SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 9, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6373 The People of the State of New York, Respondent, Ind. 4647/15

-against-

Terrence Colson, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Thomas A. Farber, J. at hearing; Mark Dwyer, J. at plea and sentencing), rendered October 25, 2016, convicting defendant of two counts of robbery in the second degree, and sentencing him, as a second felony offender, to concurrent terms of seven years, unanimously affirmed.

By order entered April 26, 2018, we held the appeal in abeyance and remanded to Supreme Court for further proceedings on defendant's motion to withdraw his plea, with new counsel assigned (160 AD3d 579). On or about November 30, 2018, Supreme

Court, upon remand, denied defendant's motion to vacate his plea and resentenced defendant. By letter dated April 12, 2019, defense counsel states that defendant does not seek review of the denial of his vacatur motion. We reject any remaining challenges and find no basis to disturb the sentence imposed.

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9801-
9802 The People of the State of New York, Ind. 2746/13
Respondent,

-against-

Faicel El Fellah,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at plea; Eduardo Padró, J. at sentencing; Edwina G. Mendelson, J., at resentencing), rendered December 23, 2015, as amended March 2, 2016, convicting defendant of grand larceny in the fourth degree, and sentencing him to a term of one year, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 364 days, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JULY 9, 2019

CLERK

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

9803-
9804 Howard Leader, et al., Index 153854/16
Plaintiffs-Appellants,

-against-

Parkside Group, et al.,
Defendants-Respondents.

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Santamarina & Associates, New York (Kacy Popyer of counsel), for appellants.

Law Office of Steven S. Sieratzki, New York (Steven S. Sieratzki of counsel), for respondents.

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Order, Supreme Court, New York County (Paul A. Goetz, J.), entered July 3, 2018, which granted defendants' motion to vacate the orders, same court and Justice, entered on or about April 24, 2017 and December 18, 2017, and respective judgments, entered June 12, 2017, and December 22, 2017; and order, same court and Justice, entered October 12, 2018, insofar as it granted defendants' motion for restitution payable by plaintiffs to defendants in the amount of $373,681.28, with interest from October 12, 2018, subject to plaintiffs' right to post an undertaking, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and defendants' motions denied.

A party seeking to vacate a judgment based on excusable

default must demonstrate both a reasonable excuse for the default and a meritorious defense (CPLR 5015[a][1]; *see Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]).

The preference for deciding cases on the merits does not justify vacating a default judgment where the moving party fails to satisfy the two-prong test of showing a reasonable excuse for the default and a meritorious defense (*see Eisenstein v Rose*, 135 AD2d 369, 370 [1st Dept 1987]).

Defendants failed to establish a meritorious defense in that collateral estoppel barred them from re-litigating the Housing Court's determination of the legal rent, as the Appellate Term properly concluded. Defendants had their day in court and failed to present evidence concerning individual apartment improvements and plaintiffs' alleged arrears. In light of this finding, we need not reach the other prong of reasonable excuse for the default.

Restitution was improper here because the court should have

declined to vacate the judgments for the reasons stated.

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: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9805 Rafael Etzion, Index 157904/17
Plaintiff-Appellant,

-against-

Blank Rome, LLP, et al.,
Defendants-Respondents.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 24, 2018, dismissing the complaint, unanimously affirmed, with costs.

Plaintiff alleges that defendants negligently drafted a fee provision in a stipulation of settlement in his divorce action, which ended with entry of a final judgment of divorce in August 2005. He alleges that, as a result of defendants' negligence, he was unable to recover the attorneys' fees he incurred in defending against a subsequent lawsuit brought by his former wife, who alleged that he had fraudulently misrepresented and concealed information concerning the value of an asset while negotiating the stipulation of settlement, resulting in more than

$38 million in damages to her (*see Etzion v Etzion*, 84 AD3d 1015, 1018 [2d Dept 2011], *lv dismissed* 18 NY3d 854 [2011]; *Etzion v Etzion*, 62 AD3d 646, 652 [2d Dept 2009], *lv dismissed* 13 NY3d 824 [2009]). After plaintiff, represented by defendants, prevailed in the fraud action (*see Etzion v Etzion*, 138 AD3d 678 [2d Dept 2016], *lv denied* 28 NY3d 910 [2016]), he commenced the instant malpractice action, effectively seeking to be relieved of the obligation to pay defendants' fees for the services rendered by them in the post-divorce fraud action.

The motion court correctly found that this action, which was commenced 12 years after the divorce action ended, is barred by the applicable three-year statute of limitations (*see Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]; CPLR 214[6]). Contrary to plaintiff's contentions, the continuous representation doctrine is inapplicable, because defendants were retained under two separately executed retainer agreements in the divorce action and the fraud action (*see Glamm v Allen*, 57 NY2d 87, 93-94 [1982]; *see also Shumsky*, 96 NY2d at 168). The first retainer agreement expressly stated that it did not cover any services following the entry of a final judgment of divorce. Thus, there was no mutual understanding that further representation was necessary on the

specific subject matter of the malpractice claim (*see McCoy v Feinman*, 99 NY2d 295, 306 [2002]; *see also Champlin v Pellegrin*, 111 AD3d 411, 412 [1st Dept 2013]). Moreover, the divorce action and the fraud action, although related, were two distinct and separate actions (*see Verkowitz v Ursprung*, 153 AD3d 1443 [2d Dept 2017]; *see also Voutsas v Hochberg*, 103 AD3d 445, 446 [1st Dept 2013], *lv denied* 22 NY3d 853 [2013]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9806-
9807 The People of the State of New York, SCI 1869/17
Respondent,

-against-

Gioriver Thomas,
Defendant-Appellant.

_____

Lauriano Guzman, Jr., Bronx, for appellant.

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

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Judgment, Supreme Court, New York County (Stephen Antignani, J. at plea; Laurie Peterson, J. at sentencing), rendered October 19, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of eight years, unanimously affirmed. Purported interlocutory appeal from order, same court (Laurie Peterson, J.), entered on or about July 30, 2018, which denied defendant's application for sentencing-related relief, unanimously dismissed, as subsumed in the appeal from the judgment.

Defendant's valid waiver of his right to appeal forecloses his present claims. Furthermore, independently of any appeal waiver, under the express terms of defendant's plea agreement, he was not entitled to litigate whether his performance of the

requirements of the agreement was sufficient to merit a more lenient sentence. Instead, it was entirely within the People's discretion to make that determination, provided that they did not engage in "arbitrary and capricious conduct." The record demonstrates that defendant's performance of the agreement did not warrant leniency, and that there was no arbitrary, capricious or bad faith conduct by the People (*see e.g. People v Johnson*, 291 AD2d 245 [1st Dept 2002], *lv denied* 98 NY2d 677 [2002]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9808 U.S. Bank National Association, Index 380832/11
Plaintiff-Respondent,

-against-

Dario Reyes,
Defendant-Appellant,

New York City Department of Housing
Preservation and Development, et al.,
Defendants.

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David A. Blythewood, Mineola, for appellant.

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Appeal from order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about July 21, 2017, which denied defendant Reyes's motion to vacate a judgment of foreclosure and sale entered January 25, 2017, unanimously dismissed, without costs, as moot.

After defendant's motion to vacate was denied, plaintiff moved to discontinue the action, vacate the notice of pendency, and vacate the judgment of foreclosure and sale in its entirety, and the motion was granted by order, same court (Doris Gonzalez, J.), entered February 6, 2019, of which we take judicial notice (*see Matter of Travelers Prop. Cas. Co. of Am. v Archibald*, 124

AD3d 480, 481 [1st Dept 2015]). Accordingly, this appeal is moot (*see Reyes v Sequeira*, 64 AD3d 500, 505 [1st Dept 2009], citing *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9809-
9809A In re Elijah M.,

A Child under the Age of
Eighteen Years, etc.,

Robin M., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Stephen N. Preziosi, P.C., New York, (Stephen N. Preziosi of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about September 13, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 5, 2018, which found that respondents neglected the subject child, unanimously reversed, on the law, without costs, the finding of neglect vacated, and the matter remanded for further proceedings. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner agency brought the instant neglect petition

within a week after a physical altercation occurred between the teenage child and respondent father, which resulted in an order of protection being issued against the child in favor of the father. Respondents refused to allow the child to return home, claiming that they were afraid of him, and the child did not want to return to the home. In the days between the matter being reported to the agency and the petition being filed, the agency attempted to schedule a child safety conference with respondents, but respondents retained an attorney who insisted on communicating on their behalf and being present at any meeting. The agency then commenced this proceeding.

Parents are obligated to support a child under the age of 21 (Family Court Act § 413[1][a]) and to exercise a "minimum degree of care" in supplying the child with adequate food, clothing, shelter, and education (*id.* § 1012[f][i]). In determining whether a parent has neglected a child by failing to meet that standard, the court "must evaluate parental behavior objectively," by asking whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing" (*Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]). This Court has concluded in many circumstances that a child's history of disciplinary issues did not justify a parent in excluding the child from the home while failing to cooperate

with the agency's efforts to address the child's problems and to return the child to the home (*see e.g. Matter of Kimberly F. [Maria F.]*, 146 AD3d 562, 563 [1st Dept 2017], *lv denied* 29 NY3d 902 [2017]; *Matter of Joelle T. [Laconia W.]*, 140 AD3d 513 [1st Dept 2016]).

However, none of those cases involved pending criminal proceedings and an order of protection against the child and in favor of one parent. Respondents were entitled to a full and fair opportunity to present evidence (*see generally Matter of Colby II [Sheba II.]*, 145 AD3d 1271, 1273 [3d Dept 2016]; *Matter of Tequan R.*, 43 AD3d 673, 679 [1st Dept 2007]) showing that they acted reasonably as prudent parents under all the circumstances (*see Nicholson v Scoppetta*, 3 NY3d at 370), and that, based on a founded fear that it would be unsafe for the child to return home, they were unable to continue to care for him *(but see Matter of Jacklynn BB. [Donna CC.]*, 155 AD3d 1363, 1364 [3d Dept 2017] [unwillingness to allow child to return home is not excused by child's disciplinary or behavioral issues]). Instead, the court limited evidence to the time period alleged in the petition, precluding respondents from presenting other evidence concerning the child's behavior. Respondents also were precluded from presenting evidence of their attorney's communications with the agency, which was offered to show their willingness to meet

and plan with the agency provided that the child was not present and their attorney could be present.

Accordingly, the matter is remanded for further proceedings consistent herewith.

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9810 The People of the State of New York, Respondent, Ind. 6439/09

-against-

Daniel Trager, Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Noreen M. Stackhouse of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 24, 2014, convicting defendant, after a nonjury trial, of assault in the second degree and two counts of attempted assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of five years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Defendant's intent to injure the three victims could readily be inferred from the totality of his violent conduct (*see e.g. Matter of Marie K.*, 19 AD3d 149 [1st Dept 2005]). While shouting angrily, defendant aggressively shoved three separate women, two of whom fell to the

ground, and one of whom (a senior citizen walking with a cane) was hospitalized. On appeal, defendant suggests that his conduct may have been the product of mental illness, but no psychiatric defense was offered at trial.

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9811 In re Domenick Muro, Index 260080/17
Petitioner-Appellant,

-against-

St. Raymond Cemetery,
Respondent-Respondent.

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Law Office of Randall Richards, Bronxville (Mitchell L. Perry of counsel), for appellant.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about July 26, 2017, which denied the petition to disinter the remains of Lucy Penenpede, petitioner's sister, from St. Raymond Cemetery for transfer to and internment at Gate of Heaven Cemetery, unanimously reversed, on the law, without costs, and the petition granted.

This a special proceeding, pursuant to N-PCL 1510(e), to disinter the remains of petitioner's sister, Lucy Penenpede. Petitioner, an elderly man, and his sister were inseparable from 1968, the year she became a widow, to the date of her death in 2016. St. Raymond Cemetery, where decedent is currently buried, did not oppose the petition, and the executors of decedent's will are in full support of the petition.

Petitioner wishes to visit his sister's plot more often, but cannot because she is buried at St. Raymond Cemetery in the

Bronx, which is 70 miles away from his home. Petitioner also wishes to be buried together with his sister and their parents, who are buried at Gate of Heaven Cemetery. We find that petitioner has demonstrated good and substantial reasons to disinter his sister (see *Matter of Currier [Woodlawn Cemetery]*, 300 NY 162, 164 [1949]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9812-
9812A Guinette Harrison, Index 114244/09
Plaintiff-Respondent-Appellant,

-against-

New York City Housing Authority,
Defendant-Appellant-Respondent,

"John Doe," et al.,
Defendants.

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Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant-respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered August 9, 2017, which, to the extent appealed from as limited by the briefs, denied that part of defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing plaintiff's trespass claim, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint. Plaintiff's cross appeal from aforesaid order, unanimously dismissed, without costs, as abandoned.

NYCHA was entitled to summary judgment dismissing plaintiff's claim for trespass. There was no evidence that NYCHA knew, when it fumigated plaintiff's upstairs neighbor's apartment, that its acts would cause the "immediate or

inevitable" intrusion of fumes into any other apartment (*Phillips v Sun Oil Co.*, 307 NY 328, 331 [1954]), or that there was a substantial certainty that the fumes would permeate into plaintiff's apartment (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2015]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9813 Joaquin F. Escobar Camacho, Index 161948/14
Plaintiff-Respondent,

-against-

Ironclad Artists Inc., et al.,
Defendants-Appellants.
- - - - -
[And A Third-Party Action]
- - - - -
Beggars Capital LLC,
Second Third-Party Plaintiff,

-against-

The Palombo Group Inc.,
Second Third-Party Defendant-Appellant.

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for Ironclad Artists Inc., appellant.

Faust Goetz Schenker & Blee LLP, New York (Damian F. Fischer of counsel), for Beggars Capital LLC, appellant.

Gorton & Gorton, LLP, Garden City (John T. Gorton of counsel), for The Palombo Group Inc., appellant.

Ginarte Gallardo Gonzalez Winograd, LLP, New York (Timothy Norton of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered September 20, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment against defendants Ironclad Artists Inc. and Beggars Capital LLC on the issue of liability for violations of Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff was injured in a fall from a scaffold. It is undisputed that the scaffold he was supplied with and directed to use lacked guard rails and that he fell off when the scaffold tipped. Plaintiff was not provided with any other safety devices. This evidence establishes prima facie a violation of Labor Law § 240(1) (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *see also Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]).

In opposition, defendants failed to raise an issue of fact. Contrary to defendants' claim, the alleged failure to unlock the wheels does not raise an issue of fact (*see Celaj*, 144 AD3d at 590 [the plaintiff's alleged failure to use the locking wheel devices and his movement of the scaffold while standing on it were at most comparative negligence, which is not a defense to a section 240(1) cause of action]). Plaintiff's fall from the scaffold, without guard rails or other protective devices, was a

proximate cause of the accident (*Vergara* at 280 [1st Dept 2005] ["defective or inadequate protective devices constituted a proximate cause of the accident"]; *Anderson v International House*, 222 AD2d 237 [1st Dept 1995]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9814-
9815-
9816 In re Richie N.V.
also known as Richie V., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Stephanie M., et al.,
Respondents-Appellants,

The New York Foundling Hospital,
Petitioner-Respondent.

_____

Susan Barrie, New York, for Stephanie M., appellant.

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

The New York Foundling Hospital Adoption and Legal Services, Long Island City, (Daniel Gartenstein of counsel), for respondent.

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

_____

Order, Family Court, New York County (Emily Olshansky, J.), entered on or about March 19, 2018, which, upon a finding of permanent neglect, terminated respondents' parental rights to the child Jessica and transferred custody of the child to petitioner agency and the Administration for Children's Services for purposes of adoption, unanimously affirmed, without costs.

Order, same court and Judge, entered on or about March 26, 2018, which terminated respondent mother's and respondent father's

parental rights to the child Richie upon the grounds, respectively, of permanent neglect and abandonment, and transferred custody of the child to petitioner agency and the Administration for Children's Services for purposes of adoption, unanimously affirmed, without costs.

The findings of permanent neglect against both parents with respect to Jessica and against the mother with respect to Richie are supported by clear and convincing evidence that the agency made diligent efforts to strengthen and encourage the parental relationship and that nonetheless respondents failed to plan for the children's future (*see* Social Services Law § 384-b[7][a], [c], [f], [3][g][i]; *Matter of Sheila G.*, 61 NY2d 368, 384 [1984]). Among other things, the agency scheduled regular and meaningful visitation with the children and formulated a service plan for each parent, which included regular supervised visitation, a parenting skills program, anger management, and, for the mother, referrals for substance abuse programs and domestic violence counseling.

Contrary to the mother's contentions, her service plan was specifically tailored to address the impediments to reunification; the children were removed from the home because of domestic violence and the mother's substance abuse. However, the mother failed to complete substance abuse treatment

and submit to regular drug testing and domestic violence counseling, and continued to believe that these services were unnecessary (*see Matter of L. Children [Wileen J.]*, 168 AD3d 455, 456 [1st Dept 2019]). She repeatedly tested positive for alcohol and illicit substances as recently as 2017 - four years after the children were removed from the home. Moreover, the record demonstrates that while her visits with the children were generally positive, the mother was often late or missed the visits altogether (*see Matter of Aisha C.*, 58 AD3d 471, 472 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]).

The record shows that, although the father largely completed his service plan, he failed to gain insight into how to plan for the children's future (*see e.g. Matter of L. Children*, 168 AD3d at 456). To the contrary, despite completing services such as batterer's intervention and anger management, the father was incarcerated in August 2016, before the dispositional hearing was held, and eventually sentenced to prison, in part, for assaulting the mother.

To the extent the father challenges the finding of abandonment as to Richie, this finding is supported by clear and convincing evidence that the father failed for the relevant time period to visit with the child, although he was able to do so and was not prevented or discouraged from doing so by the agency (*see*

Social Services Law § 384-b[5][a]). The father neither disputes that he had no contact with Richie for the eight months preceding the filing of the termination proceeding nor provides any explanation for his absence (*see Matter of Tiara Dora S. [Debbie S.]*, 170 AD3d 458, 458 [1st Dept 2019]). Contrary to the father's contention, in a case of abandonment, the agency has no obligation to make diligent efforts to strengthen the parental relationship (*id.* § 384-b[5][b]).

A preponderance of the evidence shows that termination of respondents' parental rights was in the best interests of the children, who had been in foster care for approximately five years and required permanency (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not warranted, because there is no evidence that respondents had a realistic and feasible plan to provide an adequate and stable home for the children, who have special needs (*see Matter of Rayshawn F.*, 36 AD3d 429, 430 [1st Dept 2007]).

We have reviewed the parents' remaining contentions, including the father's claim of ineffective assistance of counsel, and find them unavailing.

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9817 Nigel Samuels, et al., Index 22178/13
Plaintiffs-Appellants,

-against-

Town Sports International, LLC
doing business as New York Sports Club,
Defendant-Respondent.

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The Law Office of David S. Klausner PLLC, White Plains (Crystal Massarelli of counsel), for appellants.

Gordon & Rees, LLP, Harrison (Ryan G. Dempsey of counsel), for respondent.

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Order, Supreme Court, Bronx County (Rubén Franco, J.), entered on or about April 6, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Nigel Samuels contends he was injured when, while engaged in playing basketball on defendant gym's indoor court, he slipped on an accumulation of dust and fell.

Supreme Court erred in granting defendant summary judgment as defendant failed to make a prima facie case on its affirmative defense of primary assumption of the risk. The doctrine limits the scope of the defendant's duty of care (*Morgan v State of New York*, 90 NY2d 471, 483-484 [1997]). It relieves an owner or operator of a sporting venue from liability for those risks

inherent in the sport that the plaintiff was participating in where the plaintiff was aware of the risks; had an appreciation of the nature of the risks; and voluntarily assumed the risks (*Morgan*, 90 NY2d at 484). The underlying policy of the doctrine is "to facilitate free and vigorous participation in athletic activities" (*Cotty v Town of Southampton*, 64 AD3d 251, 254 [2d Dept 2009] [internal quotation marks omitted]), not to exculpate a landowner from liability for ordinary negligence in maintaining its premises *(Sykes v County of Erie*, 94 NY2d 912, 913 [2000]).

An owner may not be held liable if the injury results from certain conditions inherent in a participant's outdoor game of basketball (*id.* [irregular surfaces]; *see also Felton v City of New York*, 106 AD3d 488 [1st Dept 2013] [cracked, repaired and uneven outdoor court]). The same is true if a condition on an indoor basketball court is otherwise open and obvious (*see Egbebemwen A. v New York City Dept. of Educ.*, 148 AD3d 440, 441 [1st Dept 2017] [wrestling mat on indoor gym floor]; *Ciocchi v Mercy Coll.*, 289 AD2d 362 [2d Dept 2001] [the plaintiff collided with badminton pole stored in the corner of the gym]).

Here, defendant failed to establish that accumulated dust on an indoor basketball court is inherent in the sport of basketball. Nor did defendant establish that the alleged

condition was an open and obvious one (*Morgan*, 90 NY2d at 488 [tennis player tripped on torn net on indoor tennis court; not a risk inherent in the sport of tennis so as to relieve premises owner of liability, as a matter of law]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9818 Lea Ausch-Alteras, Index 156700/16
Plaintiff-Appellant,

-against-

Equinox - 85th Street, Inc.,
Defendant-Respondent.

_____

Gottlieb Siegel & Schwartz, LLP, New York (Lauren M. Solari of counsel), for appellant.

LaRocca Hornik Rosen & Greenberg LLP, New York (David N. Kittredge of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered December 14, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Summary judgment was not warranted in this action, because plaintiff's deposition testimony that she felt "stuck" as she attempted to step off the elliptical machine, coupled with defendant's maintanance worker's testimony that his right leg was stretched out next to the elliptical machine on which plaintiff was exercising, cleaning the outlets in the area, and that plaintiff's foot hit his foot, causing her to lose balance and fall, were together sufficient to raise a triable issue as to

whether plaintiff's injuries were caused by defendant's negligence (*Cohen v Shopwell, Inc.*, 309 AD2d 560 [1st Dept 2003]). An incident report prepared by the manager consistently recounts that plaintiff fell over a worker.

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9819 The People of the State of New York, Ind. 5518/15
Respondent,

-against-

Richard Parsels,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (M. Callagee O'Brien 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 (Michael J. Obus, J. at plea; Patricia Nunez, J. at sentencing), rendered February 16, 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: JULY 9, 2019

CLERK

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

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9820 Marina District Development Co., LLC, etc., Plaintiff-Appellant, Index 650230/18

-against-

Raphael Toledano, Defendant-Respondent.

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Josiah Knapp Law, PC, New York (Josiah Knapp of counsel), for appellant.

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered June 18, 2018, which denied plaintiff's motion for summary judgment in lieu of complaint and sua sponte dismissed the action on the ground that a violation of Judiciary Law § 470 rendered it a nullity, without prejudice to the filing of a new action under a new index number in which plaintiff is represented by an attorney who may practice law in New York, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded for further proceedings consistent herewith.

The court determined, on its own motion, that the action is a nullity because plaintiff's counsel was a nonresident of New York and although admitted to practice law in New York, did not maintain an office in New York State within the meaning of Judiciary Law § 470. The statute states, "A person, regularly admitted to practice as an attorney and counsellor, in the courts

of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." In *Schoenefeld v State of New York* (25 NY3d 22, 27 [2015]), the Court of Appeals held that "[b]y it plain terms . . . [Judiciary Law § 470] requires nonresident attorneys practicing in New York to maintain a physical law office here." The Court expressly rejected that the provision is satisfied merely because the nonresident has some type of physical presence in New York for the receipt of service by, for example, maintaining an address here or by the appointment of an agent to receive process.

Counsel claims that his participation in the Virtual Law Office Program (VLOP) at the New York City Bar Association (NYCBA) is sufficient for him to satisfy the requirement of maintaining a physical law office in New York. NYCBA's VLOP permits a subscribing attorney to use the bar association's address as a postal address, have the bar association accept mail and deliveries on behalf of the subscribing attorney, and it is authorized to accept service of process on behalf of such attorney. There is also a right to use conference rooms and facilities for subscribing attorneys to hold on site meetings and conduct work. The use of the conference room may entail additional fees.

To the extent that counsel uses the VLOP only as a mailing address and an agent authorized to accept service of process, it is insufficient to meet the physical presence requirement of *Schoenefeld*. While the additional services VLOP provides may well satisfy physical presence, an attorney needs to actually take advantage of those services to meet the requirements of Judiciary Law § 470. At bar, counsel does not claim that he actually uses the VLOP for anything but the delivery of mail and packages and for service of process. Although office space and conference rooms may be available to him, there is no claim that he actually uses those services. His May 2018 letter to the court was unsworn, and his accompanying proofs did not include his own sworn statement or testimony as to how he makes use of the facilities afforded by the program (*cf. Reem Contr. v Altschul & Altschul*, 117 AD3d 583 [1st Dept 2014] [Judiciary Law § 470 satisfied by attorney's affirmation that law firm leased New York office with a telephone, that firm partners used the office periodically, and that many of the firm's attorneys were admitted to practice in New York]; *Matter of Scarsella*, 195 AD2d 513 [2d Dept 1993] [statute satisfied by attorney's testimony that he maintained a desk in Manhattan office, with a telephone, shared the office with realty company, and there was a secretary available to him although not on his payroll]).

Counsel's correspondence and the papers served on his adversary and/or filed in court contradicted any physical presence in New York. His very letterhead showed a Philadelphia office and a New York office at the bar association for his PC but stated, "REPLY TO: PHILADELPHIA OFFICE," and the telephone and fax numbers feature a "215" area code.

Notwithstanding that we find that counsel is not authorized to maintain this action in New York State, we do not believe that it should have been dismissed. The Court of Appeals recently held that a nonresident attorney's failure to comply with the requirement of Judiciary Law § 470 of maintaining a physical office in New York State at the time a complaint is filed does not render the filing a nullity and therefore that dismissal of the action is not required (*Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P.*, 32 NY3d 645 [2019]). The party may cure the statutory violation with the appearance of compliant counsel or an application for admission pro hac vice by appropriate counsel (*id.* at 650). Accordingly, we vacate the order and remand the matter to afford plaintiff an opportunity to

cure the violation.

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

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9821 CitiMortgage, Inc., Index 13637/06
Plaintiff-Respondent,

-against-

Rafael Pantoja, et al.,
Defendants,

Ana Iris Salazar, et al.,
Defendants-Appellants.

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Balfe & Holland, P.C., Melville (Lee E. Riger of counsel), for appellants.

Houser & Allison, APC, New York (Victoria R. Serigano of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about March 13, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its foreclosure complaint as against defendants Ana Iris Salazar, Bernice Collado, and Intervenida Salvador (the Salazar defendants), unanimously reversed, on the law, without costs, the motion denied, and plaintiff's relief against the Salazar defendants limited to an equitable lien in the amount of the payoff of the prior valid lien held by Chase Mortgage Company.

It is undisputed that nonparty Rapsil Corporation conveyed the same property to two different recipients, first, defendant

Rafael Pantoja (who obtained a mortgage from CitiMortgage), and, second, a bona fide entity that transferred it to the Salazar defendants. Although the deed that conveyed the property from Rapsil to Pantoja was unacknowledged, which ordinarily would render it only voidable, because Pantoja controlled Rapsil, the deed was made under false pretenses and was therefore void ab initio (*see Marden v Dorthy*, 160 NY 39, 53 [1899]; *International Union Bank v National Sur. Co.*, 245 NY 368, 372-373 [1927]). Accordingly, the CitiMortgage mortgage was invalid as well (*Weiss v Phillips*, 157 AD3d 1, 10 [1st Dept 2017]).

This determination is not inconsistent with our prior related decisions (*Salazar v Pantoja*, 137 AD3d 511 [1st Dept 2016]; *ABN Amro Mtge. Group, Inc. v Pantoja*, 91 AD3d 440 [1st Dept 2012]). In any event, the law of the case doctrine does not limit our power to reconsider issues "where there are extraordinary circumstances, such as subsequent evidence

affecting the prior determination" (*J.P. Morgan Sec., Inc. v Vigilant Ins. Co.*, 166 AD3d 1, 8-9 [1st Dept 2018] [internal quotation marks omitted]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9822 The People of the State of New York, Respondent, Ind. 660/11

-against-

Anonymous, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 6, 2014, convicting defendant, after a jury trial, of murder in the second degree and gang assault in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress photo and lineup identifications. We have examined the photo array and a photograph of the lineup, and we conclude that the record supports the court's finding that neither was unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]; *see also People v Perkins*, 28 NY3d 432 [2016]). Any differences in the composition and backgrounds of the photos was insignificant. As for the lineup, the color photo thereof established "that defendant and the fillers were

sufficiently similar in skin tone and other features" (*People v Bazemore*, 147 AD3d 698, 698 [1st Dept 2017], *lv denied* 29 NY3d 1076 [2017]). Defendant's argument that the witness might have recognized one lineup filler, a police detective, is unsupported by any evidence that the witness had ever seen him before.

Defendant did not preserve his claim that the court should have allowed him to question the detective about another person's out-of-court statement, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant did not establish any basis for introducing a hearsay statement by a person who was available to testify and was a prospective defense witness.

The court properly admitted a recording of a 911 call under the present sense impression exception to the hearsay rule, because the declarant was describing substantially contemporaneous events (*see People v Vasquez*, 88 NY2d 561, 575 [1996]). There was no violation of the Confrontation Clause, because the caller's statements addressing an ongoing emergency were nontestimonial (*see People v Villalona*, 145 AD3d 625, 626 [1st Dept 2016], *lv denied* 29 NY3d 953 [2017]).

We also find that any error in any of the above-discussed ruling, including those relating to identification evidence, was harmless in light of the overwhelming evidence of guilt (*see*

People v Crimmins, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9823 Man Advisors, Inc., Index 654967/17
Plaintiff-Appellant,

-against-

Gregory Selkoe, et al.,
Defendants-Respondents.

_____

Carnelutti & Altieri Esposito Minoli PLLC, New York (Alexander D. Tripp of counsel), for appellant.

Kirsch & Neihaus PLLC, New York (Emily Kirsch of counsel), for respondents.

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Order, Supreme Court, New York County (John J. Kelley, J.), entered September 26, 2018, which granted defendants' motion to dismiss the complaint's second cause of action for fraud, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that, as CEO of nonparty Karmaloop, Inc., defendant Gregory Selkoe solicited from plaintiff a bridge loan in the amount of $2,040,000. Plaintiff agreed, on condition that Selkoe personally guarantee the loan. Selkoe provided the personal guarantee, and also represented to plaintiff that he had previously given only one other personal guarantee, and that Karmaloop had never defaulted on any loan payment. Both of these representations were false, in that, unbeknownst to plaintiff, Selkoe had previously guaranteed a loan issued to another

Karmaloop executive, and Karmaloop had defaulted on that loan.

The foregoing states a claim for fraudulent inducement, which is not duplicative of plaintiff's claim for breach of the guarantee. Plaintiff does not allege that Selkoe misrepresented the intent to perform on the guarantee and underlying promissory note, which would render the fraud claim duplicative, but rather alleges that Selkoe misrepresented his and Karmaloop's ability to perform (*see Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 181 [1st Dept 2017]; *Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 581 [1st Dept 2015]).

At this early juncture, we find that plaintiff should be "permitted to plead in the alternative (see CPLR 3014)," and its claim "for fraud, should not be dismissed as duplicative of the breach-of-contract cause of action" *(Citi Mgt. Group, Ltd. v Highbridge House Ogden, LLC*, 45 AD3d 487, 487 [1st Dept 2007]).

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

ENTERED: JULY 9, 2019

CLERK

Renwick, J.P., Gische, Kapnick, Singh, JJ.

9827N Telx-New York, LLC, Index 650440/17
Plaintiff-Appellant,

-against-

60 Hudson Owner LLC,
Defendant-Respondent.

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Debra L. Greenberger of counsel), for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Caitlin L. Bronner of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about January 24, 2019, which, upon reargument, adhered to the original determination that the common interest privilege does not shield the communications at issue from disclosure, unanimously affirmed, without costs.

The common interest privilege does not apply to the communications at issue, in which plaintiff and a third party collaborated to promote their common interest in closing a merger transaction, because the communications do not relate to

litigation, either pending or reasonably anticipated (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616 [2016]).

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: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

9828 The People of the State of New York, Respondent, Ind. 4776/14

-against-

Jeffrey Wong, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered November 30, 2015, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court providently exercised its discretion when it announced that it would grant the People an adjournment to allow for a psychiatric examination of defendant (*see generally People v Diaz*, 15 NY3d 40, 47 [2010]), and in giving the statutory adverse inference instruction against defendant based on his refusal to be examined (*see* CPL 250.10[5]). The prosecutor inadvertently overlooked the statement of notice of an extreme emotional disturbance defense contained in defendant's omnibus motion, and immediately requested an adjournment for examination

after becoming aware of the omission 10 months later during a court appearance shortly before the scheduled start of the trial.

The statutory provision under which the People may apply to have a defendant examined by their own psychiatrist (CPL 250.10[3]) contains no time limit. Furthermore, defendant has not established that he was prejudiced by the court's ruling. We note that the trial was not actually adjourned, and that, in his direct testimony, defendant explained his reason for refusing to be examined, which had nothing to do with the untimeliness of the People's request for an examination.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9829-
9829A In re Elijah T. and Another,

Children Under Eighteen
Years of Age, etc.,

Clayton T.,
Respondent-Appellant,

Administration for Child Services,
Petitioner-Respondent.

_____

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

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

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

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Order of disposition, Family Court, New York County (Michael R. Milsap, J.), entered on or about September 13, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about July 11, 2018, which found that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1012[f][i][B]). The record

shows that the father engaged in a severe act of domestic violence against the mother by repeatedly punching and kicking her arms, back, and face, while the children were nearby (*see Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]*; Matter of Moises G. [Luis G.]*, 135 AD3d 527 [1st Dept 2016]). Because of the father's violent actions, the mother went immediately to the hospital to seek treatment and, the children, who were ages two and four, were left without supervision. Furthermore, the court properly drew "the strongest possible negative inference" from the father's failure to testify or offer any evidence (*Matter of Mia B. [Brandy R.]*, 100 AD3d 569, 569 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]; *see Matter of Ninoshka M. [Liz R.]*, 125 AD3d 567, 568 [1st Dept 2015]).

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9830 Greenbacker Residential Solar LLC., Index 656717/17
Plaintiff-Respondent,

-against-

OneRoof Energy, Inc., et al.,
Defendants,

Dalton William Sprinkle,
Defendant-Appellant.

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Pierce Bainbridge Beck Price & Hecht LLP, New York (Aaron J. Gold of counsel), for appellant.

Law Office of Mark E. Goidell, Garden City (Mark E. Goidell of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered September 27, 2018, which denied defendant Dalton William Sprinkle's motion to dismiss the complaint as against him for lack of personal jurisdiction, without prejudice, and for failure to state a claim, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The complaint fails to state a cause of action as against Sprinkle for tortious interference with contract, because there is no allegation that Sprinkle personally benefitted from the corporations' alleged breach of contract; the only benefit he is alleged to have received is his salary from the corporations (*see*

G.D. Searle & Co. v Medicore Communications, Inc., 843 F Supp 895, 912 [SD NY 1994]).

Plaintiff failed to make a sufficient start on a showing of jurisdiction over Sprinkle to entitle it to jurisdictional discovery (*see Venegas v Capric Clinic*, 147 AD3d 457, 458 [1st Dept 2017]). Because the conduct complained of involved the diversion of funds from outside New York to recipients outside New York, the "critical events," and thus the situs of injury, were not in New York (*see Deutsche Bank AG v Vik*, 163 AD3d 414, 415 [1st Dept 2018]; CPLR 302[a][3][ii]). Moreover, plaintiff does not allege that Sprinkle received substantial revenue from interstate or international commerce (*see* CPLR 302[a][3][ii]). Because Sprinkle did not personally benefit from the breach of contract, the corporations' contacts with New York cannot be imputed to him (*see Charles Schwab Corp. v Bank of Am. Corp.*, 883 F3d 68, 85 [2d Cir 2018]).

Nor can Sprinkle be said to have "reasonably expected" his actions to have consequences in New York (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214–215 [2000]; CPLR 302[a][3][ii]), as he neither did anything to avail himself of New York nor took any

steps to project himself into New York. Given that Sprinkle had no contact with New York and did not purposefully avail himself of New York, the constitutional guarantee of due process bars New York courts from exercising personal jurisdiction over him.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Gesmer, Kern, JJ.

9831 The People of the State of New York, Ind. 3376/11
Respondent,

-against-

Guillermo Villa,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered April 23, 2014, convicting defendant, after a nonjury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the court's credibility determinations. The testimony of the sole eyewitness was sufficient to support a finding of guilt beyond a reasonable doubt (*see People v Calabria*, 3 NY3d 80 [2004]). Although there were inconsistencies between the eyewitness's testimony and her out-of-court statements, and between her

testimony and that of police witnesses, she never equivocated about her core testimony identifying defendant as the person who shot the victim. She consistently testified that her attention was drawn to the shooter because of the color of his shirt, and that she had an opportunity to "stare at his face" as they walked by each other. She identified defendant in a photo array 10 days after the shooting, and in a lineup the following day, and testified that she immediately recognized him in the lineup and had no doubt about it.

Defendant did not preserve his challenges to the validity of his waivers of his right to a jury trial and his right to testify, and we decline to review them in the interest of justice. As an alternative holding, we find nothing in the existing record to cast doubt on either of these waivers, or to suggest that further inquiry by the court was necessary in either instance (*see People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]; *People v Christian*, 244 AD2d 297 [1st Dept 1997], *lv denied* 91 NY2d 890 [1998]).

The court properly denied defendant's suppression motion. An examination of the photo array reveals that defendant and the other participants were similar in appearance, and the discrepancy in skin tone was not so noticeable as to create a substantial likelihood that defendant would be singled out for

identification (*see e.g. People v Muhammad*, 168 AD3d 549 [1st Dept 2019]). As for defendant's procedural objections to the suppression ruling, the defense consented to the inconsequential presentation of some trial testimony before determination of the suppression motion, and despite the hearing court's noncompliance with CPL 710.60(6), this Court has an adequate record on which to make its own findings and conclusions (*see People v Rodriguez*, 258 AD2d 299, 299 [1st Dept 1999], *lv denied* 93 NY2d 902 [1999]).

Although the prosecutor's summation mischaracterized the evidence in two isolated respects, these remarks were not so egregious as to have deprived defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]), particularly in a nonjury trial (*see generally People v Moreno*, 70 NY2d 403, 405-406 [1987]).

Defendant's ineffective assistance of counsel claims relating to trial counsel's failure to raise various above-discussed issues are unreviewable on direct appeal because they involve matters not reflected in the record, particularly with regard to consultations between defendant and counsel (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the

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

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9832 The People of the State of New York, Ind. 2951/15
Respondent,

-against-

Jevone Frye,
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 (Brent Ferguson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 11, 2017, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, and sentencing him to a term of 10 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to a youthful offender determination (*see People v Rudolph*, 21 NY3d 497, 501 [2013]).

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9833 Robin Eshaghpour, Index 652344/18
Plaintiff-Respondent,

-against-

Zepsa Industries, Inc., et al.,
Defendants-Appellants.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Larry F. Gainen of counsel), for appellants.

Law Office of Alan C. Stein, P.C., Woodbury (Alan C. Stein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered November 7, 2018, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, with costs.

Defendant Zepsa Industries, Inc. (Zepsa) and plaintiff entered into a contract to install architectural woodwork in residential apartments owned by plaintiff's wife. Plaintiff signed the front page of the agreement, indicating that the "prices, specifications and conditions above and on the back of this proposal [were] satisfactory." Zepsa moved to have the complaint dismissed, relying on the "Terms and Conditions" printed on the back of the proposal page, which included a forum selection clause requiring all disputes to be litigated in North Carolina. However, the Terms and Conditions section never

appeared in the proposed agreement that plaintiff ultimately reviewed and signed, and it is undisputed that plaintiff never saw the Terms and Conditions page. Indeed, the final 29-page agreement, which did not include the "Terms and Conditions," was paginated consecutively and signed on each page by both parties. Therefore, contrary to defendants' suggestions, plaintiff had no reason to ask for any other documents.

Although documents may be incorporated by reference as part of an executed agreement (*see Kachurin v Barr*, 272 AD 391, 398 [1st Dept 1947], *affd* 297 NY 889 [1948]; *see also Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 498-499 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010]), the doctrine of incorporation by reference "is grounded on the premise that the material to be incorporated is so well known to the contracting parties that a mere reference to it is sufficient" (*see Maines Paper & Food Serv., Inc., v Keystone Assoc., Architects Engrs. & Surveyors, LLC*, 134 AD3d 1340, 1342 [3d Dept 2015]). The referenced material must be described in the contract such that it is identifiable beyond all reasonable doubt (*Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 251-252 [1st Dept 1995]). Here the agreement's oblique reference to an otherwise unidentified Terms and Conditions page, which was

never provided to plaintiff, is insufficient to meet this exacting standard (*see id.* at 252).

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: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9834 Tall Tower Capital, LLC, Index 652447/18
Plaintiff-Respondent,

-against-

Stonepeak Partners LP,
Defendant-Appellant.

_____

Simpson Thacher & Bartlett LLP, New York (Joseph M. McLaughlin of counsel), for appellant.

King & Spalding LLP, New York (Richard T. Marooney of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about November 28, 2018, which granted plaintiff's motion to dismiss defendant's counterclaims for fraudulent misrepresentation, negligent misrepresentation, and violation of Florida's Deceptive and Unfair Trade Practices Act (Fla Stat § 501.201 *et seq.*), unanimously affirmed, with costs.

Applying New York conflict of laws principles, we find that an "actual conflict" exists between Florida and New York law applicable to the misrepresentation counterclaims (*see Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200-202192 misc2d 7 [1st Dept 2013]). An interest analysis demonstrates that New York has the greater interest in this dispute (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]).

While there are connections to both jurisdictions, the significant contacts with New York outweigh those with Florida (*L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 [1st Dept 2009]). Also, the law of the place of the tort applies, which here is New York, where defendant is based and sustained its injury (*see SFR Holdings Ltd. v Rice*, 132 AD3d 424, 426 [1st Dept 2015], *lv dismissed* 27 NY3d 977 [2016]; *JAO Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 12 [Sup Ct, NY County 2001], *affd* 293 AD2d 323 [1st Dept 2002]).

Defendant failed to sufficiently allege justifiable or reasonable reliance, since the Florida lawsuit was a matter of public record and could have been verified by defendant through the exercise of ordinary diligence (*Churchill Fin. Cayman, Ltd. v BNP Paribas*, 95 AD3d 614, 614-615 [1st Dept 2012]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 [1st Dept 2000]; *see also MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 287 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]).

Also, as alleged, no special relationship arose between these sophisticated parties engaged in an arm's-length business

transaction (*Basis Pac-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 124 AD3d 538, 539 [1st Dept 2015]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 141 [1st Dept 2014]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296-297 [1st Dept 2011]).

The majority of Florida district court decisions have concluded that only "consumers" have standing to bring a claim under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA)(*Gibson v MHHS-Sinsations, LLC*, 2018 WL 3625783, *5, 2018 US Dist LEXIS 130401, *11 [MD Fla, June 21, 2018]; *see Gibson v Paradise Lakes, LLC*, 2017 WL 3421532, *4, 2017 US Dist LEXIS *12 [MD Fla, Aug 9, 2017]; *Carroll v Lowes Home Ctrs., Inc.*, 2014 WL 1928669, *3, 2014 US Dist LEXIS 68525, *3 [SD Fla, May 6, 2014]). The allegations demonstrate that defendant was not acting as a consumer of plaintiff's goods or services.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9835 J.K. Trading Associates, Inc., Index 159611/17
Plaintiff-Respondent,

-against-

Avnissh Patel,
Defendant-Appellant.

_____

Goetz Fitzpatrick LLP, New York (Scott D. Simon of counsel), for appellant.

_____

Order, Supreme Court, New York County (Robert David Kalish, J.), entered December 21, 2018, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Defendant's argument that the personal guarantee language in the memoranda at issue was insufficient to bind him, requiring dismissal of this action, is unavailing at this stage of the litigation (*see MIMS Master Fund, L.P. v Cambi*, 155 AD3d 449 [1st Dept 2017], *lv dismissed* 31 NY3d 1062 [2018]). Defendant's claims of vagueness are defeated by his own affidavit, in which he states that he knew plaintiff wanted a personal guarantee from him. Similarly unpersuasive is defendant's argument that he cannot be held personally liable, since he did not sign on the signature lines of the memoranda, but above them in a box describing the consigned merchandise, and thus cannot be bound by any terms outside that box (*see Chen v Yan*, 109 AD3d 727 [1st

Dept 2013]). Defendant did not strike out the guarantor language, or otherwise express disagreement with it. Furthermore, the subject memoranda were between plaintiff and "Sirgold/Avnissh Patel" and not merely defendant's company Sirgold (*see Key Equip. Fin. v South Shore Imaging, Inc.*, 69 AD3d 805 [2d Dept 2010]).

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9836 In re Charles R.,
Petitioner-Appellant,

-against-

Diana E.,
Respondent-Respondent.

_____

Bruce A. Young, New York, for appellant.

_____

Appeal from order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about December 18, 2017, which granted respondent mother's application to modify a visitation order to provide that a specified individual or other person could drop off and pick up the subject child for visitation with petitioner father at a specified location, unanimously dismissed, without costs, as taken from a nonappealable order.

The order appealed from, which modified a temporary visitation order upon the mother's ex parte order to show cause, is not appealable as of right since it is not an order of disposition (*see* Family Court Act § 1112[a]; *Matter of Rosa M. v Francisco P.*, 151 AD3d 451 [1st Dept 2017]), and did not decide a

motion made on notice (CPLR 5701[a][2], 5704[a]; *see Sholes v Meagher*, 100 NY2d 333, 335 [2003]). We decline to grant leave to appeal.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9837 OmniVere, LLC, Index 154544/16
Plaintiff/Defendant-Respondent,

-against-

Saul N. Friedman, et al.,
Defendants,

Intelligent Discovery Management LLC,
et al.,
Defendants/Plaintiffs-Appellants.

- - - - -

Intelligent Discovery Management LLC,
et al.,
Third-Party Plaintiffs-Appellants,

-against-

OmniVere Holding Company, LLC, et al.,
Third-Party Defendants-Respondents.

_____

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for appellants.

Bernstein & Associates, PLLC, Scarsdale (Robert B. Bernstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered December 7, 2018, which granted the motion of OmniVere LLC, OmniVere Holding Company LLC and Eric S. Post (Omnivere) to dismiss the counterclaim and third-party complaint, unanimously affirmed, with costs.

The court correctly dismissed the claims of Intelligent Discovery Management, LLC and Balint Brown & Basri, LLC (IDMB) for damages resulting from alleged misrepresentations and

fraudulent conduct relating to equity IDMB received in a transaction with Omnivere. IDMB failed to sufficiently allege justifiable reliance on the alleged misrepresentations regarding Omnivere's financial projections and financing since IDMB had the means to discover the true nature of the transaction by the exercise of ordinary diligence but failed to make use of those means (*see Ventus Group LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009]). Similarly, the court correctly dismissed the negligent misrepresentation claim because IDMB failed to allege that it had no means to discover the financial information about Omnivere which it claims was misrepresented to it (*see Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]). The court also properly dismissed the breach of contract claims arising from Omnivere's alleged refusal to make distributions and recognize conversion rights under the relevant agreements since conditions in the agreements had not been met before litigating those claims.

We have considered IDMB's remaining claims and find them unavailing.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9838 The People of the State of New York, Respondent, Ind. 2684/12

-against-

Mario Gulindo, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about May 30, 2018, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant defendant's request for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by

the risk assessment instrument, or that outweighed the seriousness of the underlying sexual conduct committed against a child. Defendant's favorable score on the Static-99 test had only limited probative value (*see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]).

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9839 Lawrence E. Mann, et al., Index 157874/17
Plaintiffs-Appellants,

-against-

Kristen A. Thomas-Senior, et al.,
Defendants-Respondents.

_____

Kishner Miller Himes, P.C., New York (Bryan W. Kishner of counsel), for appellants.

Nixon Peabody LLP, Jericho (Juan Luis Garcia of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 19, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The court properly dismissed the complaint because reasonable reliance is an element of claims sounding in fraud (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]), and plaintiffs failed to plead that they reasonably relied upon defendants' representations concerning the view from the apartment that they were purchasing. The complaint is devoid of any allegations that plaintiffs exercised adequate due diligence

in ascertaining the extent to which the adjacent building would impact the view (*see Jee Foo Realty Corp. v Lemle*, 259 AD2d 401, 402 [1st Dept 1999]).

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

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9840 Little Cherry, LLC, Index 654136/16
Plaintiff-Respondent,

-against-

Cherry Street Owner LLC, et al.,
Defendants-Appellants.

- - - - -

New York Community Bank,
Plaintiff-Intervenor-Respondent,

-against-

Cherry Street Owner LLC, et al.,
Defendants.

_____

Kasowitz Benson Torres LLP, New York (Paul M. O'Connor III, of counsel), for appellants.

Herrick Feinstein LLP, New York (Ross L. Hirsch of counsel), for Little Cherry, LLC, respondent.

Cullen and Dykman LLP, New York (Samit G. Patel of counsel), for New York Community Bank, respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered October 2, 2018, which, to the extent appealed from as limited by the briefs, denied in part defendants' motion to dismiss the amended complaint, unanimously affirmed, with costs.

Defendants' motion to dismiss was properly denied, as the amended complaint set forth a cause of action for declaratory relief (*see generally Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]; *Fillman v Axel*, 63 AD2d 876, 876 [1st Dept 1978]). In the amended complaint,

plaintiff, a ground lease tenant, alleges that, pursuant to Zoning Resolution § 12-10(f)(4), it is a party in interest in a portion of the tract of land covered by the written declaration consenting to the zoning lot merger, and seeks a declaratory judgment that the defendants cannot proceed with their development as planned without the express consent of plaintiff.

Defendants failed to establish, as a matter of law, that plaintiff is not a party in interest whose consent is required for the zoning lot merger (*see generally Macmillan, Inc. v CF Lex Assoc.*, 56 NY2d 386, 389 [1982]). A ground lease tenant has an interest in a tract of land akin to the fee owner. Plaintiff in this case identified multiple adverse effects of the zoning lot merger, which could meet the requirement of Zoning Resolution 12-10(f)(4)(Y) that plaintiff be adversely affected by the Declaration (*see Macmillan, Inc. v Cadillac Fairview Corp.*, 86 AD2d 15, 18 [1st Dept 1982], *rev on other grounds sub nom. Macmillan, Inc. v CF Lex Assoc.*, 56 NY2d 386 [1982]). Plaintiff was also identified as a party in interest in a certification prepared in order to effectuate a prior zoning lot merger, and, in connection with that prior merger, also executed a waiver of declaration of zoning lot restrictions in which it was identified

as a party in interest. Both of these documents were filed with the New York City Department of Finance without any objection by defendants or the prior owner of the property.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9841 The People of the State of New York, Ind. 1650/14
Respondent,

-against-

Felix Rodriguez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jack H. Peterson-Daily 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 (Ethan Greenberg, J. at plea; Alvin Yearwood, J. at sentencing), rendered August 17, 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: JULY 9, 2019

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9843-
9843A In re Belinda J.,
Petitioner-Respondent,

-against-

Tyrone J.,
Respondent-Appellant.
- - - - -
Bethany J., et al.,
Nonparty Appellants.

_____

Richard L. Herzfeld, New York, for Tyrone J., appellant.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children appellants.

Andrew J. Baer, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about October 13, 2017, which granted the mother final custody of the subject children with visitation to father, unanimously affirmed, as to the three youngest children, without costs, and appeals therefrom otherwise dismissed, without costs, as moot. Appeals from order, same court and Justice, entered on or about October 11, 2017, unanimously dismissed, without costs, as subsumed within the appeals from the order entered on or about October 13, 2017.

The record supports the court's determination, after a hearing, where it had the opportunity to evaluate the testimony and credibility of the parties, to grant the mother custody of

the parties' children (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). The court appropriately considered the fact that a final order of protection had been issued against the father based on allegations of domestic violence against the mother (Domestic Relations Law § 240[1][a]), as the issuance of such an order required proof of domestic violence by a "fair preponderance of the evidence" (Family Court Act § 832). The court also took appropriate consideration of the children's expressed preferences (*Eschbach*, 56 NY2d at 173), which are entitled to consideration, but are not determinative (*William-Torand v Torand*, 73 AD3d 605, 606 [1st Dept 2010]). We have considered the appellants' remaining contentions and find them unavailing.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9844 Omni Contracting Company, Inc., Index 601200/09
Plaintiff-Appellant,

-against-

New York City Housing Authority, etc.,
Defendant-Respondent.

_____

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

Kelly D. MacNeal, New York (Paul A. Marchisotto of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered May 15, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that it was fraudulently induced to award plaintiff the construction contract at issue by submitting evidence that it reviewed plaintiff's bid submissions through the Vendors Information Exchange System (VENDEX) and that those submissions failed to disclose two prior investigations by the Department of Labor. In opposition, plaintiff failed to raise an issue of fact (*see Omni Contr. Co., Inc. v City of New York*, 84 AD3d 763 [2d Dept 2011], *lv denied* 17 NY3d 716 [2011]). Long before the events at issue in this case occurred, the law was well settled that defendant was, and remains, a New York City

agency (*see Bass v City of New York*, 38 AD2d 407, 410 [2d Dept 1972], *affd* 32 NY2d 894 [1973]). Thus, at a minimum, plaintiff should have known that, in determining whether to award it a construction contract, defendant could review its VENDEX submissions. Defendant was not required to so inform plaintiff.

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: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9845 In re 101 West 23 Owner I LLC, Petitioner-Appellant, Index 650905/18

-against-

715-723 Sixth Avenue Owners Corp., Respondent-Respondent.

_____

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for appellant.

Anderson Kill P.C., New York (Peter I. Livingston of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 9, 2018, which denied the petition to confirm the subject appraisal, and dismissed the special proceeding brought pursuant to CPLR article 76, unanimously reversed, on the law, with costs, and the petition granted.

Supreme Court improperly concluded that the neutral appraiser's valuation of the entire building, and not just the residential portion, in determining the building's fair market value rendered the decision "wholly irrational." Schedule B of the lease at issue specifically provides that the adjustment to the rent for the leased premises would be calculated by 36% of the fair market value index (FMV Index) (as defined by the lease), multiplied by the Mortgage Index Percentage, determined by reference to published data. The FMV Index was the "value of

the Land only, plus the value of the building." The lease further states: "For purposes of this Lease, the value of the building shall mean the fair market value of the building existing on said Land." Such language is clear and unambiguous, and nowhere excludes the value of the commercial space from the value of the building. Furthermore, there is no evidence of "fraud, bias or bad faith" on the part of the neutral appraiser (*Liberty Fabrics v Corporate Props. Assoc. 5*, 223 AD2d 457, 457 [1st Dept 1996]), and the appraisal followed the procedures as set forth in the lease. Accordingly, there is no basis to disturb the neutral's appraisal in this case (*see 936 Second Ave., L.P. v Second Corporate Dev., Co., Inc.*, 82 AD3d 446 [1st Dept 2011], *lv denied* 17 NY3d 713 [2011]).

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9846-
9847-
9848 Frances Freeman, Index 307933/11
Plaintiff-Respondent, 300358/11

-against-

Angjelin Shtogaj, et al.,
Defendants-Appellants,

Kwame Opoku,
Defendant.

- - - - -

Regina Amponsah, et al.,
Plaintiffs-Respondents,

-against-

Angjelin Shtogaj, et al.,
Defendants-Appellants,

Kwame Opoku,
Defendant.

_____

Picciano & Scahill, P.C., Bethpage (Keri A. Wehrheim of counsel), for appellants.

Law Office of Aguwa & Metu, P.C., Jamaica (Chijioke Metu of counsel), for Frances Freeman, respondent.

Heriberto Cabrera & Associates, Brooklyn (Heriberto Cabrera of counsel), for Regina Amponsah and Manuel Amponsah, respondents.

_____

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 14, 2017, in favor of plaintiff Frances Freeman against defendants Angjelin Shtogaj and Arien N. Shtogaj, following a jury trial on damages only, unanimously reversed, on the law, without costs, and the matter remanded for a new trial

on damages. Judgment, same court and Justice, entered June 19, 2017, in favor of plaintiff Regina Amponsah and against defendants Angjelin Shtogaj and Arien N. Shtogaj, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 14, 2017, unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Defendants Angjelin Shtogaj and Arien N. Shtogaj were found to be solely responsible for the motor vehicle accident from which this action arises; the judgments on appeal were entered upon jury verdicts following a trial of damages only.

Defendants are entitled to a new trial of damages in Freeman's case, because the trial court erred in denying their request for a continuance to permit their expert orthopedist to testify about his examination of Freeman (*see generally Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 52 [1st Dept 2008]). The orthopedist's testimony was likely to be material. Although defendants were able to elicit testimony from their expert radiologist to rebut Freeman's expert's testimony at trial, the orthopedist had a different specialty, would have testified based on a physical examination of Freeman rather than an examination of her MRI films, and would have testified that no future treatment was necessary - an opinion that the radiologist did not

offer and that is directly relevant to damages. The need for a continuance did not result from a failure to exercise due diligence on defendants' part. The orthopedist became unavailable because of a death in his family - a circumstance that defendants had no way of predicting or avoiding. Moreover, the resulting brief delay would not have affected the orthopedist's ability to testify at trial if not for the constricted timeline due to the court's vacation schedule.

The court properly denied defendants' request for a continuance to permit their expert radiologist to testify about her interpretation of Amponsah's MRI films, because the need for a continuance resulted from defendants' failure to exercise due diligence. Defendants admittedly knew before the trial began that the radiologist would not be available until after the court left for vacation, yet failed to timely raise this issue.

The court properly admitted into evidence the medical records of plaintiffs' treating physician, notwithstanding that these records contained reports from other doctors, based on the treating physician's testimony that they were created in the ordinary course of business for the purposes of diagnosis and treatment (*see Williams v Alexander*, 309 NY 283, 287 [1955]; *Freeman v Kirkland*, 184 AD2d 331, 332 [1st Dept 1992]).

Plaintiffs' treating physician properly relied on these

records in offering his opinions at trial. Unlike the situation in the cases relied upon by defendants, the underlying MRI films were properly entered into evidence (*see Kovacev v Ferreira Bros. Contr., Inc.*, 9 AD3d 253, 253 [1st Dept 2004]), and the other doctors' reports did not "form[] the principal basis" for plaintiffs' expert's opinion on the "crucial issues of the existence and severity of plaintiff's injuries" (*see Sigue v Chemical Bank*, 284 AD2d 246, 247 [1st Dept 2001]; *Borden v Brady*, 92 AD2d 983, 984 [3d Dept 1983]; *see also Ferrantello v St. Charles Hosp. & Rehabilitation Ctr.*, 275 AD2d 387 [2d Dept 2000]).

Plaintiffs established that their injuries were caused by the subject accident through their own testimony, as well as the testimony of their expert witness. Although defendants' expert offered conflicting testimony with respect to the cause of Freeman's injuries, the jury was entitled not to credit this testimony (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Contrary to defendants' contention, plaintiffs' future

medical expenses[1] were not too speculative to be compensable (*see generally Trezza v Metropolitan Transp. Auth.*, 113 AD3d 402, 404 [1st Dept 2014], *appeal dismissed* 23 NY3d 1011 [2014]; *Pilgrim v Wilson Flat, Inc.*, 110 AD3d 973, 974 [2d Dept 2013]). Plaintiffs' expert testified that plaintiffs would likely need surgery, physical therapy, and pain medication in the future, and estimated the costs of those treatments. Although the amounts of the jury awards were inconsistent with these estimated costs, the trial court corrected this issue by reducing the awards. Moreover, although plaintiffs expressed some reluctance to have surgery and admitted that they had declined surgery in the past, they also testified that they were open to having surgery in the future. The jury could reasonably have credited this testimony.

[1] If the orthopedist's testimony at Freeman's new trial results in an award for future medical expenses that differs from the award on appeal, then our ruling on this issue will be inapplicable as to Freeman.

We reject defendants' arguments about verdict inconsistency in Freeman's case and juror confusion and the missing witness charge in Amponsah's case.

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

ENTERED: JULY 9, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Gesmer, Kern, JJ.

9849N Paul Bridger, Index 155013/18
Plaintiff-Appellant,

-against-

Fourth Avenue Capital Partners, L.P., et al.,
Defendants-Respondents.

Olshan Frome Wolosky, LLP, New York (Brian A. Katz of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Jacqueline G. Yecies of counsel), for respondents.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about December 6, 2018, which granted defendants' motion to compel arbitration, unanimously affirmed, without costs.

The court properly granted defendants' motion to compel arbitration where the parties entered into an agreement upon the termination of plaintiff's employment, which contained a broad arbitration clause governed by the Federal Arbitration Act (FAA). This required, among other things, arbitration for all controversies and claims "relating to [plaintiff's] employment, this Agreement or the breach, enforcement, interpretation or validity of this Agreement (including the determination of the scope or applicability of this Agreement to arbitrate)," except for claims related to a separate confidentiality agreement.

Contrary to plaintiff's contention, his claims clearly arose under the terms of his agreement as related to his employment, and thus fell within the scope of the arbitration clause, thus ending judicial inquiry (*Liberty Mgt. & Constr. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 80 [1st Dept 1995]). Even if the arbitration clause were, as plaintiff contends, ambiguous in scope, any such ambiguities would be resolved in favor of arbitration since its construction is governed by the FAA (*see Matter of PricewaterhouseCoopers v Rutlen*, 284 AD2d 200 [1st Dept 2001]).

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

ENTERED: JULY 9, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Rosalyn H. Richter
Peter Tom
Cynthia S. Kern
Anil C. Singh, JJ.

8172
Index 161799/15

_____x

Timothy Reif, et al.,
Plaintiffs-Respondents,

-against-

Richard Nagy, et al.,
Defendants-Appellants.
_____x

Defendants appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 11, 2018, which, inter alia, granted plaintiffs' motion for summary judgment on their claims of replevin and conversion directing defendants to return the Artworks to plaintiffs, and for an award of damages, costs, and attorneys' fees.

Nixon Peabody LLP, New York (Thaddeus J. Stauber and Kristin M. Jamberdino of counsel), for appellants.

Dunnington Bartholow & Miller LLP, New York (Raymond J. Dowd and Samuel A. Blaustein of counsel), for respondents.

SINGH, J.

This controversy stems from art allegedly looted by the Nazis during World War II. We are asked to decide whether Supreme Court properly granted plaintiffs, Timothy Reif and David Frankel, as co-executors of the estates of Leon Fischer and Milos Vavra (collectively plaintiffs), summary judgment on their claims for conversion and replevin. We find that plaintiffs made a prima facie showing of entitlement to judgment as a matter of law that they have superior title to two pieces of art by Egon Schiele, "Woman Hiding Her Face (1912)" and "Woman in a Black Pinafore (1911)" (collectively the Artworks), and that defendants Richard Nagy and Richard Nagy Ltd. (collectively defendants) failed to raise a triable issue of material fact.

Background

Plaintiffs are the legally declared heirs of Fritz Grunbaum (Grunbaum), a well-known Jewish Viennese cabaret artist and art collector.[1] Grunbaum admired the Viennese modern artist, Egon Schiele, and amassed an 81-piece collection of his work before World War II. After the Nazi invasion of Austria on March 12,

[1] Grunbaum was also a doctor of the law and veteran of World War I. His jokes often targeted the Nazis. His fame in Vienna was such that there is a square named after him, "Fritz Grunbaum Platz."

1938, Grunbaum attempted to escape with his wife, Elisabeth "Lilly" (nee Herzl) Grunbaum (Elisabeth), to Czechoslovakia, but was apprehended and arrested by the Nazis on or about March 22, 1938. From the time of his arrest until his murder on or about January 14, 1941, Grunbaum remained imprisoned in various concentration camps, including Buchenwald and Dachau.

Throughout Grunbaum's imprisonment Elisabeth endeavored to secure his release so that they could flee to family abroad. Her sister, Mathilde Lukacs (Mathilde), and brother-in-law, Sigmund Lukacs (Sigmund) (collectively the Lukacses) had fled Vienna to escape Nazi persecution of the Jews. Sigmund had been arrested at the same time as Grunbaum but was released two months later on condition that he would leave Austria. He and Mathilde escaped to Belgium on August 26, 1938, where they resided until 1941 when they fled to Brussels. Elisabeth remained in Austria hoping Grunbaum would be released, as promised by certain German officers. However, starting on Kristallnacht[2] and continuing

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[2]Kristallnacht, German for "crystal night" or "night of broken glass," occurred on November 9–10, 1938. During these days, Nazis attacked Jewish persons and destroyed their property. The name Kristallnacht refers to the litter of broken glass left in the streets after these organized riots took place (*see* https://www.britannica.com/event/Kristallnacht [last accessed June 10, 2019]). Quoting historians, plaintiffs' expert Petropolous notes that Kristallnacht "inaugurated the definitive

throughout the war, the Nazis passed a series of laws targeting the Viennese Jewish community, directly impeding Elisabeth's efforts to secure Grunbaum's release as well her own ability to flee Nazi persecution.

On July 16, 1938, while Grunbaum was imprisoned at Dachau, the Nazis forced him to execute a power of attorney in favor of Elisabeth. Just four days later, pursuant to the purported power of attorney, Elisabeth was compelled to permit a Nazi official named Franz Kieslinger (Kieslinger) to inventory Grunbaum's property, including his art collection, which contained the 81 pieces by Schiele. Kieslinger determined Grunbaum's entire art collection of over 400 pieces to be valued at 5,791 Reichsmarks (RM).[3] Kieslinger inventoried the Schiele pieces as follows: he

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phase of . . . the coerced expropriation of German-Jewish property . . . [even calling] for robbing the Jews of their apartments."

[3] The Nazis enacted a regulation on April 26, 1938, requiring Jews with holdings of more than 5,000 RM to declare all of their assets. Based upon that declaration, a Jew would then be subject to a tax, called an "expiation fine," in the amount of 20% of all assets. By The Ordinance on The Use of Jewish Property, enacted January 16, 1938, all property held by Jews, including art valued in excess of 1,000 RM was declared to be property of the Third Reich. Remaining property would be held by trustees, who permitted only the withdrawal of subsistence amounts. The Ordinance on the Seizure of Assets of Enemies of the People and the State in Austria, enacted November 18, 1938, legitimized the confiscation of all Jewish assets in favor of the Reich, and on

first listed the five oils by name, then he listed together 55 sheets of "large hand drawings," 20 pencil drawings, and one etching, but gave no more details, nor their titles. Grunbaum's collection also included French watercolors and pieces by artists such as Rembrandt, Degas, Rodin and Durer, all identified by name in the Kieslinger inventory. Only Grunbaum's name appears on the inventory. Elisabeth had her own property and filed a separate declaration on behalf of herself on or about April 27, 1938.

Sometime after it was inventoried, Grunbaum's entire art collection was deposited with Schenker & Co., A.G. (Schenker), a Nazi-controlled shipping company,[4] and marked for "export." On September 8, 1938, the company formally applied for an export license for "Lilly Grunbaum." The license, however, is devoid of customs stamps, meaning that the art collection never legally left Austria.[5] In addition, a subsequently filed statement of assets dated November 12, 1938, lists Grunbaum, "formerly Vienna

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July 11, 1939, it was declared that all Jews were to be stripped of their citizenship, and reiterated that all of their property was forfeited to the Third Reich.

[4] The US War Department confirmed Nazi control of Schenker in a letter dated October 19, 1945.

[5] Schenker was a defendant in the *Bakalar* litigation (discussed *infra*). It claimed that its headquarters and warehouses were destroyed during the war, and thus it had no additional records.

. . . now Buchenwalde," as still possessing 5,791 RM worth of "pictures and graphics."

Prior to fleeing Austria, the Lukacses' were also forced to inventory their assets. In her property registration dated July 15, 1938, Mathilde reported a total of 22 pictures, without further detail, which were valued at 400 RM. This inventory corresponded with the Lukacses' "moving notice," which Mathilde had filed in the name of Sigmund on June 23, 1938. The notice stated that the Lukacses had, among other things, "23 various framed pictures, 1 photo frame, 16 small photo's [sic] and etchings framed." Schenker filed an export request on behalf of Sigmund on June 27, 1938, which listed for export "eleven oil paintings, three watercolors, eight graphics, five miniatures, three drawings, 20 pieces of miscellaneous porcelain and ten carpets." The items left Vienna on or about August 12, 1938, about the same time the Lukacses fled. The Grunbaum art collection, including the 81 works by Schiele, was not listed as part of any of the Lukacses' emigration documents.[6]

On or about January 31, 1939, attorney Ludwig Rochlitzer

[6] While these inventories, notices and requests are not in the record, these facts and conclusions are stated in the Resolution of the Michalek Commission of the Austrian Art Restitution Commission, dated November 18, 2010.

(Rochlitzer) was appointed as the Grunbaums' Aryan Trustee.[7] That same day, Rochlitzer sent Elisabeth a bill for 6,500 RM for services. It appears that Elisabeth paid Rochlitzer's bill, but it is unclear from whose assets she paid it.

By early 1939, under Nazi orders, Elisabeth was evicted from her apartment. She went to live with a non-Jewish woman, Grete Hassel (Hassel). After going into hiding, Elisabeth was captured by the Nazis and sent to live in the "collective Jewish residences," a euphemism for "ghetto."[8] In the ghetto, she was forced to live in overcrowded and squalid conditions, deprived of nearly all valuables.

While in the ghetto, Elisabeth filed an updated property declaration on behalf of Grunbaum on or about June 30, 1939.

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[7] An Aryan Trustee was "an administrator commissioned by" the Nazis for Jewish owned assets, as it was illegal for Jews to possess the property in their property declarations after November 8, 1938.

[8] In general, US Courts have found that "Nazi persecutory policy toward the Jews . . . had three main components: 1) all Jews first were confined in ghettos and issued new identification papers that identified them as Jews; 2) nearly all of these Jews later were forcibly removed from the ghetto for subsequent murder either by shooting or gassing; and 3) a limited number of Jews whom the Germans considered 'work capable' temporarily were spared and were transferred to forced labor camps where many died from starvation, disease and other inhumane conditions" (*United States v Firishchak*, 426 F Supp 2d 780, 785 [ND Ill 2005], *affd* 468 F3d 1015 [7th Cir 2006]).

That declaration listed Grunbaum's assets as now depreciated by the Reich Flight Tax which was 17,250 RM and the Jewish Property Levy of 8,800 RM, as well as some smaller bills, but, notably, it did not include any depreciation for Rochlitzer's bill. However, it still listed the entire art collection as valued at 5,791 RM. Accordingly, Grunbaum's art collection remained in Austria after Mathilde fled.

On September 3, 1939, World War II broke out, making any subsequent Jewish emigration nearly impossible and highly dangerous.

Grunbaum was murdered at Dachau on June 9, 1941. Elisabeth signed a declaration before an Austrian notary in connection with obtaining her husband's death certificate, stating, "[T]here is nothing left," in other words, there is no estate. Therefore, "[b]ecause of a lack of goods or property, there [was no] estate proceeding for inheritance" before the Dachau Probate Court. On or about October 5, 1942, Elisabeth was murdered at Maly Trostinec death camp.

Grunbaum was survived by Elisabeth and two siblings, one of whom was Elise Zozuli (Zozuli). Zozuli was the only heir who survived World War II. Zozuli is directly related to Milos

Vavra,[9] a plaintiff in this action.

Postwar Restitution Claims

On May 15, 1947, Sigmund filed two claims to reclaim his property. He had been forced by the Nazis to close his business, they had confiscated his inventory of jewels and they made him pay a number of export taxes so that he and his wife could flee Austria. In those claims, Sigmund also noted that Mathilde and he had been imprisoned in Brussels by the Nazis on October 26, 1943 and were detained in a senior citizens' home until the end of the war.

On June 16, 1954, Mathilde formerly applied to an Austrian court to declare Elisabeth to be dead and certify her heirship, but she withdrew the application on July 16, 1954. Additionally, in 1959, Mathilde made a claim for restitution on behalf of her sister Elisabeth. Her claim was for Elisabeth's bank assets and jewelry, including a large pearl necklace, a diamond and platinum brooch, and a large diamond ring. She rescinded the applications when the German government requested a certificate of her right to inheritance.

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[9] Vavra is a testamentary heir (by will) of Marta Bakalova, Zozuli's daughter, who died in 1996. Marta Bakalova was the heir to Zozuli, who died in 1977.

Between 1945 and 2002, other potential heirs to Grunbaum attempted to lay claim to the Grunbaums' lost assets. None were successful.

On April 19, 1999, Vavra, a great-nephew of Grunbaum, filed a claim for restitution for Grunbaum's works of art in Austria.[10] On September 12, 2002, Leon Fischer (Fischer), second cousin of Elisabeth, and Vavra were declared by an Austrian court to be the legal heirs of Grunbaum. Fischer and Vavra (the heirs) passed away, and plaintiffs Reif and Frankel are the current co-executors of their estates.

Grunbaum's Schiele Art Collection

The Kieslinger inventory dated April 27, 1938 listed that Grunbaum had 81 pieces by Schiele. Grunbaum's ownership of the Schieles can be traced back to 1928, when he loaned 21 of the pieces (the two subject paintings not included) to his friend, the Viennese art dealer Otto Nirenstein (later known as, and hereinafter referred to as, Otto Kallir), who exhibited them as part of a retrospective celebrating Schiele's work. There is a detailed list of all 21 pieces from the Grunbaum collection in

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[10] Vavra lived behind the Iron Curtain until 1989 and there is testimony in the record that he was unable to effectively pursue heirship claims while behind it.

the exhibition. However, the 1928 catalog compiled by Otto Kallir features only four of the pieces, explicitly attributing them to Grunbaum, but fails to mention the rest of the loaned pieces.

In 1930, Otto Kallir compiled the first catalogue raisonné[11] of Schiele's work (the 1930 catalog). Three[12] pieces in the catalog are designated as belonging to Grunbaum, none of which are the pieces at issue.

During the subsequent prewar and war years, there was no mention of the Schieles at issue or the entire Grunbaum art collection, aside from the Kieslinger inventory and the Schenker documents.

In 1956, 65 pieces by Schiele surfaced at Gutekunst & Klipstein (later known as and hereafter referred to as Galerie Kornfeld), an art gallery in Switzerland in which Eberhard Kornfeld (Kornfeld) was a principal. The artworks were put on sale by Kornfeld on September 8, 1956, almost immediately after the window for claims made in Austria for Nazi looted art closed,

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[11] A catalogue raisonné is a comprehensive, annotated listing of all known artworks by an artist.

[12] While the 1928 catalog explicitly attributes four Schiele works to Grunbaum, the 1930 catalog only includes three works.

on July 31, 1956. That same year, Galerie Kornfeld issued a sales catalog for its Schiele collection (1956 catalog), which included the artworks at issue here, listed under the titles "Woman, Sitting with Hands on Hips" and "Model, Hiding Face." The catalog also listed "Dead City III" with a provenance of being previously owned by Grunbaum. However, aside from "Dead City III," no provenance is given for the other Schiele pieces.[13] Mathilde's name does not appear as provenance for any of the pieces listed in the 1956 catalog.

Otto Kallir purchased the Schiele collection listed in the 1956 catalog as well as a few others, totaling 110 pieces, from Galerie Kornfeld before 1957. In Otto Kallir's 1966 update of his 1930 catalog, Grunbaum is still the only name listed as the provenance for the same Schiele artworks he had featured. Notably, while Kornfeld's gallery is listed in its provenance as well, Mathilde's name is nowhere to be found.

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[13] Defense expert Laurie A. Stein states that "[t]he paucity of detailed and illustrated published information about Schiele's works on paper (which had little monetary value at the time) hindered awareness of which objects specifically may have had provenance to Grunbaum. . . ." Further, Kornfeld testified at his deposition that he created his own titles as "[n]one of the leaves had any names and had to be written upon, described . . . [Therefore, often there was] the same work by two different names . . . [and] title c[ould] change once you process[ed] the piece of art."

In 1988, Jane Kallir, the granddaughter of Otto Kallir, published "Egon Schiele: The Complete Works," which included "Woman in a Black Pinafore" (1911) and "Woman Hiding Her Face" (1912), the current titles of the artworks at issue here. She also listed the artworks without full provenance, stating only that they were part of a "private collection." In the *Bakalar* action, discussed *infra*, Jane Kallir testified that the Schieles were of Grunbaum provenance. However, in her 1988 catalog and its subsequent updates, there is no mention of either Grunbaum or Mathilde.

The 1998 Seizure of "Dead City III"

In 1998, "Dead City III" was being exhibited at the Museum of Modern Art (MOMA), on loan by the Leopold Foundation,[14] a collection amassed after World War II by Dr. Rudolph Leopold and later sold to the Austrian government. Before the painting could be removed from New York, then-District Attorney Robert Morgenthau seized "Dead City III" on the grounds that the Nazis had stolen it from Grunbaum (*see Matter of Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 NY2d 729, 732

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[14] A second Schiele "Portrait of Wally" was also on loan from the Leopold Foundation and exhibited at MOMA in late 1997. The heirs, different from those in this case, laid claim to it and the matter settled for $19 million while trial was pending.

[1999]). MOMA contested the seizure citing to section 12.03 of New York's Arts and Cultural Affairs Law, which exempts works of fine art from seizure while on exhibition in a museum. MOMA argued that it was compelled to return the painting to the Leopold Foundation (*see Museum of Modern Art*, 93 NY2d at 733-734).

The Court of Appeals quashed the subpoena on the grounds that it was contrary to the legislative intent of the statute to permit such seizures. It noted that the legislative intent was "to insulate nonresident lenders from seizures via legal process and, concomitantly, to protect State cultural institutions that depend upon the free flow of art for the benefit of the people of the State of New York" (*id.* at 736). As a result, "Dead City III" was returned to the Leopold Foundation.

The 2005 Federal Action Regarding "Seated Woman With Bent Left Leg" (1917)

In 2005, David Bakalar brought suit against the Grunbaum heirs, finally declared to be Fischer and Vavra, seeking, inter alia, a declaration that he was the rightful owner of the Schiele drawing "Seated Woman With Bent Left Leg" (1917), a piece he had owned for over 40 years (*see Bakalar v Vavra*, 819 F Supp 2d 293 [SD NY 2011], *affd* 500 Fed Appx 6 [2d Cir 2012], *cert denied* 569

US 968 [2013]).

Bakalar testified that he had purchased the drawing in 1963 from Otto Kallir's Galerie St. Etienne, which had purchased it from Galerie Kornfeld. He maintained that he was not informed of its provenance and he had never heard of either Grunbaum or Kornfeld (*Bakalar*, 819 F Supp 2d at 295). Kornfeld testified in his deposition in the *Bakalar* action that he had corresponded with Dr. Leopold in 1998 and told him that he acquired "Dead City III," as well as the rest of the Schiele collection featured in the 1956 catalog, from Mathilde, who died in 1979. This is the first time Kornfeld stated that he purchased the Schiele collection in his 1956 catalog from Mathilde.

Following a bench trial, the District Court made a number of factual determinations, including that Grunbaum had possessed the drawing prior to World War II (*Bakalar*, 819 F Supp 2d at 295). It also found that Kornfeld had purchased the drawing from Mathilde in 1956 and that Bakalar had purchased the drawing in good faith in 1964 (*id.*). The court explained that the heirs had failed to produce "any concrete evidence that the Nazis looted the drawing or that it was otherwise taken from Grunbaum" and that the "most reasonable inference . . . is that the [d]rawing remained in the Grunbaum family's possession" throughout World

War II (*id.* at 297, 298-299 [internal quotation marks omitted]).

However, the District Court found that, "Bakalar c[ould] not establish by a preponderance of the evidence that Grunbaum *voluntarily* relinquished possession of the [d]rawing, or that he did so intending to pass title" (*id.* at 300). The court also found that Mathilde had not acquired valid title to the drawing (*id.* at 302-303). Nonetheless, the District Court awarded the drawing to Bakalar on the ground of laches (*id.* at 305-306).

The Second Circuit affirmed in a summary order,[15] observing that the District Court's finding that the drawing had not been looted by the Nazis was not "clearly erroneous" (*Bakalar*, 500 Fed Appx at 8). However, the Court explicitly declined to rule on whether Mathilde had acquired proper title to the drawing. Instead, it affirmed the District Court's finding that laches applied (*id.* at 9).

This Action to Recover the Artworks: "Woman Hiding Her Face" (1912) and "Woman in a Black Pinafore" (1911)

By complaint dated March 18, 2016, plaintiffs filed suit against defendants claiming a right of replevin and conversion and a violation of New York General Business Law § 349 and

[15] US Court of Appeals for the Second Circuit, Local Rule 32.1.1 (b) states that "Rulings by summary order do not have precedential effect."

seeking a declaratory judgment that they have ownership of the Artworks. The complaint annexed various documents concerning the Grunbaums, including the Kieslinger inventory, the power of attorney and the property declarations of Grunbaum and Elisabeth.

Also annexed to the complaint is an email from plaintiffs' counsel to defendants, dated November 13, 2015, advising defendants that plaintiffs had learned that day that defendants were offering two Schiele pieces with acknowledged Grunbaum provenance for sale. The Artworks were the pieces at issue here, "Woman in a Black Pinafore" (1911), listed as number 21 in the 1956 catalog, and "Woman Hiding Her Face" (1912), listed as number 22 in the 1956 catalog. Additionally, plaintiffs annexed a letter dated October 6, 2004, from the Art Loss Register,[16] stating that "Girl [sic] in a [Black] Pinafore" was not in their database, but that it was definitely a Schiele from the Grunbaum collection and in light of the "Dead City III" litigation, there was a "remote" "chance of a title claim" against the work.

Defendant Richard Nagy, who has been an independent art dealer since 1980, first obtained a 50% share in "Woman in a

[16] The Art Loss Register operates a database of pieces stolen or missing (http://www.artloss.com/en [last accessed June 11, 2019]).

Black Pinafore" from Thomas Gibson Fine Art on or around February 24, 2005, the day after its unsuccessful auction at Sotheby's.[17] In October 2011, he "voided" his interest, given the ambiguity and problems with the provenance. However, he reacquired his interest in the piece on or around December 9, 2013, soon after the Second Circuit affirmed the dismissal of the plaintiffs' claims in *Bakalar* (*see Bakalar*, 500 Fed Appx at 6).

Nagy acquired "Woman Hiding Her Face" on December 18, 2013. The Art Sale and Transfer Agreement (the Agreement) for "Woman Hiding Her Face" states that "the heirs of Fritz Grunbaum claim ownership of the Painting on the theory that it was stolen from Mr. Grunbaum when he was deported to a German concentration camp during World War II." Nagy agreed that he would have no claim against the seller if title were declared invalid on that basis. The Agreement listed the provenance of the work, as per Sotheby's, as follows:

> "• Fritz Grunbaum, Vienna (until 1941);
> "• Elisabeth Grunbaum-Herzl (widow of the above until 1942);
> "• Mathilde Lukacs-Herzl (sister of the above);
> "• Gutekunst & Klipstein Bern, selling exhibition 1956, No. 22 (purchased from above);"

[17] Prior to Thomas Gibson, the painting had passed through several owners.

and six subsequent purchasers, the last of whom Nagy acquired it from.

Additionally, pursuant to the terms of the Agreement, on January 16, 2014, Nagy purchased title insurance for "Woman Hiding Her Face," which acknowledged that the piece was registered as "Lost Art" and that claims had been made by Grunbaum's heirs that it was looted by the Nazis during World War II.

Defendants moved to dismiss the action pursuant to CPLR 3211, arguing, inter alia, that *Bakalar* collaterally estopped plaintiffs from pursuing their claims. Supreme Court, New York County (Charles E. Ramos, J.), denied the motion. On appeal, we modified by dismissing plaintiffs' General Business Law § 349 claim, and otherwise affirmed (149 AD3d 532 [1st Dept 2017]). We explained:

> "Collateral estoppel requires the issue to be identical to that determined in the prior proceeding, and requires that the litigant had a full and fair opportunity to litigate the issue. Neither of those requirements has been shown here where the purchaser, the pieces, and the time over which the pieces were held differ significantly. The three works are not part of a collection unified in legal interest such to impute the status of one to another"

(*id.* at 533 [internal citations omitted]).

Thereafter, plaintiffs moved for summary judgment on their

claims for replevin and conversion, supported by an expert report by Jonathan Petropoulos[18] and an expert opinion of Kathrin Hofer.[19]

Nagy cross-moved for summary judgment, arguing that there was a lack of evidence that Grunbaum ever owned the Artworks, and, rather, that the evidence showed that the Artworks were always possessed by Mathilde and never stolen by the Nazis. Nagy asserted that he was a good faith purchaser and that plaintiffs had failed to timely pursue their claim. Nagy relied upon the expert reports of Dr. Sophie Lillie,[20] Lynn Nicholas,[21] Laurie Stein[22] and Dr. August Reinisch.[23] He also submitted

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[18] Petropoulos is a Professor of European History and Director of the California Center for the Study of the Holocaust, Genocide, and Human Rights, and former Research Director for Art and Cultural Property on the 2001 Presidential Commission on Holocaust Assets in the United States.

[19] Hofer is an Austrian attorney-at-law.

[20] Lillie is an independent scholar on Viennese Art prior to 1938.

[21] Nicholas is the author of several books on the looting of art by the Nazi regime.

[22] Stein is a curator and specialist in 19th-20th Century German Art.

[23] Reinisch is a professor of international law at the University of Vienna and has written on issues including Holocaust-related property restitution.

correspondence allegedly between Kornfeld and Mathilde regarding the 1956 sale of the Schiele Collection.

Supreme Court granted plaintiffs' motion for summary judgment (61 Misc 3d 319 [Sup Ct, NY County 2018]). The court concluded that the Artworks belonged to Grunbaum prior to World War II and that they were looted by the Nazis. Supreme Court found that plaintiffs had made "a threshold showing that they have an arguable claim of a superior right of possession to the Artworks, and that the Artworks are in the unauthorized possession of another who is acting to exclude plaintiffs' rights" (*id.* at 325). Accordingly, the court held that the burden of proof had shifted to defendants (*id.* at 325-326) and found that "[d]efendants have neither presented evidence nor raised a triable issue of fact to show that Mr. Grunbaum voluntarily transferred the subject artworks during his lifetime" and that "any evidence that Ms. [Mathilde] Lukacs possessed good title to the Artworks is absent from the record" (*id.* at 326).

Discussion

Replevin and Conversion

"'A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that

person's right of possession'" (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 505 [1st Dept 2018], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *see also Solomon R. Guggenheim Found. v Lubell*, 153 AD2d 143 [1st Dept 1990], *affd* 77 NY2d 311 [1991]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito*, 8 NY3d at 50 [internal citations omitted]). Where a party's interests in property have been sold, there can be no interference with their property rights and a conversion claim may not be maintained (*see Pappas v Tzolis*, 20 NY3d 228, 234 [2012]).

To state a cause of action for replevin, a plaintiff must establish a superior possessory right to property in a defendant's possession (*see Pivar v Graduate School of Figurative Art of N.Y. Academy of Art*, 290 AD2d 212, 213 [1st Dept 2002]). Here, we find that plaintiffs have made a prima facie showing of superior title to the Artworks based on evidence that establishes the following: (1) Grunbaum owned the Artworks prior to World War II; and (2) Grunbaum never voluntarily relinquished the Artworks.

1. Grunbaum owned the Artworks prior to World War II.

Defendants argue that plaintiffs submitted insufficient proof of Grunbaum's ownership of the Artworks. We disagree. While the specific works in question are not named in the inventories of Grunbaum's property or the prewar catalogs, there is sufficient proof of Grunbaum's ownership of the Artworks before World War II.

a. "Dead City III" is of Grunbaum provenance.

The 1956 catalog contained many Schieles, including "Dead City III," "Seated Woman With Bent Left Leg (Torso)" and the Artworks. However, Kornfeld only attributed "Dead City III" to Grunbaum. Mathilde is not included in the provenance listed for "Dead City III." Therefore, it is undisputed that at least one of the Schieles in the same collection as the Artworks originated from Grunbaum.

b. Federal courts concluded that "Seated Woman With Bent Left Leg (Torso)" has a Grunbaum provenance.

In *Bakalar*, the District Court found that another Schiele in the 1956 catalog, "Seated Woman With Bent Left Leg (Torso)," has a Grunbaum provenance. In reaching this conclusion, the court relied in part on Kornfeld's 2007 testimony where he admitted that all the Schiele works in the 1956 catalog were originally

from the Grunbaum collection. A 2004 email from Galerie Kornfeld also confirmed that the provenance of all the Schieles featured in the 1956 catalog was Grunbaum.

Furthermore, defendants in their answer in this action admit that the Artworks share an established and documented historical provenance with "Seated Woman With Bent Left Leg (Torso)" and "Dead City III." However, defendants argue that all share the Lukacs-Kornfeld provenance, explicitly ignoring the conclusions made by the District Court in *Bakalar*, discussed *supra*. Plaintiffs' expert Petropoulos also relies on both the District Court and the Second Circuit *Bakalar* decisions, concluding that this, paired with other relevant evidence, supports the finding that the Artworks were definitively of the Grunbaum collection. Petropoulos notes that defense expert Lillie agreed in her report and a 2005 article she wrote about "Dead City III" that the Schieles in the 1956 catalog all shared the same provenance.[24] Petropoulos also opines that there is documentary evidence that the collection was transferred to an Aryan Trustee prior to 1940.

[24] In her rebuttal, Lillie explains that in 2005, she had found no evidence that Elisabeth gifted Mathilde the collection, that Kieslinger had looted the collection, or that the collection had been looted by other Nazis. Lillie still concludes though, by stating that the collection was in the possession of Mathilde and does not deny that it was originally Grunbaum's.

He maintains that the gaps in the record do not suggest, as defendants' experts state, that the art was returned to the victims. This was never standard Nazi practice. Rather, it strongly suggests that former Nazis took and sold the Artworks in the thriving black market for stolen art in postwar Europe. He explained that this is the reason why the Grunbaum collection was kept largely intact during the war, as evidenced by the fact that Kornfeld sold approximately 80% of it in the mid-1950s. Petropoulos states that there are a number of individuals who would have been capable of stealing the collection, including Kieslinger and Rochlitzer. Kieslinger was a known admirer of Schiele, and worked with Dr. Kajetan Muhlmann, a Nazi colonel, known as one of the most prolific art plunderers in history. He adds that Otto Kallir purchased the works from Kornfeld in 1956 with the knowledge that they had belonged to Grunbaum. Otto Kallir and Grunbaum were friends before the war and there is evidence that Otto Kallir had inspected Grunbaum's Schiele collection in the late 1920s.

Finally, Petropoulos states that since the *Bakalar* ruling, new evidence has come to light that Kornfeld was found by German and Swiss governments to be an individual who trafficked in Nazi looted art. Kornfeld was the art dealer for Cornelius Gurlitt,

purchasing 11 works in 1988 of what Kornfeld called "degenerate art." A raid on Gurlitt's home, known as "the 2012 Munich Artworks Discovery," revealed over one thousand pieces of art, with a value of over $1 billion, looted by the Nazis during the war. Gurlitt's father, Hildebrand Gurlitt, a dealer appointed by Joseph Goebbels and Hermann Goering to participate in the Nazi confiscation of Jewish-owned art, retained pieces for his "personal collection." Cornelius Gurlitt had agreed to cooperate with the German government but died shortly after the seizure. No one was ever prosecuted for the thefts.

c. Kornfeld explicitly acknowledged that the Artworks in the 1956 catalog share a Grunbaum provenance.

Kornfeld testified in his May 25, 2007 deposition in the *Bakalar* action that he acquired the Schieles in the 1956 catalog through Mathilde. He testified that he only knew of the Grunbaum provenance of these Schiele artworks because of the 1998 "Dead City III" proceeding.[25] He also stated that he did not know that the Artworks were originally Grunbaum's when he purchased them from Mathilde in 1956.

Plainly, Kornfeld's testimony that he did not know of the

[25] He also stated that he had no personal knowledge concerning their provenance.

Grunbaum provenance of at least some of the Schieles in 1956 is false, as he listed "Dead City III" as originating from Grunbaum. Kornfeld testified that apart from his consultation of the 1930 catalog in creating the 1956 catalog, he had never heard of Grunbaum. However, there were *three* Schieles listed in the 1930 catalog attributed to Grunbaum's collection, while Kornfeld chose only to list one, "Dead City III," as explicitly attributed to Grunbaum in the 1956 catalog. He intentionally omitted Grunbaum's provenance as to the other two Schieles. Moreover, prior to the 1998 seizure of "Dead City III," Kornfeld denied ever corresponding with Mathilde. However, after the seizure Kornfeld claimed that the Artworks had provenance through Mathilde. While Kornfeld testified in 2007 that he acquired the Schieles from Mathilde in 1956, her name does not appear in the 1956 catalog. Nor does Mathilde's name appear in Otto Kallir's 1966 update of his 1930 catalog as the provenance for the Schiele works. He includes Galerie Kornfeld and his own Gallery in the provenance. This update was made after Otto Kallir purchased the corresponding Schieles from Kornfeld. Additionally, Otto Kallir's granddaughter, Jane Kallir, also makes no mention of Mathilde in the provenance histories of her 1988 catalog of Schiele artworks.

Further proving that he knew of the provenance of the Artworks, Kornfeld admitted that in 2001 he had written to Dr. Leopold, who had amassed the Leopold Collection containing "Dead City III," stating that Mathilde had told him in the 1950's that the entire Schiele collection at issue had been held in storage at Schenker, but not sold during World War II, and was then retrieved by Mathilde after the war. He maintained that when he asked her of their origin, Mathilde allegedly told him they were "an old Viennese family possession" and he declined to inquire further.

The records purporting to show that Mathilde sold a total of 113 works of art to Kornfeld from 1952 through 1956 at best are inconclusive. Kornfeld acknowledged in his deposition that the records he produced had Mathilde's signature and name added in pencil, while the rest of the page was written in ink. He also admitted that her name was not added contemporaneously with the purchase. Kornfeld confirmed that Mathilde's signature on key documents was misspelled and her signature did not appear in her handwriting. Kornfeld surmised that the signature could have been her secretary's. Petropoulos states that Kornfeld refused to allow the original documents to be examined by a handwriting expert.

We note that Kornfeld acquired three non-Schiele pieces as part of his acquisition of artworks in 1956. Grunbaum's 1939 property declaration specifically lists the three non-Schiele pieces acquired by Kornfeld.[26] Accordingly, it is clear that the Artworks here were obtained by Kornfeld from the same seller - whether or not that seller was Mathilde - as at least four other pieces that can conclusively be traced to Grunbaum's collection.

d. Additional evidence that the Artworks share a Grunbaum provenance.

Jane Kallir explicitly attributes the provenance of the Artworks to Grunbaum in her deposition. She testified that in 1956, Otto Kallir, a friend of Kornfeld and a friend of Grunbaum with direct knowledge of his Schiele collection, having inspected and catalogued it in the 1920s, purchased the entire Schiele collection featured in the 1956 catalogue from Kornfeld. Jane Kallir had knowledge of the pieces as well, and she listed the

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[26] Specifically, Kornfeld's ledgers reads that he acquired "Egger Lienz, 2 [S]oldiers in [B]lue [U]niforms," "a water color on cardboard 61x43" and "Kokoschka, 1 drawing, charcoal, female head," and "[Kokoschka], 1 drawing, pencil, female head." Grunbaum's property declaration from 1939 reads that he possessed "17. Egger-Lienz, 2 soldiers in front of mountain landscape, watercolour" and "40. 2 large Kokoschkas, female heads, hand drwg."

Artworks by their current titles in her 1988 publication.

Furthermore, the Art Loss Registry lists "Girl [sic] in a [Black] Pinafore" as a Schiele from the Grunbaum collection, and Galerie Kornfeld confirmed via an email in 2004 stating that the provenance of the Artworks was Grunbaum.

Additionally, when Nagy reacquired "Woman Hiding Her Face," the Agreement listed the provenance of the work, as per Sotheby's, as being Fritz Grunbaum (until 1941), Elisabeth Grunbaum-Herzl (until 1942) and Mathilde Lukacs-Herzl.

e. Defense experts speculate that Mathilde had possession and title of the Artworks.

Defendants argue that plaintiffs did not "conclusively" prove that the Artworks belonged to Grunbaum. However, conclusive proof is not required to shift the burden to defendants. "A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*id.*).

Defendants' experts' speculations are unsupported by the evidence in the record and are insufficient to defeat summary judgment (*Mitchell v Atlantic Paratrans of NYC, Inc.*, 57 AD3d 336, 337 [1st Dept 2008] ["The conclusory statements of . . . experts, unsupported by any probative evidence . . . are insufficient to defeat summary judgment"]; *see also Bacani v Rosenberg*, 74 AD3d 500, 503 [1st Dept 2010] ["An expert's affidavit containing bare conclusory assertions is insufficient to defeat summary judgment"], *lv denied* 15 NY3d 708 [2010]; *Wright v New York City Hous. Auth.*, 208 AD2d 327, 331 [1st Dept 1995] ["It is well settled that an expert's affidavit which contains bare conclusory assertions is insufficient to defeat summary judgment. While an expert may, in his area of expertise, reach conclusions beyond the ken of the ordinary layman, he may only do so on the basis of the established facts. He may not himself create the facts upon which the conclusion is based"]).

Defendants argue that the Artworks belonged to Mathilde. However, they do not explain how Mathilde was able to acquire the Artworks either during the war or upon her return visits to Vienna after the war. Nor do defendants raise a triable issue of fact that Mathilde had valid title to the Artworks.

Elisabeth confirmed in her 1941 statement before an Austrian

notary that there were no remaining assets in Grunbaum's estate after his murder. There were no records showing that Elisabeth had withdrawn the collection from Schenker[27] prior to Grunbaum's death to transfer it to Mathilde[28] or anyone else.

Furthermore, Mathilde left Austria in August 1938, months before the Schenker export permit was even filed, and was imprisoned in an internment camp herself for part of the war, making it improbable that she acquired the Artworks during the war. Defendants' expert Stein does not dispute that Mathilde did not remove the collection when she fled Austria. Stein states that records show that Elisabeth paid fees to Schenker at least until June 1939. Nor did the Artworks pass through the Allied Monuments, Fine Arts and Archives program, a program established in 1943 to aid in protecting cultural property in the war zones, indicating that they were no longer with Schenker after the war

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[27] Petropoulos notes that Elisabeth and Grunbaum were labeled "enemies of the state"; therefore it was illegal for Schenker to release the collection to them.

[28] Petropoulos adds that Thomas Buomberger, a researcher of the Grunbaum collection, states that, practically, Mathilde getting in touch with the Nazis over the collection would have meant her risking her life. Either way, she did not smuggle the art in a suitcase, as Dr. Leopold suggests, since the Artworks were still listed in Schenker and the property declarations after Mathilde had fled.

although they had been placed there during the war.

Lillie speculates that it is possible that Rochlitzer exported the collection at Elisabeth's direction. She argues that Rochlitzer was both a lawyer and composer, so he was "likely" acquainted with the Grunbaums prior to the war. Lillie adds that Rochlitzer himself was arrested by the Nazis three times on suspicion of aiding refugees in moving valuables abroad; therefore, he *may* have acted as an Aryan Trustee for the Grunbaums simply as a "ploy" to shield their assets from the Nazis. She opines that Rochlitzer's fee of 6,500 RM could have provided cover for the Grunbaums to dispose of the art collection to him so he could transfer them to Mathilde.

Lillie hypothesizes that the other "feasible" scenario is that Elisabeth gave the collection to a non-Jewish woman, Hassel, who appears to have helped other Viennese Jews during the war.[29] According to Lillie, the fact that so many of Schiele's works remained together indicates that the collection remained in the possession of a close family relative and that either Rochlitzer

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[29] Lillie bases this only on the existence of a letter by another Jewish woman to her daughter. While that letter mentions Hassel and Elisabeth by name, it only notes that this woman left items for her daughter with Hassel for her daughter to claim after the war.

or Hassel provided a "possible" mode to transfer the entire collection to Mathilde.

Further, defense expert Stein posits that the Lukacses likely transferred the Artworks when they fled Austria, as there is evidence that they were able to move a great deal of their household assets through Schenker, including "11 oil paintings, 3 watercolors, 8 graphics, and 3 drawings." She admits such a transfer is unusual given that forced emigration was often used by the Nazis to seize property.

These opinions are speculative. First, the record establishes that Mathilde and her husband were detained and imprisoned by the Nazis in Brussels from October 26, 1943 until the end of the war. As it was standard Nazi practice to confiscate all property owned by Jews upon their imprisonment, it is improbable that Mathilde could have acquired Grunbaum's Schiele collection while imprisoned, as defendants' experts assert.[30]

Second, there is no evidence that Grunbaum and Rochlitzer were acquainted prior to the war. Additionally, Rochlitzer's fee

[30] While defendants' experts do not explicitly state that Mathilde acquired the Artworks while imprisoned by the Nazis, they do contend that she acquired them during the war, which is the time she was imprisoned.

was substantially greater than the listed value of the entire art collection. Also, the evidence in the record more closely reflects that Elisabeth paid his fee out of her own assets. There is no evidentiary basis for defendants' experts' speculations that Rochlitzer's appointment as Aryan Trustee was used by Grunbaum or Elisabeth as a ploy to transfer the art collection to Mathilde. Moreover, if Rochlitzer did somehow transfer the art collection to Mathilde at Elisabeth's behest, he would have had to do so during the war while Mathilde was imprisoned, because Rochlitzer was killed in an Allied air strike in 1945.

Third, while Hassel may have helped Jews transfer their possessions to loved ones, there is no evidence to support defendants' experts' speculations that Hassel helped Elisabeth transfer the art collection to Mathilde.

Finally, the entire art collection declared and exported by the Lukacses totals 400 RM and contained only 24 pieces. The Grunbaum collection which included 81 Schieles and many other works was valued at 5,791 RM. Further, Mathilde allegedly sold at least 110 pieces of art to Kornfeld after the war, substantially more than the 24 pieces exported by the Lukacses according to the record. We note that there are no records,

including invoices, checks or receipts documenting that the Artworks were purchased by Kornfeld from Mathilde. Moreover, even if Mathilde had possession of Grunbaum's art collection, possession is not equivalent to legal title.

Accordingly, we find that plaintiffs have met their prima facie burden that the Artworks belonged to Grunbaum.

2. Grunbaum did not voluntarily relinquish the Artworks.

Under New York common law, a manual taking is not necessary to show that a wrongful exercise of dominion has occurred in order to claim conversion or replevin (*see State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 260 [2002]). Accordingly, to whom Grunbaum lost the Artworks is immaterial. Supreme Court was not required to consider speculative theories of defendants' experts, in light of the undisputed facts that the art was inventoried, an Aryan Trustee was appointed to administer Grunbaum's art collection and Grunbaum was executed during the Holocaust.

First, the record establishes that the Nazis tracked Grunbaum's property through the Kieslinger inventories of Grunbaum's art collection signed by Otto Demus,[31] the head of the

[31] The Nazi policy was that all Jewish assets listed in any property declaration were effectively confiscated and available

Nazi Federal Monuments Agency, and stamped as "completed." Plaintiffs' expert Petropoulos opines that this conclusively meant that at this point Grunbaum no longer had any control of his property. Defense expert Lillie concedes this point, stating that the Nazi policy was that all Jewish assets listed in any property declaration were usually effectively confiscated and available to the Reich after November 18, 1938.

Second, Rochlitzer's appointment as an Aryan Trustee for Grunbaum's property further establishes that Grunbaum no longer had any rights to his property, as only his Aryan Trustee could transfer Grunbaum's property at will.[32]

Third, it is undisputed that Schenker, the Nazi-controlled

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to the Reich after November 18, 1938. Petropoulos adds that defendants' expert Lillie opined at one point that there was also no way for Jews to legally transfer property abroad after this date. In fact, Lillie opined that while this was not *always* synonymous with confiscation or seizure, assets listed in a property declaration were *often* plundered. However, she found that there was no evidence in the record that the Grunbaum collection was looted by the Nazis. She also stated that there was only automatic confiscation of property by the Nazis when Elisabeth was deported to Maly Trostinec.

[32] The Aryan Trustee Law of December 3, 1938, states that, "[u]pon the delivery of the order on the basis of which a trustee is appointed according to Paragraph 2, the owner of the business enterprise is deprived of his/her right to dispose of the assets which are administered by the appointed trustee." Petropoulos explains that this law rendered Jews legally powerless to transfer any property.

shipping company, took control of Grunbaum's property. There are no documents showing that the collection was exported from Schenker or that Rochlitzer's appointment was ever canceled. Accordingly, neither Grunbaum or Elisabeth ever reacquired possession or control of the Artworks.

Even accepting defendants' speculation that Elisabeth or Mathilde somehow managed to retrieve the Artworks, it was still misappropriated from, and lost to, Grunbaum and his legal heirs.

Defense experts posit that the power of attorney transferring the property from Grunbaum to Elisabeth was valid, or, alternatively, that the Artworks were given as an inter vivos gift by either Grunbaum or Elisabeth to Mathilde. Defense expert Lillie concedes that the Artworks once belonged to Grunbaum. However, she asserts that Elisabeth had the authority to transfer good title to Mathilde.

There is no evidence in the record that Elisabeth transferred title to the collection. Nor was Elisabeth able to convey good title as Grunbaum signed the purported power of attorney while imprisoned in Dachau. We reject the notion that a person who signs a power of attorney in a death camp can be said to have executed the document voluntarily (*Bakalar*, 819 F Supp 2d at 298 [the concurrence opines that "any transfer subsequent to

Grunbaum's execution of the power of attorney at Dachau was void as a product of duress"]; *id.* at 300 [it was not established that "Grunbaum *voluntarily* relinquished possession of the Drawing, or that he did so intending to pass title"]; *see also Philipp v Federal Republic of Germany*, 248 F Supp 3d 59, 70 [D DC 2017], *affd* 894 F3d 406 [DC Cir 2018] [the sale of art during the Holocaust by a Jewish owner was coerced and under duress, covered by both HEAR and a violation of international law such to be an exception to the Foreign Sovereign Immunities Act]).

We find that plaintiffs have established that the power of attorney signed by Grunbaum while under Nazi control is a product of duress, and, therefore, any subsequent transfer of the Artworks did not convey legal title. "[A]rtwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods" (*Bakalar v Vavra*, 619 F3d 136, 141 [2d Cir 2010] [internal quotation marks omitted]). In New York, a thief cannot pass good title (*see Lubell*, 77 NY2d at 320; *Federal Ins. Co. v Diamond Kamvakis & Co.*, 144 AD2d 42, 44, [1st Dept 1989], *lv denied* 74 NY2d 604 [1989]). Therefore, even assuming that Grunbaum transferred his collection to Elisabeth, the transfer was

invalid. Accordingly, Mathilde could not pass good title to Kornfeld and/or Galerie Kornfeld.

Alternatively, defendants claim that Mathilde was gifted the Artworks by Grunbaum prior to his execution of the power of attorney, creating a valid inter vivos gift. To create an inter vivos gift, "there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee" (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]). "[T]he proponent of a gift has the burden of proving each of these elements by clear and convincing evidence" (*id.*).

Here, the record is bereft of evidence that Grunbaum or even Elisabeth intended to gift the Artworks to Mathilde, let alone any evidence of delivery or acceptance. Since there is no evidence as to how Mathilde acquired the Artworks, defendants have not raised a triable issue of fact that Grunbaum voluntarily relinquished possession of the Artworks, or that he did so intending to pass title.

3. Laches is not a bar to plaintiffs' claims to the Artworks.

Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an

adverse party" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801 [2003], 816, *cert denied* 540 US 1017 [2003]; *Matter of Schultz v State of New York*, 81 NY2d 336, 348 [1993]). The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches (*see Saratoga*, 100 NY2d at 816; *Macon v Arnlie Realty Co.*, 207 AD2d 268, 271 [1st Dept 1994]; *Matter of Flamenbaum*, 22 NY3d 962, 966 [2013] ["the essential element of laches [is] prejudice"] [internal quotation marks omitted]). Prejudice may be demonstrated "by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" (*Matter of Linker*, 23 AD3d 186, 189 [1st Dept 2005] [internal quotation marks omitted]).

We reject defendants' argument that the defense of laches is a bar to plaintiffs' replevin and conversion claims (*see B.N. Realty Assoc. v Lichtenstein*, 21 AD3d 793, 799 [1st Dept 2005]). Nagy acquired both pieces in 2013. He suffered no change in position. Nor was any evidence lost between defendants' acquisition and plaintiffs' demand for the return of the Artworks. Significantly, Nagy was on notice of plaintiffs' claims to the Grunbaum collection prior to the purchase, as he filed a brief in the *Bakalar* action. Further, it is undisputed

that Nagy purchased the Artworks at a substantial discount[33] from the price sought by Sotheby's prior to the claim being publicized, and he obtained insurance for the very purpose of insuring title against plaintiffs' claims.

The *Bakalar* court pointed to Mathilde's death as a prejudice. Mathilde, and other witnesses had died well before Nagy purchased the Artworks. In any event, as we already discussed, Mathilde could not have shown she had good title to the Artworks and her testimony would not have been probative (*see Matter of Flamenbaum*, 22 NY3d at 966 ["although the decedent's testimony may have shed light on how he came into possession of the [artwork], we can perceive of no scenario whereby the decedent could have shown that he held [good] title"]).

4. Plaintiffs are not entitled to attorneys' fees.

It is well settled in New York that attorneys' fees are considered an incident of litigation and are not recoverable unless authorized by statute, court rule, or written agreement of the parties (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *see also Madison Park Dev. Assoc. LLC v Febbraro*, 159

[33] Nagy did not submit an affidavit disputing plaintiffs' assertion that the Artworks were purchased at a substantial discount.

AD3d 569 [1st Dept 2018]). An exception to that general rule exists when parties have "acted with disinterested malevolence [and have] . . . intentionally [sought] to inflict economic injury on [another party] by forcing [him or her] to engage legal counsel" (*Brook Shopping Ctrs. v Bass*, 107 AD2d 615, 615 [1st Dept 1985], *appeal dismissed* 65 NY2d 923 [1985]; *see Palermo v Taccone*, 79 AD3d 1616 [4th Dept 2010] [attorneys' fees denied in conversion even where the defendant locked up the plaintiff's equipment to intentionally prevent access]; *Anniszkiewicz v Harrison*, 291 AD2d 829, 830 [4th Dept 2002], *lv denied* 98 NY2d 611 [2002]).

Supreme Court granted attorneys' fees on a finding of "bad faith." However, more is required than bad faith. We find that Nagy did not act with "disinterested malevolence." Rather, he made a business calculation to purchase the Artworks knowing that title was cloudy yet believing that title could possibly be successfully defended.

Accordingly, we modify Supreme Court's decision to deny the motion as to attorneys' fees.

Conclusion

We end by noting that in an effort to "ensure that laws governing claims to Nazi-confiscated art and other property

further United States policy," and that "claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations," Congress enacted the Holocaust Expropriated Recovery Act of 2016 (HEAR Act) (Pub L No 114-308, § 3 [2016]).

In promulgating the HEAR Act, Congress found that (1) the Nazis "confiscated or otherwise misappropriated hundreds of thousands of works of art" (HEAR Act, Sec. 2[1]) from Jews and others they persecuted, and that many works "were never reunited with their owners" (Sec. 2[2]); and (2) the Nazi victims and heirs have sought legal relief to recover artwork, but they "must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution [and] war" (Sec. 2[6]).[34]

The tragic consequences of the Nazi occupation of Europe on the lives, liberty and property of the Jews continue to confront

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[34] Courts have generally interpreted the HEAR Act liberally, focusing on the purpose for which it was enacted (*see e.g. Philipp*, 248 F Supp 3d at 70 [the sale of art during the Holocaust by a Jewish owner was coerced and under duress, covered by both HEAR and a violation of international law such to be an exception to the Foreign Sovereign Immunities Act]; *De Csepel v Republic of Hungary*, 859 F3d 1094, 1110 [DC Cir 2017], *cert denied* --US--, 139 S Ct 784 [2019] [amendment to add HEAR claim permitted although state statute of limitations expired]).

us today. We are informed by the intent and provisions of the HEAR Act which highlights the context in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law. We also note that New York has a strong public policy to ensure that the state does not become a haven for trafficking in stolen cultural property, or permitting thieves to obtain and pass along legal title (*see e.g. Lubell*, 77 NY2d at 320; *Reif*, 149 AD3d at 533). It is important to note that we are not making a declaration as a matter of law that plaintiffs established the estate's absolute title to the Artworks. Rather, we are adjudicating the parties' respective superior ownership and possessory interests. We find that plaintiffs have met their burden of proving superior title to the Artworks. Defendants raise no triable issue of fact.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 11, 2018, which, inter alia, granted plaintiffs' motion for summary judgment on their claims of replevin and conversion and directing defendants to return the Artworks to plaintiffs, and for an award of

damages, costs and attorneys' fees, should be modified, on the law, to deny the motion as to attorneys' fees, and otherwise unanimously affirmed, with costs.

All concur.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 11, 2018, modified, on the law, to deny the motion as to attorneys' fees, and otherwise affirmed, with costs.

Opinion by Singh, J. All concur.

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

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

ENTERED: JULY 9, 2019

CLERK