thus, when the police entered the bodega, they had no additional information indicative of criminality and made no observations of suspicious conduct or conduct that would pose a

[1]In *People v Argyris* (24 NY3d 1138 [2014]), a case involving vehicular stops, a divided Court of Appeals debated the nature of corroboration required for an anonymous tip. The judges disagreed over whether "predictive information" was a sine qua non of the corroboration requirement, or merely one indicium of reliability. Several of the judges were of the view that predictive information was indeed indispensable; others were of the view that the *Aguilar-Spinelli* framework (*see Spinelli v United States*, 393 US 410 [1969], *Aguilar v Texas*, 378 US 108 [1964]), applicable to determination of whether an anonymous tip is sufficiently reliable in the probable cause context, should apply to a level three encounter. The judges recognized the continuing vitality of the precept in *People v Moore* (6 NY3d 496, 499 [2006]) that anonymous tips must be corroborated by sufficient indicia of reliability. *Argyris* thus does not significantly alter the analysis pertaining in this case.

risk to the officers' safety or the safety of others. The tip had proven reliable only "in its tendency to identify a determinate person," and not in its "assertion of illegality" (*J.L.*, 529 US at 272), which was insufficient to justify a stop (*id.*; *see Moore*, 6 NY3d 496 [anonymous tip regarding a dispute involving an 18-year-old black male at a specified location did not furnish reasonable suspicion]).

One of the officers asked defendant if everything was okay, and he replied in the affirmative. Defendant then attempted to pass by the officers and exit the store. He was prevented from exiting when one of the officers "sidestepped to [his] right," in order to "prevent [defendant] from leaving the store." The officer testified at the hearing that they "decided to frisk [defendant] for [their] safety, since it came over as male with a firearm and he fit the description." They walked defendant to the counter, which was 5 to 10 feet away. Defendant put his hands on the counter, and the officers proceeded to frisk him. The officer testified that defendant placed his hand inside his jacket pocket, whereupon he used force to pull defendant's wrist from the pocket. The officer testified that when he grabbed defendant's wrist a silver firearm fell to the ground.

The People argue that defendant's action in putting his hand in his pocket gave rise to reasonable suspicion. The problem

with this argument is that defendant was already seized prior to this point. He was seized when the officers, having no more than a level two right to inquire, blocked his exit from the bodega, walked him to the counter, and directed him to put his hands on the counter. Defendant's reaching into his own pocket after the illegal seizure and frisk did not validate a police intrusion that was not justified at its inception (*J.L.*, 529 US at 271). Only information known to the police at the time of an arrest is relevant for determining whether the arrest was justified. "Where a police encounter is not justified in its inception, it cannot be validated by a subsequently acquired suspicion" (*see People v William II*, 98 NY2d 93, 98 [2002]).

Defendant's attempt to leave the store did not have the effect of increasing the officer's level of suspicion and escalating the encounter. There was no testimony that defendant ran, walked hurriedly, or even that he walked away in an evasive or suspicious manner. As the Court of Appeals has had occasion to observe, "If merely walking away from the police were sufficient to raise the level of suspicion . . . the common-law right of inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-law right of inquiry was justified" (*Moore*, 6 NY3d at 500 [internal citation omitted]; *see also*

People v Major, 115 AD3d 1, 6 [1st Dept 2014] [walking at a hurried pace, without more, is insufficient to constitute flight]).

People v Arias (142 AD3d 874, 875 [1st Dept 2016], *lv denied* 28 NY3d 1070 [2016]), is distinguishable on its facts. *Arias* did not hold that an anonymous caller's present sense impressions alone suffice to establish reasonable suspicion; in *Arias*, we stressed that an anonymous tip "was accompanied by several indicia of reliability," including predictive information which proved reliable (*id.* at 875). Indeed, *People v Vasquez* (88 NY2d 561 [1996]), cited by *Arias*, emphasizes that the "key components" of the present sense impressions, a member of the res gestae family of exceptions, "are contemporaneity *and corroboration*" (*id.* at 575 [emphasis added]). There was no such corroboration in this case.

Accordingly, the judgment of the Supreme Court, Bronx County (Efrain Alvarado, J.), rendered June 22, 2015, as amended July 13, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and

sentencing him, as a second felony offender, to a term of 2½ to 5 years, should be reversed, on the law and the facts, and the indictment dismissed.

All concur.

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered June 22, 2015, as amended July 13, 2015, reversed, on the law and the facts, and the indictment dismissed.

Opinion by Manzanet-Daniels, J. All concur.

Acosta, P.J., Richter, Manzanet-Daniels, Tom, Moulton, JJ.

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

ENTERED: APRIL 30, 2019

CLERK