SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 7, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Manzanet-Daniels, Singh, JJ.

9984 Stevenson Petit, Index 155523/16
Plaintiff-Appellant,

-against-

The Department of Education
of the City of New York
Defendant-Respondent.

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Stewart Lee Karlin Law Group, P.C., New York (Stewart Karlin of counsel), for appellant.

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

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Order, Supreme Court, New York County (W. Franc Perry III, J.), entered December 22, 2017, which granted defendant's motion to dismiss the complaint, and denied plaintiff's cross motion for leave to file a second amended complaint, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted.

Plaintiff, Stevenson Petit, commenced this employment discrimination action on or about July 1, 2016, against his former employer, the Department of Education (DOE). Plaintiff was hired by the DOE in 1994 as a paraprofessional. In 2010, he

became a guidance counselor at the Tilden Educational Campus and received tenure.

Plaintiff, a 55-year-old black male from Haiti, who alleges that he studied voodoo, but does not practice it, asserts that he was discriminated against by the principal of the school, Marina Vinitskaya (a Caucasian woman), due to his Haitian origin and her belief that he is a voodoo priest. Since his hiring in 2010, plaintiff had no performance issues until Vinitskaya became the school's principal in the 2008-2009 school year. He asserts that Principal Vinitskaya then began creating a hostile work environment, by targeting him due to his Haitian origin. Plaintiff asserts that Principal Vinitskaya falsely accused him of misconduct, subjecting him to an Office of Special Investigations investigation, during which Vinitskaya falsely accused plaintiff of being a voodoo priest.

Plaintiff also asserts that Principal Vinitskaya assigned him to an unsanitary basement office upon his return to Tilden Educational Campus from a temporary administrative office assignment. Plaintiff asserts that Principal Vinitskaya did this maliciously in disregard of his seniority even though there were other available offices. Reportedly, both plaintiff and his union submitted administrative complaints to no avail. Ultimately, Principal Vinitskaya demoted plaintiff to the

position of temporary substitute, assigned on a weekly basis to different schools.

Crediting plaintiff's allegations for the purpose of this pre-answer, pre-discovery motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7), we find that the complaint states a causes of action for discrimination, retaliation and hostile work environment in violation of the New York State and New York City Human Rights laws. These allegations are sufficient to give defendant DOE "fair notice" of the nature of plaintiff's claims and their grounds (*see Vig v New York Hairspray Co.*, L.P., 67 AD3d 140, 145 [1st Dept 2009] [court reinstated discrimination claims dismissed on a motion to dismiss for failure to state a cause of action because "employment discrimination cases are . . . generally reviewed under notice pleading standards"]; *compare Ortiz v City of New York*, 105 AD3d 674 [1st Dept 2013]). Fair notice is all that is required to survive at the pleading stage.

To the extent plaintiff asserts acts by Principal Vinitskaya that occurred more than one year before he commenced this action (*see* Education Law § 3813[2-b]), we cannot say, as a matter of law, "that these acts, if proven, were not part of a single continuing pattern of unlawful conduct extending into the one-year period immediately preceding the filing of the

complaint" (*Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-498 [1st Dept 2014]; *see Ain v Glazer*, 257 AD2d 422, 423 [1st Dept 1999]). In any event, plaintiff "is not precluded from using the prior acts as background evidence in support of a timely claim" (*Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2016] [internal quotation marks omitted]).

Finally, defendant's argument that there were legitimate, nondiscriminatory reasons for actions taken against plaintiff is unavailing. Defendant presents a potential rebuttal argument to a prima facie case of employment discrimination, which is misplaced at this early procedural juncture (*see McDonnell Douglas Corp. v Green*, 411 US 792 [1973]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Under the circumstances, plaintiff's cross motion for leave to amend his complaint should have been granted.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Acosta, P.J., Sweeny, Webber, Oing, JJ.

10142 & Index 302742/17
M-7515 Sylvia E. DiPietro,
Plaintiff-Respondent,

-against-

Joel Vatsky,
Defendant-Appellant.

_____

Blank Rome LLP, New York (Caroline Krauss-Browne of counsel) and Crowell & Moring, New York (Michelle Ann Gitlitz of counsel), for appellant.

McNamee, Lochner, Titus & Williams, P.C., Albany (Bruce J. Wagner of counsel), for respondent.

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Order, Supreme Court, New York County (Douglas E. Hoffman, J.), entered December 3, 2018, which, inter alia, granted plaintiff's motion for summary judgment dismissing defendant's affirmative defenses and counterclaims and for a declaration that the parties' prenuptial agreement and its amendments are valid and enforceable, unanimously affirmed, without costs.

Defendant husband's efforts to meet his "very high burden" for challenging the parties' prenuptial agreement fail (*Anonymous v Anonymous*, 123 AD3d 581, 582 [1st Dept 2014]). The parties, both educated and savvy professionals with significant assets of their own, were each represented by independent counsel, and entered into the prenuptial agreement after a period of negotiations several months before the marriage.

Contrary to defendant's contention, the record demonstrates that plaintiff adequately disclosed her finances. In fact, prior to executing the prenuptial agreement, the parties met with defendant's financial advisor to discuss their financial future together. In any event, plaintiff's alleged failure to disclose does not provide a ground to set aside the prenuptial agreement (*see Gottlieb v Gottlieb*, 138 AD3d 30, 38-39 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016]; *Strong v Dubin*, 48 AD3d 232, 233 [1st Dept 2008]), particularly, here, where defendant proceeded to execute the prenuptial agreement despite his claim that plaintiff refused to supply him with financial documents (*see Matter of Fizzinoglia*, 26 NY3d 1031, 1032 [2015]).

We also agree with the motion court that the prenuptial agreement and its amendments were not the product of overreaching. The prenuptial agreement, which included joint waivers of maintenance, the right to equitable distribution, and the right to election, was not so "manifestly unfair" as to warrant equity's intervention (*see Gottlieb* at 41-42). Although the transfer of defendant's house to plaintiff may not have been in his best financial interest, defendant's attorney made his objection to this provision abundantly clear. Defendant proceeded to execute the prenuptial agreement over his attorney's objection. Thus, even if, in retrospect, this specific provision

was improvident or one-sided, it does not provide a ground to vitiate the prenuptial agreement (*Christian v Christian*, 42 NY2d 63, 72-73 [1977]; *Barocas v Barocas*, 94 AD3d 551, 551 [1st Dept 2012], *appeal dismissed* 19 NY3d 993 [2012]). Defendant's efforts to establish that the agreement was the product of duress are not persuasive (*see Cohen v Cohen*, 93 AD3d 506 [1st Dept 2012], *lv denied* 24 NY3d 909 [2014]).

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

M-7515 - *DiPietro v Vatsky*

Motion to enlarge record on appeal denied.

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

ENTERED: NOVEMBER 7, 2019

CLERK

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

9879 Stephen Gabris, Jr., etc., Index 190259/17
Plaintiff-Respondent,

-against-

3M Company, et al.,
Defendants,

R.J. Reynolds Tobacco Company,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Manuel Mendez, J.), entered on or about August 22, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 10, 2019,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: NOVEMBER 7, 2019

CLERK

Sweeny, J.P., Tom, Mazzarelli, Oing, Singh, JJ.

10072 The People of the State of New York, Respondent, Ind. 3/06

-against-

Steven Armento, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Steven Barrett, J., at hearing; Martin Marcus, J., at trial and sentencing), rendered November 13, 2008, convicting defendant, after a jury trial, of murder in the first degree, and sentencing him to a term of life without parole, unanimously affirmed.

Defendant's codefendant was previously convicted of attempted burglary in the first degree and sentenced to a term of 10 years in connection with the crime (*People v Brancato*, 101 AD3d 459 [1st Dept 2012], *lv denied* 20 NY3d 1096 [2013]). Defendant was convicted of the point-blank shooting death of an off-duty police officer who was responding to the nighttime burglary of his neighbor's residence. The evidence was legally sufficient (*People v Bleakley*, 69 NY2d 490, 495 [1987]), and the

verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The People gave defendant adequate notice pursuant to CPL 710.30 of his statement that would be introduced at trial, including aspects of his statement on two pages in a police officer's notepad that by inadvertence were not physically attached to the formal notice. The part of the statement in the notepad was made to the same police officer in the same location and at the same time as, and was part of the same communication and was consistent with, the formally noticed statement (see *People v Morris*, 248 AD2d 169 [1st Dept 1998], *affd* 93 NY2d 908 [1999]), and was even less inculpatory than the formally noticed statement.

Giving due deference to the hearing court's findings on credibility (*People v Prochilo*, 41 NY2d 759, 761 [1977]) and on the basis of the hearing evidence, we conclude that defendant's inculpatory statements, as to which he waived his *Miranda* rights, were made voluntarily, notwithstanding a minor unintended delay in defendant's arraignment at the hospital where he was being treated.

Defendant's challenge to the justification charge was not preserved (CPL 470.05[2]), and we decline to exercise our discretion to review it in the interest of justice (see *People v*

Williams, 145 AD3d 100 [1st Dept 2016]; *People v Marshall*, 106 AD3d 1, 11 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]), especially in view of the potential adverse consequences to the administration of justice caused by defendant's lengthy delay in appealing (*see e.g. People v Taveras*, 10 NY3d 227 [2008]).

We find no basis for concluding that the sentence imposed was excessive.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10266 The People of the State of New York Ind. 1540N/14
Respondent,

-against-

Johanna Vasquez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered November 3, 2016, convicting defendant, after a jury trial, of unlawfully dealing with a child in the first degree, and sentencing her to three years' probation, unanimously affirmed.

Defendant's duplicity argument is unpreserved (*see People v Allen*, 24 NY3d 441, 449-450 [2014]), and we decline to review it

in the interest of justice. Defendant's ineffective assistance claim implicates counsel's strategy and thus requires expansion of the record by way of a CPL 440.10 motion.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Gesmer, Oing, Singh, JJ.

10267 In re Social Services Employees Union Local 371, etc., Petitioner-Appellant, Index 101343/16

-against-

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

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Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jamison Davies of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered February 27, 2018, denying the petition brought pursuant to CPLR article 78 for, inter alia, a declaration that results of a civil service examination administered by respondent New York City Department of Citywide Administrative Services (DCAS) were null and void, and dismissing the proceeding, unanimously affirmed, without costs.

Petitioner failed to establish that DCAS's inclusion of 20 ungraded research questions in an examination administered for the position of Associate Fraud Investigator violated the merit and fitness clause of the New York State Constitution (art. V, § 6), the state's Civil Service Law § 50(1), or was otherwise arbitrary and capricious. DCAS is afforded considerable

discretion in preparing and administering civil service examinations (*see Matter of Gallagher v City of New York*, 307 AD2d 76, 81 [1st Dept 2003], *lv denied* 1 NY3d 503 [2003]). As long as the examination is "reasonable in testing for the skills identified for the position" and "'competitive' in the constitutional context," courts should not "second guess the format or the methods of the examination" (*Matter of Merlino v Schneider*, 93 NY2d 477, 486 [1999]; *see also Gallagher*, 307 AD2d at 81).

DCAS provided reasonable bases for including the 20 ungraded research questions in the examination. Specifically, the inclusion of these questions allowed DCAS to develop alternate forms of an exam for a given title that would yield measurably equivalent outcomes. Research questions also provided a means for "pre-testing" the validity of exam questions, ensuring that these questions were valid across differing groups of test-takers, regardless of their racial or ethnic background (*see Guardians Assn. of New York City Police Dept., Inc. v Civil Serv. Commn. of City of New York*, 630 F2d 79 [2d Cir 1980], *cert denied* 452 US 940 [1981]). Moreover, the time for taking the examination was extended to provide adequate time to answer all questions.

Petitioner fails to sufficiently allege that the inclusion

of these ungraded questions was arbitrary or capricious. Indeed, all candidates were scored the same way on the graded questions, and the test did not inherently disadvantage any one candidate. Moreover, candidates were evaluated only on the basis of questions that had already been validated as providing an accurate measure of merit and fitness for the role. DCAS is not required to adopt petitioner's preferred method of testing proposed examination questions, particularly where the method chosen meets the constitutional mandate (*see Matter of Hughes v Doherty*, 5 NY3d 100, 105-06 [2005]).

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

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10268 In re Millie P.,
Petitioner-Appellant,

-against-

Arthur P.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

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Order, Family Court, Bronx County (Sue Levy, Ref. at fact-finding; Emily Morales-Minerva, J. at disposition), entered on or about January 14, 2019, insofar as it issued a two-year, nonexclusionary order of protection against respondent father in favor of petitioner daughter, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in determining that the incident at issue was isolated and that the threat that the father made, while upsetting to the daughter, did not lead to the conclusion that an exclusionary stay-away order of protection, excluding the father from their shared home of 37 years, was reasonably necessary to protect the daughter (*Matter of Gil v Gil*, 55 AD3d 1024, 1025 [3d Dept 2008]).

Contrary to the daughter's argument, the court was not

constrained to enter a full stay-away order of protection based on its finding of menacing in the third degree.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10269 Alda Bonilla, Index 20651/14E
Plaintiff-Respondent,

-against-

Balla Bathily, et al.,
Defendants-Appellants,

Frederick Y. Appawu,
Defendant-Respondent.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for appellants.

Alda Lizette Bonilla Arzu, respondent pro se.

Russo & Tambasco, Melville (Jill Dabrowski of counsel), for Frederick Y. Appawu, respondent.

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Order, Supreme Court, Bronx County (Donna Mills, J.), entered July 17, 2018, which denied defendants Bathily and IMF Associates' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that she suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted and, upon a search of the record, defendant Appawu's motion for summary judgment granted as well. The Clerk is directed to enter judgment accordingly.

Defendants met their prima facie burden of demonstrating that plaintiff did not sustain a serious injury to her cervical

spine, lumbar spine, and shoulders causally related to the accident. Defendants submitted plaintiff's own emergency room and medical records, which showed, among other things, that she made no complaints concerning her shoulders in the hospital and that her own doctors found evidence of degenerative disease and osteoarthritis. Defendants' emergency medicine specialist and orthopedist opined that the emergency room records were entirely inconsistent with any claim of traumatic injury to her spine or shoulders (*see Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567, 567 [1st Dept 2017]). The orthopedist further opined that plaintiff's medical records, including MRI and operative reports, showed chronic, preexisting degenerative conditions, including osteoarthritis, facet disease, bursitis and chondromalacia (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Campbell v Drammeh*, 161 AD3d 584, 585 [1st Dept 2018]). Defendants' radiologist also opined that the MRI films of plaintiff's shoulders and cervical spine showed preexisting degenerative conditions unrelated to the accident, and their neurologist found conditions relating to plaintiff's diabetes.

In opposition, plaintiff failed to raise an issue of fact as to her claimed injuries. While plaintiff submitted certified records showing post-accident treatment of her cervical spine and lumbar spine, the affirmed report of her medical expert did not

provide the results of any recent examination or provide any opinion as to the cause of those conditions, so that plaintiff presented no admissible evidence sufficient to raise an issue of fact (*see Callahan v Shekhman*, 149 AD3d 454, 455 [1st Dept 2017]; *Green v Domino's Pizza, LLC*, 140 AD3d 546, 546-547 [1st Dept 2016]). As for the claimed shoulder injuries, plaintiff's certified medical records provided no evidence of contemporaneous treatment, and thus did not causally connect the injuries to the accident (*Moore-Brown v Sofi Hacking Corp.*, 151 AD3d at 567; *Jones v MTA Bus Co.*, 123 AD3d 614, 615 [1st Dept 2014]). Moreover, plaintiff's expert failed to adequately address the degenerative findings in plaintiffs' own medical records and MRI reports or to explain why those degenerative conditions could not have been the cause of plaintiff's claimed shoulder injuries (*see Franklin v Gareyua*, 136 AD3d 464, 465-466 [1st Dept 2016], *affd* 29 NY3d 925 [2017]; *Campbell v Drammeh*, 161 AD3d at 585).

Because plaintiff cannot meet the serious injury threshold against the appealing defendants, she cannot meet it against the nonappealing defendant (*Lall v Ali*, 101 AD3d 439 [1st Dept 2012]).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10270 The People of the State of New York, Ind. 1201/16
Respondent,

-against-

Travis Lopez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Thomas M. Montella 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 (Shari Michels, J.), rendered October 20, 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: NOVEMBER 7, 2019

CLERK

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

Richter, J.P., Webber, Gesmer, Oing, JJ.

10271 The People of the State of New York, Respondent, Ind. 1201/16

-against-

Darrin Brown, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered May 3, 2017, convicting defendant, after a jury trial, of sexual abuse in the third degree, and sentencing him to one year of probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. Although none of the witnesses actually saw defendant touch the victim's buttocks, the inference is inescapable that defendant did so. Contrary to defendant's assertion, this was not the victim's "surmise." Immediately after feeling such contact, she turned around and saw defendant, the only person in a position to have touched her. He was standing directly behind her and

continuing to press into her, and he then held his crotch and asked the victim to touch it. Moreover, other persons in the store where this occurred corroborated the victim's testimony.

The court providently exercised its discretion in admitting the victim's statement to a police officer as an excited utterance (*see generally People v Hernandez*, 28 NY3d 1056, 1057 [2016]). It is undisputed that the victim experienced a startling event (the unwanted sexual contact) and that the statement was made just a few minutes later, while the victim was still visibly upset. The victim personally observed the facts underlying her accusation of defendant *(see People v Cummings*, 31 NY3d 204, 209-210 [2018]), and defendant's argument that she did not personally observe him touch her is unavailing for the reasons stated above. We likewise reject defendant's argument that the victim's excited state was not attributable to the sexual abuse but rather to an intervening fight in the store involving defendant and others. The sexual abuse and ensuing fight constituted one continuous event, and the fight did not at

any rate create an opportunity for studied reflection so as to call the veracity of the victim's statement into question (*see generally Hernandez*, 28 NY3d at 1057). Moreover, any error was harmless (*see People v Ludwig*, 24 NY3d 221, 230 [2014]).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10272 In re Cesar Bernacet, Index 250781/16
Petitioner-Appellant,

-against-

Joseph Ponte, Commissioner
of the New York City Department
of Correction,
Respondent-Respondent.

Janet E. Sabel, The Legal Aid Society, New York (William D. Gibney of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Claude S. Platton of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about February 14, 2018, denying the petition to annul respondent's determination dated April 5, 2016, which credited 268 days of jail time to petitioner's 2003 sentence rather than to his subsequently imposed sentences, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent properly credited the 268 days of jail time at issue to postrelease supervision running as part of petitioner's initial 2003 sentence, pursuant to Penal Law § 70.30(3). That provision barred respondent from crediting those 268 days to petitioner's November 2015 and February 2016 sentences, which were imposed subsequent to the June 2015 maximum expiration date

of the 2003 sentence (*see Matter of Lewis v Holford*, 168 AD3d 1303 [3d Dept 2019]; *Matter of Brown v Apple*, 119 AD3d 1295 [3d Dept 2014]; *Matter of Booker v Lafflin*, 98 AD3d 1213 [3d Dept 2012]). The decisions in *Matter of Sparago v New York State Bd. of Parole* (71 NY2d 943 [1988]) and *Matter of Jeffrey v Ward* (44 NY2d 812 [1978]) do not compel a contrary result.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10273 Stacy Sonkin, Index 304447/09
Plaintiff-Respondent,

-against-

Paul Sonkin,
Defendant-Appellant.

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Paul Sonkin, appellant pro se.

The Isaacs Firm PLLC, New York (Randi S. Isaacs of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered December 20, 2018, which, insofar as appealed from, granted plaintiff wife's motion for an award of attorneys' fees to the extent of directing defendant husband to pay the wife's counsel $50,000 within 60 days, unanimously affirmed, without costs.

After successfully defending two prior motions by the husband for downward modification of his support obligations and a plenary action to vacate the judgment of divorce (*see* 157 AD3d 414 [1st Dept 2018], *lv denied* 32 NY3d 904 [2018]), the wife moved to enforce certain obligations under the parties' stipulation of settlement and for an award of approximately $200,000 in attorneys' fees under the stipulation of settlement and/or Domestic Relations Law §§ 237(b) and 238. The husband

does not dispute that the wife was entitled to counsel fees incurred in connection with her defense of his appeal from the dismissal of his plenary action under the plain terms of the parties' stipulation (see *Rainbow v Swisher*, 72 NY2d 106, 109 [1988]). Under the circumstances, the motion court, being fully familiar with the underlying proceedings, appropriately determined without further hearing that the amount of fees sought, as supported by counsel's detailed billing statements, was reasonable. It is noted that the award reflected a significant reduction in the amount of fees sought by the wife (*see Wolman v Shouela*, 171 AD3d 664 [1st Dept 2019]).

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

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10275 Terri Martin, etc., Index 304548/11
Plaintiff-Appellant,

-against-

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

_____

Parker Waichman, LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kevin Osowski of counsel), for The City of New York, respondent.

Office of Nadine Rivellese, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, respondent.

_____

Order, Supreme Court, Bronx County (Rubén Franco, J.), entered on or about June 15, 2017, which granted defendants' separate motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, defendant Consolidated Edison Company of New York, Inc.'s motion denied, and defendant the City of New York's motion denied without prejudice to renewal on the condition that, within 60 days of the date of this order, it produces a witness for further deposition regarding the records and other discovery exchanged in support of its motion.

Plaintiff's decedent was fatally injured after tripping and falling on a roadway defect in the Bronx. The parties entered

into an order pursuant to a preliminary conference in April 2012, which required the City to disclose, within sixty days of the date thereof, pertinent records for two years prior to and including the date of the decedent's accident. The City was again ordered to disclose these records at two subsequent compliance conferences in 2013 and 2014.

After the filing of the note of issue, and in support of its motion for summary judgment, the City exchanged, for the first time, nearly 200 pages of records concerning the location of the decedent's accident. The City also exchanged an affidavit from a City Department of Transportation official who averred that certain records of the time frame the City had been ordered to search were destroyed as a result of Hurricane Sandy in October 2012. In opposition to the City's motion, plaintiff argued, among other things, that she should be permitted to conduct further discovery regarding the newly exchanged records.

Con Edison also moved for summary judgment, arguing that its evidence demonstrated that it did not perform any work at the location of plaintiff's decedent's accident. We find that Supreme Court improperly granted both defendants' motions.

The City failed to comply with its discovery obligations to plaintiff in this case. At the latest, it was on notice that at least some of the destroyed records were relevant to, and

discoverable in, this litigation in April 2012, when it was ordered to disclose such records following a preliminary conference. That was six months before the records were destroyed, and four years before the City even conducted its actual search for those records. The City then compounded this failure by disclosing the destruction of those records and exchanging nearly 200 pages of previously unexchanged records for the first time in support of its own motion, months after the filing of the note of issue.

Accordingly, the court should have denied the City's motion as premature and granted plaintiff's request for further discovery regarding the belated disclosure (*see generally* CPLR 3212[f]; *Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007]). The City may renew its motion for summary judgment only if it produces, within 60 days of the date of this order, a knowledgeable witness who the parties may depose regarding those records and things which were exchanged by the City for the first time in support of its motion.

Con Edison's motion also should have been denied. With regard to a violation that Con Ed had received for a defect in the area where plaintiff's decedent's accident occurred, Con Ed argues that it completed an investigative report denying that it

had created the defect, or was otherwise responsible therefor. This denial of responsibility fails to establish that it, in fact, was not responsible for the defect. Accordingly, Con Edison failed to establish its prima facie entitlement to judgment as a matter of law (*compare with Amini v Arena Constr. Co., Inc.*, 110 AD3d 414, 414-415 [1st Dept 2013]).

We have considered defendants' remaining contentions and find them either unavailing or academic in light of our determination.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10276 Elizabeth Chambers, Index 21591/15E
Plaintiff-Appellant, 43100/17E

-against-

Tilden Towers Housing Co. Section II, Inc., et al.,
Defendants-Respondents,

Tilden Towers II, et al.,
Defendants.
- - - - -
[And A Third-Party Action]

_____

Burns & Harris, New York (Jason Steinberg of counsel), for appellant.

Morris, Duffy, Alonso & Faley, New York (Iryna S. Krauchanka and Kevin G. Faley of counsel), for Tilden Towers Housing Co. Section II, Inc., Tudor Realty Services Corp. and Tony Rookard, respondents.

Gottlieb Siegel & Schwartz, LLP, New York (Laura R. McKenzie of counsel), for Eli-Tech Industries, Inc., respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 31, 2018, which granted the motion of defendants Tilden Towers Housing Co. Section II, Inc., Tudor Realty Services Corp., and Tony Rookard (collectively owner defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Owner defendants established their prima facie entitlement to judgment in this action for personal injuries plaintiff

allegedly sustained when an elevator in the building in which she lived suddenly dropped five floors. Owner defendants showed that they had no notice of a problem with elevators in the building suddenly dropping (*see Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Her reliance on the doctrine of res ipsa loquitur to impute notice to owner defendants is misplaced. Exclusive control of the instrumentality bringing about the injury, which is necessary for the doctrine to apply, is absent where, as here, an owner has ceded all responsibility for maintenance and repair to its elevator service contractor (*see Hodges v Royal Realty Corp.*, 42 AD3d 350, 351-352 [1st Dept 2007]).

Furthermore, defendant Rookard was additionally entitled to summary judgment dismissing the complaint as against him where plaintiff does not contest that he acted solely in his capacity as defendant Tudor's representative (*see Mendez v City of New York*, 259 AD2d 441, 441-442 [1st Dept 1999]).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10277 In re Stacey T.,
Petitioner-Appellant,

-against-

Felix M.,
Respondent-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Alyson A. Cohen of counsel), for appellant.

Andrew J. Baer, New York, for respondent.

George E. Reed, Jr., White Plains, attorney for the child.

_____

Order, Supreme Court, Bronx County (Judith Lieb, J.), entered on or about September 28, 2018, which, to the extent appealed from, upon determining that petitioner showed good cause for a five-year extension of an order of protection issued October 1, 2014, granted an extension of the order from its date of expiration, September 30, 2016, rather than from the date of the decision and order, unanimously reversed, on the law, without costs, and the order of protection extended for five years from September 28, 2018.

Although the original order of protection had been extended by a series of temporary orders of protection during the pendency of the application for an extension, we find that under the

undisputed and serious facts of the case, as determined by the court, as well as the legislative history of the statute, a five-year extension from the date of the court's September 2018 decision is warranted (Family Ct Act § 842).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10278 Victoria Goetz, et al., Index 306086/13
Plaintiffs-Appellants,

-against-

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

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for Victoria Goetz, appellant.

Orrick, Herrington & Sutcliffe, LLP, Washington, DC (Benjamin Paul Chagnon of the bar of the State of California and the District of Columbia, admitted pro hac vice, of counsel), for David Diaz and Quintesha Diaz, appellants.

Georgia M. Pestana, Acting Corporation Counsel, New York (Claibourne Henry of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about July 30, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment dismissing the false arrest and false imprisonment claims. Defendants submitted competent proof that the Diaz plaintiffs were in constructive possession of the contraband recovered from the apartment in which they were registered as tenants, and these plaintiffs failed to raise any triable issue of fact with respect defendant's probable cause to arrest (*see*

Walker v City of New York, 148 AD3d 469 [1st Dept 2017]; *Shields v City of New York*, 141 AD3d 421 [1st Dept 2016]). With respect to plaintiff Goetz, probable cause to arrest was established based on the evidence that the police found her in a room with contraband in plain view and with her boyfriend, Jonathan Garcia, who pleaded guilty to possession of the drugs; her conclusory claims that the drugs were not discovered in plain view are not sufficient to raise a genuine issue of material fact (*see De Lourdes Torres v Jones*, 26 NY3d 742, 771 [2016]; *Flavin v City of New York*, 171 AD3d 633 [1st Dept 2019]).

The court properly dismissed the malicious prosecution claim, as there was probable cause for the arrest and the absence of evidence that such probable cause dissipated between the arrest and commencement of criminal proceedings (*see Brown v New York*, 60 NY2d 893 [1983]; *Flavin*, 171 AD3d at 634).

The court also correctly dismissed the remaining claims, including the excessive force claims, "since the plaintiffs offered no competent proof to show that the alleged excessive

actions by the police were unreasonable given the circumstances, or caused plaintiffs compensable injury" (*Walker*, 148 AD3d at 470; *see Koeiman v City of New York*, 36 AD3d 451 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10279 Capital One, N.A., successor by merger to ING Bank, FSB,
Plaintiff,

-against-

Andrew Banfill,
Defendant-Appellant,

National City Bank, et al.,
Defendants,

Board of Managers of the 520 West 110th Street Condominium,
Defendant-Respondent.

Index 850225/16

_____

Richland & Falkowski, PLLC, Astoria (Michal Falkowski of counsel), for appellant.

Armstrong Teasdale LLP, New York (Kenneth H. Amorello of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered December 18, 2018, which granted defendant Board of Managers of the 520 West 110th Street Condominium's motion for the appointment of a temporary receiver to collect reasonable rent from defendant Andrew Banfill for his use and occupancy of his unit during the pendency of this foreclosure action, unanimously affirmed, with costs.

Contrary to defendant Banfill's contention, the Board is not precluded from seeking the appointment of a temporary receiver before answering the complaint (*see* CPLR 6401).

The motion court's appointment of a temporary receiver in this mortgage foreclosure action was a provident exercise of discretion. Both Real Property Law § 339-aa and the condominium bylaws provide for the appointment of a receiver in a lien foreclosure action to collect the reasonable rent for the use and occupancy of a unit by the defaulting unit owner (*see Heywood Condominium v Wozencraft*, 148 AD3d 38, 49 [1st Dept 2017], *appeal dismissed* 29 NY3d 986 [2017]; *compare Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 101 [1st Dept 2001] [affirming grant of condominium board's motion for appointment of temporary receiver in mortgage foreclosure action brought by lender against unit owner and board]).

Nor did the Board fail to establish its entitlement to this drastic remedy (*see Matter of Armienti & Brooks*, 309 AD2d 659, 661 [1st Dept 2003]). It is undisputed that Banfill has not paid common charges since 2008. The Board submitted evidence

establishing that his failure to pay the common charges caused a shortfall in the condominium's monthly income, creating a burden shouldered by the other unit owners.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10280 In re Bronx Council for Environmental Quality, et al., Petitioners-Appellants, Index 100240/18

-against-

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

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Bronx Legal Services, Bronx (Anne Nacinovich of counsel), for appellants.

Georgia M. Pestana, Acting Corporation Counsel, New York (Nwamaka Ejebe of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about July 9, 2018, insofar as appealed from as limited by the briefs, denying the amended petition for a judgment declaring that respondent City of New York's actions in releasing a parcel of land on the Harlem River in the Bronx known as Pier 5 for nonpark use is illegal and that ceding control of public parkland to a private developer without first securing State legislative approval violates the public trust doctrine, and to enjoin respondents from proceeding with the development project without State legislative authorization, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The record demonstrates that Pier 5 was never in "continuous

use as a public park or recreational area," and thus was never impliedly dedicated for such use (*Matter of 10 E. Realty, LLC v Incorporated Vil. of Val. Stream*, 49 AD3d 764, 767 [2d Dept 2008], *revd on other grounds* 12 NY3d 212 [2009]). To the contrary, the parcel was used for rail and storage for decades until 2006, when it was transferred to the management and jurisdiction of respondent New York City Department of Parks and Recreation (DPR), and it remained fenced-off and closed to the general public for most of the next decade. For most of the final period, from 2014 to 2017, DPR permitted the New York State Department of Transportation to use the parcel for work and equipment storage for a highway rehabilitation project.

While DPR permitted private companies to hold circuses and carnivals at Pier 5 for a few weeks each year from 2010 to 2016 and permitted petitioner Bronx Council for Environmental Quality to use the parcel for an environmental study from June 2013 to August 2014, apparently with some access by the community for educational purposes, these uses comprised only a small fraction of the total use of the parcel (*see Matter of Glick v Harvey*, 121 AD3d 498 [1st Dept 2014], *affd* 25 NY3d 1175 [2015]).

The fact that Pier 5 was transferred to DPR's jurisdiction and management does not by itself evince any intention on the City's part to commit the parcel permanently to use as parkland

(*see Martin v Eagle Hill Found.*, 111 AD2d 372, 373-374 [2d Dept 1985]). Nor do the facts that the parcel's fencing bore DPR signage and that DPR and other entities at times referred to the parcel as a park compel the conclusion that Pier 5 became a park by implication (*see Hotel Empls. & Rest. Empls. Union, Local 100 of New York, N.Y., & Vicinity, AFL-CIO v City of New York Dept. of Parks & Recreation*, 311 F3d 534, 548-549 [2d Cir 2002]).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10281 The People of the State of New York, Respondent, Ind. 4980/12

-against-

Ana A. Rosario, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered July 15, 2013, as amended July 17, 2013, convicting defendant, after a jury trial, of identity theft in the first degree (two counts) and grand larceny in the third and fourth degrees, and sentencing her to concurrent terms of one year, unanimously affirmed.

The court correctly responded to a jury note asking for clarification of the term "financial loss," in the context of the element of financial loss exceeding $2000 contained in first-degree identity theft under Penal Law § 190.80(2), when it charged as follows: "financial loss is not the ultimate harm suffered by the victim, but is rather the value of what was taken. Loss includes the value of all property taken even though all or part of it was returned." As the court explained in its

detailed posttrial opinion (41 Misc 3d 392 [Sup Ct, New York County 2013]), in the absence of a Penal Law definition of financial loss, the court adopted a definition of that term found in federal law "protect[ing] the same interests that the New York Legislature sought to protect when it enacted Penal Law § 190.80" (*id.* at 400).

Where a Penal Law provision uses a term without providing a definition, and the term has no "cut-and-dried meaning," courts should seek to "interpret and apply the statute . . . in a manner that comports with its purpose" (*People v McNamara*, 78 NY2d 626, 633 [1991]). The legislative history and purpose of Penal Law § 190.80 are discussed in detail in *People v Roberts* (31 NY3d 406 [2018]) as well as in the trial court's opinion (41 Misc 3d at 397-399). In particular, "the law was drafted to ensure maximum deterrence and the prosecution of unauthorized conduct as defined in the statute" (*Roberts*, 31 NY3d at 416).

We reject the definition of financial loss advanced by defendant, that is, an actual, unreimbursed out-of-pocket loss incurred by the victim, in addition to valuation of the victim's time spent seeking restitution for the loss. That reading of the statute would result in no criminal liability in the event the perpetrator, or a collateral source such as a bank or insurance company, made the victim whole. Aside from the fact that a

reimbursed loss is at least a temporary loss, it is inconceivable, given the stated goal of deterring financial crimes, that the legislature intended to create a unique offense where criminal liability is extinguished by reimbursement or restitution. Furthermore, the statute explicitly states that the perpetrator must cause financial loss to the victim or "to another person or persons" (Penal Law § 190.80[2]). Since Section 10.00(7) of the Penal Law includes corporations in its definition of "persons," it is clear that the legislature intended to include companies such as banks as additional victims. We note that in the present case, the indictment encompassed financial loss to unidentified other persons, and the trial evidence established that the victims were reimbursed by their banks.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10282 Randolph W. Slifka, et al., Index 652058/17
Plaintiffs-Appellants,

-against-

Barbara Slifka, et al.,
Defendants-Respondents.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Allan J. Arffa of counsel), for Barbara Slifka, 477 Madave Associates, 477 Madave Management Corp., 477 Madave Holdings, LLC, J.A.B. Madison Associates, LLC, J.A.B. Madison Management Corp. and J.A.B. Madison Holdings, LLC, respondents.

Shearman & Sterling LLP, New York (K. Mallory Brennan of counsel), for SRI Ten 477 Madison LLC and SRI Ten 477 Madison TRS LLC, respondents.

Proskauer Rose LLP, New York (Steven H. Holinstat of counsel), for David Slifka, respondent.

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Order, Supreme Court, New York County (Joel M. Cohen, J.), entered April 19, 2019, which, to the extent appealed from, granted defendants' motions to dismiss the complaint as against them except for the fifth cause of action, and declared that defendant Barbara Slifka continues to hold the authority of Managing Partner and that plaintiffs' trusts did not succeed, nor do they currently have, such authority, unanimously affirmed, with costs.

To the extent plaintiffs challenge the court's March 7, 2019

order lifting the stay entered by Justice Bransten to allow for the adjudication of the instant motions to dismiss, that order is not before this Court and is beyond the scope of review on the instant appeal (CPLR 5501).

The court correctly dismissed all but the fifth cause of action, which seeks an order requiring defendant Barbara Slifka (Barbara) to produce the books and records, or other information, pertaining to the partnership. Section 8.1 of the Partnership Agreement gave the Managing Partner, Joseph Slifka, "sole and absolute discretion, including without limitation, and without the consent of the other Partners, the right to sell (a) sell . . . all of the real property owned by the Partnership," including the building at 477 Madison Avenue, which is at issue here. Joseph died in 1992. Section 12.2 of the Partnership Agreement states, "In the event of the death . . . of the Managing Partner, the execution [sic] of the estate of the Managing Partner, the guardian of the Managing Partner or the trustee of the Managing Partner, as the case may be, shall act as successor to the authority . . . of such Managing Partner."

The court correctly deemed the word "execution" a scrivener's error that was intended to be "executor." The phrase refers to two other people, the "guardian" and the "trustee," and thus, the parties clearly intended to refer to a person, an

"executor," not the action of "execution" (*see Lehman Bros. Holdings, Inc. v Matt*, 34 AD3d 290, 291 [1st Dept 2006]; *Ferguson Elec. Co. v Kendal At Ithaca*, 274 AD2d 890, 892 [3d Dept 2000]). The court was not, as plaintiffs suggest, constrained to adopt an absurd phrasing in the contract merely because the statute of limitations for reformation had passed, when the error is obvious and the drafters' intention clear.

Upon Joseph's death, section 12.2 of the Partnership Agreement conferred on Alan, now deceased, and Barbara, Joseph's executors, the authority to act as Managing Partner. Thus, under section 8.1, Barbara had "sole and absolute" discretion to sell the property. The reference to "executor" unambiguously refers to Barbara. No further discovery is required, and thus, the court correctly dismissed the causes of action based on Barbara's alleged lack of authority to sell the property.

In dismissing the cause of action seeking a declaration that the ground floor tenant is "in default of its obligations" under the ground lease, the court correctly concluded, inter alia, that the allegations against defendants SRI Ten 477 Madison LLC and SRI Ten 477 Madison TRS LLC (collectively, the Shorenstein defendants) were insufficiently pleaded and that those against Barbara were duplicative of the breach of fiduciary duty claims

(*see Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1st Dept 2008]).

Since there is no breach of fiduciary duty by Barbara, there is no aiding and abetting any breach of fiduciary duty by the Shorenstein defendants (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). In any case, the court correctly dismissed all claims against the Shorenstein defendants because the allegations against them were speculative and conclusory (*Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014]).

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10283 The People of the State of New York, Ind. 663/16
Respondent,

-against-

Joseph Johnson,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Mandelbaum, J.), rendered November 10, 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: NOVEMBER 7, 2019

CLERK

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

Richter, J.P., Webber, Gesmer, Oing, JJ.

10284-
10284A Atlas MF Mezzanine Borrower, LLC, etc., Plaintiff-Respondent, Index 651657/17

-against-

Macquarie Texas Loan Holder LLC, etc., Defendant,

KKR REPA AIV-2 L.P., etc., et al., Defendants-Appellants.

_____

Quinn Emanuel Urquhart & Sullivan LLP, New York (Sanford I. Weisburst of counsel), for appellants.

Meister Seelig & Fein, New York (Stephen B. Meister of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered November 14 and 23, 2018, which, inter alia, granted plaintiff's motion to dismiss defendants-respondents' (defendants) counterclaim for fraud, unanimously affirmed, with costs.

Plaintiff's statement that its required deposit check was "on its way" was an actionable statement of present fact, not of future expectation (*cf. GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.*, 168 AD3d 563, 564 [1st Dept 2019]). However, defendants' allegations are insufficient to show reasonable reliance as a basis to continue bidding against plaintiff, where

the fact that the check was not there was disclosed, the auctioneer disqualified plaintiff from bidding, and when the auctioneer later allowed bidding he stated that he was making "an exception" from the bidding procedures to allow plaintiff to bid (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] [internal quotation marks omitted]).

Nor do defendants' allegations that they reasonably relied on some implied representation about plaintiff's financial condition fare any better. By their own admission, defendants knew that plaintiff had defaulted on the underlying debt, that it had failed to tender the required deposit check for the auction, and that it was bidding more than the amount of the underlying debt. Based on this information, defendants ceased bidding some 15 minutes into the auction. Defendants do not allege they obtained any further information before making the decision to stop bidding. They had all the information necessary to determine that plaintiff likely did not have the ability to close.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Richter, J.P., Webber, Gesmer, Oing, JJ.

10285N GMAC Mortgage, LLC, Index 17112/07
Plaintiff-Appellant,

-against-

Liza Ortiz, et al.
Defendants.

- - - - -

Royal Realty of Kings, Inc.,
Nonparty Respondent.

_____

RAS Boriskin, LLC, Westbury (Joseph F. Battista of counsel), for appellant.

The Rosenfeld Law Office, Lawrence (Avi Rosenfeld of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about July 5, 2018, which, upon deeming plaintiff's motion pursuant to CPLR 2221 as a motion pursuant to CPLR 5015(a) to vacate the pre-note of issue dismissal order, denied the motion, unanimously affirmed, with costs.

Plaintiff waived its right to challenge the dismissal of this foreclosure action when it voluntarily discontinued the action in 2013 (*see OneWest Bank, FSB v McKay*, 172 AD3d 887, 888 [2d Dept 2019]). In any event, the motion, brought four years after the action was dismissed, was properly denied. Plaintiff failed to offer any reasonable excuse for its failure to appear

at a 2013 scheduled court conference (*see Diaz v Perlson*, 168 AD3d 463 [1st Dept 2019]), and despite plaintiff's claims to the contrary, there is no evidence that there were ongoing settlement negotiations between it and defendant Ortiz.

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

ENTERED: NOVEMBER 7, 2019

CLERK

Gische, J.P., Tom, Kapnick, Kern, Moulton, JJ.

10300 Harvey Rubin, Index 653707/15
Plaintiff-Respondent,

-against-

James Baumann, et al.,
Defendants-Appellants.

_____

Zingman & Associates PLLC, New York (Mitchell S. Zingman of counsel), for appellants.

Law Offices of Joseph Neiman, Jamaica Estates (Mark F. Heinze for respondent.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about June 10, 2019, which denied defendants' motion for summary judgment dismissing plaintiff's misconduct claim for improperly excluding him from managing the property at issue, unanimously affirmed, without costs.

Defendants submit that because the Operating Agreement does not discuss or provide any process for appointing or replacing the existing managing agent of the building, the default provisions of the Limited Liability Company Law (LLCL) control. In this vein, defendants claim that LCLL § 408(b) requires an affirmative vote of the majority of managers to implement any decision that would change the "status quo" of the Company.

Defendants' argument is unavailing. Even if the Operating Agreement is "silent" with respect to the replacement of Managers

and the default provisions of the LLCL apply, the continued decision to keep Win Win Asset Management LLC as the managing agent of the company is also a major management decision for the Company, and requires a majority vote. Given that Rubin and Baumann each hold a 50% ownership stake in the Company, the parties are deadlocked as to this fundamental decision regarding its operations.

Nor are defendants entitled to summary judgment with respect to plaintiff's request for damages. It is a fundamental principle of contract law that an award of damages should put "plaintiff in the same position as he or she would have been in if the contract had not been breached" (*Wai Ming Ng v Tow*, 260 AD2d 574, 575 [2d Dept 1999). If the contract had not been breached, plaintiff would have either been paid to manage or would at least have saved half of the fees paid to the management company.

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

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

ENTERED: NOVEMBER 7, 2019

CLERK

Friedman, J.P., Renwick, Richter, Mazzarelli, Oing, JJ.

10383- Index 154205/19
10383A & The City Club of New York, et al.,
M-7735 Plaintiffs-Appellants,

-against-

Extell Development Company, et al.,
Defendants-Respondents.

_____

John R. Low-Beer, Brooklyn, for appellants.

Boies Schiller Flexner LLP, Armonk (Jason Cyrulnik of counsel), for respondents.

_____

Appeals from judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 14, 2019, dismissing the complaint, and order, same court and Justice, entered June 11, 2019, dismissing the complaint and denying preliminary injunctive relief, unanimously dismissed, without costs, as moot.

In this action, plaintiffs allege that defendants' construction of a high-rise building in Manhattan violates various zoning regulations. Plaintiffs brought this litigation after an unsuccessful challenge to a permit issued by the NYC Department of Buildings (DOB). Plaintiffs moved for a preliminary injunction halting further construction, and defendants cross-moved to dismiss the complaint. While this action was pending, plaintiffs also pursued an administrative appeal of DOB's decision to issue the permit before the Board of

Standards and Appeals (BSA). The motion court granted defendants' cross motion based on plaintiffs' failure to have exhausted their administrative remedies, and denied the preliminary injunction as academic. A judgment dismissing the complaint was subsequently entered.

After this appeal was perfected, the parties informed this Court that BSA issued a final decision denying plaintiffs' administrative appeal. Because the administrative remedies have now been exhausted, the appeal from the dismissal of the complaint is moot (*see 985 Fifth Ave, LLC v Reiss*, 8 AD3d 11, 12 [1st Dept 2004]). We find no merit to plaintiffs' argument that the appeal from the denial of the preliminary injunction is still properly before us. Since no action is presently pending, the

appeal from the order denying the injunction is moot (*see Hakim v James*, 169 AD3d 450, 452 [1st Dept 2019]).

M-7735 - *The City Club of New York v Extell Development Company*

Motion to dismiss appeal denied as academic.

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

ENTERED: NOVEMBER 7, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Anil C. Singh, JJ.

9991-
9991A
Index 101831/17

_____x

In re Local 621, et al.,
Petitioners-Respondents-Appellants,

-against-

The New York City Department of Transportation, et al.,
Respondents-Appellants-Respondents.

_____x

Cross appeals from the order and judgment (one paper) of the Supreme Court, New York County (Carol Edmead, J.), entered July 16, 2018, to the extent appealed from, dismissing the third (Bharat retaliation), fourth and fifth (Bharat and Kubair discrimination) causes of action in this article 78 proceeding/plenary action and declaring that respondent New York City Department of Transportation (DOT) entered certain determinations into the employment files of petitioners Bharat and Kubair and Cohen's decedent in violation of their due process rights, and from the order of the same court and Justice, entered November 13, 2018, which granted petitioners' motion to renew respondents' motion to dismiss, and, upon renewal, adhered to the original determination.

Zachary W. Carter, Corporation Counsel, New York (Kevin Osowski, Fay Ng and Jason Anton of counsel), for appellants-respondents.

Gordon, Gordon & Schnapp, P.C., New York (Kenneth E. Gordon of counsel), for respondents-appellants.

RENWICK, J.

The individual petitioners, who worked as Supervisors of Mechanics (Mechanical Equipment) (SMME) in respondent New York City Department of Transportation's (DOT) Fleet Service Division, commenced this article 78 proceeding/plenary action after DOT's Office of Equal Employment Opportunity (EEO) determined that petitioners Bharat and Kubair and petitioner Cohen's decedent, Andrew Cohen (collectively, petitioners), had engaged in discriminatory and retaliatory conduct toward a fellow employee with disability. Prior to this action, in 2017, Bharat had filed a federal action against DOT for discriminatory denial of a promotion. He, along with several other minority DOT employees at the DOT's Fleet Services Division received promotions pursuant to a consent decree in the federal action.

The petition alleges that respondents deprived petitioners of their due process rights by placing the DOT determinations in their EEO employment files without affording them a hearing. The petition alleges further in the fifth cause of action that by issuing the determinations DOT discriminated against Bharat and Kubair (who are of East Indian descent) under the New York City and York State Human Rights Laws on the basis of their national origin, and, it also alleges that DOT discriminated against Bharat by failing to upgrade him to SMME II status.

The petition further alleges in the third cause of action that DOT engaged in retaliatory conduct against Bharat in violation of the New York City and New York State Human Rights laws by issuing the determination dated October 4, 2017, and by refusing to upgrade him to the next level of seniority within his employment.

Petitioners were correctly awarded judgment on their due process claims. Civil Service Law § 75(1) provides that tenured civil service employees (such as petitioners) "shall not be . . . subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges." It is undisputed that no hearing was held before the determinations were placed into petitioners' DOT employment files. The failure to hold a hearing on the charges against these individuals violated their due process rights (*Matter of D'Angelo v Scoppetta*, 19 NY3d 663, 667 [2012]). In light of the undisputed fact that no hearing was held, respondents need not be afforded a chance to submit an answer pursuant to CPLR 7804(f) (*Matter of Kusyk v New York City Dept. of Bldgs.*, 130 AD3d 509, 510 [1st Dept 2015]).

However, the discrimination claims of Bharat and Kubair were improperly dismissed. A plaintiff states a "claim of invidious discrimination under the State and City [Human Rights Laws] by

alleging (1) that he/she is a member of a protected class, (2) that he/she was qualified for the position [held or for a promotion], (3) that he/she was subjected to an adverse employment action (under State HRL) or that he/she was treated differently from or worse than other employees (under City HRL), and (4) that the adverse or different treatment occurred under circumstances giving rise to an inference of discrimination" (*Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]; *see also* Executive Law § 296; Administrative Code of City of N.Y., § 8-107).

It is undisputed that petitioners sufficiently stated the first two elements of an employment discrimination claim on behalf of Bharat and Kubair under both the State and City HRLs — namely, that they are both members of a protected class and were well qualified for their respective positions (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Petitioners also sufficiently stated the third element — that they were adversely (State HRL) or differently treated (City HRL) (*id.*). In particular, petitioners allege that DOT's failure to upgrade Bharat to SMME II status (a position with greater salary and pension benefits) was discriminatory conduct as a less qualified white employee received the upgrade.

With regard to both petitioners Bharat and Kubair, the petition alleges that DOT discriminated against them by conducting a biased investigation of a baseless EEO complaint filed against them by a white disabled employee. The EEO complaint resulted in DOT placing an EEO letter, substantiating the EEO complaint in petitioners' employment files, as a form of reprimand.

We find that the fact that a white employee (Cohen) was also issued an EEO letter of reprimand based on the same allegedly baseless EEO complaint does not negate the fourth element of discrimination so as to render the claim insufficient. In fact, in arguing that no inference of discriminatory motive can be drawn when white and nonwhite employees receive similar treatment, DOT wishes us to ignore the context in which the alleged discriminatory conduct took place with regard to the EEO letters placed in petitioners' employment files. In essence, petitioners allege that respondent's biased investigation of the EEO complaint was part of a pattern and practice of discrimination by DOT on the basis of race. This alleged pattern and practice of discrimination is supported by DOT's history of discrimination as suggested by the federal action initiated by Bharat, which culminated in a consent decree promoting minority employees who had been discriminated on the basis of race. This

alleged pattern and practice of discrimination is also supported by the conduct of DOT during the investigation of the EEO complaint against petitioners that, as fully explained before, disregarded their due process rights.

In addition, we cannot ignore Bharat's statements against the disabled employee who filed the EEO complaint against petitioners. Bharat states that the disabled employee was furious at Cohen, who as a supervisor had given a favorable assignment to an employee of East Indian descent. Petitioners also allege that, after the federal action's consent decree was executed, there was an atmosphere among white employees at DOT, including the disabled employee, that minority employees were receiving treatment they did not deserve. Under the circumstances and according petitioners the benefit of every possible inference, it is fair to infer that the disabled employee's animus toward Cohen was a byproduct of the disabled employee's animus toward Bharat and Kubair. Bearing in mind the liberal pleading standards governing this stage of the action (*see Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]; *Wiese v New York Univ.*, 304 AD2d 459, 460 [1st Dept 2003]), the foregoing sufficiently alleges discriminatory animus by DOT with regard to its investigation of the baseless EEO complaint that resulted in the EEO letter of reprimand.

We also find that the claim of retaliation against petitioner Bharat was improperly dismissed. "To make out a prima facie claim of retaliation under the State HRL, a plaintiff must show that (1) he/she has engaged in a protected activity, (2) his/her employer was aware of such activity, (3) he/she suffered an adverse employment action based upon the activity, and (4) a causal connection exists between the protected activity and the adverse action. Under the City HRL, the test is similar, through rather than an adverse action, the plaintiff must show only that the defendant took an action that disadvantaged him or her" (*Harrington*, 157 AD3d at 585 [internal quotation marks and citations omitted]). Contrary to respondents' contention, the fact that Bharat's filing of an EEO complaint against the DOT was not temporally proximate to the issuance of the October 4, 2017 determination against him or the refusal to upgrade his employment "is not necessarily fatal to a retaliation claim . . . [and] will not defeat the claim, where, as here, there are other facts supporting causation" (*id.* at 586).

Bharat's allegations are sufficient, at the pleading stage, to permit the inference that the reason he was not awarded an upgrade and the determination was issued against him was because of his involvement in the prior federal action against the DOT, which resulted in the issuance of a consent decree that subjected

the DOT to significant damages (*Harrington*, 157 AD3d at 586; *see also Jin Sun Kim v Jennifer Goldberg, Weprin, Finkel, Goldstein LLP*, 120 AD3d 18, 21, 25 [1st Dept 2014]). The petition provides additional support for an inference of retaliation in the fact that an employee with less experience was upgraded over Bharat shortly after the consent decree was issued. In light of the foregoing, Bharat and Kubair may pursue the issue of back-pay and seek compensatory damages and attorney's fees on their discrimination and retaliation claims (Administrative Code §§ 8-502[g]; 8-120[a][8]; Executive Law § 297[4][c][iii]; *see also Matter of Jacobs v New York State Div. of Human Rights*, 131 AD3d 883, 884 [1st Dept 2015]).

Finally, we find that the petition was properly dismissed as against the individual respondents.

We have considered the remaining arguments and find them unavailing.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Carol Edmead, J.), entered July 16, 2018, to the extent appealed from, dismissing the third (Bharat retaliation), fourth, and fifth (Bharat and Kubair discrimination) causes of action in this article 78 proceeding/plenary action, and declaring that DOT entered certain determinations into the employment files of petitioners in

violation of their due process rights, and the order of the same court and Justice, entered November 13, 2018, which granted petitioners' motion to renew respondents' motion to dismiss, and, upon renewal, adhered to the original determination, should be modified, on the law, to deny respondents' motion to dismiss as to the third (Bharat retaliation claim) and fifth (Bharat and Kubair discrimination) causes of action, and vacate the dismissal of those claims, and otherwise affirmed, without costs.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Carol Edmead, J.), entered July 16, 2018, and order, same court and Justice, entered November 13, 2018, modified, on the law, to deny respondents' motion to dismiss as to the third (Bharat retaliation claim) and fifth (Bharat and Kubair discrimination) causes of action, and vacate the dismissal of those claims, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Acosta, P.J., Renwick, Manzanet-Daniels, Singh, JJ.

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

ENTERED: NOVEMBER 7, 2019

CLERK