SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 6, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

8567 In re Puah B., and Others,

Children Under the Age of
Eighteen Years, etc.,

Autumn B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Hemerd B.,
Respondent.

_____

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

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

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

_____

Order of fact-finding and disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about July 13, 2017, insofar as it determined, after a hearing, that respondent mother neglected the subject children, modified, on the law and the facts, to vacate the finding that the mother neglected the children by failing to provide them with adequate food, clothing and shelter, and remand the matter for a new dispositional

hearing, and otherwise affirmed, without costs.

We conclude that the Family Court erred in finding neglect and derivative neglect for failure of the mother to provide adequate food, clothing and shelter, because the caseworker's progress notes and the police officer's testimony about her observations from a single visit made to the home were insufficient to support a determination that the mother neglected the subject children (Family Court Act § 1012[f][i][A]). Although the mother's living conditions were unsuitable, the record presents no basis for a conclusion that the children's "physical, mental or emotional condition ha[d] been impaired or [wa]s in imminent danger of becoming impaired" as a result of their exposure to such environment (Family Court Act § 1012[f][i]). The officer's testimony provided no information about the physical or mental condition of the children at the time of her visit, and petitioner did not introduce the results of the medical examination of the children conducted on the day when they were first removed from the home.

However, a preponderance of the evidence supports the court's findings of educational neglect as to the two older children and derivative neglect as to the younger children. The record shows that during the 2015-2016 school year, the older children were at least six years old and were required to receive

full-time educational instruction. The court found that the children were not enrolled in school and that the mother failed to cooperate with authorities or follow proper procedures for home schooling despite her testimony that she had thoroughly researched the requirements set by the Commissioner of Education (see *Matter of Rakeem M. [Marissa M.]*, 139 AD3d 622 [1st Dept 2016]). The court further found that, while the mother's passion for education was compelling, her stated efforts to educate the children did not comport with the legally set guidelines for home schooling in any way (*see Matter of Dyandria D.*, 303 AD2d 233 [1st Dept 2003], *lv dismissed* 1 NY3d 623 [2004], *cert denied* 543 US 826 [2004]). The court found that the mother did not establish that she was qualified to teach, especially with respect to elementary-school-aged children. The mother admitted that she knew her educational plan was not approved by the Board of Education, yet, she never followed up with an approved individual home instruction plan as required by the Board of Education. The court found that the mother failed to show that her instruction was substantially equivalent to that in public school, and that the children were educated for at least as many hours as provided in public school (*see Matter of Dyandria D.*, 303 AD2d at 233; *Matter of Franz*, 55 AD2d 424 [2d Dept 1977]). The court further found that the mother's use of college-level

textbooks and testing the children using high school examination tests did not constitute appropriate education for elementary-school-aged children. We defer to these findings of the Family Court. Nor do we find any basis on which to credit the mother's claims on which the partial dissent relies, which are essentially self-serving. Moreover, in the complete absence of documentation, her claims are unsupported. The extent to which the children may have been harmed by the absence of adequate education would be better evaluated if the children were allowed to be tested, but that would require a degree of cooperation that the record indicates has not been forthcoming from the parents. Nor does the mother persuasively explain how she spends 25 hours each week homeschooling the children when she also claims to be employed at an advertising firm in downtown Manhattan. We find no basis on which to disturb the Family Court's credibility findings. It is well established that the Family Court's assessment of the credibility of witnesses is accorded great deference on appeal (*Matter of Troy B. [Troy D.]*, 121 AD3d 570 [1st Dept 2014]). Since the mother failed to offer credible evidence that the children were being home schooled in accordance with the Department of Education's requirements, the finding of educational neglect with respect to the two older children is supported by a preponderance of the evidence (*see*

Matter of Rakeem M., 139 AD3d at 623). Such conclusions support a finding of derivative neglect even though the younger children were not yet of school age (*see Matter of Danny R.*, 60 AD3d 450 [1st Dept 2009]; *Matter of Yahmir G. [Tanisha N.]*, 48 Misc 3d 1224 [A], 2015 NY Slip Op 51255[U], *4 [Fam Ct, Bronx County 2015]).

All concur except Acosta, P.J. and Manzanet-Daniels, J. who dissent in part in a memorandum by Acosta, P.J. as follows:

ACOSTA, P.J. (dissenting in part)

Pursuant to Family Court Act § 1012(f)(i)(A), a parent may be culpable of neglect when he or she fails to "exercise a minimum degree of care" in supplying the child with, among other things, adequate food, clothing, shelter or education in accordance with the provisions of the Education Law, article 65, part 1, resulting in impairment or risk of impairment to the child's "physical, mental or emotional condition." There must be proof of a causal connection between the alleged parental misconduct and the child's impairment or threatened impairment (*Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]). The burden of proving allegations of neglect by a preponderance of the evidence is on petitioner (*Nicholson v Scoppetta*, 3 NY3d at 368).

On the facts of this case, I agree with the majority that the Family Court erred in finding neglect and derivative neglect for failure of the mother to provide adequate food, clothing and shelter. In my opinion, however, the evidence also fails to support a finding that the two older children, David and Asa,[1] were educationally neglected. Family Court Act § 1012(f) requires that the parent comply with the Education Law's legal mandate that the child "attend an educational institution within

[1]During the 2015-2016 school year, David was nine and Asa seven years old.

the school district or receive substantially equivalent instruction elsewhere" (*Matter of Jeremy VV.*, 202 AD2d 738, 740 [3d Dept 1994]). Further, to establish educational neglect, there must be a showing of parental misconduct, harm or potential harm to the child, and "a causal connection between the conduct of the parent and the alleged harm to the child" (*Matter of Christopher UU.*, 24 AD3d 1129, 1131 [3d Dept 2005] [internal quotation marks omitted]).

Here, the mother attempted to follow DOE regulations by submitting Letters of Intent indicating her intention to homeschool David and Asa, but she did not receive responses from the DOE, which were necessary to proceed with the process of submitting her Individual Home Instruction Plans (IHIPs) for approval and registering the children as being homeschooled. In fact, she provided copies of the letters she sent in 2016, and the DOE confirmed receipt of those letters. She was unable to produce copies of previous letter because they had been stolen.

In any event, even accepting that the mother failed to comply with DOE regulations, there was no showing that the children suffered impairment or the risk of impairment by not being enrolled in an educational institution or formally registered as being homeschooled. While unrebutted evidence of excessive absences from school over a prolonged period of time

has in some instances been found sufficient to establish educational neglect (*see e.g. Matter of Fatima A.*, 276 AD2d 791 [2d Dept 2000] [child absent 101 of 166 school days]; *Matter of Jovann B.*, 153 AD2d 858 [2d Dept 1989] [child missed approximately one third of school days over two school years]), the evidence here does not show excessive school absences, as the mother credibly testified that the children were being homeschooled approximately five hours a day and were in compliance with the DOE's attendance requirements.

Assuming for the sake of argument that the mother's conduct created an inference that the children were being educationally harmed, that inference was rebutted (*see e.g. Matter of Giancarlo P.*, 306 AD2d 28, 28 [1st Dept 2003] ["child's prolonged, unexcused absence from school does not, ipso facto, establish either the parental misconduct or the harm or potential harm to the child necessary to a finding of neglect"]; *Matter of Jamol F.*, 24 Misc 3d 772, 781 [Fam Ct, Kings County 2009] ["(p)roof of a prima facie case (of educational neglect) does not create a conclusive presumption of parental culpability or risk of impairment. It simply creates a permissible inference"]). The mother, a college graduate, who had familiarized herself with IHIP standards, testified that she was providing the children with a well rounded education at home. She explained that she

had developed a curriculum that was consistent with the DOE's homeschooling regulations. In addition to teaching the basic common core subjects, she provided the children with instruction in computer skills and programming, a subject with which she had some expertise. She also enrolled the children in online classes through Time4Learning and the Khan Academy, which, in addition to offering instruction on the common core curriculum, used state-of-the-art adaptive technology to create learning programs tailored to the student's particular needs and strengths.

The mother enriched the children's education by exposing them to New York's cultural institutions and by using the local community garden. In addition, David was interested in robots and had created his own blog about them, and David and Asa had a blog for Bible stories and drawings. Last, the mother provided for periods of free play at home and in parks. Even the court noted that the mother's dedication to providing the children with a good education was admirable.

The majority unfairly characterizes this testimony as "self serving." But it goes without saying that any parent who testifies on his or her own behalf against charges of neglect is doing so to serve his or her own interest. In any event, I do not see any indication in the record that the mother was lying. This characterization also misses the point. The issue is

whether the mother engaged in misconduct (i.e., not properly following the New York State homeschooling requirements) that caused harm to David and Asa.

In this regard, it should be noted that there was no educational testing conducted by petitioner that established that the children were not performing at age-appropriate levels. The mother, on the other hand, tested the children periodically, and she testified that they were meeting, if not exceeding, the DOE's standards. She even had David read from a textbook to Child Protective Specialist Yendry Bonilla to demonstrate the advanced reading skills he had acquired through his schooling at home. Indeed, when Bonilla visited the apartment in December 2015, she noted that there were books and educational posters on the wall. While Police Officer Michaels testified to seeing no books or educational materials in the home, she was in the apartment on only one brief occasion under somewhat chaotic circumstances. And, as noted above, the burden is on petitioner to prove allegations of neglect by a preponderance of the evidence (Family Court Act § 1046(b)(i)). There is no proof that the oldest children were harmed (or at risk of being harmed) by the mother's homeschooling. This finding was based on pure speculation.

I also disagree with the court's finding that the mother was not qualified to teach. Indeed, New York State does not require

teaching credentials for parents providing home instruction (https://www.homeschoolfacts.com/state-laws/new-york-homeschool-state-laws.html).

I also do not agree that the younger children were derivatively neglected. At most, the evidence supports a finding that the mother did not follow the correct procedure with the BOE that would have allowed her to homeschool David and Asa. It did not, however, evince defective parental judgment in not understanding the importance of providing her children with a solid education. Indeed, the mother's lapse in judgment in not appreciating the strict rules that must be complied with is a far cry from the type of defective parental judgment that would support a finding of derivative neglect of children that were not even of school age at the time of the proceedings.

I would therefore reverse the Family Court's findings to the contrary and dismiss the petition.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8158 Jennifer Bloom, et al., Index 656656/17
Plaintiffs-Respondents-Appellants,

-against-

Adam Westereich, et al.,
Defendants-Appellants-Respondents.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants-respondents.

Hunton Andrews Kurth LLP, New York (Patrick L. Robson of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered May 31, 2018, which denied defendants' motion for summary judgment, granted plaintiffs' motion to the extent it sought summary judgment on their declaratory judgment claim, declared that plaintiffs were entitled to cancel the subject contract and directed defendants to return plaintiffs' contract deposit with interest, and denied plaintiffs' motion for sanctions, unanimously affirmed, without costs.

Plaintiffs entered into a contract to buy defendants' cooperative apartment, which was subject to the cooperative board's giving "unconditional consent" to the sale. Either party was entitled to cancel the contract if such unconditional consent was not given by the adjourned closing date, or if "such consent is refused at any time." In the event of such cancellation, "the

Escrowee shall refund the Contract Deposit to Purchaser." The Board twice gave conditional approval, requiring plaintiffs to provide additional financial security. After receipt of the second conditional approval, plaintiffs provided written notice terminating the contract, in accordance with sections 6.1 and 6.3 of the contract. Defendants contend that the board's issuance of a conditional approval is not the same as a "refusal" to provide an unconditional approval, and, therefore, plaintiffs breached the contract and are not entitled to the return of their deposit.

"[A]greements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases" *(Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Under the terms of the subject contract, if unconditional consent is refused, either party, at any time, may cancel the contract. The board made two offers of conditional consent, both of which were rejected by the buyers, and "there is no evidence that the Board would have assented unconditionally" to the sale (*Lovelace v Krauss*, 60 AD3d 579, 580 [1st Dept 2009], *lv denied* 12 NY3d 714 [2009]). Therefore, plaintiffs were entitled to cancel the contract and seek the return of their deposit. The board's subsequent issuance of a purported unconditional approval after plaintiffs had terminated was without effect.

The court did not abuse its discretion in denying the motion

for sanctions based on sellers' failure to disclose to the court the full facts concerning the board's belated issuance of the purported unconditional approval (*see Watson v City of New York*, 157 AD3d 510, 513 [1st Dept 2018]).

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

ENTERED: JUNE 6, 2019

CLERK

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

8572 F.L., Index 307157/13
Plaintiff-Appellant-Respondent,

-against-

J.M.,
Defendant-Respondent-Appellant.

_____

Pavia & Harcourt LLP, New York (Polly N. Passonneau of counsel), for appellant-respondent.

Schwartz Sladkus Reich Greenberg Atlas, LLP, New York (Barry Abbott of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Joseph P. Burke, Special Referee), entered October 16, 2017, after a trial, to the extent appealed from as limited by the briefs, valuing the marital portion of defendant husband's stock options and restricted stock units at $252,974 and distributing 40% to plaintiff wife, valuing the marital funds at $410,696.82, terminating the pendente lite maintenance award as of July 31, 2017, and declining to award plaintiff post-divorce maintenance, imputing income of $831,710 to defendant husband and imposing an income cap of $400,000 for the purpose of determining child support, and awarding plaintiff $25,000 in counsel fees, unanimously modified, on the law and the facts, to award plaintiff 50% of the value of the marital portion of defendant's stock options and restricted stock units, impose an income cap of

$300,000 for the purpose of determining child support, and make the child support award retroactive to October 1, 2014, and to remand the matter for further proceedings in accordance herewith, and otherwise affirmed, without costs.

The court properly relied on the valuation of the marital portion of defendant's stock options and restricted stock units (GSUs) performed by Financial Research Associates (FRA). The parties jointly retained FRA to value this marital asset, and FRA's report was stipulated to at trial and entered into evidence without objection. Plaintiff did not call any witness from FRA or present any expert testimony to support her argument on appeal that FRA's methodology was flawed. Moreover, the claimed patent errors in the report, such as omissions of certain stock grants, can be explained by FRA's mandate to value only the stock options and GSUs held by defendant as of the date of the commencement of this action. To the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487 (*see Greenwald v Greenwald*, 164 AD2d 706, 715, 722 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]).

The court properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist. The court

providently exercised its discretion in maintaining plaintiff's pendente lite maintenance award through July 2017, the month in which it issued its decision. The duration of the pendente lite maintenance was one of the factors the court considered in determining that further maintenance was not warranted.

In determining the child support award, the court properly imputed income to defendant based on the average of his total income for the years 2012 through 2014 (*see generally Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006]). Although defendant argues that the court erred in including "nonrecurring income" related to the grant of stock options and GSUs, he testified that such grants occurred on an annual basis, albeit they fluctuated in size and value. To the extent defendant argues that his income during 2013 and 2014 was artificially inflated by an unusually large and anomalous equity award, the argument is unavailing; we note that defendant's total income in 2012 was $701,546.32, well within range of his imputed income of $831,710.

Given the disparity in the parties' incomes, the court correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap (*see* Domestic Relations Law § 240[1-b][f][3]). However, as the court also ordered defendant to pay his 88% pro

rata share of add-on expenses, including extracurricular activities, summer camp, and any private school, we find that the income cap should be reduced from $400,000 to $300,000.

Plaintiff correctly argues that the court erred in making the child support award prospective only (*see* Domestic Relations Law § 236[B][7][a]). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support. We remand the matter to Supreme Court for a determination of the amount of retroactive child support owed, including adjustments to defendant's pro rata share of add-on expenses, and whether payment of any arrears due should be made in one sum or periodic sums.

In awarding plaintiff counsel fees of $25,000, the court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). Defendant had already paid $120,000 of her counsel fees, and, together with the fee award, the amount of his share is more than half of

plaintiff's legal costs at the time of trial (*see Schorr v Schorr*, 46 AD3d 351, 351 [1st Dept 2007]).

The Decision and Order of this Court entered herein on March 5, 2019 (170 AD3d 409 [1st Dept 2019]) is hereby recalled and vacated (*see* M-1905 and M-1906 decided simultaneously herewith).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9534 The People of the State of New York, Respondent, Ind. 2684N/11

-against-

Robert Adrian, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Milbank, LLP, New York (Emily Lilburn of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered August 1, 2014, convicting defendant, after a jury trial, of conspiracy in the second degree, operating as a major trafficker, and criminal possession of a controlled substance in the first and third degrees, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court properly admitted testimony referring to defendant as a person speaking in wiretapped conversations. There was circumstantial evidence that strongly connected defendant to at least one of three intercepted phones (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]). A wiretap monitor testified, from personal knowledge, that he had become familiar with the recorded voices he heard, and that the same person was speaking on all

three phones. In combination with the circumstantial evidence, this testimony supported the additional inference that it was defendant's voice on all these calls. Although it is undisputed that this witness could not identify the voice as belonging to defendant, the witness's reference to defendant by name was within this circumstantial context, and was harmless because it was clear to the jury from the evidence and the court's instructions that the witness was not actually identifying defendant's voice or rendering a lay opinion on that subject.

The court properly admitted evidence of a drug transaction as an uncharged overt act that occurred during the pendency of the charged conspiracy, even though the major overt acts took place at the end of the conspiracy. The indictment provided "sufficient detail about the scope and nature of the conspiracy and the major overt acts committed in furtherance of it" (*People v Ribowsky*, 77 NY2d 284, 293 [1991]), and the evidence supports a reasonable inference that the uncharged sale was "in furtherance of an ongoing conspiracy" (*id.*). Furthermore, defendant received sufficient notice that evidence of the uncharged act would be introduced.

We reject defendant's challenges to his conviction of operating as a major trafficker. This conviction was based on legally sufficient evidence and was not against the weight of the

evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). As relevant here, a person is guilty of operating as a major trafficker when, as a "profiteer" (Penal Law § 220.00[20]), the person "knowingly and lawfully possesses, on one or more occasions within six months or less, a narcotic drug with intent to sell the same," and the drugs have a total aggregate value of $75,000 or more (Penal Law § 220.77[3]). The evidence showed that defendant was a profiteer under Penal Law § 220.00(20)(b), because he was clearly part of a large international "controlled substance organization" (Penal Law § 220.00[18]) with many members, and because he gave orders to others, thereby exercising "managerial responsibility" (Penal Law § 220.20[20][b]). The evidence also showed that defendant was a profiteer under Penal Law § 220.20(20)(c), because he "arranged" or "planned" the execution of at least one transaction, and did not qualify for any of the exceptions set forth in that provision.

Defendant also challenges the major trafficker statute as unconstitutionally vague, both on its face and as applied (*see People v Stuart*, 100 NY2d 412, 420-421 [2003]). We find that the requirement that the drugs possessed be worth at least $75,000 does not make the statute unconstitutionally vague, because the value of illegal drugs is ascertainable and a person of ordinary intelligence would be able to determine from that aggregate

dollar amount what the statute prohibits. As applied to the facts here, defendant unquestionably had fair notice that a drug transaction involving 43 kilograms of cocaine, with each kilogram being worth at least $30,000, was forbidden by the statute. Similarly, under the facts, defendant had fair notice that his conduct in managing or arranging drug transactions constituted being a profiteer. Because we reject defendant's as-applied vagueness challenge, "the facial validity of the statute is confirmed," because it would be "impossible for a defendant to establish the statute's unconstitutionality in all of its applications" (*Stuart*, 100 NY2d at 422-423).

The colloquy between the court and counsel after the court's charge fails to establish that defendant preserved his present claim that the court was required to define the term "controlled substance organization" (*see People v Karabinas*, 63 NY2d 871, 872 [1984], *cert denied* 470 US 1087 [1985]), and we decline to review this claim in the interest of justice. As an alternative holding, we find that any error in this regard was harmless, because there was overwhelming evidence of the existence of a controlled substance organization consisting of at least four persons, and no reasonable possibility that the jury could have found otherwise.

By objecting on different grounds from those raised on

appeal, defendant failed to preserve his challenges to expert testimony explaining coded language in intercepted conversations and describing large-scale narcotics operations (*see People v Graves*, 85 NY2d 1024, 1026-1027 [1995]), and we decline to review them in the interest of justice. As an alternative holding, we find that the testimony about coded language did not exceed the limitations contained in *People v Inoa* (25 NY3d 466, 474 [2015]) and that the testimony about narcotics operations was beyond the knowledge of the typical juror.

We adhere to our prior decision in which we denied defendant's motion for disclosure of unredacted or sealed materials relating to warrant applications, and to our similar determination on a codefendant's appeal (*People v Adrian-Reyes*, 155 AD3d 537, 538 [1st Dept 2017], *lv denied* 31 NY3d 1011 [2018]). The value of appellate counsel's review of that

information is greatly outweighed by the continued risk to the informant (*see People v Castillo*, 80 NY2d 578, 583-584 [1992], *cert denied* 507 US 1033 [1993]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9535 The People of the State of New York, Respondent, Ind. 2684N/11

-against-

Jose Cruz Ortiz, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered August 12, 2014, convicting defendant, after a jury trial, of conspiracy in the second degree, operating as a major trafficker and criminal possession of a controlled substance in the first and third degrees, and sentencing him to an aggregate term of 15 years to life, unanimously affirmed.

The court accorded defendant an adequate opportunity to voice his concerns about defense counsel (*see People v Porto*, 16 NY3d 93, 99-101 [2010]). Late in the trial, defendant made a conclusory, unelaborated "objection" that his counsel was ineffective. Although this was initially conveyed to the court by counsel, the court confirmed with defendant, personally, that this was the extent of the statement he wished to make. Defendant did not expressly request new counsel, and there is no

indication that the court understood defendant's statement as such a request. Even if defendant could be viewed as requesting new counsel, he "failed to make specific factual allegations of serious complaints that would trigger the court's obligation to inquire further" (*People v King*, 142 AD3d 917, 917 [1st Dept 2016], *lv denied* 28 NY3d 1147 [2017]).

Defendant affirmatively waived his challenge to voice identification testimony. Defense counsel originally objected to having a police wiretap monitor compare a voice heard on intercepted conversations with a recording known to be that of defendant's voice, arguing that instead the recordings should be played for the jurors so they could make their own comparisons. However, counsel then reversed course, stating that after discussing the matter with defendant he no longer wanted the recorded conversations played for the jury. In any event, the monitor's testimony was permissible as "an aid to the jury's identification process" (*see People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9536 New Globaltex Co., Ltd., Index 152361/13
Plaintiff-Appellant,

-against-

Zhe Lin,
Defendant-Respondent,

Imperial International Trading Inc.,
Defendant.

_____

Soong & Liu, New York (Arthur J. Soong of counsel), for appellant.

Zane and Rudofsky, New York (Eric S. Horowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 23, 2018, which, sua sponte, dismissed the complaint, unanimously reversed, on the law, without costs, to reinstate the complaint and the default judgment, and the matter is remanded to the motion court to consider the merits of defendant's motion to vacate the default judgment.

An order issued sua sponte is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335 [2003]). However, given the nature of the motion court's sua sponte relief in dismissing the complaint pursuant to CPLR 3215(c), we deem the notice of appeal to be a motion for leave to appeal, and grant such leave (*see Ray v Chen*, 148 AD3d 568 [1st Dept 2017]; CPLR 5701[c]).

The record is clear that plaintiff had moved for a default judgment within one year, and thus, the motion court's sua sponte vacature of the judgment and dismissal of the complaint as untimely was in error (*see Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1st Dept 1999]; *US Bank N.A. v Dorestant*, 131 AD3d 467, 469 [2d Dept 2015]). In view of this decision, the merits of defendant's motion to vacate the default judgment are no longer moot and it is remanded back to the trial court for consideration on the merits.

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9537 In re Phillip M.,
Petitioner-Respondent,

-against-

Precious B.,
Respondent-Appellant.

_____

Richard L. Herzfeld, New York, for appellant.

Leslie L. Lowenstein, Woodmere, for respondent.

The Law Offices of Salihah R. Denman, PLLC, Harrison, (Salihah R. Denman of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about June 14, 2018, which, after a hearing, granted petitioner-respondent father's motion for a modification of an order of custody of the same court (Adetokunbo Fasanya, J.), entered on or about June 26, 2015, and awarded sole legal and physical custody of the subject child to him with visitation to respondent-appellant mother, unanimously affirmed, without costs.

The Referee's determination that it was in the child's best interests to modify the prior joint custody order and award the father sole legal and physical custody of the child with visitation to the mother has a sound and substantial basis in the record (*see Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], *lv*

denied 13 NY3d 716, *cert denied* 560 US 940 [2010]. Initially, the parties are unable to reach a consensus or communicate on issues related to the child, rendering joint custody inappropriate (*id.* at 955; *see Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012]; *see also Bast v Rossoff*, 91 NY2d 723, 728 [1998]).

Further, the record demonstrates that when the child was in the mother's custody, the child was excessively absent and late to school, to the detriment of her academic performance. The mother also failed to appreciate the danger that her relationship with an abusive, level three sex offender posed to the child, even bringing the child to see him while he was incarcerated, despite knowing that he was a convicted sex offender and having an active order of protection against him. The father, by contrast, has demonstrated that he is able to ensure that the child's educational and emotional needs are met, and has provided the child with a safe and stable home (*see Matter of Hugh L. v Fhara L.*, 44 AD3d 192 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007]). Moreover, it was in the child's best interests to remain in the father's custody, with whom she wishes to remain, and in the school where she is doing well academically and

socially (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 94-95 [1982]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9538 Frank Sagarese, et al., Index 156846/14
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered August 7, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff Frank Sagarese's motion for partial summary judgment on liability and granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, the complaint as amplified by the further supplemental bill of particulars reinstated, and otherwise affirmed, without costs.

The court properly granted defendant's motion for summary judgment dismissing so much of plaintiff's General Municipal Law § 205-e claim predicated on the Jones Act (46 USC § 30104 *et seq.*). Plaintiff, a land-based boat mechanic for the New York Police Department Harbor Unit, was not a "seaman" for purposes of the Jones Act (*see Chandris, Inc. v Latsis*, 515 US 347, 368

[1995]).

The court should not have treated plaintiff's further supplemental bill of particulars as a nullity. Rather, plaintiff should have been permitted to file the further supplemental bill of particulars with respect to defendant's alleged violations of statutes, ordinances, rules, and/or regulations which amplify and elaborate upon facts and theories already set forth in the original bill of particulars and raise no new theory of liability (*Orros v Yick Ming Yip Realty, Inc.*, 258 AD2d 387, 388 [1st Dept 1999]).

We decline to search the record to dismiss the complaint.

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9539 In re WE 223 Ralph LLC, Index 157148/16
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development,
Respondent-Respondent.

_____

Harwood Reiff LLC, New York (Simon W. Reiff of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 29, 2017, which denied the petition to annul a determination of respondent (HPD), dated April 28, 2016, denying petitioner's protests against charges billed to it in connection with emergency fire guard services contracted for by HPD, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

HPD's denial of petitioner's emergency repair charge protests has a rational basis in the record and is not arbitrary and capricious (*see Matter of Ward v City of Long Beach*, 20 NY3d 1042 [2013]). Petitioner contends that the notices of violation of the Housing Maintenance Code (Administrative Code of City of NY § 27-2002 *et seq.*) that led to HPD's posting of a fire guard

at petitioner's building as an emergency measure were not properly served under Administrative Code § 27-2095(c), because they were served on petitioner's registered managing agent only and not on petitioner as well. However, because the notices were directed to the managing agent, not to petitioner, section 27-2095(c) is inapplicable. The notices were properly served under Administrative Code § 27-2095(a)(3)(ii), which governs service of notice on a managing agent.

Petitioner contends that HPD's proofs of service were inadequate because they were unaccompanied by any supporting affidavit or explanation of the computer printouts purporting to show service on the managing agent. This argument is unpreserved and in any event unavailing. Petitioner's challenge to the sworn statement by HPD's Assistant Commissioner for Special Enforcement that service on the managing agent was made is conclusory. HPD's documents and sworn pleadings make a prima facie showing that the NOVs were served in the manner required by statute, and petitioner's assertion to the contrary is without support in the record.

Contrary to petitioner's contention that it was not given an opportunity to challenge HPD's purported proofs of service, it could have done so in its reply papers on the petition. However, rather than raising factual issues as to the adequacy of HPD's

proofs in its reply, petitioner reiterated its legal arguments under Administrative Code § 27-2095(c).

To the extent petitioner contends HPD made computational errors, one computation was a downward adjustment, namely, a change in petitioner's favor, from 720 to 694 hours of fire guard services, which, in turn, reflected a simple arithmetic correction of 29 rather than 30 days; the other was an under-billing error of two hours. Although HPD also improperly charged petitioner for fire guard services from midnight July 3, 2015 to midnight July 4, 2015, after the violation was corrected, this overcharge was conceded by HPD in its answer and it agreed to remove that overcharge.

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

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9540 Madison Sullivan Partners LLC, on behalf of itself and derivatively on behalf of PMG-Madison Sullivan Development LLC, etc., Plaintiff-Appellant, Index 650930/17

-against-

PMG Sullivan Street, LLC, et al., Defendants-Respondents,

PMG-Madison Sullivan Development LLC, et al., Nominal Defendants-Respondents.

_____

Tarter Krinsky & Drogin, LLP, New York (Richard C. Schoenstein of counsel), for appellant.

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), and Franklin R. Kaiman, New York, for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 11, 2018, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a) and to award defendant PMG Sullivan Street LLC (PMG Sullivan) attorneys' fees, unanimously affirmed, without costs.

Plaintiff alleges essentially that it was damaged in connection with the development of a property jointly undertaken with defendant PMG Sullivan because PMG Sullivan and its affiliates permitted delays and cost overruns, and that defendants' actions constituted bad faith, intentional

wrongdoing, and gross negligence. It alleges further that a pre-suit demand on the nominal defendants would have been futile. However, under Delaware law, which governs the instant demand futility analysis (*see Asbestos Workers Phila. Pension Fund v Bell*, 137 AD3d 680, 681 [1st Dept 2016]), the allegations in the complaint are insufficient to show demand futility because they lack the requisite particularized facts establishing that defendants faced a "substantial likelihood" of personal liability (*Rales v Blasband*, 634 A2d 927, 934-936 [Del 1993] [internal quotation marks omitted]; *see Asbestos Workers*, 137 AD3d at 683-684).

Moreover, on the merits, the failure to allege particularized facts is fatal to the cause of action for breach of fiduciary duty (*see Giuliano v Gawrylewski*, 122 AD3d 477 [1st Dept 2014]) and to the causes of action for aiding and abetting breach of fiduciary duty (*see Deason v Fujifilm Holdings Corp.*, 165 AD3d 501, 502 [1st Dept 2018]). Plaintiff makes no separate argument in its main brief on appeal that its claim for an accounting survives the dismissal of its other claims. It is, therefore, deemed abandoned (*Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009]). The cause of action alleging breach of the construction management agreement is barred by the waiver of consequential damages in that agreement.

The motion court correctly granted defendants' application for attorneys' fees. The relevant contractual provision plainly contemplates that in an action to enforce the operating agreement or amendment thereto, even where no damages are sought, the prevailing party – whether plaintiff or defendant – is entitled to its cost of collection. In any event, insofar as the interpretation plaintiff now urges was not advanced before the motion court and on this record does not present a pure question of law, we do not reach the issue (*see Beta Holdings, Inc. v Goldsmith*, 129 AD3d 521 [1st Dept 2015]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9541 The People of the State of New York, Ind. 1740/16
Respondent,

-against-

Lejend B.,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua Satter 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 (George Villegas, J.), rendered September 14, 2017,

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

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

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

ENTERED: JUNE 6, 2019

CLERK

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

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9542 Budget Truck Rental, LLC, Index 150666/15
Plaintiff-Respondent,

-against-

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

Prompt Medical Services, P.C., et al.,
Defendants.

_____

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

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

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about December 19, 2017, which, inter alia, denied defendants-appellants' (appellants) motion to vacate an order and judgment, same court and Justice, entered February 21, 2017, inter alia, striking appellants' answer and granting plaintiff a default judgment, unanimously affirmed, with costs.

The motion court properly denied vacatur, as appellants failed to establish a meritorious defense to plaintiff's claims for declaratory relief (*see generally Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). Notably, appellants did not submit an affidavit from a party with personal knowledge in support of their alleged defenses to plaintiff's

claims (*see Bustamante v Green Door Realty Corp.*, 69 AD3d 521 [1st Dept 2010]; *see also Brownfield v Ferris*, 49 AD3d 790 [2d Dept 2008]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9543 Michael Catalano, Index 115597/10
Plaintiff-Appellant,

-against-

Fox Television Stations, Inc.,
Defendant-Respondent,

WNYW-Fox 5 Television,
Defendant.

_____

Michael G. O'Neill, New York, for appellant.

Holland & Knight LLP, New York (Michael Starr of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 22, 2017, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint as against defendant Fox Television Stations, Inc., unanimously affirmed, without costs.

Defendants met their obligation, under the New York State and City Human Rights Laws, to engage in a good-faith interactive dialogue with plaintiff aimed at reasonably accommodating his disability (*see* Executive Law § 292[21], [21-e]; Administrative Code of City of NY § 8-107[15][b]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 836-837 [2014]). Defendants repeatedly offered to train plaintiff and place him as an "ELC" ("Enhanced Live Control") operator. The offer was qualified only

by a request that plaintiff furnish a note from his physician confirming that he could perform all the ELC operator functions "without limitations; or, if he believes you have limitations, what those are." Given that his orthopedist had stipulated that plaintiff could return to work as of August 23, 2010, but only if there were "no use of Robotic Tension Joysticks operation until further notice," defendants' request for medical confirmation of his ability to perform the ELC operator functions (which included joystick use) was reasonable. However, plaintiff never updated the orthopedist's note; he submitted doctors' notes stating merely that he continued to be seen and treated.

Plaintiff's engineer's affidavit, submitted in opposition to defendants' motion and corroborating plaintiff's own efforts to find ways to modify the existing joystick or find joystick alternatives, is not relevant to this analysis. The reasonableness of an employer's response to a disabled employee's request for an accommodation turns not on whether some accommodation was theoretically available, but rather on "whether a reasonable accommodation was available for the employee's disability at the time the employee sought accommodation" (*Jacobsen*, 22 NY3d at 838). The record demonstrates that defendants, in consultation with their equipment vendor, made extensive efforts to test plaintiff's suggestions and find

alternatives. Thus, defendants did not "arbitrarily reject [plaintiff's] proposal[s] without further inquiry," but met their obligation "to investigate that request and determine its feasibility" by engaging in "at least some deliberation upon the viability of [his] request" (*Jacobsen*, 22 NY3d at 836, 837 [internal quotation marks omitted]). The record also demonstrates that defendants attempted to further the interactive dialogue with plaintiff (via his union) by requesting that the vocational expert he had identified in the fall of 2010 (not the mechanical engineer who submitted the opposition affidavit) visit the workplace and perform an ergonomic evaluation aimed at finding an accommodation. However, the union did not respond to defendants' last request for dates of availability.

Plaintiff contends that defendants could have accommodated him by placing him in an evening floor manager position, which did not require use of a joystick. However, it is undisputed that defendants were filling that position temporarily, because they were in the process of consolidating it into a new ELC position to be held by per diem employees. Defendants were not required to place plaintiff in the evening ELC position when it became available, thereby bumping a more junior staff technician

whom defendants had been preparing for the position (*see Silver v City of N.Y. Dept. of Homeless Servs.*, 2012 NY Slip Op 32447[U], *9 [Sup Ct, NY County 2012], *affd* 115 AD3d 485 [1st Dept 2014]).

Because defendants did not cross-appeal, we cannot grant their request that we dismiss the complaint as against defendant WNYW-Fox 5 Television, which defendants assert is merely a trade name without separate juridical existence (*see Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9544 In re Anecia S.H.,
Petitioner-Appellant-Respondent,

-against-

Grevelle D.B.,
Respondent-Respondent-Appellant.

_____

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Elana Rose Beale of counsel), for appellant-respondent.

Anne Reiniger, New York, for respondent-appellant.

_____

Order, Supreme Court, Bronx County (IDV Part)(Judith Lieb, J.), entered on or about April 24, 2018, which determined, after a dispositional hearing, that petitioner proved aggravating circumstances and granted her request for a five-year order of protection, to be calculated from the issuance of a criminal order of protection, same court and Justice, entered on or about March 9, 2017, to expire on March 8, 2022, unanimously affirmed, without costs.

The record supports the finding of aggravating circumstances, namely that respondent's actions of attempting to strangle petitioner, hitting her head against the wall, and threatening to kill her, constituted "an immediate and ongoing danger" and were perpetrated while the parties' child was in close proximity, thus exposing him to injury (*see* Family Ct Act

§§ 827[a][vii]; 842; *see Matter of Kondor v Kondor*, 109 AD3d 660, 661 [2d Dept 2013]). Accordingly, we uphold the finding of aggravating circumstances (*see e.g. Matter of Leticia T. v Tomas V.*, 12 AD3d 170 [1st Dept 2004]).

However, contrary to petitioner's contention, we find that the IDV court acted within its discretion in calculating the duration of the five-year civil order of protection from the date of a criminal order of protection issued by the same court on March 9, 2017, upon respondent's sentencing in the criminal proceeding. Although petitioner argues that the IDV court erred as a matter of law in "backdating" the civil order of protection, the duration of an order of protection is a matter of the court's discretion within the guidelines set by statute (*see* Family Ct Act § 842; *Matter of Liu v Yip*, 127 AD3d 1196, 1197 [2d Dept 2015]).

As well, we find unpersuasive petitioner's claim that by setting a retroactive date of commencement for the civil order of protection, the IDV court subverted the Legislature's intent to establish "'stronger and more aggressive court intervention in family offense cases'" (*see Matter of Richardson v Richardson*, 80 AD3d 32, 40 [2d Dept 2010] [discussing the legislative history of the 1994 amendment granting concurrent jurisdiction to criminal and family courts]). Petitioner still had access to both

tribunals, and the IDV court found respondent guilty of criminal charges (*see People v Bartley*, 163 AD3d 435 [1st Dept 2018], *lv denied* 32 NY3d 1063 [2018]), in addition to the findings in the instant family offense proceeding. Based on the foregoing, we see no reason to disturb the IDV court's decision to calculate the duration of the civil order of protection from the issuance of the criminal order of protection, which still resulted in a period of approximately four years.

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9545 Borden LP, Index 657398/17
Plaintiff,

-against-

TPG Sixth Street Partners, et al.,
Defendants.
- - - - -
TPG Sixth Street Partners, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Michael Borden, et al.,
Third-Party Defendants-Respondents,

Smudge Monster, LLC,
Third-Party Defendant.

_____

Clarick Gueron Reisbaum LLP, New York (Gregory A. Clarick of counsel), for appellants.

Eisner, LLP, New York (Simon Miller of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 3, 2019, which, to the extent appealed from, granted third-party defendants Michael Borden's and PRS1000, LLC's motions to dismiss the third-party complaint as against them, unanimously reversed, on the law, with costs, and the motion denied.

The third-party complaint alleges facts sufficient to support a finding that third-party defendants Michael Borden and PRS1000 had a sufficiently close relationship with the

signatories of the subject agreement to confer on the court personal jurisdiction over them pursuant to the agreement's jurisdiction clause (*see Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 179 [1st Dept 2017]). In light of the facts alleged, the clause in the agreement stating that no third parties had any rights or obligations under the agreement does not, without more, preclude a finding of "close relationship" (*see id.*).

The third-party complaint sufficiently alleges that Michael Borden, plaintiff debtor Borden LP's controlling person and manager, was a beneficiary of the fraudulent conveyance to a sham company (PRS1000) created by him solely for the purpose of depriving third-party plaintiffs of the collateral for their loan (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]).

The third-party complaint sufficiently alleges that Michael Borden, who caused plaintiff debtor to make a sub-market sale of its principal assets to a shell company owned solely by Michael Borden, tortiously interfered with plaintiff's contract with

third-party plaintiffs (*see Island Two LLC v Island One, Inc.*, 2013 WL 5380216, *3, 2013 US Dist LEXIS 138963, *11-12 [SD NY Sept. 26, 2013]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9546 The People of the State of New York, Ind. 1793/15
Respondent,

-against-

Christopher Edwards,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline A. Meese-Martinez of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered September 12, 2016,

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

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

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

ENTERED: JUNE 6, 2019

CLERK

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

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9547 In re Meirav Gavrielov, et al., Index 570582/17
Petitioners-Appellants,

-against-

Unger Consulting Group Ltd., et al.,
Respondents-Respondents.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellants.

Helene W. Hartig, New York, for respondents.

_____

Order, Appellate Term, First Department, entered February 1, 2016, which affirmed an order of the Civil Court, New York County (Jack Stoller, J.), entered on or about November 14, 2016, granting respondents' motion for summary judgment dismissing the petition in a holdover summary proceeding and denying petitioners' cross motion for summary judgment on the petition and to strike respondents' affirmative defenses and counterclaims, and an order of the same court and Judge, entered on or about March 6, 2017, granting petitioners' motion for reargument, and upon reargument, adhering to the original determination, unanimously reversed, on the law, without costs, respondents' motion denied and petitioners' cross motion granted.

The parties do not dispute that before 2014 the apartment that had been occupied by respondent Harold Unger for several

decades was subject to rent stabilization. Rent stabilized renewal leases were executed by Unger from at least 1989 until January 31, 2008, listing as the tenant a corporate entity wholly owned by Unger. In 2008, Unger himself was added as a tenant to the lease renewal. However, in 2014, Unger executed a rent stabilized lease renewal designating respondent Unger Corporate Group (UCG), another corporate entity wholly owned by him, as the tenant. The lease renewal did not identify any occupant of the apartment.

By omitting Unger as a named tenant and adding UCG, respondents created a vacancy and a new tenancy, which resulted in the deregulation of the apartment, because the rent exceeded the deregulation threshold (*see Fox v 12 E.88th LLC*, 160 AD3d 401 [1st Dept 2018], *lv denied* 32 NY3d 911 [2018]).

Respondents failed to present evidence that, by accepting Unger's personal checks for the rent and offering the lease renewal on the form used by the Division of Housing and Community

Renewal for rent stabilized apartments, petitioners or the predecessor landlord voluntarily waived a known right to deregulate the apartment based on the vacancy (*see Sullivan v Brevard Assoc.*, 66 NY2d 489, 495 [1985]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Renwick, Oing, Moulton, JJ.

9548 In re Ruth Pickholz, Index 100014/17
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation & Development,
Respondent-Respondent.

_____

David A. Bart, Fresh Meadows, for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered December 18, 2017, denying the petition to annul a determination of respondent (HPD), dated September 13, 2016, which denied petitioner's application for succession rights to an apartment governed by the Mitchell-Lama housing program, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

HPD's denial of petitioner's application for succession rights to a Mitchell-Lama apartment has a rational basis and is not arbitrary and capricious (*see* CPLR 7803[3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Petitioner, a senior citizen whose sister was the tenant/cooperator, failed to establish that she resided with her

sister in the apartment as a primary residence for a period of not less than one year immediately before her sister died (on March 31, 2016) and that she was listed on income documentation submitted by her sister for at least the reporting period immediately before her sister's death (*see* 28 RCNY 3-02[p][3]; *Matter of Licciardi v Been*, 149 AD3d 665 [1st Dept 2017]). Petitioner used another address on her 2015 New York State tax return and other documents (*see Matter of Cyril v New York City Dept. of Hous. Preserv. & Dev.*, 140 AD3d 632 [1st Dept 2016], *lv denied* 28 NY3d 913 [2017]), and she was not listed on the income affidavits submitted to HPD by petitioner's sister for the years 2014 and 2015.

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

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9549 The People of the State of New York, Respondent, Ind. 1981/14

-against-

Luis Cosme, Defendant-Appellant.

_____

Marianne Karas, Thornwood, for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered October 11, 2016, convicting defendant, after a jury trial, of robbery in the first degree (three counts), burglary in the second degree (three counts), attempted robbery in the first degree, robbery in the second degree (12 counts) and attempted robbery in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court providently exercised its discretion in admitting limited portions of a nontestifying victim's medical records in which he reported that he had been struck with a handgun, and there was no violation of the hearsay rule or the Confrontation Clause. The particular type of object that caused the victim's injuries was relevant to diagnosis and treatment (*see People v*

Ortega, 15 NY3d 610 [2010]). There was no *Crawford* violation, because the records were not prepared in anticipation of litigation (*see People v Rawlins*, 10 NY3d 136 [2008], *cert denied* 557 US 934 [2009]). We have considered and rejected defendant's related challenges to the sufficiency and weight of the evidence supporting the attempted first-degree robbery conviction, involving the nontestifying victim.

Defendant did not preserve his claim that the verdict, which reached different results as to certain charges regarding different victims, was legally repugnant, and we decline to review it in the interest of justice. As an alternative holding, we find no legal repugnancy (*see People v Muhammad*, 17 NY3d 532 [2011]).

Defendant has not established that he was prejudiced by the fact that the court submitted certain counts to the jury after reserving decision on defendant's dismissal motion (*see* CPL 290.10[1]), and ultimately dismissed those counts for legal insufficiency after the verdict (*see People v Brown*, 83 NY2d 791, 794 [1994]).

The court providently exercised its discretion when it dismissed a sworn alternate juror who had engaged in substantial misconduct involving trial-related social media posts, and was

also grossly unqualified to serve (*see* CPL 270.35). In any event, because the juror at issue was an alternate juror, and no alternate jurors were ultimately needed, this juror would never have taken part in deliberations.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9551 William Powers, Index 159844/16
Plaintiff,

-against-

Plaza Tower, LLC,
Defendant.
- - - - -
Plaza Tower, LLC,
Third-Party Plaintiff-Appellant,

-against-

Global BMU, LLC,
Third-Party Defendant-Respondent.

_____

Fullerton Beck LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for appellant.

Pillinger Miller Tarallo, LLC, Elmsford (Edward J. O'Gorman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 16, 2019, which, insofar as appealed from as limited by the briefs, denied defendant/third-party plaintiff Plaza Tower, LLC's (Plaza) motion for summary judgment on its third-party claim for contractual indemnification, and granted third-party defendant Global BMU, LLC's (Global) motion for summary judgment dismissing the claim, unanimously affirmed, without costs.

Plaintiff sustained injuries while installing a window washing scaffold or rig on the roof of a building owned by Plaza.

Plaza retained plaintiff's employer, Global, to perform the work. At the time, plaintiff was walking on a metal catwalk that had been partially dismantled and was no longer in use. As he was walking, a section of the grating on the catwalk collapsed, causing him to fall 18-20 feet to the roof top below.

The court properly denied Plaza summary judgment on its claim for contractual indemnification and granted Global summary judgment dismissing the claim. The contract provision requires Global to indemnify Plaza from claims "arising out of or resulting from the performance of the Work . . . except to the extent caused by the sole negligence of any such Indemnitees." Nothing in the record indicates that Global or plaintiff acted negligently. On the other hand, the record establishes that the accident was due to Plaza's sole negligence.

As the court found, Global did not own the premises or install the catwalk so as to give rise to a duty to maintain it (*cf. Urban v No. 5 Times Sq. Dev. LLC*, 62 AD3d 553, 554 [1st Dept 2009]). Further, nothing in the record indicated that Global or plaintiff had reason to know that the catwalk was unsafe. Indeed, Global's president and plaintiff's coworker testified that Plaza personnel never instructed them not to use the catwalk, and assumed it was safe for use. Global's president also testified that dismantled catwalks are usually accompanied

by warning signs, which Plaza admittedly did not put up.

By contrast, Plaza, as the owner of the premises, had a duty to keep the catwalk safe or to warn Global's workers of the hazards (*see Basso v Miller*, 40 NY2d 233, 245 [1976]). The fact that it did not supervise or control plaintiff's work is irrelevant in this matter arising from a dangerous premises condition (*McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]). Despite its duty to maintain, and notice of the dilapidated condition of, the catwalk, Plaza failed to warn Global's workers of the hazard. Plaza also never informed Global's employees that they were not to use the outlet located on the catwalk and that another outlet was available for use.

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9552 The People of the State of New York, Ind. 1728/17
Respondent,

-against-

Fernando Guzman,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Kevin McGrath, J.), rendered January 11, 2018,

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: JUNE 6, 2019

CLERK

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

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9553N Ciminello Property Associates, Index 25834/17E
Plaintiff-Appellant,

-against-

New 970 Colgate Avenue Corp., et al.,
Defendants-Respondents.

_____

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (David Abramovitz of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 1, 2019, which, to the extent appealed from, denied plaintiff's motion for a preliminary injunction to enjoin and restrain defendants from installing or maintaining any physical obstruction preventing plaintiff and its tenants' access to certain portions of Close Avenue, unanimously affirmed, with costs.

Plaintiff failed to demonstrate that the motion court abused its discretion by declining to grant a preliminary injunction in this case (*see generally After Six v 201 E. 66th St. Assoc.*, 87 AD2d 153, 155 [1st Dept 1982]; *Borenstein v Rochel Props.*, 176 AD2d 171, 172 [1st Dept 1991]; *Porcari v Griffith*, 169 AD3d 729, 730-731 [2d Dept 2019]). Although the record before the motion court contained some evidence of plaintiff's control of the

disputed sections of Close Avenue, it also included affidavits indicating that defendants, rather than plaintiff, had maintained the portions of Close Avenue in dispute, that since at least 1999 defendants had controlled access and plaintiff and its tenants' use had been permissive, and that plaintiff and its tenants did not complain about defendants changing the gate locks. Plaintiff also conceded that the facts necessary to establish its right to an easement will likely require discovery concerning activities from decades ago, possibly from the 1970s. Under these circumstances, the motion court providently exercised its discretion in declining a preliminary injunction on the basis that plaintiff failed to demonstrate a likelihood of success on the merits because it did not establish a prescriptive easement by clear and convincing evidence (*see Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364, 364-365 [1st Dept 2006]).

In any event, plaintiff also failed to establish that it would suffer irreparable harm in the absence of a preliminary injunction, or that a balance of the equities was in its favor

(*see generally GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586, 586 [1st Dept 2009]; *cf. Grand Manor Health Related Facility, Inc. v Hamilton Equities, Inc.*, 85 AD3d 695, 695 [1st Dept 2011]).

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

ENTERED: JUNE 6, 2019

CLERK

Sweeny, J.P., Gische, Webber, Oing, Moulton, JJ.

9554N In re Katshana H., etc., et al., Index 28916/17E
Petitioners-Respondents,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Schweder of counsel), for appellant.

Diamond & Diamond LLC, Brooklyn (Stuart Diamond of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered May 1, 2018, which granted petitioners' motion for leave to file a late notice of claim, unanimously affirmed, without costs.

The decision to grant petitioners leave to file a late notice of claim was a provident exercise of discretion (*see generally Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]). Petitioners' failure to set forth a reasonable excuse for not timely filing a notice of claim is not fatal to their leave application (*see Velazquez v City of N.Y. Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]), because they met their burden of showing that respondent obtained actual knowledge of

the essential facts constituting the claim within the 90-day statutory time period or a reasonable time thereafter, and would not be prejudiced by having to defend against the action on its merits (*see Caminero v New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330, 332 [1st Dept 2005]). The medical records, which were in respondent's possession since the time of the alleged malpractice, show that respondent had knowledge of the essential facts of petitioners' claims because they document that infant petitioner was having seizures and had "extensive areas of infarct" after her "head wedged into [the mother's] pelvis due to prolonged second stage" as confirmed by an MRI performed by Jacobi Medical Center (*see Figueroa v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 49 AD3d 454 [1st Dept 2008]).

Following petitioners' showing, respondent raised no claim made with particularity as to how it would be substantially prejudiced should it be required to defend against the action on the merits (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467 [2016]; *Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401, 405 [1st Dept 2018]). That petitioners did not submit an expert affidavit in support of their leave application does not warrant a different determination, because the basic facts underlying the malpractice

claim can be gleaned from the medical records (*see Matter of Rojas v New York City Health & Hosps. Corp.*, 127 AD3d 870, 873 [2d Dept 2015]).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9555 The People of the State of New York, Respondent, Ind. 494/13

-against-

Raymond Bell, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Ruth Pickholz, J. at jury trial and sentencing), rendered October 13, 2015, as amended October 21, 2013, convicting defendant of three counts each of robbery in the first and second degrees and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

The court properly denied defendant's suppression motion. The People met their burden of coming forward, and defendant did not meet his ultimate burden of proving the illegality of the search and seizure (*see People v Berrios*, 28 NY2d 361, 367 [1971]). Notwithstanding defects in the police witnesses' recollections, there were sufficient details of the arrest presented to the hearing court to support a conclusion that

police responding to a reported robbery in progress found defendant lying on the ground in a nearby park under suspicious circumstances, and observed that defendant had apparently just discarded a distinctive coat that had figured prominently in the description of one of the robbers. That testimony was sufficient to establish probable cause for defendant's arrest.

Defendant claims that his counsel rendered ineffective assistance at the suppression hearing by conceding that he had no basis to move to suppress a victim's phone that the police found on the ground after defendant rose from where he had been lying down. This claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record, including the circumstances of the phone's recovery and counsel's reasonable investigation of the issue (*see e.g. People v Navarro*, 143 AD3d 522, 523 [1st Dept 2016], *lv denied* 29 NY3d 1000 [2017]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not established prejudice, because there is no reason to believe that counsel

could have obtained suppression of the phone.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The credible evidence established defendant's accessorial liability (*see* Penal Law § 20.00).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9556 Grace Glueck, Index 154685/16
Plaintiff-Appellant,

-against-

Starbucks Corporation, et al.,
Defendants-Respondents.

_____

The Turkewitz Law Firm, New York (Eric Turkewitz of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Starbucks Corporation, respondent.

Shein & Associates, P.C., Syosset (Barry Montrose of counsel), for Partnership 92 West, L.P., respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered October 31, 2018, which granted defendants' motions for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendants' motions for summary judgment were properly granted in this action where plaintiff alleges that she was injured when she tripped and fell while exiting defendants' premises; the entrance/exit to the premises has two steps outside the building. The record shows that plaintiff, who was walking with a cane, could not identify the cause or location of her fall, giving multiple versions of the accident, including stating

that she had missed a step (*see Fishman v Westminster House Owners*, Inc., 24 AD3d 394 [1st Dept 2005]; *Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004]). Nor could the nonparty witnesses identify the location of plaintiff's accident, stating that they made assumptions as to where plaintiff may have fallen, but did not actually see her fall. Plaintiff was unable to identify any defective condition at the location of her fall, the photographs of the area in front of the premises depicted two steps, in good repair, and there were no cracked or broken surfaces or foreign substances.

Plaintiff's reliance on the report of an engineering expert, who opined that there were violations of New York City Building Codes of 1916 and 1938 and unspecified recent codes that incorporate a certain standard of the American National Standards Institute, is misplaced. The report is unsworn and is therefore inadmissible for the purposes of summary judgment (*see Ulm I Holding Corp. v Antell*, 155 AD3d 585, 586 [1st Dept 2017]). In any event, the report is speculative and conclusory (*see Morrissey v New York City Tr. Auth.*, 100 AD3d 464 [1st Dept 2012]).

In view of the foregoing, plaintiff's cross motion for summary judgment on the issue liability was properly denied.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9557 In re Kevon L.,

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

_____

Susan Barrie, New York, for appellant.

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

_____

Order of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 12, 2017, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the first degree, attempted grand larceny in the fourth degree, and criminal possession of a weapon in the fourth degree, and placed him with the Close to Home Program for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The victim's testimony was corroborated by police observations and reasonable

inferences that could be drawn therefrom. The evidence established that appellant threatened the victim with a knife while demanding that he turn over his property.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9558-
9558A &
M-2347 Index 158060/17

Adam Kaplan, et al.,
Plaintiffs-Appellants,

-against-

Conway and Conway, et al.,
Defendants-Respondents.

_____

Law Office of Daniel L. Abrams, PLLC, New York (Daniel L. Abrams of counsel), for appellants.

Conway & Conway, New York (William W. Bergesch of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Frank P. Nervo, J.), entered September 17, 2018, dismissing the complaint with prejudice, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 6, 2018, which granted defendants' motion to dismiss pursuant to CPLR 3211(a)(7), unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

A claim for legal malpractice requires that a plaintiff allege facts that, if proven at trial, would demonstrate that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v*

Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007] [internal quotation marks and citation omitted]; *see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]).

The motion court properly granted defendants' motion to dismiss. The complaint alleged that defendants committed legal malpractice by failing to timely advocate for a "formal closure" of a "sham" internal investigation instigated by plaintiffs' employer, or to secure "more favorable language" in the FINRA U-5 Forms that were filed upon plaintiffs' voluntary resignation. As a result of defendants' alleged negligence, plaintiffs claim that they were subject to a FINRA investigation and "reputational damage." Given the vague, speculative, and conclusory nature of these allegations, plaintiffs failed to allege facts that "fit into any cognizable legal theory" (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal quotation marks omitted]).

Moreover, emails submitted by defendants show that the law firm did advocate for plaintiffs' employer to include language on the U-5 Forms indicating that any allegations against plaintiffs were unsubstantiated, and plaintiffs' employer refused, calling such language a "non-starter." Defendants also drafted a "Broker Comment," which would have provided plaintiffs' rebuttal to the

negative information included on their U-5 Forms, but, according to defendants, plaintiffs would not discuss or approve the comment. It is undisputed that, prior to their voluntary resignation, plaintiffs were on administrative leave and already suffering damages in the form of loss of business and reputational damage. Accordingly, plaintiffs have no cause of action to recover damages for legal malpractice as they cannot demonstrate that defendants were negligent in their representation, or that such negligence proximately caused the alleged damages (*see Rudolf v Shayne*, *supra*; *Weil v Fashion Boutique, supra*).

Contrary to plaintiffs' contention, the motion court properly considered the emails submitted by defendants in dismissing the complaint (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]). By considering this evidentiary material, the standard morphed from whether plaintiffs stated a cause of action to whether they had one (*id.*). Thus, to the extent the motion court decided the

motion on the merits, it properly dismissed the complaint on the merits (*cf. Komolov v Segal*, 96 AD3d 513 [1st Dept 2012]).

M-2347 - *Kaplan v Conway & Conway*

Motion to strike reply brief or file sur-reply denied.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9559 In re Intercontinental Construction Contracting, Inc., Petitioner-Appellant, Index 101419/15

-against-

New York City Housing Authority, Respondent-Respondent.

_____

Marco & Sitaras, PLLC, New York (George Sitaras of counsel), for appellant.

Kelly D. MacNeal, New York (Lauren L. Esposito of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 14, 2017, denying the petition to annul respondent's determination, dated April 7, 2015, which declared petitioner in default under a contract with respondent and dismissed its breach of contract claims with prejudice, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to submit a notice of claim before commencing this proceeding, as required by Public Housing Law § 157(1) (*see Matter of Silvernail v Enlarged City School Dist. of Middletown*, 40 AD3d 1004 [2d Dept 2007]). Petitioner seeks mandamus to review respondent's determination; it does not seek judicial enforcement of a legal right derived through enactment

of positive law, but seeks to vindicate a private right (*see id.* at 1005; *Matter of O'Connor v Board of Educ. of Greenburgh-Graham Union Free School Dist.*, 11 AD3d 616 [2d Dept 2004]; *Matter of McGovern v Mount Pleasant Cent. Sch. Dist.*, 114 AD3d 795, 795-796 [2d Dept 2014], *affd* 25 NY3d 1051 [2015]; *Matter of Lewandowski v Clyde-Savannah Cent. Sch. Dist. Bd. of Educ.*, 143 AD3d 1278 [4th Dept 2016]; *see generally Matter of Flosar Realty LLC v New York City Hous. Auth.*, 127 AD3d 147, 155-156 [1st Dept 2015] [discussing applicability of notice of claim requirement to petition seeking judicial enforcement of legal right derived through enactment of positive law]).

Although petitioner alleged in the amended petition that it satisfied the requirements of Public Housing Law § 157(1), the article 78 court correctly determined that the letters referred to in the petition and attached thereto did not constitute notices of claim. The exhibits, which either were sent by respondent itself or were sent by petitioner before respondent declared it in default, did not provide sufficient notice of petitioner's claim in this article 78 proceeding.

The court also correctly dismissed petitioner's claims for contract damages with prejudice, as petitioner failed to submit a notice of claim as required by Section 23 of the parties'

contract (*see Metropolitan Bridge & Scaffolds Corp. v New York City Hous. Auth.*, 138 AD3d 423 [1st Dept 2016]; *Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 [1st Dept 2015]). The letters sent by petitioner were not delineated notices of claim, and did not state either the nature or the amount of the claims (*see Hi-Tech Constr. & Mgt. Servs. Inc. v Housing Auth of the City of N.Y.*, 125 AD3d 542 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]). The letters were also sent by petitioner before the accrual date of at least two of the claims, rather than within 20 days after the claims arose (*see Everest Gen. Contrs. v New York City Hous. Auth.*, 99 AD3d 479 [1st Dept 2012]).

Even had petitioner originally brought its breach of contract claims in a separate plenary action, the claims would be barred due to petitioner's failure to submit a proper notice of claim pursuant to Section 23 of the parties' contract, thus rendering academic the relief it seeks here, i.e., the dismissal of the contract claims without prejudice (*see generally Matter of Gottlieb Contr., Inc. v City of New York*, 49 AD3d 409 [1st Dept 2008]).

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

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9560-
9560A The People of the State of New York,
Respondent,

Ind. 20164/14
20011/15

-against-

Louis Rohde,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Steven M. Statsinger, J. at first plea; Tandra L. Dawson, J. at second plea, hearing and sentencing), rendered April 10, 2015, convicting defendant of attempted assault in the third degree and criminal contempt in the second degree, and sentencing him to concurrent terms of 15 days, unanimously affirmed.

The court properly found that defendant had violated the no-arrest condition of his original guilty plea and thus forfeited the opportunity for a more lenient disposition. The record establishes a legitimate basis for both of defendant's postplea arrests (*see People v Outley*, 80 NY2d 702 [1993]). Minor defects

in police testimony at the *Outley* hearing do not warrant a different conclusion. In any event, we note that either of these arrests independently constituted a violation of the plea agreement.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9561 Silvergrove Advisors, LLC, Index 656061/17
Plaintiff-Respondent,

-against-

Crosswing Holdings LLC, et al.,
Defendants-Appellants,

Superior Crosslink Investments, L.P.,
Defendant.

_____

The Ginzburg Law Firm, P.C., Fresh Meadows (Daniel Ginzburg of counsel), for appellants.

Feuerstein Kulick LLP, New York (David Feuerstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered October 1, 2018 which denied defendants Crosswing Holdings LLC, Asheesh Mahajan and Rajeev Sharma's (defendants) motion pursuant to CPLR 3211(a)(1) and (7) to dismiss so much of the complaint as seeks "a success fee for the Provident Bank line of credit," unanimously affirmed, without costs.

Defendant Crosswing retained plaintiff to assist it in securing financing, which ultimately took the form of an acquisition of Crosswing by defendant Superior Crosslink Investments, L.P., an entity formed by nonparty Superior Capital Partners LLC for purposes of this transaction. Liberally construing the complaint and presuming the allegations to be true

(*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), we find that the complaint colorably alleges that a line of credit (LOC) acquired by Superior constitutes "Consideration" for purposes of calculating plaintiff's success fee under the engagement agreement.

Defendants failed to identify any documentary evidence or undisputed facts that conclusively establish a defense (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]). They contend that Superior's "consolidation" of two existing Crosswing LOCs into a single credit facility cannot constitute "Consideration" as defined above. However, there is support in the record for plaintiff's contention that the new LOC was no mere consolidation, but rather imported superior terms of real and material benefit to defendants. Hence, the issue cannot be resolved on this motion on the pleadings.

Defendants contend that Superior did not assume or accept a transfer of any "funded debt" as part of the transaction. The parties dispute whether Section 5.03 of a "Contribution Agreement" proves or disproves Superior's obligation to pay on the new LOC. We do not find that Section 5.03, on its face, resolves this issue one way or the other.

Defendants contend that, as this was a change of control transaction, the engagement agreement's definition of "debt" did

not apply, and instead a more restricted category of "funded debt" applied. Defendants maintain that "funded debt" is a well established term of corporate finance that means "[s]ecured long-term corporate debt," which necessarily excludes an LOC. Hence, defendants argue that the new LOC was not "funded debt" and could not constitute "Consideration" for purposes of the success fee. This argument does not avail them. First, the engagement agreement appears to define "funded debt" as a subset of the broader definition of "debt" applicable to debt and equity financing generally. It first defines "Consideration" very broadly to include all sorts of "debt." It then provides that, "in a change of control Transaction . . ., Consideration shall also include the total value of the funded debt assumed or transferred to the acquirer." Thus, "funded debt" is specified as debt in addition to, and not instead of, "debt" generally. Second, there is support in the record for plaintiff's contention that the new LOC, being secured and having a term of more than one year, in fact met defendants' definition.

In light of the foregoing, we need not reach defendants' contention that the value of the new LOC was not compensable

under the engagement agreement as part of a "recapitalization" transaction.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9562 The People of the State of New York, Ind. 4078/14
Respondent,

-against-

Jeffrey Askew,
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 (Megan DeMarco of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa C. Jackson, J.), rendered May 28, 2015,

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

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

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

ENTERED: JUNE 6, 2019

CLERK

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

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9564 & M-2370 — Index 157500/12

Joan Reveyoso,
Plaintiff-Appellant,

-against-

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

- - - - -

National Employment Lawyers Association/New York,
Amicus Curiae.

_____

Bergstein & Ullrich, LLP, New Paltz (Stephen Bergstein of counsel), for appellant.

Gordon Rees Scully Mansukhani, LLP, Harrison (Allyson Avila of counsel), for respondent.

Harrison, Harrison & Associates, New York (Julie Salwen of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered November 26, 2018, which denied in part plaintiff's motion for attorneys' fees and costs, unanimously affirmed, without costs.

Supreme Court did not abuse its discretion by awarding plaintiff compensation for 50% of the requested compensable hours expended by her attorneys, based upon the court's conclusion, detailed in its decision, that the hours billed were

disproportionate to the complexity of the case (*see Luciano v Olsten Corp.*, 109 F3d 111, 117 [2d Cir 1997]; *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 430 [2004]; Administrative Code of City of NY § 8-502[g]).

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

M-2370 - *Reveyoso v Town Sports International*

Motion to file amicus curiae brief granted, and the brief deemed filed.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9565 Brandsway Hospitality, LLC also known as Brandsway Hospitality, et al.,
Plaintiffs-Respondents,

-against-

Delshah Capital LLC, et al.,
Defendants-Appellants,

Victor Jung,
Defendant.

Index 652637/13

_____

Cordova & Schwartzman, LLP, Garden City (Jonathan B. Schwartzman of counsel), for appellants.

Fishman Decea & Feldman, Armonk (Thomas B. Decea of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered February 5, 2019, which, to the extent appealed from, denied defendants Delsah Capital LLC and Michael K. Shah's cross motion for partial summary judgment dismissing plaintiffs' breach of contract claim and to dismiss the complaint pursuant to CPLR 3126, unanimously affirmed, with costs.

Defendants failed to meet their prima facie burden of demonstrating the absence of any material issues of fact, as required for summary dismissal of plaintiff's breach of contract claim (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [*citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The

record does not permit resolution of whether, as defendants contend, plaintiffs breached the parties' agreement by either making the allegedly unauthorized single $2,500 payment or by making the contested continuing $2,500 salary payments. Defendants' additional claims of breach of the parties' agreement, premised upon plaintiffs' alleged practice of buying drinks or food for customers, designating a table for plaintiff corporation's principal, or theft of trademarks and other intellectual property are similarly the subject of material contested facts, precluding the grant of defendants' motion.

It was a sound exercise of the court's discretion to deny, at this juncture, the motion to dismiss for spoliation of electronic evidence (CPLR 3126). Instead, the court referred the issues to an expert in information technology to examine various email accounts, servers and domains to determine who deleted emails, when they were deleted, and whether they could be retrieved (*see Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 476 [1st Dept 2010]).

Although there appears to be no dispute that emails were deleted, the parties present sharply conflicting accounts of when and by whom such deletions occurred. The court, appropriately concerned about plaintiff's principal's selective use of emails from accounts that had been largely deleted, also responsibly

sought more information about the timing of the deletions and the potential recovery of admissible evidence before making a ruling on spoliation.

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: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9566 In re Madison H.,

A Child Under Eighteen Years
of Age, etc.,

Demezz J.H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Anna B. Wolonciej of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about July 26, 2018, which denied respondent father's motion for unsupervised visitation with the subject child, unanimously affirmed, without costs.

The determination that supervised visitation was in the best interest of the child has a sound and substantial basis in the record and should not be disturbed (*see Matter of Arcenia K. v Lamiek C.*, 144 AD3d 610 [1st Dept 2016]*; Linda R. v Ari Z.*, 71 AD3d 465, 465-466 [1st Dept 2010]). The record shows that the father acted aggressively, was intimidating when angered and displayed difficulty controlling himself during supervised visits

as well as courtroom proceedings (*see Matter of Joaquin C. v Josephine I.-C.*, 166 AD3d 560, 561 [1st Dept 2018]). The child also expressed that she was scared when her father became angry and wanted the visits to remain supervised, and while the child's wishes are not controlling, they are entitled to considerable weight (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]). Furthermore, the father has a prior finding of neglect against him directly related to his violent actions (*see* 99 AD3d 475 [1st Dept 2012]), and there was a lack of evidence indicating that he had made attempts to overcome such behavior.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9567 Juanita Manderson, Index 151807/15
Plaintiff-Appellant,

-against-

Phipps Houses Services, Inc.,
et al.,
Defendants-Respondents.

_____

Kiley, Kiley & Kiley, PLLC, Great Neck (James D. Kiley of counsel), for appellant.

Perry, Van Etten, Rozanski & Kutner, LLP, New York (Joseph K. Strang of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 30, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not have notice of the condition that allegedly caused plaintiff to fall. The superintendent of the building where plaintiff fell testified that he inspected the vestibule at the end of his shift and that he did not receive any complaints about the vestibule after hours (*see Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471-472 [1st Dept 2012]). Plaintiff also testified that she was not able to identify what caused her fall and did not

actually see water on the floor, and video evidence showed other people traversing the vestibule without any issue.

Plaintiff's opposition fails to raise a triable issue of fact. The evidence does not demonstrate a specific recurring dangerous condition routinely left unaddressed by defendant, as opposed to a mere "general awareness" of such a condition (*Raposo v New York City Hous. Auth.*, 94 AD3d 533, 534 [1st Dept 2012]). Although plaintiff contends that the floor was wet from rainwater being tracked into the vestibule, there is no evidence as to the amount of water in the vestibule on which plaintiff allegedly slipped and how long it was present before the accident (*see Joseph v Chase Manhattan Bank*, 277 AD2d 96 [1st Dept 2000]). The fact that it had been raining for several hours before the accident does not, alone, establish an issue of fact as to whether defendants had constructive notice (*id.*). Furthermore, contrary to plaintiff's contention, the record shows that defendants did exercise reasonable care in maintaining the vestibule, and they were not required to cover all of its floors with mats or to continuously mop up all moisture resulting from

tracked-in rainwater (*see Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1st Dept 1995]).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9568-
9569 Index 650915/12

Robert E. Wilson III,
Plaintiff-Appellant,

-against-

Daniel Valente Dantas, et al.,
Defendants-Respondents,

Opportunity Equity Partners, L.P.,
Defendant.

_____

Lankford & Reed, PLLC, Alexandria, VA (Terrance G. Reed of the bar of the Commonwealth of Virginia and the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Boies Schiller Flexner LLP, New York (Philip C. Korologos of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered January 17, 2018, which respectively granted defendants Daniel Valente Dantas, Opportunity Equity Partners, Ltd., and Opportunity Invest II, Inc.'s motion for summary judgment dismissing the amended complaint, and denied plaintiff's motion for partial summary judgment on liability, unanimously affirmed, without costs.

Plaintiff alleges that defendants promised him a 5% interest in the profits generated by an investment scheme that he

designed, but wrongfully refused to pay him the monies owed.[1]

The breach of contract claim was correctly dismissed. The alleged contract is purportedly embodied in three documents authored by plaintiff: a July 1997 term sheet, which allegedly memorialized a prior oral agreement; a 2007 letter, in which plaintiff conditioned his consent to an unrelated transaction on "a full and fair resolution of the contractual arrangements between us, . . . including my carried interest of 5%"; and a 2008 letter, which allegedly memorialized a prior oral agreement that plaintiff would be paid his 5% carried interest upon the settlement of a related federal action.

It is undisputed that the July 1997 term sheet was never countersigned, despite plaintiff's express request, thereby evincing the absence of mutual assent, which is required to create a binding contract (*see generally Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). Moreover, the alleged oral agreement could not have survived the subsequent execution of the written Shareholders' Agreement, which contained profit-sharing provisions and an

[1] The investment scheme involved the creation of several Cayman Islands entities, and some (but not all) of the governing documents are governed by Cayman Islands law. The parties do not analyze whether New York or Cayman Islands law applies to each claim. At any rate, the laws do not appear to differ meaningfully.

integration clause indicating that it "constitutes the entire agreement between the parties" and "supersedes any previous agreement" (*see Marine Midland Bank-S. v Thurlow*, 53 NY2d 381, 387 [1981]; *SERE Holdings Ltd. v Volkswagen Group U.K. Ltd.*, [2004] EWHC 1551 ¶ 22). Plaintiff's reliance on the determinations made in a related Cayman Islands litigation is misplaced, as the agreement at issue in that litigation differed materially from the one at issue here.

Insofar as plaintiff argues that the 2007 and 2008 letters constitute separate agreements, this argument is unavailing, because these letters fail to comport with the amendment process set forth in the Shareholders' Agreement (*see Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 425 [2013]; *BNP Paribas Mtge. Corp. v Bank of Am., N.A.*, 778 F Supp 2d 375, 411 [SD NY 2011]). Moreover, the terms of the 2007 letter are insufficiently definite, reflecting a mere agreement to agree.

The breach of fiduciary duty claim was also correctly dismissed. Even if (some of the) defendants owed plaintiff fiduciary duties (an issue we do not reach), the crux of the purported wrong was the "failure to pay money in accordance with an alleged promise," which is, at bottom, "a breach of contract, not a tort" (*Sheehy v Clifford Chance Rogers & Wells*, 1 AD3d 225, 230 [1st Dept 2003], *revd on other grounds* 3 NY3d 554 [2004]).

The unjust enrichment, quantum meruit, and monies had and received claims were correctly dismissed because plaintiff's relationship with defendants was governed by the written Shareholders' Agreement (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 74-75 [1st Dept 2017]; *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 27 [1st Dept 2013]).

Similarly, the promissory estoppel and fraudulent inducement claims were correctly dismissed because plaintiff could not have reasonably relied on the alleged oral promise in light of the integration and amendment provisions of the Shareholders' Agreement (*see Capricorn Invs. III, L.P. v CoolBrands Intl., Inc.*, 66 AD3d 409, 410 [1st Dept 2009]; *see also generally P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

We find an equitable accounting to be unwarranted. We also reject plaintiff's argument that summary judgment was premature, and decline to review his argument that the motion court erred in

striking his jury trial demand in a prior order that is not properly before us.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9571 Robert Streety, Index 303118/15
Plaintiff-Appellant,

-against-

Almami Toure, et al.,
Defendants-Respondents.

Lozner & Mastropietro, Brooklyn (Beth S. Gereg of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about July 3, 2018, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion except as to the "90/180-day" claim, and otherwise affirmed, without costs.

The report of defendants' expert emergency medicine physician is sufficient to establish their prima facie burden on the issue of causation insofar as the physician opined that the record of plaintiff's examination in the emergency room showed

findings inconsistent with his claimed injuries (*see Hayes v Gaceur*, 162 AD3d 437 [1st Dept 2018]; *Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567, 567 [1st Dept 2017]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]).

In opposition, plaintiff raised an issue of fact as to serious injury of a permanent nature through the submission of his pertinent medical records documenting complaints of pain and treatment to the affected body parts within days of the accident (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]) as well as the affirmed report of his treating orthopedic surgeon, who reviewed plaintiff's medical history, his own treatment of plaintiff, and plaintiff's MRIs, and who recounted his direct observations of plaintiff's injuries during surgery and opined that they were causally related to the accident (*see Liz v Munoz*, 149 AD3d 646 [1st Dept 2017]; *Hazel v Colon*, 136 AD3d 483 [1st Dept 2016]).

However, plaintiff's "90/180-day" claim was correctly dismissed in light of his deposition testimony that he was

confined to home for only about three weeks (*see e.g. Hayes v Gaceur*, 162 AD3d at 439; *Thompson v Bronx Merchant Funding Servs., LLC*, 166 AD3d 542, 544 [1st Dept 2018]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9572 The People of the State of New York, Ind. 1877/98
Respondent,

-against-

Clyde Henderson,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about September 27, 2017, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2005 (L 2005, ch 643), unanimously affirmed.

The court correctly determined that defendant was ineligible for resentencing on his class A-II felony conviction because he had been released on parole. We have previously rejected similar statutory, public policy and constitutional arguments to those raised and see no reason to depart from our previous holdings

(*see e.g. People v Soroa*, 166 AD3d 434 [1st Dept 2018]; *People v Moore*, 159 AD3d 444 [1st Dept 2018]).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9573 Edward Leili, Index 159603/16
Plaintiff-Respondent,

-against-

Joseph Romanello, et al.,
Defendants-Appellants,

Joseph Dimyan,
Defendant.

_____

Vouté, Lohrfink, Magro & McAndrew, LLP, White Plains (Edward G. Warren of counsel), for appellants.

Law Office of Todd J. Krouner, P.C., Chappaqua (Todd J. Krouner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered September 10, 2018, which denied defendants' motion to dismiss for lack of personal jurisdiction, without prejudice and with leave to renew upon completion of jurisdictional discovery, unanimously affirmed, without costs.

The court did not abuse its discretion in granting jurisdictional discovery, as plaintiff made a "sufficient start"

in demonstrating personal jurisdiction over appellants (*Avilon Auto. Group v Leontiev*, 168 AD3d 78, 89 [1st Dept 2019]; *PD Cargo, CA v Paten Intl. SA*, 149 AD3d 511, 512 [1st Dept 2017]).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9575 The People of the State of New York, SCI 3122/16
Respondent,

-against-

Kwamain Blassingame,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley 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 (Shari R. Michels, J.), rendered January 26, 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: JUNE 6, 2019

CLERK

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

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9576 Deborah Pollack, et al., Index 162668/15
Plaintiffs-Respondents,

-against-

Ariel Ovadia,
Defendant-Appellant.

_____

Ariel Ovadia, appellant pro se.

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

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.) entered on or about March 14, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although pro se defendant tenant could submit an affirmation rather than an affidavit for religious reasons, the document was still required to be notarized, and therefore the motion court was constrained to reject his unnotarized affirmation (*see Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 n [1981]; *see also John Harris P.C. v Krauss*, 87 AD3d 469 [1st Dept 2011]).

Accordingly, the motion was not supported by affidavit or affirmation of facts, and was properly denied (CPLR 3212[b]).

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9577N Tax Equity Now NY LLC, Index 153759/17
Plaintiff-Appellant,

-against-

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

_____

Latham & Watkins, LLP, New York (James E. Brandt of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Joshua M. Sivin of counsel), for City of New York and New York City Department of Finance, respondents.

Letitia James, Attorney General, New York (Seth M. Rokosky of counsel), for State of New York and New York Office of Real Property Tax Services, respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered December 4, 2018, which, granted defendants' motions for a stay of the proceedings under CPLR 5519(a), (c) pending a determination of the parties' appeal of the court's prior order denying the motion to dismiss filed by the City of New York and New York City Department of Finance and granting in part and denying in part, the motion to dismiss filed by the State of New York and the New York Office of Real Property Tax Services, unanimously affirmed, without costs, on the basis of this Court's inherent authority to grant a discretionary stay of proceedings pending appeal, rather than pursuant to CPLR 5519(a) or (c).

The court should not have granted the City defendants' motion for a stay of the proceedings under CPLR 5519(a)(1). The filing of a notice of appeal of an order denying a motion to dismiss does not trigger the automatic stay with respect to litigation obligations provided for in the CPLR, such as the obligation to answer and comply with discovery requests. We disavow our decision in *Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.* (79 AD2d 516 [1st Dept 1980]) to the extent it suggests otherwise. While the automatic stay applies to stay "proceedings to enforce the judgment or order appealed from pending the appeal," which include executory directions that command a person to do an act beyond what is required under the CPLR, the automatic stay does not extend to matters that are the "sequelae" of granting or denying relief (*Matter of Pokoik v Department of Health Servs. of County of Suffolk*, 220 AD2d 13, 15 [2d Dept 1996]). The inclusion in an order of affirmative directives on matters addressed in the CPLR does not trigger the stay as to the CPLR obligations.

The court also should not have granted the State defendants a discretionary stay under CPLR 5519(c). As defendants are not entitled to an automatic stay of their CPLR obligation to answer and provide discovery pending appeal of the order denying the motion to dismiss, no discretionary stay is available under CPLR

5519(c), as the scope of this discretionary stay is "coextensive" with the automatic stay, and applies only to provide non-governmental parties with the opportunity to stay proceedings to enforce the judgment or order appealed from pending the appeal (*see Schwartz v New York City Hous. Auth.*, 219 AD2d 47, 48 [2d Dept 1996]). However, we exercise our inherent authority to grant a discretionary stay of the proceeding pending appeal for the same substantive reasons given by the trial court in issuing the stay to the State defendants.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, JJ.

9578N Nilda Algarin, Index 21397/14E
Plaintiff-Appellant,

-against-

Stuart M. Sackin, et al.,
Defendants-Respondents.

_____

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

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about August 13, 2018, which granted defendants' motion to change venue from Bronx County to Nassau County, unanimously affirmed, without costs.

The court granted defendants' motion to change venue on forum non conveniens grounds. However, the motion was brought pursuant to CPLR 510(1) ("the county designated for that purpose is not a proper county"), and, in the exercise of our discretion, we affirm on that ground (*see* CPLR 503[a] ["the place of trial shall be in the county in which one of the parties resided when it was commenced"]). Although defendants did not move to change venue until more than three years after they served their answer (*see* CPLR 511[a]), the record demonstrates that plaintiff repeatedly made misrepresentations about her residence when the

action was commenced and that defendants moved promptly to change venue after ascertaining her residence (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 116 [1st Dept 2016]; *Philogene v Fuller Auto Leasing*, 167 AD2d 178, 179 [1st Dept 1990]). In a bankruptcy proceeding she initiated in April 2016, plaintiff signed documents under the penalty of perjury indicating that she resided in Nassau County when the instant action was commenced. Although plaintiff claimed that that address was given because of an error by her bankruptcy attorney, she failed to submit any documentary evidence showing that she actually resided in the Bronx at the time the action was commenced. Further, plaintiff failed to explain adequately the fact that her 2013 and 2014 W-2 forms showed that she resided in Nassau County.

As plaintiff and defendants resided in Nassau County when the accident that gave rise to this action happened, and the accident took place in Nassau County, the proper venue is Nassau County.

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

ENTERED: JUNE 6, 2019

CLERK

Friedman, J.P., Richter, Kahn, Singh, JJ.

9687N- Index 653961/16
9688N In re Capital Enterprises Co.,
Petitioner,

-against-

Alvin Dworman,
Respondent-Respondent.

- - - - -

Sachs Investing Company, et al.,
Nonparty Appellants.

- - - - -

In re Capital Enterprises Co.,
Petitioner-Appellant,

-against-

Alvin Dworman,
Respondent-Respondent.

_____

Morrison Cohen, LLP, New York (Y. David Scharf of counsel), for Capital Enterprises Co., appellant.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Thomas J. McGowan of counsel), for Sachs Investing Company and Sachs Properties Company, appellants.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., New York (Christopher J. Sullivan of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered January 8, 2019, which denied petitioner's motion to vacate an arbitration award and granted respondent's motion to confirm the award, and denied nonparty appellants' (Sachs) motion to vacate the award, unanimously affirmed, without costs.

The arbitrator did not exceed his authority in ordering the dissolution of the parties' partnership or in the manner in which he ordered the dissolution. The issue is within the scope of the arbitration clause, and was before the arbitrator in the statement of claim and throughout the hearing, and the arbitrator had broad discretion to fashion the remedy (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]).

The remedy was not an improper punitive award (*see Kudler v Truffelman*, 93 AD3d 549 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]). The arbitrator fashioned a remedy that appeared fair to all parties, and treated all parties the same.

The arbitrator did not improperly hold petitioner vicariously liable for the acts of nonparty Carard Management Company. It held petitioner liable for its use of its control over Carard to loot the partnership (*cf. Matter of Professional Trade Show Servs. v Licensed Ushers & Ticket Takers Local Union* 176 *of Serv. Empls., Intl. Union, AFL-CIO*, 262 AD2d 42, 44 [1st Dept 1999] [award that read into the arbitration agreement an additional obligation of one company to guaranty that another, separate company would employ members of union local for work was irrational and violated public policy by "disregarding, without any discernible basis, the separate legal existence of two corporations to the extent of holding each responsible for the

other's contractual obligations in conduct"]).

The arbitrator appropriately addressed the issue of respondent's mental state, and was not required to inquire further, especially because it was petitioner that argued in favor of respondent's capacity.

Petitioner's evidentiary challenges, mainly attacks on the arbitrator's credibility findings and interpretation of agreements, are beyond the scope of our review (*Matter of NRT N.Y. LLC v Spell*, 166 AD3d 438, 438-439 [1st Dept 2018]).

Nonparty appellants, which are partners in petitioner, lack standing to challenge this arbitration, as they could not have brought the claims (in any forum) originally (*see generally Auerbach v Bennett*, 47 NY2d 619, 626, 628 [1979]). Further, they waived any objection to the arbitration by failing to take any action, despite knowing of the arbitration and monitoring it from its inception (*see Jin Ming Chen v Insurance Co. of the State of Pa.*, 165 AD3d 588, 589 [1st Dept 2018]).

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

ENTERED: JUNE 6, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Barbara R. Kapnick
Marcy L. Kahn
Cynthia S. Kern, JJ.

7876-
7877
Index 651657/17

_____x

Atlas MF Mezzanine Borrower, LLC, etc.,
Plaintiff-Respondent,

-against-

Macquarie Texas Loan Holder LLC,
etc., et al.,
Defendants-Appellants.

_____x

Defendants appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 18, 2018, which denied their motions to dismiss the complaint as against them.

Dechert LLP, New York (Gary J. Mennitt, Daphne T. Ha and Kevin Brost of counsel), for Macquarie Texas Loan Holder LLC, appellant.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Sanford I. Weisburst and Andrew J. Rossman of counsel), for KKR Repa AIV-2 L.P. and KRE LRP Osprey Venture LLC, appellants.

Meister Seelig & Fein LLP, New York (Stephen B. Meister, James M. Ringer and Benjamin D. Bianco of counsel), for respondent.

KAPNICK, J.

Article 9 of the Uniform Commercial Code (UCC) governs the enforcement of a creditor's security interest. "The underlying purposes and policies of the [UCC] as a whole are to simplify, clarify, and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and to make uniform the law among the various jurisdictions" (95 NY Jur 2d, Secured Transactions § 2 Purpose). Here, plaintiff Atlas MF Mezzanine Borrower, LLC (Atlas), the debtor, is asking this Court to unwind a UCC sale of the equity interest in 11 commercial properties, which was collateral for Atlas's $71 million mezzanine loan, borrowed from defendant Macquarie Texas Loan Holder LLC (Macquarie), the secured creditor. It is difficult to see how such an action would simplify the laws governing commercial transactions. Rather, if UCC sales could be unwound, it would only serve to muddy the waters surrounding nonjudicial sales conducted pursuant to article 9 of the UCC, and to deter potential buyers from bidding in nonjudicial sales, which would, in turn, harm the debtor and the secured party attempting to collect after a default. Moreover, and as explained in detail below, Atlas's argument does not have support in the plain reading of the UCC nor in existing case law.

BACKGROUND

I. The Loan and Subsequent Default

Atlas Apartment Holdings, LLC, the parent company of Atlas, and its related affiliates, are developers and operators of multi-family housing throughout the United States. According to the complaint, in December 2013, Atlas purchased 11 apartment complex properties, all located in Texas, and worth approximately $240 million. Each property was financed by a separate loan insured by the United States Department of Housing and Urban Development (HUD). Atlas contends that the balance of the 11 HUD mortgage loans is approximately $140 million. Atlas purchased the properties through its wholly-owned subsidiary, Atlas MF Holdco, LLC (the Holding Company). Each of the apartment properties is owned by a special purpose entity, and all 11 of the special purpose entities are owned by the Holding Company, which in turn is owned by Atlas.

In late December 2013, in order to finance its purchase of the 11 apartment properties, Atlas obtained a mezzanine loan for $71 million from Macquarie.[1] The mezzanine loan was meant to be a short term loan that matured on January 2, 2017, with Atlas

[1] Atlas contends that its interest in the properties is worth substantially more than $71 million, because the properties, net of debt from HUD, are worth at least $100 million.

having the option to exercise two one-year extensions. As collateral for the mezzanine loan, Atlas pledged its equity interest in the Holding Company.

Atlas intended to pay off the mezzanine loan by refinancing it at the end of the initial term, as opposed to exercising its option to extend the loan for an additional year. However, in late December 2016, it became apparent that Atlas would need more time to finalize the terms of the refinancing. Atlas asked Macquarie for a forbearance, and Macquarie agreed to a short period. Thereafter, Macquarie sent Atlas a draft forbearance agreement. According to Atlas, the agreement was unacceptable because it violated the applicable HUD rules and regulations listed in the HUD mortgage documents. The parties exchanged additional draft forbearance agreements, but were unable to agree on the necessary terms.

On January 3, 2017, Macquarie issued a notice of default and demand for payment. On January 11, 2017, Macquarie sent Atlas a "Notification of Disposition of Collateral," which set forth the proposed terms of a nonjudicial public sale of "[o]ne hundred percent (100%) of the limited liability company interests in Atlas MF Holdco, LLC."

II. The Nonjudicial Sale

Macquarie established a virtual data room, and interested

bidders could apply to register to bid at the sale, which would give them access to the posted documents. On January 18, 2017, Macquarie posted a draft purchase and sale agreement; it was not the final draft, however, and was subject to Macquarie's right to make changes without notice to potential bidders. Macquarie posted a revised draft on February 6, 2017, and a further revised draft on February 25, 2017, still subject to further changes before the sale.

On February 15, 2017, Macquarie began publicly advertising the sale in the Real Estate Alert and the Wall Street Journal. The sale was scheduled to take place on February 27, 2017, at a private law office in New York City.

Under the terms of the sale, which were set by Macquarie, Macquarie maintained the right to, after the auction, reject all bids received in the auction and reschedule the auction without publishing the new date of the sale; to impose any other commercially reasonable conditions upon the sale of the collateral as Macquarie may deem proper; and to require any winning bidder to either pay off the HUD mortgage loans within 21 days or obtain HUD's approval to assume the HUD mortgage loans within 96 days. If the winning bidder chose to pay off the HUD mortgage loans, then a $4.125 million deposit was due on the day of the auction. The bidder was then required to pay off the HUD

mortgage loans and close on the purchase of the Holding Company within 21 days, or else the bidder forfeited the deposit. If the winning bidder chose to assume the HUD mortgage loans, it would need to post a deposit in the amount of $8.25 million, which would be forfeited if HUD failed to approve or reject the application to assume the HUD mortgage loans within the 96 day period. Moreover, Macquarie's terms required the winning bidder to execute the sale and purchase documents on the date of the auction; however, final drafts of the sale and purchase documents were not disclosed in advance.

On February 17, 2017, Atlas, through an affiliate, submitted a bidding certificate to register to bid at the sale. Macquarie rejected the certificate because it failed to include certain language. Atlas then submitted a new bidding certificate under its own name, which included the particular language that was missing from the previous bidding certificate. However, Atlas alleges that Macquarie changed the bidding certificate requirements after Atlas's bid submission, to impose a new requirement that Atlas submit evidence of its ability to tender payment for its bid before being permitted to register to bid.

Thereafter, Atlas provided proof of its ability to bid at the sale by submitting a term sheet from a lender for a loan that exceeded the full amount of the debt. Between February 24th and

February 26th, Atlas and Macquarie engaged in discussions regarding the proof of payment requirement. On February 26, 2017 (a Sunday), after 4:00 p.m., Macquarie finally informed Atlas that it would be permitted to bid at the sale. At that point, Atlas had minimal time to obtain the required cashier's check that, under the terms of the sale, it would have to present for deposit if it was the winning bidder.

On the day of the sale, four bidders appeared at the auction: Macquarie, Atlas, defendant KKR REPA AIV-2 L.P. (KKR) and nonparty Sandalwood Management, Inc, which did not end up bidding at the sale. KKR started the bidding at $50 million, to which Atlas responded with a bid of $50.25 million. Macquarie rejected Atlas's bid on grounds of ineligibility because Atlas had not presented the required deposit check. Macquarie then credit bid $73.5 million as the secured lender. KKR increased its bid to $73.75 million. Atlas responded with a bid for $74 million, which was initially rejected. Atlas argued that Macquarie's terms required a check at the conclusion of the sale, not at the beginning, and, therefore, Macquarie was improperly rejecting Atlas's bids. Thereafter, Macquarie accepted Atlas's $74 million bid. The bidding process continued, and KKR's last bid was for $76.75 million, to which Atlas responded with a bid of $77 million. Macquarie ended up rejecting Atlas's last bid

and accepting KKR's bid as the winning bid, based on the bidder's demonstrated ability to close.

On May 3, 2017, Macquarie purported to transfer ownership of the Holding Company to KKR, which then transferred its interest in the apartment complexes to KRE LRP Osprey Venture LLC (KRE), a company formed by KKR. On May 4, 2017, Macquarie sent Atlas a Notice of Settlement of Disposition of Pledged Equity and Accounting, stating that Macquarie was holding the surplus proceeds from the sale in the amount of $836,891.45. In the same notice, Macquarie also stated that it had incurred over $1.3 million in attorneys' fees. To date, Macquarie has not paid any of the surplus to Atlas.

III. The Federal Action

On February 14, 2017, prior to Atlas securing a bidding certificate enabling it to participate in the auction, and prior to the commencement of the auction, Atlas filed a lawsuit against Macquarie in the Southern District of New York seeking a preliminary injunction to enjoin the sale, which application was denied on February 22, 2017, after a hearing. The court noted that "what is being sold here is Atlas's equity interest in Holdco. Where a 'Plaintiff's interest in the real estate is commercial, and the harm it fears is the loss of its investment, as opposed to loss of its home or a unique piece of property in

which it has an unquantifiable interest,' such losses 'are ordinarily compensable by damages, and do not necessarily amount to an irreparable harm as a matter of law'" (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder, LLC*, 2017 WL 729128, *3, 2017 US Dist LEXIS 25838, *7-8 [SD NY Feb. 23, 2017], quoting *SK Greenwich LLC v W-D Grp. (2006) LP*, 2010 WL 4140445, *3, 2010 US Dist LEXIS 112655, *8 [SD NY Oct. 21, 2010]). Thus, the court found that "[b]ecause Atlas has failed to demonstrate irreparable injury that cannot be redressed through a monetary award, it cannot obtain a preliminary injunction" (*Atlas MF Mezzanine Borrower, LLC v Macquarie Texas Loan Holder, LLC*, 2017 WL 729128, *4, 2017 US Dist LEXIS 25838, *9). The court also rejected Atlas's argument that the terms of the sale were not commercially reasonable as required by NY UCC 9-610(b), instead finding persuasive the fact that no other prospective bidder had complained about the terms of the sale.

IV. Plaintiff's Causes of Action in its First Amended Complaint

A. Declaratory Judgment

In its first cause of action, against Macquarie, KKR and KRE, Atlas seeks a declaration that

> "(1) Macquarie did not have the authority to reject Atlas' high bid at the Sale; (2) Macquarie did not have the authority to accept KKR's low bid over Atlas' high bid at the Sale; (3) Macquarie's rejection of Atlas' high bid and acceptance of KKR's low bid was invalid

> and void; (4) the Sale has not yet been concluded and must be rescheduled and conducted on commercially reasonable terms; (5) Macquarie does not have the legal authority to transfer ownership of the Holding Company to KKR or KRE; (6) Macquarie's purported transfer of ownership of the Holding Company to KRE was invalid, void and of no effect; (7) the Sale was conducted in a commercially unreasonable manner and (8) the Terms of Public Sale were commercially unreasonable. . ."

In sum and substance, Atlas is seeking a declaration that the auction was conducted in a commercially unreasonable fashion, and that the sale can and should be unwound.

B. Violation of UCC 9-610

The second cause of action, solely against Macquarie, is for a violation of section 9-610 of the New York UCC, which requires that "[e]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable" (UCC 9-610[b]). Atlas alleges that Macquarie violated this provision, and as a result of this violation, Atlas "has suffered damages, including, but not limited to, the loss of the value of the Holding Company, loss caused by Atlas' inability to obtain alternative financing, . . . damage to Atlas' reputation, and damage to relations with Atlas' employees, customers, vendors, lenders and investors."

Pursuant to UCC 9-615(f), Atlas argues that it is "entitled to recover the difference in the amount of proceeds that would have been realized had Macquarie conducted the Sale in a

commercially reasonable manner and the amount of proceeds that were realized from the Sale." Further, pursuant to UCC 9-625(a), Atlas seeks "permanent injunctive relief setting aside the Sale and restraining Macquarie from attempting to transfer ownership of the Holding Company to KKR and/or KRE."

C. Tortious Interference with Contract

Atlas's third cause of action for tortious interference with contract against KKR is based on the allegations that KKR encouraged and induced Macquarie to conduct a commercially unreasonable sale and auction process in violation of its contractual duties to Atlas. Atlas contends that "KKR was fully aware that the Sale and auction process for the Sale was commercially unreasonable and designed to wrongfully seize Atlas' equity interest in the Holding Company." Moreover, according to Atlas, "[b]ut for KKR['s] assistance, cooperation and inducement, Macquarie would not have been able to complete its scheme to conduct a commercially unreasonable UCC Sale. . . ."

D. Civil Conspiracy

The fourth cause of action is for civil conspiracy against KKR and Macquarie and is based on the allegation that KKR and Macquarie "entered into an agreement to ensure that Macquarie conducted a commercially unreasonable sale. . . and to tortiously interfere with the Mezzanine Loan Documents."

E. Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing

The fifth and sixth causes of action allege that Macquarie breached the Mezzanine Loan agreement, and the duty of good faith and fair dealing, by conducting a commercially unreasonable sale.

F. Violation of UCC 9-615

The seventh cause of action is pleaded in the alternative and asks that if the court "does not issue a declaratory judgment finding that the Sale has not yet been concluded and must be rescheduled," then Macquarie must turn over the surplus proceeds from the sale to Atlas.

G. Punitive Damages

In addition to a claim for monetary damages of not less than $30 million incurred as a result of Macquarie's and KKR's alleged wrongful conduct and a claim for the surplus, Atlas also seeks punitive damages.

PROCEDURAL POSTURE

Defendants separately moved to dismiss the complaint. The motion court denied the motions, and disagreed with defendants' position that pursuant to the UCC a sale cannot be set aside if the transaction has closed. Further, the motion court found that the complaint was valid on its face. Defendants appealed.

DISCUSSION

I. Declaratory Judgment as to the Validity of the Sale

"Overall, the aim of the Code is to encourage parties to resolve their disputes amicably" (107 NY Jur 2d, Uniform Commercial Code § 2, Purpose of the Code). The Code provides the avenues parties may take to redeem a debt and to protect their rights during and after the disposition process, as well as remedies in the event a secured party does not comply with the Code.

In its First Amended Complaint, Atlas seeks to have the sale declared invalid and void because Macquarie had no legal right to transfer the Holding Company to KKR/KRE and, therefore, Atlas remains the owner of the collateral.[2] In its brief, Atlas focuses primarily on the alleged bad faith conduct of KKR and Macquarie in support of its request for a declaration that the sale is invalid and void, and points to UCC 9-617 and principles of equity as a basis for its claim that the Court has the power to recognize Atlas's rights in the property and to order the sale unwound and the property returned. However, Atlas's

[2] Atlas does not pursue this line of argument in its brief. Rather, Macquarie's acceptance of KKR's lower bid is referenced in support of Atlas's claim for a violation of UCC 9-610, as further proof of the commercially unreasonable nature of the sale.

interpretation of UCC 9-617 is incorrect.

UCC 9-617, Rights of Transferee of Collateral, details the effect of a secured party's disposition of the collateral after default.[3] Specifically, a disposition "(1) transfers to a transferee for value all of the debtor's rights in the collateral; (2) discharges the security interest under which the disposition is made; and (3) discharges any subordinate security interest or other subordinate lien" (UCC 9-617[a][1]-[3]). The section also addresses "good-faith transferee[s]" and "other transferee[s]" in terms of the transferee's rights after disposition. If the transferee acts in good faith, then it takes the collateral "free of the rights and interests [of the debtor] even if the secured party fails to comply with this article or the requirements of any judicial proceeding" (UCC 9-617[b]). However, if the transferee is something other than a "good-faith transferee," it takes the collateral subject to "the debtor's rights in the collateral" (UCC 9-617[c][1]).[4]

Atlas contends that the language in UCC 9-617, "subject to

---

[3] The term "transferee" as opposed to "buyer" is used because "a person is a 'transferee' inasmuch as a buyer at a foreclosure sale does not meet the definition of 'purchaser' in Section 1-201 (the transfer is not, vis-a-vis the debtor, 'voluntary')" (Comment 2 to UCC 9-617[b].

[4] "Good Faith" is defined in the UCC as "honesty in fact in the transaction or conduct concerned" (UCC 1-201[20]).

the debtor's rights in the collateral," means that the debtor, in the case of a bad faith transferee, retains its ownership interest in the collateral, and/or entitlement to the collateral, which in turn means that a court may set aside the sale as void and invalid, and return the collateral to the debtor. In other words, a transferee who did not act in good faith does not take clear title.

Atlas relies on *O'Brien v Chase Home Fin., LLC* (42 AD3d 344 [1st Dept 2007]) to support its interpretation of UCC 9-617; its reliance, however, is misplaced. First, the sale in *O'Brien* had not yet closed when the plaintiff brought his motion to vacate and annul the nonjudicial sale and restrain the defendants from closing on the sale and effectuating any transfer of the stock and proprietary lease during the pendency of the action. Second, the *O'Brien* Court did not point to any section of the UCC that allows for a sale to be unwound, after closing. Third, the *O'Brien* Court's reversal of the motion court's denial of the plaintiff's motion to vacate and annul the sale simply remanded the case for further proceedings to determine if the defendants had acted in a commercially reasonable manner, pursuant to UCC 9-610. Lastly, the *O'Brien* Court did not discuss or cite to UCC 9-617, the section relied upon by plaintiff here in support of its argument in favor of unwinding the sale.

Atlas's reliance on two other cases, *In re Hamilton* (197 BR 305 [Bankr. ED Ark 1996]) and *In re Four Star Music Co., Inc.* (2 BR 454 [Bankr. MD Tenn 1979]) likewise is misplaced. Both are bankruptcy court cases and arise in the context of a bankruptcy court's statutory power to order the turnover of property. More importantly, neither case actually stands for the proposition that, pursuant to UCC 9-617, a UCC sale can be unwound. In *Hamilton*, the plaintiff sought turnover of his airplane from the defendants, obligors of the underlying loan. After the plaintiff had defaulted on his payment to the bank, which held a security interest in the airplane, the defendants paid the loan, obtained a bill of sale from the bank, and took possession of the airplane. The court determined that while the defendants had exhibited a lack of good faith in the purchase of the airplane, the defendants had actually purchased a security interest in the airplane and not the airplane itself. Therefore, the court found that the defendants held a secured claim in the bankruptcy case, but were not the owners of the airplane. The court then ordered the defendants to turn over the airplane. While the court did cite to UCC 9-617's predecessor (UCC 9-507), it did not unwind a sale pursuant to that section.

Similarly, in *Four Star Music*, the bankruptcy court did not unwind or invalidate a sale. Rather, the bankruptcy court found

that the transaction at issue, the sale of copyrights, royalties and other interests in and derived from certain musical compositions, departed from accepted standards of commercial reasonableness, so much so that the transaction did not even qualify as a sale under Tennessee law. The court noted that the transfer of title to the music catalog was unclear. Moreover, the buyer (the movant seeking the return of the collateral from the trustee) never made any payments on the promissory note given as consideration for the music catalog. The court then considered, assuming there had been a sale, whether the "sale" was commercially reasonable and whether the buyer acted in good faith. In other words, the court's discussion of good faith versus bad faith purchasers and the effect on title to the collateral was dicta. Despite Atlas's argument to the contrary, it cannot be said that either bankruptcy court equated a finding that the debtor retained some rights in or to the collateral with a finding that a court has the power, pursuant to UCC 9-617(c), to declare the sale invalid and void.

Although UCC 9-617 discusses the rights of transferees, both good faith and otherwise, it does not touch on the remedies available to the debtor in the case of a "bad faith" transferee. At most, the language of UCC 9-617 that Atlas focuses on can be read to mean that the debtor, in the case of a commercially

unreasonable sale that also involved a transferee that falls into the category of "other transferee," may still exercise some rights in the collateral, such as the redemption right (*see* UCC 9-623; *see also Mitchell v BankIllinois*, 316 BR 891, 898 [Bankr. SD TX 2004] [finding that "[a] debtor's rights in repossessed collateral include the right to notification before the disposition of the collateral; the right to any surplus from the disposition of the collateral; and the right to redeem the collateral"] [internal citations omitted]). The Code itself does not expand upon what is meant by "subject to the debtor's rights," but, considering that UCC 9-617 does not deal with remedies for wrongdoing, rather addressing the rights of the transferee of the collateral, here, KKR, it would be a stretch to interpret the language as providing a court with the authority to unwind a concluded UCC sale.

Our interpretation of UCC 9-617 is further supported by an analysis of UCC 9-625, which does address the remedies available to a debtor when a secured party fails to comply with article 9. The section provides for injunctive relief "[i]f it is established that a secured party is not proceeding in accordance with this article," and permits a court to "order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions" (UCC 9-625[a]). Money damages

are available "in the amount of any loss caused by a failure to comply with this article" (UCC 9-625[b]).

The availability of injunctive relief depends on the status of the collateral. "By its plain terms, in order for an aggrieved party to obtain injunctive relief, section 9-625(a) requires that the secured party presently be proceeding in a manner that is not in accordance with article 9" (*Rapillo v CitiMortgage, Inc.*, 2018 WL 1175127, *8, 2018 US Dist LEXIS 35491, *21 [ED NY March 5, 2018]). Courts have interpreted this language to mean that the sale must not have taken place in order for injunctive relief to be awarded (*see In re Enron Corp.*, 2005 WL 3873890, *10, 2005 Bankr LEXIS 3469, 31-32 [Bankr SD NY June 16, 2005] [finding that "[u]nder a plain meaning of the statute, (UCC 9-625[a]) would be applicable in circumstances where the secured party is *proceeding* to dispose of the collateral and not in a situation where the disposition of the collateral has already occurred"]). The *Enron* Court stated further that because the sale of the collateral had already occurred in the case before it, the aggrieved party's remedy "would be an action for damages under section 9-625(b) of the UCC and not an invalidation of the sale"(*id.*).[5] Stated otherwise, a debtor may seek to

[5] As noted by the *Enron* Court, article 9 was revised and became effective in New York on July 1, 2001 (*see* UCC 9-701).

enjoin the sale, which is exactly what Atlas sought to do in its federal action, before the sale occurred. However, after disposition of the collateral, a debtor may seek money damages, as an offending party "is liable for damages in the amount of any loss caused by a failure to comply with [article 9]" (UCC 9-625[b]). This is the available remedy to Atlas at this stage, and, in fact, Atlas specifically seeks monetary damages in its demand for relief. It may not, after dissolution and conclusion of the sale, unwind the sale, even if a court were to find that KKR was a bad-faith transferee.

Therefore, the first cause of action seeking a declaration invalidating and setting aside the sale must be dismissed as a matter of law, because this remedy is not provided for in the UCC. The remaining portion of the first cause of action seeking a declaration that the sale was conducted in a commercially

---

The former UCC 9-507(1) is the precursor to the current section UCC 9-625. The former UCC 9-507(1) provided, in relevant part, that "[i]f it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions." Comment 1 to former UCC 9-507(1) is instructive when analyzing the revised 9-625(a). It states, "[t]his remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section, therefore, provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so . . . The Section further provides for damages where the unreasonable disposition has been concluded . . . " (Comment 1 to former UCC 9-507[1]).

unreasonable manner is also dismissed, as duplicative of Atlas's second cause of action for a violation of UCC 9-610 (*see Singer Asset Fin. Co., LLC. v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]["plaintiff may not seek a declaratory judgment when other remedies are available . . ."]). Thus, the first cause of action for a declaratory judgment is dismissed in its entirety.

B. Commercially Reasonable

UCC 9-610, Disposition of Collateral After Default, authorizes a secured party, after default, to "sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing" (UCC 9-610[a]). Further, "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable" (UCC 9-610[b]). The Code defines a commercially reasonable disposition as one that is made "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (UCC 9-627[b]).

Atlas argues that Macquarie violated UCC 9-610 by imposing unreasonable terms prior to the auction and in conducting the

auction in a commercially unreasonable manner. Specifically, Atlas alleges that Macquarie, by not publicly advertising the sale until February 15, 2017, gave potential bidders a mere two weeks to learn of the sale and conduct due diligence. This time frame was wholly inadequate, according to Atlas, because the sale involved 11 separate properties, each with its own attendant HUD loan and HUD documents, as well as the necessary documents pertaining to each special purpose entity, which owned the individual properties. This, in turn, resulted in each property having a complicated business and financial operation that required time to understand and review. Atlas alleges that it is impossible that an independent, noncollusive potential bidder would have been able to conduct the requisite due diligence in such a short period of time.

Atlas alleges further that Macquarie attempted to deprive Atlas of its right to bid at the sale by subjecting it to ever-changing requirements before Atlas was permitted to participate in the auction. Additionally, multiple drafts of the loan documents were distributed close to the date of the sale, and, a final version was not provided until after the sale. Moreover, according to Atlas, Macquarie's rejection of Atlas's bid as the high bidder was commercially unreasonable.

Atlas contends that Macquarie and KKR "colluded and

cooperated long before the Sale to orchestrate the transfer of the Apartment Properties from Atlas to KKR, and to loot and then divide up Atlas' equity in the Apartment Properties." Atlas alleges further that the auction was rigged and that Macquarie, with KKR's knowledge, intended to declare KKR the winning bidder, despite the fact that KKR did not make the highest bid. According to Atlas, it is inconceivable that at the auction, KKR did not "make an additional bid on the Holding Company, which had a value net of debt of more than $100 million" unless KKR and Macquarie had acted in bad faith and rigged the sale. Moreover, Atlas alleges that, four days before the auction, KKR formed the entity KRE "for the purpose of taking ownership of the Holding Company" and that KKR did this because it "knew that it would be the successful bidder at the Sale due to its conspiracy with Macquarie," which only further shows that defendants colluded.

Macquarie contends that the auction was commercially reasonable as a matter of law, and, therefore, the issue is susceptible to resolution at the motion to dismiss stage. Macquarie points to the fact that the auction was advertised for more than 10 days, that KKR and Sandalwood were able to comply with the bidding requirements, and that HUD approval was ultimately obtained within the 96 day period. However, Macquarie's argument ignores the standard we are to apply on a

motion to dismiss, which requires this Court to afford the complaint the presumption of truth (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Moreover, Macquarie undermines its own argument by offering its version of the facts and its interpretation of what is commercially reasonable. Indeed, whether a term or requirement is commercially reasonable is generally an issue of fact that cannot be decided at this stage (*Weinsten v Fleet Factors Corp.*, 210 AD2d 74 [1st Dept 1994]).

Nor do the cases relied upon by Macquarie warrant a different result. Those cases concerned issues of notice and were decided based on a review of the documentary evidence establishing that the secured party had indeed provided notice of the sale to the debtor (*see e.g. Zwicker v Emigrant Mtge. Co., Inc.*, 91 AD3d 443 [1st Dept 2012]; *Thornton v Citibank*, 226 AD2d 162 [1st Dept 1996], *lv denied* 89 NY2d 805 [1996]). Here, the question of commercial reasonableness is not as clear cut as a question of the mailing procedures employed by the secured party.

Therefore, the motion court properly denied Macquarie's motion to dismiss the second cause of action because Atlas has adequately pleaded a claim for violation of UCC 9-610. However, and for reasons previously stated, that portion of the second cause of action seeking permanent injunctive relief setting aside the sale pursuant to UCC 9-625(a) must be dismissed as a matter

of law.

C. Atlas's Claim for a Return of the Surplus

UCC 9-615, Application of Proceeds of Disposition, provides that in the case of a surplus or deficiency of the cash proceeds of disposition, a secured party "after making the payments and applications required . . . shall account to and pay a debtor for any surplus" (UCC 9-615[d][1]). One such required payment application is for "reasonable attorney's fees and legal expenses incurred by the secured party" (UCC 9-615[a][1]). Here, there is no dispute that a surplus resulted from the payment of the winning bid of $76.75 million on the outstanding debt of $71 million (plus interest and fees).

The surplus is approximately $836,891.45, and Macquarie has not returned any of it to Atlas. Macquarie points to its $1.3 million in attorneys' fees as the reason for not returning any amount. However, there remains a question of reasonableness that cannot be answered at this pleading stage and, therefore, it would be premature to dismiss this claim.

D. Atlas's Remaining Claims Should Have Been Dismissed

Atlas asserted causes of action for breach of contract and breach of the duty of good faith and fair dealing, solely against Macquarie. Both claims are based on the allegation that Macquarie violated the Mezzanine Loan Agreement by conducting a

commercially unreasonable sale. Atlas does not specify any provision of the agreement that allegedly was breached by Macquarie, nor does Atlas allege that it performed its obligations under the agreement. In fact, there is no dispute that Atlas defaulted on the loan and, therefore, did not perform its obligations under the agreement. Thus, the complaint fails to state of cause of action for breach of the loan agreement (*see Chappo & Co., Inc. v Ion Geophysical Corp.*, 83 AD3d 499, 500 [1st Dept 2011]). Without a claim for breach of the loan agreement, the causes of action for tortious interference with the agreement and civil conspiracy as against KKR and KRE must also fail (*see AREP Fifty-Seventh, LLC v PMGP Assoc., LP*, 115 AD3d 402 [1st Dept 2014]; *Riverbank Realty Co. v Koffman*, 179 AD2d 542 [1st Dept 1992]).

Lastly, Atlas's demand for punitive damages must be stricken because the complaint fails to assert a tort claim against Macquarie or allege that Macquarie's conduct was aimed at the public (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 18, 2018, which denied defendants' motions to dismiss the complaint as against them, should be modified, on the law and the facts, to dismiss the

first cause of action for a declaratory judgment in its entirety, to dismiss that portion of the second cause of action seeking to have the subject UCC sale declared void and invalid and set aside, to dismiss the causes of action for tortious interference with contract against defendant KKR (third cause of action), civil conspiracy against Macquarie and KKR (fourth cause of action), breach of contract and breach of the duty of good faith and fair dealing against Macquarie (fifth and sixth causes of action), and to strike the demand for punitive damages, and otherwise affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 18, 2018, modified, on the law and the facts, to dismiss the first cause of action for a declaratory judgment in its entirety, to dismiss that portion of the second cause of action seeking to have the subject UCC sale declared void and invalid and set aside, to dismiss the causes of action for tortious interference with contract against defendant KKR (third cause of action), civil conspiracy against Macquarie and KKR (fourth cause of action), breach of contract and breach of the duty of good faith and fair dealing against Macquarie (fifth

and sixth causes of action), and to strike the demand for punitive damages, and otherwise affirmed, without costs.

Opinion by Kapnick, J. All concur.

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

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

ENTERED: JUNE 6, 2019

CLERK