SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 30, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

8574 Donte Price, Index 401069/05
Plaintiff-Appellant,

-against-

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

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Thomas L. Bondy, New York, for appellant.

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

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 28, 2017, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff brought this action in 2004 alleging police misconduct arising from an incident at the three story building where his mother had an apartment and where he frequently spent the night.

On April 2, 2003, at 9:00 p.m., plaintiff left his mother's first floor apartment. As he opened the building's front door to exit, he encountered someone attempting to enter. On the other side of the door were NYPD Sergeant Michael Kelley and Detective

Josephina Lalli, both in plain clothes. Kelley and Lalli were there to patrol the building pursuant to the Trespass Affidavit Program (TAP). Plaintiff's mother's landlord had requested the TAP patrols because of drug dealing at the building.

Plaintiff did not recognize Kelley or Lalli, and he blocked the door. Plaintiff contends that neither Kelley nor Lalli identified themselves as police officers, and their badges were not visible.

For approximately six minutes plaintiff held the door preventing the officers from entering. When the officers gained entry, plaintiff and one other individual were in the building's lobby. Kelley testified that he had assumed that drug dealers had been pushing on the door to deny entry. Kelley approached plaintiff to question him. He perceived that plaintiff was "visibly shaking[,] [n]ervous," and Kelley reached out to grab plaintiff's wrist. Plaintiff slipped out of his jacket, leaving Kelley holding the jacket, and ran up the building's stairs.

At the third floor, plaintiff climbed up a ladder to the roof of the building. He made his way over the roofs of two adjacent buildings. He alleges that he was followed by the man who had attempted to grab his wrist. For his part, Kelley testified that he stopped chasing plaintiff at the ladder going up to the building's roof because he was familiar with the roof

and its lack of barriers. He testified at his deposition that he was concerned that pursuing plaintiff could place one or both of them in danger of falling off the roof.

Plaintiff testified that when he reached the roof two buildings over from his mother's, he slipped down the sloped roof and was able to catch himself at the last minute by grabbing on to the rain gutter at the building's edge.

According to plaintiff, he hung from the rain gutter by his hands, body dangling, for a total of 20 minutes. Plaintiff testified that he was unable to "pull-up" to get himself back onto the roof. According to plaintiff, for 15 of those 20 minutes, his pursuer remained standing on the same roof, or on the roof one building over, watching him. Plaintiff could tell the person had blond hair. Kelley had blond hair in 2003. Plaintiff testified that the man stood approximately 9 to 10 feet away from where plaintiff was hanging from the rain gutter. Plaintiff avers that at one point the man came over to the edge of the building and nodded and then winked at plaintiff. According to plaintiff, he yelled for help, and the man did not respond. Plaintiff gave the same description of the elapse of time at his General Municipal Law § 50-h hearing and at his deposition: for 20 minutes he held on to the rain gutter; for 15 minutes his pursuer watched him.

Plaintiff did not explain how he was able to see anything on the roof while suspended by his hands from the rain gutter, which would place his eyes approximately a foot or more below the level of the roof. He also did not explain how he was able to hang from the gutter for 20 minutes.

Plaintiff testified that he fell to the backyard below five minutes after the man left the roof. A resident of that building notified the police that someone had fallen into the yard. The police called EMS. Plaintiff was taken to a hospital, where he remained for approximately four to five months. Plaintiff alleges that he saw his pursuer soon after arriving at the hospital and that this person told plaintiff that he hadn't helped him because plaintiff had fled.[1]

Kelley testified that once a backup unit arrived he went up to the building's roof to look around, but he did not see plaintiff. He testified that the building immediately adjacent was taller than plaintiff's mother's building, and he did not attempt to scale the wall to the next building.[2] He denied that he watched plaintiff hang from a rain gutter for 15 minutes, and

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[1]Plaintiff's mother submitted an affidavit in which she asserts that she heard this conversation.

[2]That is the only direction plaintiff could have gone, as there was an empty lot on the other side.

asserted that he would have helped plaintiff had he seen him in that position. Kelley testified that the next time he saw plaintiff after the aborted chase, plaintiff was on the ground in the yard of the nearby building. There was a length of what appeared to be television cable around plaintiff and Kelley assumed that plaintiff had tried to use the cable to rappel down from the roof.

A shotgun was recovered that night by one of the officers, apparently from the apartment next to plaintiff's mother's. Plaintiff was charged with weapons possession, but this charge was dismissed the next day, on April 3, 2003, as "Lack[ing] Prosecutorial Merit." All remaining charges were dismissed at some subsequent date that is not clear from the record.

Based on these facts, plaintiff asserts nine causes of action. After discovery, defendants moved to dismiss or for summary judgment. Supreme Court granted the motion. Supreme Court incorrectly found that four causes of action had been abandoned by plaintiff. These are discussed below. We first analyze the causes of action of which Supreme Court reached the merits.

The negligence claims were correctly dismissed because Kelley's decision to pursue plaintiff was a discretionary one, and defendants are thus protected by immunity from tort liability

(*see Kinsey v City of New York*, 141 AD3d 420, 421 [1st Dept 2016], *lv denied* 28 NY3d 907 [2016]; *Valdez v City of New York*, 18 NY3d 69, 75-76 [2011]). Moreover, the complaint fails to allege any special duty owed by Kelley to plaintiff that required Kelley to rescue plaintiff after he evaded Kelley but before he fell from the rooftop (*see Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 713-714 [2017]). The excessive force claim was correctly dismissed because the complaint fails to allege that plaintiff was injured by Kelley's pushing the door open while plaintiff was pushing back or that he was arrested at that time (*see Graham v Connor*, 490 US 386, 396 [1989]).

The Fourth Amendment claim was correctly dismissed because plaintiff was not "seized" (*Brendlin v California*, 551 US 249, 254 [2007]); no seizure occurs where "the subject does not yield" (*California v Hodari D.*, 499 US 621, 626 [1991]). The Fourteenth Amendment claim was correctly dismissed because the complaint fails to allege specific facts establishing a deprivation of constitutional rights (*see Rodriguez v City of New York*, 87 AD3d 867 [1st Dept 2011]). The false arrest and imprisonment claim was correctly dismissed because the evidence submitted on the motion shows that Kelley did not restrain plaintiff, either by his ineffectual grab of plaintiff's jacket as plaintiff ran from him or at any other time.

As noted above, Supreme Court mistakenly dismissed the claims of assault, battery, "intentional infliction of personal injury," and intentional infliction of emotional distress as unopposed. Nevertheless, these claims should be dismissed either because they fail to state a cause of action or because they are not supported by the record. Nowhere in the complaint, bill of particulars or notice of claim is it alleged that plaintiff was injured in his and Kelley's struggle with the door. Thus, plaintiff's argument based on injuries he received in that struggle is a new theory of liability asserted for the first time in opposition papers, and will not be considered (*see Atkins v Beth Abraham Health Servs.*, 133 AD3d 491, 492 [1st Dept 2015]). In addition, the "intentional infliction of personal injury claim" is not a cause of action in New York State. In any event, as framed by plaintiff, it merely duplicates the assault and battery claims.

Plaintiff's claim of intentional infliction of emotional distress is not available against the City (*see Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]). His intentional infliction of emotional distress claim against Kelley fails because plaintiff's assertion that he was able to see what was happening on the roof above him is incredible as a matter of law. Plaintiff alleges that he held on to the gutter with his hands

and could not pull himself up. As this would have placed his eyes below the level of the roof, it would have been impossible for plaintiff to see someone standing on the roof 9 to 10 feet away. This untenable testimony is compounded by plaintiff's assertion that he held on to the rain gutter for a full 20 minutes. While issues of credibility are, except in rare cases, for the finder of fact to resolve, we may find testimony to be utterly incredible as a matter of law when it is "manifestly untrue, physically impossible, or contrary to common experience, and such testimony should be disregarded as being without evidentiary value notwithstanding that it is uncontradicted" (*Phillips v Katzman*, 90 AD3d 436, 436 [1st Dept 2011][internal quotation marks omitted]; *see Loughlin v City of New York*, 186 AD2d 176, 178 [2d Dept 1992][*lv denied* 81 NY2d 704 [1993]).

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

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9419 The Estate of Anthony Franzese, Index 114680/10
Plaintiff-Respondent,

-against-

Zear LLC,
Defendant-Appellant,

Zenon Chernyk, et al.,
Defendants.

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Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant.

Law Office of John James, New York (John James of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about November 7, 2018, which denied defendant Zear LLC's (defendant) motion to vacate orders, same court (Richard F. Braun, J.), entered March 18, 2015, and dated August 8, 2017, to the extent they restored the negligence claim against it to active status and ordered disclosure, and to dismiss the complaint, unanimously reversed, on the law and the facts, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff's contention that defendant should have appealed from the March 2015 order is without merit, as that order did not decide a motion made upon notice (*see* CPLR 5701[a][2]; *Sholes v*

Meagher, 100 NY2d 333, 335 [2003]). Defendant acted properly by moving to vacate the March 2015 and August 2017 orders and then appealing from the denial of vacatur (*see Sholes*, 100 NY2d at 335).

The July 2014 stipulations between defense counsel and Mr. Franzese's then-lawyer, which were so-ordered in August 2014, were "express and unconditional stipulation[s] of discontinuance ..., which w[ere] sufficient to terminate the action" (*Rotter v Ripka*, 138 AD3d 567, 567 [1st Dept 2016]; *see also Teitelbaum Holdings v Gold,* 48 NY2d 51, 53, 56 [1979]). The July 2014 stipulation permitted Mr. Franzese to recommence or renew his negligence claim on or before April 24, 2015. Mr. Franzese, however, never recommenced or renewed his negligence claim. His former attorney, unable to locate his client, belatedly sought to "stay" dismissal of the action, which the court declined to sign. Accordingly, the action was discontinued as of July 21, 2014.

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9463 The People of the State of New York, Ind. 1997/15
Respondent,

-against-

Jhon Bernabel,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Robert Myers of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered June 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: MAY 30, 2019

CLERK

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

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9464 Yolanda Berenguer, Ind. 304759/09
Plaintiff-Appellant,

-against-

St. Barnabas Hospital formerly known as Home for Incurables, et al.,
Defendants-Respondents,

The Bank of New York Mellon Corporation, etc., et al.,
Defendants.

_____

Michelstein & Ashman, PLLC, New York (Richard A. Ashman of counsel), for appellant.

Garbarini & Scher, P.C., New York (Thomas M. Cooper of counsel), for respondents.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about June 29, 2018, which denied plaintiff's motion to restore the action to the trial calendar, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The trial court dismissed the action pursuant to 22 NYCRR 202.27 upon plaintiff's failure to proceed to trial. As an initial matter, plaintiff demonstrated that she did not receive adequate notice of the advanced trial date. Thus, her failure to proceed with the trial on that date did not constitute a default (*see Pelaez v Westchester Med. Ctr.*, 15 AD3d 375, 376 [2d Dept

2005]).

In any event, in light of the strong public policy of this State to dispose of cases on their merits, the court improvidently exercised its discretion in denying plaintiff's motion to restore the action to the trial calendar (*see Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]). Plaintiff demonstrated that her expert witness was unavailable to testify on the advanced trial date due to a religious holiday and that she herself had made plans to travel from out of state for the scheduled trial date (*Vera v Soohoo*, 99 AD3d 990 [2d Dept 2012]). As plaintiff was seeking merely a 24-hour adjournment of the commencement of the trial, defendants would not have been prejudiced. Moreover, defendants do not dispute that plaintiff demonstrated a meritorious cause of action by submitting an affidavit of merit and her verified complaint.

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9465-
9466 In re Rolando A.G.,
Petitioner-Appellant,

-against-

Marisol R.M.,
Respondent-Respondent.

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Larry S. Bachner, New York, for appellant.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

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Appeal from order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about August 2, 2017, which denied petitioner father's petition to suspend respondent mother's overnight and unsupervised visits with the subject child, unanimously dismissed, without costs, as moot.

Application by the father's assigned counsel to withdraw as counsel is granted (*Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). A review of the record demonstrates that there are no nonfrivolous issues which could be raised on this appeal. The interim order is not appealable as of right, as it was issued in an Article 6 proceeding, and the father did not seek leave to appeal. Furthermore, the interim order is moot since it was superceded by

a subsequent order granting the mother overnight visits and the father has not alleged any further incidents of inadequate care of the child (*see Matter of Jadalynn N. [Louis N.]*, 147 AD3d 636 [1st Dept 2017]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9467 Martha Arias, Index 151686/13
Plaintiff-Respondent, 590686/13
595306/15

-against-

Recife Realty Co., N.V., et al.,
Defendants-Respondents,

Theodore Williams Construction Co., LLC,
Defendant-Appellant.

- - - - -

Theodore Williams Construction Co., LLC,
Third-Party Plaintiff-Appellant,

-against-

Island Painting, Inc.,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

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Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant.

Saftler & Bacher, PLLC, New York (James W. Bacher of counsel), for Martha Arias, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for Recife Realty Co., N.V. and Island Painting, Inc., respondents.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered December 8, 2017, which denied defendant/third-party plaintiff's (defendant) motion for summary judgment dismissing the complaint and all claims against it and summary judgment on its indemnification claims against third-party defendant (Island

Painting), unanimously affirmed, without costs.

Plaintiff, an evening cleaner in an office building, alleges that she was injured as a result of inhaling toxic fumes from a paint stripping product used by Island Painting, a subcontractor of defendant, during a renovation project in the building.

Defendant failed to establish prima facie that it did not have actual or constructive notice of the alleged dangerous condition of the premises in time to take corrective measures (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]; *Kittelstad v Lesco Group, Inc.*, 92 AD3d 612 [1st Dept 2012]). Defendant submitted no evidence with respect to notice. However, there is evidence in the record that defendant had superintendents on site who oversaw the subcontractors' work and that defendant had a duty to notify and warn the building owner and its occupants of hazardous work undertaken on the project site so as to safeguard the building's occupants against exposure to such hazards. Thus, issues of fact exist as to whether defendant knew of the scheduled use of the paint stripper and of the product's toxicity and yet failed to warn the building owner

and occupants to prevent harm to them. These issues of fact as to negligence also preclude summary judgment in defendant's favor on its claim for contractual indemnification by Island Painting (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 181 [1990]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9468 In re Betty & Lily Corp., Petitioner, Index 159739/17

-against-

The City of New York Office of Administrative Trials & Hearings, et al., Respondents.

Sperber Denenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), for petitioner.

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

Determination of respondent Office of Administrative Trials & Hearings (OATH), dated September 21, 2017, which, after a hearing, found that petitioner illegally converted a dwelling unit classified as a permanent residence into short-term rentals, and imposed civil penalties, 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 [Shlomo Hagler, J.], entered July 9, 2018), dismissed, without costs.

The determination that petitioner illegally converted a dwelling unit classified as a permanent residence into short-term rentals in violation of Administrative Code of City of NY §§ 28-210.3 and 28-301.1 and NY City Building Code (Administrative

Code, tit 28, ch 7) § BC 907.2.8 is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). The hearing officer found the testimony of the Department of Building's investigator credible; OATH did not disagree with that finding, and there is no basis for this Court to do so (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

The civil penalties imposed on petitioner, considering the history of similar violations, are not shockingly disproportionate to the offenses (*see Matter of SCE Group Inc. v New York State Liq. Auth.*, 159 AD3d 519, 520 [1st Dept 2018]; *see also Matter of 42/9 Residential LLC v New York City Envtl. Control Bd.*, 165 AD3d 541, 542 [1st Dept 2018]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234 [1974] [penalty may reflect need for deterrence]).

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: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9469 The People of the State of New York, Respondent, Ind. 2532/10

-against-

Dexter Green, Sr., Defendant-Appellant.

_____

Cesar Gonzalez, Jr., Bronx, for appellant.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered January 15, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 10 years, unanimously affirmed.

To the extent defendant is making any claim other than that his plea was involuntary, such claim is foreclosed by his valid waiver of the right to appeal. To the extent defendant is claiming that the plea was involuntary, that claim survives an appeal waiver but it is concededly unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the plea allocution did not negate the element of criminal intent or cast any doubt on the voluntariness of defendant's plea (*see People v Toxey*, 86 NY2d 725 [1995]).

Moreover, the requisite intent could be readily inferred from defendant's factual recitation (*see People v McGowen*, 42 NY2d 905 [1977]; *see also People v Seeber*, 4 NY3d 780, 781 [2005]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9470 Richard N.J. Djeddah, Index 350094/00
Plaintiff-Appellant,

-against-

Rachel Djeddah,
Defendant-Respondent.
- - - - -
Goldman & Greenbaum, P.C.,
Nonparty Respondent.

_____

Richard N.J. Djeddah, appellant pro se.

Judd Burstein P.C., New York (G. William Bartholomew of counsel), for Rachel Djeddah, respondent.

Goldman & Greenbaum, P.C., New York (Sheldon M. Greenbaum of counsel), for Goldman & Greenbaum, P.C., respondent.

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Appeal from order, Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about October 2, 2018, which denied plaintiff's motion seeking, in effect, leave to reargue and renew a prior order of the same court and Justice, entered on or about May 24, 2017, unanimously dismissed, without costs, for failure to perfect the appeal in compliance with CPLR 5528.

The appendix submitted on this appeal, which does not contain, *inter alia*, the underlying motion papers, does not afford a basis for review of plaintiff's contentions and or a determination of the purported appeal (*see* CPLR 5528[a][5]; *Kenan v Levine & Blit, PLLC*, 136 AD3d 554 [1st Dept 2016]; *Reiss v*

Reiss, 280 AD2d 315 [1st Dept 2001]).

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: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9471 Elba Curet, Index 304373/10
Plaintiff-Appellant,

-against-

Shenelle D. Kuhlor, et al.,
Defendants,

Marcel Hopkins, et al.,
Defendants-Respondents.

_____

Hoberman & Trepp P.C., Bronx (Adam F. Raclaw of counsel), for appellant.

Fishkin & Associates, Brooklyn (Moya M. O'Connor of counsel), for Marcel Hopkins and Shantel L. Climeson, respondents.

Cheven, Keely & Hatzis, New York (Thomas Torto of counsel), for Louis A. Diaz-Colon and Roselio Vasquez-Diaz, respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 1, 2018, which granted defendants-respondents' motions for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claim of significant limitation of use of her right shoulder, and otherwise affirmed, without costs.

Plaintiff alleges that she sustained serious injuries to her right shoulder and cervical and lumbar spine as the result of a motor vehicle accident. Regarding plaintiff's right shoulder,

defendants failed to establish their prima facie entitlement to judgment as a matter of law. Defendants' radiologist, who reviewed MRIs taken shortly after the accident, found that there were no signs of post-traumatic changes attributable to the accident and opined that the conditions in the shoulder were degenerative. However, this conflicted with the findings of defendants' other experts that the injuries were causally related to the accident (*see Johnson v Salaj*, 130 AD3d 502, 503 [1st Dept 2015]). Moreover, although defendants' orthopedic surgeon examined plaintiff approximately three years after the accident and found that she had full range of motion in the shoulder, another orthopedist retained by defendants found significant limitations of the shoulder more than six years after the accident (*see Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]; *Pineda v Moore*, 111 AD3d 577 [1st Dept 2013]).

Even if defendants met their prima facie burden, plaintiff's opposition raised triable issues as to whether she sustained a significant limitation of use of the shoulder. Plaintiff submitted the affirmation of her first orthopedic surgeon who found significant limitations which required surgery, as well as evidence that she had limitations thereafter (*see Kang v Almanzar*, 116 AD3d 540, 541 [1st Dept 2014]. Furthermore, as to the issue of causation in light of defendants' radiologists'

findings of a degenerative condition, plaintiff sufficiently addressed the issue through the report of her orthopedist, who diagnosed a rotator cuff tear, visualized during surgery, disagreed with the findings of degeneration by defendants' radiologist, and concluded that, in light of the lack of previous symptoms, plaintiff's shoulder conditions were causally related to the accident (see *Perl v Meher*, 18 NY3d 208, 219 [2011]; *Giap v Hathi Son Pham*, 159 AD3d 484, 486 [1st Dept 2018]).

As to the claims of injury to the cervical and lumbar spine, defendants made a prima facie showing through their orthopedic surgeon who found full range of motion three years after the accident and their doctors' opinions that all issues had resolved. Plaintiff failed to raise a triable issue of fact since her doctors did not opine on those claimed injuries, or address why they were not attributable to a previous accident (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]).

Defendants were entitled to summary judgment dismissing the

90/180-day claim based on plaintiff's allegations and testimony that she was not confined to her bed or home for the requisite period within six months after the accident (*see Tejada v LKQ Hunts Point Parts*, 166 AD3d 436, 437-438 [1st Dept 2018]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9474-
9475 In re Eliani M.-R.,

A Child Under Eighteen Years
of Age, etc.,

Sonia M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Thomas R. Villecco, P.C. Jericho (Thomas R. Villecco of counsel), for appellant.

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

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

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Order of disposition, Family Court, New York County (Emily M. Olshansky, J.), entered on or about May 10, 2017, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about November 4, 2016, which found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The Family Court's finding that the mother neglected the subject child was supported by a preponderance of the evidence

(*see* Family Ct Act § 1046[b][i]). The evidence showed that the mother, carrying cocaine and ecstasy, traveled to New Jersey in a vehicle with her 13-year-old daughter to engage in a drug transaction (*see Matter of Evan E. [Lasheen E.]*, 95 AD3d 1114 [2d Dept 2012]; *see also Matter of Esslieny A. [Rafael A.]*, 142 AD3d 862, 862 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]). She then dropped off her husband and the child in a parking lot to wait for her, drove to an adjoining parking lot, sold cocaine to a male and gave him an ecstacy tablet. She then drove around the corner of the motel to pick up her child and husband. Before she could exit the parking lot, the police arrested her for narcotics trafficking, in front of the child, who began to cry hysterically. By placing the child in close proximity to narcotics in the car and in close proximity to narcotics trafficking as she was merely in an adjoining parking lot, the mother placed the child in imminent danger to her physical, mental and emotional well-being (*see e.g. Matter of Jaylin E.[Jessica G.]*, 81 AD3d 451 [1st Dept 2011]; *see Matter of Eugene L.[Julianna H.]*, 83 AD3d 490 [1st Dept 2011]).

In view of our affirmance of Family Court's order on the basis discussed above, we need not reach the issue of whether the Family Court properly found that the mother neglected the subject child by misusing drugs.

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9476 Lorraine Rachimi, Index 805199/15
Plaintiff-Respondent,

-against-

Howard L. Sacher, D.O.,
Defendant-Appellant,

St. Francis Hospital, et al.,
Defendants.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Nicholas Tam of counsel), for appellant.

Koss & Schonfeld, LLP, New York (Jacob J. Schindelheim of counsel), for respondent.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered March 22, 2018, which granted defendant Howard L. Sacher, D.O.'s motion to dismiss the complaint pursuant to CPLR 3126 to the extent of issuing a conditional order of preclusion, unanimously affirmed, without costs.

The determination of the motion court was a provident exercise of discretion (*see generally Gomez v New York City Hous.*

Auth., 217 AD2d 110, 114 [1st Dept 1995]). In light of the preference that matters be decided on the merits, a conditional order of preclusion was within the ambit of available remedies for the trial court to impose.

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9477 The People of the State of New York, Ind. 1409/15
Respondent,

-against-

Rogelio Rodriguez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Zucker 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 (Edward McLaughlin, J.), rendered April 28, 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: MAY 30, 2019

CLERK

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

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9478 The People of the State of New York, Ind. 3408/12
Respondent,

-against-

Lance Williams,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (John M. Briggs of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at jury trial and sentencing; Efrain Alvarado, J. at hearing on motion to set aside the verdict), rendered April 15, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 7 years, unanimously affirmed.

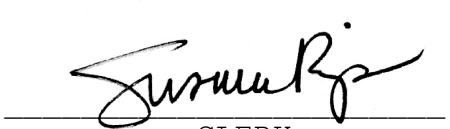
The court properly denied defendant's request for a charge on the defense of temporary lawful possession. There was no reasonable view of the evidence, viewed most favorably to defendant, to support such an instruction. Regardless of whether defendant came into possession of a pistol in an excusable manner, he "used [it] in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045 [1980]) when he fired five shots in the lobby

of a building, admittedly shooting two victims (including a bystander not claimed to be posing any threat) while defendant "just blanked out" (*see People v Aracil*, 45 AD3d 401 [1st Dept 2007], *lv denied* 9 NY3d 1030 [2008]). The fact that the jury acquitted defendant of other charges (which, we note, involved intentional rather than reckless conduct) does not warrant a different conclusion; we find it "imprudent to speculate concerning the factual determinations that underlay the verdict" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

The hearing court, to whom the trial court had referred defendant's CPL 330.30(2) motion to set aside the verdict on the ground of improper conduct toward a juror, correctly denied the motion. There is no basis for disturbing the court's finding that a juror's testimony about being threatened was incredible (*see e.g. People v Wilson*, 93 AD3d 483, 485 [1st Dept 2012], *lv denied* 19 NY3d 978 [2012]).

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

ENTERED: MAY 30, 2019



CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9479 In re Shelley H.,
Petitioner-Appellant,

-against-

Melvin Jermaine R.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about May 5, 2016, which denied petitioner mother's motion to hold respondent father in civil contempt for violating a temporary order of visitation, unanimously affirmed, without costs.

The motion court was correct in denying the mother's motion to hold the father in civil contempt. However, we disagree with the court's reasoning.

The father's counsel acknowledged that the father was aware of the order, yet failed to follow its clear and unequivocal directive that he drop off the child at a designated time and place for visitation with the mother (Judiciary Law § 753[A][3]; *McCormick v* Axelrod, 59 NY2d 574, 583 [1983]). Although the record showed that he disobeyed the temporary visitation order, the court denied the contempt motion on the basis that the father

did so "per the instructions of counsel." This was improper.

Nevertheless, the record shows that the mother's right to visitation time was not prejudiced by the father's wrongful conduct because, on January 12, 2016, the parties entered into a stipulation, which was so-ordered by the Family Court, providing the mother with "make up time." In addition, the telephonic records showed that the mother's claim that he violated the Family Court's directive that he permit her telephonic and/or Skype contact with the child was unfounded. Furthermore, even if the mother had made a sufficient contempt showing, she failed to show that she would have been entitled to reimbursement for the child's train tickets as a remedy, since the November 12, 2015 order did not unequivocally provide that she could remove the child from New York State. Accordingly, her motion should have been denied on these bases (*McCormick v Axelrod*, 59 NY2d at 583).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9480 Triadou SPV S.A., Index 653462/14
Plaintiff-Respondent,

-against-

CF 135 Flat LLC, et al.,
Defendants-Appellants.

_____

Sukenik, Segal & Graff, P.C., New York (David Salhanick of counsel), for appellants.

Kravit Smith LLP, New York (Philip M. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about March 30, 2018, which declared that defendants owed post-judgment interest on the four separate judgments entered against them, unanimously affirmed, without costs.

Defendants' deposit of full payment on the judgments entered against it to a court monitored escrow account (the Monitorship Account) was not unconditional, such that it did not stop the accrual of post-judgment interest (*see Cohen v Transcontinental Ins. Co.*, 262 AD2d 189, 191 [1st Dept 1999] [absent an unconditional tender, defendant would owe plaintiff interest from the date of entry of the original judgment]; *see also Garigen v Morrow*, 303 AD2d 956 [4th Dept 2003]). Defendants' payment to the Monitorship Account was conditioned on plaintiff

relinquishing its right to pursue two additional claims for breach of contract and forego its right to post-judgment interest on those claims (*see Concert Radio, Inc. v GAF Corp.*, 159 AD2d 258 [1st Dept 1990]).

Contrary to defendants' arguments, the payment to the Monitorship Account was not a "deposit to the court," as it was not "pursuant to an order of the court, made upon motion" (CPLR § 5021[a][3]). Further, imposing post-judgment interest would not be inequitable because defendants intentionally defied court orders requiring remittance of the amounts it owed and delayed collection without proper justification.

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

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9481 In re G.P., Index 101138/17
Petitioner,

-against-

N.Y. State Division of
Human Rights, et al.,
Respondents.

_____

G.P., petitioner pro se.

Caroline J. Downey, State Division of Human Rights, Bronx (Michael K. Swirsky of counsel), for N.Y. State Division of Human Rights, respondent.

Zachary W. Carter, Corporation Counsel, New York (Jonathan Popolow of counsel), for New York City Department of Homeless Services, respondent.

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Final order of respondent New York State Division of Human Rights (DHR), dated July 6, 2017, which dismissed petitioner's housing discrimination and retaliation complaint, unanimously confirmed, without costs, the petition denied, and the proceeding (transferred to this Court pursuant to Executive Law § 298 by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered February 7, 2018) dismissed.

DHR's findings that respondent Department of Homeless Services (DHS) did not unlawfully discriminate against or retaliate against petitioner in connection with her residency at or transfer from a homeless shelter are supported by substantial

evidence (*see Matter of White v New York State Div. of Human Rights*, 160 AD3d 448 [1st Dept 2018]; *see* Executive Law § 298). DHR's factual determinations are accorded substantial deference (*Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 630 [1988]), and the court "may not substitute its judgment for that of the agency or pass on the credibility of witnesses where conflicting evidence exists" (*State Div. of Human Rights v Dynasty Hotel*, 222 AD2d 263, 264 [1st Dept 1995]).

Contrary to petitioner's contention, the Commissioner of DHR, or her designee, "is not required to adhere to the ALJ's findings of fact or credibility, and [is] free to reach her own determination, so long as it [is] supported by substantial evidence" (*Matter of Hartley Catering, Inc. v New York State Div. of Human Rights*, 66 AD3d 1022, 1023 [2d Dept 2009] [internal quotation marks omitted]). Nor was the Commissioner, or her designee, required to recuse herself (*see* 9 NYCRR 465.17[c][3]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9482N-
9482NA

Christopher Sakala,
Plaintiff-Respondent,

-against-

Bank of New York Mellon formerly known as
The Bank of New York, as Trustee
on behalf of CIT Mortgage Loan Trust
2007-1,
Defendant-Appellant.

Index 300309/16E

_____

Cohn & Roth, LLC, Mineola (Kevin T. MacTiernan of counsel), for appellant.

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Order, Supreme Court, Bronx County (Doris Gonzalez, J.), entered on or about September 7, 2017, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and defendant's motion granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about January 19, 2018, which, inter alia, denied defendant's cross motion for reargument and renewal, unanimously dismissed, as academic.

Plaintiff financed the purchase of the subject property, and after a series of assignments, the note and mortgage was assigned to defendant. In 2010, defendant commenced a foreclosure action alleging that plaintiff had failed to pay the June 1, 2009 installment on the loan, and every payment thereafter. The foreclosure action became final after the entry of judgment of

foreclosure and the valid sale of the property at auction (*see Dulberg v Ebenhart*, 68 AD2d 323, 327 [1st Dept 1979]; *Long Is. Sav. Bank v Mihalios*, 269 AD2d 502, 503 [2d Dept 2000]).

This action, seeking return of the property upon a purported theory of wrongful foreclosure is conclusively barred by res judicata because the only issue sought to be litigated, rightful ownership of the subject property, was conclusively determined by the judgment in the foreclosure action, which plaintiff never sought to vacate (*see Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]; *Matter of Hunter*, 4 NY3d 260, 269-270 [2005]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9483N Phillip Gaynor, as Administrator of the Estate of Ronald R. Johnson,
Plaintiff-Respondent,

-against-

Mount Sinai Beth Israel Medical Center, et al.,
Defendants-Appellants,

Neil Jeffrey Zilberg, M.D., et al.,
Defendants.

Index 23218/14E

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McAloon & Friedman, P.C., New York (Roya Namvar of counsel), for Mount Sinai Beth Israel Medical Center, appellant.

Bartlett LLP, Mineola (Robert G. Vizza of counsel), for Plancher Orthopaedics & Sports Medicine, PPLC and Kevin Plancher, M.D., appellants.

Vigorito, Barker, Patterson, Nicholas & Porter, LLP, Valhalla (Leilani Rodriguez of counsel), for R.N. Network and C.H.G. Health Care Services, appellants.

Levine & Gilbert, New York (Harvey A. Levine of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 23, 2018, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to quash a subpoena served on Sing Sing Correctional Facility, unanimously reversed, on the law and the facts, without costs, and the matter remanded for in camera inspection of the requested employment records.

Defendants met their burden of demonstrating a "sufficient basis" to warrant in camera review of the decedent's employment records (*see* Civil Rights Law § 50-a[2]-[3]; *Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 563 [2018]). Plaintiff put the decedent's employment history directly at issue in this wrongful death action by making a claim for lost future earnings (*see Maglaras v Mt. Sinai Hosp.*, 107 AD2d 605, 606 [1st Dept 1985]; *Blake v Wyckoff Hgts. Hosp.*, 68 AD2d 896 [2d Dept 1979]; *see also generally Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668 [1991]).

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

ENTERED: MAY 30, 2019

CLERK

Friedman, J.P., Gische, Webber, Gesmer, Moulton, JJ.

9484N Eurocraft Millwork, Inc., et al., Index 654311/12
Plaintiffs-Appellants,

-against-

B&B Construction, Inc., et al.,
Defendants-Respondents.

_____

Sheats & Bailey, PLLC, Liverpool (Jason B. Bailey of counsel), for appellants.

Pick & Zabicki, LLP, New York (Eric C. Zabicki of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melissa Crane, J.), entered July 26, 2018, which denied plaintiffs Eurocraft Millwork, Inc. and McEvoy Interiors, Inc.'s motion to amend the complaint, unanimously affirmed, without costs.

Inasmuch as the claim against defendants' counsel alleging disbursement of trust funds in violation of Lien Law article 3A is time barred (*see* Lien Law § 77[2]), leave to add it to the complaint was properly denied (*see Tabolt v KMZ Enters.*, 52 AD2d 995 [3d Dept 1976], *affd* 43 NY2d 687 [1977]; *MBIA Ins. Corp. v*

Greystone & Co., Inc., 74 AD3d 499 [1st Dept 2010]). Further, the relation-back doctrine does not apply here (*see Higgins v City of New York*, 144 AD3d 511, 513 [1st Dept 2016]).

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

ENTERED: MAY 30, 2019

CLERK

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

9488-
9489 Index 25352/14E

Lambert Robinson, etc.,
Plaintiff-Appellant,

-against-

Shirley W. Nelson, et al.,
Defendants,

Louis M. Eisen, et al.,
Defendants-Respondents.

_____

Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, New York (Richard M. Steigman of counsel), for appellant.

Garson & Jakub LLP, New York (Michael J. Morris of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered November 28, 2018, which, to the extent appealed from, denied plaintiff's motion for leave to renew defendants Louis M. Eisen and Hudson Valley Radiology Associates, PLLC's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law and the facts, without costs, plaintiff's motion granted, and, upon renewal, defendants' motion for summary judgment denied except as to the claim for loss of consortium. Appeal from order, same court and Justice, entered July 19, 2018, which granted defendants' motion, unanimously dismissed, without costs, as academic.

The motion court improvidently exercised its discretion in declining to grant plaintiff leave to renew upon his presentation of supplemental expert submissions (*see Arabesque Recs. LLC v Capacity LLC*, 45 AD3d 404, 405 [1st Dept 2007]). The record shows that any deficiencies in the initial submissions were due to counsel's inadvertent oversight, and defendants demonstrated no prejudice from the delay caused by counsel's failure.

Summary judgment is precluded by the parties' conflicting expert submissions, which present issues of fact as to whether defendants departed from accepted medical practice and whether any departure proximately caused the decedent's injuries (*see Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]).

However, the claim for loss of consortium cannot be maintained, because the alleged malpractice occurred before plaintiff and the decedent were married (*Anderson v Eli Lilly & Co.*, 79 NY2d 797 [1991]).

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

ENTERED: MAY 30, 2019

CLERK

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

9490 In re Twania B.,
Petitioner-Respondent,

-against-

James A.B.,
Respondent-Appellant.

_____

Daniel R. Katz, New York, for appellant.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about April 29, 2016, which, upon a finding of wilful violation of a September 19, 2005 child support order, ordered respondent, the father of subject child Jayda B., committed to the NYC Department of Corrections for 90 days unless he paid $5,000 to the Support Collection Unit, unanimously affirmed, without costs.

The fact-intensive arguments presented on appeal were not raised below and are not determinable from the record, and therefore are not preserved for our review (*cf. Watson v City of New York*, 157 AD3d 510 [1st Dept 2018]). They largely turn on the question of adequacy of notice to the father of proceedings on January 11, 2016 before a Support Magistrate, during which he was found to have wilfully violated the child support order, and it is not possible to resolve this issue on the record before us.

In any event, adequacy of notice as well as the issue of

effective representation below, another issue he raises for the first time now, are academic because, during subsequent proceedings in April 2016, the court provided the father new court-appointed counsel and a full and fair opportunity to argue the issue of wilfulness.

During those proceedings, his new counsel raised no notice or effective representation issues concerning the January 11, 2016 appearance, nor tried to deny that her client had not paid child support. She acknowledged he could have sought downward modification but had not, and did not deny that he earned an income, stating only that it fluctuated and could be unpredictable.

Significantly, counsel also did not argue she needed more time to prepare for the hearing, having been appointed the day before, and the father did not try to suggest as much to the court or request an adjournment. In any event, given the

father's apparent lack of any excuse for nonpayment, any such adjournment request could have been reasonably denied (*cf. Matter of Keenan v Keenan*, 51 AD3d 1075 [3d Dept 2008]).

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

ENTERED: MAY 30, 2019

CLERK

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

9491 AC Penguin Prestige Corp., Index 656190/17
Plaintiff-Appellant,

-against-

Two Thousand Fifteen Artisanal LLC, et al.,
Defendants-Respondents.

_____

Paul T. Vink, White Plains, for appellant.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about February 20, 2018, which denied plaintiff's motion for summary judgment on its claim for breach of a settlement agreement, unanimously reversed, on the law, without costs, and the motion granted.

Defendants' bald assertion that their signatures on the settlement agreement were forged is insufficient to raise an issue of fact as to the genuineness of the signatures (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 299 AD2d 223 [1st Dept 2002], *affd* 1 NY3d 381 [2004]).

Further, documentary evidence, in the form of email correspondence, establishes that defendants were aware of their counsel's participation in settlement negotiations and the settlement. Therefore, even if he did not have actual authority,

counsel had apparent authority to bind defendants to the settlement agreement (*see Stoll v Port Auth. of N.Y. & N.J.*, 268 AD2d 379, 380 [1st Dept 2000]).

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

ENTERED: MAY 30, 2019

CLERK

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

9492-
9493 Index 850159/16

MTGLQ Investors, LP,
Plaintiff-Appellant,

-against-

Steven Wozencraft,
Defendant-Respondent.

_____

Leopold & Associates, PLLC, Armonk (Gregory M. Savran of counsel), for appellant.

Jonathan M. Landsman, New York, for respondent.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered July 7, 2017, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint with prejudice, unanimously affirmed, with costs. Order, Supreme Court, New York County (Judith N. McMahon, J.), entered July 2, 2018, which, as limited by the briefs, denied plaintiff's motion to renew, unanimously affirmed, with costs.

In moving to dismiss an action as barred by the statute of limitations (CPLR 3211[a][5]), the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017]). The burden then shifts to the plaintiff to raise a

question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period (*Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499, 500 [1st Dept 2013]), and the plaintiff must "aver evidentiary facts establishing that the action was timely or [] raise an issue of fact as to whether the action was timely" (*Lessoff v 28 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009]).

Defendant satisfied its burden with proof that plaintiff's predecessor-in-interest, Wells Fargo Bank, N.A., commenced a foreclosure action and also accelerated the underlying debt in February 2007. Once a mortgage debt is accelerated, the entire amount becomes due and the six-year statute of limitations begins to run on the entire debt (*see Wells Fargo Bank N.A. v Burke*, 94 AD3d 980, 982 [2d Dept 2012]; CPLR 213[4]). That action was dismissed without prejudice in August 2012. Thereafter, in August 2014, Wells Fargo's motion to vacate the dismissal and restore the action to the calendar was denied and no appeal was taken. Plaintiff subsequently commenced its foreclosure action in July 2016.

Plaintiff's submission of an attorney's affirmation, without documentary evidence, that the note was not in Wells Fargo's possession at the time it commenced the mortgage foreclosure

action is hearsay, and insufficient to raise an issue of fact as to whether the action was timely (*see id.; cf. Zuckerman v City of New York,* 49 NY2d 557 [1980]). As such, granting defendant's motion to dismiss on statute of limitations grounds was proper.

A court "in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]). Plaintiff's assertion that the lower court improvidently exercised its discretion in denying renewal is without merit, as plaintiff's proffer of another affidavit, also without documentary support, does nothing more than contradict earlier sworn affidavits and affirmations.

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: MAY 30, 2019

CLERK

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

9494 Dorothy Eng, etc., Index 156810/14
Plaintiff-Respondent,

-against-

NYU Hospitals Center,
Defendant-Appellant.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for appellant.

Raimond & Wong LLC, New York (Frank Raimond of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 26, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to the cause of action for negligence in maintaining and securing medical records, and otherwise affirmed, without costs.

Plaintiff's decedent first presented to defendant in early August 2013 after suffering a fall. Although she was ultimately medically cleared for discharge, one of defendant's physicians expressed concerns for the decedent's safety upon discharge. A psychiatric consultation was ordered, and it was determined that the decedent lacked the capacity to meaningfully participate in her discharge planning. This determination was corroborated by nonparty Martina Eng (Martina) - one of the decedent's daughters,

her health care proxy, and a nurse employed by defendant - who informed the decedent's treating providers that her mother was unsafe and suffering from paranoid delusions. Accordingly, the decedent was involuntarily committed for psychiatric treatment and observation, which ultimately lasted more than 15 days. During this time, Martina used her credentials as an employee of defendant to gain access to her mother's medical records without authorization, and used the records in support of her application to obtain guardianship over her mother. Martina was later reprimanded by defendant for obtaining the decedent's medical records without authorization.

When the decedent eventually was transferred from defendant to a hospice facility, she named plaintiff – another daughter and the executor herein – as her health care proxy. Plaintiff confirmed that the decedent was not suffering from a psychiatric condition, and corroborated certain of the decedent's statements, which previously had been thought to be paranoid ideations. The decedent was discharged shortly thereafter, and passed away several months later from conditions unrelated to this action. Plaintiff commenced this action asserting causes of action for negligence in the maintenance of the decedent's medical records, negligent hiring, training, supervision, and retention of Martina, and false imprisonment.

The cause of action for negligence in maintaining and securing the decedent's medical records should have been dismissed, because the record demonstrates that Martina's improper gaining of access to the decedent's medical records was in furtherance not of defendant's business but of her own personal pursuit of guardianship over her mother (*see Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 484-85 [2014]; *see also N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252-53 [2002]). There is no evidence that defendant stood to benefit from Martina's being named the decedent's guardian.

As to the cause of action for negligent hiring, training, supervision, and retention of Martina, issues of fact exist as to whether defendant knew or should have known that Martina would use her credentials as an employee to gain access to her mother's medical records without authorization (*see Doe*, 22 NY3d at 485). Martina had made it clear to defendant's staff that she was pursuing guardianship over her mother, and she made inquiries to several members of staff about obtaining her mother's medical records to use as support for her guardianship application.

As to the cause of action for false imprisonment, defendant failed to establish prima facie that it complied with the procedural requirements of the Mental Hygiene Law concerning

involuntary commitment and therefore that its commitment of the decedent was privileged as a matter of law (*see Welch v County of Westchester*, 150 AD2d 371, 371-372 [2d Dept 1989]; *Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]).

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

ENTERED: MAY 30, 2019

CLERK

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

9495 The People of the State of New York, Ind. 3365/14
Respondent,

-against-

Siaka Coulibaly,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Brenton T. Culpepper of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J. on speedy trial motion; Daniel P. Conviser, J. at jury trial and sentencing), rendered August 9, 2016, convicting defendant of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously reversed, on the law, and the indictment dismissed.

Defendant was denied the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-14 [1998]; *Strickland v Washington*, 466 US 668 [1984]) with regard to his speedy trial motion. In his CPL 30.30(2) motion for defendant's release, defense counsel mistakenly calculated 99 days of includable time, instead of the correct calculation of 103 days. The People conceded the 99 days, and the court released defendant. When

defense counsel thereafter moved to dismiss the indictment under CPL 30.30(1), defense counsel and the prosecutor repeated that error in calculating the delay as 99 days, with the court ultimately finding only 181 days of includable time and denying the motion. Had counsel correctly calculated 103 days of chargeable time, the includable time would have totaled 185 days, rather than 181, and defendant's speedy trial claim would have been meritorious. We have considered and rejected the People's arguments concerning the 63-day period following defendant's uncontested motion for release from custody, which the court found to be includable in its ultimate calculation on the dismissal motion.

Thus, counsel's error denied defendant the relief of dismissal to which he was entitled, and constituted ineffective assistance (*see e.g. People v Devino*, 110 AD3d 1146, 1149 [3d Dept 2013]). We exercise our discretion to dismiss the indictment, rather than ordering further speedy trial proceedings

with new counsel, in light of our finding that the indictment would have been dismissed on speedy trial grounds but for the ineffective assistance (*see e.g. People v Turner*, 10 AD3d 458, 460 [2d Dept 2004], *affd* 5 NY3d 476 [2005]).

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

ENTERED: MAY 30, 2019

CLERK

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

9496-
9497 Index 650438/09

Mutual Benefits Offshore Fund, Ltd.,
Plaintiff-Respondent,

-against-

Emanuel Zeltser, et al.,
Defendants-Appellants,

Alexander Fishkin, et al.,
Defendants.

- - - - -

Kayley Investments, Ltd.,
Nonparty Appellant.

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Heller Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for Emanuel Zeltser, Sternik & Zeltser, M.E. Seltser P.C. and Kayley Investments, Ltd., appellants.

Morrison Cohen, LLP, New York (Terence K. McLaughlin of counsel), for Mark Zeltser and Interel Corporation, appellants.

Kruzhkov Russo PLLC, New York (Martin P. Russo of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 23, 2018, which, insofar as appealed from, granted plaintiff's motion for summary judgment as to liability on the causes of action for conversion and breach of fiduciary duty as against defendants Emanuel Zeltser (Emanuel) and Sternik & Zeltser (S&Z) and the cause of action for unjust enrichment as against Emanuel and defendant Interel Corporation, denied defendants' motions for summary judgment dismissing the above

causes of action, and granted plaintiff's motion to vacate a so-ordered April 2010 stipulation, unanimously modified, on the law, to deny plaintiff's motion, and to grant S&Z's motion as to conversion and unjust enrichment and Interel and defendant Mark Zeltser's (Mark) motion as to unjust enrichment, and otherwise affirmed, without costs. Order, same court and Justice, entered March 28, 2018, which authorized the release to plaintiff's counsel of funds previously escrowed by the April 2010 stipulation, unanimously affirmed, with costs.

Although Kayley Investments, Ltd.[1] was not a party to the action, it may appeal (*see Auerbach v Bennett*, 64 AD2d 98, 104 [2d Dept 1978] [although CPLR 5511 refers to aggrieved *parties*, "the statute has not been so narrowly construed" as to be limited to parties], *affd in relevant part, mod on other grounds* 47 NY2d 619, 627 [1979]; *see also Three Amigos SJL Rest., Inc. v 250 W. 43 Owner LLC,* 144 AD3d 490 [1st Dept 2016]).

The court correctly denied Emanuel and S&Z's motion for summary judgment dismissing the breach of fiduciary duty claim as against them. These defendants contend that they were counsel for Kayley Ltd. However, they are barred by law of the case from

[1] For purposes of this appeal, we assume, without deciding, that Kayley Investments, Ltd. is the same as Kayley Investments N.V.; we will refer to both as "Kayley."

denying that they acted as plaintiff's counsel in an action brought by the Securities and Exchange Commission against Mutual Benefits Corporation (MBC) (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]; *Mutual Benefits Offshore Fund v Zeltser*, 93 AD3d 504 [1st Dept 2012]). Attorneys have a fiduciary relationship with their clients (*see e.g. Matter of Galasso*, 19 NY3d 688, 694 [2012]). "Few, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds" (*id.*).

Emanuel, S&Z and defendant M.E. Seltser, P.C. (Seltser) (collectively, the E. Zeltser defendants) contend that plaintiff was barred by a federal injunction from receiving any money derived from MBC's fraud. However, even if this were true, the fact that plaintiff could not receive the $4.3 million at issue does not justify giving it to Seltser and/or Kayley; instead, S&Z should have kept it in its escrow account.

Moreover, the above argument depends on showing that plaintiff's principals were convicted of fraud and enjoined from receiving any money derived from the fraud. In other words, it depends on showing that nonparty Steven Steiner still owns 75% of nonparty Triangle International Management, Ltd., which controls plaintiff. However, the Bankruptcy Court for the Southern District of Florida found that Steiner owns only one share of

Triangle and that nonparty Meridian Asset Management Ltd., which is owned by nonparty W. Shaun Davis, owns the other 4,999 shares; this finding was affirmed by the U.S. District Court and the Eleventh Circuit (*see In re Mutual Benefits Offshore Fund, Ltd.*, 508 BR 762 [SD Fla 2014], *affd sub nom. In re Fisher Is. Invs., Inc.*, 778 F3d 1172 [11th Cir 2015]).

The E. Zeltser defendants and Kayley contend that they should not be collaterally estopped by the Bankruptcy Court's findings. Insofar as control of plaintiff is concerned, this argument is unavailing. The E. Zeltser defendants and Kayley were in privity with the parties that the bankruptcy courts called the Zeltser Group, and which the E. Zeltser defendants also call the Kay Faction, after former defendant Joseph Kay (*see generally Buechel v Bain*, 97 NY2d 295, 304 [2001], *cert denied* 535 US 1096 [2002]).[2] The issue of who controlled plaintiff was necessarily decided in the bankruptcy proceeding, and the Zeltser Group/Kay Faction had a full and fair opportunity to litigate that issue (*see generally Tydings v Greenfield, Stein & Senior,*

[2] The preclusive effect of the bankruptcy proceeding should be governed by federal – not New York – law (*see e.g. Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 69 [2018]). However, the participants in this appeal mostly cite New York cases, and no one challenges plaintiff's assertion that Eleventh Circuit law on collateral estoppel is similar to New York's (*see also In re Halpern,* 810 F2d 1061, 1064 [11th Cir 1987]).

LLP, 11 NY3d 195, 199 [2008]).

The E. Zeltser defendants contend that the claims against them should be dismissed because Kayley rescinded its investment in plaintiff. However, even if there is an issue of fact as to whether Kayley rescinded, the E. Zeltser defendants cite no precedent for the proposition that, once Kayley rescinded, it was entitled – ahead of anyone else (e.g., plaintiff's lender[s]) – to funds nominally belonging to plaintiff. Moreover, "[t]he well-settled rule is that ownership of capital stock is by no means identical with or equivalent to ownership of corporate property" (*Matter of Fontana D'Oro Foods [Agosta]*, 65 NY2d 886, 888 [1985] [internal quotation marks omitted]). Therefore, although Kayley owns most of plaintiff's Class B shares, it is not entitled to funds held in escrow for plaintiff.

The E. Zeltser defendants and Kayley note that the corporate form can and should be disregarded where necessary to prevent fraud or achieve equity (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). However, the E. Zeltser defendants and Kayley are not seeking to hold plaintiff's owners liable for an obligation of plaintiff (*see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]).

Plaintiff's motion for summary judgment should be denied, because there is an issue of fact as to whether plaintiff

authorized the E. Zeltser defendants to return the funds to Kayley. Defendant Alexander Fishkin submitted an affirmation saying that Davis told him that monies recovered by S&Z should be turned over to Kayley. Davis's affidavits denying this raise an issue of credibility not to be resolved on a motion for summary judgment (*see e.g. Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

If Davis – plaintiff's authorized representative, according to the bankruptcy courts (*see e.g. Fisher Is.*, 778 F3d at 1184-1185) – said that S&Z (plaintiff's then escrow agent) could turn $4.3 million over to Kayley, then Emanuel and S&Z could hardly have breached their fiduciary duties by obeying their then client's (plaintiff's) instructions. Similarly, if Davis authorized the funds' release, then Emanuel and Seltser would not have been acting "without authority" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49 [2006]), as required for conversion.

The conversion claim against S&Z should be dismissed for the simple reason that this defendant did not exercise control over plaintiff's funds (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]).[3] Plaintiff alleges that, instead of going

[3] For purposes of this appeal, we will treat S&Z and Seltser as separate entities, because plaintiff sued them

into S&Z's escrow account, the $4.3 million went into *Seltser's* (non-escrow) accounts. The undisputed evidence shows that the money went into Seltser's accounts.

Given the existing issue of fact as to whether plaintiff authorized the release of the funds to Kayley, plaintiff's motion for summary judgment on its unjust enrichment claim against Emanuel and Seltser should also be denied. If plaintiff authorized the release, then it can hardly be "against equity and good conscience to permit" Emanuel – or, more precisely, Seltser – to retain the funds (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks omitted]), as an affiliate of S&Z has already transferred the equivalent of $4.3 million to Kayley.

S&Z's motion for summary judgment dismissing the unjust enrichment claim should be granted because there is no evidence that S&Z – as opposed to Seltser or Emanuel – was enriched (*see Abacus*, 75 AD3d at 473; *see also Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421-422 [1972], *cert denied* 414 US 829 [1973]).

Similarly, the unjust enrichment claim should be dismissed as against Mark and Interel because there is no issue of fact as

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separately. However, S&Z may be a mere "doing business as" name for Seltser, as Emanuel says Seltser is "a/k/a" S&Z.

to whether "the benefit still remains with" those defendants (*Paramount*, 30 NY2d at 421).

Mark and Interel's motion for summary judgment dismissing the conversion claim was correctly denied. These defendants assert that they did not come into possession of the funds in Seltser's account through tortious or unlawful means. Neither a tortious taking nor bad faith is an element of the cause of action (*Pokoik v Gittens*, 171 AD2d 470, 471 [1st Dept 1991]; *see also Boyce v Brockway*, 31 NY 490, 493 [1865]). However, whether Mark and Interel's possession was lawful is relevant, because a lawful possessor cannot be charged with conversion until after a demand and refusal to return the property (*MacDonnell v Buffalo Loan, Trust & Safe Deposit Co.*, 193 NY 92, 101 [1908]; *see also e.g. Johnson v Law Off. of Kenneth B. Schwartz*, 145 AD3d 608, 612 [1st Dept 2016]). There is a triable issue of fact as to whether Mark and Interel came lawfully into possession of the funds. The money did not go directly from plaintiff to Mark and Interel (*cf. Apex Ribbon Co. v Knitwear Supplies*, 22 AD2d 766, 766-767 [1st Dept 1964]; *Cutler-Hammer, Inc. v Troy*, 283 App Div 123, 124 [1st Dept 1953]). Instead, it first went into Seltser's accounts. This is akin to the situation described in *Boyce*, where defendants who "obtained ... goods fairly from a person whom they had reason to think was the true owner" – in the instant action,

Seltser – could still be liable for conversion (31 NY at 493 [internal quotation marks omitted]).

Mark and Interel note that they did not use any of the funds for themselves. However, "whether or not [defendants] derive personal advantage is immaterial" for conversion (*Mendelson v Boettger*, 257 App Div 167, 170 [2d Dept 1939], *affd* 281 NY 747 [1939]).

Collateral estoppel does not bar Kayley from arguing that it is the true owner of plaintiff's assets, because the issue in the bankruptcy proceeding was who *controlled* plaintiff (i.e., who owned its *Managers* Shares, which have voting rights but no claim to its assets), not who owned plaintiff's assets (*see generally City of New York v Associated Ambulance Serv.*, 149 AD2d 336, 338-339 [1st Dept 1989]). Nevertheless, we uphold the March order and the portion of the January order vacating the April 2010 stipulation and permitting the funds from the joint escrow account to be released to plaintiff's counsel. At the time the stipulation was entered into, S&Z (as trustee for Kayley) and Kay had asserted counterclaims; thus, as the stipulation states, the insurance policies that are yielding the monies held in the joint escrow account were the subject of conflicting claims as to ownership. However, the counterclaims were dismissed in November 2010 (*see* 93 AD3d at 504-505), the court denied Kayley's motion

to intervene in March 2012, and Kayley did not appeal. Thus, there are no longer conflicting claims to ownership of the policies (and the money they yield) in the instant action. The $4.3 million that was supposed to go into S&Z's escrow account is separate from the money in the joint escrow account.

We have considered Kayley's remaining arguments and find that they do not warrant the relief Kayley seeks (releasing all, or at least two-thirds, of the money in the joint escrow account to it).

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

ENTERED: MAY 30, 2019

CLERK

Sweeny, J.P., Richter, Manzanet-Daniels, Tom, Oing, JJ.

9498 Kirsys Gallardo, Index 805199/12
Plaintiff-Respondent,

-against-

Akuezunkpa Oliaku Ude, M.D.,
et al.,
Defendants-Appellants.

_____

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

Rosenblatt & Frasciello, LLC, New York (Giulio S. Frasciello of counsel), for respondent.

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Order, Supreme Court, New York County (Judith M. McMahon, J.), entered on or about July 19, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants made a prima facie showing of entitlement to judgment as a matter of law. They submitted the affirmation of an expert surgeon, who averred that the treatment provided to plaintiff comported with good and accepted practice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Coronel v New York City Health & Hosps. Corp.*, 47 AD3d 456 [1st Dept 2008]). The complications resulting from plaintiff's bariatric surgery were well-known and common risks, and were addressed in the consent

executed by plaintiff prior to surgery.

In opposition, plaintiff failed to raise an issue of fact. The claims of plaintiff's expert that the surgery, and the subsequent procedure, were incorrectly performed, are unsupported by the evidence, and the allegations of a remaining obstruction are contradicted by diagnostic test results (*see Vargas v St. Barnabas Hosp.*, 168 AD3d 596 [1st Dept 2019]; *Brown v Bauman*, 42 AD3d 390, 392 [1st Dept 2007]).

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

ENTERED: MAY 30, 2019

CLERK

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

9499 In re Wilda C.,
Petitioner-Appellant,

-against-

Miguel R.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about July 11, 2017, which dismissed respondent mother's petition seeking modification of a custody order, unanimously affirmed, without costs.

Application by the mother's assigned counsel to withdraw as counsel is granted (*see Anders v California,* 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). A review of the record demonstrates that there are no nonfrivolous issues which could be raised on this appeal. We agree with counsel that the

court lacked subject matter jurisdiction to entertain the mother's petition (*see* Domestic Relations Law § 76-a[1]; *Matter of Renaldo R. v Chanice R.*, 131 AD3d 885 [1st Dept 2015]).

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

ENTERED: MAY 30, 2019

CLERK

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

9500 The People of the State of New York, Ind. 403/15
Respondent,

-against-

Allan Sloan,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen 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 (Neil Ross, J.), rendered November 29, 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: MAY 30, 2019

CLERK

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

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

9501 U.S. Bank National Association, etc., Plaintiff-Appellant, Index 381054/07

-against-

Lascell Spence also known as Lacell A. Spence, Defendant-Respondent,

Federal National Mortgage Association, et al., Defendants.

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Parker Ibrahim & Berg LLP, New York (Anthony Del Guercio of counsel), for appellant.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about February 21, 2017, which granted the Estate of Novlett Spence and defendant Lascell Spence's motion to vacate a judgment of foreclosure and sale, entered June 15, 2016, vacated an "Order Vacating Order of Reference and Granting Second Order of Reference," entered June 10, 2015, stayed the sale of the subject property until further order of the court, and ordered that a substitution for decedent Novlett Spence be made a party to the action, unanimously affirmed, with costs.

In a mortgage foreclosure action, a decedent who executed a note and mortgage on real property is not a necessary party if the decedent made an absolute conveyance of all of her interest

in the property and if the plaintiff does not seek a deficiency judgment against the decedent's estate (*see Wells Fargo Bank, NA v Emma*, 161 AD3d 1131, 1132 [2d Dept 2018]; *Countrywide Home Loans, Inc. v Keys*, 27 AD3d 247, 247 [1st Dept 2006], *lv denied* 7 NY3d 702 [2006]; *HSBC Bank USA v Ungar Family Realty Corp.*, 111 AD3d 673, 673-674 [2d Dept 2013]; *Waterfall Victoria Master Fund, Ltd v Dingilian*, 92 AD3d 593, 594 [1st Dept 2012]).

Here, the judgment of foreclosure and sale contains language providing for a potential deficiency judgment against the decedent if the sale of the property did not cover the amount due to plaintiff. Accordingly, the motion to vacate was properly granted (*see U.S. Bank N.A. v Esses*, 132 AD3d 847, 848 [2d Dept 2015]; *cf. Waterfall Victoria Master Fund* at 594; *Countrywide Home Loans* at 247).

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

ENTERED: MAY 30, 2019

CLERK

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

9502 Capital Business Credit LLC, Index 655171/16
Plaintiff-Appellant-Respondent,

-against-

Tailgate Clothing Company, Corp.,
Defendant-Respondent-Appellant.

_____

Hahn & Hessen, LLP, New York (John P. Amato of counsel), for appellant-respondent.

Chipman Brown Cicero & Cole, LLP, New York (Adam D. Cole of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about July 25, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to dismiss defendant's equitable recoupment affirmative defense and for summary judgment on the account stated claim, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff purchased the accounts receivable of nonparty Rio Asset (Asset), the assignee of nonparty Rio Garment (Garment), which manufactured clothing under an agreement with defendant, a supplier to retailers under a licensing agreement with nonparty College Licensing Company (CLC). Defendant then paid plaintiff for 33 invoices, leaving an additional 12 outstanding. After Garment closed its factory in Honduras without paying the workers

severance pay, contrary to Honduran law, defendant paid a sum of money to the Worker Rights Consortium (WRC) for severance for the workers. Plaintiff seeks damages related to the 12 unpaid invoices. Defendant claims that it is entitled to a credit for the amount it paid to WRC, pursuant to the doctrine of equitable recoupment.

Summary judgment on the account stated claim is precluded by an issue of fact as to the timeliness of defendant's objection to the unpaid invoices (*see Peterson v Schroder Bank & Trust Co.*, 172 AD2d 165 [1st Dept 1991]). It is undisputed that Garment did not violate its manufacturing agreement with defendant until August 2016, when it terminated the workers in Honduras. Thus, defendant had no grounds for objecting to the invoices and/or purchase orders until that time. Moreover, plaintiff conceded that 8 of the 12 invoices for which it seeks payment were not yet due at the time of Garment's alleged breach.

The equitable recoupment defense was correctly sustained, as it is based on the same transactions that were subject to defendant's licensing agreement with CLC and its manufacturing agreement with Garment, which required compliance with Honduran law (*see* CPLR 203[d]; *182 Franklin St. Holding Corp. v Franklin Pierrepont Assoc.*, 217 AD2d 508, 509 [1st Dept 1995]; *see* UCC 9-404[a], [b]). While Asset (Garment's assignee) was not a party

to those agreements, as the motion court observed, the transactions could not have occurred without the agreements and CLC's consent to permit Garment to manufacture the licensed goods, based on Garment's commitment to comply with the local law (*see James Talcott, Inc. v Winco Sales Corp.*, 14 NY2d 227, 233 [1964]). Whether the parties intended to treat the licensing agreement, the manufacturing agreement and the distribution agreement as mutually dependent contracts, "the breach of one undoing the obligations under the other[s]," is a question of fact (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]).

Plaintiff contends that defendant waived and should be estopped to assert a recoupment defense based on its course of conduct of accepting and paying invoices that showed Asset as the seller. However, the invoices that were paid by defendant were on Garment's letterhead, and defendant was not bound by the characterization of Asset as the seller in the distribution agreement between Garment and Asset (*see Anonymous v Anonymous*, 150 AD3d 91, 94 [1st Dept 2017]).

It is unclear from the record whether the four purchase orders submitted by defendant in support of its motion reflect all the items listed on the 12 invoices. For that reason and because of the above-discussed issues of fact as to the equitable recoupment defense, summary judgment in defendant's favor was

correctly denied.

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: MAY 30, 2019

CLERK

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

9503 In re Leilany R., and Others,

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

Kicha C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondent.

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

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Order, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about June 8, 2018, which denied respondent mother's motion to modify an order of disposition finding educational neglect, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the mother's motion to vacate the order finding educational neglect, pursuant to Family Court Act § 1061, for failure to demonstrate that the relief sought promoted the best interests of

the children (*see Matter of Frankie S. [Katiria Y.]*, 155 AD3d 559 [1st Dept 2017]). The mother never requested a hearing, nor was one warranted (*id.*). The submissions and supporting documentation showed that the mother failed to ensure that the children attended school regularly and timely during the supervisory period prior to the court's determination of her motion.

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

ENTERED: MAY 30, 2019

CLERK

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

9504-
9505 Index 450585/16

In re The Board of Education of the City School District of the City of New York,
Petitioner-Respondent,

-against-

Shelley Jones Crooks,
Respondent-Appellant.

_____

Glass & Hogrogian LLP, New York (Jordan F. Harlow of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (D. Alan Rosinus, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 31, 2017, which, as modified by order, same court and Justice, entered January 16, 2018, granted the petition of the Board of Education of the City School District of the City of New York (the Board) to vacate an arbitration award and penalty, and remitted the matter to an appropriate arbitrator on the panel selected to hear cases involving allegations of teacher misconduct, unanimously affirmed, without costs.

The court correctly vacated the arbitration award in this disciplinary action involving a tenured teacher, which was subject to compulsory arbitration (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 ["judicial

scrutiny is stricter (for compulsory arbitration) than for a determination rendered (after) ... voluntary arbitration"]). The record supports the court's conclusion that the Hearing Officer's opinion and award was not only irrational, but also arbitrary and capricious (CPLR 7511[b]). The administrative record supports the court's determination to sustain all four specifications in the Board's complaint, two of which were based upon respondent's 2014 conduct and statements, which threatened physical violence and placed at least one child in fear of his physical safety. The court's conclusion to uphold the third specification of misconduct was similarly appropriate because the students who were the object of respondent's 2015 racist comments could not have been "unaffected" by the statements, which were far from "benign" or "uplifting," as characterized by the arbitrator.

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

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

ENTERED: MAY 30, 2019

CLERK

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

9506 The People of the State of New York, Ind. 1285/16
Respondent,

-against-

Darnell Riddles,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered April 19, 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: MAY 30, 2019

CLERK

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

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

9507-
9507A Index 406619/07

Mauray Realty Co., et al.,
Plaintiffs-Appellants,

-against-

Advantage Plastics, Inc.,
Defendant-Respondent.

_____

Weiss Zarett Brofman Sonnenklar & Levy, P.C., New Hyde Park (Michael J. Spithogiannis of counsel), for appellants.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 19, 2018, bringing up for review an order, same court and Justice, entered April 19, 2017, amended by order, same court and justice, entered April 20, 2018, to clarify that it applied to both plaintiffs, which, to the extent appealed from, limited in part the amount awarded at trial to the rent due before defendant was locked out of the premises, unanimously affirmed, without costs. Appeal from the aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment and as abandoned.

Although plaintiffs landlords argue that changing the locks did not amount to an eviction, the Court of Appeals states plainly in *Barash v Pennsylvania Term. Real Estate Corp.* (26 NY2d 77 [1970]), "where the landlord changes the lock, or padlocks the door, there is an actual eviction" (*id.* at 83; *see also 3855*

Broadway Laundromat, Inc. v 600 W. 161st St. Corp., 156 AD2d 202, 203 [1st Dept 1989] [changing the locks amounts to actual eviction]). The evidence at trial showed that the landlords changed the locks, demanded that the tenant's counsel and not tenant maintain control over the key, and further demanded that the tenant seek approval before being permitted to obtain the key from its own counsel, thus constituting an eviction (*West Broadway Glass Co. v Namaskaar of Soho, Inc.*, 11 Misc 3d 144(A) [App Term, 1st Dept 2006]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: MAY 30, 2019

CLERK

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

9509N- Index 810002/13
9509NA-
9509NB-
9509NC Steven C. Horn,
Plaintiff-Respondent,

-against-

Marianne Nestor,
Defendant-Appellant,

New York City Parking Violations
Bureau, et al.,
Defendants.

_____

Reppert Kelly & Vytell, LLC, New York (Christopher P. Kelly of counsel), for appellant.

Pryor Cashman LLP, New York (Michael H. Levison of counsel), for respondent.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered on or about January 23, 2018, which, insofar as appealed from as limited by the briefs, denied defendant Marianne Nestor's motion to amend the answer (motion sequence no. 2), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 26, 2018, which, insofar as appealed from as limited by the briefs, denied defendant's motion to compel the disclosure of documents (motion sequence no. 4), unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 23, 2018, which, insofar as

appealed from, denied defendant's motion to strike certain requests to admit (motion sequence no. 8), unanimously affirmed, without costs. Order, entered on or about January 26, 2018, which, insofar as appealed from as limited by the briefs, denied defendant's motion to amend the answer (motion sequence no. 9), unanimously affirmed, without costs.

Supreme Court did not abuse its discretion by denying leave to amend the answer, as the proposed affirmative defenses and counterclaims lacked merit based on the evidence adduced during discovery (*see Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). Granting defendant's second motion to amend would also prejudice plaintiff, as the original answer submitted over four years beforehand did not challenge the contractual condition precedent to suit "specifically and with particularity" as required to "resist[] enforcement of the contract" (*1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]).

As to the document requests concerning defendant's existing counterclaims and affirmative defense under the Truth in Lending Act and the Banking Law, the disclosure of responsive documents would not uncover "facts bearing on the controversy which will assist in the preparation for trial" because defendant cannot establish her claims and defenses even with such disclosure

(*Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [1st Dept 2006], citing CPLR 3101[a]; *accord Forman v Henkin*, 30 NY3d 656, 664 [2018]).

Supreme Court properly denied defendant's motion to strike the requests for admission. Based on the evidence, plaintiff "reasonably believe[d] there c[ould] be no substantial dispute" as to the matters at issue therein (CPLR 3123[a]). In any event, Supreme Court granted defendant's request to amend her answers thereto.

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

ENTERED: MAY 30, 2019

CLERK

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

9510-
9511N Index 301915/14

Fausto Espinosa Almonte,
Plaintiff-Appellant,

-against-

KSI Trading Corporation, et al.,
Defendants-Respondents.

_____

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

Law Office of Brian Rayhill, Elmsford (David M. Heller of counsel), for respondents.

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Orders, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about September 8, 2017, and on or about December 5, 2018, which, respectively, granted defendants' motion to strike the complaint for failure to produce plaintiff for deposition, or in the alternative, to preclude plaintiff from testifying at trial as to each and every item of damages set forth in the bill of particulars, unless plaintiff was made available for deposition on or before February 28, 2018, and denied plaintiff's motion to vacate the September 8, 2017 order, unanimously affirmed, without costs.

Plaintiff commenced this action on or March 25, 2014. He was subsequently incarcerated. Pursuant to a October 14, 2014 compliance conference order, plaintiff was to be deposed on

December 12, 2014. A second compliance conference order, dated December 1, 2015, directed plaintiff's deposition to be held on or before February 2, 2016, at the location of plaintiff's incarceration. Over a year later, plaintiff was not deposed, and defendants moved to strike the complaint, or in the alternative, preclude plaintiff form testifying at trial as to each and every item of damages set forth in his bill of particulars. Defendants also noted that plaintiff's counsel had advised them that plaintiff was incarcerated in Brooklyn, New York, but through defendants' own investigation, they discovered that plaintiff was incarcerated in Miami, Florida. The court providently exercised its discretion in issuing a conditional order striking plaintiff's complaint for failure to produce plaintiff for deposition, or in the alternative, to preclude plaintiff from testifying at trial, unless plaintiff was produced by a certain time, based on plaintiff's failure to comply with the discovery orders (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010]; *Vaca v Village View Hous. Corp.*, 145 AD3d 504, 505 [1st Dept 2016]).

On January 31, 2018, the parties entered into a stipulation agreeing that plaintiff's deposition was to be conducted on or about March 31, 2018, due to plaintiff's counsel's representation that plaintiff would be transferred from the Florida facility to

either a New York or New Jersey facility. Plaintiff then moved on March 28, 2018 to vacate the court's conditional order, on the ground that instead of being transferred to New York or New Jersey, plaintiff was transferred to Oklahoma. Counsel did not demonstrate that he attempted to make plaintiff available to defendants, why plaintiff was unable to be deposed, and failed to adequately address his misrepresentation to defendants that plaintiff would be transferred to either New York or New Jersey. Accordingly, the court properly granted defendants' motion pursuant to CPLR 3126, since plaintiff's continued pattern of noncompliance with court orders warranted an inference of willful noncompliance (*see Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488, 489 [1st Dept 2010]).

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

ENTERED: MAY 30, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
Peter Tom
Troy K. Webber
Marcy L. Kahn
Anil C. Singh JJ.

8206
Index 155016/15

_____x

Curby Toussaint,
Plaintiff-Respondent-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Appellant,

Granite Construction Northeast, Inc.,
Defendant-Respondent,

Skanska USA Civil Northeast, Inc.,
et al.,
Defendants.
_____x

Cross appeals from the order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered October 24, 2017, which, to the extent appealed from, denied defendant Port Authority of New York and New Jersey's motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-9.9(a).

Segal McCambridge Singer & Mahoney, Ltd., New York (Janine J. Wong and Simon Lee of counsel), for appellant-respondent and respondent.

Sullivan Papain Block McGrath & Cannavo, New York (Brian J. Shoot of counsel), for respondent-appellant.

SINGH, J.

We are asked in this appeal to decide whether the requirement in the Industrial Code that a "designated person" operate a power buggy is sufficiently specific to support a claim under Labor Law § 241(6). We find that the requirement is specific and, upon a search of the record, grant plaintiff summary judgment on his Labor Law § 241(6) cause of action.

Plaintiff was injured when he was struck in the back by a power buggy after an operating engineer on the construction site attempted to move the buggy. The operating engineer admitted at his examination before trial that he struck plaintiff with the power buggy. Plaintiff testified that the operating engineer jumped on the power buggy, lost control and fell off the buggy, which then struck him. Plaintiff stated that he had seen the operating engineer around the worksite prior to his accident, and that the operating engineer was not supposed to be in plaintiff's work area "messing with that machine." According to plaintiff, the operating engineer was a watchman on another side of the construction site. Plaintiff testified that the operating engineer repeatedly apologized after the accident for striking him with the buggy, saying that he did not mean to do so and that he was "horse playing."

It is undisputed that the operating engineer was not

designated to operate the power buggy. The operating engineer acknowledged that laborers on the construction site were assigned to operate the power buggy.

12 NYCRR 23-9.9(a) states: "Assigned operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy." The term "designated person" is defined in 12 NYCRR 23-1.4(b)(17) as "[a] person selected and directed by an employer or his authorized agent to perform a specific task or duty." The requirement that a designated person operate a power buggy is "self-executing in the sense that [it] may be implemented without regard to external considerations such as rules and regulations, contracts or custom and usage" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993] [internal quotations omitted]).

We have held that similarly worded provisions of the Industrial Code are sufficiently specific to support a Labor Law § 241(6) claim. In *Medina v 42nd & 10th Assoc., LLC* (129 AD3d 610, 611 [1st Dept 2015]), we found Industrial Code (12 NYCRR) § 23-5.1(h), which provides that "[e]very scaffold shall be erected and removed under the supervision of a designated person," and section 23-5.8(c)(1), which provides that "[t]he installation or horizontal change in position of every suspended scaffold shall be in charge of and under the direct supervision of a designated

person," sufficiently specific.

In *Sawicki v AGA 15th St., LLC* (143 AD3d 549 [1st Dept 2016]), we implied that Industrial Code § 23-9.5(c) which requires, in pertinent part, that excavating machines "be operated only by designated persons" was sufficiently specific by analyzing whether the employee was a "designated person" and citing to the definition in Industrial Code § 23-1.4(b)(17). However, we dismissed the Labor Law § 241(6) claim, finding that the equipment was operated by a person "selected and directed by his employer" (143 AD3d at 550 [internal quotation marks omitted]).

Significantly, in *Batista v Manhanttanville Coll.* (138 AD3d 572, 572-573 [1st Dept 2016], *mod on another ground* 28 NY3d 1093 [2016]), we sustained the Labor Law § 241(6) cause of action predicated upon Industrial Code § 23-5.1(e), (g) and (h), finding the provisions sufficiently specific. Industrial Code § 23-5.1(h) states, "Every scaffold shall be erected and removed under the supervision of a designated person." The Court of Appeals, while modifying on other grounds, affirmed our finding as to the specificity of the relevant provisions. The dissent dismisses the affirmance of the Court of Appeals as "provid[ing] no further clarification" on the issue. We disagree. The Court of Appeals' affirmance necessarily indicates that the Court found "designated

person" sufficiently specific.

We agree with the dissent that the regulation's requirement that a "trained and competent operator . . . shall" operate the power buggy is general, as it lacks a specific requirement or standard of conduct. However, since the term "designated person" has been held to be specific, 12 NYCRR 23-9.9(a) is a proper predicate for a claim under Labor Law § 241(6).

The dissent's concern that we are exposing a defendant to liability for injury caused by a power buggy operated by an unauthorized person is misplaced.[1] We note that the Court of Appeals has reiterated that, while the duty imposed by Labor Law § 241(6) may be "onerous[,] . . . it is one the Legislature quite reasonably deemed necessary by reason of the exceptional dangers inherent in connection with 'constructing or demolishing buildings or doing any excavating in connection therewith'"

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[1] The dissent also raises the hypothetical consequence that our finding will impose absolute liability for a trespasser's use of a power buggy. Unlike Labor Law § 240(1), § 241(6) does not impose absolute liability for any injury. Instead, it requires a determination whether the safety measures were reasonable and adequate under the circumstances (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998] ["once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault"]).

(*Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 300 [1978]), and that "[t]he Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace" (*St. Louis v Town of N. Elba*, 16 NY3d 411, 416 [2011]).

Moreover, liability under Labor Law § 241(6) "is dependent on the application of a specific Industrial Code provision and a finding that the violation of the provision was a result of negligence" (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013]).

The fact that the operating engineer was "horse playing" prior to operating the power buggy does not absolve defendant from liability under Labor Law § 241(6) (*see Christey v Gelyon*, 88 AD2d 769, 770 [4th Dept 1982] ["It is well established that horseplay or frivolous activities . . . are natural diversions between coemployees during lulls in work activities and injuries sustained during them are compensable as an incident of the work"]).

We grant plaintiff's request to search the record and award him summary judgment on the Labor Law § 241(6) claim as there are no disputed issues of fact as to defendant's liability for the violation of 12 NYCRR 23-9.9(a). It is undisputed that the operating engineer was not "designated by the employer" to

operate the power buggy. He nevertheless did so, and his operation of the power buggy was a proximate cause of plaintiff's injuries.

Accordingly, the order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered October 24, 2017, which, to the extent appealed from, denied defendant Port Authority of New York and New Jersey's motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-9.9(a) as against it, should be modified, on the law, upon a search of the record, to grant plaintiff summary judgment as to liability on that claim as against said defendant, and, as so modified, affirmed, without costs.

All concur except Tom and Kahn, JJ. who dissent in an Opinion by Tom, J.

TOM, J. (dissenting)

Because I conclude that the Labor Law § 214(6) claim predicated on Industrial Code (12 NYCRR) § 23-9.9(a) is untenable under the facts of this case and should be dismissed, I respectfully dissent.

Plaintiff's injury arose from an accident at the World Trade Center Construction site on October 24, 2014. While plaintiff was engaged in fabricating steel on a rebar bending machine on the north side of the large construction site, Paul Estavio, a person qualified to do so, rode a concrete buggy to the vicinity where plaintiff was working. Estavio exited the buggy and conversed with another worker, James Melvin. Plaintiff testified that they were "talking loud, joking and playing," after which Melvin "jumped on it [the buggy], and he lost control of the buggy, fell off the buggy, and it smashed me." Plaintiff testified that Melvin was an operating engineer who was supposed to be a watchman on the south side of the construction site and "wasn't supposed to be on that side of town messing with that machine." Plaintiff testified that Melvin, who apologized, explained that he had been "horse playing." Melvin testified that he was an oiler responsible for maintaining cranes on the day of the accident, that he had not received any training in the use of the buggy, that he had never used the buggy previously,

that as an operating engineer he was not supposed to use the buggy, that he had not been designated to do so, and that he was fired as a consequence of the accident. Melvin testified that he lost control of the buggy when it was about 15 feet away from plaintiff.

Industrial Code (12 NYCRR) § 23-9.9(a) states: "Assigned operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy." "Designated person" is defined as "[a] person selected and directed by an employer or his authorized agent to perform a specific task or duty" (12 NYCRR 23-1.4[17]). "Competent" is defined as a person "[q]ualified by training and/or experience to perform a particular task of duty" (12 NYCRR 23-1.4[12]). The issue presented for appeal is whether § 23-9.9(a) contains "specific commands and standards" that "mandat[e] compliance with concrete specifications" as a valid predicate for liability under Labor Law § 241(6), or only "general safety standards" that "invok[e] '[g]eneral descriptive terms,'" which do no more than incorporate general common-law standards of care and cannot support a § 241(6) claim (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503, 505 [1993]).

In *Scott v Westmore Fuel Co., Inc.* (96 AD3d 520 [1st Dept 2012]), we found that 12 NYCRR 23-9.2(b)(1), which, in almost

identical language to that in § 23-9.9(a), requires that "[a]ll power-operated equipment used in construction . . . operations shall be operated only by trained, designated persons," was only a "mere general safety standard that is insufficiently specific to give rise to a non-delegable duty under [Labor Law § 241(6)]," a characterization that applies also to § 23-9.9(a). I conclude that Industrial Code § 23-9.9(a) is insufficiently specific to support a claim under Labor Law § 241(6). In light of our prior holding, the majority is relying on the phrase that we have already found to lack specificity, and is ignoring the remainder of the regulatory language, which is also non-actionable. However, the regulation must be considered as a whole and not relied on in part, which the majority is doing, in order to determine whether it supports the purpose for which it is being employed.

Further, the record contains no support for a proposition that Melvin was a person who was, or would be, designated to move the buggy. While the majority relies on this fact to impose liability on defendant, that, I think, misses the point that Melvin was an interloper rather than an improperly designated operator. Speculation aside, nor is there any basis for concluding that he could have been acting under the direction of the appealing defendant. Rather, the record shows that Melvin

was without authorization to operate the buggy. It seems to me to be clear that the regulatory language requires that if someone is authorized to move the buggy, that operator must be "designated" to do so as further defined in the regulation. It does not follow from this, however, that if no one was authorized to move the buggy, a fortiori no one was designated, so that the owner faces liability on that basis. Such a conclusion is not logically supported by the regulatory language with respect to Labor Law 241(6) liability. To impose liability under these circumstances, and on these facts, pursuant to Labor Law § 241(6) and Industrial Code § 23-9.9(a), would potentially expose a defendant to liability any time an unauthorized person on his own initiative or even a trespasser moved such an item of equipment and caused injuries, an outcome not within the scope of the statute and inconsistent with our precedent.[1] Under the majority's holding, a defendant would be exposed to liability whenever a person neither trained nor competent operated a machine and injured a worker, regardless of whether the operator was designated by the employer to operate the machinery. This is clearly not supported by Industrial Code § 23-9.9(a).

[1]Contrary to the majority's characterization, I am not mistakenly applying a strict liability standard, which, while applicable to Labor Law § 240(1), is not applicable to § 241(6).

Although the majority concludes that defendant cannot be absolved from liability because Melvin acknowledged that he was "horse playing," and that that should be deemed to have occurred within the scope of employment, that is not a factually relevant issue for these purposes. Moreover, the case cited by the majority for that proposition is a worker's compensation case, a legal context that also is inapplicable to this case.

The majority's reliance on *Medina v 42nd & 10th Assoc., LLC* (129 AD3d 610 [1st Dept 2015]), *Sawicki v AGA 15th St., LLC* (143 AD3d 549 [1st Dept 2016]) and *Batista v Manhattanvile Coll.* (138 AD3d 572 [1st Dept 2016], *mod on other grounds*, 28 NY3d 1093 [2016]), none of which formed the basis for the Supreme Court decision in the present case nor were decided on the basis of 23 NYCRR 9.9(a), is misplaced.

In *Sawicki*, the claim under 23 NYCRR 23-9.5(c) was dismissed since the operator was designated by the employer to operate the excavating machine. This does not address the present situation, where Melvin was never designated, and would not have been designated, by his employer to operate the buggy. In *Medina*, issues of fact regarding whether a designated person was supervising precluded summary judgment to plaintiff on his claim under 12 NYCRR 23-5.1 and 23-5.8(c)(1). Once again, Melvin was not a designated person. In *Batista*, we dismissed the Labor Law

§ 241(6) claim except insofar as it was predicated on 12 NYCRR 23-5.1(e), (g) and (h), and denied as a predicate the other Industrial Code provisions in the bill of particulars as insufficiently specific. However, the Court of Appeals (28 NY3d 1093) granted the plaintiff summary judgment under Labor Law § 240(1) on the ground that the defendants failed to raise a triable issue of fact as to whether the plaintiff was the sole proximate cause of his injuries, unrelated to a claim under Labor Law § 241(6). The certified question from this Court addressed only the Labor Law § 240(1) issue, which the Court of Appeals "answered in the negative." *Batista* provides no further clarification of the facts in the latter regard (§ 241[6]). It cannot reasonably be implied from the Court of Appeals' answer to the certified question that it was also elucidating an issue of law as to § 241(6), and certainly not on the issue that presently divides us. As to the § 241(6) issue in *Batista*, why would the Court of Appeals even reach the issue? However, since the present undisputed factual context is that a qualified designated person had previously moved the buggy to a proper location, and no one, certainly not Melvin, was authorized to move it again at that time and place, the decisions relied on by the majority, which do not even explicitly address the issue of specificity with respect to the Industrial Code provisions cited in those

cases and do not address 23 NYCRR 23-9.9(a), do not constrain our analysis.

Hence, on the facts and by interpretation of 12 NYCRR 23-9.9(a), I conclude that the defendant is entitled to summary judgment dismissing the claim under Labor Law § 241(6) insofar as it is predicated on 12 NYCRR 23-9.9(a).

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered October 24, 2017, modified, on the law, upon a search of the record, to grant plaintiff summary judgment as to liability on the Labor Law § 241(6) claim insofar as it is predicated on 12 NYCRR 23-9.9(a) as against defendant Port Authority of New York and New Jesrsey, and, as so modified, affirmed, without costs.

Opinion by Singh, J. All concur except Tom and Kahn, JJ. who dissent in an Opinion by Tom, J.

Sweeny, J.P., Tom, Webber, Kahn, Singh, JJ.

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

ENTERED: MAY 30, 2019

CLERK