SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 17, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10124-
10124A McGraw-Hill Education, Inc.,
Plaintiff-Appellant-Respondent,

Index 655708/16

-against-

Illinois National Insurance Company,
et al.,
Defendants-Respondents-Appellants.

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Dykema Gossett PLLC, Washington, DC (Lewis K. Loss of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant-respondent.

Carlton Fields, P.A., New York (Robert Novack of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered on or about January 10, 2019, which denied plaintiff's motion for summary judgment declaring that defendants are obligated to provide insurance coverage in the underlying copyright actions, unanimously reversed, on the law, with costs, and the motion granted. Order, same court and Justice, entered on or about January 17, 2019, which denied defendants' motion for summary judgment declaring in their favor, unanimously affirmed, with costs. The Clerk is directed to enter judgment declaring

that defendants are obligated to provide insurance coverage in the underlying copyright actions.

Exclusions I and D of the insurance policies, which preclude coverage for claims arising out of a contract, do not apply here. For a claim to "arise" out of a contract, the existence of the contract must be the "but for" cause of the loss (*see Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]). Although the parties had license agreements, the licensors could have brought claims based on copyright regardless of whether a contract had ever been entered into; thus, the contract is not the but for cause of the loss (*see Bridge Metal Indus., LLC v Travelers Indem. Co.*, 559 Fed Appx 15, 19-20 [2d Cir 2014]).

Exclusion G, which precludes coverage for claims arising, as relevant here, out of intentional violation of law or gaining profit or advantage to which the insured is not legally entitled, does not apply. The relevant policy provision with regard to infringement of copyright is in the definition of damages, which bars coverage only where it is "judicially determined" that the violation was intentional and was carried out by a senior vice president, or someone more senior, of plaintiff. This specific clause controls over the general provision in exclusion G relating to intentional violations of law (*see e.g. Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1,

8 [1st Dept 1998] ["(I)f there is an inconsistency between a general provision and a specific provision of a contract, the specific provision controls"]).

Further, there has been no such judicial determination in the underlying actions. Defendants cannot litigate that issue in the coverage action (*see generally National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 6 Misc 3d 763, 776 [Sup Ct, NY County 2004], *affd* 25 AD3d 309 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]). Had defendants desired the right to litigate that issue here, they could have provided for it through appropriate language in the exclusion (*see e.g. Darwin Natl. Assur. Co. v Luzerne County Transp. Auth.*, 2016 WL 1242283, *4, 2016 US Dist LEXIS 41733, *13-14 [MD Pa., Mar. 30, 2016]).

Nor does the fortuity doctrine apply to bar coverage. The fortuity doctrine has been applied to insurance policies under which coverage is triggered by an "accident" or "occurrence" (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220 [2002]; *see also Chase Manhattan Bank v New Hampshire Ins. Co.*, 193 Misc 2d 580, 592 [Sup Ct, NY County 2002]). One of the express purposes of the policies in this case, however, was to provide coverage for a defined risk: "claims arising out of . . . infringement of common law or statutory copyright." Thus, invoking the fortuity doctrine would render that portion of the

policy illusory.

Although the issue is rendered moot by our ruling on the exclusions, we note that defendants' letters were effective to reserve their right to recoupment (*see generally United Specialty Ins. Co. v CDC Hous., Inc.*, 233 F Supp 3d 408, 414 [SD NY 2017]).

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

ENTERED: DECEMBER 17, 2019

CLERK

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10453N-
10453NA-
10453NB In re Kelly G.,
Petitioner-Appellant,

-against-

Circe H.,
Respondent-Respondent.

Index 309154/16

Warshaw Burstein, LLP, New York (Eric Wrubel of counsel), for appellant.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin of counsel), for respondent.

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered January 22, 2019, which, upon remand from this Court, (1) set forth criteria to establish equitable estoppel, and (2) granted respondent's cross motion for counsel fees to the extent of awarding respondent $200,000 in interim counsel fees without prejudice to further application, and reserving decision on respondent's application for outstanding counsel fees pending a hearing framed on the issue at a date to be determined, unanimously affirmed, without costs. Orders, same court and Justice, entered January 3, 2019, which, to the extent appealed from, directed petitioner to pay 100% of the costs of an attorney for the child and a neutral forensic evaluator, unanimously affirmed, without costs.

This case raises an issue of first impression for this Court, that is, whether in a proceeding to establish standing to assert parental rights in seeking visitation and custody under Domestic Relations Law §70 (*see generally Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1 [2016]), the court has discretion to direct the "more monied" party to pay the other party's counsel and expert fees under Domestic Relations Law § 237 before that party has been adjudicated a parent. We find that it does.

Domestic Relations Law § 237(b), which is a statutory exception to the general rule that each party is responsible for her own legal fees (*see Hooper Assoc., Ltd. v AGS Computers,* 74 NY2d 487, 491 [1989]), provides, in relevant part, that "upon any application . . . concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires . . . ." This statute, like Domestic Relations Law § 70, does not define the term "parent." In holding that Domestic Relations Law § 70 "permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation" (*Brooke*

S.B.,

28 NY3d at 27), the Court of Appeals focused on our courts' historic exercise of their inherent powers of equity to act in the best interests of children (*id.* at 23; *see also Debra H. v Janice R.*, 14 NY3d 576, 609 [2010][Ciparick, J., concurring], cert denied 562 US 1136 [2011]; N.Y. Const. art. VI, § 7[a]). The Court of Appeals also stressed that it "has gone to great lengths to escape the inequitable results dictated by a needlessly narrow interpretation of the term 'parent'" (*Brooke S.B.* at 24). Consonant with that approach, we conclude that highly inequitable results would flow in this case from permitting the party with far greater resources to seek custody as against the child's primary parent without allowing that parent to seek counsel fees. Without determining that she is a parent for purposes beyond the application of Domestic Relations Law § 237(b), we find that Domestic Relations Law § 237(b) must be read to permit the court to direct petitioner to pay respondent's counsel fees as necessary "to enable [her] to. . . defend the application. . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties."

Here, the motion court appropriately considered the income and resources of each party and the equities of this case and

properly exercised its discretion in granting respondent's cross motion for interim counsel fees to the extent of awarding her $200,000 and holding the balance of her requests for additional fees and past counsel fees in abeyance. Accordingly, we affirm the interim counsel fee award.

Petitioner further contends that the court's articulation of 11 estoppel factors to be considered at trial creates a heightened burden for her to meet by clear and convincing evidence when the appropriate analysis has already been well-established by precedent. We disagree.

As a preliminary matter, contrary to respondent's contention, we find that this portion of the order is appealable. Although there was no formal motion with respect to the court fashioning an equitable estoppel test, the issue was argued and briefed before the court, with counsel submitting legal memoranda regarding the appropriate factors. Under these circumstances, we determine that the estoppel factors were not issued by sua sponte order (*see generally Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 133 [2014]). Likewise, we reject respondent's contention that the estoppel factors, at best, constituted an advisory opinion since that portion of the order was directly related to the final determination of the merits of the case and, therefore, affected a substantial right, and was

appealable (*see Brown v State of New York*, 250 AD2d 314, 320 [3d Dept 1998]).

Turning to the merits, however, we do not find petitioner's arguments availing. Significantly, petitioner never specifically objected to the criteria enumerated by the motion court, although given the opportunity to do so, and, on appeal, she does not single out any one factor, but asserts that the test is unfair because she claims that she must prove each factor by clear and convincing evidence. Petitioner's position ignores the explicit language of the court's decision, which states that "[t]he ultimate determination of parenthood shall be predicated upon the best interests of the child" and "[i]n consideration thereof, the court will determine and consider *the extent to which* the petitioner, by clear and convincing evidence [met the court's equitable estoppel criteria]" (emphasis added). We view Supreme Court's list of criteria to be considered at the trial in this case as neither exclusive nor dispositive, and therefore consistent with the Court of Appeals' rejection of "the premise that we must now declare that one test would be appropriate for all situations, or that the. . . tests [proposed by the litigants and amici] are the only options that should be considered" (*Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 27 [2016]).

Given that the factors enumerated by the motion court

encompass criteria proposed by both parties and closely track evidence relied upon in other cases (*see e.g. Matter of Shondel J. v Mark D.*, 7 NY3d 320 [2006]; *Matter of Chimienti v Perperis*, 171 AD3d 1047 [2d Dept 2019], *lv denied* 33 NY3d 912 [2019]), petitioner's position that she is being subjected to a stringent test in which she must definitively "prove" every factor is unpersuasive. Moreover, the motion court specifically expressed concern about creating a "heightened legal barrier" or "any unique challenge" for nontraditional families, and, to that end, noted that it "remains available to address any objection which may come to light as this matter proceeds." The motion court further noted that it identified estoppel factors at the parties' urging "in order that any appointed forensic expert, as well as all others concerned with the orderly progression of this matter, [may] be properly guided." Under these circumstances, we find that the estoppel factors listed by the court are appropriate for consideration at trial in this case, and should not be disturbed.

Finally, petitioner appeals from separate orders appointing an attorney for the child and a neutral forensic evaluator, to the extent that they directed her to pay 100% of their costs, subject to reallocation. The court, as parens patriae, has authority to direct petitioner to pay the costs associated with the attorney for the child (*see People ex rel. KM v SF*, 31 Misc

3d 505, 511-512 [Sup Ct, NY County 2011]). The function of the neutral forensic evaluator is to assist the court in deciding what is in the best interests of the child. Accordingly, the court may also exercise its parens patriae authority to allocate payment of the neutral forensic evaluator as between the parties. In light of the disparate financial positions of the parties, we find that the motion court appropriately exercised its discretion in allocating the fees, particularly since each order is subject to reallocation.

We have considered the parties' remaining contentions and find them either unavailing or academic in light of our determination.

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

ENTERED: DECEMBER 17, 2019

CLERK

Mazzarelli, J.P., Webber, Singh, Moulton, JJ.

10578 The People of the State of New York, Ind. 332/12
Respondent,

-against-

Paul Davidson,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Diane Kiesel, J.), rendered April 28, 2014, convicting defendant, after a jury trial, of attempted murder in the second degree, burglary in the first degree (three counts), assault in the second degree (two counts) and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

A Facebook photograph of defendant holding two handguns at a shooting range was not sufficiently authenticated under the standards and methods of authentication discussed in *People v Price* (29 NY3d 472 [2017]). However, the error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). We find it unnecessary to address any other issues relating to the admissibility of the

photograph.

The court providently exercised its discretion in admitting evidence that defendant owed $15,000 in child support arrears to his estranged wife, one of the victims. The evidence was relevant to defendant's alleged motive (*see generally People v Bailey*, 32 NY3d 70, 83 [2018]), and its prejudicial impact did not outweigh any probative value.

Defendant did not preserve his arguments concerning the court's charge and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The court's alibi charge sufficiently conveyed the principle that the People have the burden of disproving an alibi defense beyond a reasonable doubt (*see People v Victor*, 62 NY2d 374 [1984]). When defense counsel objected to the court's expanded identification charge on the ground that defendant was claiming he had been falsely accused by his relatives rather than

misidentified, the court retracted that charge with a curative instruction that met with counsel's satisfaction. We find no possibility of confusion or prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10579 Jane Biondi Munna, Index 151405/17
Plaintiff-Respondent,

-against-

Leslie Axman, et al.,
Defendants-Appellants,

Ronald Lawrence Crane,
Defendant.

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Cole Hansen Chester LLC, New York (Michael S. Cole of counsel), for appellants.

Profeta & Eisenstein, New York (Jethro M. Eisenstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about June 27, 2019, which, to the extent appealed from, denied defendants Leslie Axman and Douglas Elliman Real Estate's motion for summary judgment dismissing the causes of action for breach of fiduciary duty, unanimously affirmed, without costs.

Plaintiff's omission of an affidavit in opposition to defendants' motion does not require that the facts in defendants' affidavit be deemed admitted, because defendants submitted plaintiff's affidavit and deposition testimony, which indicate the existence of issues of fact (*Connell v Buitekant*, 17 AD2d 944 [1st Dept 1962]).

Plaintiff stated in her affidavit and at deposition that defendant Axman failed to disclose that she represented both plaintiff, the purchaser of an apartment, and the seller of the apartment. While Axman averred that she told plaintiff that she was representing the seller, she admitted that she did not make the required statutory disclosure about "the possible effects of dual representation, including that by consenting to the dual agency relationship the buyer and seller are giving up their right to undivided loyalty" (Real Property Law § 443[4][a]; *see Rivkin v Century 21 Teran Realty LLC*, 10 NY3d 344, 353-354 [2008]; *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]; *John J. Reynolds, Inc. v Snow*, 11 AD2d 653 [1st Dept 1960], *affd* 9 NY2d 785 [1961]).

Contrary to defendants' contention, plaintiff provided sufficient proof of damages; her bank appraisal included six comparables, five of which were located in the subject building

(*see Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992]).

Defendants' argument that plaintiff committed perjury is unpreserved and in any event unavailing.

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10580 The People of the State of New York, Respondent, Ind. 5272/14

-against-

Pablo Martinez-Jiminez, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

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Judgment, Supreme Court, New York County (Gilbert C. Hong, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered April 21, 2017, convicting defendant of murder in the second degree and assault in the second degree, and sentencing him to an aggregate term of 25 years to life, 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 determinations concerning credibility and identification. Defendant's homicidal intent could be reasonably inferred from his acts of repeatedly kicking and stomping the victim in the head and body (*see e.g. People v Davis*, 149 AD3d 451, 452 [1st Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

The court properly denied defendant's suppression motion. The police had reasonable suspicion justifying a stop, and their initial stop of defendant did not constitute an arrest requiring probable cause. Late at night, the police received a radio message that a fight was in progress between two men at a bus stop, and that the 911 caller was at the scene and still on the phone. Upon arriving a few minutes later, they saw a man on a phone pointing toward the bus stop saying, "[T]here it is, there it is." Defendant, the only other person in view, was running away from the bus stop. This combination of circumstances provided reasonable suspicion that defendant was involved in an assault (*see e.g. People v Cumberbacths*, 250 AD2d 505 [1st Dept 1998], *lv denied* 92 NY2d 895 [1998]; *see also People v Rosa*, 67 AD3d 440 [1st Dept 2009], *lv denied* 14 NY3d 773 [2010] [pointing as significant nonverbal accusation]).

We need not reach the issue of whether the court providently exercised its discretion in admitting testimony that the victim said, in effect, "Help, this guy wants to kill me." Any error in the admission of such testimony was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10581 Norddeutsche Landesbank Girozentrale, et al., Plaintiffs-Respondents, Index 651695/15

-against-

Lynn Tilton, et al., Defendants-Appellants.

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Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellants.

Berg & Androphy, New York (Michael M. Fay of counsel), for respondents.

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Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about August 20, 2019, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Summary judgment is precluded by issues of fact as to whether plaintiffs' losses were proximately caused by defendants' alleged fraud (*see Basis PAC-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 149 AD3d 146, 149 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017]).

Further, the facts do not present the rare circumstance in which the issue of reasonable reliance can be resolved at the summary judgment stage of a fraud case (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 99 [1st Dept 2006], *lv denied* 8 NY3d

804 [2007]). It is true that "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring" (35 AD3d at 100) and that "when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it" (*id.*). However, in a prior appeal in this case, this Court found that much of the information and disclosures that defendants contend triggered a duty of inquiry beyond the inquiry that plaintiffs undertook "can be interpreted in a myriad of ways and does not facially clash with plaintiffs' position that, even having some knowledge that the Funds had an equity component to them, they could not have known before the SEC proceeding the extent to which defendants used plaintiffs' investment to acquire and control the Portfolio Companies, or otherwise had an obligation, based on that evidence, to further investigate" (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 161-162 [1st Dept 2017]). In the instant motion, defendants did not cite any evidence that surfaced thereafter in discovery that would warrant a different conclusion.

Similarly, the evidence adduced in discovery as to plaintiffs' knowledge that the Zohar Funds included equity

interests in distressed companies does not eliminate issues of fact as to whether the information plaintiffs had was sufficient to place them on inquiry notice of the alleged fraud before May 2013, and therefore does not permit a conclusion as a matter of law that the fraud claim is barred by the statute of limitations (*see Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 316 [1st Dept 2006]).

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10583- Index 160286/17
10583A In re Judicial Watch, Inc.,
Petitioner-Appellant,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

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Judgment, Supreme Court, New York County (Verna L. Saunders, J.), entered on or about August 30, 2018, insofar as appealed from as limited by the briefs, denying so much of the petition as sought to compel respondents to disclose records pertaining to an unsolved 1972 homicide pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about May 11, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Respondents properly withheld the requested materials pursuant to the exemption to FOIL for documents that "are compiled for law enforcement purposes and which, if disclosed,

would . . . interfere with law enforcement investigations" (Public Officers Law § 87[2][e][i]). They "identif[ied] the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents" (*Matter of Lesher v Hynes*, 19 NY3d 57, 67 [2012]). Respondents submitted an affidavit by a police captain setting forth information obtained from the detective leading an active, ongoing investigation into the homicide, which included receiving tips from informants and conducting interviews of potential witnesses (*see Matter of Loevy & Loevy v New York City Police Dept.*, 139 AD3d 598 [1st Dept 2016]). Petitioner's submission of an affidavit by a retired detective who had previously participated in investigating the case and who set forth generalized hearsay statements by others about the investigation does not present a basis for rejecting the captain's affidavit as to the ongoing investigation. Respondents established that disclosing the records sought could interfere with the investigation by compromising the apprehension of perpetrators (*see Matter of Lesher*, 19 NY3d at 67-68; *Matter of Loevy & Loevy*, 139 AD3d at 599) or deterring witnesses from cooperating with the police (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277-278 [1996]).

It does not avail petitioner to suggest that redactions could minimize such risks. Redactions to records sought under FOIL are available only under the personal privacy exemption (*Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 569 [2018]; Public Officers Law § 87[2][b]).

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10584-
10585-
10586-
10587 In re Kevon L.,

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

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Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for presentment agency.

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Orders of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 12, 2017 and March 13, 2019, which adjudicated appellant a juvenile delinquent, upon fact-finding determinations that he committed acts that, if committed by an adult, would constitute the crimes of menacing in the second degree (two counts), criminal possession of a weapon in the fourth degree, petit larceny and criminal possession of stolen property in the fifth degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him with the Close to Home Program for concurrent periods of one year, unanimously affirmed, without costs.

Initially, there is no basis for disturbing the court's credibility determinations regarding the suppression ruling and the three fact-finding determinations challenged on appeal. Given the testimony credited by the court, we conclude that appellant's suppression motion was properly denied, and that the fact-finding determinations were based on legally sufficient evidence and were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Regarding the November 19, 2016 incident, the court properly denied appellant's motion to suppress a knife. The description of the perpetrator of a larceny was sufficiently specific, when combined with the close temporal and spatial proximity between the larceny and the police encounter as well as appellant's acknowledgment to the police of his awareness of the larceny, to provide reasonable suspicion justifying a stop and detention for the purpose of identification (*see e.g. Matter of Joshua D.*, 165 AD3d 540, 541 [1st Dept 2018]). The police testimony also established that appellant was searched pursuant to a lawful arrest only after being identified by the victim of the larceny.

Regarding the October 14 and November 16, 2016 incidents, the evidence established all the elements of second-degree menacing (Penal Law § 120.14[1]). The record supports inferences that in both instances appellant's display of knives caused the

victims to fear physical harm, that appellant intended to cause such fear, and that the knives were dangerous instruments.

Regarding the January 22, 2017 incident, appellant's intent to permanently deprive the victim of property was readily inferable from his conduct and statements during the incident.

We have considered and rejected appellant's remaining arguments regarding each of the orders on appeal.

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10588 The People of the State of New York, Ind. 3678/13
Respondent,

-against-

Frank Goldstein,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Derek M. Ciulla of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Eugene Oliver, J. at sentencing), rendered December 17, 2015,

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

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

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

ENTERED: DECEMBER 17, 2019

CLERK

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

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10589 Matthew W. Bryskin, et al., Index 653348/16
Plaintiffs-Respondents,

-against-

Eric Mann, et al.,
Defendants-Appellants,

John Does 1-10,
Defendants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about August 24, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 10, 2019,

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10590 Marta Michelle Estreich, etc., Index 450176/16
Plaintiff-Appellant,

-against-

Jewish Home Lifecare, et al.,
Defendants,

New York-Presbyterian Hospital, et al.,
Defendants-Respondents.

_____

The Jacob D. Fuchsberg Law Firm, LLP, New York (Walter Osuna of counsel), for appellants.

Martin Clearwater & Bell LLP, New York (Jean M. Post of counsel), for New York-Presbyterian Hospital, respondent.

Georgia M. Pestana, Acting Corporation Counsel, New York (Eva L. Jerome of counsel), for New York City Health and Hospitals Corporation, respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 4, 2018, which, insofar as appealed from as limited by the briefs, granted defendant New York-Presbyterian Hospital's and defendant New York City Health and Hospitals Corporation's motions for summary judgment dismissing the conscious pain and suffering claim as against them, unanimously reversed, on the law, without costs, and the motions denied.

The record presents issues of fact as to whether plaintiff's decedent experienced "*some level* of cognitive awareness" during her admissions to defendant facilities (*see Sanchez v City of New*

York, 97 AD3d 501, 506 [1st Dept 2012]). Defendants' experts opined that the decedent did not have cognitive awareness or the ability to experience conscious pain during the relevant periods. These experts relied on notations in the medical records that the decedent had suffered extensive brain injury, was unresponsive, and was in a vegetative state. However, although she was in a vegetative state, the decedent was generally responsive to pain, and sometimes followed commands or responded to verbal stimuli (*see Williams v City of New York*, 71 AD3d 1135, 1137-1138 [2d Dept 2010]; *Walsh v Staten Is. Obstetrics & Gynecology Assoc.*, 193 AD2d 672, 673 [2d Dept 1993], *lv denied* 82 NY2d 845 [1993]; *see also Maracle v Curcio*, 24 AD3d 1233, 1234 [4th Dept 2005], *lv denied* 7 NY3d 703 [2006]; *Weldon v Beal*, 272 AD2d 321, 322 [2d Dept 2000]). Although defendants' experts opined that reflex responses to pain, such as grimacing or withdrawing, are not signs of conscious awareness, at least some of the behaviors recorded in the medical records transcend such reflex responses.

The medical records also reflect that the decedent was administered pain medication in at least one of defendant facilities. Although not dispositive, this fact suggests that the decedent's doctors believed that she might be able to experience pain.

In addition, plaintiff testified that, while at defendants'

facilities, the decedent made expressions of pain or emotion, such as moaning, crying, or smiling, and communicated with her by blinking (*see Williams*, 71 AD3d at 1137-38; *Walsh*, 193 AD2d at 673). Plaintiff's belief that the decedent blinked in response to questions was reflected in the medical records, although the phenomenon was not itself observed by others. The fact that the decedent did not communicate via blinking on some occasions does not mean that she never did so, as it is possible (and consistent with plaintiff's own testimony) that her mental condition got better and worse. Although defendants' experts opined that it was "not medically plausible" that the decedent blinked in response to questions, these opinions are not sufficient to render plaintiff's testimony incredible as a matter of law, especially because the experts never actually observed the decedent's behavior.

Plaintiff's expert also opined that the decedent "had a sufficient level of awareness to enable her to feel pain," as evidenced by the fact that she "made facial expressions, smiled, ... grimaced, moaned, blinked, responded to simple questions, responded to verbal and tactile stimuli, and retracted to pain," all of which were "indicators of some level of awareness and conscious pain." Although plaintiff's expert did not specifically address defendants' experts' assertions that

reflexes are not evidence of conscious perception of pain, it is sufficient that she opined that the specific behaviors on which she relied (which included but were not limited to such reflexes) were "indicators of some level of awareness and conscious pain."

We decline to consider defendant New York-Presbyterian Hospital's argument about proximate causation, which was improperly raised for the first time on appeal (*see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 146 AD3d 603, 603-04 [1st Dept 2017]).

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10591 Anthony Varriano, Index 301005/16
Plaintiff-Respondent,

-against-

Maria Proietti Varriano,
Defendant-Appellant.

_____

Maria Proietti Varriano, appellant pro se.

_____

Judgment of divorce, Supreme Court, New York County (Tandra Dawson, J.), entered June 8, 2018, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for entry of a judgment consistent with this decision.

Under the circumstances presented, the judgment of divorce should have included a reservation of defendant's rights as to an interspousal tort action that was proceeding simultaneously in Supreme Court, Bronx County (*see Xiao Yang Chen v Fischer*, 6 NY3d 94, 102 [2005]).

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10592 In re House 93, LLC, Index 161159/18
Petitioner-Respondent-Appellant,

-against-

Heidi Lipton,
Respondent-Appellant-Respondent.

_____

The Law Office of Robert Moore, PLLC, New York (Robert Moore of counsel), for appellant-respondent.

Valiotis & Novella PLLC, Long Island City (Anthony J. Novella and William J. Alesi of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 1, 2019, which, inter alia, granted petitioner a 60-day license to enter respondent's adjoining property under RPAPL 881 and granted respondent's request for legal fees, unanimously affirmed, without costs.

In weighing the interests of the parties, we find that, under these circumstances, issuing petitioner a 60-day license to access a small portion of respondent's property to commence immediately is reasonable and that the inconvenience respondent may face is slight compared to the hardship if the license is refused (*see* (*Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]). Contrary to respondent's argument, we do not find that the motion court's order is premature because petitioner did make a showing

as to the reasonableness and necessity of the trespass referenced in the order (*see id.*).

The court providently determined that the respondent be awarded the license fee award of $2,000 a month as a result of her temporary loss of enjoyment to the small portion of the rear yard petitioner will be accessing pursuant to the limited license (*see e.g. Matter of Trinity NYC Hotel, LLC v 11 Rector St., LLC*, 2018 WL 5498773 [Sup Ct, New York County 2018]; *Matter of North 7-8 Invs., LLC v Newgarden*, 43 Misc 3d 623, 636 [Sup Ct, Kings County 2014]; *Ponito Residence LLC v 12th St. Apt. Corp.*, 38 Misc 3d 604, 612-613 [Sup Ct, NY County 2012]).

Contrary to the petitioner's argument, it is within the court's discretion to determine that attorney fees be resolved by a special referee (*see Merrimack Mut. Fire Ins. Co. v Moore*, 91 AD2d 759, 761 [3d Dept 1982]; *see also Matter of North 7-8 Invs.* 43 Misc 3d at 632).

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10593 The People of the State of New York, Ind. 2331/13
Respondent,

-against-

Ramon McLean,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nina A. Vershuta of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (April Newbauer, J.), rendered January 27, 2017,

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

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

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

ENTERED: DECEMBER 17, 2019

CLERK

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

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10594N Harvey Marcus, Index 652330/18
Plaintiff-Appellant,

-against-

Jason & Bill's Pool Service, et al.,
Defendants-Respondents.

Hecht, Kleeger & Damashek, P.C., New York (Jordan Hecht of counsel), for appellant.

Thomas Gibbons, Southampton, for respondents.

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered January 11, 2019, which, in this action alleging, inter alia, breach of contract, granted defendants' motion to change venue from New York County to Suffolk County pursuant to CPLR 510(3), unanimously affirmed, with costs.

There exists no basis to disturb the motion court's decision to change venue to Suffolk County. The record shows that the pool that defendants were hired to perform work on is located in Suffolk County, and defendants submitted an affirmation of their counsel identifying a nonparty material witness who was allegedly present during some of the events in question and has indicated that although he was willing to testify about what he observed, he would be inconvenienced if required to travel from Suffolk County, where he lives and works, to New York County (*see*

Ryan-Avizienis v JBEW Bar Corp., 121 AD3d 579 [1st Dept 2014]; *Tricarico v Cerasuolo*, 199 AD2d 142, 143 [1st Dept 1993]).

The record further shows that two of plaintiff's nonparty witnesses would not be inconvenienced by venue being changed to Suffolk County because they frequently visited the subject premises before the action was commenced, and plaintiff's third nonparty witness's testimony is not material.

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

ENTERED: DECEMBER 17, 2019

CLERK

Gische, J.P., Mazzarelli, Singh, Moulton, JJ.

10595N Clark Tower, LLC, Index 651319/19
Plaintiff-Respondent,

-against-

Wells Fargo Bank, N.A.,
etc., et al.,
Defendants-Appellants,

Axonic Capital LLC,
Defendant.

_____

Jenner & Block LLP, New York (Stephen L. Ascher of counsel), for appellants.

Frydman LLC, New York (David S. Frydman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 26, 2019, which granted plaintiff mortgagor's motion for a preliminary injunction restraining defendants from foreclosing on plaintiff's office building in Memphis, Tennessee, pending resolution of this action, unanimously reversed, on the law, without costs, and plaintiff's motion denied.

Plaintiff financed its purchase of the property in 2007 with a note secured by a deed of trust. In 2015, plaintiff and defendant trustee entered into a loan modification agreement (LMA) that, inter alia, bifurcated the original loan and allowed Note B to be forgiven if a subsequent sale or refinancing was insufficient to pay the principal and interest thereon. The LMA

is governed by Tennessee law but requires plaintiff to submit to the jurisdiction of the courts of this State. It does not similarly require defendant-appellants to submit to the jurisdiction of this State.

Defendant trustee advertised a nonjudicial foreclosure sale (Tenn Code Ann 35-5-101) based on plaintiff's apparent failure to pay the entire amount due upon maturity, and its failure to cause all rents to be deposited into a lockbox. Plaintiff sued, alleging, among other things, breach of the LMA provision prohibiting the trustee from unreasonably withholding consent to refinancing.

"[T]he courts of one State may not decide issues directly affecting title to real property located in another State" (*Posner v Handelsman*, 179 AD2d 723, 723 [2d Dept 1992]; *Johnson v Dunbar*, 114 NYS2d 845, 849 [Sup Ct Kings County 1952], *affd* 282 AD 720 [2d Dept 1953], *affd* 306 NY 697 [1954]). Although a court with personal jurisdiction over the parties may adjudicate their rights with respect to foreign realty (*see Isaly v Devlin*, 139 AD3d 470, 470 [1st Dept 2016]), plaintiffs cite no authority allowing an out-of-state foreclosure sale to be enjoined (*see Fielding v Drew*, 94 AD2d 687, 687 [1st Dept 1983] [RPAPL § 1301 does not support stay of Maryland judicial foreclosure]; *see also Carpenter v Black Hawk Gold Min. Co.*, 20 Sickels (65 NY) 43, 52

[1875] ["no ground for equitable interference" with a foreclosure sale of Colorado property without proof of conflict with Colorado law]; *Central Gold Mining Co. v Platt*, 3 Daly 263, 273-274 [Ct Common Pleas of City & County of NY 1870] [same]). Contrary to plaintiff's argument, its one-sided agreement to submit to personal jurisdiction in New York does not confer upon the New York courts a contractual right to enjoin an out-of-state foreclosure sale.

In any event, plaintiff did not "clearly show[]" that its "rights are being or will be violated" (Tenn R Civ P 65.04[2]), as required to demonstrate a probability of success on the merits (*Moody v Hutchinson*, 247 SW3d 187, 199 [Tenn Ct App 2007]). The claim that defendants unreasonably withheld consent to refinancing is belied by the record, which shows that defendants requested details concerning the new lender's appraisal, plaintiff's request to assign Note B to an entity sharing common ownership with it, and plaintiff's tardy admission that the refinancing package was also to be secured by a second property for which plaintiff had not provided an appraisal. Contrary to plaintiff's contention, defendants did not initially consent by issuing loan payoff estimates that expired the same day they were issued. Issues of fact concerning whether defendants unreasonably withheld consent, or waived the requirement to pay

rents into the lockbox, are not sufficient under Tennessee law to warrant an injunction (*Moody*, 247 SW3d at 199-200; *accord Milton v Harness*, 2017 WL 837704, at *4 [Tenn Ct App 2017]; *see also Essa Realty Corp. v J. Thomas Realty Corp.*, 70 AD3d 483, 483 [1st Dept 2010]).

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

ENTERED: DECEMBER 17, 2019

CLERK