SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 28, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7358N Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Julio Guevara,
Defendant-Appellant,

HSBC Bank USA, et al.,
Defendants.

Index 380447/11

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Rubin & Licatesi, P.C., Garden City (Amy J. Zamir of counsel), for appellant.

Hinshaw & Culbertson, LLP, New York (Benjamin Noren of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about June 6, 2017, which granted plaintiff's motion for summary judgment on its foreclosure complaint, reversed, on the law, with costs, and plaintiff's motion for summary judgment denied.

A plaintiff in a foreclosure action establishes standing by showing that it had either a written assignment or physical possession of the underlying note and mortgage prior to

commencement (*Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695 [1st Dept 2012]; *see also Aurora Loan Servs. v Taylor*, 25 NY3d 355, 361 [2015]). Where, as here, a plaintiff cannot establish a written assignment prior to commencement, it must "adequately prove[] that it did, indeed, have possession of the note prior to commencement of this action" (*Aurora Loan Servs.*, 25 NY3d at 362). A conclusory statement in an affidavit will not suffice (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]). As shown below, plaintiff did not establish on its motion that it had possession of the note at the time of commencement, so it was not entitled to summary judgment.

The complaint alleges that, in February 2007, defendant Julio Guevara borrowed $499,120 from American Brokers Conduit (ABC) in connection with the purchase of his home in the Bronx.

On or about May 1, 2007, American Home Mortgage Assets LLC as depositor (AHMA), Wells Fargo Bank NA as servicer and securities administrator, and plaintiff Deutsche Bank National Trust Company as trustee entered into a Pooling and Servicing Agreement (PSA), pursuant to which AHMA agreed to transfer to plaintiff as trustee a group of mortgage and cooperative loans. Defendant's mortgage loan number and property appear to be listed on the Mortgage Loan Schedule associated with the PSA.

The PSA states, at page 36, that AHMA "has" caused the

sponsor, American Home Mortgage Corp., to deliver to Deutsche Bank the original note, or a lost note affidavit, and an assignment of mortgage in connection with each of the pooled mortgage loans. However, there is no proof in the record that the note was in fact delivered.

On March 18, 2009, an Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for ABC to plaintiff as trustee for the AHMA trust dated March 11, 2009 was recorded. On October 5, 2010, a "Correcting Assignment of Mortgage" dated September 14, 2010 was recorded.[1] However, neither document mentions the note. In addition, neither demonstrates that AHMA had complied with the requirements of the PSA, which states that, as of May 1, 2007, AHMA "has" caused to be delivered to plaintiff an assignment of each mortgage to it as trustee.

Plaintiff commenced this foreclosure action on April 26, 2011, alleging that defendant had failed to make payments due under the note since August 1, 2008. Plaintiff did not attach a copy of the note to its complaint.

On or about September 17, 2014, plaintiff executed a power of attorney appointing Ocwen Loan Servicing, LLC (Ocwen) as its

[1]This document states that the notarization on the 2009 assignment was improper.

attorney-in-fact with power to enforce its rights with regard to loans included in the PSA.

Two years after that, on October 19, 2016, plaintiff moved for summary judgment. Plaintiff submitted an affidavit by Kyle Lucas, an employee of a company whose indirect subsidiary is Ocwen. Lucas alleged that plaintiff had had physical possession of the note since June 6, 2007, but he failed to identify any document which provided the basis for his knowledge. A copy of defendant's note, endorsed in blank by ABC, was attached to plaintiff's summary judgment motion. However, there is nothing in the record that proves when the note was physically delivered to plaintiff.

In response, defendant raised a triable issue of fact by pointing out that plaintiff's affiant did not claim to have personal knowledge of the relevant facts, including the circumstances of the alleged physical delivery of the note to plaintiff, and failed to substantiate his claim that plaintiff had physical possession of the note prior to commencement.

Ocwen did not have authority to act on plaintiff's behalf until September 17, 2014. Therefore, Lucas cannot and does not claim to have personal knowledge of the claim that plaintiff came into physical possession of the note in 2007. Instead, he claims to rely on his review of the business records of Ocwen,

plaintiff, and their agents. Specifically, he alleges that "the physical transfer to plaintiff was later memorialized" in the 2009 "Assignment of Mortgage" and 2010 "Correcting Assignment of Mortgage."

However, as discussed above, neither of those documents mentions the note, much less memorializes its physical delivery to plaintiff as of June 6, 2007, or at any time before commencement of this action on April 26, 2011. Nor does the PSA establish that the note was in fact delivered by AHMA to plaintiff in 2007, since it is not a sworn statement. Moreover, the assignment of defendant's mortgage was not executed and effective until, at the earliest, March 8, 2009. Therefore, unlike the plaintiff in *Nationstar Mtge. LLC v Accardo* (159 AD3d 662 [1st Dept 2018], *lv denied* 31 NY3d 1132 [2018]), Lucas failed to attach "corroborating documentary evidence" showing that plaintiff had physical possession of the note before commencement (*id.* at 662; *see also Aurora Loan Servs.*, 25 NY3d at 362 [allonge in attachments to note "clearly show the note's chain of ownership"]).

Our dissenting colleague takes the position that the documents attached to the Lucas affidavit make it "clear that both the mortgage and note had been assigned to plaintiff." We disagree. To support his statement that the mortgage had been

delivered to plaintiff before commencement, Lucas relied solely on certain assignments attached to his affidavit. However, those documents only purport to assign the mortgage, and say nothing about an assignment or physical transfer of the underlying note. Even plaintiff does not claim that the original lender, ABC, ever executed a written assignment of the note to it. Plaintiff only claims that it had physical possession of the note as of June 6, 2007, but fails to offer any proof of this, either in the form of an affidavit by one with personal knowledge of that fact, or documents establishing it. Consequently, contrary to the statements in the opposing writing, there is no documentary support at all for the claim that plaintiff had physical possession of the note, or an assignment of it.

Contrary to the dissent's statement, the facts of this case are entirely distinguishable from those in *Aurora Loan Servs*. There, the Court of Appeals found that the plaintiff had established that it had physical possession of the note four days prior to commencement by: (1) producing an allonge indorsing the note to the plaintiff and showing the chain of possession history from the original lender to the plaintiff, as was required by the PSA in that case; and (2) submitting an affidavit by its legal liaison stating that she had personally viewed the original note, which had been in the bank's possession since four days before

commencement.[2] Moreover, in *Aurora*, the affiant was acting as the plaintiff's agent at the time the affiant claimed the plaintiff had obtained physical possession of the note and at the time of commencement. Here, the affiant's employer's subsidiary obtained power of attorney to act on plaintiff's behalf more than seven years after plaintiff allegedly obtained physical possession of the note and more than three years after commencement of the action.

Accardo, also cited by our dissenting colleague, is similarly distinguishable from this case. There, the plaintiff established possession of the note prior to commencement by attaching the note to the complaint and submitting the affidavit of its vice president to which was attached the "corroborating documentary evidence" on which the affiant relied.

All concur except Tom and Singh, JJ.
who dissent in a memorandum by
Tom J. as follows:

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[2]For these reasons, we respectfully disagree with our dissenting colleague's reading of *Aurora* as standing for the proposition that a bare statement of "the exact date the note was received . . . is sufficient" to establish standing (*see also Wells Fargo Bank*, 139 AD3d at 524).

TOM, J. (dissenting)

Since I conclude that the affidavit of the senior loan analyst for Ocwen Financial Corporation acting on behalf of plaintiff, considered with the documentation in the record, was sufficient to support the action of foreclosure under the principles set forth by the Court of Appeals in *Aurora Loan Servs., LLC v Taylor* (25 NY3d 355, 361 [2015]), thus warranting an affirmance, I respectfully dissent.

The facts in this matter are largely undisputed. Defendant Julio Guevara purchased a house at 1055 Manor Avenue in the Bronx in February 2007. At that time, he borrowed $499,120.00 from American Brokers Conduit. The loan was memorialized in a note and secured by a mortgage on the property. The loan was pooled and securitized and sold into a residential mortgage backed security trust, American Home Mortgage Asset Trust 2007-3. The securities issued by this trust were Mortgage Backed Pass-Through Certificates Series 2007-3. The trustee of the trust is Deutsche Bank National Trust Company. Ocwen Loan Servicing LLC is the loan servicer and attorney in fact for the Trustee. Ocwen's parent is Ocwen Financial Corporation.

After transfer of the mortgage to the trust, defendant defaulted on the mortgage payments. As of August 2008, defendant failed to make monthly payments. Defendant was sent a default

letter in July 2010. Plaintiff commenced this action for foreclosure in April 2011.

In support of its motion for summary judgment, plaintiff submitted an affidavit from Kyle Lucas, a Senior Loan Analyst employed by Ocwen Financial Corporation, the parent company of Ocwen Loan Servicing LLC, the loan servicer and attorney in fact for the trustee. Attached to the affidavit were a limited power of attorney, the 2007 pooling agreement, the February 15, 2007 Truth-in-Lending Disclosing Statement which identify the loan number as 1600777, the note of the same date with this identical loan number and address, the mortgage loan document and the assignment of the mortgage from the Mortgage Electronic Registration Systems, Inc., to plaintiff as the new lender, dated March 12, 2009, with the same loan number and address, and a 2010 corrected assignment. These documents considered together made clear that both the mortgage and note had been assigned to plaintiff, and that they came into plaintiff's possession in 2009. The Lucas affidavit satisfactorily established that plaintiffs remained in possession of the documents when the action was commenced in 2011. Straining further for additional documents or averments should not be required to establish plaintiff's standing in this case.

Lucas averred that his job duties "include reviewing the

computerized systems, together with the proprietary and business records of *Ocwen, Plaintiff, and their agents* which are made in the regular course of business and are in the possession, custody and control of *Ocwen, Plaintiff, and their agents*. It is within my responsibilities as a loan analyst to review the records of *Ocwen, Plaintiff, and their agents*, review and sign certifications and affidavits, and I am authorized to sign this Affidavit on behalf of Plaintiff" (emphasis added).

Lucas further averred that he "thoroughly reviewed the computerized systems, together with the proprietary and business records of *Ocwen, Plaintiff and their agents*, which are maintained in the ordinary course, concerning the loan described in the complaint, including but not limited to, the original note and mortgage, note possession history and payment history concerning the subject loan" (emphasis added).

Based on his review, Lucas averred that the note and mortgage were physically delivered to plaintiff, which has been in continuous possession of the note since June 6, 2007. He also confirmed that defendant defaulted under the terms of the note and mortgage by failing to make payments since August 1, 2008, and had been sent a default letter and multiple copies of a 90 day pre-foreclosure notice.

Standing in these mortgage foreclosure actions is

established by showing that the plaintiff is the holder or assignee of the subject note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). Here, the affidavit by Lucas is sufficient to show that plaintiff had possession of the note when the action was commenced in 2011 (*see e.g. Nationstar Mtge., LLC v Cogen*, 159 AD3d 428, 429 [1st Dept 2018]). In opposition, defendant borrower Julio Guevara offered no evidence to contradict Lucas's factual averments and thus failed to raise an issue of fact. Notably, defendant does not contest the fact that he has defaulted in the loan payments since August, 2008.

The majority apparently finds that the affidavit is deficient because Lucas did not use the word "personally" to describe his own thorough review of the pertinent records and because he did not utilize the phrase "personally familiar" to describe his understanding of the plaintiff's record-keeping practices. However, no magic words are required. It is clear from Lucas's affidavit that he, in fact, personally reviewed the relevant loan records, which he stated are made and kept in the ordinary course of business.

Indeed, Lucas averred that he had "thoroughly reviewed" the records, which were kept in the ordinary course of business. His thorough review is inherently a personal one. Thus, he has

acquired personal knowledge of the contents of the loan documents he reviewed. Further, Lucas's job duties and responsibilities as a senior loan analyst included reviewing the computer and other business loan records of Ocwen and plaintiff and thus we can infer that he was personally familiar with plaintiff's record-keeping practices. Yet, the majority chooses to elevate form over substance concerning the validity of the Lucas affidavit.

Although in *Bank of Am. v Brannon* (156 AD3d 1 [1st Dept 2017]), the representative of the party that had held the note and mortgage since 2009 stated that he made his affidavit with "personal knowledge" and based on his examination of the records, and stated he was "familiar" with the plaintiff's record-keeping systems that case does not stand for the proposition that those exact words are required to deem an affidavit sufficient in these cases. Rather, we should look to the fact that the substance of Lucas's affidavit is essentially identical to the affidavit in *Brannon*. We held in *Brannon* that the affiant's familiarity with the record-keeping systems used by the plaintiff bank and/or its loan servicer is sufficient. In sum and substance, the Lucas affidavit achieves that result, notwithstanding the omission of phrasing that Lucas was "personally" knowledgeable about plaintiff's record keeping. Nor does *Nationstar Mtge. LLC v Accardo* (159 AD3d 662 [1st Dept 2018]) require a different

result. That the plaintiff in *Nationstar* attached a copy of the note to the complaint was sufficient, but that does not compel any conclusion that producing a copy of the note was necessary.

Simply stated, plaintiff herein established standing by virtue of its possession of the endorsed-in-blank note at the commencement of this action (*see Aurora*, *supra*, 25 NY3d at 361–362) and demonstrated its prima facie entitlement to judgment as a matter of law by providing evidence of the note and mortgage, and proof of defendant's default.

Almost identical to the facts in *Aurora*, the evidence here showed that as of 2007, Deutsche, as trustee under the pooling agreement, became the lawful owner of the note. The Lucas affidavit establishes that plaintiff came into possession of the note on June 6, 2007, four years prior to the commencement of the foreclosure action. From such specific statements, together with proof of plaintiff's authority and the limited power of attorney, the Court of Appeals in *Aurora* agreed with the Second Department's holding that "[i]t can reasonably be inferred . . . that physical delivery of the note was made to the plaintiff" before the action was commenced (*see Aurora*, 25 NY3d at 361, *quoting Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 629 [2d Dept 2014]). We should similarly infer in this case from the totality of the submitted evidence and Lucas's affidavit that

physical delivery of the note (attached to his affidavit) was made to plaintiff before the action was commenced.

Notably, the Court of Appeals also held in *Aurora* that production of the original note is not required in this context (25 NY3d at 362), particularly where, as is also the case here, the witness examined the original note. Lucas even advised in a footnote in his affidavit that the original note and mortgage were available for discovery and inspection upon request.

Further, as we held in *Brannon*, Lucas was not required to have personal knowledge of each of the facts asserted in his affidavit, and plaintiff was entitled to use an "original loan file prepared by its assignor, when it relies upon those records in the regular course of its business" (*Brannon*, 156 AD3d at 8; *see also Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]; *State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1296 [3d Dept 2012], *lv denied* 20 NY3d 858 [2013][records admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business"]).

Nor is plaintiff required to provide details of how, or

precisely when, the note was delivered (*see Aurora*, 25 NY3d at 361 [finding affidavit sufficient despite lack of details regarding how plaintiff came into possession of the note]; *see also HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 824 [2d Dept 2017] ["the plaintiff was not required to provide factual details of the delivery to establish how it came into possession of the note"]). Rather, where an affidavit satisfies the business record foundation, and states the exact date the note was received, it should be sufficient (*Aurora*, 25 NY3d at 361).

Accordingly, I would affirm the order granting plaintiff's motion for summary judgment on its foreclosure complaint.

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

ENTERED: MARCH 28, 2019

CLERK

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

8149 Joanne Corazza, etc., Index 190028/14
Plaintiff-Respondent,

-against-

Amchem Products, Inc., etc., et al.,
Defendants,

Caterpillar, Inc.,
Defendant-Appellant.

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Holwell Shuster & Goldberg LLP, New York (Daniel M. Sullivan of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Pierre A. Ratzki of counsel), for respondent.

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Judgment, Supreme Court, New York County (Martin Shulman, J.), entered October 12, 2017, awarding plaintiff the aggregate amount of $1,791,772.56 as against defendant Caterpillar, Inc., unanimously reversed, on the law, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff failed to establish "some scientific basis for a finding of causation attributable to the particular defendant's product" (*Matter of New York City Asbestos Litig.*, 148 AD3d 233, 239 [1st Dept 2017], *affd* 32 NY3d 1116 [2018]). Although decedent testified that he was exposed to asbestos as a result of his work changing brakes, clutches, and gaskets on defendant's

forklifts, as well as on forklifts of other manufacturers, he testified as to defendant only that he worked on its forklifts "[a] lot." Decedent provided no context for deciphering the meaning of "a lot." In fact, he highlighted that he was not "good at percentages." Nor did he offer any other basis for determining the frequency of his exposure to asbestos through his work on defendant's forklifts (*compare Matter of New York City Asbestos Litig.*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51597[U], *9 [Sup Ct, NY County 2012] [in addition to testimony, the jury verdict against defendant Crane Co. was supported by "evidence that the ships on which plaintiff served contained hundreds of Crane's valves"], *affd* 121 AD3d 230 [1st Dept 2014]; *affd* 27 NY3d 765 [2016]). Therefore, plaintiff's experts had insufficient foundation for their medical opinions that plaintiff's work with defendant's forklifts was a substantial cause of his lung cancer.

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

ENTERED: MARCH 28, 2019

CLERK

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

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Index 190415/12

In re New York City Asbestos Litigation

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Phyllis Brown, etc.,
Plaintiff-Appellant-Respondent,

-against-

Bell & Gossett Company, et al.,
Defendants,

Consolidated Edison Company of New York, Inc.,
Defendant-Respondent-Appellant.

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Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for appellant-respondent.

Venable LLP, New York (Edward P. Boyle of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered December 19, 2017, to the extent appealed from, upon a jury verdict in favor of plaintiff and apportioning liability 30% to defendant Consolidated Edison of New York, Inc. (Con Ed), capping the net verdict against Con Ed at 30%, unanimously reversed, on the law, without costs, and the judgment vacated. The Clerk is directed to enter an amended judgment apportioning 65% of plaintiff's total recovery against Con Ed. Appeal from order, same court and Justice, entered on or about December 12, 2017, unanimously dismissed, without costs, as subsumed in the

appeal from the judgment. Appeal from order, same court (Sherry Klein Heitler, J.), entered on or about October 11, 2013, which denied Con Ed's motion for summary judgment dismissing the complaint as against it, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The sole issue on this appeal is the attribution of liability as between Con Ed and nonparty Robert A. Keasbey, Co. (Keasbey). Plaintiff's decedent, Harry E. Brown, contracted mesothelioma and died as a result of his exposure to asbestos. He was exposed to asbestos during his work installing insulation at various commercial sites from 1958 to 1974. For approximately three months in 1958, Brown worked for nonparty Asbestos Construction Company at the powerhouse in Astoria, Queens. Keasbey was also a subcontractor there. While there, Brown worked in close proximity to Keasbey employees, who used asbestos-containing concrete products, including Rex and Rakco concrete manufactured by Keasbey. From the winter of 1964 until the spring of 1965, Brown worked for Keasbey as an asbestos installer at the Con Ed plant in Ravenswood, Queens, and used Rex and Rakco. From 1965 to 1973, he worked for other companies. From 1973 to 1974, Brown again worked for Keasbey.

Plaintiff's case against Con Ed and three other defendants under Labor Law § 200 came to trial in 2014. The jury also heard

testimony purporting to show liability against 19 other nonparty companies, including Keasbey. The judge instructed the jury, inter alia, that plaintiff had the burden of proving that Con Ed was negligent, and that defendant had "the burden of proving that other companies were negligent and that these companies' negligence was a substantial factor in causing Mr. Brown's . . . disease." She then charged the jury on negligence and generally on the duty of a manufacturer, and told the jury that these charges applied to defendant's "claims against the other companies." The judge did not specifically mention Keasbey when charging the jury.

Keasbey is listed on Section IV of the special verdict sheet, entitled "Other Companies," along with other nonparties. The jury was asked to answer: (1) whether Brown was exposed to asbestos "from products made, sold, distributed and/or used in connection with products or equipment by any" of the listed companies; (2)if so, as to any, whether that company failed to exercise reasonable care by not adequately warning Brown of the risks associated with asbestos exposure; and (3) if so, whether its failure was a contributing factor in Brown's mesothelioma. No description appears next to Keasbey's name on the special verdict sheet that would indicate that it was subject to liability as a manufacturer or as an employer. Some of the

listed nonparty companies were manufacturers of asbestos products. The list also includes Lilco, which was a plant owner, and Allis-Chalmers, Con Ed's general contractor.

The jury found that Brown had been exposed to asbestos at Ravenswood, that Con Ed had exercised supervision and control over workers at the powerhouse and had failed to exercise reasonable care to make its worksite reasonably safe, and that Con Ed's failure to exercise reasonable care to make the worksite reasonably safe was a substantial contributing factor in causing Brown's injuries. The jury also found, inter alia, that the failure of other entities, including Keasbey, to give Brown adequate warning about the potential hazards of exposure to asbestos was a substantial contributing factor in the development of his mesothelioma. As relevant to this appeal, the jury apportioned liability 30% to Con Ed and 35% to Keasbey.

Plaintiff submitted to the trial court a proposed judgment apportioning to Con Ed 65% of the net verdict (combining the 30% to Con Ed and the 35% to Keasbey, pursuant to CPLR 1602[4], because Keasbey was Brown's employer and therefore could not be sued directly by plaintiff, while Con Ed could proceed against Keasbey for indemnification or contribution, as Brown had suffered a "grave injury" under Workers' Compensation Law § 11). Con Ed proposed a judgment in which it was apportioned liability

in the percentage the jury found, on the ground that its apportioned share was less than 50% (*see* CPLR 1601). The trial court adopted Con Ed's proposed judgment, from which plaintiff now appeals. For the reasons discussed below, we hold that the trial court erred in adopting Con Ed's proposed judgment.

As Con Ed concedes, plaintiff is barred from suing Keasbey for the time periods in which Brown was exposed to Rex and Rakco as an employee of Keasbey (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 158-159 [1980] [rejecting the "dual capacity" doctrine as applied to permit employees to sue employers in their capacity as manufacturers]). Accordingly, CPLR 1602(4) would apply and permit allocation to Con Ed of Keasbey's share of liability for those periods.

Con Ed argues, however, that liability can be apportioned to Keasbey for the time period in which Brown was employed by another company at the Astoria power plant where Keasbey workers used Rex and Rakco in Brown's vicinity. Plaintiff counters that Workers' Compensation Law § 44, which requires that the last employer pay all Workers' Compensation benefits that could have been collected from other employers for the same disease, applies for all of Brown's periods of employment, even as to exposures occurring during a time when he was employed by other companies using Keasbey products. Since plaintiff and Brown collected

Workers' Compensation benefits from Keasbey pursuant to Workers' Compensation Law § 44, plaintiff argues that Workers' Compensation Law § 11 bars her from suing Keasbey for Brown's exposure to Rex and Rakco during periods when Brown was employed by a different employer and worked at the Astoria plant.

We do not reach either Con Ed's or plaintiff's argument for two reasons. First, we reject Con Ed's argument that the jury understood Keasbey to have been included on the special verdict sheet only as a manufacturer. The distinction (Keasbey as manufacturer, rather than employer) was not clearly communicated to the jury in the verdict sheet, in the court's charges, or in Con Ed's summation.

Second, it is unlikely that the jury assessed 35% of liability to Keasbey in any capacity other than as Brown's employer at Con Ed's Ravenswood plant. Out of the many pages of Brown's deposition testimony read into the trial record, only two covered Brown's brief description of encountering Keasbey workers using Rex and Rakco near him at the Astoria powerhouse when he worked for another company. In contrast, Con Ed's entire defense to plaintiff's Labor Law § 200 claim was that Keasbey alone was at fault for the unsafe manner in which Keasbey supervised and controlled Brown's work at Con Ed's Ravenswood plant. Accordingly, at trial, Con Ed attempted to ascribe as much fault

as possible to Keasbey in its role as Brown's employer at the Ravenswood plant. The jury assessed 30% liability to Con Ed for failing to exercise reasonable care in making the Ravenswood powerhouse safe. It is unlikely that the jury would have shifted its focus away from Ravenswood to assess 35% of liability to Keasbey in its role as the manufacturer of Rex and Rakco for the brief three month period in 1958 when Brown worked for another company at the Astoria plant, regardless of Con Ed's intent that the special verdict sheet questions address Keasbey's role solely as manufacturer.

Thus, plaintiff established prima facie that CPLR 1602(4) applied, as Keasbey was Brown's employer and Brown suffered a grave injury. To the extent that the verdict is unclear as to whether the jury apportioned liability to Keasbey to any degree in its role as manufacturer, Con Ed, as the proponent of the theory that it could limit that portion of Keasbey's liability for which it was jointly and severally liable, failed to meet its burden to object to the verdict sheet and charges and to propose an appropriate and clarifying question (*see Cunha v City of New York*, 12 NY3d 504, 510 [2009]).

With respect to Con Ed's cross appeal from the motion court's denial of its pretrial summary judgment motion, we considered Con Ed's arguments on this issue in a prior appeal and

rejected them (146 AD3d 461 [1st Dept 2017], *appeal dismissed* 29 NY3d 1141 [2017]).

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

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

ENTERED: MARCH 28, 2019

CLERK

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

8489 Marianne O'Toole, etc., et al., Index 301137/08
Plaintiffs-Appellants,

-against-

Elliot Goodman, MD,
Defendant-Respondent,

Holy Name Hospital, et al.,
Defendants.

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The Law Office of Adam M. Stengel, P.C., New York (Adam Stengel of counsel), for appellants.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about January 11, 2018, which, to the extent appealed from as limited by the briefs, granted defendant Elliot Goodman MD's motion for summary judgment dismissing all claims against him, unanimously affirmed, without costs.

Plaintiffs claim that defendant Goodman, a private attending bariatric surgeon with privileges at Holy Name Hospital in New Jersey who performed a gastric bypass on plaintiff Lee Green (patient), failed to timely resume the patient's Lexapro prescription while he was recovering from complications in the intensive care unit (ICU). The patient had a medical history of using Lexapro, a selective serotonin reuptake inhibitor, to

manage his anxiety. As a result of this failure, plaintiffs allege that the patient, while in a medically induced coma, developed severe agitation caused by Lexapro withdrawal, which led to the use of wrist restraints, and, eventually, permanent bilateral wrist drop.

"[A]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient" (*Burtman v Brown*, 97 AD3d 156, 161-162 [1st Dept 2012] [internal quotation marks omitted]). Under the particular circumstances in this case, defendant, as the patient's surgeon, did not owe patient a duty to manage his medication in the ICU. Rather, in this emergent setting, defendant properly relied on the ICU staff and other specialists to treat and manage the patient's non-surgical issues (*see Perez v Edwards*, 107 AD3d 565, 566 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014] [holding that the defendant doctor "was entitled to rely on the treatment rendered to decedent in the hospital by specialists better equipped to handle decedent's condition"]; *cf. Tierney v Girardi*, 86 AD3d 447, 448 [1st Dept 2011] [finding that the defendant doctor "continued to owe a duty of care because he established a doctor-patient relationship with decedent, consulted with her, her family, and the cardiologist concerning her treatment following the

cardiocatheterization, and continued to monitor her condition" even after another surgeon had performed a subsequent heart procedure]).

To reach any discussion about deviation from accepted medical practice, it is necessary first to establish the existence of a duty (*see Burtman*, 97 AD3d at 161). Thus, in light of our determination, we need not address the parties' remaining contentions.

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8817 The People of the State of New York, Respondent, Ind. 398/09

-against-

Isaac Middleton, Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Robin V. Richardson of counsel), for appellant.

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

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Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about February 14, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly found that clear and convincing evidence supported the assessment of 15 points under the risk factor for defendant's use of violence (causing physical injury), and 25 points under the risk factor for sexual contact with the victim (aggravated sexual abuse). These two assessments did not constitute double counting of the same injury, because they were supported by evidence of multiple injuries, separately qualifying

as physical injury under the Penal Law (*see generally People v Chiddick*, 8 NY3d 445 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant, including his age (mid 50s), were outweighed by the particularly violent and heinous nature of the underlying sex offense and defendant's extensive criminal record.

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8818 Adwoa Gyabaah, Index 307081/10
Plaintiff-Appellant,

-against-

Rivlab Transportation Corp., et al.,
Defendants-Respondents.

_____

Law Offices of Kenneth A. Wilhelm, New York (Kenneth A. Wilhelm of counsel), for appellant.

Perry, Van Etten, Rozanski & Primavera, LLP, Melville (Elizabeth Gelfand Kastner and Leonard Porcelli of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about February 28, 2018, which denied plaintiff's motion for prejudgment interest, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant Rivlab Transportation Corp.'s insurer's bare offer to pay the policy limit was not a "tender" of the policy for the purposes of stopping the accrual of prejudgment interest under 11 NYCRR 60-1.1(b). While the policy provides that the insurer will pay interest on a judgment until "we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance," 11 NYCRR 60-1.1(b) requires the insurer to pay postjudgment interest until it has "paid or tendered or

deposited in court" the part of the judgment that does not exceed the policy limit. As the policy language is less generous to the insured than the regulation, it is deemed superseded by the regulation (*see Dingle v Prudential Prop. & Cas. Ins. Co.*, 85 NY2d 657, 660 [1995]). Within that framework, a bare offer to pay does not constitute a tender. Thus, interest must be calculated from the date of entry of the order that granted summary judgment to plaintiff until the date of payment (*see Love v State of New York*, 78 NY2d 540, 544 [1991] ["prejudgment interest must be calculated from the date that liability is established regardless of which party is responsible for the delay"]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8819 & [M-16] In re Francois B.,
Petitioner-Respondent,

-against-

Fatoumata L. also known as Haidatia L., etc.,
Respondent-Appellant.

- - - - -

J. A. B.,
Nonparty Appellant.

_____

Larry S. Bachner, New York, for Fatoumata L., appellant.

The Law Office of Valerie Wolfman, New York (Valerie Wolfman of counsel), for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the child, J. A. B., appellant.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about January 12, 2018, which granted petitioner father's motion to enforce a custody order of a foreign court, unanimously affirmed, without costs.

The parties are both French citizens as is their child. Upon their separation, the French court issued an order dated October 21, 2009, awarding them joint custody of the child. Subsequently, the French court modified the prior custody order, by order dated November 8, 2016, granting the mother permission to relocate with the child to the United States. It also provided the father parenting time in France with the child

during school vacations. The mother relocated with the child to New York shortly thereafter. In August 2017, the father filed an enforcement petition in Family Court, alleging that the mother had violated the French order by refusing to permit the child to visit him in France. Meanwhile, the father had also appealed the French order, and the parties litigated the matter in the French Court of Appeal, with the mother represented by counsel. During the enforcement proceedings in Family Court, the French Court of Appeal issued a decision awarding the father residential custody of the child.

Contrary to the mother's contention, under these circumstances, Family Court properly determined that it did not have jurisdiction over this matter and enforced the French custody order pursuant to Domestic Relations Law § 77-b by returning the child to the father in France (*see Stocker v Sheehan*, 13 AD3d 1 [1st Dept 2004]; *see also Grahm v Grahm*, 13 AD3d 324 [1st Dept 2004]). Although the record supports that the child wished to remain in New York with the mother, and suffered extreme anxiety at the idea of leaving, such evidence did not rise to the level of an "immediate threat" to warrant Family Court invoking emergency jurisdiction (*see Matter of Michael P. v Diana G.*, 156 AD2d 59, 66 [1st Dept 1990], *lv denied* 75 NY2d 1003 [1990]; *Valone v Valone*, 41 Misc 3d 797, 805 [Sup Ct, Monroe

County 2013]). Accordingly, we affirm the order, noting that the French Court of Appeal affirmed the order awarding the father custody upon the mother's appeal.

We have considered the mother's remaining contentions, including her claim that neither she nor the child received meaningful representation before Family Court, and find them unavailing.

M-16 - *In re Francois B. v Fatoumata L.*

Motion to dismiss appeal as moot denied.

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

ENTERED: MARCH 28, 2019

CLERK

CORRECTED ORDER - APRIL 4, 2019

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8820 Cameron Winklevoss, etc., et al., Plaintiffs-Appellants, Index 159079/17

-against-

Todd Steinberg, an individual, Defendant-Respondent.

_____

Harder LLP, New York (Anthony J. Harwood of counsel), for appellants.

Wechsler & Cohen, LLP, New York (Kim Lauren Michael of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered September 19, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the defamation claim, unanimously affirmed, with costs.

Plaintiffs seek relief for alleged defamation related to a stock purchase deal where they were to purchase defendant's shares in a startup company in the medical cannabis industry. When they withdrew, defendant commenced suit in Delaware Chancery Court seeking, inter alia, specific performance of the alleged agreement; shortly thereafter defendant was quoted in a New York Post article, among other places, allegedly making false statements defaming plaintiffs. Subsequently, defendant voluntarily withdrew his lawsuit, prior to any determination as to the merits, when he was able to sell the shares to another purchaser.

Plaintiffs are limited purpose public figures. Through their voluntary participation in numerous interviews, in widely-covered conferences and meetings with entrepreneurs, and in their own radio broadcasts, they have attracted public attention to themselves as investors in start-ups, have voluntarily injected themselves into the world of investing, and have sought to establish their reputation as authorities in the field (*see Perez v Violence Intervention Program*, 116 AD3d 601 [1st Dept 2014], *lv denied* 25 NY3d 915 [2015]; *Farber v Jeffreys*, 103 AD3d 514 [1st Dept 2013], *lv denied* 21 NY3d 858 [2013]). The individual plaintiffs are also general purpose public figures, famous by virtue of their participation in the Olympics, their portrayal in the film "The Social Network," and routine coverage in popular media, coverage in which they willingly participate (*see Gertz v Welch, Inc.*, 418 US 323, 342 [1974]).

Accordingly, to withstand dismissal of their defamation claim, plaintiffs needed to allege that defendant published the statements at issue with actual malice, that is, with either knowledge that they were false, or reckless disregard for the

truth (*Huggins v Moore*, 94 NY2d 296 [1999]; *James v Gannett Co.*, 40 NY2d 415 [1976]); *Farber v Jeffreys*, 103 AD3d at 515; *Gross v New York Times Co.*, 281 AD2d 299 [1st Dept 2001], *lv denied* 96 NY2d 716 [2001]). Inasmuch as they failed to do so as a matter of law, their defamation claim was properly dismissed.

We have considered plaintiffs' remaining contentions, and find them unavailing.

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8821 Robin B. Vaca, Index 114747/09
Plaintiff-Respondent,

-against-

Village View Housing Corporation,
et al.,
Defendants,

Fowler Equipment Company,
Defendant-Appellant.

- - - - -

Fowler Equipment Company,
Third-Party Plaintiff-Appellant,

-against-

Whirlpool Corporation,
Third-Party Defendant-Respondent.

_____

Law Office of James J. Toomey, New York (Jason Meneses of counsel), for appellant.

Weiss & Rosenbloom, P.C., New York (Andrea R. Krugman of counsel), for Robin B. Vaca, respondent.

Goldberg Segalla, White Plains, (William T. O'Connell of counsel), for Whirlpool Corporation, respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 25, 2017, which, to the extent appealed from, denied defendant/third-party plaintiff Fowler Equipment Company's motion to vacate an order, same court and Justice, entered on or about September 15, 2015, which granted third-party defendant's (Whirlpool) motion to dismiss the third-party complaint and, upon

vacatur, restore the motion to the calendar and afford Fowler an opportunity to oppose it, or, alternatively, to renew Whirlpool's motion and, upon renewal, deny the motion, and to strike plaintiff's claim regarding the use and operation of a certain washing machine, unanimously affirmed, without costs.

Fowler was not entitled to relief under CPLR 5015(a)(1) because the September 15, 2015 order granting Whirlpool's motion to dismiss was not entered on default. Fowler's counsel appeared in court on the return date and participated in oral argument on the motion, and nothing in the court's decision indicated that it was granting relief on default. Therefore, CPLR 5015(a)(1) is inapplicable, and Fowler's only remedy was to have timely appealed or sought reargument, neither of which it did (*see Spatz v Bajramoski*, 214 AD2d 436, 436 [1st Dept 1995]).

Even if we view the prior motion as having been granted on default, CPLR 5015(a)(1) relief would not be appropriate. Fowler failed to move to vacate within one year after a copy of the order with written notice of entry was served on it. Thus, the motion was untimely (*see e.g. US Natl. Bank Assn. v Melton*, 90 AD3d 742, 744 [2d Dept 2011]; *Prospect Park Mgt., LLC v Beatty*, 73 AD3d 885 [2d Dept 2010]).

Fowler's attempt to circumvent the time limitation of CPLR 5015(a)(1) by styling its motion as one for leave to renew

Whirlpool's motion to dismiss is unavailing, as Fowler neither based the motion on new facts nor demonstrated that there has been a change in the law that would change the prior determination (CPLR 2221[e][2]). This is not a case that warranted a grant of leave to renew in the interest of justice "so as not to defeat substantive fairness" (*Garner v Latimer*, 306 AD2d 209, 210 [1st Dept 2003] [internal quotation marks omitted]).

Fowler is precluded by the doctrine of collateral estoppel from relitigating the propriety of plaintiff's claims for breach of warranty and strict products liability regarding the washing machine, as it had a full and fair opportunity to litigate this issue when plaintiff moved to amend her complaint and assert the claims (*see Mahota v City of Hudson*, 179 AD2d 845, 846 [3d Dept 1992], *lv denied* 79 NY2d 760 [1992]).

In light of the foregoing, we do not reach Fowler's remaining contentions.

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8822 The People of the State of New York, Respondent, Ind. 1184/14

-against-

Calvin Brooks, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Scott H. Henney of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ellen I. Biben, J.), rendered October 24, 2016, convicting defendant, after a jury trial, of identity theft in the first degree (two counts) and grand larceny in the third degree, and sentencing him to concurrent terms of 1⅓ to 4 years, unanimously affirmed.

Defendant did not preserve his argument that assumption of a corporation's identity cannot constitute identity theft, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The corporation from which defendant stole by making unauthorized online transfers of funds to his personal accounts qualified as a "person" within the meaning of Penal Law § 10.00(7) (*see People v Assi*, 14 NY3d 335, 340-341 [2010]). The mere fact that Penal Law § 190.80 employs gendered pronouns (he or she) in describing the

conduct that a "person" must engage in to commit identity theft does not compel the conclusion that the statute restricts either the class of "persons" who may commit the crime, or may be victims of it, to individuals rather than corporations. Nor do any of defendant's other arguments regarding statutory language or legislative history warrant such a conclusion.

Defendant's legal sufficiency claim regarding the grand larceny convictions is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that defendant's thefts "involved a unitary fraudulent scheme, rather than separate and independent impulses" (*People v Miller*, 145 AD3d 593, 594 [1st Dept 2016], *lv denied* 29 NY3d 950 [2017]),

and that the "thefts were committed pursuant to a single, ongoing intent" (*id.* at 545), so that it was proper to aggregate the individual amounts to reach the statutory threshold.

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8823 In re Fatima Bautista, Index 100210/17
Petitioner,

-against-

Shola Olatoye, etc., et al.,
Respondents.

_____

Bronx Legal Services, Bronx (Chelsea L. Breakstone of counsel), for petitioner.

Kelly D. MacNeal, New York City Housing Authority, New York (Melissa R. Renwick of counsel), for respondents.

_____

Determination of respondents, dated October 31, 2016, which, after a hearing, found that petitioner's apartment was being used by her son as part of his illegal drug enterprise and terminated petitioner's Section 8 housing subsidy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Nancy M. Bannon, J.] entered April 26, 2018), dismissed, without costs.

Contrary to petitioner's contention, there is substantial evidence in the record to support the finding that petitioner's apartment was being used by an authorized family member as part of his

illegal drug conduct (*see Matter of Board of Educ. of Monticello Cent. School Dist. v Commissioner of Educ.*, 91 NY2d 133, 141 [1997]; *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The record also supports the hearing officer's findings that petitioner was not credible and withheld pertinent information from respondent NYCHA when she sought to transfer her voucher and remove her son as a household member.

As the hearing officer made "a careful and painstaking assessment of all the available evidence" (*Matter of Rosenkrantz v McMickens*, 131 AD2d 389, 391 [1st Dept 1987]), the credibility determination is not reviewable (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

We do not find that, under the circumstances, the penalty of termination of petitioner's Section 8 subsidy is so disproportionate to the offense as to be shocking to one's sense of fairness (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; 24 CFR 2.552[c][2][i]). Finally, petitioner's equal protection claim fails because she is not similarly situated to tenants of public housing projects, for which there are distinct governing regulations and termination procedures (*compare* 24 CFR Part 960 *and Matter of Brown v Popolizio*, 166 AD2d 44, 51-52 [1st Dept 1991], citing NYCHA

Termination of Tenancy Procedures ¶ 6[d], *with* 24 CFR Part 982 *and Diedre Williams v New York City Hous. Auth.*, US Dist Ct, SD NY, 81 Civ 1801 [RJW], Oct. 17, 1984 [First Partial Consent Judgment]).

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

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8824 Hudson Insurance Company, Inc., Index 653524/15
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Westermann Sheehy Keenan Samaan & Aydelott, LLP, East Meadow (Michael J. Rosenthal of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered December 19, 2016, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The court correctly granted defendant's motion because Article 56 of the parties' public works contract had an explicit six month limitations period which accrued upon defendant's issuance of a certificate of substantial completion, issued here on August 15, 2014. Because the action was not commenced until October 23, 2015, well beyond the limitations period, it was correctly deemed untimely.

We reject plaintiff's contention that it elected to submit all of its damages for extra work and delays at the same time that it requested an extension of the project's completion, and that it had given the City notice of damages and delays by letter

and at meetings throughout the project, which should have satisfied Articles 11 and 30 of the parties' contract, because the contract's notice requirements were strict and unambiguous. It is uncontested that plaintiff did not comply therewith, and the contract provides that noncompliance constitutes a waiver, precluding the claims asserted in this lawsuit (*Madison Equities, LLC v Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431 [1st Dept 2016]; *see A.H.A. Gen. Constr. V New York City Hous. Auth.*, 92 NY2d 20, 33-34 [1998]).

Plaintiff's argument that alleged representations and assurances by defendant's agents, to the effect that compliance with the contract's notice requirements would not be enforced, is unavailing, given the contract's explicit merger, estoppel and no oral modification clauses (*Excel Graphics Tech., v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69-70 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]).

Plaintiff's quantum meruit cause of action was properly dismissed as it arose out of the same subject matter governed

here by a valid, enforceable contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

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

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8825 938 St. Nicholas Avenue Lender, LLC, Index 850011/13
Plaintiff-Appellant,

-against-

936-938 Cliffcrest Housing Development Fund Corporation,
Defendant-Respondent,

The Department of the City of New York, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Windels Marx Lane & Mittendorf, LLP, New York (Mark A. Slama and Ryan Federer of counsel), for appellant.

The Kurland Group, New York (Yetta G. Kurland of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered December 26, 2017, which held in abeyance the determination of plaintiff's motion for summary judgment pending the outcome of a traverse hearing on whether notice of the foreclosure was served in accordance with RPAPL 1303, unanimously affirmed, with costs.

Although the traverse hearing has been held and the complaint dismissed, without prejudice, upon a finding that plaintiff failed to establish compliance with RPAPL 1303, this appeal is not moot, because the "change in circumstances [does

not] prevent[] [this] [C]ourt from rendering a decision that would effectively determine an actual controversy" (*see Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]; *cf. Wells Fargo Bank, N.A. v Gore*, 162 AD3d 437 [1st Dept 2018] [upon appeal from order, after traverse hearing, granting motion to vacate default judgment, Court dismissed appeal from order directing that traverse hearing be held]).

The motion court correctly determined that, in opposition to plaintiff's prima facie showing of compliance with RPAPL 1303, the unit owners' sworn denials that they had ever seen foreclosure notices posted at the building were sufficient under the circumstances to rebut the presumption of proper service, warranting a traverse hearing (*see Nationstar Mtge. LLC v McCallum*, 167 AD3d 523 [1st Dept 2018]). This case is factually distinguishable from cases involving personal service on an individual (*see e.g. HSBC Bank USA, N.A. v Whitter*, 159 AD3d 942, 945 [2d Dept 2018]). Plaintiff is foreclosing against a

cooperative corporation, with service of RPAPL 1303 notice on numerous building residents effectuated by allegedly posting the notice at entrances and exits to the building (*see NYCTL 2012-A Trust v Phillip*, 145 AD3d 684, 685 [2d Dept 2016]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8826 Susan Kim also known as Dosun Susan Kim, et al., Plaintiffs-Respondents, Index 160555/14

-against-

New York Presbyterian also known as the University Hospital of Columbia and Cornell also known as New York Presbyterian Columbia University Medical Center, et al., Defendants-Appellants.

_____

Bartlett LLP, Mineola (Robert G. Vizza of counsel), for appellants.

Fellows Hymowitz, P.C., New City (Samuel S. Coe of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered on or about February 16, 2018, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that defendants failed to properly assess her condition and the degree of her supervisory needs in the restroom, a claim sounding in medical malpractice, and her action, brought three years after her injuries, is therefore

untimely *(Harrington v St. Mary's Hosp.*, 280 AD2d 912 [4th Dept 2001], *lv denied* 96 NY2d 710 [2001]; *Scott v Uljanov*, 74 NY2d 673, 674-675 [1989]). Because the loss of consortium claim is derivative of the injured plaintiff's claim, that cause of action must also be dismissed as untimely (*Hazel v Montefiore Med. Ctr.*, 243 AD2d 344, 345 [1st Dept 1997]; *Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8827 In re Evelyn B.,
Petitioner-Appellant,

-against-

Vishnu P.A.,
Respondent-Respondent.

_____

Bruce A. Young, New York, for appellant.

Law and Mediation Office of Helene Bernstein, PLLC, Brooklyn (Helene Bernstein of counsel), attorney for the child.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about May 3, 2018, insofar as it denied petitioner mother's custody modification petition, unanimously affirmed, without costs.

The court's determination that it was in the best interests of the subject child to remain in the sole legal and physical custody of respondent father has a sound and substantial basis in the record (*Matter of Reeva A.C. v Richard C.*, 84 AD3d 521 [1st Dept 2011]; *Matter of China S. [Tonia J.-Levon S.]*, 77 AD3d 568 [1st Dept 2010]). The court examined and weighed numerous factors, relying on no single factor, including the quality of the home environment, the parental guidance provided, the ability of each parent to provide for the child's emotional and intellectual growth, the relative fitness of each parent and the

separation of the half-siblings (*Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]).

The mother's contention that she was deprived of a fair hearing by the Family Court's failure to direct forensic evaluations is unpreserved for appellate review because she never requested them at any point during the proceedings (*Matter of Bailey v Carr*, 125 AD3d 853 [2d Dept 2015]). In any event, the Family Court possessed sufficient information to enable it to render its determination without forensic evaluations and the mother was not deprived of a fair hearing (*see Matter of Solovay v Solovay*, 94 AD3d 898, 900 [2d Dept 2012], *lv denied* 19 NY3d 808 [2012]).

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

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8828-
8829 The People of the State of New York,
Respondent,

-against-

Juan Caceres,
Defendant-Appellant.

Ind. 473/10

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered March 1, 2011, as amended April 13, 2011, convicting defendant, after a jury trial, of rape in the second degree, endangering the welfare of a child and criminal contempt in the second degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

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 determinations concerning credibility and the evaluation of expert testimony. The victim's testimony was extensively corroborated by other evidence.

After the victim testified about an uncharged incident of sexual abuse, the court providently exercised its discretion when

it denied defendant's belated motion for the unduly drastic remedy of a mistrial, and instead offered to strike the testimony and deliver a curative instruction. Although the prosecutor should have sought an advance ruling (*see People v Ventimiglia*, 52 NY2d 350, 361-62 [1981]), the evidence was admissible as background information to place the events in context and explain the victim's delay in reporting the charged criminal conduct (*see e.g. People v Nicholson*, 26 NY3d 813, 829 [2016]), and the lack of a *Ventimiglia* hearing did not cause defendant any prejudice (*see People v McLeod*, 279 AD2d 372 [1st Dept 2001], *lv denied* 96 NY3d 921 [2001]). In any event, striking the testimony would have been more than sufficient (*see People v Vaz*, 118 AD3d 587 [1st Dept 2014], *lv denied* 24 NY3d 1089 [2014]), but defense counsel declined that remedy because he did not want to be precluded from cross-examining the victim on her recantation of the uncharged allegation.

Defendant's challenges to the People's summation are unpreserved, and we decline to review them in the interest of

justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8830 In re Morgan McCadney, Index 452138/17
Petitioner-Appellant,

-against-

Shola Olatoye, etc.,
Respondent-Respondent.

_____

The Bronx Defenders, Bronx (Steven T. Hasty of counsel), for appellant.

Kelly D. MacNeal, New York (Melissa R. Renwick of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 24, 2018, denying the petition to annul respondent's determination, dated June 28, 2017, which terminated petitioner's Section 8 subsidy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously vacated, the petition treated as one transferred to this Court pursuant to CPLR 7804(g) for de novo review, and, upon such review, the determination unanimously confirmed, the petition denied, and the proceeding dismissed, without costs.

Since the petition raised an issue of substantial evidence, the proceeding should have been transferred to this Court pursuant to CPLR 7804(g) (*see Matter of Roberts v Rhea*, 114 AD3d 504 [1st Dept 2014]). Accordingly, we will "treat the substantial evidence issues de novo and decide all issues as if

the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

The challenged determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The Hearing Officer's decision to terminate petitioner's Section 8 subsidy was based on his failure to occupy the subsidized residence as his primary residence during his incarceration for five years and the undisputed documents confirming his incarceration for a violent felony. Nor were petitioner's due process rights violated, as he was provided a hearing, was represented by counsel, submitted mitigating evidence, and testified on his own behalf. The Hearing Officer considered the mitigating evidence and found such evidence insufficient to lessen the five-year period after incarceration during which an applicant could be considered ineligible for Section 8 benefits. Although the mitigating evidence, comprised of petitioner's treatment providers, portrayed petitioner as a "role model" who took his recovery very seriously, the Hearing Officer's determination is nonetheless rational, based on the fact that petitioner had not begun his treatment until 2013, in addition to his criminal activity and absence from the subsidized residence.

Under the circumstances presented, the termination of

petitioner's subsidy does not shock our sense of fairness (*see generally Matter of Featherstone v Franco*, 95 NY2d 550, 554-555 [2000]; *see Pickering-George v Wambua*, 117 AD3d 583 [1st Dept 2014], *lv denied* 25 NY3d 963 [2015]; *compare Matter of Pagan v Rhea*, 92 AD3d 479, 479-480 [1st Dept 2012]).

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: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8831 A&Z Empire, Inc., Index 23844/16E
Plaintiff-Respondent,

-against-

Atia Shima, et al.,
Defendants-Appellants.

_____

Viscardi, Basner & Bigelow, P.C., Richmond Hill (Luke J. Bigelow of counsel), for appellants.

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City (Evelyn P. Flores of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 14, 2017, which, inter alia, upon reargument, granted plaintiff's motion for summary judgment, unanimously modified, on the law, solely to declare that plaintiff is the sole fee owner of the subject property located at 1924B, 1926, and 1928 McGraw Avenue, Bronx, New York, that defendants have no ownership interest in the property, and that a March 4, 2009 deed purporting to transfer the property from defendant City Builders, Inc. to defendant Shima is null and void, and, as so modified, affirmed, without costs.

Plaintiff purchased the subject property by deed dated September 1, 2005, which was duly recorded. At the same time, plaintiff's three shareholders entered into an "Ownership Agreement" with defendant City Builders, which provided that City

Builders was solely responsible for "all construction and management of the premises," that City Builders "shall" own 50% of the property, and that plaintiff's shareholders would sign a new deed and appropriate transfer documents "to reflect the true ownership of the premises" after the construction was complete.

In March 2009, plaintiff commenced an action (the prior action) in Suffolk County, later transferred to New York County, alleging that City Builders had failed to meet its obligations under the Ownership Agreement. City Builders defaulted in appearing. Subsequently, City Builder's sole owner signed a deed (the 2009 deed) purporting to transfer the subject property to his wife, defendant Shima, and recorded the deed. The prior action culminated in the entry of a judgment, following an inquest, in favor of plaintiff and against City Builders, in August 2016.

In June 2016, having unsuccessfully sought to amend its complaint in the prior action to add Shima as a party and to assert claims challenging the 2009 deed, plaintiff commenced this action seeking to quiet title. In support of its renewed motion for summary judgment, plaintiff submitted its valid deed and a certified chain of title, which established prima facie that it holds title and that defendants' title claim is without merit

(*see White Sands Motel Holding Corp. v Trustees of Freeholders & Commonalty of Town of E. Hampton*, 142 AD3d 1073 [2d Dept 2016]; *see also 5000, Inc. v Hudson One, Inc.*, 130 AD3d 676 [2d Dept 2015]).

In opposition, defendants failed to demonstrate that City Builders had any ownership interest under the Ownership Agreement, because plaintiff was not a party to that agreement, and, in any event, defendants did not demonstrate that City Builders completed the construction of the premises, a condition of the shareholders' execution of documents effecting the transfer of a 50% interest in the property. In any event, the Ownership Agreement does not provide support for the 2009 deed purporting to transfer 100% ownership from City Builders to Shima, because City Builders never held title.

Plaintiff's claims are not barred by collateral estoppel or res judicata, because the issue of ownership of the subject property was not actually or necessarily litigated in the prior action, which asserted breach of contract and fraud claims (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]; *Salazar v Pantoja*, 137 AD3d 511 [1st Dept 2016]). Nor does res judicata bar this action based on the recording of the 2009 deed, because the 2009 deed was not recorded until after plaintiff had

commenced the prior action (*see O'Brien v City of Syracuse*, 54 NY2D 353 [1982]; *see also Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]).

Because the 2009 deed was void ab initio (*see Cruz v Cruz*, 37 AD3D 754 [2d Dept 2007]), it is not subject to a statute of limitations defense (*see Faison v Lewis*, 25 NY3d 220, 224-225 [2015]; *Weiss v Phillips*, 157 AD3d 1, 10 [1st Dept 2017]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8832 Lois Paulino, Index 101927/11
Plaintiff-Appellant-Respondent,

-against-

Valerie Paulino,
Defendant-Respondent-Appellant,

City of New York, et al.,
Defendants.

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellant-respondent.

Goldberg, Miller & Rubin, New York (Harlan R. Schreiber of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered March 2, 2018, which, insofar as appealed from as limited by the briefs, granted defendant Valerie Paulino's (defendant) cross motion for summary judgment dismissing the cause of action for intentional infliction of emotional distress as against her, and denied defendant's cross motion as to the cause of action for wrongful eviction, unanimously modified, on the law, to deny the cross motion as to the cause of action for intentional infliction of emotional distress, and otherwise affirmed, without costs.

There is a triable issue of fact as to whether defendant's conduct was sufficiently outrageous to sustain a cause of action

for intentional infliction of emotional distress, i.e., whether defendant engaged in "a deliberate and malicious campaign of harassment or intimidation" (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018] [internal quotation marks omitted]; *see also 164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004], *lv dismissed* 2 NY3d 793 [2004]; *Vasarhelyi v New School for Social Research*, 230 AD2d 658, 661 [1st Dept 1996]). An issue of fact also exists as to whether defendant abused her power (*see Scollar*, 160 AD3d at 146) by leading plaintiff to believe that she was going to use her position as an auxiliary police officer to get plaintiff thrown out of her home.

Although plaintiff mentions negligent infliction of emotional distress on appeal, the complaint does not assert such a cause of action as against defendant.

Defendant contends that plaintiff should be estopped from arguing that she is a New York resident based on a single federal tax return listing Florida as her residence. This argument is unpreserved, as neither defendant's answer and affirmative defenses nor her briefs on her motion mentioned estoppel or quasi-estoppel (*see McHale v Anthony*, 70 AD3d 466, 467 [1st Dept 2010]; *Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]). Were we to reach the merits, we would reject the argument. The address as designated on a tax return is only one

of many factors to consider in determining primary residency (*Glenbriar Co. v Lipsman*, 11 AD3d 352, 353 [1st Dept 2004], *affd* 5 NY3d 388 [2005]). We note that, at her deposition, plaintiff explained that listing a Florida business address as her residence on the federal tax return was an accountant's error (*see West 157th St. Assoc. v Sassoonian*, 156 AD2d 137 [1st Dept 1989] [explanation sufficient to raise issue of fact in opposition to landlord's motion for summary judgment]). Moreover, plaintiff's New York State tax return listed the disputed New York City apartment as her permanent home address and listed the Florida business as a mere mailing address (*see 310 E. 23rd LLC v Colvin*, 41 AD3d 149 [1st Dept 2007] [evidence supported finding that New York City apartment was tenant's primary residence where upstate residence was specified as home in certain tax-related documents but New York State tax returns specified that tenant was a full-year resident of the City]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8833 The People of the State of New York, SCI 557N/15
Respondent,

-against-

Handy Canela,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Bonnie G. Wittner, J.), rendered October 13, 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: MARCH 28, 2019

CLERK

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

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8834 Elsa Lugo, Index 153109/15
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Law Office of Ryan S. Goldstein, P.L.L.C., Bronx (Ryan S. Goldstein of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered August 20, 2018, which denied the motion of defendant New York City Housing Authority for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant established prima facie entitlement to summary judgment in this action where plaintiff was injured when she slipped and fell on ice on the sidewalk in front of defendant's building. Defendant submitted evidence showing that there was a storm in progress when the accident happened, including a meteorological expert's affidavit and report stating that there was an ongoing storm when plaintiff fell between 9:30 a.m. and

10:00 a.m., plaintiff's deposition testimony that there was a heavy, frozen rain that was sticking to the surface of the sidewalk and making it slippery when she fell, and her acknowledgment that the ice that caused the accident could have resulted from the storm (*see Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541 [1st Dept 2015]).

In opposition, plaintiff raised a triable issue of fact as to when the storm began at the accident location. The caretaker responsible for the sidewalk testified that the storm that occurred on the day of the accident did not start depositing precipitation until 10:00 a.m., which conflicted with the certified weather reports that the storm began between 9:00 and 10:00 a.m. (*see Salamone v Midland Ave. Owners Corp.*, 66 AD3d 422 [1st Dept 2009]). Plaintiff also showed that there was an issue of fact as to whether defendant had notice of the alleged icy condition on its sidewalk that pre-existed the storm because the caretaker testified that there were icy conditions in her area, which was why she was called into work an hour earlier on the day of the accident, while plaintiff testified that the ice on which

she fell was not treated with salt or sand and did not form during the storm (*see Rivas v New York City Hous. Auth.*, 261 AD2d 148 [1st Dept 1999]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8835 The People of the State of New York, Respondent, Ind. 1778/13

-against-

Jamie Sanchez, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 14, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8836 The People of the State of New York, Ind. 903N/17
Respondent,

-against-

Wayne Green,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered June 5, 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: MARCH 28, 2019

CLERK

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

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8837-
8838N Century Indemnity Company, Index 603405/01
403087/02
Plaintiff-Respondent,

-against-

Brooklyn Union Gas Company,
Defendant-Appellant.

- - - - -

Brooklyn Union Gas Company,
Plaintiff-Appellant,

-against-

Century Indemnity Company,
Defendant-Respondent,

Munich Reinsurance America, Inc.,
Defendant.

- - - - -

Century Indemnity Company,
Plaintiff-Appellant,

-against-

Brooklyn Union Gas Company,
Defendant-Respondent.

- - - - -

Brooklyn Union Gas Company,
Plaintiff-Respondent,

-against-

Century Indemnity Company,
Defendant-Appellant,

Munich Reinsurance America, Inc.,
Defendant.

_____

Covington & Burling LLP, New York (Jay T. Smith of counsel), for Brooklyn Union Gas, appellant/respondent.

O'Melveny & Myers LLP, Washington, D.C. (Jonathan D. Hacker, of the bar of the State of Maryland and District of Columbia, admitted pro hac vice, of counsel), and O'Melveny & Myers LLP, New York (Anton Metlitsky of counsel), for Century Indemnity Company, respondent/appellant.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 16, 2018, which granted Century Indemnity Company's motion for summary judgment in its favor as to whether it is obligated to reimburse Brooklyn Union Gas Company for amounts that Brooklyn Union agreed in a settlement to pay for remediation of the former Metropolitan manufactured gas plant, whether certain insurance policies issued by Century or its predecessors to Brooklyn Union or its predecessors require a pro rata allocation of losses, and whether the per-occurrence limits in certain of the policies are limits for the respective policies' entire terms, rather than annual per-occurrence limits, unanimously modified, on the law, to deny the motion as to the obligation to reimburse and the per-occurrence limits, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about May 8, 2018, which denied Century's motion for spoliation sanctions, unanimously affirmed, with costs.

Century's commencement of this litigation constituted a repudiation of liability under the policies for the remediation

claims against Brooklyn Union, relieving Brooklyn Union of its obligation under the policies to obtain Century's consent before agreeing to pay for remediation costs for the Metropolitan manufactured gas plant (*see J.P. Morgan Sec. Ins. v Vigilant Ins. Co.*, 151 AD3d 632 [1st Dept 2017]; *AJ Contr. Co. v Forest Datacom Servs.*, 309 AD2d 616, 617-618 [1st Dept 2003]).

Supreme Court correctly determined that the "other insurance" clauses in four of the policies do not contain "non-cumulation" or "anti-stacking" clauses and that therefore occurrences or losses spanning successive policies must be allocated pro rata across the successive policies (*see Matter of Viking Pump, Inc.*, 27 NY3d 244, 255-256, 265-267 [2016]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 223 [2002]; *Boston Gas Co. v Century Indem. Co.*, 454 Mass 337, 342-344, 361-362 [2009]). However, the policies that had multi-year terms or contained a multi-year renewal are ambiguous as to whether the per-occurrence limits were limits for the respective policies' entire terms or were annual per-occurrence limits.

Supreme Court properly concluded that Brooklyn Union was not on notice at the time that the minutes of executive conference meetings in 1951-1952 and 1988-1989 were lost or destroyed that the minutes may have been needed for future litigation (*see Strong v City of New York*, 112 AD3d 15, 22 [1st Dept 2013]), and

properly concluded that sanctions were not necessary as a matter of elementary fairness (*see Diaz v Rose*, 40 AD3d 429 [1st Dept 2007]).

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

ENTERED: MARCH 28, 2019

CLERK

Renwick, J.P., Richter, Kapnick, Kahn, Oing, JJ.

8839 Ind. 1940/15
[M-523] 4862/15
In re Sharif King, OP 174/19
Petitioner,

-against-

Hon. Neil Ross, etc.,
Respondent.

_____

Sharif King, petitioner pro se.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MARCH 28, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels,
Peter Tom
Marcy L. Kahn
Ellen Gesmer, JJ.

8617
Index 652064/17

_____x

VXI Lux Holdco S.A.R.L.,
Plaintiff-Appellant,

-against-

SIC Holdings, LLC, et al.,
Defendants-Respondents,

Flanderit Holding AB, et al.,
Defendants.
_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered July 2, 2018, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss the causes of action for breach of contract and declaratory judgment.

Proskauer Rose, LLP, Los Angeles, CA (Jonathan M. Weiss of the bar of the State of California, admitted pro hac vice, of counsel), and Proskauer Rose, LLP, New York (David W. Heck of counsel), for appellant.

Wollmuth Maher & Deutsch LLP, New York (William F. Dahill, Jay G. Safer and Mara R. Lieber of counsel), for respondents.

MANZANET-DANIELS, J.

Plaintiff's claims are not definitively contradicted by the documentary evidence. The record (to the extent there is one on this motion pursuant to CPLR 3211) demonstrates the existence of issues of fact concerning when plaintiff determined that there was a matter that might give rise to a right of indemnification so that it was required to give notice pursuant to section 8.03(a) of the parties' contract. Plaintiff's discovery of an isolated issue at the Chengdu plant in November 2015 did not trigger the Notice of Claim provision of the parties' contract as a matter of law.

Further, defendants' defense of a condition precedent is not conclusively established. Even if section 8.03(a) might be construed as a condition precedent (which is highly doubtful), there has been no showing regarding the materiality of the provision as would be necessary given that nonoccurrence of the condition would lead to a draconian forfeiture.

Early in 2014, plaintiff[1] identified defendant Symbio Investment Corp. (Symbio) as a potential acquisition target, and shortly afterward, the parties began exchanging financial and

[1]Plaintiff is the successor in interest to VXI Offshore Ltd., the purchaser under the Share Purchase Agreement. For simplicity's sake, we refer to plaintiff as the purchaser.

other information. Symbio projected its year-end EBITDA[2] to be between $7.5 and $9 million. PricewaterhouseCoopers, relying on the same data, projected EBITDA to be $8.8 million after adjustments by management. The parties relied on these projections in arriving at a purchase price of between $100 and $110 million.

On November 26, 2014, plaintiff and Symbio entered into a Share Purchase Agreement (SPA) whereby plaintiff acquired all of Symbio's shares for approximately $110 million. The transaction closed in early 2015. When fiscal year accounting was completed, Symbio's normalized EBITDA was calculated to be only $6.4 million. The understatement of expenses (and corresponding overstatement of earnings) represented approximately 45% of the EBITDA, a significant figure that plaintiff alleges would have dramatically altered the parties' negotiation of the transaction and the price paid. Symbio is alleged to have made multiple misrepresentations and false claims during the due diligence process that resulted in the misstatement of EBITDA.

In the months after closing, Symbio's existing management and finance staff continued to work for the company and to handle its affairs in China. Plaintiff did not became more involved in

[2]"EBITDA" stands for earnings before interest, taxes, depreciation, and amortization.

Symbio's operations until mid-2015, and alleges that it was hampered in getting up to speed by Symbio's existing personnel. Plaintiff alleges that Symbio's finance and management teams provided inaccurate data, did not inform incoming personnel where certain data was stored, and in at least one case deleted relevant information entirely.

Plaintiff eventually commenced an investigation into Symbio's books, records, and practices. Plaintiff alleges that between January and February 25, 2016, it obtained data from Beijing, Chengdu, Shenzhen and Guangzhou that revealed consistent underpayments of social insurance and housing taxes. On February 26, 2016, plaintiff sent a "Notice of Claim" for indemnification to the selling shareholders of Symbio pursuant to section 8 of the SPA alleging breaches of numerous representations and warranties in the SPA.

Section 8.03(a) of the SPA sets forth the procedures and requirements for the purchaser to give notice of a claim to the seller:

> "An Indemnified Party shall give the Sellers' Representative notice of any matter that an Indemnified Party has determined has given or could give rise to a right of indemnification under this Agreement, within 30 days of such determination (a '<u>Notice of Claim</u>')."

Defendants moved to dismiss the complaint pursuant to CPLR

3211(a)(1) and (a)(7). The motion court granted defendants' motion pursuant to 3211(a)(1) and did not decide whether the complaint failed to state a claim pursuant to (a)(7).

The motion court interpreted the notification provision set forth in section 8.03(a) of the SPA as a condition precedent for bringing a lawsuit which plaintiff had failed to meet as a matter of law. The court cited paragraph 55 of the initial complaint in concluding that plaintiff had come to a "determination" as to potential liability in 2015 (it should be noted that nowhere in paragraph 55 is there a reference to the year 2015 or indeed any mention of when such "determination" was made). The motion court cited paragraph 73 of the first amended complaint in finding that plaintiff had access to evidence upon which it relies to bring its claim no later than November 2015. Because a Notice of Claim was not issued until February 2016, the court dismissed plaintiff's claims for breach of contract and a declaratory judgment pursuant to CPLR 3211(a)(1).[3]

A motion to dismiss may be granted if the defendant asserts "a defense . . . founded upon documentary evidence" (CPLR 3211[a][1]). A paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous";

[3]Plaintiff does not appeal from the dismissal of the third cause of action alleging fraud.

(2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86, 87 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21–22). A court may not dismiss a complaint based on documentary evidence unless "the factual allegations are definitively contradicted by the evidence or a defense is conclusively established" (*Yew Prospect v Szulman*, 305 AD2d 588, 589 [2d Dept 2003]; *see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Here, the terms of the SPA do not "utterly refute the plaintiff's factual allegations" (*Esposito v Weiner*, 160 AD3d 928, 929 [2d Dept 2018] [internal quotation marks omitted]). Indeed, as applied to the factual allegations advanced by plaintiff in this case, the terms of section 8.03(a) of the SPA are ambiguous as to what constitutes a "determination." Further, defendant neither conclusively established its defense that section 8.03(a) operated as a condition precedent, nor refuted plaintiff's argument that, if so, the condition precedent was material to the parties so that its nonoccurrence should be excused on the ground that it would effect a forfeiture.

Rather, paragraph 55 of the initial complaint states only that plaintiff came to a determination "[a]fter further internal investigation and analysis." Notably, "2015" appears nowhere in

the paragraph, and nothing in the initial complaint supports a finding that plaintiff had made such a determination in 2015. The allegation that one Symbio employee who left in 2015 turned over some of her working materials does not support the conclusion that plaintiff thereby acquired all the information it needed to determine that it had a potential claim, much less to make such a determination contemporaneously. Ms. Yang's documents, in any event, pertained only to the city of Chengdu, and gave no indication as to the scope of any of the issues on a countrywide basis. Certainly, "determination" connotes something more than having some evidence concerning one office. At a minimum, due to the ambiguity of the term "determination" as applied to the factual allegations of the initial complaint, defendants failed to conclusively establish that a "determination" was made in 2015 so as to trigger the Notice of Claim procedure set forth in section 8.03(a).

Section 8.03(a) also sets forth specific conditions for what such a Notice of Claim must contain, namely: (1) a statement that there have been or could be indemnifiable losses; (2) a calculation or estimate of those losses; (3) the method of calculation of losses; and (4) a description "in reasonable detail" of the facts and circumstances giving rise to the losses. When reading the provision as a whole, as rules of contract

interpretation require, we must conclude that a party can only arrive at a "determination" within the meaning of section 8.03(a) when it comes to a conclusion regarding whether there are losses, calculates those losses, and assembles a reasonably detailed explanation of how those losses came about.[4] Reason would dictate that plaintiff cannot be expected to submit a Notice of Claim without assessing the information it was contractually obligated to provide in the notice. Plaintiff's factual allegations regarding Symbio's employees actively impeding investigation must also be considered. The motion court's interpretation of the provision would allow Symbio to thwart plaintiff's investigation and then blame plaintiff for failing to earlier conclude its investigation, a reductio ad absurdum.

The court also erred in construing Section 8.03(a) as an express condition precedent, as opposed to a contractual promise. A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]

[4]It is true that this enumeration of the contents of the Notice of Claim is prefaced by the language "as applicable and to the extent reasonably available to the Indemnified Party." Nonetheless, it is reflective of a certain level of expected detail in any such Notice of Claim.

[internal quotation marks omitted]). In determining whether a given clause makes an event a condition, doubtful language should be interpreted as a promise rather than an express condition, especially where a finding of express condition would increase the risk of forfeiture by the obligee (*id.* at 691). "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange" (*id.* [internal quotation marks omitted]).

Section 8.03(a) does not contain *any* conditional language, let alone "unmistakable" conditional language such as "if," "unless and until," or "null and void" (*see id.* at 688, 691). None of the cases cited by defendants supports their argument that the use of the word "shall" in section 8.03(a) is unmistakably indicative of a condition precedent (*see Dallio v Spitzer*, 343 F3d 553, 562 [2d Cir 2003], *cert denied* 541 US 961 [2004]; *Eastman Kodak Co. v Bostic*, No. 91-Civ-1797, 1991 WL 243378, *1-2, 1991 Dist LEXIS 16396, *1-7 [SD NY Nov. 14, 1991]; *First Natl. Bank of Chicago v Silver*, 73 AD3d 162, 165-166 [2d Dept 2010]). Courts are reluctant to interpret a contractual clause as a condition precedent in the absence of such unmistakable conditional language (*see e.g. EidosMedia Inc. v*

Citigroup Tech., Inc., 140 AD3d 555 [1st Dept 2016]); *DirecTV Latin Am., LLC v RCTV Intl. Corp.*, 115 AD3d 539 [1st Dept 2014]; *Su Mei, Inc. v Kudo*, 302 AD2d 740 [3d Dept 2003]). Assuming, arguendo, that Section 8.03(a) is properly construed as a condition precedent, treating it as such in this case would have draconian consequences, i.e., effectively shortening the statute of limitations for fraud from six years to 30 days, and it was error to interpret it as such with no inquiry whatsoever concerning the materiality of the provision.

Finally, defendants should not be permitted to benefit from the nonexistence of any condition precedent where it is alleged that defendants themselves have frustrated or prevented the occurrence of the condition (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 31 [1998]). "A condition precedent is linked to the implied obligation of a party not to do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.* [internal quotation marks omitted]). Thus, "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*id.* [internal quotation marks omitted]).

Accordingly, the order of the Supreme Court, New York County

(Eileen Bransten, J.), entered July 2, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for breach of contract and a declaratory judgment, should be reversed, on the law, without costs, and the motion denied.

All concur.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 2, 2018, reversed, on the law, without costs, and the motion denied.

Opinion by Manzanet-Daniels, J. All concur.

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

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

ENTERED: MARCH 28, 2019

CLERK