SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 10, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10066 Juan Garcia, Index 162400/14
Plaintiff-Appellant, 595335/15
595215/17

-against-

SMJ 210 West 18 LLC, et al.,
Defendants-Respondents,

Bay Bridge Enterprises LT, et al.,
Defendants.

- - - - -

SMJ 210 West 18 LLC, et al.,
Third-Party Plaintiffs,

-against-

S&E Bridge & Scaffold LLC,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

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

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Benjamin Gonson of counsel), for SMJ 210 West 18 LLC, respondent.

Wood Smith Hennig and Berman, LLP, New York (Patrick James of counsel), for JM3 Construction LLC, respondent.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for S&E Bridge & Scaffold LLC, respondent.

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Order, Supreme Court, New York County (Robert D. Kalish,

J.), entered November 30, 2018, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, and granted the cross motions of defendants-respondents for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1) and 241(6), unanimously reversed, on the law, without costs, plaintiff's motion granted and defendants-respondents' cross motions denied.

The record reflects that plaintiff was on a temporary exterior platform on the 21st floor of a building under construction, when he was struck and injured by a falling piece of DensGlass, an exterior sheetrock material, which matched the size of a missing piece of sheetrock one floor above. Plaintiff was in the process of dismantling the bridge that was linked to the exterior hoist elevator.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim based on the record evidence that a piece of the exterior facade of the building still under construction fell on him, that workers were performing patch work to the DensGlass on the floors above plaintiff, and that the exterior facade was not complete (*see Hill v Acies Group, LLC*, 122 AD3d 428 [1st Dept 2014). Furthermore, defendants' cross motions for summary judgment dismissing the § 241(6) claim should have been denied because

there is a triable issue of fact as to whether the area where the accident occurred was "normally exposed to falling material or objects" requiring that plaintiff be provided with “suitable overhead protection” (*see* 12 NYCRR 23-1.7[a][1]; *Clarke v Morgan Contr. Corp.*, 60 AD3d 523, 524 [1st Dept 2009]).

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

ENTERED: DECEMBER 10, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kern, JJ.

10404 In re E.D.,
Petitioner-Appellant,

-against-

T.D.,
Respondent-Respondent.

____

Blank Rome LLP, New York (Brett S. Ward of counsel), for appellant.

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

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Order, Family Court, New York County (Jonathan H. Shim, J.), entered on or about March 28, 2019, which denied petitioner mother's objection to an order, same court (Support Magistrate Lewis A. Borofsky), entered on or about April 4, 2018, which, after a trial, dismissed her petition for downward modification of child support, unanimously affirmed, without costs.

We accord great deference to the findings of the Support Magistrate, who is in the best position to assess the credibility of the witnesses and the evidence presented (*Matter of Minerva R. v Jorge L.A.*, 59 AD3d 243 [1st Dept 2009]).

The Family Court properly found that the mother failed to produce evidence substantiating her testimony about the extent to which the parties' son's medical care impacted upon her ability to seek employment.

A court is not required, in evaluating grounds for modification, to accept a parent's testimony that he or she is prevented from working (*see e.g. Matter of Angela B. v Gustavo D.*, 150 AD3d 471 [1st Dept 2017]; *Matter of Elyorah E. v Ian E.*, 127 AD3d 449 [1st Dept 2015]; *Matter of Virginia S. v Thomas S.*, 58 AD3d 441 [1st Dept 2009]; *Matter of Maria T. v Kwame A.*, 35 AD3d 239 [1st Dept 2006]).

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

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

ENTERED: DECEMBER 10, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Webber, Kern, JJ.

10412 Jemima O., individually and as a parent and natural guardian of J.N. and R.N., Plaintiff-Appellant, Index 154971/17

-against-

Schwartzapfel, P.C., et al., Defendants-Respondents,

John Does 1-3, Defendants.

Quainton Law, PLLC, New York (Eden P. Quainton of counsel), for appellant.

Cruser, Mitchell, Novitz, Sanchez, Gaston & Zimet, LLP, Farmingdale (Rondiene E. Novitz of counsel), for respondents.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about March 12, 2018, which granted defendants Schwartzapfel, P.C. and Daniel Poli's motion to dismiss the complaint as against them, unanimously affirmed, without costs.

The motion court correctly found that plaintiff's causes of action for legal malpractice, violation of Judiciary Law § 487, negligent misrepresentation and negligent infliction of emotional distress were time-barred as they accrued on September 10, 2013, at the latest, and plaintiff did not commence the instant action until May 31, 2017, over eight months after the applicable three-year statute of limitations had already expired (*see* CPLR 214;

Benjamin v Allstate Ins. Co., 127 AD3d 1120, 1121 [2d Dept 2015]; *Colon v Banco Popular N. Am.*, 59 AD3d 300, 300 [1st Dept 2009]).

Plaintiff's claim for breach of fiduciary duty was also properly dismissed as untimely pursuant to the applicable three-year statute of limitations because plaintiff sought only money damages and not equitable relief (*see Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]).

Plaintiff's argument that the statute of limitations was tolled by reason of disability or insanity pursuant to CPLR 208 was properly rejected by the motion court, without a hearing. Plaintiff failed to put forth any evidence that would support a finding of disability or insanity sufficient to show that plaintiff was unable to function in society (*see Santo B. v Roman Catholic Archdiocese of N.Y.*, 51 AD3d 956, 958 [2d Dept 2008]). In particular, she did not submit any doctors' affidavits or medical records documenting the severity of her condition (*see Matter of Brigade v Olatoye*, 167 AD3d 462 [1st Dept 2018]; *Santana v Union Hosp. of Bronx*, 300 AD2d 56 [1st Dept 2002]). Moreover, the record does not show that plaintiff was incapable of protecting her legal rights despite her mental health diagnosis (*see Burgos v City of New York*, 294 AD2d 177, 178 [1st Dept 2002]). Although we have some concerns about the actions of plaintiff's prior counsel, this does not alter the conclusion

that this action is time-barred.

The complaint fails to state a cause of action for either negligent misrepresentation or negligent infliction of emotional distress on behalf of the children. There is no allegation that defendants made any representation to the children or that defendants engaged in any extreme and outrageous conduct (*see Hernandez v Central Parking Sys. of N.Y., Inc.*, 63 AD3d 411 [1st Dept 2009]).

The motion court correctly found that the complaint fails to state a cause of action for fraudulent misrepresentation because plaintiff's claimed losses resulted from defendants' unauthorized withdrawal of her appeal and not from their purported false statements as to their ability to handle administrative proceedings (*see Friedman v Anderson*, 23 AD3d 163, 167 [1st Dept 2005].

Because plaintiff has put forth no specific argument on

appeal as to her cause of action for intentional infliction of emotional distress, such claim is deemed abandoned.

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: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10518 The People of the State of New York, Ind. 5299/10
Respondent,

-against-

Donnell Baines,
Defendant-Appellant.

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

Donnell Baines, appellant pro se.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley and Ruth Pickholz, JJ. at colloquies on self-representation; Wiley, J. at speedy trial motion and suppression proceedings; Patricia M. Nuñez, J. at jury trial and sentencing), rendered April 1, 2013, as amended April 2, 2013, convicting defendant of rape in the first degree, criminal sexual act in the first degree, sex trafficking in the first degree (three counts), promoting prostitution in the second and third degrees, assault in the second degree (three counts), sexual abuse in the first degree, unlawful imprisonment in the second degree and coercion in the first degree, and sentencing him, as a predicate sex offender, to an aggregate term of 50 years, unanimously modified, on the law, to the extent of vacating the second-degree promoting

prostitution conviction and dismissing that charge, and further modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentence on the rape conviction run concurrently with all other sentences, and directing that the sentences on the convictions of unlawful imprisonment in the second degree and coercion in the first degree run consecutively to all other sentences, resulting in an aggregate term of 28½ to 32 years, and otherwise affirmed.

Defendant was not deprived of his right to counsel when the court allowed him to proceed pro se at pretrial proceedings. Initially, it appears that defendant did not represent himself at the time of the grand jury presentation. Defendant subsequently represented himself, with the aid of a legal advisor, through various stages of the case up through the suppression hearing, and then chose to be represented by counsel at trial. The record includes the combined effect of several waiver colloquies conducted by two justices, along with other indicia of defendant's ability to represent himself and awareness of the disadvantages of doing so, as well as the seriousness of the case. Viewed as a whole, this record establishes that defendant's request to waive his right to counsel was unequivocal, and that he made a knowing, intelligent and voluntary waiver (*see People v Providence*, 2 NY3d 579, 580-81

[2004]). Accordingly, we find no basis for reversal in this regard.

The court properly denied the speedy trial motion that is at issue on appeal. We agree with defendant that the court should not have excluded the entire 56-day period beginning on February 26, 2010, because, as the People conceded, after the suppression hearing had been granted 30 days would have sufficed as a reasonable time to prepare given the particular circumstances of the case. However, the court properly disregarded the People's erroneous concession (*see e.g. People v Wells*, 16 AD3d 174 [1st Dept 2005], *lv denied* 5 NY3d 796 [2005]) that the period from July 23 to September 8, 2010 was includable (which was not the type of factual concession governed by CPL 210.45[4][c]). The record establishes that this delay was attributable to the absence of defense counsel at a stage when defendant was not yet appearing pro se (*see e.g. People v Bahadur*, 41 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 920 [2007]). When the additional 26 days with regard to the first adjournment at issue are added to the 150 days that are undisputedly includable, the total falls short of the applicable 182-day limit.

The only preserved aspect of defendant's challenges to evidence of uncharged crimes relates to certain text messages. We find that the texts should not have been admitted, but that

the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]. The remaining challenges to uncharged crimes evidence are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see generally People v Dorm*, 12 NY3d 16, 19 [2009]). To the extent any of this evidence should have been excluded, any error was likewise harmless. Defendant's ineffective assistance of counsel claim relating to these issues is unreviewable on direct appeal. In the alternative, to the extent the record permits review, we reject that claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The court provided meaningful responses to two jury notes (*see generally People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). These responses sufficiently addressed the jury's requests, and the court did not remove any contested elements from the jury's consideration.

We dismiss the count of promoting prostitution in the second degree as multiplicitous because it spans the same time period as the sex trafficking counts and does not require proof of any other facts (*see People v Alonzo*, 16 NY3d 267, 269 [2011]).

We find the sentence excessive to the extent indicated.

We have considered and rejected the remaining arguments contained in defendant's main and pro se supplemental briefs.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10519 Monte Stephens, Index 303716/14
Plaintiff-Appellant,

-against-

Isabella Geriatric Center, Inc., et al.,
Defendants-Respondents.

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Keenan & Bhatia, LLC, New York, (Edward (E.E.) Keenan of counsel), for appellant.

Peckar & Abramson, P.C., New York (Kevin J. O'Connor of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 4, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims of retaliation in violation of the New York State and New York City Human Rights Laws, unanimously affirmed, without costs.

Plaintiff asserts that he was terminated from his employment at defendant Isabella Geriatric Center as a certified nursing assistant shortly after he stated during an August 2011 performance evaluation meeting that defendant Mariam Paul, who was the director of nursing at Isabella, was "very biased" and that he intended to take a copy of his evaluation "to Human Rights." Assuming that plaintiff made out a prima facie case of

retaliation based on these facts (*see Albunio v City of New York*, 16 NY3d 472, 477-479 [2011]), defendants met their burden of proffering legitimate, nondiscriminatory reasons for the termination (*see Bantamoi v St. Barnabas Hosp.*, 146 AD3d 420 [1st Dept 2017]; *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553–554 [1st Dept 2010]). Defendants submitted numerous written statements and letters from plaintiff's coworkers to Isabella, spanning more than 10 years, complaining of plaintiff's insubordinate and aggressive behavior in the workplace, which made them feel threatened. He had previously been suspended for such conduct in 2005, and a nursing supervisor also testified that she had to move several staff members to other units, upon their request, as they did not want to work with plaintiff.

In response, plaintiff failed to show that defendants' reasons for suspending and ultimately terminating his employment were mere pretexts (*see Bantamoi*, 146 AD3d at 421; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 46 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Plaintiff did not attempt to refute any of the evidence defendants submitted, which showed that before he was terminated he had engaged in years of inappropriate behavior in violation of the Employee Handbook.

We have considered plaintiff’s remaining arguments, including that further discovery was necessary, and find them unavailing.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10520-
10520A-
10520B In re Anthony V. L.,
Petitioner-Appellant,

-against-

Bernadette R.,
Respondent-Respondent.

____

Law Offices of Lauren N. Mallin, New York (Lauren N. Mallin of counsel), for appellant.

Blank Rome LLP, New York (Brett S. Ward of counsel), for respondent.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 11, 2013, which, to the extent appealed from as limited by the briefs, denied petitioner father's objection to the Support Magistrate's June 2013 order denying petitioner's motion to vacate the parties' 2008 order of child support, unanimously affirmed, without costs. Order, same court (Stewart H. Weinstein, J.), entered on or about September 18, 2017, which, to the extent appealed from as limited by the briefs, denied petitioner's objection to the Support Magistrate's June 2017 order denying petitioner's request to vacate the 2008 order of child support and for a downward modification, and granted petitioner's objection to the extent of remanding the issues of petitioner's entitlement to a health insurance credit

and downward modification of child care costs to the Support Magistrate for further findings or hearings, unanimously modified, to direct that the Support Magistrate also issue further findings as to whether the child support obligation should be reduced in accordance with respondent mother's actual housing costs and, if any reduction is warranted, whether it should be made retroactive and the extent to which it should be applied as a credit against future add-on expenses, and otherwise affirmed, without costs. Order, same court and Judge, entered on or about September 18, 2017, which, to the extent appealed from as limited by the briefs, directed petitioner to pay 50% of respondent's requested counsel fees, unanimously affirmed, without costs.

As a preliminary matter, petitioner's appeal from the order entered on or about September 11, 2013 is timely, because the record does not show that respondent ever served petitioner with notice of entry of that order, and therefore the time to notice the appeal never began to run (*see Matter of Reynolds v Dustman*, 1 NY3d 559 [2003]; CPLR 5513[a]).

Family Court providently exercised its discretion in declining to vacate the 2008 child support order pursuant to CPLR 5015(a)(3). Petitioner alleged that respondent engaged in fraud by inflating the child's rent, health care premiums, and child

care costs. He sought vacatur based upon "new evidence" in the form of subpoenaed documents, including the mother's lease from 2008, her employment records, and her tax returns. However, he did not show that this "new evidence" could not have been found earlier with due diligence (*see Bongiasca v Bongiasca*, 289 AD2d 121, 122 [1st Dept 2001]). In addition, petitioner failed to move to vacate the order within a reasonable time, having waited approximately four years before seeking relief (*see Mark v Lenfest*, 80 AD3d 426, 426 [1st Dept 2011]).

Petitioner also argues that Family Court should have awarded him immediate restitution or credit for the overpaid rent, health insurance premiums, and child care, rather than remanding to the Support Magistrate for further factual findings as to respondent's actual health care premiums and the reasonableness of child care costs. We find that the Support Magistrate and the court should have considered a downward modification of petitioner's prospective child support obligations. Petitioner demonstrated at the hearing that there had been a substantial change in circumstances based upon respondent's actual housing costs. However, additional findings of fact by the Support Magistrate are necessary to determine respondent's actual housing costs, whether petitioner is entitled to overpayment credit to be applied to future add-on expenses (*see Coull v Rottman*, 35 AD3d

198, 200-01 [1st Dept 2006], *appeal dismissed* 8 NY3d 903 [2007]), and the amount of the credit, if any (*Matter of McGovern v McGovern*, 148 AD3d 900, 902 [2d Dept 2017]).

In light of the inconclusiveness of the record as to respondent's health insurance premium payments, Family Court properly determined that further findings by the Support Magistrate were needed to determine the amount of credit to which petitioner may be entitled for past overpayment of the premiums. In addition, the court properly remanded the matter to the Support Magistrate for a determination as to reasonable child care expenses. Petitioner's argument that he should be given full reimbursement of his child care costs is not supported by the evidence, which shows that the child has special needs and was not in school full-time until 2012.

Family Court providently exercised its discretion in awarding respondent 50% of her attorneys' fees (*see Matter of Anna Y. v Alexander S.*, 142 AD3d 864, 864-865 [1st Dept 2016]). The evidence shows that respondent is the non-monied party and that she was compelled to defend numerous allegations that were unrelated to the downward modification petition, including that

petitioner should be reimbursed for his voluntary payments for private school tuition and summer camp costs, as well as pointless motion practice. As Family Court noted, "At times . . . , [both parties'] advocacy bordered on frivolous."

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Webber, Kern, Oing, JJ.

10521 John Davis, et al., Index 805123/15
Plaintiffs-Appellants,

-against-

Samir Taneja, et al.,
Defendants-Respondents.

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Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, New York (Christopher J. Donadio of counsel), for appellants.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliot J. Zucker of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 20, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiffs' theory of liability in this action alleging medical malpractice relies on the assertion that plaintiff John Davis was affixed to the operating table before the table was flexed into position in preparation for a partial nephrectomy. Defendants made a prima facie showing that Davis was affixed to the table after the table was flexed, through plaintiff's medical records, which noted that his skin was intact after the nephrectomy. Defendants' expert urologist agreed with defendant doctors' testimonies that the patient's skin would have torn if

the table was flexed after the patient was affixed to it (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs' expert did not deny that plaintiff's skin would have been torn if he were affixed to the table before it was flexed, and plaintiffs did not submit evidence addressing the condition of Davis's skin after the surgery. Nor did plaintiffs identify any note in his medical records that indicated that his skin had been damaged. The operative report by Dr. Taneja is insufficient to raise an issue of fact, in light of the testimony that the report only listed the actions that occurred, not necessarily in chronological order, and the fact that the report clearly lists the placement of the Foley catheter out of order (*see DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 523 [1st Dept 2004]).

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: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10522 In re 247-253 West 116 LLC, Index 100541/17
Petitioner-Appellant,

-against-

New York State Division of Housing and Community Renewal, et al.,
Respondents-Respondents.

____

Sidrane, Schwartz-Sidrane, Perinbasekar & Littman LLP, Rockville Centre (Arun Perinbasekar of counsel), for appellant.

Mark F. Palomino, New York (Robert Ambaras of counsel), for New York State Division of Housing and Community Renewal, respondent.

Law Office of Stephen H. Palitz, New York (Stephen H. Palitz of counsel), for Constance Jones, respondent.

____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered July 5, 2018, denying the petition to annul a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated March 9, 2017, which assessed rent overcharges and imposed treble damages and attorneys' fees, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination that refinishing an existing bathtub in the subject apartment constituted repair or maintenance work rather than an Individual Apartment Improvement was rational (*see Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158 [1st Dept 1997]). Although

petitioner’s predecessor made various improvements to the apartment, DHCR did not make a finding that the bathtub refinishing was part of a renovation project. DHCR’s determination disallowing various items shown in quantities far greater than necessary for this one apartment was also rational.

DHCR properly relied on its inspector’s report in disallowing certain items that it found had not been installed (*see generally Matter of 333 E. 49th Assoc., LP v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 40 AD3d 516 [1st Dept 2007], *affd* 9 NY3d 982 [2007]). DHCR rationally concluded that the inspection report was reliable despite the passage of time between the work performed and the inspection (*see Matter of Pickman Realty Corp. v New York State Div. of Hous. & Community Renewal*, 299 AD2d 552 [2d Dept 2002]; *Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 204 AD2d 127 [1st Dept 1994]). Even assuming it was required to give petitioner notice of the inspection (*cf. Matter of Whitehouse Estates v New York State Div. of Hous. & Community Renewal*, 5 AD3d 190 [1st Dept 2004]), DHCR provided adequate notice by mailing the notice of inspection to an address where petitioner maintained an office (*see generally California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 150 [1st Dept 2012]).

DHCR’s calculation of the overcharge and treble damages was

not irrational and did not result in excessive damages. Petitioner's predecessor's failure to file a proper and timely annual rent registration statement in 2010 resulted in the rent being frozen at the level in effect on the date of the last preceding registration statement (*see* Administrative Code of City of NY § 26-517[e]; *Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 684 [1st Dept 2011]). The imposition of a rent freeze is a statutory requirement (*see Matter of 215 W 88th St. Holdings LLC v New York State Div. of Hous. & Community Renewal*, 143 AD3d 652, 653 [1st Dept 2016]). DHCR's imposition of treble damages was also rational, as petitioner failed to establish that the overcharge was not willful (*see* 9 NYCRR 2526.1[a][1]; *Matter of 125 St. James Place LLC v New York State Div. of Hous. & Community Renewal*, 158 AD3d 417 [1st Dept 2018]). In addition, many of the charges that DHCR disallowed consisted of items that either were shown in quantities far in excess of what was necessary for this one apartment or had never been installed at all. The calculations of the overcharge and imposition of treble damages were consistent with the governing regulations and were not excessive (*see generally Matter of Pamela Equities Corp. v Environmental Control Bd. of the City of N.Y.*, 171 AD3d 623, 624 [1st Dept 2019]).

DHCR providently exercised its discretion in awarding

attorneys' fees (*see* 9 NYCRR 2526.1[d]). The agency conducted a careful review of the documents submitted by respondent tenant demonstrating the time that counsel spent on this matter over the course of nearly 3½ years, as well as the nature of the services performed and the difficulties involved. DHCR's calculation of a reasonable hourly rate and the amount of time devoted to this matter was not irrational.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10523 The People of the State of New York, Ind. 3850/16
Respondent,

-against-

Michael Bunche,
Defendant-Appellant.

Janet E. Sabel, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham L. Clott, J.), rendered November 10, 2016,

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

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

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

ENTERED: DECEMBER 10, 2019

CLERK

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

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10524-
10524A A.P., an infant, by
Raysa R., etc., et al.,
Plaintiffs-Appellants-Respondents,

Index 350458/10

-against-

Charles Stolar, M.D.,
Defendant-Respondent-Appellant,

Jose Ruben Rodriguez, M.D., et al.,
Defendants-Respondents.

____

Scaffidi & Associates, New York (Anthony J. Scaffidi of counsel), for appellants-respondents.

Gordon & Silber, P.C., New York (Michael A. Bayron of counsel), for respondent-appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered on or about June 1, 2018, insofar as appealed from as limited by the briefs, dismissing the complaint as against defendants Jose Ruben Rodriguez, M.D., David Woodland, M.D., New York Presbyterian Hospital and Columbia University, unanimously affirmed, without costs. Order, same court and Justice, entered on or about May 22, 2018, to the extent it granted in part and denied in part defendant Charles Stolar, M.D.'s motion for summary judgment dismissing the complaint as against him, unanimously modified, on the law, without costs, to grant the

part of the motion that was denied, and appeal therefrom otherwise dismissed, without costs, as subsumed in the appeal from the judgment. The Clerk is directed to enter judgment dismissing the complaint as against Stolar.

In opposition to defendants' prima facie showing in support of their motions for summary judgment, plaintiffs failed to raise an issue of fact as to whether defendants departed from the accepted standard of care or whether any such departures were a proximate cause of injury. Their expert's opinion that defendants departed from the accepted standard of care in failing to replace an NG tube, timely recognize a bowel obstruction, and otherwise timely diagnose and treat the infant plaintiff lacks a factual basis in the record and is therefore insufficient to defeat summary judgment (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10525 Mitra Shapiro, Plaintiff-Appellant, Index 652282/18

-against-

Gail Sankarsingh, Defendant-Respondent.

____

Law Office of Nelson Farber, New York (Nelson Farber of counsel), for appellant.

Heiberger & Associates, P.C., New York (Lawrence C. McCourt of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered October 12, 2018, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, an independent contractor with nonparty Douglas Elliman (DE), brought this action against defendant, a licensed real estate broker with DE, based on an alleged oral agreement concerning commissions. Plaintiff signed a form acknowledging receipt of the DE policy manual and that she was obligated to follow the corporate policies and rules. The policy manual includes an arbitration clause requiring "any disputes between DE Agents relating to commissions" to be resolved through the company's internal arbitration procedures and imposing a six-month limitations period. Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (5), citing those

policy manual provisions.

By signing the aforementioned form, plaintiff agreed to be bound by the terms of the DE policy manual, including the arbitration provision (*see Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). The manual plainly requires disputes between agents to be resolved by internal arbitration (*see Casper v Cushman & Wakefield*, 74 AD3d 669, 670 [1st Dept 2010], lv dismissed 16 NY3d 766 [2011]). Although defendant is not a signatory to the arbitration agreement in the DE policy manual, she can enforce it as a third-party beneficiary (*see generally Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]).

Matter of Waldron (Goddess) (61 NY2d 181 [1984]) does not avail plaintiff. In that case, the parties were two employees of the same real estate concern. The arbitration agreement in the employment contract provided for internal arbitration when the parties to the dispute had mutually consented to it. As only one of the parties had a contract with the employer, there was no mutual consent to arbitration. The arbitration agreement in the one employee's contract could not be extended, by construction or implication, to include the other employee, who was not a party to the contract (*id.* at 184-185).

Plaintiff's remaining contentions, including that defendant

should be estopped to rely on the contractual limitations period and is improperly relying on certain provisions of the DE policy manual while rejecting others, are subjects to be resolved in arbitration.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10526 In re Progressive Specialty Insurance Company, Petitioner-Respondent, Index 20000/17E

-against-

Pabel N. Tapia, Respondent-Appellant.

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

Picciano & Scahill, P.C., Bethpage (Albert J. Galatan of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 27, 2018, which denied respondent Pabel Tapia's motion to vacate an order, entered upon his default, permanently staying the parties' arbitration, unanimously affirmed, without costs.

In support of his motion to vacate, respondent failed to establish a reasonable excuse for his failure to appear for hearings and a meritorious defense (*see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). Respondent does not address the fact that he failed to appear on two hearing dates – November 15, 2017 and January 10, 2018. The record is devoid of any excuse or letters from counsel regarding respondent's failure to appear for the November hearing.

With respect to the January hearing, respondent contends that he did not receive notice of that court date from his counsel because he had moved to Connecticut and that when he learned of the date he could not take time off from work on short notice. While respondent submitted an affidavit to this effect, he submitted no evidence to corroborate that he was scheduled to work on that day and could not take time off. Regardless, it is uncontested that he knew about the court appearance before it took place and did not attend. Respondent's conduct demonstrates a pattern of willful neglect (*see Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539 [1st Dept 2016]).

Respondent failed to demonstrate a meritorious defense to the petition to stay arbitration, i.e., that he was covered under the insurance policy issued by petitioner to his cousin for the motor vehicle accident in which he allegedly was injured. The issue to be determined at the January hearing was whether respondent was a member of his cousin's household on the date of the accident. Respondent submitted documents to support his claim that he lived at the Castle Hill Apartment complex in the Bronx on the date of the accident. However, he did not establish that defendant's insured, Breilin Tapia-Feliz, was his family member or that Tapia-Feliz was living at the Castle Hill Apartment on the date of the accident.

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

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10527 Jeffrey Weinstein, Index 652365/14
Plaintiff-Respondent,

-against-

W.W.W. Associates, LLC, et al.,
Defendants-Appellants.

____

Michael B. Schulman & Associates, P.C., Melville (Michael B. Shulman of counsel), for appellants.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (David R. Brody of counsel), for respondent.

____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered July 27, 2018, which, inter alia, denied defendants' motion to dismiss or for summary judgment dismissing the complaint, and granted in part plaintiff's cross motion to amend the complaint, unanimously affirmed, with costs.

Given that defendants failed to show any significant prejudice from plaintiff's amendment of the complaint, the court providently exercised its discretion in allowing the amendment in part (*see Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Nor are the highly detailed allegations of the proposed amended complaint, which are supported by extensive documentary evidence, "palpably insufficient" (*see Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015]).

Defendants were unable to articulate any inequitable effect

a judgment in this case would have on nonparty 553 Shore Road Corp., given that the corporation was dissolved in 2011. Since, at most, 553 is a joint tortfeasor, it is not a necessary party (*see Amsellem v Host Marriott Corp*., 280 AD2d 357, 360 [1st Dept 2001]).

Defendants' failure to identify any of the supposed managing members on their tax returns, together with defendant Leon Weinstein's statement in the verified answer and at his deposition that he was the managing member of defendant W.W.W. Associates, LLC, and the contested role of defendants in the management of W.W.W. and its alleged managing members, presents an issue of fact as to whether Leon and defendant Kenneth Weinstein owed fiduciary duties to plaintiff (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *Arfa v Zamir*, 75 AD3d 443 [1st Dept 2010]).

We decline to reach defendants’ unpreserved arguments (*see Matter of Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545 [1st Dept 2013]).

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10528-
10528A The People of the State of New York, Respondent,

Ind. 5104/15
2634/16

-against-

Kenneth Spulka,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban 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 (Arlene Goldberg, J.), rendered April 19, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: DECEMBER 10, 2019

CLERK

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

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10529 The People of the State of New York, Ind. 2171/11
Respondent,

-against-

Darrell Rose,
Defendant-Appellant.

____

Janet E. Sabel, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered February 14, 2013, convicting defendant, after a jury trial, of robbery in the second degree, attempted assault in the second degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously affirmed.

The detective who was the People's sole witness at the suppression hearing testified that, after an investigation that included, among other things, a photographic identification of defendant, he issued an "I-card," indicating that defendant was wanted for a crime. Eleven days later, the detective and his partner obtained voluntary oral and written statements from defendant at the precinct. Defendant initially denied any knowledge of the incident, but after being shown portions of a

surveillance video, he admitted that he had an altercation with the complainant, but denied robbing him.

The court properly denied defendant's motion to suppress the statements he made to the detective following his lawful arrest. Although the arresting officer did not testify, the testimony of the detective who issued the I-card mandated the inference that defendant was arrested with probable cause by another officer, based on the issuance of that I-Card (*see generally People v Ellis,* 161 AD3d 539 [1st Dept 2018], *lv denied* 32 NY3d 1003 [2018]; *People v Midgette*, 115 AD3d 603, 605 [1st Dept 2014], *lv denied* 23 NY3d 965 [2014]; *People v Johnson*, 281 AD2d 183 [1st Dept 2001], *lv denied* 96 NY2d 903 [2001]). Defendant offered no evidence to support his speculation that he was randomly seized without cause and brought to the same precinct that was investigating his involvement in the subject robbery.

Furthermore, the Court providently exercised its discretion in allowing the detective to testify as to his opinion regarding the events depicted in the surveillance video. Initially, we note that the People correctly point out that defendant's argument is unpreserved because defense counsel sought no "additional curative relief" after the court sustained counsel's objection and gave a detailed curative instruction (*People v Davis*, 232 AD2d 227 [1st Dept 1996], *lv denied* 91 NY2d 890

[1998]), and we decline to review this claim in the interest of justice. In any event, the detective's testimony did not impair defendant's right to a fair trial and the court appropriately mitigated the risk of prejudice to defendant with a limiting instruction (*see People v Albaladejo*, 10 AD3d 582 [1st Dept 2004], *lv denied* 4 NY3d 740 [2004]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

We perceive no basis for reducing defendant's sentence.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10530 Board of Managers of Central Park Place Condominium, Plaintiff-Respondent, Index 118205/09

-against-

Hubert Potoschnig also known as Hubert W. Potoschnig, Defendant-Appellant.

Hubert Potoschnig, appellant pro se.

Schwartz Sladkus Reich Greenberg Atlas, LLP, New York (Debra M. Schoenberg of counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered March 21, 2018, which, insofar as appealed from as limited by the briefs, denied defendant's motion to vacate a money judgment and judgment of foreclosure and sale (same court and Justice), entered June 26, 2017, unanimously affirmed, with costs.

Defendant failed to preserve the arguments he makes addressed to the validity of the judgment. The arguments are also unavailing. As to the amount of the money judgment, which was stipulated to by the parties, defendant knew the amount of liability he would face if he defaulted and he willingly agreed to it (*see Katz v Robinson Silverman Pearce Aronsohn & Berman*, 277 AD2d 70, 73 [1st Dept 2000]).

Defendant's argument that the judgment represents a double recovery is unavailing, since the Real Property Law expressly permits condominium boards enforcing liens to seek both a money judgment and foreclosure (*see* Real Property Law § 339-aa). Finally, while the stipulation underlying the judgment did not on its face make provision for any deficiency judgment, it provided for entry of judgment in the form attached. That form of judgment, which became the judgment herein, laid out the provision for a deficiency judgment.

We note that defendant's attacks on the stipulation — to which he devotes the bulk of his brief — do not lie on this appeal from the denial of his motion to vacate the judgment (*see Nichols v Curtis*, 104 AD3d 526, 529 [1st Dept 2013]; *Jericho Group, Ltd. v Midtown Dev., L.P.*, 47 AD3d 463, 463 [1st Dept 2008], *lv dismissed* 11 NY3d 801 [2008]).

Defendant failed to address that portion of the order which

granted plaintiff's cross motion to the extent of referring the issue of attorneys' fees to a special referee to hear and report, and thereby abandoned that portion of his appeal (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]).

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10532 The Automobile Insurance Company of Hartford, Connecticut, Plaintiff, Index 160743/15

-against-

Jevan Damadian, et al., Defendants.

Jonathan Tang, Deceased, by and through Timothy Tang, etc., Defendant-Respondent.

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Jevan Damadian, Third-Party Plaintiff-Appellant,

-against-

North Country Insurance Company, Third-Party Defendant-Respondent.

____

Anderson Kill P.C., New York (Marshall Gilinsky of counsel), for appellant.

Finkelstein & Partners, LLP, Newburgh (George A. Kohl, II of counsel), for Jonathan Tang, respondent.

Smith Dominelli & Guetti LLC, Albany (Christopher A. Guetti of counsel), for North Country Insurance Company, respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 28, 2018, which to the extent appealed from as limited by the briefs, granted third-party defendant North Country Insurance Company's (NCIC) summary judgment motion seeking a declaration that it was not obligated to defend or indemnify third-party plaintiff Jevan Damadian in the underlying

wrongful death action, unanimously affirmed, without costs.

The underlying wrongful death action alleged that Damadian's negligence in not providing proper life preservers at his premises, and failure to properly check and maintain the kayaks he allowed the occupants renting his lake house to use on a nearby pond, caused Jonathan Tang to fall into the water and drown.

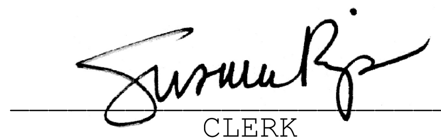
NCIC issued a property insurance policy to Damadian, which insured the premises the decedent rented during the relevant time period. Pursuant to the watercraft provision, the insurance policy excluded coverage for bodily injury "resulting from the use, occupancy, renting, loaning, or entrusting" of watercraft while not ashore.

"To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). In this matter, because the kayak was not ashore, the exclusion applied. Thus, NCIC has no

duty to defend or indemnify Damadian in the underlying action (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]; *Country-Wide Ins. Co. v Excelsior Ins. Co.*, 147 AD3d 407, 40 [1st Dept 2017], *lv denied* 30 NY3d 905 [2017]).

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

ENTERED: DECEMBER 10, 2019



CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10533 The City of New York, Index 400227/11
Plaintiff-Respondent,

-against-

George G. Sharp, Inc.,
Defendant-Appellant.

____

Rubin, Fiorella & Friedman LLP, New York (James E. Mercante of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered August 6, 2018, which denied defendant's motion to dismiss the complaint alleging professional malpractice as untimely, unanimously affirmed, without costs.

Defendant failed to meet its prima facie burden of establishing that plaintiff City of New York's time in which to sue has expired (*see Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). "A cause of action to recover damages against an architect for professional malpractice is governed by a three-year statute of limitations, which accrues upon termination of the professional relationship – that is, when it completes its performance of significant (i.e. non-ministerial) duties under the parties' contract" (*New York City Sch. Constr. Auth. v Ennead Architects LLP,* 148 AD3d 618, 618 [1st Dept 2017] [internal quotation marks

omitted]; CPLR 214[6]). Here, the City has sufficiently alleged that defendant completed its performance under the contract, and the parties' professional relationship terminated, on or about February 2, 2010, when defendant allegedly delivered its completed as-built designs. Because the City commenced this suit a year later, on or about January 28, 2011, its malpractice claim was timely (CPLR 214[6]).

The City's allegations, that defendant departed from accepted practice and failed to perform services in accordance with professional standards, sound in negligence. However, even if couched in contract, the City's claim still would be timely under CPLR 214(6) (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542 [2004]; *Risk Control Assoc. Ins. Group v Maloof, Lebowitz, Connahan & Oleske, P.C.*, 151 AD3d 527, 528 [1st Dept 2017], *lv dismissed* 32 NY3d 1196 [2019]; *compare Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704 [2018]).

We have considered defendant’s remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10534 The People of the State of New York, Ind. 2749/10
Respondent,

-against-

Alexis Laboy,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel) and Orrick, Herrington & Sutcliffe LLP, New York (Matthew L. Bush of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered May 4, 2013, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously affirmed.

Based on the trial record, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Initially, we note that defendant raised related ineffective assistance claims in an unsuccessful CPL 440.10 motion, and his motion for leave to appeal to this Court was denied. Accordingly, while defendant's claims are cognizable on direct appeal, our review is limited to

the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]), which fails to support a finding of ineffective assistance.

Defendant has not shown that counsel's alleged errors regarding the issue of the ability of the victim, who sustained a brain injury during the assault, to make an identification fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. To the extent the trial record permits review, it reveals that the decisions of counsel that defendant challenges on appeal were objectively reasonable and were not prejudicial, particularly where the principal identifying witness was not the victim, but a credible bystander who was acquainted with defendant.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 10, 2019

CLERK

Friedman, J.P., Kapnick, Kern, Oing, JJ.

10535N In re East River Fifties Alliance, Inc., et al., Index 157917/18
Petitioners-Appellants,

-against-

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

Sutton 58 Holding Company LLC,
Respondent.

Hiller PC, New York (Jason E. Zakai of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo DiSilvio of counsel), for City respondents.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun of counsel), for Sutton 58 Holding Company, LLC, respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 8, 2019, which, in this article 78 proceeding to annul a determination of the Board of Standards and Appeals of the City of New York, dated July 27, 2018, approving an application under Zoning Resolution § 11-331 to renew building permits and authorize an extension of time for the completion of a foundation of a residential tower on East 58th Street whose development was rendered noncompliant under a Zoning Amendment that became effective November 30, 2017, denied petitioners' motion for a preliminary injunction and temporary restraining order to halt construction of the building pending determination

of the petition to annul, unanimously affirmed, without costs.

The court correctly denied petitioners' motion for a preliminary injunction because petitioners failed to make the requisite clear showing of a likelihood of success on the merits of the petition to annul (*see CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC*, 168 AD3d 567 [1st Dept 2019]). In light of petitioners' failure to make such showing, it is unnecessary to reach the issues of irreparable injury and the balancing of the equities.

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

ENTERED: DECEMBER 10, 2019

CLERK