SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 21, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8381 Aminata Kromah, Index 303791/13
Plaintiff-Respondent,

-against-

2265 Davidson Realty LLC, et al.,
Defendants-Appellants.

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Cozen O'Connor, New York (Eric J. Berger of counsel), for appellants.

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

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Judgment, Supreme Court, Bronx County (James W. Hubert, J.), entered May 24, 2018, to the extent appealed from, awarding plaintiff $2,547,054 for future medical expenses, $4,500,000 for future pain and suffering, and $1,600,000 for past pain and suffering, unanimously modified, on the law and the facts, to vacate the award for future medical expenses and remand for a new trial solely of these damages, unless plaintiff stipulates, within 30 days after entry of this order, to reduce the award for future medical expenses to $2,252,580 and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The trial court providently exercised its discretion in recalling the jury only an hour after deliberations had begun and instructing that evidence that defendants violated Administrative Code of City of NY §§ 27-127 and 27-128[1] could be considered evidence of negligence (*see Carlino v County of Albany*, 178 AD2d 772, 773 [3d Dept 1991]; *cf. Barreto v Calderon*, 31 AD2d 896, 897 [1st Dept 1969] [instruction to jury on "entirely new legal principle" after 23 hours of deliberation was prejudicial to defendants]). Defendants were not prejudiced by the supplemental instruction, which simply reiterated the original instruction that defendants had a duty to maintain the stairs on which plaintiff fell in a safe condition. Further, the court instructed the jury that the supplemental charge was merely an addition and did not change or modify its original instructions.

As a result of the accident, plaintiff's ankle was pulled out of its joint, and plaintiff sustained a trimalleolar ankle fracture. Plaintiff underwent two surgeries and developed traumatic arthritis and reflex sympathetic dystrophy. Defendants argue that the awards of $1,600,000 and $4,500,000 for past and future pain and suffering, respectively, deviate materially from

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[1] These sections were repealed and re-codified at Administrative Code § 28-301.1, effective July 1, 2008 (*Centeno v 575 E. 137th St. Real Estate, Inc.*, 111 AD3d 531 [1st Dept 2013]).

what is reasonable compensation for plaintiff's injuries. We disagree (*see e.g. Hernandez v Ten Ten Co.*, 102 AD3d 431 [1st Dept 2013]; *Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242 [1st Dept 2009], *lv denied* 13 NY3d 711 [2009]).

Defendants argue that the award for future medical expenses is against the weight of the credible evidence because there was no evidence that plaintiff would have a spinal cord simulator implanted or that she would tolerate and benefit from a radiofrequency sympathectomy. Defendants also argue that the jury's award for future medications, pain management visits, steroid injections, orthopedic joint lubrications, orthopedic visits, and MRIs should be reduced by 50% because plaintiff's doctors testified that she would need an ankle fusion, which would reduce any pain.

We find that the jury's award for radiofrequency sympathectomy is against the weight of the evidence. Plaintiff had not had a radiofrequency sympathectomy. Thus, there is no evidence that the procedure would provide relief to her and become necessary to her future treatment. Accordingly, we reduce the jury's award for future medical expenses by the amount awarded for this treatments.

We find that the award for the remaining future medical expenses is not against the weight of the credible evidence. One

of the treating doctors testified that a spinal cord stimulator could be used to treat plaintiff's reflex sympathetic dystrophy, but he was not able to get the funding for that procedure for plaintiff.

Defendants' contention that the ankle fusion would have mitigated plaintiff's pain is unsupported by the record (*see Lantigua v 700 W. 178th St. Assoc., LLC*, 27 AD3d 266, 267 [1st Dept 2006]). Plaintiff's physicians did not testify that pain would be eliminated or even reduced if plaintiff were to undergo an ankle fusion. Their testimony indicated only that pain reduction was the goal of ankle fusion surgery.

Defendants failed to establish their entitlement to a collateral source hearing (*see Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 36 [2d Dept 2008], *lv denied* 11 NY3d 705 [2008]). They assert that their expert would have testified as to the health insurance plans available to plaintiff and her coverage under those plans. However, they did not show that plaintiff might in the future receive collateral benefits through

health insurance.

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

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

6638N Argenis H., an infant, by his mother and natural guardian, Roxana H.,
Plaintiff-Respondent,

-against-

New York City Health & Hospitals Corporation,
Defendant-Appellant.

Index 805110/12

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (George J. Silver, J.), entered on or about August 7, 2015,

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 January 24, 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: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8396 Bowery 263 Condominium Inc., Index 153614/15
Plaintiff-Appellant,

-against-

D.N.P. 336 Covenant Avenue LLC, et al.,
Defendants,

Nexus Building Development Group Inc., et al.,
Defendants-Respondents.

_____

Kishner Miller Himes P.C., New York (Ryan O. Miller of counsel), for appellant.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for respondents.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered June 27, 2017, which, to the extent appealed from as limited by the briefs, granted defendants Nexus Building Development Group Inc. and Yaniv Cohen's motion for summary judgment dismissing the cause of action for breach of fiduciary duty as against Cohen, unanimously reversed, on the law, and the motion denied.

Defendants failed to establish prima facie that Cohen served as the sole member of the condominium corporation board during the period of sponsor control only as a representative of the sponsor, and therefore owed no fiduciary duties to plaintiff condominium corporation and the unit owners in his individual

capacity. The Offering Plan provided that, during the sponsor-controlled period, "the Board shall consist of one person designated by Sponsor," and that "Sponsor anticipate[d] designating ... Yaniv Cohen." Defendants argue that Yaniv was not a "sponsor-designee" who owed fiduciary duties, because only the sponsor was responsible for condominium affairs during the period of sponsor control. However, the Offering Plan provided that during that period the sponsor would control condominium affairs "through its control of the Board," and the sponsor controlled the board through the person it designated (Cohen). Like the sponsor-appointed board in *Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills* (193 AD2d 322, 327 [2d Dept 1993], this board owed a fiduciary duty to plaintiff and the unit owners.

A breach of fiduciary duty claim may be asserted against Cohen individually, because as the sole member of the sponsor-controlled board he either "participated" or "directed, controlled, approved, or ratified" the decisions challenged in this action (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012] [internal quotation marks omitted]; *see Gochberg v Sovereign Apts., Inc.*, 119 AD3d 431, 432 [1st Dept 2014]). Plaintiff alleges that Cohen received notice of defects, failed to address them properly, and concealed known defects, which

resulted in the creation of hazardous conditions. Plaintiff also submitted evidence of the complaints that unit owners began to assert during the period of sponsor control. Accordingly, issues of fact exist regarding whether Cohen's actions or inactions constitute a breach of fiduciary duty. Because there has been no discovery, and Cohen's knowledge of conditions and intent with respect thereto are matters exclusively within defendants' control, summary dismissal of the breach of fiduciary duty cause of action was inappropriate (*see Slemish Corp., S.A. v Morgenthau*, 63 AD3d 418, 419-420 [1st Dept 2009]).

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

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8446 The People of the State of New York, Ind. 5034/14
Respondent,

-against-

Antonio Benoit,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Brent Ferguson 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, New York County (Gregory Carro, J.), rendered November 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: FEBRUARY 21, 2019

CLERK

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

Renwick, J.P., Tom, Singh, Moulton, JJ.

8447 HSBC Bank USA, etc., Index 381904/09
Plaintiff-Respondent,

-against-

Betty Lugo,
Defendant-Appellant,

New Century Mortgage Corporation, et al.,
Defendants.

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Pacheco & Lugo, PLLC, Brooklyn (Carmen A. Pacheco of counsel), for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Kenneth Flickinger of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 26, 2017, which denied the motion of defendant Betty Lugo to dismiss the complaint, and granted plaintiff's cross motion for leave to reply to defendant's counterclaims, unanimously modified, on the law, defendant's motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendant's motion did not violate the one-motion rule of CPLR 3211(e) because her prior motion was not based on the merits of the complaint (*see Rivera v Board of Educ. of the City of N.Y.*, 82 AD3d 614 [1st Dept 2011]).

Once a defendant demonstrates prima facie that plaintiff

lacks standing, it is plaintiff's burden to establish standing by showing physical possession of the note or a written assignment of the note prior to commencement of the action (*see Deutsche Bank Natl. Trust Co. v Umeh*, 145 AD3d 497 [1st Dept 2016]). It is the note, not the mortgage, that is the dispositive instrument that conveys standing to foreclose (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2016]).

Defendant demonstrated prima facie that plaintiff lacked standing based on the unverified complaint, the failure to allege in the complaint that plaintiff possessed the note or a written assignment prior to commencement of the action, the failure to include the note as an exhibit to the complaint, and the discrepancies between the copy of the note defendant received from the custodian and the copy provided by plaintiff in opposition to the motion to dismiss the complaint (*see Bank of Am., N.A. v Thomas*, 138 AD3d 523, 524 [1st Dept 2016]).

Plaintiff failed to provide sufficient evidence to raise a triable issue as to its standing, since it did not produce an affidavit of a person with knowledge stating that the note was in its possession or assigned to it in writing when the action was commenced. The assignment of the note, which was signed by a person who may not have had the authority to make the assignment, was insufficient because the endorsement was undated, on a

separate page from the note, and made no reference to the note (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523-524 [1st Dept 2016]). The statements of plaintiff's attorney and the paralegal at his law firm were insufficient because neither asserted that the note or assignment of the note were in plaintiff's possession or the legal file of its attorneys when the action was commenced.

The court properly granted plaintiff's motion to interpose a late reply to defendant's counterclaims. Plaintiff's attorney stated that he failed to serve the response to the counterclaims because he was focused on completing the short sale of the property, which would have mooted the litigation. He also prima facie stated a meritorious defense (*see Finkelstein v East 65th St. Laundromat*, 215 AD2d 178 [1st Dept 1995]), and there was no pattern of dilatory conduct by plaintiff or evidence of prejudice to defendant from the delay.

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8448-
8449-
8450-
8451 In re Ja'Dore G.,

A Child Under Eighteen Years
of Age, etc.,

Cannily G., (Anonymous), et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

Syeita G. (Anonymous),
Nonparty Respondent.

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Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for Cannily G., appellant.

Thomas R. Villecco, Jericho, for Beverly R., appellant.

Steven N. Feinman, White Plains, for Barrymore S., appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan Popolow of counsel), for Administration for Children's Services, respondent.

Douglas H. Reiniger, New York, for Syeita G., respondent.

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

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about October 2, 2017, which, inter alia, after a hearing, found that respondent father neglected and derivatively abused the subject child, and that respondents paternal

grandparents neglected the child, unanimously modified, on the law and facts, to vacate the finding of derivative abuse as against the father, and otherwise affirmed, without costs.

The evidence supports the Family Court's finding that the paternal grandparents were persons legally responsible for the subject child within the meaning of Family Court Act § 1012(g). The testimony of the mother and of the agency caseworker showed that the child visited the grandparents' home approximately every other weekend, often spending the night, and the grandparents cared for him during these visits, permitting an inference of "substantial familiarity" between them (*Matter of Christopher W.*, 299 AD2d 268, 268 [1st Dept 2002]; *see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]). The testimony further established that the grandparents cared for the subject child as part of their familial role, and thus were persons legally responsible (*see Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1006 [2015]).

In addition, a preponderance of the evidence established that the grandparents neglected the six-year-old child where he repeatedly disclosed that his 16-year-old cousin was sexually abusing his six-year-old half-brother, and the grandparents failed to protect the child from abuse (*see Matter of Diana N. [Kim N.]*, 139 AD3d 573, 574 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). The court properly credited the corroborated out-

of-court statements of the child and his half-brother that the grandparents were aware of the abuse (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118 [1987]), and there exists no basis to disturb the court's credibility findings (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

The finding of neglect as against the father was also supported by a preponderance of the evidence where testimony indicated that he was aware of the sexual abuse occurring, but failed to protect the subject child (*see Diana N.* at 574). Moreover, two acts of domestic violence committed by the father provided another basis for the finding of neglect against him. During the first incident, in which he assaulted the mother outside of the courthouse in connection with a child support proceeding, the mother sustained visible injuries, and ultimately retreated from seeking child support. The second incident occurred when the father was picking up the child for a visit, and thus was sufficient to establish that the child was in imminent danger of physical impairment (*see Matter of Andru G. [Jasmine C.]*, 156 AD3d 456, 457 [1st Dept 2017]). Further, there was evidence that the father neglected the child by engaging in sexual activity in his presence, contributing to the six-year-old's inappropriate knowledge of sexual behavior (*see Matter of Cerenity F. [Jennifer W.]*, 160 AD3d 540 [1st Dept 2018]).

However, as petitioner and the attorney for the child effectively concede by failing to raise any arguments in opposition, the Family Court erred in finding that the father derivatively abused the child based on the cousin's out-of-court statement that the father sexually abused him several years earlier. Because the cousin's statement was uncorroborated by any other evidence, it was insufficient to support a finding of sexual abuse (*see Matter of Nicole V.*, 71 NY2d at 123-124), and, in turn, a finding of derivative abuse.

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8454 Norma Fowler, Index 22577/13E
Plaintiff-Appellant,

-against-

Salvatore D. Buffa, M.D., et al.,
Defendants-Respondents,

Surgicare Ambulatory Center, Inc.,
Defendant.

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Law Office of Robert F. Danzi, Jericho (Christine Coscia of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Salvatore D. Buffa, M.D., Victoria A. Brand, CRNA and Alliance Anesthesiology Associates, P.L.L.C., respondents.

Ekblom & Partners, LLP, New York (Deborah I. Meyer of counsel), for Anurag Shrivastava, M.D., respondent.

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Judgment, Supreme Court, Bronx County (Faviola A. Soto, J.), entered July 31, 2017, which, following a jury verdict in defendants' favor, dismissed the complaint, unanimously affirmed, without costs.

The trial court did not err in precluding a disability insurance form alleged to contain a statement against interest from defendant Anurag Shrivastava, M.D. The imposition of sanctions for discovery misfeasance is a matter better left to the sound discretion of the trial court (*see Gomez v New York City Hous. Auth.*, 217 AD2d 110, 114 [1st Dept 1995]). CPLR 3101

provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, including a party's own statements (*see also Sands v News Am. Publ.*, 161 AD2d 30, 42 [1st Dept 1990]). Plaintiff's disclosure of the document less than two days prior to trial was an unfair surprise for which no reasonable excuse was proffered (*see Curbean v Kibel*, 12 AD3d 206, 207 [1st Dept 2004]; *Ward v Mehar*, 264 AD2d 515, 516 [2d Dept 1999]).

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

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8455 Mario Suarez, et al., Index 160035/15
Plaintiffs-Respondents-Appellants,

-against-

Four Thirty Realty LLC, et al.,
Defendants-Appellants-Respondents.

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Horing, Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellants-respondents.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 23, 2018, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint as against Four Thirty Realty LLC, and granted plaintiffs' cross motion for summary judgment dismissing the fourth and fifth affirmative defenses and the sixth except as it applies to the third cause of action, and denied the cross motion for summary judgment declaring that the apartment is rent stabilized and that plaintiff Suarez is a rent stabilized tenant thereof, unanimously modified, on the law, to grant plaintiffs' motion to the extent of declaring that apartment 9H in the building located at 430 East 86th Street in Manhattan is a rent-stabilized unit and that plaintiff Suarez is entitled to a rent-stabilized lease, and otherwise affirmed, without costs.

Defendants argue that plaintiffs' claims, that the subject apartment was improperly removed from rent stabilization, and for a rent-overcharge and attorneys' fees, are barred by the doctrine of collateral estoppel (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]). Defendants are correct that plaintiffs had a full and fair opportunity to participate in the proceedings held 13 years earlier before New York State Division of Housing and Community Renewal (DHCR) that resulted in the deregulation of plaintiffs' apartment pursuant to high income deregulation law. However, plaintiffs' present claims raise an issue that was not raised or litigated in the prior DHCR deregulation proceedings, i.e., whether their apartment was subject to re-regulation when they entered into a new market rate lease at a time when the building was still receiving J-51 tax benefits (*see Leight v W7879 LLC*, 128 AD3d 417 [1st Dept 2015], *affd* 27 NY3d 929 [2016]; *Extell Belnord LLC v Uppman*, 113 AD3d 1, 11 [1st Dept 2013]).

Accordingly, Supreme Court should have granted plaintiffs' motion for summary judgment declaring that apartment 9H in the building located at 430 East 86th Street in Manhattan is a rent-stabilized unit and that plaintiff Suarez is entitled to a rent-stabilized lease (*see Roberts v Tishman Speyer Props, L.P.* 13 NY3d 270 [2009] [apartments restored to rent stabilization

because the owner deregulated the apartments pursuant to the luxury decontrol laws while it was receiving tax benefits under the City's J-51 program; *Gersten v 56 7th Ave. LLC.*, 88 AD3d at 198 [applying *Roberts* retroactively]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8456-
8457 John Tozzi, et al.,
Plaintiffs-Appellants,

-against-

Carola Mack, et al.,
Defendants-Respondents.

Index 152499/17

Franzino & Scher LLC, New York (George F. Du Pont of counsel), for appellants.

Parker Pohl LLP, New York (M. Todd Parker of counsel), for Carola Mack, respondent.

Capuder Fazio Giacoia LLP, New York (Joseph D. Giacoia of counsel), for DJK Residential, LLC, respondent.

Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 15, 2018 and March 15, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' CPLR 3211(a)(1) motions to dismiss the complaint, unanimously affirmed, with costs.

The option agreement, the correction rider, and the emails constitute documentary evidence which utterly refutes plaintiffs' factual allegations and conclusively establishes a defense as a matter of law (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014]; *Schutty v Speiser Krause P.C.*, 86 AD3d 484, 484-485 [1st Dept 2011]). Tozzi's claim that "it was his belief" that Mack

presented him with only the signature pages of the option agreement, and that he did not see the entire agreement, is insufficient as a basis upon which to deny these motions, as "[a] party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms" (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]). There is no evidence raising triable issues of fact as to whether plaintiff was given the entire agreement (*see Martin v Citibank, N.A.*, 64 AD3d 477, 477-478 [1st Dept 2009]).

Contrary to Tozzi's contention that the motion court erred in dismissing the case based on the contracts of sale because the court incorrectly ignored Real Property Law (RPL) § 443, "[p]ursuant to Real Property Law § 441-c(1), respondent may revoke or suspend the license of a real estate broker or salesperson, reprimand the real estate broker or salesperson, or impose a fine" (*Matter of Re/Max All-Pro Realty v New York State Dept. of State, Div. of Licensing Servs.*, 292 AD2d 831, 831-832 [4th Dept 2002], *lv denied* 98 NY2d 606 [2002]). In any event, plaintiffs complied with the disclosure required by RPL 443, albeit somewhat untimely, and the documentary evidence constituted written admissions that defendants were entitled to commissions.

The remaining causes of action for unjust enrichment and breach of fiduciary duty were correctly dismissed as duplicative of the first cause of action for invalid commission "since both claims arise from the same facts and seek the identical damages" (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 433-434 [1st Dept 2013]). There was also no damages or unjust enrichment, as plaintiffs were not licensed New York real estate brokers and were not entitled to commissions.

Mack's request for imposition of sanctions is denied.

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8458 The People of the State of New York, Ind. 1462/15
Respondent,

-against-

Jose Hernandez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diana Wang 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, New York County (Arlene Goldberg, J.), rendered April 20, 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: FEBRUARY 21, 2019

CLERK

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

Renwick, J.P., Tom, Singh, Moulton, JJ.

8459 In re Samantha F., and Others,

Children Under the Age of Eighteen Years, etc.,

Edwin F.
Respondent-Appellant,

The Administration for Children's Services
Petitioner-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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

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Order of fact-finding (denominated a decision), Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about January 29, 2018, which, after a hearing, found that respondent sexually abused the eldest child and derivatively neglected the other children, unanimously affirmed, without costs.

Contrary to petitioner agency's argument, the appeal is properly taken from an appealable paper. Although denominated a decision, the paper bears the standard language advising that any appeal from the "order" must be taken within 30 days (Family Ct Act § 1113), and is, in substance, an order finding that the children have been abused/neglected (Family Ct Act § 1051[a]),

which is appealable as of right (Family Ct Act § 1112[a]).

The court's determination that respondent sexually abused the eldest child, for whom he was responsible, is supported by a preponderance of the evidence. The testimony of the child was not necessary to make a fact-finding of abuse (Family Ct Act § 1046[a][vi]; [b][i]). The court properly found that the child's detailed out-of-court statements were sufficiently corroborated by the testimony of her mother, by out-of-court statements of a sibling submitted through a case worker's testimony, as well as by the expert testimony of a therapist social worker with a specialization in child abuse and trauma, who opined that the child's behavior and demeanor were consistent with a child who has been sexually abused (*see Matter of Nicole V.*, 71 NY2d 112, 120-121 [1987]; *Matter of Dorlis B. [Dorge B.]*, 132 AD3d 578 [1st Dept 2015]). The expert's opinion was properly based on the testimony of another social worker who was subject to cross-examination, whose testimony was in evidence and found to be reliable, and whose credibility is not challenged by respondent *(see e.g. Wagman v Bradshaw*, 292 AD2d 84, 86-87 [2d Dept 2002]).

Respondent's sexual abuse of the eldest child supports a finding of derivative neglect of the other children since it demonstrates that his understanding of his parental obligations is so defective as to place them at substantial risk,

particularly since the children were in respondent's sole care at the times that the abuse occurred (*see Matter of Skylean A.P. [Jeremiah S.]*, 136 AD3d 515, 516 [1st Dept 2016], *lv denied* 27 NY3d 907 [2016]; *Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556 [1st Dept 2012]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8460 Wimbledon Financing Master Fund, Ltd., Index 653468/15
Plaintiff-Respondent,

-against-

Keith Laslop,
Defendant-Appellant,

Weston Capital Management LLC, et al.,
Defendants.

_____

Kudman Trachten Aloe LLP, New York (Paul H. Aloe of counsel), for appellant.

Kaplan Rice LLP, New York (Daniel D. Edelman of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 15, 2017, which, to the extent appealed from, granted plaintiff an extension of time to serve defendant Keith Laslop in the interest of justice and deemed him served by e-filing as of the date of entry of the court's decision in the NYSCEF e-filing system, unanimously affirmed, with costs.

The court did not abuse its discretion in granting plaintiff an extension of time to serve appellant with process in the interest of justice (CPLR 306-b). Plaintiff established the existence of several relevant factors weighing in favor of an extension (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-

105 [2001]).

The claims asserted against Laslop seem to be potentially meritorious (*Solano v Mendez*, 114 AD3d 614 [1st Dept 2014]). Indeed, this Court has previously recognized the potential merits of the fraud allegations in the amended complaint against other Gerova directors involved in the alleged fraudulent scheme (*Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 160 AD3d 596, 597 [1st Dept 2018]; *Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 150 AD3d 427 [1st Dept 2017]).

Laslop has not established that he would suffer prejudice from the extension, since he has had actual notice of this action and the allegations against him from early on (*Deutsche Bank, AG v Vik*, 149 AD3d 600 [1st Dept 2017]). He hired counsel in Canada and the US to challenge service and oppose plaintiff's motion for a default judgment, and his counsel also represents other officers and directors of Gerova. Conversely, plaintiff, which diligently attempted service on Laslop multiple times within the statutory period, would suffer prejudice without an interest of justice extension, because the statute of limitations has expired (*Hernandez v Abdul-Salaam*, 93 AD3d 522 [1st Dept 2012]; *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430, 431 [1st Dept 2011]).

Under the circumstances, the motion court was not precluded from granting plaintiff's application for this second CPLR 306-b

extension asserted in its brief in opposition to Laslop's cross motion to dismiss the amended complaint for nonservice, rather than in a formal notice of cross motion. To conclude otherwise would limit the court's discretion in granting relief in the interest of justice (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 65 [2d Dept 2013]).

Alternative service on Laslop by the Court System's NYSCEF e-filing system was appropriate. Plaintiff established that statutory methods of service were impracticable (CPLR 308[5]). Moreover, since Laslop's counsel received notices of filings in this action through NYSCEF, service by that alternative method comported with due process by being reasonably calculated to apprise Laslop of the pendency of the action (*Matter of Harner v County of Tioga*, 5 NY3d 136, 140 [2005]; *see Kozel v Kozel*, 161 AD3d 700 [1st Dept 2018], *lv dismissed* 32 NY3d 1089 [2018][service by email]; *Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141-142 [1st Dept 2010] [service

by email]; *Baidoo v Blood-Dzraku*, 48 Misc 3d 309 [Sup Ct, NY County 2015] [service by Facebook]).

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: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8461 Mano Enterprises, Inc., Index 652486/13
Plaintiff-Appellant,

-against-

Metropolitan Life Insurance Company,
Defendant-Respondent.

_____

Thompson Hine, New York (Maranda Fritz of counsel), for appellant.

d'Arcambal Ousley & Cuyler Burk LLP, New York (Michelle J. d'Arcambal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered January 11, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

We previously determined that an issue of fact existed as to whether defendant appropriately refused to process the assignment of the subject policy (*see* 143 AD3d 597 [1st Dept 2016]).

Plaintiff has not demonstrated that this issue has been resolved since our prior decision.

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: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8462 The Estate of Alexander Calderwood, etc., Plaintiff-Appellant, Index 650150/15

-against-

Ace Group International LLC, et al., Defendants-Respondents.

_____

Ball Janik LLP, Portland, OR (James T. McDermott of the bar of the State of Oregon, the State of Idaho and the District of Columbia, admitted pro hac vice, of counsel), and Kishner & Miller, New York (Scott Himes of counsel), for appellant.

Squire Patton Boggs (US), New York (Joseph C. Weinstein of the bar of the State of Ohio, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 18, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the breach of contract claim regarding the Full Call Right of the Limited Liability Company Agreement, and denied plaintiff estate's cross motion for partial summary judgment regarding the Full Call Right, unanimously affirmed, without costs.

The motion court properly determined that the estate could not exercise the decedent's Full Call Right, which contractual right terminated upon his death. We have considered and rejected

the estate's remaining arguments, most of which are generally similar to arguments this Court rejected on a prior appeal in this case (*see* 157 AD3d 190 [1st Dept 2017] *lv dismissed* 31 NY3d 1111 [2018]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8463 In re Sean Sokol, Index 160141/16
Petitioner-Appellant,

-against-

The New York City Civil Service Commission, et al.,
Respondents-Respondents.

_____

Matthew Jeon, P.C., New York (Matthew Jeon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 11, 2017, denying the petition seeking, among other things, to annul respondents' determination that petitioner was not qualified for the position of police officer, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

"Wide discretion is afforded to civil service commissions in determining the fitness of candidates," and "[t]he exercise of that discretion is to be sustained unless it has been clearly abused" (*Matter of Smith v City of New York*, 228 AD2d 381, 383 [1st Dept 1996], *lv denied* 89 NY2d 806 [1997] [internal quotation marks omitted]). Petitioner fails to show that the finding that he was not qualified for the position of police officer was

arbitrary and capricious or in bad faith (*see Matter of Carchietta v Department of Personnel of City of N.Y.*, 172 AD2d 304, 305 [1st Dept 1991]). The determination was rationally based on, among other things, petitioner's failure to meet the minimum grade point average as reflected on his official undergraduate transcript, and his inaccurate statements in application forms about his arrest and drug history (*see e.g. Matter of Smith* at 383; *Matter of Carchietta* at 305).

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

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8465 The People of the State of New York, Respondent, Ind. 1716/13

-against-

Ernest Bellinger, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at pretrial motions; Ronald A. Zweibel, J. at further motions, plea and sentencing), rendered November 10, 2016, convicting defendant of two counts of attempted robbery in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously affirmed.

The court properly denied defendant's motion to withdraw the guilty pleas at issue on appeal. Defendant pleaded guilty to three counts of attempted first-degree robbery, involving three incidents, with a promised sentence of three concurrent 15-year terms. At sentencing, the court granted defendant's motion to withdraw one of the pleas, on a ground specific to that plea, and dismissed that count as satisfied by the remaining two concurrent 15-year sentences. Defendant did nothing to alert the court to

his present claim that he was thus entitled to withdraw the remaining pleas on the ground that all three pleas were part of a single plea bargain. Accordingly, this claim is unpreserved (*see People v Mackey*, 77 NY2d 846 [1991]), and we decline to review it in the interest of justice. As an alternative holding, we find, based on all the circumstances, that defendant received a sufficient remedy when the court dismissed the lone allegedly tainted count, and that the remaining pleas were not induced by an unfulfilled promise (*see People v Collier*, 22 NY3d 429, 433 [2013], *cert denied* 573 US 908 [2014]).

To the extent defendant moved to withdraw the two pleas at issue, he did so solely on a generalized claim of innocence. That claim was baseless and contradicted by the plea allocution, and the court providently exercised its discretion in rejecting it without further inquiry (*see People v Fisher*, 28 NY3d 717, 726 [2017]; *People v Frederick*, 45 NY2d 520 [1978]). The court also providently exercised its discretion in denying defendant's request for new counsel at sentencing, because defendant did not establish good cause for a substitution. Defendant's only colorable claim of ineffective assistance related to the count that the court had just dismissed.

Defendant did not establish his entitlement to any kind of evidentiary hearing relating to any Fourth Amendment issues. The

police obtained a warrant to search a car that defendant left on the street after fleeing from the scene of one of the robberies. Defendant was not entitled to a *Franks/Alfinito* hearing to challenge the veracity of the affiant's statements in the search warrant application (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]), because defendant failed to make the requisite "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" (*Franks*, 438 US at 155-156). Defendant cast no such doubt on the affiant's statements, particularly with regard to the principal basis for the warrant, which is that, from a vantage point outside the car, an officer saw part of a handgun protruding from under the driver's seat. Defendant's claim that the police searched the car before applying for a warrant is speculative, and his submissions at various junctures,

even when viewed collectively, did not create a factual dispute warranting a hearing into whether there was any unlawful police conduct (*see generally People v Mendoza*, 82 NY2d 415 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8466N Tanesha Arthur, Index 162454/15
Plaintiff-Appellant,

-against-

Liberty Mutual Auto and Home Services LLC, doing business as Liberty Mutual Insurance,
Defendant,

Leean Cassar,
Defendant-Respondent.

_____

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered April 2, 2018, which, upon renewal, granted defendant Leean Cassar's motion to change venue of this action to Supreme Court, Nassau County, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion to relax the "vigorous requirements for renewal" in the interest of substantive fairness (*Corporan v Dennis*, 117 AD3d 601, 601 [1st Dept 2014]; *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]), where defendant Leean Cassar failed to justify her failure to present proper evidentiary support on her initial motion to change venue to Nassau County.

Venue was originally correctly placed by plaintiff in New York County. Subsequently, plaintiff entered into a stipulation of settlement and discontinuance with defendant Liberty Mutual Insurance. Transfer of venue may be granted when plaintiff voluntarily discontinues the action against the party that served as the basis for venue (*see Crew v St. Joseph's Med. Ctr.*, 19 AD3d 205, 206 [1st Dept 2005]; *Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]). Upon renewal, Cassar provided evidence that both she and plaintiff resided in Nassau County at the time this action was commenced.

Supreme Court properly determined that the unsigned deposition testimony of defendant Cassar constituted admissible evidence of Cassar's residence as the transcript was certified by the court reporter and plaintiff does not challenge its accuracy (*see Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591, 591-592 [1st Dept 2016]; *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8467N Jose Lobo, Index 301930/16
Plaintiff-Appellant,

-against-

Gatehouse Partners, LLC,
Defendant-Respondent.
- - - - -
Gatehouse Partners, LLC,
Third-Party Plaintiff-Respondent,

-against-

V&Y Construction, LLC,
Third-Party Defendant,

Anatoliy Kovalskyy,
Third-Party Defendant-Respondent.

_____

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

Kennedys CMK, New York (Nitin Sain of counsel), for Gatehouse Partners, LLC, respondent.

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for Anatoliy Kovalskyy, respondent.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about February 23, 2017, which granted third-party defendant Anatoliy Kovalskyy's motion to dismiss the action pursuant to CPLR 327(a), unanimously reversed, on the facts, without costs, and the motion denied.

Plaintiff, a resident of Connecticut, seeks to recover damages under the Labor Law for injuries he sustained in a fall

from a scaffold while working at a home renovation project in Westchester County. Defendant, the general contractor, and third-party defendants, the subcontractors, are also residents of Connecticut.

Third-party defendant Kovalskyy failed to meet the heavy burden of demonstrating that plaintiff's selection of New York as the forum for this action is not proper (*see Wilson v Dantas*, 128 AD3d 176, 187 [1st Dept 2015]; *see also Swaney v Academy Bus Tours of N.Y., Inc.*, 158 AD3d 437 [1st Dept 2018] [setting forth relevant factors to consider]). The Labor Law exists to protect construction workers, like plaintiff, laboring in New York (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985]). The burden on the courts is minimal, given that the action involves the application of New York law to plaintiff's claims and only a possibility that Connecticut law will be applied to the third-party claims for indemnification and contribution (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 522-523 [1994]; *Wilson*, 128 AD3d at 187). Nothing in the record demonstrates hardship to Kovalskyy, who affirmatively entered into a substantial contract to perform construction work on a home in New York, which requires compliance with New York law governing worker safety (*see Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]).

Kovalskyy also failed to demonstrate that a change of venue, as an alternative to dismissal on forum non conveniens grounds, should be granted. Plaintiff was permitted to designate any county as the venue for the action, because neither he nor defendant was a resident of New York when the action was commenced (CPLR 503[a]; 510[1]). Therefore, Bronx County is a proper venue. Kovalskyy made no showing that the convenience of any material nonparty witnesses warranted a discretionary change of venue (CPLR 510[3]; *see Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

Renwick, J.P., Tom, Singh, Moulton, JJ.

8468- Index 160953/13
8469N Margaret O'Halloran,
Plaintiff-Respondent,

-against-

Metropolitan Transportation
Authority, et al.,
Defendants-Appellants.

_____

Steve S. Efron, New York, for appellants.

The Kurland Group, New York (Erica T. Healey-Kagan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 10, 2018, to the extent it granted in part plaintiff's motion pursuant to CPLR 3124 to compel discovery, unanimously affirmed, without costs. Order, same court and Justice, entered August 6, 2018, which, to the extent appealed and appealable, denied defendants' motion to renew plaintiff's motion to compel discovery, unanimously affirmed, without costs.

The court providently exercised its discretion in granting in part plaintiff's motion to compel discovery and ordering defendants to run searches of electronic mailboxes of defendants' employees and to produce those documents responsive to plaintiffs' requests (CPLR 3101[a]; *148 Magnolia, LLC v Merrimack*

Mut. Fire Ins. Co., 62 AD3d 486, 487 [1st Dept 2009]; *see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *GoSMILE, Inc. v Levine*, 112 AD3d 469 [1st Dept 2013]). The record demonstrates that plaintiff's requests seek material and necessary information, and that her search terms, all of which were to be combined with her name or nickname or the name or nickname of a coworker she alleges was discriminated or retaliated against on similar grounds, would result in the disclosure of relevant evidence, and are reasonably calculated to lead to the discovery of relevant information.

Plaintiff's second Supplemental Request for Production of Documents, dated November 30, 2017, seeking all complaints, discrimination-related or not, involving defendant George Menduina's conduct from 2010 to present, sought information material and necessary to this particular lawsuit because such information was relevant not only to whether Menduina, plaintiff's supervisor, discriminated against plaintiff, but also to whether Menduina was more qualified than plaintiff to hold the very position that plaintiff alleges she was denied for discriminatory reasons.

In support of their motion for leave to renew, defendants

cited no new facts that would change the court's prior determination. As a result, their motion to renew and reargue was in essence only a motion for reargument, the denial of which is non-appealable of right (*see e.g. Kitchen v Diakhate*, 68 AD3d 570 [1st Dept 2009]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8470 The People of the State of New York, Respondent, Ind. 3505/15

-against-

Cecil McKenzie, Defendant-Appellant.

_____

Stanley Neustadter, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Meghan Callagee O'Brien of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 9, 2016, as amended January 20, 2017, convicting defendant, after a jury trial, of persistent sexual abuse and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of four years, unanimously affirmed.

The court providently exercised its discretion in admitting evidence of defendant's two most recent prior incidents of sexual misconduct on the subway. This evidence was relevant to establish defendant's intent, where the charged sexual conduct occurred on a crowded subway, and portions of the defense cross-examination and summation could be viewed as challenging the proof of the element of intent (*see People v Ingram*, 71 NY2d 474, 479-480 [1988]). Even if defendant's intent could be inferred

from his behavior, the People, who had the burden of proving that element, "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). Furthermore, the prior incidents were not excessively remote in time, and the court provided suitable limiting instructions.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8471-
8472 Index 158216/15

Veg 83, LLC,
Plaintiff-Respondent,

-against-

JTED83, Inc., et al.,
Defendants-Appellants.

_____

Berry Law PLLC, New York (Eric W. Berry of counsel), for appellants.

Ofeck & Heinze, LLP, Hackensack (Mark F. Heinze of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Debra A. James, J.), entered September 29, 2016, in favor of plaintiff in the amount of $372,887.45, unanimously affirmed, without costs. Order, same court and Justice, entered October 4, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion to vacate the judgment, unanimously affirmed, without costs.

The IAS court properly granted plaintiff's motion for summary judgment in lieu of complaint under CPLR 3213, and defendants failed to establish that the note was subject to a right of offset. While they raise possible defenses and counterclaims, these allegations create issues that are separate and severable from plaintiff's claims under the note and do not

defeat plaintiff's motion for CPLR 3213 treatment (*Mitsubishi Trust & Banking Corp. v Housing Servs. Assoc.*, 227 AD2d 305, 306 [1st Dept 1996]).

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

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8473 In re Ronald Kendell G., III, and Another,

Children Under the Age of Eighteen Years, etc.,

Janet G.,
Respondent-Appellant,

Saint Dominic's Family Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Gilbert A. Taylor, J.), entered on or about April 13, 2018, which denied respondent mother's motion to vacate an order, same court and Judge, entered on or about March 23, 2018, which, upon the mother's default, determined that she permanently neglected the subject children, terminated her parental rights, and committed custody and guardianship of the children to petitioner agency and the Commissioner for the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the mother's motion to vacate her default because she failed to

substantiate her claim that employment in Pennsylvania prevented her from timely attending the hearing (*see Matter of Derrick T.*, 261 AD2d 108 [1st Dept 1999]). Notwithstanding that the day before the hearing both the mother's counsel and the agency warned her that she must appear, the mother failed to contact the court or counsel to advise them that while she intended to appear, she would be late (*see Matter of Ilyas Zaire A.-R. [Habiba A.-R.]*, 104 AD3d 512 [1st Dept 2013], *lv denied* 21 NY3d 859 [2013]). The mother's excuse was also unreasonable in light of her pattern of nonappearances (*id.* at 512-513).

The mother also failed to establish a meritorious defense to the allegations of permanent neglect. Despite the mother's claims to the contrary, the agency exercised diligent efforts to reunite her with the children (*see Matter of Janaya T. [Sarah T.]*, 165 AD3d 566 [1st Dept 2018]). Although the mother participated in certain services, there was no change in her ability to care for the children (*see Matter of Tyshawn S. [Shana S.]*, 143 AD3d 990 [2d Dept 2016]).

Furthermore, the preponderance of the evidence supported the finding that termination of the mother's parental rights was in the children's best interest. The record shows that the foster

mother, who is also the children's paternal grandmother, has cared for the children for several years and tends to their special needs (*see Matter of Angel P.*, 44 AD3d 448, 449 [1st Dept 2007]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8474 In re 177 Water Street Realty LLC, Petitioner, Index 100109/16

-against-

New York City Loft Board, et al., Respondents.

_____

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for New York City Loft Board, respondent.

Ween & Kozek, PLLC, Brooklyn (Michael P. Kozek of counsel), for Octavio Molina and Doreen Gallo, respondents.

_____

Determination of respondent New York City Loft Board (Board), dated January 15, 2015, which, among other things, granted the coverage application by respondent Molina under article 7-C of the Multiple Dwelling Law (Loft Law) with respect to the second floor unit of the subject building and his protected occupant status, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Shlomo Hager, J.], entered November 15, 2017), dismissed, without costs.

The Board's grant of the application by tenant Molina for coverage under the Loft Law is supported by substantial evidence

(*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The Board reasonably accepted the Administrative Law Judge's findings that Molina lived in a separate and independent household for 12 months during the window period, and was in possession of, and primarily resided at, that separate unit as of June 21, 2010.

In view of our disposition on the merits, we need not reach the Board's argument that this proceeding was not timely commenced. We have considered the remaining contentions, and find them unavailing.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8475 The People of the State of New York, Respondent, Ind. 4183/14

-against-

Ernest Gray, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered March 15, 2016, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 11 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police responded to a woman's report that defendant was trespassing in her one-bedroom apartment. The police woke defendant up and arrested him in the apartment's bedroom. Because defendant was nude and the police could not tell what articles of clothing belonged to him, an officer asked him where his clothes were. When defendant pointed to a shirt and shorts,

the police recovered evidence from the shorts, and then assisted defendant in dressing himself in these clothes. When the officer asked defendant where his clothes were, this question was "reasonably related to the police's administrative concerns" (*Pennsylvania v Muniz*, 496 US 582, 601-02 [1990]), because it would have been "impossible to process [the] arrest properly" (*People v McCloud*, 50 AD3d 379, 380 [1st Dept 2008], *lv denied* 11 NY3d 738 [2008]) without dressing defendant. "[E]ven if the answer was reasonably likely to be incriminating" (*People v Martin*, 147 AD3d 587, 588 [1st Dept], *lv granted* 30 NY3d 951 [2017]) in light of the woman's statement to the police that defendant had heroin in his shorts, the pedigree exception applies because the officer's intent was to address an administrative need rather than "to elicit an incriminating response" (*People v Wortham*, 160 AD3d 431, 431 [1st Dept], *lv denied* 31 NY3d 1123 [2018]).

Because defendant objected to the court's jury charge on a different ground from the one raised on appeal, his present claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the language employed in the charge was a provident exercise of discretion, and that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters not explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant's sole claim of error by his counsel pertains to a ruling the court made in an off-the-record conference, and the unexpanded record prevents this Court from considering any alternative rulings counsel might have sought in that conference. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8476 Aderonke Ayangbesan, Index 162328/15
Plaintiff-Respondent,

-against-

Seth Finkelstein, MD,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered November 9, 2016, which, inter alia, denied defendant's motion to dismiss the complaint as untimely, and granted plaintiff's cross motion to dismiss the second affirmative defense based upon the statute of limitations, unanimously modified, on the law, to deny the cross motion, and otherwise affirmed, without costs.

On the record created by the parties' submissions on the motion and cross motion, triable issues exist as to whether defendant is equitably estopped to assert the affirmative defense of the statute of limitations (*Simcuski v Saeli*, 44 NY2d 442,

453-454 [1978]). Accordingly, while we affirm the denial of defendant's motion to dismiss the complaint as untimely, we modify to deny plaintiff's cross motion to dismiss the affirmative defense of the statute of limitations.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8477 The People of the State of New York, Ind. 2912N/14
Respondent,

-against-

Jason Torres,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler 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 (Michael Sonberg, J.), rendered February 3, 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: FEBRUARY 21, 2019

CLERK

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

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

8478 Virginia M. Henneberry, Index 600357/10
Plaintiff-Appellant,

-against-

Leon Baer Borstein, et al.,
Defendants-Respondents.

Capuder Fazio Giacoia LLP, New York (Douglas M. Capuder of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (Spencer A. Richards of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 24, 2018, to the extent it denied plaintiff's motion for a protective order and to quash subpoenas duces tecum served by defendants on the attorneys who represented plaintiff in an action to vacate an arbitration award, unanimously reversed, on the law, with costs, and the motion granted. Appeal from said order, to the extent it deferred decision on plaintiff's motion for a protective order and to quash subpoenas duces tecum served by defendants on the attorneys who represented plaintiff in a matrimonial action and directed those attorneys to submit affidavits and documents for in camera review, unanimously dismissed, without costs, as taken from a nonappealable order.

The record does not establish that plaintiff affirmatively waived her attorney-client privilege with counsel in the action

to vacate the arbitration award (*Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 373 [1st Dept 2008]). A review of the complaint shows that plaintiff's claims do not need to be proved through the files from her counsel in the action to vacate the arbitration award. Defendants have not countered that showing or established that those files are vital to their defenses (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 64 [1st Dept 2007]; *see also IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451, 452 [1st Dept 2013]).

The motion court's deferral of decision on plaintiff's motion to quash and for a protective order as it related to the subpoenas served on plaintiff's counsel in the matrimonial action is not appealable as of right (CPLR 5701[a][2][v]; *Garcia v Montefiore Med. Ctr.*, 209 AD2d 208, 209 [1st Dept 1994]; *see also Albino v New York City Hous. Auth.*, 52 AD3d 321, 321-322 [1st Dept 2008]; *Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st

Dept 2011]). We decline to nostra sponte grant leave to appeal (*Garcia*, 209 AD2d at 209).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8479 In re Marine Engineers' Beneficial Association,
Petitioner-Respondent,

Timothy Wood,
Petitioner,

-against-

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

Index 651627/17

_____

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for appellants.

Tabak Mellusi & Shisha LLP, New York (Jacob Shisha of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about December 26, 2017, which denied respondents' cross motion to vacate an arbitration award dated March 1, 2017, and granted petitioners' motion to confirm the award, unanimously affirmed, without costs.

After petitioner Wood was found asleep on duty during a shift as Chief Marine Engineer (CME) of a Staten Island ferryboat, he and petitioner union and respondents entered into an agreement in which Wood agreed to a 30-day suspension without pay "in full satisfaction of the disciplinary matter." Upon returning to work following the suspension, Wood was told that he could not work as a Chief Marine Engineer (CME) aboard vessels in

service and could not bid for jobs in his title. Although Wood retained his CME title and hourly rate of pay for regular and overtime duty, the number of overtime hours available to him in the jobs in the lower title to which he was permitted to bid was limited.

The arbitrator found that respondents' restriction of Wood's bidding rights after his suspension was a de facto demotion based on "the identical conduct" "dealt with" in the settlement agreement, and therefore violated the section of the parties' collective bargaining agreement that provided, "Per annum Licensed Officers shall have the right to bid for jobs on the basis of seniority. Such bid will be permanent for one year. Changes may be made before the expiration of the year by mutual consent of the Licensed Officers, subject to prior approval by the Employer. Such approval shall not be unreasonably withheld."

Respondents argue that the arbitration award, which found that Wood had the right to bid and work as a full-duty CME without regard to the incident that gave rise to the settlement agreement, violates public policy with respect to maritime passenger safety. However, respondents' safety concerns, albeit important, are not "embodied in constitutional, statutory or common law [that] prohibit a particular matter from being decided or certain relief from being granted by an arbitrator" (*Matter of*

Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp., 35 AD3d 211, 213 [1st Dept 2006], *lv denied* 9 NY3d 805 [2007]). Respondents' claim of management prerogative pursuant to New York City Administrative Code § 12-307(b) is also availing (*id.*), as is their reliance on 18 USC § 1115 ("Misconduct or neglect of ship officers"), which cannot be read to bar or add to the actions taken by the parties' representatives to resolve this disciplinary matter.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8480 In re Daiva Gasperetti, Index 152371/17
Petitioner-Appellant,

-against-

Metropolitan Transportation Authority,
Respondent-Respondent.

_____

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about March 12, 2018, which denied petitioner's application for leave to file a late notice of claim, unanimously reversed, on the law and in the exercise of discretion, without costs, and the application granted.

The motion court improvidently exercised its discretion in denying petitioner's application for leave to file a late notice of claim given that it appears respondent had actual knowledge of the facts and circumstances constituting the claim within a reasonable time after the statutorily prescribed 90-day filing

period (*see* General Municipal Law § 50-e[5]). Moreover, it appears that respondent is not prejudiced by petitioner's delay in filing the notice of claim.

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

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8481- Index 451187/15
8482 In re People of the State of
New York, by Eric T. Schneiderman,
Attorney General of the State
of New York,
Petitioner-Appellant,

-against-

Orbital Publishing Group, Inc., et al.,
Respondents-Respondents,

Laura Lovrien,
Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Seth Rokosky of counsel), for appellant.

Lennon & Klein, P.C., New York (David P. Lennon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 1, 2015, which, insofar as appealed from as limited by the briefs, denied petitioner's request for a summary determination that respondents violated General Business Law §§ 349 and 350, unanimously reversed, on the law, with costs, and the request granted. Order, same court and Justice, entered June 20, 2016, which, insofar as appealed from as limited by the briefs, denied petitioner's request for a summary determination that respondents violated Executive Law § 63(12), unanimously reversed, on the law, with costs, and the request granted.

Contrary to Supreme Court, we conclude as a matter of law that solicitations for newspaper and magazine subscriptions promulgated by respondents are materially misleading (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 and n 1 [2002]; *People v General Elec. Co.*, 302 AD2d 314, 315 [1st Dept 2003]; *see generally* General Business Law §§ 349; 350; Executive Law § 63[12]). The solicitations implied that they were sent directly from the publishers or their authorized agents and offered their lowest available rates. However, the record demonstrates that respondents had at best indirect relationships with publishers (some of whom expressly forbade respondents to sell their publications) and offered rates well above the standard subscription prices.

The voluntary removal by respondents of some of the challenged language from the solicitations shortly before this proceeding was commenced does not prevent a finding of liability for the years when the language was in place or the issuance of an injunction to prevent re-inclusion of the language in the future (*see Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 109 [3d Dept 2005], *lv dismissed* 7 NY3d 741 [2006]).

Nor does it avail respondents that a version of the solicitations was "approved" by the Oregon Department of Justice in 2004. The Oregon determination is not binding on New York

courts, the Oregon settlement expressly provided that it did "not constitute approval for past, present or future business practices," the solicitations at issue do not even comply with the "approved" solicitation, and Oregon later brought a new enforcement action against respondents based on the solicitations at issue.

The disclaimer on the back of the solicitations is insufficiently prominent or clear to negate the overall misleading impression that consumers are being offered standard publisher rates (*see Federal Trade Commn. v Direct Mktg. Concepts, Inc.*, 624 F3d 1, 12 [1st Cir 2010]; *Federal Trade Commn. v Cyberspace.com, LLC*, 453 F3d 1196, 1200 [9th Cir 2006]; *see also Applied Card*, 27 AD3d at 107-108). The disclaimer appears on the back of the solicitation, is not referenced on the front, and consists of two dense paragraphs of block text all in the same typeface, making it unlikely to be read by consumers. In addition, the disclaimer either does not address or directly contradicts several claims made on the front of the solicitation, and its use of the term "agent" implies a closer relationship with the publishers than respondents actually have.

Even if, as respondents argue, express publisher authorization was not necessary for them to sell subscriptions, the solicitations were still misleading insofar as they purported

to be so authorized. This misrepresentation is also material insofar as publisher authorization implies some regulation of the rates charged.

Respondent Lydia Pugsley may be held individually liable, because the record demonstrates that she owned and operated respondent Adept Management, Inc., which performed "consulting" services for the respondent subscription agents, and that she had "actual knowledge" of the language of the solicitations and the ways in which it was likely to be misleading (*see People v Apple Health & Sports Clubs*, 206 AD2d 266, 267 [1st Dept 1994], *lv dismissed in part, denied in denied* 84 NY2d 1004 [1994]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8483 The People of the State of New York Ind. 1381/14
Respondent,

-against-

Yunnel Ramirez,
Defendant-Appellant.

_____

David K. Bertan, Bronx, for appellant.

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Joseph J. Dawson, J.), rendered July 15, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees and resisting arrest, and sentencing him to an aggregate term of five years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's suspicious behavior, including moving a metal object from his waistband to the crotch area of his pants, gave the police a founded suspicion of criminality justifying a common-law inquiry, and "[a]s a result of defendant's flight upon the approach of the officers, and the additional suspicion engendered by it, the evidence met the level of reasonable suspicion, justifying pursuit" (*People v Pines*, 281 AD2d 311, 312 [1st Dept 2001], *affd* 99 NY2d 525 [2002]).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the plausibility of the police account of the incident.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8484- Ind. 337/11
8485 The People of the State of New York,
Respondent,

-against-

Anthony Williams,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered September 17, 2013, as amended December 3, 2018, convicting defendant, after a jury trial, of criminal contempt in the first degree (three counts), assault in the third degree, falsely reporting an incident in the second degree, burglary in the second degree, forcible touching, and criminal contempt in the second degree, and sentencing him to an aggregate maximum term of 17 years and 2 months, unanimously affirmed.

Defendant's arguments concerning the sufficiency and weight of the evidence supporting the burglary conviction are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The element of unlawful entry was amply supported by the victim's

testimony that defendant entered her apartment despite her objections, as well as being in violation of an order of protection (*see People v Cajigas*, 19 NY3d 697, 701 [2012]; *People v Lewis*, 5 NY3d 546, 552 [2012]). The evidence also supports a reasonable inference that when defendant entered the apartment, he intended, at least, to threaten the victim and subject her to forcible touching.

The court properly denied defendant's request for a missing witness charge with respect to police officers who had allegedly examined damage to the victim's window caused by defendant's entry into her apartment. The officers would not have provided material testimony (*see generally People v Gonzalez*, 68 NY2d 424, 427 [1986]), because whether defendant caused damage when he opened the window and entered over the victim's objection was not a material issue in the context of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8486 New York City Transit Authority, Index 452721/14
Plaintiff-Appellant,

-against-

4761 Broadway Associates, LLC,
Defendant-Respondent.

_____

Peter Sistrom, New York, for appellant.

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

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 27, 2017, which denied plaintiff New York City Transit Authority's motion for summary judgment, unanimously affirmed, without costs.

The court correctly denied the Transit Authority's motion (CPLR 3212[f]; *Windley v City of New York*, 104 AD3d 597, 598-599 [1st Dept 2013]). The record does not permit resolution, as a matter of law, of the issue of whether the Transit Authority waived the covenant requiring defendant landowner, 4761 Broadway

Associates, LLC, to provide maintenance for the entrances, passages and stairwells leading to the subject subway stop (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 410-411 [1st Dept 2017]; see *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2016]).

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8487 The People of the State of New York, Ind. 1154/16
Respondent,

-against-

Edwin Alvarez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Revellese 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, New York County (Laura Ward, J.), rendered September 12, 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: FEBRUARY 21, 2019

CLERK

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

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

8490-
8491 Index 652892/13

The State Insurance Fund,
Plaintiff-Respondent,

-against-

Selective Insurance Company of America,
Defendant-Appellant.

_____

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Michael J. Marone of counsel), for appellant.

Montfort, Healy, McGuire & Salley LLP, Garden City (James Michael Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14, 2017, awarding plaintiff the aggregate amount of $1,456,904.11, unanimously reversed, on the law, without costs, the judgment vacated, and it is declared that defendant does not owe coverage under its umbrella policy. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about October 13, 2017, which denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Due to the employer's liability endorsement, which is clear and unambiguous, the umbrella policy issued by defendant did not

cover All Waste Interiors LLC (*see Monteleone v Crow Constr. Co.*, 242 AD2d 135, 140-141 [1st Dept 1998], *lv denied* 92 NY2d 818 [1998]).

Both sides agree that New Jersey law governs the issue of whether defendant should be estopped from denying coverage to All Waste. None of the situations mentioned in *Griggs v Bertram* (88 NJ 347, 443 A2d 163 [1982]) apply to this case.

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

ENTERED: FEBRUARY 21, 2019

CLERK

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

8492N Board of Managers of Ruppert Yorkville Towers Condominium,
Plaintiff-Respondent,

-against-

Carol Hayden,
Defendant-Appellant.

Index 153652/15

_____

Law Office of Stephen C. Silverberg, PLLC, Uniondale (Stephen C. Silverberg of counsel), for appellant.

Montgomery McCracken Walker & Rhoads LLP, New York (Kenneth H. Amorello of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 2, 2018, deemed appeal from judgment, same court and Justice, entered November 27, 2018 (CPLR 5520[c]), in favor of plaintiff and against defendant, and bringing up for review an order, same court and Justice, entered March 16, 2016, which, inter alia, granted plaintiff's motion for summary judgment on liability and dismissed defendant's affirmative defenses, unanimously affirmed, without costs.

Plaintiff is permitted by Real Property Law § 339-aa, and article V, § 7, of the condominium bylaws, to maintain this action notwithstanding the pendency of its cross claims against defendant in the foreclosure action brought by defendant's mortgage lender.

Defendant's remaining affirmative defenses were correctly dismissed on the ground that they were pleaded conclusorily (*see 170 W. Vil. Assoc. V G&E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]). Moreover, defendant failed to raise a triable issue of fact as to the defenses.

In opposition to plaintiff's prima facie showing that defendant was required to pay the common and other charges and fees, that she failed to do so, and that she received notices of her arrears and did not object to them (*see Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424 [1st Dept 2005]), defendant failed to raise an issue of fact.

Contrary to defendant's contention, the court properly considered plaintiff's records, including the tenant ledger (*see* CPLR 4518[a]; *DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146 [1st Dept 2003])). Plaintiff's witness testified that she was a corporate officer of plaintiff's managing agent, that she was familiar with and was a custodian of plaintiff's records, that the records were prepared in the ordinary course of plaintiff's business and were relied on by plaintiff, and that the entries in the records were made by persons with a business duty to prepare accurate records.

The Special Referee's calculation of damages is supported by the record (*see Sichel v Polak*, 36 AD3d 416 [1st Dept 2007]).

As defendant acknowledges, Penal Law § 190.40 is not applicable to the condominium's late penalty and interest charges, because those charges did not constitute interest "on the loan or forbearance of any money or other property." Moreover, defendant agreed to such charges when she purchased the unit, and could have avoided them by paying the invoices sent to her (*see Board of Mgrs. of Cent. Park Place Condominium v Potoschnig*, 111 AD3d 586 [1st Dept 2013]).

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: FEBRUARY 21, 2019

CLERK

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

8493N William Murawski, Index 114664/11
Plaintiff-Appellant,

-against-

Richard Bisso,
Defendant-Respondent.

_____

Law Office of Jay Stuart Dankberg, New York (Jay Stuart Dankberg of counsel), for appellant.

Miller, Leiby & Associates, P.C., New York (Jeffrey R. Miller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 25, 2016, which denied plaintiff's motion to vacate a default, unanimously affirmed, without costs.

Plaintiff moved to vacate an order entered against him upon his default in opposing defendant's motion to dismiss. Supreme Court denied the motion, finding that even if plaintiff had a reasonable excuse for the default, his claims were time-barred. Contrary to plaintiff's contention, defendant adequately pleaded an affirmative defense and it is otherwise clear that the first three causes of action in the complaint were barred by the statute of limitations.

Plaintiff also failed to show that his claim for intentional exposure to toxic chemical substances occurred within any applicable statute of limitations. His claim arises from alleged

exposure to oil based paint used in public areas of the building owned by defendant landlord. His own affidavit indicates that the first exposure occurred before a July 19, 2006 stipulation made in Housing Court. This claim was not interposed until sometime in 2011, at the earliest. Although plaintiff claims that such exposure continued, it was described as resulting from "touch up[s]" to common hallways and did not identify the timing of any of these incidents. Such a conclusory affidavit is insufficient to establish that he timely interposed these claims, let alone that they have substantive merit.

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

ENTERED: FEBRUARY 21, 2019

CLERK