Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9894 The People of the State of New York, Ind. 6606/03
Respondent,

-against-

Kyle Jenkins,
Defendant-Appellant.

_____

Law Office of Richard M. Weinstein, New York (Richard M. Weinstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel McCullough, J.), entered on or about July 30, 2012, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (William A. Wetzel, J.), rendered August 18, 2005, unanimously affirmed.

The motion court providently exercised its discretion in denying defendant's motion to vacate his conviction on the basis of newly discovered evidence. "[W]hether a defendant is entitled to a hearing on a CPL 440.10 motion is a discretionary determination" (*People v Jones*, 24 NY3d 623, 635 [2014]). The motion was not made with due diligence, because it was filed years after the discovery of the alleged new evidence without any valid excuse for the delay (*see* CPL 440.10[1][g]; *People v Mallet*, 168 AD3d 542, 543 [1st Dept 2019], *lv denied* 33 NY3d 978 [2019]). Furthermore, the new evidence was not "of such character as to create a probability that had [it] been received at the trial the verdict would have been more favorable to the

defendant" (CPL 440.10[1][g]). The affidavit of the proposed witness did nothing to undermine the extensive proof of defendant's guilt presented at trial, including defendant's incriminating statements. On the contrary, even assuming that the proposed witness was describing an incident that occurred around the time and place of the murder, his affidavit, when viewed in conjunction with the trial evidence, appears to describe an unrelated incident.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9895 Jerusalem Avenue Taxpayer, LLC, Index 159842/13
Plaintiff-Respondent,

CastlePoint Insurance Company,
Plaintiff,

-against-

Liberty Mutual Insurance Company,
Defendant-Appellant,

Best Yet Market, Inc., et al.,
Defendants.

_____

Jaffe & Asher, LLP, New York (Marshall T. Potashner of counsel), for appellant.

Kennedys CMK, LLP, New York (Max W. Gershweir of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 28, 2018, which, to the extent appealed from, denied defendant Liberty Mutual Insurance Company's (defendant) cross motion for an order, pursuant to CPLR 5015(d) and 5523, directing plaintiff Jerusalem Avenue Taxpayer, LLC (plaintiff) to pay restitution of amounts that defendant paid to settle an underlying action against it, or, alternatively, for leave to amend its answer to assert a claim for restitution, unanimously affirmed, with costs.

The motion court providently exercised its discretion in denying defendant's request for the equitable remedy of restitution (*see generally Gaisi v Gaisi*, 108 AD3d 687 [2d Dept 2013]; Restatement [Third] of Restitution and Unjust Enrichment §

1, Comment a). Even assuming plaintiff was not insured under the insurance policy issued by defendant, it was plaintiff's insurer that received the benefit of defendant's contribution to the settlement of the underlying action, and defendant's right to recoup its settlement contribution from plaintiff's insurer is governed by an agreement between defendant and plaintiff's insurer.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9896 In re Keisha L. B.,
Petitioner-Respondent,

-against-

Damien R. W.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about September 6, 2018, which, upon granting petitioner's objection to a Support Magistrate's order dismissing her petition seeking to enforce a money judgment for child support arrears, remanded the matter to the Support Magistrate for a willfulness hearing, unanimously dismissed, without costs, as taken from a nonappealable order.

The order appealed from is not appealable as of right since it is not an order of disposition (*see* Family Ct Act § 1112[a]; *Matter of Holtzman v Holtzman*, 47 AD2d 620 [1st Dept 1975]), and we decline to review it.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9897 Jacek Wikiera, Index 307404/13
Plaintiff-Respondent,

-against-

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

New York City School Construction Authority,
Defendant.

_____

Cozen O'Connor, New York (Daniel Goodstadt of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (D. Allen Zachary of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 15, 2019, which, to the extent appealed from, denied the motion of defendants City of New York and New York City Department of Education for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was allegedly injured when he fell from a scaffold while jack-hammering stone facing. Although defendants submitted documentary evidence, including plaintiff's employer's time sheets and payroll records, indicating that plaintiff did not work at the construction site on October 15, 2012, plaintiff unwaveringly testified at deposition that he did work that day and was injured in a fall from a scaffold when its wooden planks

shifted. Such evidence presents credibility issues that cannot be resolved on this motion for summary judgment (*see generally S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9898 The People of the State of New York, Ind. 1341N/15
Respondent,

-against-

Ait-Abdellah Salem,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered August 9, 2016, convicting defendant, after a jury trial, of assault in the second degree and petit larceny, and sentencing him, as a second violent felony offender, to an aggregate term of five years, 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]). The evidence, including testimony regarding the sequence of events in which a plainclothes anticrime officer identified himself, supported the inference that at the time of the assault defendant knew that his victim was a police officer.

The court providently exercised its discretion in refusing to allow defendant to show the jury the condition of his teeth, a matter allegedly bearing on the credibility of an officer's testimony, inasmuch as defendant offered no proof that the

condition of his teeth had not changed in the 18 months between the arrest and the trial (*see People v Rodriguez*, 64 NY2d 738, 741 [1984]).

Defendant's challenges to the court's supplemental instructions are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the court meaningfully responded to the jury notes.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9899-
9899A-
9899B

Ind. 47/12
2450/12

The People of the State of New York,
Respondent,

-against-

Bernard Moultrie,
Defendant-Appellant.

_____

Michael E. Lipson, Jericho, for appellant.

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

_____

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 15, 2012, convicting defendant, upon his pleas of guilty, of manslaughter in the first degree, operating as a major trafficker and conspiracy in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 35 years, and order, same court and Justice, entered on or about February 26, 2013, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant's unpreserved challenge to the validity of his plea does not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently, and voluntarily made, notwithstanding deficiencies in the plea

colloquy (*see id.* at 383; *People v Harris*, 61 NY2d 9, 16-19 [1983]).

Defendant also claims that the attorney who represented him on his CPL 440.10 motion, made on grounds not at issue on this appeal, rendered ineffective assistance of counsel by failing to include a challenge to the inadequacy of the plea colloquy. However, counsel could not have raised such a record-based claim in a CPL 440.10 motion (*see People v Tyrell*, 22 NY3d 359, 364 [2012]; *People v Cooks*, 67 NY2d 100, 104 [1986]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9900 Bistro Shop LLC, Index 110907/09
Plaintiff-Respondent,

Penny Bradley,
Plaintiff,

-against-

N.Y. Park N. Salem, Inc.,
Defendant-Appellant.

_____

Carmel, Milazzo & DiChiara LLP, New York (Christopher P. Milazzo of counsel), for appellant.

Neufeld O'Leary & Giusto, New York (David S.J. Neufeld of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered March 20, 2018, after a nonjury trial which, to the extent appealed from as limited by the briefs, awarded plaintiff Bistro Shop LLC damages on its rescission claim of construction and preparatory expenses incurred in anticipated occupation of the premises, and prejudgment interest at 9% per annum from March 31, 2008, unanimously affirmed, with costs.

Supreme Court properly found that defendant N.Y. Park N. Salem, Inc., the owner of a building located at 30 East 60th Street, New York, New York, breached a lease by failing to timely complete construction work contemplated by the lease and turn over the premises to plaintiff Bistro Shop LLC. The lease contemplated that defendant was going to add numerous floors to the building, and required occupation of the leased premises for

a relatively short duration to complete construction related to the building's foundation. Plaintiff was authorized under the lease to conduct demolition and preparatory construction work on the premises while defendant simultaneously occupied the premises.

In December 2007, plaintiff notified defendant that it had completed its demolition and preparatory construction work and sought permission to continue preparing the space as a restaurant. In a January 24, 2008 email, plaintiff's counsel memorialized a verbal agreement between the parties whereby plaintiff would continue to renovate the space while defendant waited for third-party approvals necessary to complete its work in the premises. In a responding email, defendant acknowledged that plaintiff counsel's email was accurate. Supreme Court properly found that this exchange constituted a written modification of the lease, permitting plaintiff to conduct additional renovations on the restaurant (*see Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011]; *Williamson v Delsener*, 59 AD3d 291, 291-292 [1st Dept 2009]). In March 2008, plaintiff stopped renovating the premises because defendant was not in compliance with the lease. Ultimately, defendant offered the leased premises to plaintiff in 2016.

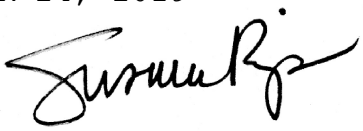
Accordingly, Supreme Court properly granted rescission damages for all of the work completed in the leased premises

which was rendered useless due to defendant's breach of the lease, which was "so substantial and fundamental as to strongly tend to defeat the object of the parties" in making the lease (*see Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]; *Bisk v Cooper Sq. Realty, Inc.*, 115 AD3d 419, 419 [1st Dept 2014]).

Supreme Court also providently exercised its discretion in awarding plaintiff prejudgment interest at a rate of 9% from March 31, 2008. CPLR 5001(a) provides, in relevant part, that "in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." CPLR 5001(b) requires that "interest be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." The evidence clearly shows that in March 2008, the tenant stopped making monetary investments into the property as the owner did not appear to be complying with the lease. As such, tenant was deprived of the time value of the money spent in furtherance of construction of its restaurant from March 31, 2008 onward (*see Mosesson v 288/98 W. End Tenants Corp.*, 294 AD2d 283, 284 [1st Dept 2002]).

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

ENTERED: SEPTEMBER 24, 2019



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CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9901 In re Ernest A. Zurita II also known as Ernesto Zurito, Petitioner-Appellant, Index 101088/18

-against-

The New York State Department of Labor, et al., Respondents-Respondents.

_____

Glenn H. Ripa, New York, for appellant.

Letitia James, Attorney General, New York (Seth Kupferberg of counsel), for respondents.

_____

Determination of respondent New York State Industrial Board of Appeals (the Board), dated June 6, 2018, which, after a hearing, affirmed respondent New York State Department of Labor's Order to Comply, dated November 20, 2014, directing petitioner to pay unpaid wages, liquidated damages, interest, and civil penalties for violations of Labor Law articles 6 and 19, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carmen Victoria St. George, J.], entered January 3, 2019), dismissed, without costs.

Substantial evidence supports the determination that petitioner was an "employer" within the meaning of Labor Law

articles 6 and 19 (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The hearing evidence that petitioner's clothing assembly business had the same address as the workers' formal employer, Fama Fashion Inc., that petitioner had shifted the work in its entirety from a previous operator without material changes, that it was petitioner who explained to the workers how to do the work, that petitioner checked every piece of work before shipping it to the customers, and that Fama and petitioner worked exclusively with one another demonstrates the economic reality that petitioner was the workers' employer (*see Matter of Exceed Contr. Corp. v Industrial Bd. of Appeals*, 126 AD3d 575 [1st Dept 2015]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]; *see generally Matter of Ovadia v Office of the Indus. Bd. of Appeals*, 19 NY3d 138 [2012]).

The hearing officer providently exercised her discretion in declining to adjourn the hearing to give petitioner a chance to procure documents — corporate tax returns or organizational documents — to rebut an Apparel Industry Registration Certificate's statement that he was a 50% shareholder in Fama. Petitioner was on notice that the Department of Labor sought to hold him liable as an employer of Fama's workers, and had had ample opportunity to procure documents to show that he was not an owner of Fama. In any event, the hearing evidence shows that petitioner had "functional control" over the employees, and thus qualified as a "joint employer," even without the evidence that

he was a half-owner of the formal employer (*see Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61, 72 [2d Cir 2003]).

Contrary to petitioner's contention, the Board's reliance on some hearsay evidence does not impair its determination (*see* 12 NYCRR 65.29; *Matter of Flynn v Hevesi*, 308 AD2d 674, 676 [3d Dept 2003], *lv denied* 1 NY3d 504 [2003]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9902 In re Jahaire A. M., etc.,

A Child Under Eighteen Years
of Age, etc.,

Tabitha A. M.,
Respondent-Appellant,

-against-

New York Foundling Hospital,
Petitioner-Respondent.

_____

Steven P. Forbes, Jamaica, for appellant.

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

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

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about March 20, 2018, which, after a hearing, found violations of a suspended judgment, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother failed to comply with material terms of the suspended judgment requiring her to adequately address the child's medical and educational needs while he was in her custody (*see Matter of Micah T. [Josette D.]*, 171 AD3d 546 [1st Dept 2019]). The record demonstrates that the mother caused many school absences that

prevented the child from receiving, inter alia, speech therapy, physical therapy, and occupational therapy. She also allowed sores on the child's skin to persist and worsen without seeking appropriate medical care.

The finding that termination of parental rights was in the child's best interest is supported by a preponderance of the evidence. The mother failed to show insight into the child's needs and the conditions that had resulted in removal of her two older children. Furthermore, with the exception of the time spent with the mother during the term of the suspended judgment, the child has been in foster care his whole life and requires permanency (*see id.*; *Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 699 [1st Dept 2012]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9903 The People of the State of New York, Ind. 11977/88
Respondent,

-against-

Luis Rosales,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about May 18, 2018, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (Herbert I. Altman, J.), rendered April 19, 1991, unanimously affirmed.

The Supreme Court providently exercised its discretion in denying, without a hearing, defendant's motion to vacate his 1991 murder conviction on the basis of newly discovered evidence. "[W]hether a defendant is entitled to a hearing on a CPL 440.10 motion is a discretionary determination" (*People v Jones*, 24 NY3d 623, 635 [2014]).

In 2017, defendant submitted an affidavit from a fellow inmate stating that defendant did not commit the 1988 shooting at issue, and that a man named "Yeppes" who resembled defendant committed the crime. The motion court properly concluded that this did not constitute newly discovered evidence. At the time of his trial, defendant knew, based primarily on a police report,

that police suspected a "Yeppes" or "Yeppez," of the shooting, and that a man named Jose Yepez was arrested for a pistol whipping close to the time and place of the homicide. In his moving papers, defendant acknowledged that he knew Yeppes, and attached a photo of himself with Jose Yepez to show the resemblance between the two men. Thus, even without the proposed new witness's testimony, defendant could have pursued a misidentification theory at trial, through his own testimony and cross-examination of police officers. Moreover, defendant testified at his trial that a detective asked if he knew someone named "Jepis," and defendant said he did not.

In any event, regardless of whether the affidavit constitutes newly discovered evidence, the affidavit was not "of such character as to create a probability that had [it] been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10[1][g]). The trial evidence included the testimony of eyewitnesses to the shooting who identified defendant as one of the shooters, and evidence that cartridge cases found at the crime scene matched the pistol found on defendant when he was arrested. There was also evidence that there were two shooters, so that Yepez could have been the other shooter.

Furthermore, the proposed new witness would have been subject to significant impeachment, rendering it even less likely that his testimony would result in a different verdict. The

witness, defendant's fellow inmate, was a persistent violent felony offender serving 25 years to life for robbery in the first degree who previously attempted to present a false alibi in connection with one of his own convictions. He also came forward almost 30 years after the murder, and long after Yepez had died.

Accordingly, the court providently exercised its discretion in determining that no hearing was required, notwithstanding its reliance on the incorrect evidentiary standard (*see People v Brown*, 56 NY2d 242, 247 [1982]; *People v Velazquez*, 143 AD3d 126, 131-32 [1st Dept 2016], *lv denied* 28 NY3d 1189 [2016]). We have considered and rejected defendant's remaining arguments to the contrary.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9904 The People of the State of New York, Ind. 842/17
Respondent,

-against-

Dwayne Faulkner,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Kevin B. McGrath, Jr., J.), rendered January 2, 2018,

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

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9907-
9907A The People of the State of New York, Ind. 3380/15
Respondent, 742/16

-against-

Eddy-Albert Ramirez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Michael J. Schordine of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Alvin Yearwood, J.), rendered October 24, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9908 The People of the State of New York, Ind. 4177/11
Respondent,

-against-

Walde Vizcaino,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about May 3, 2018, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction, unanimously affirmed.

Upon our review of the record, which has now been expanded by way of information from trial counsel setting forth his strategic decision-making, to the best of his recollection, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that either of counsel's two alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Reopening of the suppression hearing based on the victim's trial testimony would have had no more than a remote chance of

obtaining suppression of any evidence (*see People v Gray*, 27 NY3d 78, 82 [2016]; *People v Jamison*, 96 AD3d 571, 572 [1st Dept 2012], *lv denied* 19 NY3d 1026 [2012]), and the discrepancies in police testimony regarding the place and manner in which the victim's property was recovered had "minimal impeachment value" (*People v Smith*, 90 AD3d 561, 561 [1st Dept 2011], *lv denied* 18 NY3d 998 [2012]; *see also People v Andrade*, 71 AD3d 601, 602-03 [1st Dept 2010], *lv denied* 15 NY3d 918 [2010]). Accordingly, defendant has not established either the unreasonableness or prejudice prongs of a state or federal ineffectiveness claim with regard to the absence of a motion to reopen the suppression hearing or the lack of cross-examination as to the alleged discrepancies in police testimony.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9909 The People of the State of New York, Ind. 951/15
Respondent,

-against-

Luisito Colon-Pagan,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered October 31, 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: SEPTEMBER 24, 2019

CLERK

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

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9910 The People of the State of New York, Ind. 3177/15
Respondent,

-against-

Stephan C.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered January 13, 2016, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9911 The People of the State of New York, Ind. 1812/15
Respondent,

-against-

Jacqueline Gonzalez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 10, 2016, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9912 In re Tony Abdallah, et al., Index 157618/18
Petitioners-Appellants,

-against-

Maria T. Vullo, in her capacity as Superintendent of Financial Services, et al.,
Respondents-Respondents.

Law Office of Stuart Salles, New York (Stuart Salles of counsel), for appellants.

Letitia James, Attorney General, New York (Matthew William Grieco of counsel), for The New York Department of Financial Services, respondent.

Litchfield Cavo, LLP, New York (Brian S. Gitnik of counsel), for Municipal Credit Union, respondent.

Appeal from judgment, Supreme Court, New York County (Melissa Crane, J.), entered October 25, 2018, denying the petition to annul a determination by respondent Superintendent of Financial Services, dated June 22, 2018, to the extent it removed petitioners from the board of directors of Municipal Credit Union, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously dismissed, without costs, as moot.

This appeal was rendered moot by the appointment of a conservator of respondent Municipal Credit Union, replacing the credit union's board of directors, among others, by operation of law (*see* Banking Law § 634; *see also* 12 USC § 1787[b]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9913N Sussman Education, Inc., Index 655978/18
Plaintiff-Respondent,

-against-

Eric Gorenstein,
Defendant-Appellant,

M. Infantino & Associates, Inc.
doing business as Educational
Resource Company,
Defendant.

_____

Shapiro Litigation Group PLLC, New York (Alison B. Cohen and David J. Shapiro of counsel), for appellant.

Akerman LLP, New York (Jeffrey A. Kimmel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered December 21, 2018, which, inter alia, granted plaintiff's motion for a preliminary injunction restraining defendant Eric Gorenstein, until August 24, 2020, from soliciting or attempting to solicit certain entities to do business with defendant M. Infantino & Associates, Inc. d/b/a Educational Resource Company, unanimously reversed, on the law, without costs, and the motion denied.

The party seeking a preliminary injunction must make a "clear showing of a likelihood of success on the merits, irreparable harm if the injunction [i]s not granted, and a balance of equities in its favor" (*Sterling Fifth Assoc. v Carpentille Corp.*, 5 AD3d 328, 329 [1st Dept 2004]). Plaintiff failed to make such a showing.

To show a likelihood of success on the merits, plaintiff had to demonstrate that the restrictive covenant signed by Gorenstein was enforceable (*see Buchanan Capital Mkts., LLC v DeLucca,* 144 AD3d 508 [1st Dept 2016]). A covenant not to compete is not enforceable "when the party benefited was responsible for the breach of the contract containing the covenant" (*Cornell v T. V. Dev. Corp.,* 17 NY2d 69, 75 [1966]). Gorenstein submitted an affidavit stating plaintiff owed him $42,520 in commissions. In reply, plaintiff's president submitted an affidavit saying Gorenstein's termination was unrelated to commissions, but he did not deny that plaintiff owed Gorenstein commissions.

Separate and apart from the issue of plaintiff's breach, the covenant prohibits Gorenstein from soliciting "any Person who is a publisher, K-12 school or business relation of [plaintiff], whether or not [he] had personal contact with such Person." This is overbroad (*see Brown & Brown, Inc. v Johnson,* 25 NY3d 364, 370-371 [2015]; *Good Energy, L.P. v Kosachuk,* 49 AD3d 331, 332 [1st Dept 2008]). The covenant is also overbroad in that it contains no geographical restriction (*see Good Energy,* 49 AD3d at 332; *Crippen v United Petroleum Feedstocks,* 245 AD2d 152, 153 [1st Dept 1997]; *Garfinkle v Pfizer, Inc.,* 162 AD2d 197 [1st Dept 1990]). Even if plaintiff and the court could narrow the geographical area in the injunction (*compare Crippen,* 245 AD2d at 153, *with Willis of N.Y. v DeFelice,* 299 AD2d 240, 241-242 [1st Dept 2002]), neither plaintiff nor the court narrowed the scope

of the anti-solicitation provision.

It was also an improvident exercise of the court's discretion to grant a preliminary injunction where the conflicting affidavits raised sharp issues of fact (*see e.g. Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 123 [1st Dept 1991]), including whether plaintiff terminated Gorenstein for cause (*see Buchanan Capital Mkts., LLC*, 144 AD3d at 508-509), and whether the contact information for plaintiff's clients was confidential (*see e.g. Samuel-Rozenbaum USA v Felcher*, 292 AD2d 214, 215 [1st Dept 2002]).

In light of plaintiff's failure to make a clear showing of a likelihood of success on the merits, it is unnecessary to reach the issues of irreparable injury and balance of the equities (*see Sterling Fifth Assoc.*, 5 AD3d at 329). Were we to consider these points, we would note that plaintiff's president was able to quantify plaintiff's loss of business (*see Buchanan Capital Mkts., LLC*, 144 AD3d at 509; *Perez v Computer Directions Group*, 177 AD2d 359 [1st Dept 1991]). Furthermore, the relative hardship to Gorenstein if an injunction is granted appears to be

greater than that to plaintiff if the injunction is denied (*see Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 [1st Dept 2016]), and the preliminary injunction changed the status quo (*see e.g. Buchanan Capital Mkts., LLC*, 144 AD3d at 509).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Mazzarelli, Webber, Moulton, JJ.

9914
[M-3790] In re People of the State of New York ex rel. Martin J. LaFalce on behalf of Bill Ayala,
Petitioner,

-against-

Hon. Abraham Clott, etc.,
Respondent.

- - - - -

Bridget G. Brennan, Special Narcotics Prosecutor,
Nonparty Respondent.

Ind. 869/19
OP. 185/19

_____

Janet E. Sabel, The Legal Aid Society, New York (Martin J. LaFalce of counsel), for petitioner.

Darcel D. Clark, District Attorney, Bronx (Eric J. Aho of counsel), for Bridget G. Brennan, respondent.

_____

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

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

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

or disbursements.

Justice Abraham Clott has elected, pursuant to CPLR 7804(i) not to appear in this proceeding.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

Gische, J.P., Webber, Kahn, Kern, JJ.

9656 Lenworth A. Fullerton, Index 301698/15
Plaintiff-Respondent,

-against-

MTA Bus Company, et al.,
Defendants-Appellants.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about November 1, 2017,

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 September 9, 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: SEPTEMBER 24, 2019

CLERK

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

9870 The People of the State of New York, Ind. 2444/12
Respondent,

-against-

Steven Murray,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 2, 2015, as amended February 7, 2018, convicting defendant, upon his plea of guilty, of murder in the second degree, attempted murder in the first degree (two counts), attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 35 years to life, unanimously affirmed.

Defendant has not demonstrated that his plea was rendered involuntary by alleged misinformation about his sentencing exposure in the event of a conviction after trial. Defendant was correctly informed of the maximum aggregate sentence he could receive even if he established the affirmative defense of extreme emotional defense as to all applicable counts. Although the court did not specifically explain the limitation, by operation of law, of the maximum sentence in that situation to 50 years

(*see* Penal Law § 70.30[1][e][vi]), this did not render the plea involuntary (*see People v DePerno*, 148 AD3d 1463, 1465 [3d Dept 2017], *lv denied* 29 NY3d 1030 [2017]). In any event, to the extent defendant could be viewed as having received inaccurate information concerning his possible sentence exposure, that factor "is not, in and of itself, dispositive" regarding the voluntariness of a plea (*People v Garcia*, 92 NY2d 869, 870 [1998]). Under the totality of circumstances, we conclude that the alleged misinformation could not have influenced defendant's decision to plead guilty (*see id.*; *see also Hill v Lockhart*, 474 US 52, 59-60 [1985]). These circumstances included the strength of the People's case, the numerous counts involving multiple victims, the weakness of the evidence supporting the affirmative defense, and the reasonableness of the court's promised sentence, which was offered over the People's objection.

Defendant's related claim of ineffective assistance regarding his counsel's alleged failure to advise him of the above-cited 50-year limitation is unreviewable on direct appeal because it involves matters outside the record regarding the full extent of counsel's sentencing advice. Although defendant made a CPL 440.10 motion, it was denied and defendant did not seek leave to appeal. Accordingly, the merits of this claim may not be addressed on direct appeal. In the alternative, to the extent the existing record permits review, we find, for the reasons already discussed, that defendant has not established that he was

prejudiced by the alleged misadvice.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9871 Virginia Agosto, Index 25797/16E
Plaintiff-Appellant,

-against-

Western Beef Retail, Inc.,
doing business as Western Beef,
et al.,
Defendants-Respondents.

Yadgarov & Associates, PLLC, New York (Ronald S. Ramo of counsel), for appellant.

Rosenbaum & Taylor, P.C., White Plains (Mark E. Jordan-Poinsette of counsel), for respondents.

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered October 5, 2018, which denied plaintiff's motion pursuant to CPLR 5015 and 22 NYCRR 202.27 to vacate an order of the same court (Fernando Tapia, J.), entered July 26, 2017, dismissing the action after plaintiff failed to appear for a rescheduled compliance conference, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiff's vacatur motion. The record shows that plaintiff's counsel of record was aware that the June 8, 2017 compliance conference had been adjourned before plaintiff failed to appear for the rescheduled compliance conference on July 24, 2017. The representation made by plaintiff's counsel of record that plaintiff's failure to appear for the July 24, 2017 compliance conference was caused by law office failure is insufficient to establish a reasonable excuse for her

nonappearance, because he failed to explain how his law firm came to the conclusion that the conference was adjourned at the request of plaintiff's trial counsel (*see Pichardo-Garcia v Josephine's Spa Corp.*, 91 AD3d 413, 413-414 [1st Dept 2012]).

Furthermore, plaintiff does not explain why her vacatur motion was not filed until July 17, 2018, almost a year after the order dismissing the action was entered, despite her counsel of record's claim that trial counsel returned the file about two months after the action was dismissed (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [1st Dept 2010], *lv dismissed* 15 NY3d 863 [2010]). Given plaintiff's persistent and willful inaction, the motion court did not abuse its discretion in finding that it need not decide the issue of whether her action has merit (*see Pires v Ortiz*, 18 AD3d 263, 264 [1st Dept 2005]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9872 In re Sean B.,
Petitioner-Respondent,

-against-

Erica C.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Deborah D. Clegg, Croton Falls, for respondent.

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

_____

Order, Family Court, Bronx County (David J. Kaplan, J.), entered on or about November 7, 2018, which granted petitioner father sole legal and physical custody of the subject child and provided for semimonthly therapeutic supervised visitation with respondent mother, unanimously affirmed, without costs.

Family Court's determination that supervised therapeutic visitation with the mother would be in the child's best interest has a sound and substantial basis in the record (*see Matter of Michael Evan W. v Pamela Lyn B.*, 152 AD3d 414 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]; *Matter of Arcenia K. v Lamiek C.*, 144 AD3d 610 [1st Dept 2016]). The court took judicial notice of an order finding that the mother had neglected the child by use of excessive corporal punishment and considered testimony indicating that she was "having a negative impact on the child's emotional well-being" (*Matter of Frank M. v Donna W.*, 44 AD3d 495, 495 [1st Dept 2007]; *see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The

court appropriately considered the wishes of the teenage child to remain in the sole custody of his father and have limited or no contact with his mother (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 408 [1st Dept 2014]).

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9873 Keith Edwards, Index 26800/15E
Plaintiff-Respondent,

-against-

Shauna Levy, et al.,
Defendants-Appellants.

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Mauro Lilling Naparty LLP, Woodbury (Jessica L. Smith of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered August 2, 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 established their prima facie entitlement to judgment as a matter of law in this action where plaintiff was injured when, while carrying a ladder with both hands, he slipped down the front porch stairs of defendants' house. Plaintiff testified that it had rained about one to two hours before the accident and that his fall was caused by his wet feet from the rain. "Mere wetness on a walking surface due to rain does not constitute a dangerous condition" (*Greco v Pisaniello,* 139 AD3d 617, 618 [1st Dept 2016]). Moreover, based on plaintiff's testimony, defendants had no duty to remedy the wet condition within an hour or two after the rain (*see e.g. Perez v Abbey*

Assoc. Corp., 103 AD3d 573 [1st Dept 2013]), and both defendants testified that they had no knowledge of prior accidents on the stairs, which were not slippery when wet.

In opposition, plaintiff failed to raise a triable issue of fact. His contention that the absence of a handrail on the stairs was a dangerous condition and a proximate cause of his fall is unavailing since he was carrying a ladder in both hands and testified that he fell because his feet were wet (*see e.g. Perez v River Park Bronx Apts., Inc.*, 168 AD3d 465, 466 [1st Dept 2019]; *Robinson v 156 Broadway Assoc., LLC*, 99 AD3d 604 [1st Dept 2012]). Furthermore, the findings of plaintiff's expert are conclusory since he never visited the site of the accident or took measurements of the coefficient of friction, and the code violations he referenced were not applicable to the subject stairs (*see Perez v Abbey Assoc. Corp.*, 103 AD3d at 573).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9876 The People of the State of New York, Ind. 4362/14
Respondent,

-against-

Antoinette Wesley,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at suppression hearing; Robert M. Stolz, J. at jury trial and sentencing), rendered April 6, 2016, convicting defendant of criminal possession of a weapon in the third degree, petit larceny and criminal possession of stolen property in the fifth degree, and sentencing her, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. An officer saw defendant engage in a pattern of conduct, including concealing store merchandise in her purse and bag, that clearly indicated that she was shoplifting. The officer did not see defendant move toward the back of the store where the registers were located, and defendant's pattern of behavior rendered it highly unlikely that she paid for the merchandise during a brief period that the officer lost sight of her. Accordingly, the officer had probable cause to arrest defendant

as she left the store. "[P]robable cause does not require proof beyond a reasonable doubt or the exclusion of every reasonable innocent explanation (*People v Lewis*, 50 AD3d 595, 595 [1st Dept 2008], *lv denied* 11 NY3d 790 [2008]).

Furthermore, defendant lacked standing to seek suppression of a knife found in a police transport van. The evidence supports the inference that she purposefully discarded it while riding in the van (*see e.g. People v Febo*, 167 AD3d 451 [1st Dept 2018], *lv denied* 33 NY3d 948 [2019]).

Defendant did not preserve her claim that the trial court should have delivered a circumstantial evidence charge, and we decline to review it in the interest of justice. As an alternative holding, we find that the circumstantial evidence that defendant possessed the knife found in the police van was

overwhelming and there was no reasonable possibility that the absence of a circumstantial evidence charge caused any prejudice (*see People v Brian*, 84 NY2d 887, 889 [1994]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9877 Lamar Vanterpool, Index 304839/15
Plaintiff-Appellant,

-against-

Crotona Terrace Apartments, L.P.,
et al.,
Defendants-Respondents.

Monier Law Firm, PLLC, New York (Philip Monier, III of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, White Plains (Jonathan W. Greisman of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 14, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to satisfy their prima facie burden on constructive notice by showing that they followed their prescribed cleaning schedule for the stairwell owned and managed by them, on which plaintiff fell (*see Mendoza v Fordham-Bedford Hous. Corp.*, 139 AD3d 578 [1st Dept 2016]). Plaintiff first observed urine on the building's staircase at approximately 8 p.m., and he slipped on the same hazardous puddle about midnight the same night. In support of their motion, defendants introduced the superintendent's deposition testimony, which conflicted with his affidavit on two critical points: (1) whether he had inspected the subject staircase in accordance with his

daily routine on the date of plaintiff's accident; and (2) whether he recalled the condition of the staircase on that same date. Accordingly, the record precludes determination, as a matter of law, of whether the urine puddle was extant on the stairs for a period of time sufficient to allow a reasonable opportunity to remedy the hazard (*Hobbs v New York City Hous. Auth.*, 168 AD3d 634 [1st Dept 2019]; *Gautier v 941 Intervale Realty LLC*, 108 AD3d 481 [1st Dept 2013]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9878 Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, not Individually but as Trustee for Hilldale Trust,
Plaintiff-Appellant,

-against-

Trevor C. Moran,
Defendant-Respondent,

Board of Managers of 120 Riverside Blvd at Trump Place, et al.,
Defendants.

Index 850291/17

_____

Friedman Vartolo LLP, New York (Zachary Gold of counsel), for appellant.

Rozario & Associates, P.C., New York (Rovin R. Rozario of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered December 14, 2018, which denied plaintiff's motion for summary judgment on its foreclosure complaint, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established its standing to foreclose on the mortgage by attaching to the complaint a copy of the mortgage, a copy of the note, on which is it undisputed that defendant defaulted, and a copy of the mortgage assignment (*see Bank of N.Y. Mellon v Knowles*, 151 AD3d 596 [1st Dept 2017]). Contrary to defendant Moran's contention, plaintiff was not required to submit proof that the note, as well as the mortgage, was assigned (*id.* at 596-597).

Plaintiff established its compliance with RPAPL 1304 by

submitting copies of the required default and 90-day foreclosure notices with an affidavit by the loan servicer's foreclosure specialist stating, based upon her review of the loan servicer's records, that the notices were mailed to defendant in accordance with the provisions of the statute (*see Deutsche Bank Natl. Trust Co. v Al Rasheed*, 169 AD3d 532 [1st Dept 2019]; *Bank of Am., N.A. v Brannon*, 156 AD3d 1, 8 [1st Dept 2017]).

In opposition, defendant failed to raise an issue of fact.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9880 In re Edwin R.,
Petitioner-Respondent,

-against-

Maria G.,
Respondent-Appellant,

Administration for Children's Services,
Respondent.

_____

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

Steven P. Forbes, Jamaica, for respondent.

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

_____

Order, Family Court, Bronx County (Lynn M. Leopold, J.), entered on or about November 15, 2018, which granted petitioner father's petition for sole legal and physical custody of the subject children, and directed that visitation by respondent mother continue as mutually agreed upon by the parties, unanimously affirmed, without costs.

The hearing evidence presents a sound and substantial basis for the award of custody of the children to petitioner (*see generally Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

Respondent failed to present evidence to support her argument that the order continuing visitation based on the mutual agreement of the parties is improper because the parties cannot work together (*see Matter of Samuel v Sowers*, 162 AD3d 674, 675

[2d Dept 2018]; *Matter of Alleyne v Cochran*, 119 AD3d 1100, 1101-1102 [3d Dept 2014]). The hearing record demonstrates that petitioner has made the children available to respondent in person and by telephone, and petitioner testified that he intends to continue to ensure the children's access to their mother and her family. Should the parties be unable to reach a mutual agreement on visitation, either may file a petition to enforce or modify the order (*see Samuel*, 162 AD3d at 675).

The court properly declined to permit respondent's child life specialist to testify in her "professional capacity" about how respondent had changed while participating in a supportive housing program because the witness was not an expert and could not opine on respondent's parental fitness (*see Matter of Sara B.*, 41 AD3d 170, 171 [1st Dept 2007]). Respondent had agreed that the witness would limit her testimony to her relationship with respondent and the services respondent received, and respondent was permitted to testify about her own progress while residing in supportive housing (*cf. Matter of Painter v Painter*, 211 AD2d 993, 995 [3d Dept 1995] [court improperly precluded proof of respondent's alleged interference with petitioner's visitation rights]; *Matter of Thomson v Battle*, 99 AD3d 804, 806 [2d Dept 2012] [mother's due process rights were violated when she was not permitted to present any evidence]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9881 The People of the State of New York, Ind. 4427/15
Respondent,

-against-

Rodney Mitchell,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered December 9, 2015, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9882 The People of the State of New York, Ind. 1570/10
Respondent,

-against-

Joseph Roman,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered May 17, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years, unanimously reversed, on the law and the facts, defendant's motion to suppress statements granted, and the matter remanded for a new trial.

Defendant's motion to suppress his incriminating written and videotaped statements should have been granted. Several days before defendant made the contested statements, he was taken into custody by the Las Vegas Police Department. While in custody, defendant requested to speak with the detective from the Regional Fugitive Task Force who had located defendant in Las Vegas and was about to bring him back to New York. The detective met defendant in a conference room and asked him if he wanted to talk. Defendant responded, "I would like to tell you what

happened, but I think I want to talk to an attorney." The detective, who responded by saying "okay," and did not ask defendant any questions about the homicide, testified that he understood that defendant "wanted an attorney."

Upon returning to New York, defendant met with the investigating detective and made incriminating written and video statements. Defendant moved to suppress his statements, which was denied, and the statements were admitted at trial.

"When a defendant in custody unequivocally requests the assistance of counsel, any purported waiver of that right obtained in the absence of counsel is ineffective" (*People v Glover*, 87 NY2d 838, 839 [1995]; *see also People v Grice*, 100 NY2d 318, 321 [2003]). "Whether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*Glover*, 87 NY2d at 839).

Here, the circumstances surrounding defendant's statement, "I would like to tell you what happened, but I think I want to talk to an attorney," necessitate a finding that he unequivocally invoked his right to counsel (*see People v Porter*, 9 NY3d 966 [2007]; *People v Harris*, 93 AD3d 58 [2d Dept 2012], *affd* 20 NY3d 912 [2012]). These circumstances include the facts that defendant was in custody at the time he made the statement, that

he clearly expressed that he wanted to speak about the homicide and that the detective understood defendant to mean he wanted an attorney. The fact that defendant was not interrogated is not dispositive as to whether he unequivocally invoked his right to counsel (*see Glover*, 87 NY2d at 839). Accordingly defendant's later statements, in the absence of counsel, to other law enforcement personnel were inadmissible.

The record does not warrant a finding of harmlessness. Because we are ordering a new trial, we find it unnecessary to address defendant's other argument for reversal.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9883 Lamar Blake, Index 303251/15
Plaintiff-Appellant,

-against-

Pierre Cadet, et al.,
Defendants-Respondents,

NY Kind Taxi Corp., et al.,
Defendants.

_____

Mirman, Markovitz & Landau, P.C., New York (David Weissman of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about July 25, 2018, which granted defendants Pierre Cadet and K. Khan, M.D.'s (defendants) motion to vacate a prior order denying their motion for summary judgment dismissing the complaint for failure to meet the serious injury threshold of Insurance Law § 5102(d), and, upon vacatur, to grant the motion for summary judgment, unanimously modified, on the law, to deny the motion for summary judgment as to the claim of significant limitation of use of the lumbar spine, and otherwise affirmed, without costs.

The court providently exercised its discretion in treating the motion to vacate as one for renewal and granting it, since defendants demonstrated that their failure to include their codefendants' answer in support of the initial motion was inadvertent and excusable (*see* CPLR 2221[e][2], [3]; *Hernandez v*

Marcano, 161 AD3d 676, 677 [1st Dept 2018]).

Defendants established prima facie that plaintiff did not sustain any significant or permanent injury to his cervical spine or left shoulder and that his claimed lumbar spine injury was not causally related to the accident but was degenerative in nature (*see e.g. Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]). Defendants also identified a two-year gap or cessation in plaintiff's medical treatment after he underwent a lumbar discectomy procedure (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Plaintiff failed to raise a triable issue of fact as to his cervical spine and left shoulder claims, since he submitted neither objective evidence of injury to either body part nor evidence of recent limitations in range of motion in his left shoulder (*see Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]).

However, plaintiff raised an issue of fact as to causation with respect to his lumbar spine injuries through affirmations of his treating physicians, who opined that those injuries were traumatic in origin and causally related to the subject accident (*see Fathi v Sodhi*, 146 AD3d 445 [1st Dept 2017]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]). This evidence was sufficient to raise an issue of fact, given plaintiff's relatively young age and the absence of any evidence in his own medical records of prior injuries or of degeneration (*see Sanchez v Oxcin*, 157 AD3d 561, 563 [1st Dept 2018]). As plaintiff failed

to explain the cessation of his treatment about 10 months after the accident, he did not raise an issue of fact as to his claim of "permanent consequential" injury (*see Holmes v Brini Tr. Inc.*, 123 AD3d 628, 628-629 [1st Dept 2014]). However, his medical evidence is sufficient to raise an issue of fact as to whether he sustained an injury involving "significant limitation of use" of his lumbar spine as a result of the subject accident (*see id.*; *see also Vasquez*, 107 AD3d at 539 ["a significant limitation . . . need not be permanent in order to constitute a serious injury"] [internal quotation marks omitted]). If a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Defendants established prima facie that plaintiff did not sustain a 90/180-day injury, through plaintiff's deposition testimony that he worked for several days during the months following the accident and that he was not advised by any of his

treating medical providers to refrain from returning to work (*see Pouchie*, 173 AD3d at 645; *Echevarria v Ocasio*, 135 AD3d 661 [1st Dept 2016]). Plaintiff failed to raise a triable issue of fact in opposition (*see Pouchie*, 173 AD3d at 645; *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9884 ABKCO Music, Inc., Index 656243/16
Plaintiff-Respondent,

-against-

Carl G. McMahon, as Trustee of the
Andrea Marless Cooke Family Trust,
Defendant-Appellant,

Andrea M. Cooke,
Defendant.

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Rivkin Radler LLP, Uniondale (Avigael Fyman of counsel), for appellant.

Michael B. Kramer & Associates, New York (Michael B. Kramer of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered December 6, 2017, which denied defendant trustee's motion for summary judgment dismissing the complaint as against him for lack of personal jurisdiction, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The trustee's requests from Ohio, by letter, telephone, and/or email, to plaintiff in New York to send him monies due under the royalty agreement that plaintiff had entered into in 1986 with nonparty Denise Somerville, a/k/a Denise Somerville Cooke (Somerville) – which would merely continue plaintiff's previous practice of sending royalties to Somerville in Ohio – do not constitute the transaction of business under CPLR 302(a)(1) (*see e.g. Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 511 [2007] ["The

mere receipt by a nonresident of a benefit or profit from a contract performed by others in New York is clearly not an act by the recipient in this State sufficient to confer jurisdiction under our long-arm statute"] [internal quotation marks omitted]; *Courtroom Tel. Network v Focus Media*, 264 AD2d 351, 353 [1st Dept 1999] ["a passive buyer of a New York . . . service" would not be subject to this State's jurisdiction]; *Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002] ["Telephone calls and written communications, which generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute, must be shown to have been used by the defendant to actively participate in business transactions in New York"] [internal quotation marks omitted]).

Plaintiff cites no authority for imputing Somerville's act of negotiating the contract in 1986 to the trustee, who did not become the trustee until 2009. Even if Somerville's conduct were attributed to the trustee, negotiating a contract from outside New York "is insufficient to constitute the transaction of

business in New York" (*Kennedy v Yousaf*, 127 AD3d 519, 520 [1st Dept 2015]; *see also SunLight Gen. Capital LLC v CJS Invs. Inc.*, 114 AD3d 521, 522 [1st Dept 2014]; *Libra Global Tech. Servs. [UK] v Telemedia Intl.*, 279 AD2d 326, 327 [1st Dept 2001]).

The fact that the contract chooses New York law does not "constitute a voluntary submission to personal jurisdiction in New York" (*First Natl. Bank & Trust Co. v Wilson*, 171 AD2d 616, 619 [1st Dept 1991]; *see also Aero-Bocker Knitting Mills v Allied Fabrics Corp.*, 54 AD2d 647, 648 [1st Dept 1976]). As the motion court recognized when granting former defendant Andrea M. Cooke's motion to dismiss the claims against her pursuant to CPLR 3211(a)(8), plaintiff could have added a New York forum selection clause when it prepared the royalty agreement (*see also Merrill Lynch, Pierce, Fenner & Smith v McLeod*, 208 AD2d 81, 84 [1st Dept 1995]).

The trustee made a prima facie case that New York lacked jurisdiction over him, and plaintiff failed to meet its burden to present sufficient facts to demonstrate jurisdiction (*see Cotia [USA] Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]; *see also Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

In light of the foregoing, we need not reach the issues of whether this action arises out of defendant's alleged New York

contacts (*Ehrenfeld*, 9 NY3d at 513 n 10) and whether it would violate due process for New York to exercise jurisdiction over the trustee (*see e.g. Williams v Beemiller, Inc.*, __ NY3d __, 2019 NY Slip Op 03656, *2 [May 9, 2019]).

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9885 The People of the State of New York, SCI. 2795/15
Respondent,

-against-

Roberto Beltran,
Defendant-Appellant.

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

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Judgment, Supreme Court, Bronx County (Marc Whiten, J.), rendered March 14, 2016, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9888 The People of the State of New York, Ind. 2875/15
Respondent,

-against-

Calvin T. Norwood,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered March 27, 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: SEPTEMBER 24, 2019

CLERK

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

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

9889 The People of the State of New York, Ind. 3611/15
Respondent,

-against-

David Green,
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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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 March 15, 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: SEPTEMBER 24, 2019

CLERK

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

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

9890 The People of the State of New York, Ind. 99025/18
Respondent,

-against-

Jose Almonte,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about August 3, 2018, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in granting the People's request for an upward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), based on clear and convincing evidence of the egregiousness and extent of defendant's possession of over 11,000 images and 1,500 videos of child pornography. Among other things, defendant possessed a graphic videotape of a violent sexual assault on a very young child, and his "interest in this abhorrent type of pornography demonstrates

a danger to children" (*People v Vitiello*, 158 AD3d 585, 585 [1st Dept 2018], *lv denied* 32 NY3d 905 [2018]; *see also People v Velasquez*, 143 AD3d 583, 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]). Further, there are no mitigating factors that were not adequately taken into account by the risk assessment instrument, or that outweigh the seriousness of the underlying offense.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9891 The People of the State of New York, Ind. 1977/16
Respondent,

-against-

Mosi Mann,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered July 17, 2017, convicting defendant, upon his guilty plea, of attempted murder in the second degree, and sentencing him to a prison term of nine years, unanimously affirmed.

Defendant's claim that his counsel provided him with ineffective assistance regarding the immigration consequences of his plea (*see Padilla v Kentucky*, 559 US 356 [2010]) is unreviewable on direct appeal because it involves matters not reflected in the record regarding the full extent of counsel's immigration advice. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this claim may not be addressed

on appeal (*see People v Pastor*, 28 NY3d 1089, 1091 [2016]; *compare People v Doumbia*, 153 AD3d 1139 [1st Dept 2017] [content of actual advice placed on the record]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 24, 2019

CLERK

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

9892N-
9892NA Noah Stark Morris, et al., Index 28656/17E
Plaintiffs-Appellants,

-against-

Stephen Greenberg, et al.,
Defendants-Respondents.

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Simonson Goodman Platzer, P.C., New York (Edward S. Goodman of counsel), for appellants.

Furman, Kornfeld & Brennan, LLP, New York (Tracy S. Katz of counsel), for Stephen Greenberg and East River Medical Imaging, P.C., respondents.

Ekblom & Partners, LLP, New York (Hillary C. Agins of counsel), for Guy Lin and ENT and Allergy Associates, LLP, respondents.

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Orders, Supreme Court, Bronx County (Joseph E. Capella, J.), entered May 24, 2018 and July 17, 2018, which granted defendants' motions to change venue of the action from Bronx County to Rockland County, unanimously affirmed, without costs.

The motion court's determination to change venue to Rockland County was proper. The court's findings that Bronx County was not plaintiff Noah Stark Morris's bona fide residence turned largely on its finding, after a hearing, that he was not credible. Such credibility determinations are entitled to deference, particularly where, as here, Noah gave conflicting testimony (*see generally Arrufat v Bhikhi*, 101 AD3d 441, 442 [1st Dept 2012]).

The remaining evidence submitted by plaintiffs does not demonstrate that Mr. Morris intended to reside at the Bronx

apartment with some degree of permanency (*see Rivera v Jensen*, 307 AD2d 229, 229-230 [1st Dept 2003]). Plaintiffs did not produce a lease, utility bills, or similar documentary evidence such as "insurance policies, tax returns, automobile registration, or driver's license" listing a Bronx County address (*Gladstone v Syvertson*, 186 AD2d 400, 401 [1st Dept 1992]). Contrary to plaintiffs' contentions, Mr. Morris's bank statements, pharmacy records, and gym records do not show any degree of permanency in Bronx County. Although Mr. Morris's bank statements were mailed to his grandmother's apartment in the Bronx, he also received medical correspondence and other mail at his mother's and wife's homes in Orange and Rockland Counties.

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

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

ENTERED: SEPTEMBER 24, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Sallie Manzanet-Daniels
Marcy L. Kahn
Cynthia S. Kern
Peter H. Moulton, JJ.

9404-
9405-
9406
Index 28254/16E

_____x

Margaret Doe,
Plaintiff-Respondent,

-against-

Bloomberg, L.P., et al.,
Defendants,

Michael Bloomberg,
Defendant-Appellant.
_____x

Defendant Michael Bloomberg appeals from an order of the Supreme Court, Bronx County (Fernando Tapia, J.), entered September 10, 2018, which, upon reargument, denied his motion to dismiss the first, second and third causes of action as against him.

Proskauer Rose LLP, New York (Elise M. Bloom and Rachel S. Philion of counsel), for appellant.

The Clancy Law Firm, P.C., New York (Niall MacGiollabhui of counsel), for respondent.

KERN, J.

On this appeal, we are asked to determine when an individual owner or officer of a corporate employer may be held strictly liable as an employer under the New York City Human Rights Law (City HRL)(Administrative Code of City of NY § 8-107[13][b]). We find that an individual owner or officer of a corporate employer may be held strictly liable as an employer under the City HRL, in addition to the corporate employer, only if the plaintiff sufficiently alleges that the individual encouraged, condoned or approved the specific discriminatory conduct giving rise to the claim. As the plaintiff in this case failed to allege that individual defendant Michael Bloomberg encouraged, condoned or approved the specific discriminatory conduct she alleges in the complaint, we find that the complaint should be dismissed as against Mr. Bloomberg in its entirety.

The allegations in the complaint are as follows. In September 2012, plaintiff began working in the marketing department at defendant Bloomberg L.P. as a temporary employee selling subscription services to various newsletters. At that time, she was a 22-year-old recent college graduate and had never before held a professional job. Defendant Nicholas Ferris was the Global Business Director of the Bloomberg Brief Newsletter Division and was plaintiff's direct supervisor.

Mr. Ferris allegedly began making unwanted advances toward plaintiff a few weeks into her employment at Bloomberg L.P. In or around January 2013, Mr. Ferris inappropriately touched plaintiff during a Bloomberg L.P. radio event. Mr. Ferris continued to regularly send plaintiff inappropriate and offensive emails and "Instant Bloomberg" (IB) messages throughout 2013. He invited plaintiff to lunches and "quick drinks" during and after work, which plaintiff often attended. Plaintiff alleges that she was concerned Mr. Ferris would retaliate if she rejected his advances as he held the decision-making authority to hire her as a permanent employee. Mr. Ferris allegedly raped plaintiff on two occasions, once in February 2013 and once in March 2013, while she was intoxicated. Plaintiff states that Mr. Ferris caused her to become dependent on drugs that he hid in various locations throughout the Bloomberg L.P. office.

Plaintiff alleges that she did not report Mr. Ferris's conduct to Bloomberg L.P.'s Human Resources Department because she thought the complaint would be ignored or trivialized and would subject her to retaliation. Although plaintiff requested that the HR Department move her desk away from Mr. Ferris's desk, she did not state the basis for her request.

Plaintiff alleges that by October 2015, her mental and physical health had deteriorated and she was placed on indefinite

medical leave for major depressive disorder and anxiety disorder. In or around December 2015, Bloomberg L.P. terminated Mr. Ferris.

With respect to Mr. Bloomberg, the allegations in the complaint are as follows. Following Mr. Bloomberg's example and leadership, Bloomberg L.P. bred a hostile work environment that led to the type of discrimination plaintiff experienced. Mr. Bloomberg was sued in a class action brought by female employees who alleged sexual harassment and creation of a hostile work environment while he was CEO of Bloomberg L.P. Mr. Bloomberg was also accused of condoning systemic top-down discrimination against female employees in a sexual harassment suit brought by the US Equal Employment Opportunity Commission on behalf of 58 female employees, not including the plaintiff. The complaint also cites various magazine articles and statements by public figures describing unsavory conduct and comments made by Mr. Bloomberg, directed at or regarding women other than plaintiff.

Plaintiff commenced this action against Bloomberg L.P., Mr. Bloomberg and Mr. Ferris. In a decision dated December 5, 2017, the motion court granted a motion by Mr. Bloomberg to dismiss the complaint against him in its entirety. However, upon reargument by the plaintiff, the motion court held that plaintiff sufficiently stated claims against Mr. Bloomberg as an employer

under the City HRL.[1]

We now reverse and find that the complaint should be dismissed as against Mr. Bloomberg in its entirety. On a motion to dismiss pursuant to CPLR 3211(a)(7), "[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions . . . are not entitled to such consideration" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

The City HRL imposes strict liability on an "employer" for the discriminatory acts of the employer's managers and supervisors (*see* Administrative Code of the City of New York § 8-107[13][b][1]; *Zakrzewska v New School*, 14 NY3d 469, 480-481 [2010]).[2] Specifically, Administrative Code § 8-107(13)(b)

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[1]We need not address whether the complaint states claims against Mr. Bloomberg under the State HRL, since the court dismissed these claims in the December 5, 2017 decision and plaintiff's motion for reargument did not seek to reinstate them.

[2]This is unlike the New York State Human Rights Law (State HRL), which only imposes liability on an employer for an employee's discriminatory acts if the employer encouraged, condoned or approved the discriminatory conduct (*see Matter of*

provides:

> "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:
> (1) The employee or agent exercised managerial or supervisory responsibility . . . ."

However, the statute does not provide a definition of "employer" and the legislature has not provided guidance as to how "employer" should be defined under the statute. The legislature has also not provided guidance as to when an individual, in addition to the corporate employer, may be held strictly liable under the statute.

The Court of Appeals has held that section 8-107(13)(b)(1) of the Administrative Code holds *corporate* employers strictly liable for the discriminatory acts of their managers and supervisors (*see Zakrzewska*, 14 NY3d at 469). Additionally, pursuant to the plain language of the statute, where the only employer is an *individual* and there is no corporate employer, the individual may be held strictly liable for the discriminatory acts of his or her managers and supervisors as such individual is the only possible employer under the statute. However, the Court

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Totem Taxi v New York State Human Rights Appeal Bd., 65 NY2d 300 [1985]).

of Appeals has never addressed the issue of when an individual, in addition to the corporate employer, may be held strictly liable under section 8-107(13)(b)(1) of the Administrative Code.

Based on a review of the cases that have addressed the issue, we find that in order to hold an individual owner or officer of a corporate employer, in addition to the separately charged corporate employer, strictly liable under section 8-107(13)(b)(1) of the Administrative Code, a plaintiff must allege that the individual has an ownership interest or has the power to do more than carry out personnel decisions made by others *and* must allege that the individual encouraged, condoned or approved the specific conduct which gave rise to the claim.[3]

This Court has twice explicitly addressed the issue of when an individual may be held strictly liable, in addition to the corporate employer, under section 8-107(13)(b)(1) of the

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[3] Neither *Patrowich v Chemical Bank* (63 NY2d 541 [1984]) nor *Kaiser v Raoul's Rest. Corp.* (72 AD3d 539 [1st Dept 2010]) addresses the issue before us now, specifically, when an individual may be held strictly liable under the *City HRL* as an employer. Moreover, the Court of Appeals has clearly held that in order for an individual to be held liable as an employer pursuant to the State HRL, it is not enough to show that the individual has an ownership interest in the company or the power to do more than carry out personnel decisions made by others (*see Matter of Totem Taxi*, 65 NY2d 300). To the contrary, to hold an individual liable as an employer under the State HRL, a plaintiff must also show that the individual encouraged, condoned or approved the alleged discriminatory conduct (*see id.* at 305).

Administrative Code, and held that an individual will be held strictly liable under the statute if he or she encouraged, condoned or approved the specific discriminatory behavior alleged in the complaint. In *Boyce v Gumley-Haft, Inc.* (82 AD3d 491, 492 [1st Dept 2011]), this Court denied summary judgment to the individual owner of the corporate employer under section 8-107(13)(b)(1) of the Administrative Code because there were issues of fact as to whether he "encouraged, condoned or approved" the specific discriminatory conduct alleged by the plaintiff (82 AD3d at 492). This Court reiterated this standard in *McRedmond v Sutton Place Rest. & Bar, Inc.* (95 AD3d 671, 673 [1st Dept 2012]), a case in which we denied summary judgment to the individual officers of the corporate employer under section 8-107(13)(b)(1) of the Administrative Code because there were issues of fact as to whether they condoned or participated in the discriminatory conduct complained of by the plaintiff.

All of the federal cases cited by the parties which have addressed the specific issue before us now have also held that an individual will only be held strictly liable under section 8-107(13)(b)(1) of the Administrative Code if he or she participated, in some way, in the specific discriminatory conduct alleged in the complaint (*see Marchuk v Faruqi & Faruqi, LLP*, 100 F Supp 3d 302, 309 [SD NY 2015] [a plaintiff must establish "at

least some minimal culpability on the part of (the company's individual shareholders)" in order to hold them liable as employers under the City HRL]; *Zach v East Coast Restoration & Constr. Consulting Corp.*, 2015 WL 5916687, *1, 2015 US Dist LEXIS 138334, *1 [SD NY 2015] [denying plaintiff's motion to add the president of the corporate employer as an individual defendant under the City HRL because the proposed amended complaint failed to "allege any knowledge, participation, or involvement whatsoever" in the discriminatory conduct detailed in the complaint]; *Burhans v Lopez*, 24 F Supp 3d 375, 385 [SD NY 2014] [allowing plaintiffs' claims to proceed against the individual defendant as an employer under the City HRL on the ground that plaintiffs "sufficiently allege that (the individual defendant) was personally involved in the conduct in question"]).[4]

We note that the legislative history of section 8-107(13)(b)(1) does not address whether an individual owner or officer of a corporate employer may be held strictly liable, in addition to the corporate employer, absent a finding of

[4] The cases cited by the dissent, including *Makinen v City of New York* (167 F Supp 3d 472 [SD NY 2016], *affd in part and revd in part on other grounds* 722 Fed Appx 50 [2d Cir 2018]), do not address the specific issue of when an individual owner or officer of a corporate employer may be held strictly liable as an employer under Administrative Code § 8-107(13)(b)(1), in addition to the corporate employer.

culpability on the part of the individual. However, holding an individual owner or officer of a corporate employer liable under the City HRL as an employer, without even an allegation that the individual participated, in some way, in the specific conduct that gave rise to the claim, would have the effect of imposing strict liability on every individual owner or high-ranking executive of any business in New York City. The City HRL is not so broad that it imposes strict liability on an individual for simply holding an ownership stake or a leadership position in a liable corporate employer.

Moreover, interpreting section 8-107(13)(b)(1) of the Administrative Code to impose liability on an owner or officer of a corporate employer in his or her individual capacity without any inquiry into his or her personal participation in the conduct giving rise to the claim would be inconsistent with the principles underlying this State's corporate law (*see Marchuk*, 100 F Supp 3d at 309). "The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability" (*Walkovszky v Carlton*, 18 NY2d 414, 417 [1966]). Indeed, a corporate owner or officer may be held individually liable for a tort committed by the corporation but only if the corporate officer or owner "participates in the commission of [the] tort" (*American Express Travel Related Servs.*

Co. v North Atl. Resources, Inc., 261 AD2d 310, 311 [1st Dept 1999]). Moreover, a plaintiff who attempts to pierce the corporate veil and hold a corporate officer or owner liable for an obligation of, or a wrong committed by, the corporation must show complete domination of the corporation and that "the [individual], through [his] domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [the plaintiff]" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 142 [1993]). Thus, some participation in the specific conduct committed against the plaintiff is required in order to hold an individual owner or officer of a corporate employer personally liable in his or her capacity as an employer.

Based on the foregoing, we find that plaintiff's City HRL claims must be dismissed as against Mr. Bloomberg because plaintiff has failed to sufficiently allege that Mr. Bloomberg is her employer for purposes of the City HRL. She has failed to allege that Mr. Bloomberg encouraged, condoned or approved the specific discriminatory conduct allegedly committed by Mr. Ferris.

Plaintiff alleges that Mr. Bloomberg has been sued for his own discriminatory conduct against others, that he has displayed discriminatory conduct toward other women, that he has made

discriminatory remarks about other women and that he has created a culture of discrimination and sexual harassment at Bloomberg L.P. However, such allegations, even if true, fail to support a finding that Mr. Bloomberg was plaintiff's employer under the City HRL because they fail to connect Mr. Bloomberg in any way to the specific discriminatory conduct allegedly committed by Mr. Ferris. Plaintiff fails to allege any facts from which it can be inferred that Mr. Bloomberg was aware or should have been aware of the discriminatory conduct committed by Mr. Ferris. Plaintiff never complained to Bloomberg L.P.'s HR Department about Mr. Ferris's conduct and there are no allegations in the complaint that Mr. Bloomberg knew or should have known about Mr. Ferris's conduct toward plaintiff, that Mr. Bloomberg knew or should have known that Mr. Ferris behaved in a discriminatory manner toward women other than the plaintiff or that Mr. Bloomberg had any involvement or interactions with Mr. Ferris at any point.[5]

Plaintiff's assertion that the mere allegation that Mr.

[5] Plaintiff does not state a claim against Mr. Bloomberg based on allegations that Mr. Ferris sent plaintiff offensive and misogynistic messages through Bloomberg L.P.'s IB messaging system and that Bloomberg L.P. had a "selective practice" of reviewing IB for inappropriate conduct. There are no allegations in the complaint that Mr. Bloomberg himself ever reviewed the IB messages between plaintiff and Mr. Ferris or that Mr. Bloomberg should have reviewed the IB messages between plaintiff and Mr. Ferris.

Bloomberg created a culture of discrimination and sexual harassment at Bloomberg L.P. is sufficient to sustain a claim against him as an employer under section 8-107(13)(b)(1) of the Administrative Code is unavailing as there is no authority for such conclusion. Plaintiff's reliance on *Burhans* (24 F Supp 3d at 375) is misplaced. In *Burhans*, the district court allowed the litigation to proceed against the individual defendant as an employer under the City HRL based on the plaintiffs' allegation that the individual defendant was personally aware that the employee who allegedly committed the discrimination had done so before on numerous occasions and not merely based on the plaintiffs' allegation that the individual created a culture of discrimination. Here, unlike *Burhans*, there are no allegations that Mr. Bloomberg was aware of Mr. Ferris's alleged discriminatory conduct toward plaintiff or toward anyone else.

Plaintiff's reliance on *Irizarry v Catsimatidis*, (722 F3d 99 [2d Cir 2013]), is similarly misplaced as that case is distinguishable. In *Irizarry*, the Second Circuit held that defendant John Catsimatidis, the chairman, president and CEO of Gristede's Food, could be held personally liable for violations of the Fair Labor Standards Act's (FLSA) overtime provisions, without regard to his personal culpability in the FLSA violations. However, the reasoning behind such holding is

inapplicable here because the FLSA is an entirely different statute than the City HRL. The FLSA establishes minimum wage, overtime pay, record keeping and child labor standards. Thus, the requirements of the economic reality test and a CEO's operational control of the corporate employer are far more important, on their own, in establishing liability for FLSA violations than they would be for establishing liability for violations based on discriminatory conduct under the City HRL.

Accordingly, the order of the Supreme Court, Bronx County (Fernando Tapia, J.), entered September 10, 2018, which, upon reargument, denied defendant Michael Bloomberg's motion to dismiss the first, second and third causes of action as against him, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Michael Bloomberg.

All concur except Renwick, J.P. and Manzanet-Daniels, J. who dissent in an Opinion by Manzanet-Daniels, J.

MANZANET-DANIELS, J. (dissenting)

The City HRL is broader than its state counterpart and is to be construed liberally, as the statute itself dictates and as our highest court has decreed (*see* Administrative Code of City of NY § 8-107 *et seq.*). The majority would disregard the plain wording of the statute concerning the circumstances under which an employer is strictly liable, as well as the express purpose underlying the Restoration Act amending the City HRL that the statute requires an independent liberal construction in all circumstances (*see* Local Civil Rights Restoration Act of 2005 [Local Law No. 85]). I accordingly dissent.

Section 8-130 of the City HRL makes explicit that "[t]he provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have so been construed."

As noted by Justice Acosta, writing for the majority in *Williams v New York City Hous. Auth.* (61 AD3d 62 [1st Dept 2009], *lv denied* 13 NY2d 702 [2009]), the City HRL expressly "requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws

have comparable language" (*id.* at 66). Such independent analysis must "be targeted to understanding and fulfilling what the statute characterizes as . . . the City HRL's 'uniquely broad and remedial purposes'" (61 AD3d at 66; *see also Bennett v Health Mgmt. Sys., Inc.*, 92 AD3d 29, 34-35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). The Restoration Act amended the City HRL to mandate that all provisions of the City HRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-478).

In *Patrowich v Chemical Bank* (63 NY2d 541 [1984]), the Court of Appeals held that an individual qualifies as an "employer" under the State HRL when shown to have an ownership interest in the relevant organization *or* the power to do more than carry out personnel decisions made by others (*id.* at 542). Bloomberg, the founder, namesake, and majority owner of Bloomberg L.P., clearly qualifies as an (1) individual with an ownership interest; as well as (2) someone with the power to do more than carry out the personnel decisions of others, and the majority does not contend otherwise. This should end the inquiry, particularly in light of the current pre-discovery posture and our mandate to give the City HRL "an independent liberal construction analysis in all circumstances" (*Williams*, 61 AD3d at 66). As noted in *Williams*,

"the text and legislative history represent a desire that the City HRL meld the broadest vision of social justice with the strongest law enforcement deterrent" (61 AD3d at 68).

Patrowich and its progeny enunciate a two-prong disjunctive standard for determining who constitutes an "employer" under the State Human Rights Law and other statutes. Once someone is determined to be an "employer," a court must then turn to the question of liability under the relevant statute, i.e., whether an employer has "encouraged, condoned or approved" the underlying discriminatory conduct so as to be liable under the State HRL; or whether the employee in question (here, Ferris) has "exercised managerial or supervisory control" so as to render Bloomberg strictly liable under the City HRL. The majority collapses these two distinct requirements, in effect holding that only someone who "encourages, condones or approves" is an "employer." This error – conflating the definition of "employer" with the bases for liability – infects the majority opinion. The majority would graft the State standard onto the City HRL, subverting the purpose underlying the more liberal statutory scheme of the City HRL. Indeed, a standard requiring "encouragement, condonation or approval" is antithetical to the very concept of vicarious liability.

Section 8-107 of the City HRL creates an interrelated series

of provisions that govern an employer's liability for an employee's discriminatory conduct in the workplace. This framework simply does not match up with certain defenses under the State HRL and is not to be so construed (see *Zakrzewska v New School*, 14 NY3d 469 [2010]). Indeed, the Court of Appeals cautioned against making the very same error the majority now makes:

> For the same reason, we may not apply cases under the State Human Rights Law imposing liability only where the employer encourages, condones or approves the unlawful discriminatory acts. . . . By the plain language of NYCHRL 8-107(13)(b), these are not factors to be considered so long as the offending employee [in this case, Ferris] exercised managerial or supervisory control"

(*id.* at 481).

In arriving at its reading of "employer," the majority cites *Boyce v Gumley-Haft, Inc.* (82 AD3d 491, 492 [1st Dept 2011]), and *McRedmond v Sutton Place Rest. & Bar., Inc.* (95 AD3d 671 [1st Dept 2012]). In *McRedmond*, we found certain individual defendants to be liable under the State HRL. We thus found that those same individuals, a fortiori, were liable under the City HRL – hardly a surprising conclusion given that the City HRL is indisputably broader than its State counterpart.

In *Boyce*, a memorandum opinion from which it is difficult to divine much in the way of factual background or reasoning, we

found that the individual defendant 50% owner of a limited liability company could be liable under the City HRL where the proof showed that he "encouraged, condoned, or approved" of the underlying discriminatory conduct, citing Administrative Code § 8-107(13)(b)(1).

To the extent *Boyce* may be construed along the lines the majority suggests, it is at odds with the definition of "employer" articulated in *Patrowich*, at odds with the overarching statutory purpose, as articulated in *Williams* and *Bennett*, and at odds with the express test of section 8-107(13)(b), which sets forth three independent circumstances under which an employer shall be liable for the conduct of an employee or agent, including where such "employee or agent exercised managerial or supervisory responsibility" (*id.*). The statute imposes no requirement that the employer encourage, condone or acquiesce in the conduct. I do not believe we should adopt such a drastic interpretation of "employer" absent clearer and more well articulated authority than *Boyce*.

Neither case is authority for grafting the State standard onto the City HRL, when it is our statutory mandate to construe the City HRL as broadly as possible consistent with its liberal aims. It should be noted that the Legislature has recently amended the State HRL to further expand its reach and the

grievances it is intended to remedy.

Federal district courts interpreting the City HRL have arrived at differing conclusions as to the appropriate standard for imposing individual liability on an owner/CEO such as Bloomberg. While some would require "some minimal culpability" on the part of individual owners, consistent with principles of corporate law (*see Marchuk v Faruqi & Faruqi, LLP*, 100 F Supp 3d 302, 308-309 [SD NY 2015]), many hold, consistent with the plain text of the statute, that a plaintiff seeking to impose liability on an individual "employer" need only show that the individual have an ownership interest or power to carry out personnel decisions; it need not be shown that such individual employer participated or was aware of the discriminatory conduct (*see Makinen v City of New York*, 167 F Supp 3d 472, 487-488 [SD NY 2016], *affd in part and revd in part on other grounds*, 722 Fed Appx 50 [2018] ["immaterial" that there was no evidence that the defendant commissioner participated directly in the discrimination since "[h]e could be held liable solely on the basis that he had the power to do more than carry out the personnel decisions of others"];[1] *Equal Employment Opportunity*

[1]Defendant's attempt to dismiss *Makinen* is unpersuasive. The fact that the case involved a public official, as opposed to a private individual, has no bearing upon the relevant analysis. The court in that case looked to the City charter to define the

Commission v Suffolk Laundry Serv., Inc., 48 F Supp 3d 497 [ED NY 2014] [individual co-owner defendants liable under State HRL since they had authority to do more than carry out the personnel decisions made by others]).

The allegations in the complaint are plainly sufficient to state a cause of action at this pre-discovery stage, where we are obliged to accept the facts alleged in the complaint as true and to accord the plaintiff the benefit of every possible favorable inference. Under the City HRL, plaintiff is required only to allege that Bloomberg is an individual with an ownership interest and/or someone with the power to do more than carry out the personnel decisions of others, and that Ferris exercised managerial or supervisory authority over plaintiff, which the complaint alleges.

Even under the majority's heightened culpability standard, the allegations are sufficient. Plaintiff alleges that Bloomberg created, encouraged or condoned a culture of sexual harassment at Bloomberg LLP. Plaintiff alleges, inter alia, that Bloomberg had

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scope of the official's authority, i.e., to determine whether he had sufficient "power, authority, and control" over the governance of the department so as to be considered an "employer" under *Patrowich*, and thus liable under the City HRL, regardless of his own participation or lack thereof. Here, of course, the individual defendant is the eponymous owner and founder of the corporate defendant, easily qualifying as an employer.

an internal messaging system, Instant Bloomberg (IB), that served as "a pseudo dating site." Plaintiff alleges that Bloomberg had a "selective practice" of reviewing IB for inappropriate content. Defendant Ferris is alleged to have sent plaintiff offensive and misogynistic emails on work email over a three-year period. Plaintiff also alleges that she communicated with a coworker over IB about Ferris's inappropriate conduct.

Plaintiff alleges that female employees were encouraged to dress provocatively and that employees regularly commented on female employees' appearance using a rating system. Plaintiff alleges that Bloomberg did not provide adequate sexual harassment training and that employees were afforded no effective means of complaining about and/or reporting harassment. Indeed, plaintiff alleges that her request for a change of seating assignment so that she did not have to work in proximity to defendant Ferris, her alleged rapist, went unheeded.[2] Plaintiff also alleges that she complained about Ferris's alleged harassment to a social worker in Bloomberg's Employee Assistance Program (EAP), who recommended that she be transferred, but that EAP did not formally demand that Ferris's behavior be investigated and that

[2]Plaintiff explained to Human Resources (HR) that Ferris's presence would interfere with her work, though she admittedly did not inform HR of the rape allegation.

the transfer never occurred.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered September 10, 2018, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Michael Bloomberg.

Opinion by Kern, J. All concur except Renwick, J.P. and Manzanet-Daniels, J. who dissent in an Opinion by Manzanet-Daniels, J.

Renwick, J.P., Manzanet-Daniels, Kahn, Kern, Moulton, JJ.

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

ENTERED: SEPTEMBER 24, 2019

CLERK