SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 2, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

11149 Susan Kuti, Index 303529/13
Plaintiff-Respondent,

-against-

Sera Security Services,
Defendant-Appellant.

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Barry McTiernan & Wedinger, LLC, New York (Laurel A. Wedinger of counsel), for appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Victor Goldblum of counsel), for respondent.

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Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered May 10, 2019, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint and deferred plaintiff's cross motion for discovery sanctions, unanimously affirmed, without costs.

Plaintiff, a nurse, was injured when she was attacked by a patient at the healthcare facility where she worked. Defendant Sera Security Services (Sera) provided security for the facility pursuant to a contract. After plaintiff commenced a negligence

action, Sera moved for summary judgment dismissing the complaint, arguing that it was not liable to plaintiff, either as a third-party beneficiary under the contract or as a result of detrimental reliance (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), and that the assault on plaintiff by a patient was, in any event, an unforseeable act (*see Florman v City of New York*, 293 AD2d 120, 125-126 [1st Dept 2002]). The motion court denied the motion. Sera appealed, and we now affirm.

It is axiomatic that a finding of negligence requires a finding that defendant breached a duty it owes to plaintiff. "[T]he existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations" (*Espinal*, 98 NY2d at 138). "Unlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to fact-finding or jury consideration" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 585 [1994]). A contractual duty, standing alone, generally does not give rise to third-party liability. However, a court

may impose third-party liability where the alleged tortfeasor has entirely displaced the other contracting party's duty to maintain safe premises, or where "plaintiff detrimentally relies on the continued performance of the contracting party's duties" (*Espinal*, 98 NY2d at 140; *see also Palka*, 83 NY2d at 584).

Here, the motion court correctly determined that the contractual language and deposition testimony were sufficient to defeat Sera's motion for summary judgment to the extent that they raised questions as to whether Sera had a duty to plaintiff, either because she was a third-party beneficiary under the contract with plaintiff's employer, or because she had detrimentally relied on Sera's continued performance of its contractual duties.

The contract does not expressly exclude third-party beneficiaries. Its language raises a question of fact as to whether it "displace[d] and substitut[ed] [onto defendant]. . . a particular safety function designed to protect persons like this plaintiff" (*Palka*, 83 NY2d at 589; *see also Espinal*, 98 NY2d at 140).

The contract incorporates by reference the facility's solicitation for proposals and Sera's proposal. Reading these documents as one precludes us from finding that Sera is not

solely responsible for the security of premises, and the property and persons on it. The solicitation states that the security vendor shall "provide security services and. . . uniformed security guards, which will ensure the safety and security of [the] facilities," and "maximize[] safety," and will "provide [the] appropriate level of tour supervision 24 hours per day, 7 days per week." The solicitation specifies that the vendor must provide security guards who have experience "providing security services to homeless individuals[,] . . . homeless families. . . . [and] a population with special needs such as medical conditions and mental health issues." In response to the solicitation's request for guards who have training in, among other things, "arrest procedures," Sera's proposal states that its guards have the ability "to handle emotionally disturbed individuals. . . . [and]. . . enforce restraining procedures." The agreement requires Sera to obtain comprehensive general liability insurance, including coverage for "personal injury, false arrest and assault and battery." It further provides that Sera shall have an independent contractor relationship with the facility, and that nothing in the contract shall be construed to create an employee relationship between them, implying that Sera Security had sole responsibility for training and supervising its

guards.

While defendant argues that the contract was intended to require Sera to provide services only to protect against unauthorized entry into the premises and damage to property, we agree with the motion court that the contractual language is ambiguous (*see LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 4 [1st Dept 2019]). Accordingly, the court may consider extrinsic evidence of the contractual intent (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

As the motion court noted, the testimony of the Sera security guard who responded to plaintiff's call for assistance indicated that he understood his obligation to include ensuring that the patient, who had already assaulted plaintiff by the time he arrived, "not. . . come back and. . . do something to them. . . . or. . . get into a fight with them," and that he therefore approached the patient and "slowly talked to her going back to her door. . . . just to buy time until the police and ambulance comes. . . . My attendance is just to say whatever I need to say to that woman to just keep her calm." He further testified that he and his fellow Sera security guards regularly responded to facility staff's calls for assistance with incidents, including "altercations" and "fighting."

Given this testimony and the contractual language, the motion court properly denied summary judgment on the issue of whether defendant is liable to plaintiff as a third-party beneficiary of the contract.

Similarly, the motion court also properly concluded that plaintiff raised questions of fact sufficient to overcome summary judgment as to whether Sera is liable to plaintiff under a theory of detrimental reliance based on plaintiff's allegation that the Sera security guard promised to respond to plaintiff's call for assistance, but failed to do so in a timely manner or failed to call the police promptly or at all (*see Espinal*, 98 NY2d at 140).

Defendant's security guard testified that he could not recall when he received the call from his colleague directing him to go to the floor where plaintiff worked, whether he was advised of any details of what was occurring, or how long it took him to get there. He further testified that he was trained to investigate calls prior to determining whether to call the police, and that, if a staff member called the security station about an incident, it was the Sera security guards' responsibility to call 911 or the police when warranted.

Plaintiff testified that she called the security guard station three times to report that a patient was behaving in an

aggressive and threatening manner, and that the lobby security guard assured her that he was sending a guard to assist her. She further testified that approximately 5 to 10 minutes passed between her first call and the assault, that the assault lasted approximately 3 or 4 minutes, and that the security guard arrived after she had been assaulted. It is not clear when the police were called or who called them, but they arrived and arrested the patient after the security guard appeared. Given the testimony by plaintiff and the Sera security guard to the effect that Sera staff undertook to respond to plaintiff's call for help, and the discrepancy between the parties' claims about the length of time it took for a Sera security guard to respond, plaintiff raised questions of fact as to whether Sera might be liable to her under a theory of detrimental reliance.

Moreover, while the motion court declined to credit surveillance video offered by Sera in support of its claim that the security guard arrived "one minute" after plaintiff called for help, the court should not have considered the video at all for two reasons. First, as the motion court noted, it was offered with defendant's reply papers and plaintiff had no opportunity to respond to it. Second, it was not authenticated, and thus did not constitute evidence in admissible form, as

required on a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The motion court also correctly denied summary judgment as to whether or not the assault on plaintiff was foreseeable. A criminal act may result in liability for the party with a duty to maintain safety when he or she "knows or has reason to know that there is a likelihood that third persons may endanger the safety of those lawfully on the premises," including where the responsible party is aware of prior similar acts occurring on the premises (*Florman*, 293 AD2d at 124 [1st Dept 2002]). Moreover, it is not necessary that "the past experience relied on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected" (*Jacqueline S. v City of New York*, 81 NY2d 288, 294 [1993]).

Here, the contract itself appears to contemplate the likelihood of incidents like the one at issue, since the contract requires that Sera security guards have the ability to "handle emotionally disturbed individuals," "enforce restraining procedures," and be trained in "arrest procedures." In addition, the Sera security guard who responded to plaintiff's call for help testified that he and his colleagues had previously received

calls from facility employees on the floor where plaintiff worked seeking assistance with patients who had become "angry." During those incidents, he testified that they would "have to take the patient down and try to calm him the best – - as much as we can do." He also testified to receiving as many as five calls for assistance in one day from various locations on the premises because "a lot of stuff happens," including "altercations" and "fighting." Plaintiff testified that the patient who assaulted her had a history of aggressive behavior and resistance to authority, and that staff had sent the patient "to psych several times."

Under these circumstances, the motion court properly found that Sera had failed to meet its burden, as the proponent of a summary judgment motion, to demonstrate an absence of prior assaults or similar incidents on the premises (*see Sanchez v State of New York*, 99 NY2d 247, 254 [2002]). Even if Sera had made a prima facie showing, plaintiff has raised a question of fact sufficient to overcome Sera's summary judgment motion on the issue of foreseeability.

Finally, we find that the motion court, in the exercise of its broad discretion in such matters (CPLR 3126; *Ortega v City of New York*, 9 NY3d 69, 76 [2007]), properly deferred plaintiff's cross motion for discovery sanctions to the trial judge to determine whether plaintiff had suffered any prejudice (*see Linarello v City Univ. of N.Y.*, 6 AD3d 192, 194 [1st Dept 2004]).

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

ENTERED: APRIL 2, 2020

CLERK

Richter, J.P., Manzanet-Daniels, Gesmer, Singh, JJ.

11036 Rosalyn Farkas, Claim 128709
Claimant-Appellant,

-against-

City University of New York,
Defendant-Respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Court of Claims (David A. Weinstein, J.), entered on or about July 19, 2018,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 28, 2020,

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11170 Domingo Armental, Jr., Index 151083/15
Plaintiff-Appellant,

Joy Armental,
Plaintiff,

-against-

401 Park Avenue South Associates, LLC, et al.,
Defendants-Respondents,

- - - - -

United Alliance Enterprises, LLC,
Third-Party Plaintiff-Respondent,

-against-

Alliance Building Systems, LLC,
doing business as Elite Glass,
Third-Party Defendant-Respondent.

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Marshall S. Bluth, New York, for appellant.

Cozen O'Connor, New York (William K. Kirrane of counsel), for 401 Park Avenue South Associates, LLC, Meringoff Properties, Inc., WeWork Companies, Inc., WW 401 Park Avenue South, LLC, Janet Goldman, Catherine Lipkin Schwartz, Peter Schwartz, Margaret Schwartz Salzman, R. Anthony Goldman, Mark Goldman, Edith Charlotte Landau, ELL-401 LLC, The Max Rosenfeld Foundation, Inc., The Max and Morton M. Rosenfeld Foundation, Inc., The Seed Moon Foundation, Inc., I Dream a World Foundation, Inc., John Herring, Paul Herring, Daniel Lehmann, Laura M. Twomey, Michael Rosenfeld, Hal Patterson, Mia Alexander Rosenfeld and Robbyco Holdings, LLC, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ian Marc Herman of counsel), for United Alliance Enterprises, LLC, respondent.

Lewis Johs Avallone Aviles, LLP, New York (Kevin G. Mescall of counsel), for Independent Mechanical, Inc., respondent.

Law Office of James J. Toomey, New York (James J. Toomey of counsel), for Intel Plumbing and Heating, LLC, respondent.

Cascone & Kluepfel, LLP, Garden City (Beth L. Roggoff Gribbins of counsel), for Alliance Building Systems, LLC, respondent.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about March 22, 2019, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the Labor Law § 200 and common-law negligence claims as against defendants United Alliance Enterprises, LLC (UA), Independent Mechanical Inc. (Independent Mechanical), Intel Plumbing and Heating, LLC (Intel Plumbing), and WeWork Companies, Inc. (WeWork), on the Labor Law § 240(1) claim as against all defendants, and on so much of the Labor Law § 241(6) claim as is based on alleged violations of Industrial Code (12 NYCRR) §§ 23-1.7(e)(1), 23-1.7(e)(2), 23-2.1(a)(1), and 23-2.1(b) as against all defendants, and granted defendants' motions for summary judgment dismissing those claims, unanimously modified, on the law, to deny UA's, Independent Mechanical's, Intel Plumbing's, and WeWork's motions as to the Labor Law § 200 and common-law negligence claims, and to deny the motions of UA, WeWork, and all other defendants joining WeWork's appellate brief other than Meringoff Properties, Inc. (401 Park defendants) as to

the Labor Law § 241(6) claim insofar as it is based on alleged violations of Industrial Code §§ 23-1.7(e)(1), 23-1.7(e)(2), and 23-2.1(a)(1), and otherwise affirmed, without costs.

The court correctly dismissed the complaint as against Meringoff Properties, Inc., in light of plaintiff's concession that there is no basis for holding Meringoff liable.

The court correctly dismissed the Labor Law § 240(1) claim, as that statute does not cover a fall allegedly caused by stepping on a pile of unsecured pipes on the floor of a construction site (*see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902 [2008]; *Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259 [1st Dept 2005]).

The Labor Law § 200 and common-law negligence claims should not be dismissed as against UA, Independent Mechanical, Intel Plumbing, and WeWork. The cause of plaintiff's accident was not the manner in which his work was performed but a dangerous condition on the premises, i.e., the loose pipes that had been laid on the floor directly in front of a doorway (*see Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]). Issues of fact exist as to whether UA negligently created the hazardous condition by directing the placement of the pipes and by failing to properly coordinate work on the site (*see Maza v University Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004]). The conflicting

testimony about whether the black pipes involved in the accident resembled those used by Independent Mechanical presents issues of fact as to whether that company or Intel Plumbing, which used different types of black pipes on the site, created the hazardous condition (*see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 68 [1st Dept 2018]). WeWork failed to establish that it lacked actual or constructive notice of the condition (*see id.*).

The court correctly dismissed the Labor Law § 241(6) claim as against subcontractors Intel Plumbing and Independent Mechanical, which could not be held liable as statutory agents absent evidence that they "controlled the work area or had authority to insist that safety precautions be taken with regard to" the placement of the materials that allegedly caused plaintiff's accident (*see Serpe v Eyris Prods.*, 243 AD2d 375, 380 [1st Dept 1997]).

However, the record does not support the summary dismissal of the Labor Law § 241(6) claim as against the UA and 401 Park defendants. Plaintiff's testimony that his fall was caused by a pile of loose pipes obstructing the doorway presents an issue of fact as to whether the accident was caused by a tripping hazard in a passageway (Industrial Code [12 NYCRR] § 23-1.7[e][1]; *see Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447-448 [1st

Dept 2016]; *McCullough v One Bryant Park*, 132 AD3d 491 [1st Dept 2015]). There is also an issue of fact as to whether the accident was caused by a violation of 12 NYCRR 23-1.7(e)(2), since part of the floor where workers worked or passed was not kept free from scattered tools or materials (*see Quigley*, 168 AD3d at 68). In addition, there is an issue of fact as to whether the unsecured pipes, which were allegedly piled about two feet high directly in front of the doorway, were safely stored pursuant to 12 NYCRR 23-2.1(a)(1) (*see id.*).

Industrial Code § 23-2.1(b) is insufficiently specific to serve as a predicate for a Labor Law § 241(6) claim (*Quinlan v City of New York*, 293 AD2d 262, 263 [1st Dept 2002]).

The Court incorrectly dismissed the complaint on the alternative ground that plaintiff was the sole proximate cause of the accident. There are disputed issues of fact, including conflicting testimony about whether plaintiff disregarded limitations on walking through a restricted area at the time of his accident (*see e.g. Demetrio v Clune Constr. Co., L.P.*, 176 AD3d 621 [1st Dept 2019]).

The issues raised by the 401 Park defendants concerning contractual indemnification and the third-party complaint are not properly before this Court, since they are unrelated to the

issues raised by plaintiff, the only party that filed a notice of appeal from the order under review (*see Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495, 497 [1st Dept 2015], *affd* 28 NY3d 958 [2016]).

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

ENTERED: APRIL 2, 2020

CLERK

Richter, J.P., Oing, Moulton, González, JJ.

11206-
11207 Andrew Kolchins,
Plaintiff-Respondent,

-against-

Evolution Markets, Inc.,
Defendant-Appellant,

Andrew Ertel,
Defendant.

- - - - -

[And Another Action]

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Andrew Kolchins,
Plaintiff-Appellant-Respondent,

-against-

Evolution Markets, Inc.,
Defendant-Respondent-Appellant,

Andrew Ertel,
Defendant-Respondent.

- - - - -

[And Another Action]

Index 653536/12
651271/13

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Wechsler & Cohen, LLP, New York (David B. Wechsler of counsel), for appellant/respondent-appellant and respondent.

Debevoise & Plimpton LLP, New York (Jyotin Hamid of counsel), for respondent/appellant-respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 2, 2019, which, to the extent appealed from, granted Andrew Kolchins (Kolchins), Titan Energy

Markets, LLC (Titan), and John Dall's (Dall) motion for summary judgment dismissing the claims in Evolution Markets, Inc.'s (Evolution) second amended complaint (SAC) alleging that Kolchins breached the restrictive covenants in his 2009 employment agreement with Evolution; denied Evolution's cross motion for summary judgment on the SAC's claim alleging that Titan tortiously interfered with the 2009 employment agreement; denied Evolution's motion for summary judgment dismissing Kolchins's claim for breach of the 2009 employment agreement as extended by the purported "Extension Agreement"; and granted Evolution's motion for summary judgment dismissing Kolchins's claims for breach of the "Production Bonus" clause of the 2009 employment agreement and violation of Labor Law § 193, unanimously modified, on the law, to deny Evolution's motion as to Kolchins's claim for breach of the "Production Bonus" clause of the 2009 employment agreement, and otherwise affirmed, without costs. Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about August 6, 2019, which, to the extent appealed from, denied Evolution's motion to renew its motion for summary judgment dismissing Kolchins's claim for breach of the "Guaranteed Compensation" clause in the alleged "Extension Agreement," unanimously affirmed, without costs.

Kolchins's Labor Law § 193 claim was correctly dismissed, because Evolution's failure to pay the Production Bonus constitutes a "wholesale withholding of payment," which is not a "deduction" within the meaning Labor Law § 193 (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449-450 [1st Dept 2017]).

The dismissal of the Labor Law § 193 claim does not necessitate dismissal of the Production Bonus claim. That Evolution did not violate Labor Law § 193 in withholding the Production Bonus has no bearing on its contractual obligation to pay the bonus (*see e.g. Perella*, 153 AD3d 443 [court correctly declined to dismiss contract claims while correctly dismissing Labor Law § 193 claims]).

On the present record, summary dismissal of the Production Bonus claim is precluded by an issue of fact as to whether the bonus was discretionary compensation or earned wages (*see* Labor Law § 190; *Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012]; *Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 389-390 [1st Dept 1994]; *Weiner v Diebold Group*, 173 AD2d 166, 167 [1st Dept 1991]). It was determined on the prior appeal that the contract language and documentary evidence did not conclusively establish that the production bonus was discretionary, rather than earned (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 109-110

[2018]). The additional evidence submitted by Evolution on the instant motion does not compel a different result.

The court correctly dismissed the SAC's claims alleging breach of the restrictive covenants. The record demonstrates as a matter of law that these covenants are not enforceable because Evolution did not have a "continued willingness" to employ Kolchins, despite Kolchins's continued desire to work for the company (*Buchanan Capital Mkts., LLC v DeLucca*, 144 AD3d 508, 508 [1st Dept 2016] [internal quotation marks omitted]).

The court correctly declined to dismiss Kolchins's claim for breach of the "Extension Agreement." It was held on the prior appeal that the parties' correspondence and course of conduct did not conclusively refute Kolchins's claim that the parties intended to enter into a binding agreement, despite the lack of a formal written contract (*Kolchins*, 31 NY3d at 107-108). The additional evidence submitted by Evolution on the instant motion does not compel a different result.

Evolution did not support its motion to renew its summary judgment motion with new facts or a change in the law (CPLR 2221[e][2]) that would justify dismissing Kolchins's claim to recover "Guaranteed Payment" under the alleged Extension Agreement. Moreover, Evolution did not provide reasonable

justification for its failure to present such facts on the motion for summary judgment (CPLR 2221[e][3]).

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

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11317 The People of the State of New York, Ind. 1921/15
Respondent,

-against-

Ezequiel Ochoa,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered February 6, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of six years, unanimously modified, on the law, to the extent of vacating the sentence, and remanding for a further youthful offender determination, and otherwise affirmed.

To the extent that the court concluded that defendant was presumptively ineligible for youthful offender treatment, that determination was incorrect. Defendant's prior conviction of criminal possession of a weapon in the second degree, for "possess[ing] a loaded firearm" (Penal Law § 265.03[1][b]) was not an "armed felony" within the meaning of CPL 720.10(2)(a). As

relevant here, CPL 1.20, which CPL 720.10(2)(a) incorporates, defines "armed felony" as "any violent felony offense defined in section 70.02 of the penal law that includes as an element . . . possession . . . of a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged" (CPL 1.20[41][a]). The statutory definition of "loaded firearm" explicitly does not require that the firearm be "actually" loaded, because it includes within the definition a "firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm" (Penal Law § 265.00[15]). In contrast, the definition of "deadly weapon" contains no proviso indicating that an actually unloaded weapon is deemed "loaded," and the definition is therefore met, where usable ammunition is readily available. Accordingly, "in order to be a deadly weapon, a gun must actually be loaded, as that term is commonly understood" (*People v Wilson*, 252 AD2d 241, 246 [4th Dept 1998] [internal quotation marks omitted][*citing People v Shaffer*, 66 NY2d 663, 664 [1985]). Since a "loaded firearm" is therefore not always a "deadly weapon," the crime to which defendant pleaded guilty did not "include[] as an element . . . possession . . . of a deadly

weapon" (CPL 1.20[41][a]), and the court should not have found that defendant's conviction rendered him presumptively ineligible. Accordingly, defendant was eligible to be considered for youthful offender status without any presumption of ineligibility due to the nature of his crime (CPL 720.10[1],[2]; *People v Boria*, 124 AD3d 467 [1st Dept 2015], *lv denied* 25 NY3d 1069 [2015]). We therefore remand this matter to the trial court for further proceedings consistent herewith (*see People v Rudolph*, 21 NY3d 497 [2013]).

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11318 Deluxe Home Builders Corp., et al., Index 656083/16
Plaintiffs-Appellants,

-against-

Harleysville Worcester Insurance Company,
Defendant-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about July 16, 2018,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 2, 2020,

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11319 In re Kathleen M. H., Dkt. F-21828-18/18A
Petitioner-Respondent,

-against-

John J. C.,
Respondent-Appellant.

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Carol Kahn, New York, for appellant.

Kathleen M. H., respondent pro se.

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Order, Family Court, New York County (Patria Frias-Colón, J.), entered on or about May 9, 2019, insofar as it, after a hearing, confirmed the findings of the same court (Support Magistrate Tionnei Clarke), entered on or about May 9, 2019, that respondent willfully violated an order of support entered on or about September 7, 2016, unanimously affirmed, without costs. Appeal from that portion of the order that committed respondent to the Department of Correction for a six-month term of weekend incarceration with a purge amount set at $30,000, unanimously dismissed, without costs, as academic.

The appeal from that part of the order of commitment that committed respondent to the custody of the Department of Correction for a period of six months unless he paid the purge amount is dismissed as academic, as the period of incarceration

has expired (*see Matter of Elizabeth L. v Kevin O.*, 179 AD3d 404 [1st Dept 2020]). However, the appeal from that part of the order affirming the determination that respondent was in willful violation of the September 7, 2016 order of support should not be dismissed as academic given the enduring consequences which might flow from the finding that he willfully violated that order (*see Matter of Berg v Berg*, 166 AD3d 763, 764 [2d Dept 2018]; *Matter of April G. v Duane M.*, 105 AD3d 491 [1st Dept 2013]).

The question of whether respondent received adequate notice of the proceedings while before the Support Magistrate during which he was found to have willfully violated the September 7, 2016 support order is fact-intensive and had to be raised in a timely way in order to preserve that contention for appellate review (*see Matter of Twania B. v James A.B.*, 172 AD3d 643, 643 [1st Dept 2019]; *Matter of Jasco v Alvira*, 107 AD3d 1460, 1460 [4th Dept 2013]). Since respondent never raised the issue before the Family Court, as he acknowledged, he failed to preserve this issue for appellate review (*see Matter of Borggreen v Borggreen*, 13 AD3d 756, 757 [3d Dept 2004]).

Even if we were to consider the issue, respondent's contention that he received insufficient notice is belied by the record. The summons states that he was to appear in the Family

Court on a date certain because petitioner alleged that he failed "to obey the support order dated September 7, 2016," and that he was to, inter alia, "provide the court with proof" of his "income and assets" by completing "the annexed form" and supplying his W-2 wage and tax statements submitted with the returns (*see Matter of Santana v Gonzalez*, 90 AD3d 1198 [3d Dept 2011]). His completion of a financial disclosure affidavit and submission of his tax returns to the Support Magistrate established that he received adequate notice.

We find that petitioner met her initial burden to show that respondent willfully violated a prior order of the Family Court directing him to tender spousal support to her by presenting the certified records from Monroe County Family Court (i.e., the September 7, 2016 support order, the July 3, 2018 fact-finding order establishing that he owed petitioner $91,700 for spousal maintenance, and the July 3, 2013 judgment entered against him in her favor for that amount) (*see Matter of Delaware County Dept. of Social Servs. v Brooker*, 272 AD2d 835, 836 [3d Dept 2000]). Upon petitioner's satisfaction of her burden, the burden shifted to respondent going forward to offer some credible evidence that his failure to make the required payments was the result of his inability to obtain gainful employment despite making reasonable

efforts to find work (*see Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012]).

Respondent failed to meet his burden of presenting credible evidence that he was unable to make payments as directed (*see Matter of Brooks v Brooks*, 163 AD3d 554, 556 [2d Dept 2018]; *Matter of Kretkowski v Pasqua*, 147 AD3d 836, 837 [2d Dept 2017]; *Matter of Erie County Dept. of Social Servs. v Shaw*, 81 AD3d 1328, 1329 [4th Dept 2011]). Respondent's receipt of benefits from Social Security and SNAP did not preclude the Support Magistrate from finding that he was capable of working (*see Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1244-1245 [4th Dept 2012]; *Matter of Aranova v Aranov*, 77 AD3d 740, 741 [2d Dept 2010]). There is no basis to reject the Support Magistrate's finding that respondent was incredible in claiming that he lacked income and was unable to work (*see Matter of Espinal-Melendez v Vasquez*, 160 AD3d 852, 854 [2d Dept 2018]).

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Oing, Singh, Moulton, JJ.

11321 Dean/Wolf Architects, Index 651932/14
Plaintiff-Appellant,

-against-

Steven Gottlieb,
Defendant-Respondent,

Stephanie Gottlieb, et al.,
Defendants.

_____

Nelson Madden Black LLP, New York (John B. Madden of counsel), for appellant.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Thomas M. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered March 25, 2019, which, to the extent appealed from, following a nonjury trial, denied in part plaintiff's claim for damages resulting from defendant's breach of an agreement for architectural services, unanimously affirmed, without costs.

While the trial court should not have interpreted section 11.5.1 of the parties' agreement to divest plaintiff of all damages under the agreement, plaintiff failed to prove its entitlement to any amounts beyond the sum awarded (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990]). Its invoices, time

sheets, and payment records failed to establish that there was more due and owing under the agreement, as claimed, and it failed to plead or prove quantum meruit damages (*see Najjar Indus. v City of New York*, 87 AD2d 329, 334 [1st Dept 1982], *affd* 68 NY2d 943 [1986]). However, the testimony of both parties' witnesses established that certain additional services were performed, accepted, documented, and submitted for payment, which warranted the fees awarded, plus interest at the contractual rate of 1%.

Contrary to its contention, plaintiff failed to demonstrate that it was entitled to lost profits under section 11.5.3 of the agreement (*see Wade Lupe Constr. Co. v B & J Roofing Co.*, 84 AD2d 615, 615 [3d Dept 1981], *affd* 55 NY2d 993 [1982]).

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11323 Naji Nassar, Index 161207/14
Plaintiff-Respondent,

-against-

Macy's Inc., et al.,
Defendants-Appellants.

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Mauro Lilling Naparty LLP, Woodbury (Eric Z. Leiter of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered March 4, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.22(b)(3) and the common-law negligence and Labor Law § 200 claims as against defendant Structure Tone, Inc., unanimously modified, on the law, to grant the motion as to the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.22(b)(3), and otherwise affirmed, without costs.

Because the record is devoid of evidence that defendants' violation of 12 NYCRR 23-1.22(b)(3), if any, was a proximate cause of plaintiff's injuries, the Labor Law § 241(6) claim must

be dismissed to the extent it is predicated on that provision (*see Guaman v City of New York*, 158 AD3d 492, 493 [1st Dept 2018], *lv denied* 32 NY3d 903 [2018]; *McCullum v Barrington Co. & 309 56th St. Co.*, 192 AD2d 489 [1st Dept 1993]).

Defendants contend that Structure Tone cannot be held liable for plaintiff's injuries under Labor Law § 200 or in common-law negligence because it lacked the requisite supervisory control over the means and methods of his work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). However, an issue of fact exists whether Structure Tone lent plaintiff the A-frame cart involved in his accidents; if it did, then defendants must demonstrate that Structure Tone neither created nor had actual or constructive notice of the dangerous or defective condition of the cart (*Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2d Dept 2008]; *accord Jaycoxe v VNO Bruckner Plaza, LLC*, 146 AD3d 411, 412 [1st Dept 2017]; *Lam v Sky Realty, Inc.*, 142 AD3d 1137, 1138-1139 [2d Dept 2016]). Defendants failed to do so; rather, they "merely pointed to gaps in plaintiff's proof" (*Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012]).

Defendants' argument that plaintiff was the sole proximate

cause of his injuries is unpreserved (*see Ervin v Consolidated Edison of N.Y.*, 93 AD3d 485 [1st Dept 2012]) and in any event unavailing.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11324 The People of the State of New York, Ind. 1376/15
Respondent,

-against-

Antonio Cruz,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about January 4, 2017, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure. Clear and convincing evidence established aggravated factors that were not adequately taken into account by the risk assessment instrument (*see People Gillotti*, 23 NY3d 841, 861-862). Although defendant was assessed the maximum amount of points for the number and nature of his prior crimes, this did not reflect the seriousness and extent of that history, which included four prior sex offense convictions and was indicative of

sexual recidivism (*see People v Roman*, 143 AD3d 476 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017]). Moreover, despite having been adjudicated a level three offender on a prior case, and subjected to the requirements of that classification, he nevertheless committed yet another sex crime, resulting in the instant adjudication. This was also predictive of sexual recidivism (*see People v Collins*, 127 AD3d 568 [1st Dept 2015], *lv denied* 26 NY3d 901 [2015]; *People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

The mitigating factors that defendant relied upon were adequately taken into account by the risk assessment instrument, and, in any event, were outweighed by the aggravating factors.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11325 In re Jensli C., and Others, Dkt. NA-8069-71/16

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

Orlenis C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

James E. Johnson, Corporation Counsel, New York (Lorenzo DiSilvio of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about August 31, 2018, which, to the extent appealed from as limited by the briefs, denied respondent mother's application for a suspended judgment, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the mother's motion for a suspended judgment (*see Matter of Sophia W. [Tiffany P.]*, 176 AD3d 723 [2019]; *cf. Matter of Leenasia C. [Lamarriea C.]*, 154 AD3d 1, 6 [1st Dept 2017]). The mother's youngest child suffered severe and unexplained injuries,

and the record provides ample support, including, but not limited to the mother's refusal to draw logical inferences regarding the cause of those injuries, for the court's determinations. For example, the mother stated her belief that she could "co-parent" with the child's father, despite the fact that he had repeatedly perpetrated violence against the mother (*see William S. v Tynia C.*, 283 AD2d 327, 327 [1st Dept 2001]). Best interest analysis, which requires consideration of a parent's ability to supervise a child and eliminate any threat of future abuse or neglect, supports the court's exercise of discretion to decline to grant a suspended judgment in these circumstances (*Matter of Marie Annette M.*, 23 AD3d 167, 169 [1st Dept 2005]; *Matter of Lemar H.*, 23 AD3d 383 [2d Dept 2005]).

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11326 In re Nasser Larkem, Index 100351/18
Petitioner,

-against-

New York City Conflicts of Interest Board,
Respondent.

_____

Nasser Larkem, petitioner pro se.

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

_____

Determination of respondent, dated February 14, 2018, which, after a hearing, found that petitioner violated New York City ethics rules and imposed a penalty of $20,000, 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 [Arlene P. Bluth, J.], entered August 2, 2018), dismissed, without costs.

Substantial evidence supports the determination that petitioner violated New York City Charter §§ 2604(b)(2) and 2604(a)(1)(b) (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The evidence showed that petitioner taught more than 400 hours of classes at the French Institute Alliance Francaise, an entity with contracts

with the City, during his scheduled work hours at the Department of Education. There exists no basis to disturb the credibility determinations of the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *Sewell v City of New York*, 182 AD2d 469, 473 [1st Dept 1992], *lv denied* 80 NY2d 756 [1992]).

The imposition of a $20,000 penalty for petitioner's violations does not shock one's sense of fairness in light of the egregiousness of petitioner's conduct (*see Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065 [2018]).

We have considered petitioner's remaining arguments, including that he was not afforded due process, and find them unavailing.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11327 The People of the State of New York, Ind. 3946/08
Respondent,

-against-

Eshawn Almodovar,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered February 9, 2018, resentencing defendant to a term of 15 years, unanimously affirmed.

Given the seriousness of the underlying crime, during which defendant shot two victims, killing one of them, we find that the resentencing court providently exercised its discretion in

denying youthful offender treatment (*see generally People v Drayton*, 39 NY2d 580 [1976]), and in reducing the original sentence from 20 years to 15 years. We perceive no basis for further reducing the sentence.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11328 Arie Genger, Index 651089/10
Plaintiff-Respondent,

Orly Genger, etc.,
Plaintiff,

-against-

TPR Investment Associates, Inc.,
Defendant-Appellant,

Sagi Genger, et al.,
Defendants.

_____

Greenberg Traurig, LLP, New York (Carmen Beauchamp Ciparick of counsel), for appellant.

The Law Office of Peter J. Glantz, White Plains (Peter J. Glantz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about February 19, 2019, to the extent appealed from as limited by the briefs, awarding defendant TPR Investment Associates, Inc. attorneys' fees, and bringing up for review orders, same court and Justice, entered on or about May 19, 2015, and December 3, 2018, which reduced the amount of fees to which defendant was entitled by 80% and denied defendant prejudgment interest, unanimously modified, on the law, to vacate the 80% pro-rata reduction of fees, and otherwise affirmed, without costs.

Supreme Court correctly found that attorneys' fees that defendant incurred in a related Delaware proceeding and a prior appeal to this Court were sufficiently inseparable from the issues on vacatur of the preliminary injunction as to be properly recoverable here (*see Republic of Croatia v Trustee of Marquess of Northampton 1987 Settlement*, 232 AD2d 216 [1st Dept 1996]).

However, the court erred in ordering a "proration" of the attorneys' fees to correspond with the amount of proceeds covered by a voluntary escrow agreement. In a December 2011 order, upon plaintiff's motion, another justice had expanded the preliminary injunction to cover those funds as well. Further, plaintiff argued successfully on that motion that the escrow agreement was not sufficient restraint and that the preliminary injunction was required. He is barred by the doctrine of judicial estoppel from arguing now that the escrow agreement was the equivalent of the injunction (*Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000]).

The court did not abuse its discretion in denying pre-judgment interest under CPLR 5001(a) in this equitable matter.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11329 Aleks Y. Kovkov, Index 300163/18
Plaintiff-Appellant,

-against-

Law Firm of Dayrel Sewell, PLLC, et al.,
Defendants,

The Schutzer Group, et al.,
Defendants-Respondents.

_____

Aleks Y. Kovkov, appellant pro se.

The Schutzer Group, PLLC, New York (Eric P. Schutzer of counsel), for The Schutzer Group, PLLC and Rickin Desai, respondents.

Cullen and Dykman LLP, Garden City (Ryan Soebke of counsel), for Anthony Agolia and Fordham University, respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 7, 2019, which granted defendants-respondents Anthony Agolia and Fordham University's motion and defendants-respondents The Schutzer Group, PLLC and Rickin Desai's motion, each pursuant to CPLR 3211(a) to dismiss the complaint as against them, and dismissed the complaint as against them with prejudice, unanimously affirmed, without costs.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are afforded a liberal construction and the only issue is whether the facts alleged, accepted as true, state a claim

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). New York does not recognize an independent cause of action for civil conspiracy, which may only be asserted to connect actions of separate defendants to an underlying tort (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). To assert a civil conspiracy claim, the complaint must allege a cognizable cause of action, agreement among the conspirators, an overt act in furtherance of the agreement, intentional participation by the conspirators in furtherance of a plan or purpose, and damages (*id.*). Bare, conclusory allegations of conspiracy are insufficient (*Schwartz v Society of N.Y. Hosp.*, 199 AD2d 129, 130 [1st Dept 1993]). Here, the complaint only alleges bare, conclusory allegations that defendants-respondents engaged in a conspiracy to defraud plaintiff, to breach a retainer agreement he entered into with a nonparty to this appeal, to breach a

fiduciary duty and to intentionally inflict emotional distress upon him.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11330 The People of the State of New York, Ind. 2411/17
Respondent,

-against-

David Glasgow,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (April Newbauer, J.), rendered October 9, 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: APRIL 2, 2020

CLERK

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

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11331 Latoya Meaders, Index 26937/15E
Plaintiff-Respondent,

Nigel Granville, et al.,
Plaintiffs,

-against-

Elvin Diaz, Jr., et al.,
Defendants-Appellants,

Kelley-Amerit Fleet Services, Inc.
doing business as Amerit Fleet Solutions,
Defendant-Respondent.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Ian Marc Herman of counsel), for appellants.

Shayne, Dachs, New York (Jonathan A. Dachs of counsel), for Latoya Meaders, respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for Kelley-Amerit Fleet Services, Inc., respondent.

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Order, Supreme Court, Bronx County (Lizbeth González, J.), entered September 7, 2018, which, upon reargument, granted plaintiff Latoya Meaders's successive motion for partial summary judgment as to liability against defendants Elvin Diaz, Jr. and DS Services of America, Inc. (collectively the DS defendants), and defendant Kelley-Amerit Fleet Services, Inc.'s (Amerit) cross motion for summary judgment as against the DS defendants and all

plaintiffs, unanimously reversed, on the law, without costs, and the motion and cross motion denied.

Plaintiff Meaders alleges that she sustained injuries in an accident that occurred when the DS defendants' vehicle rear-ended the construction vehicle in which she was a passenger. She also alleges that Amerit negligently maintained the brakes on the DS defendants' vehicle.

It is undisputed that reargument was warranted (CPLR 2221). However, plaintiff Meaders did not demonstrate that changed circumstances warranted consideration of her underlying successive motion for partial summary judgment, because her contention that the DS defendants had been precluded from offering evidence at trial was refuted by a subsequent order of the court denying Amerit's motion for discovery sanctions against the DS defendants (*see Amill v Lawrence Ruben Co., Inc.*, 117 AD3d 433, 433 [1st Dept 2014]). In any event, in opposition to Meaders' prima facie showing that the DS defendants' vehicle rear-ended her vehicle, which raised a presumption of negligence, the DS defendants presented evidence of a non-negligent explanation for the collision, namely the unanticipated failure of their vehicle's brakes, despite their reasonable maintenance

of the vehicle (*see Osborne v New York City Dept. of Parks & Recreation*, 111 AD3d 465, 466 [1st Dept 2013]; *Garcia v Bakemark Ingredients [E.] Inc.*, 19 AD3d 224 [1st Dept 2005]).

As for Amerit's cross motion for summary judgment, its own submissions, particularly the deposition testimony of its fleet manager, presented triable issues of fact as to whether it negligently maintained the brakes of the DS defendants' vehicle in the month preceding the accident (*see Cordella v Raymond of N.J., LLC*, 159 AD3d 975, 976 [2d Dept 2018]; *Parker v Crown Equip. Corp.*, 39 AD3d 347, 348 [1st Dept 2007]). Accordingly, the cross motion also should have been denied.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11332- 160149/17
11333- 160136/17
11334N In re The Board of Managers of the Legacy Condominium, 160142/17
Petitioner-Respondent,

-against-

Core Management NY, LLC,
Respondent-Appellant.

- - - - -

In re The Board of Managers of the Lux Condominium,
Petitioner-Respondent,

-against-

Core Management NY, LLC,
Respondent-Appellant.

- - - - -

In re The Board of Managers of the Union Square Condominium,
Petitioner-Respondent,

-against-

Core Management, NY, LLC,
Respondent-Appellant.

_____

Moses & Singer LLP, New York (Robert B. McFarlane of counsel), for appellant.

Lueker Mott Zezula LLC, New York (Nathan C. Zezula of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 22, 2019, which, to the extent appealed from

as limited by the briefs, granted petitioners' motions for sanctions against respondent to the extent of awarding petitioners costs in the form of reimbursement for actual expenses reasonably incurred in connection with the proceedings and reasonable attorneys' fees, unanimously affirmed, with costs.

The court providently exercised its discretion in imposing monetary sanctions on respondent and detailed the reasons for doing so (*see* 22 NYCRR 130-1.1; 22 NYCRR 130-1.2; *Saleh v Hochberg*, 5 AD3d 234 [1st Dept 2004]). The record shows that respondent, inter alia, refused to turn over petitioners' files after it had been terminated as petitioners' managing agent thereby causing petitioners to commence the instant proceedings. Respondent then delayed turning over the sought material, subsequently provided the material in an unusuable and disorganized format, and ignored a court order. Under the totality of the circumstances, the court's conclusion that respondent engaged in frivolous conduct during the course of the

proceedings was amply supported (*see e.g. Braverman v Braverman*, 146 AD3d 704 [1st Dept 2017]).

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11335N In re Jessica Delgrange, Index 161557/18
Petitioner-Respondent,

-against-

The RealReal, Inc.,
Respondent-Appellant,

Marc Jacobs International, LLC,
Respondent.

_____

Boies Schiller Flexner LLP, New York (Yotam Barkai of counsel), for appellant.

Kaplan Levenson P.C., New York (Steven M. Kaplan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered May 3, 2019, which, to the extent appealed from, denied respondent The RealReal, Inc.'s (TRR) motion pursuant to CPLR 3103(a) for a protective order denying the petition brought pursuant to CPLR 3102(c) to compel TRR to disclose the identity of persons who posted for sale on its consignment website articles of clothing allegedly stolen from petitioner, or, alternatively, directing petitioner to execute a confidentiality agreement as a pre-condition to disclosure by TRR, unanimously affirmed, with costs.

As a threshold matter, TRR's motion pursuant to CPLR 3103(a)

is a proper vehicle for challenging the petition brought pursuant to CPLR 3102(c) (*see e.g. Liberty Imports v Bourguet*, 146 AD2d 535, 537 [1st Dept 1989]). CPLR 3102(c) merely provides a device for obtaining pre-action discovery, and CPLR 3103(a) is a means for obtaining "at any time" an order "denying, limiting, conditioning or regulating the use of any disclosure device." The fact that TRR has produced information relating to 20 of the items at issue does not moot its appeal (*see Matter of Camara v Skanska, Inc.*, 150 AD3d 548 [1st Dept 2017]; *Matter of New York City Asbestos Litig.*, 109 AD3d 7, 12 n 2 [1st Dept 2013], *lv dismissed* 22 NY3d 1016 [2013]).

In support of her application for pre-action discovery pursuant to CPLR 3102(c), petitioner demonstrated a meritorious cause of action for conversion (*see Bishop v Stevenson Commons Assoc., L.P.*, 74 AD3d 640 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]; *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995] [elements of conversion claim]). In an affidavit, she averred that she had a collection of thousands of articles of fashion items made by respondent Marc Jacobs International, LLC (Marc Jacobs), many of which were rare or unique; that she routinely monitored TRR's website for other Marc Jacobs items; and that she noticed, beginning in late 2017,

that items similar to hers were being posted online. Growing suspicious, she inventoried her collection and discovered that many pieces were missing that seemed to be the same as items posted on TRR's website. Petitioner reviewed thousands of Marc Jacobs items that had been listed for sale on TRR's website, and identified 153 items that she believed had been stolen from her collection. She then purchased several of the items, including one that had an identifying tear in it, and ascertained that they had been hers.

Petitioner also demonstrated that the discovery she seeks from TRR — the identity of the people who posted — is material and necessary to the prosecution of her posited cause of action (*see Bishop*, 74 AD3d at 641; *see e.g. Matter of Alexander v Spanierman Gallery, LLC*, 33 AD3d 411 [1st Dept 2006]; *Matter of Banco de Concepcion v Manfra, Tordella & Brooke*, 70 AD2d 840, 841 [1st Dept 1979], *appeal dismissed* 48 NY2d 655 [1979]; *Matter of Cohen v Google, Inc.*, 25 Misc 3d 945 [Sup Ct, NY County 2009]).

Supreme Court providently exercised its discretion in shaping and executing the confidentiality order governing disclosure by TRR. The court addressed TRR's concerns about petitioner's contacting its customers by modifying the form to require petitioner to give TRR 24 hours' written notice prior to

any use of information disclosed under the order. The court also providently exercised its discretion in declining to restrict petitioner's use of information disclosed under the order to conversion claims. Although petitioner does not currently posit any theory other than conversion as a basis for pre-action discovery, she is not foreclosed from developing, at some point, new viable theories for recovery, such as replevin (*see e.g. Alexander*, 33 AD3d at 412). There is no basis for making it impossible for her to seek recovery under any legitimate theory that may arise.

We have considered TRR's other arguments and find them unavailing.

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

ENTERED: APRIL 2, 2020

CLERK

Gische, J.P., Gesmer, Oing, Moulton, JJ.

11336 In re Jean Azor, Ind. 3693/18
Petitioner,

-against-

Hon. Abraham L. Clott, etc.,
Respondent.

- - - - -

Cyrus R. Vance, Jr., etc.
Nonparty Respondent.

_____

Jean Azor, petitioner pro se.

Letitia James, Attorney General, New York (Elizabeth A. Figueira of counsel), for Hon. Abraham L. Clott, respondent.

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

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11337 The People of the State of New York, Ind. 1076/17
Respondent,

-against-

Terry Brown,
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 (Luis Morales of counsel), for respondent.

_____

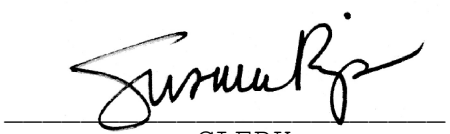
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen Biben, J.), rendered July 3, 2018,

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: APRIL 2, 2020



CLERK

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

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11338 Madeline Fontanez, Index 300592/16
Plaintiff-Respondent,

-against-

PV Holding Corp., et al.,
Defendants-Appellants.

_____

Schenck, Price, Smith & King, LLP, New York (Thomas N. Gamarello of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Christopher J. Soverow of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered March 26, 2019, which granted plaintiff's motion for service of her complaint against defendant Xiang Yu under CPLR 308(5) and directed service to be made on Yu by substituted service on his insurer, defendant PV Holding Corp., unanimously affirmed, with costs.

The motion court properly determined that service upon Mr. Yu pursuant to CPLR 308(1), (2), or (4) was impracticable. Plaintiff served the summons and complaint on the Secretary of State of New York and mailed notice of this service with a copy of the pleadings to defendant Yu by registered mail to his last known address. She also hired a process server, who attempted to obtain Mr. Yu's address through the Department of Motor Vehicles

and through people search databases, including "Premium People Search" and "IRB Search." Further, the motion court properly concluded that plaintiff's attempts to serve through the Chinese Central Authority in accordance with the Hague convention would have been futile because she did not have defendant's correct address (*see Born To Build, LLC v Saleh*, 139 AD3d 654, 656 [2d Dept 2016]). Plaintiff was not required to show due diligence to meet the impracticability threshold under CPLR 308(5) (*see Franklin v Winard*, 189 AD2d 717 [1st Dept 1993]).

The motion court properly directed that alternate service be made on defendant PV Holding as real party in interest, even if neither the attorney nor the insurer had knowledge of defendant's Yu's whereabouts (*see Matter of New York City Asbestos Litig.*, 116 AD3d 571 [1st Dept 2014], *lv dismissed* 23 NY3d 1030 [2014]; *Cives Steel Co. v Unit Bldrs.*, 262 AD2d 164 [1st Dept 1999]).

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11339	In re Awilda M., Petitioner-Respondent, -against- Juan Francisco O., Respondent-Appellant.	Dkt. V-4572/17 V-4573/17 V-12231/17 V-12232/17

Larry S. Bachner, New York, for appellant.

Order, Family Court, New York County (Maria Arias, J.), entered on or about September 6, 2018, which, inter alia, granted parenting time to petitioner mother on three consecutive weekends per month, and set a schedule regarding holiday visitation and vacation time, unanimously affirmed, without costs.

Application by respondent father'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]). A review of the record shows that there are no nonfrivolous issues which could be

raised on appeal. There is no basis to argue that the award of three weekends per month to the mother is excessive, and the order was clearly within the scope of the court's discretion (*see Matter of Lattina B. v Daquan H.*, 171 AD3d 601 [1st Dept 2019]).

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11340 In re Osquagama F. Swezey, et al., Index 155600/13
Petitioners-Respondents,

-against-

Merrill Lynch, Pierce, Fenner & Smith Incorporated,
Respondent,

New York City Department of Finance,
Respondent-Appellant.

- - - - -

Philippine National Bank, et al.,
Intervenors.

_____

James E. Johnson, Corporation Counsel, New York (Edan Burkett of counsel), for appellant.

Anderson Kill P.C., New York (Jeffrey E. Glen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 12, 2018, which, based on the findings of a memorandum decision dated October 25, 2018 granting petitioners' motion, ordered respondent Department of Finance (DOF) to transfer to the New York State Comptroller the sum of $625,975.87, to be added to the funds that had been previously transferred on April 4, 2017, unanimously reversed, on the law, without costs, the order vacated, and the motion denied.

DOF properly withheld the administrative fee of two percent

under CPLR 8010(1) upon its payment of the court-deposited funds to the State Comptroller pursuant to Abandoned Property Law (§ 602. The court erred in concluding that the payment to the Comptroller was not a "payment out of court."

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11341 Priscilla Perez, as Administrator of the Estate of Antonio Perez, deceased, Plaintiff-Appellant, Index 402692/06

-against-

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

North General Hospital, Defendant.

_____

Michael N. David, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 22, 2018, which granted the motion of defendants City of New York and Fire Department of the City of New York for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In order to state a claim that defendants were negligent in failing to provide an ambulance in a timely fashion, plaintiff was required to show a special relationship (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 423-424, 428 [2013]; *Laratro v City of New York*, 8 NY3d 79, 82-83 [2006]). However, plaintiff did not allege a special duty or the factual predicate for

finding a special duty in her notice of claim or the complaint, precluding her from asserting it for the first time in opposition to summary judgment (*see Blackstock v Board of Educ. of the City of N.Y.*, 84 AD3d 524 [1st Dept 2011]; *Rollins v New York City Bd. of Educ.*, 68 AD3d 540, 541 [1st Dept 2009]). In any event, the record establishes that plaintiff could not prove all of the elements necessary to show a special relationship (*see Laratro* at 84). There was no direct contact between defendants and decedent or an immediate family member, and there is no indication that more efficacious alternatives to waiting for the ambulance to arrive were available (*id.*; *see Silver v City of New York*, 281 AD2d 233, 234 [1st Dept 2001]).

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

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11342-
11342A-
11342B The People of the State of New York, Ind. 578/14
Respondent, 3091/14
4337/16

-against-

Cesar Pimentel,
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 (Noreen M. Stackhouse of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald Zweibel, J.), rendered January 29, 2015 and February 7, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentences 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: APRIL 2, 2020

CLERK

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

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11343-
11343A JPMorgan Chase Bank, N.A.,
Plaintiff-Appellant,

-against-

Daisy Castro,
Defendant-Respondent,

Luis Castro also known as Luis M. Castro, et al.,
Defendants.

Index 380668/12

_____

D.J. and J.A. Cirando, PLLC, Syracuse (John A. Cirando of counsel), for appellant.

Gomberg Legal, P.C., New York (Stanislav Gomberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 8, 2018, which, after a traverse hearing, vacated the judgment of foreclosure and sale and dismissed the action as against defendant Daisy Castro for lack of personal jurisdiction, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about January 25, 2018, which directed a traverse hearing, unanimously dismissed, without costs, as academic.

Plaintiff failed to sustain its burden of demonstrating by a preponderance of the evidence that defendant was properly served

with process (*see Wells Fargo Bank, N.A. v Gore*, 162 AD3d 437 [1st Dept 2018]). Any presumption of proper service raised by the process server's affidavit was overcome by defendant's testimony and documentary evidence and that of her former spouse, who was purportedly served as a substitute for defendant. This evidence shows that defendant's former spouse did not reside at the subject property and was not there at the purported time of service, that the description of the person served did not match that of the former spouse, that the property identified by the process server as the subject property was not in fact the subject property, and that, contrary to the process server's affidavit, the second floor was not vacant. We find no basis for disturbing the court's credibility findings.

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11344-
11345 Index 653795/15

Mehrnaz Nancy Homapour, etc.,
Plaintiff-Appellant,

-against-

Mark Harounian, et al.,
Defendants-Respondents,

Orange & Blue LLC, et al.,
Defendants.

- - - - -

Mehrnaz Homapour, et al.,
Plaintiffs-Respondents-Appellants,

-against-

3M Properties, et al.,
Defendants,

Alexander Seligson, et al.,
Defendants-Appellants-Respondents.

_____

Oved & Oved LLP, New York (James T. Reilly of counsel), for appellant and respondents-appellants.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for appellants-respondents.

Pryor Cashman LLP, New York (William L. Charron of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 5, 2018, which, to the extent appealed from as limited by the briefs, granted defendants Mark Harounian, the Family LLCs, and the Harounian LLCs' CPLR 3211(a) motion to

dismiss certain derivative claims for breach of fiduciary duty and waste brought on behalf of the 16 Family LLCs as barred by the three-year statute of limitations, the derivative claim for a constructive trust against Harounian and the Harounian LLCs, and the part of the derivative unjust enrichment claim seeking a declaration that "the Family LLCs are entitled to a pro rata ownership interest in the real estate that Harounian purchased," and granted defendants Seligson Rothman & Rothman and Alexander Seligson's (Seligson defendants) CPLR 3211(a) motion to dismiss 9 of the 16 derivative claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty as barred by the three-year statute of limitations, and otherwise denied the motion, unanimously modified, on the law, to deny Harounian, the Family LLCs, and the Harounian LLCs' motion as to the breach of fiduciary duty and waste claims against Harounian, the constructive trust claim against Harounian and the Harounian LLCs, and to deny the Seligson defendants' motion to dismiss the breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims against them, and otherwise affirmed, without costs.

The derivative causes of action for breach of fiduciary duty and waste brought on behalf of the 16 Family LLCs against

defendant Harounian are governed by the six-year statute of limitations. The claims are not fraud-based. However, plaintiff seeks both money damages and equitable relief (*see DiBartolo v Battery Place Assoc.*, 84 AD3d 474, 476 [1st Dept 2011]), i.e., a constructive trust, an injunction, and an accounting (*see Kaufman v Cohen*, 307 AD2d 113, 118-119 [1st Dept 2003]). In addition, a six-year statute of limitations applies to derivative claims, because they are "equitable in nature" (*Otto v Otto*, 110 AD3d 620, 620-621 [1st Dept 2013] [internal quotation marks omitted]; *see also Sitt v Sitt*, 2015 NY Slip Op 32316[U], *9 [Sup Ct, NY County 2015]). In any event, the "open repudiation" doctrine applies to toll any applicable statute of limitations, because Harounian continues to be in a fiduciary relationship with the Family LLCs (*see Otto*, 110 AD3d at 621; *DiBartolo*, 84 AD3d at 476).

The court erred in dismissing the derivative claim for a constructive trust against Harounian and the Harounian LLCs. A constructive trust is an equitable remedy *(see Simonds v Simonds*, 45 NY2d 233, 241 [1978]), and its purpose is to prevent unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). Accordingly, it may be appropriate to impose a constructive trust in situations "when property has been acquired in such

circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*id.* [internal quotation marks and brackets omitted]). Here, the complaint sufficiently alleges that Harounian misappropriated the Family LLCs' funds to acquire real property for his own personal benefit (*see Fellner v Morimoto*, 52 AD3d 352 [1st Dept 2008]; *Schneidman v Tollman*, 190 Ad2d 524 [1st Dept 1993]).

The court correctly dismissed the part of the unjust enrichment claim seeking a declaration that "the Family LLCs are entitled to a pro rata ownership interest in the real estate that Harounian purchased" (*see* General Obligations Law § 5-703[1]). Insofar as plaintiffs argue that the unjust enrichment claims were also "based upon the fact that [Harounian] should not be able to keep for himself assets he purchased with money he fraudulently diverted from the Family LLCs to the exclusion of his partners," the court sustained that part of the claim.

The derivative claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty against the Seligson defendants are governed by the six-year statute of limitations, because, although the claims are not fraud-based, plaintiff seeks both money damages and equitable relief (*DiBartolo*, 84 AD3d at 476; *Kaufman*, 307 AD2d at 118-119), and the claims are derivative

(*Otto*, 110 AD3d at 620-621; *Sitt*, 2015 NY Slip Op. 32316[U] at *9). We note that plaintiffs' reliance on the continuous representation doctrine (*see Shumsky v Eisenstein*, 96 NY2d 164, 167-168 [2001]) in arguing for a global tolling of the statute of limitations is misplaced, as each Family LLC is a discrete client (*see Tiffany Gen. Holding Corp. v Speno, Goldberg, Steingart & Penn*, 278 AD2d 306, 308 [2d Dept 2000]). We do not reach plaintiffs' unpreserved argument that issues of fact exist as to the accrual dates.

The Seligson defendants' arguments as to standing are unavailing. Their affidavit and the copies of the agreements attached thereto do not "utterly" refute plaintiffs' claim that they drafted the controlling operating agreements as to all of the Family LLCs (*see Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]).

Accepting plaintiff's allegations as true, and according them the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), we find that the complaint adequately states a cause of action for breach of fiduciary duty by alleging that the Seligson defendants, while retained as the Family LLCs' corporate counsel, began acting as attorney for

Harounian personally, without so disclosing, and inserted unilateral changes into operating agreements that favored Harounian's personal interests over those of the Family LLCs (*see Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]).

Similarly, plaintiffs adequately stated a cause of action for aiding and abetting breach of fiduciary duty by alleging that the Seligson defendants assisted Harounian in making unilateral changes to the operating agreements, and appending her signature pages to those altered agreements, as part of Harounian's scheme to misappropriate funds from the LLCs (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11347 In re Angel L., and Others, Dkt. NN-6037-39/18

Children Under the Age of
Eighteen Years, etc.,

Administration for Children's
Services,
Petitioner-Appellant,

Victor M.,
Respondent-Respondent.

_____

James E. Johnson, Corporation Counsel, New York (Cynthia Kao of counsel), for appellant.

Daniel R. Katz, New York, for respondent.

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Order, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about February 27, 2019, which granted respondent's prima facie motion to dismiss the neglect petitions against him, unanimously reversed, on the law, without costs, the motion denied, the petition against respondent reinstated, and the matter remitted to Family Court, Bronx County, to reopen and complete the fact-finding hearing.

On a motion to dismiss, the allegations in the petition, as well as the petitioner's evidence "must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom" (*Matter of Oakes v Oakes*, 127 AD3d 1093, 1093

[2d Dept 2015] [internal quotation marks omited]; *see Matter of Ramroop v Ramsagar*, 74 AD3d 1208, 1209 [2d Dept 2010]). When viewing the evidence in the light most favorable to petitioner and affording it the benefit of every inference, there is sufficient evidence in the record to establish that respondent was a person legally responsible for the subject children, and to meet petitioner's initial burden to show that the subject children were neglected. An Administration for Children's Services child protective supervisor testified that respondent had power over the children's environment by controlling the family's spending and exerting command over the mother's food stamps and social security cards, leaving the family unable to purchase necessities such as food and clothes (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996] [a factor in determining "whether a particular person has acted as the functional equivalent of a parent" is "the nature and extent of the control exercised by the (person) over the child's environment"]). The children also reported that often times they would not eat and would have to ask respondent if and when they could eat.

Moreover, it can be inferred from the testimony that respondent neglected the subject children by committing acts of violence against the mother. When it comes to acts of domestic

violence against a parent, the child need not witness the act, and it is sufficient if the acts of domestic violence are "within the hearing of a child" (*Matter of Jihad H., [Fawaz H.]* 151 AD3d 1063, 1064 [2d Dept 2017]). The children reported that they heard the mother and respondent yelling and screaming with items being thrown around in the bedroom, and that the mother would emerge from the bedroom crying and with marks on her. Although the children did not witness the alleged acts of violence, the testimony indicated that respondent's behavior had a detrimental effect on the children. The children feared respondent and reported that he made sexual comments to them. As such, a reasonable inference can be made from the evidence presented prior to the dismissal motion that the children were placed at imminent risk of emotional or physical harm.

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11349 Glenda Melendez, etc., Index 310107/11
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Respondent,

Lakhi General Contractor, Inc.,
Defendant-Appellant.

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Colleen E. Hastie of counsel), for appellant.

Breadbar, Garfield, New York (Martin R. Garfield of counsel), for Glenda Melendez, respondent.

James E. Johnson, Corporation Counsel, New York (Jonathan A. Popolow of counsel), The City of New York, respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about December 13, 2018, which, to the extent appealed from, denied defendant Lakhi's cross motion for summary judgment dismissing the action against it, unanimously affirmed, without costs.

Lakhi, which contracted with defendant City to construct a sidewalk shed that, in part, fell on plaintiff's decedent approximately five years after it was constructed, did not establish prima facie entitlement to summary judgment. The unsigned contract agreement with the City was insufficient to

establish the scope of its contractual obligations, including whether the shed was to be temporary or permanent. Lakhi also failed to establish that it did not owe a duty of care to third parties using the sidewalk, since it did not eliminate issues of fact as to whether it negligently constructed the sidewalk shed, thereby launching a dangerous condition (see *Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept 2011]; *Dickert v City of New York*, 268 AD2d 343, 343-344 [1st Dept 2000]; *see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

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

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11350 The People of the State of New York, Ind. 3326/16
Respondent,

-against-

Jasson Melo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered January 3, 2018, convicting defendant, after a jury trial, of coercion in the first degree, assault in the third degree, aggravated harassment in the second degree, menacing in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of 2⅓ to 7 years, unanimously affirmed.

The court providently exercised its discretion in admitting social media posts by defendant, including, among other things, a music video reenacting part of the crime. This evidence contained defendant's admissions to elements of the charged crimes (*see People v Chico*, 90 NY2d 585, 589 [1997]). To the extent the probative value of some of this evidence may have been

outweighed by its potential for prejudice, any error in admitting it was harmless (*see People v Crimmins*, 36 NY2d 230, 241–242 [1975]). Independent of the evidence at issue, there was overwhelming evidence of defendant's guilt, including his recording of the original incident, his voice messages admitting that he threatened and punched the victim, the victim's testimony along with that of corroborating witnesses, and evidence of the victim's injuries.

Defendant has not established the prejudice requirement of a state or federal ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Because of his misunderstanding of the court's *Sandoval* ruling, defense counsel elicited the underlying facts of a youthful offender adjudication incurred 9 years earlier when defendant was 16 years old, along with defendant's mitigating explanation of the incident. Although this was a mistake, as counsel acknowledged, he asked only three brief questions about the prior conduct, which was remote from and dissimilar to the instant offense, and he never revisited the issue in summation, nor did the prosecutor refer to it at any point. Accordingly, we find no reasonable possibility that counsel's error affected the outcome of the case or deprived

defendant of a fair trial, particularly since there was overwhelming evidence of defendant's guilt. Defendant's remaining claim of ineffective assistance, relating to the above-discussed social media posts, is unreviewable on the present record.

Defense counsel impliedly consented to the court's submission to the jury of written copies of its final instructions, which the jurors were permitted to take with them when they retired to deliberate (*see People v Muhammad*, __ NY3d __, 2020 NY Slip Op 00180 [2020]; *People v McFadden*, 162 AD3d 501 [1st Dept 2018], *lv denied*, 32 NY3d 939 [2018]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11351 416 W 25th Street Lender LLC, Index 850242/18
Plaintiff-Appellant,

-against-

416 W. 25th Street Associates, LLC, et al.,
Defendants-Respondents,

New York City Environmental Control Board, et al.,
Defendants.

_____

Katsky Korins LLP, New York (Robert A. Abrams and Steven H. Newman of counsel), for appellant.

Oved & Oved LLP, New York (Aaron J. Solomon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about May 14, 2019, which, inter alia, granted the motion by defendants 416 W. 25th Street Associates, LLC and Andreas Steiner (collectively, defendants) to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's notice to cure was deficient, as it failed to inform the borrower of the 30-day period to cure, which was a critical portion of section 21 of the Consolidation, Extension and Modification Agreement (CEMA) (*see Filmtrucks, Inc. v Express Indus. & Term. Corp.*, 127 AD2d 509, 510 [1st Dept 1987]; *PNC*

Capital Recovery v Mechanical Parking Sys., 283 AD2d 268, 271 [1st Dept 2001], *appeal dismissed* 98 NY2d 763 [2002]).

Plaintiff contends that even if paragraph 21 of the CEMA required written notice that defendant borrower had 30-days to cure its non-monetary default, such written notice was provided to borrower by virtue of its June 28, 2018 email sent in response to the default letter, which stated: "Our position is that the lien needs to be removed within 30 days of the letter we sent you." Plaintiff additionally asserts that borrower was provided with more than 30 days to cure its default. The CEMA, however, requires written notice to be sent by hand; via certified mail, return receipt requested; or by overnight courier with evidence of receipt. The email did not meet this requirement, or the specificity required of a notice to cure (*see Filmtrucks, Inc.* at 510-511).

The motion court should not have reached the merits of the foreclosure claim, raised for the first time on reply, and we decline to address the arguments regarding that claim.

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11354 The People of the State of New York, Ind. 3780/15
Respondent,

-against-

Joe Stanford,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered August 12, 2016, convicting defendant, after a jury trial, of burglary in the second degree (six counts), attempted burglary in the second degree (two counts) and possession of burglar's tools, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The record does not support defendant's assertion that he appeared before the jury in identifiable prison clothing. Rather, the record supports the court's finding that, as in *People v Then* (28 NY3d 1170 [2017]), defendant's clothing was "not identifiable as correctional garb" (*id.* at 1173). Accordingly, defendant's right not to be "compel[led] . . . to

stand trial before a jury while dressed in identifiable prison clothes" (*Estelle v Williams*, 425 US 501, 512 [1976]) was not implicated.

The court providently exercised its discretion when it declined to preclude the prosecution from introducing still photographs drawn from a surveillance videotape that was not turned over to the defense, and that was destroyed before the trial. There is no indication of bad faith on the part of the police or prosecution and defendant had the opportunity to cross-examine witnesses about the content of the missing videotape. Accordingly, the adverse inference charge that the court delivered was sufficient to prevent any prejudice (*see People v Martinez*, 71 NY2d 937, 940 [1988]).

The court properly denied defendant's request for submission of criminal trespass in the second degree as a lesser included offense. Viewing the evidence in the light most favorable to defendant, there was no reasonable view of the evidence that he entered or attempted to enter any of the premises at issue without criminal intent (*see e.g. People v Ocasio*, 167 AD3d 412 [1st Dept 2018], *lv denied* 32 NY3d 1208 [2019]; *People v LeCorps*, 19 AD3d 216 [1st Dept 2005], *lv denied* 5 NY3d 807 [2005]). The record fails to support defendant's assertion that the court

employed an incorrect standard in denying defendant's request.

Defendant's particular suppression argument is unpreserved, and we decline to review it in the interest of justice. We note that the People were never placed on notice of any need to develop the record (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]) as to the specific factual issue defendant now raises. As an alternative holding, we find that the hearing record, and the reasonable inferences to be drawn therefrom, support the conclusion that the special patrolmen who arrested defendant acted lawfully in all respects.

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11355 Robert Stec, Index 152069/14
Plaintiff-Appellant,

-against-

Passport Brands, Inc., et al.,
Defendants-Respondents.

_____

Stulberg & Walsh, LLP, New York (Patrick J. Walsh of counsel), for appellant.

Lazarus & Lazarus, P.C., New York (Yvette J. Sutton of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy Friedman, J.), entered August 22, 2018, which, to the extent appealed from, granted that portion of defendants' motion for summary judgment seeking dismissal of plaintiff's claim for unpaid wages under the Labor Law, unanimously affirmed, without costs.

Plaintiff's Labor Law § 193 claim was properly dismissed because plaintiff did not allege that defendants made deductions from his salary, and withholding of payment is not actionable under this statutory section (*see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449-450 [1st Dept 2017]; *see also Goldberg v Jacquet*, 667 Fed Appx 313, 314 [2d Cir 2016]). Moreover, defendants' submissions show that plaintiff agreed to have his salary withheld during various pay periods in order to allow

Passport to continue its operations in the midst of its financial troubles, establishing that his wages were not reduced in the manner prohibited by Labor Law § 193.

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

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11356 Jacob Hindlin, Index 651974/18
Plaintiff-Respondent,

-against-

Prescription Songs, LLC, et al.,
Defendants-Appellants,

Advanced Alternative Media, Inc., et al.,
Defendants.

_____

Mitchell Silberberg & Knupp LLP, New York (Christine Lepera of counsel), for appellants.

Foster Garvey P.C., New York (Andrew J. Goodman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about July 5, 2019, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion to dismiss the second and third causes of action, seeking a declaration as to the duration of the parties' 2014 music co-publishing agreement, unanimously affirmed, without costs.

The documentary evidence defendants offer in support of their motion does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Those documents show that confirmation of mechanical

royalty rates, for purposes of Major Delivery Release Commitment (MDRC) fulfillment, must come directly from the record company, but do not show who was expected to obtain that confirmation to ensure timely receipt by the music publisher defendant Prescription Songs.

The 2014 co-publishing agreement expressly assigned particular duties to plaintiff but did not assign him the task of obtaining and remitting the confirmation from the record company, much less by a certain date. Thus, the agreement does not support defendants' position that even if they, notwithstanding plaintiff's 15-day January 5, 2018 notice, did not receive the requisite confirmation until February 14, 2018, they necessarily had until that date to decide whether to exercise their renewal option. However, the agreement itself does not provide for an extension beyond 15 days on such ground.

The motion court properly identified this ambiguity, and we find that additional ambiguity surrounds the question of what was supposed to happen if the record company's confirmation post-dated the deadline triggered upon plaintiff's 15-day notice.

The agreement shows plaintiff was required to send notice of fulfillment of the MDRC, per § 3(a), and the MDRC is, per § 4(b)(iv), not fulfilled without confirmation from the record

company, yet § 4(b)(iv) is drafted differently from the description of plaintiff's obligations in, *e.g.*, § 4(b)(iii) – even as concerns the mechanical royalty information. While, in § 4(b)(iii), and for purposes of meeting the Minimum Delivery Commitment, plaintiff has the option to provide per-composition mechanical royalty information generated by himself *or* the record company, § 4(b)(iv) offers no such choice and the information must come from the record company. We decline to read into the agreement an implied obligation on plaintiff's part to assume the responsibility to ensure that a third party beyond his control, i.e., a record company, would furnish the information and, moreover, do so by a particular time (*see Jade Realty LLC v Citigroup Commercial Mtge. Trust 2005-EMG*, 83 AD3d 567, 568 [1st Dept 2011], *affd* 20 NY3d 881 [2012]).

The emails between Interscope Records and Prescription also do not resolve these questions in defendants' favor as a matter of law. Even if they show defendants did not obtain the requisite information until February 14, 2018, they do not resolve the core question of who should suffer the consequences of the information not having been obtained sooner.

The motion court properly declined to dismiss the third cause of action. The allegations state a claim that the

agreement, if not expired, is in its Third Option Period. However, it is unclear what occurred between July 20, 2015 and August 12, 2016, and the ambiguity is not resolved by the documentary evidence, including defendants' unilateral statement in their August 12, 2016 letter that the "First" Option Period would now commence, which cannot, in and of itself, negate the complaint's allegation that, instead, it was the Second Option Period that commenced at that time (*Amsterdam Hospitality Group, LLC v Marshal-Alan Assoc., Inc.*, 120 AD3d 431, 432-434 [1st Dept 2014]).

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

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11357 Judith Bailey, Index 401326/11
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Da'Tekena Barango-Tariah, Brooklyn, for respondent.

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Order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered July 10, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish prima facie entitlement to judgment as a matter of law by relying exclusively on plaintiff's allegations and deposition testimony. Plaintiff testified that the crowd on the subway platform was so large that the only space she could maneuver as she proceeded past a staircase was close to the edge, just behind the yellow strip, when she was bumped over the edge and onto the tracks below (*see Stark v Penn Cent. Co.*, 26 NY2d 761 [1970], *affg* 32 AD2d 910 [1st Dept 1969]). Thus, defendant did not show, as a matter of law, that the crowd was

not "'so large and unmanaged that a user of the platform was restricted in [her] free movements or was unable to find a safe standing place'" (*Ryan v City of New York*, 7 AD2d 298, 299 [1st Dept 1959], *affd* 6 NY2d 896 [1959], quoting *Cross v Murray* 260 App Div 1030, 1030 [2d Dept 1940]).

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11358N	Orhan Aikanat, Plaintiff-Respondent, -against- Spruce Assoc., L.P., et al., Defendants-Appellants. - - - - - [A Third-Party Action and Other Actions]	Index 161887/14 150107/15 152551/15 156593/15 595828/17 595836/18 595019/19

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Cozen O'Connor, New York (Rafael Rivera, Jr. of counsel), for appellants.

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered February 1, 2019, which, inter alia, in this action for personal injuries, denied the motion of defendants Spruce Assoc., L.P., Pine Assoc., LLC, Reed Elsevier Inc. and Reed Elsevier Realty Corporations (collectively defendants) to vacate the note of issue and compel further discovery, unanimously affirmed, without costs.

The court providently exercised its discretion in declining to vacate the note of issue or permit post-note of issue discovery in light of defendants' failure to seek the discovery at an earlier time (*see generally Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). Although defendants requested

authorization to obtain plaintiff's tax returns in 2015, they took no action to enforce their request until after the note of issue was filed. Similarly, they did not seek the Facebook Data until soon before the note of issue was filed, despite the asserted need for the information based on plaintiff's testimony in his depositions, the last of which was taken in July 2018.

Defendants contend that the note of issue should be vacated because plaintiff misrepresented in the certificate of readiness that discovery was complete. However, the certificate of readiness correctly stated that plaintiff responded to all outstanding discovery requests, in that objections are an appropriate response. Furthermore, defendants failed to indicate why they are entitled to the discovery they belatedly sought; why the information in the tax returns was not available from another less private source, such as plaintiff's employer's payroll records (*see Gama Aviation Inc. v Sandton Capital Partners, LP*, 113 AD3d 456, 457 [1st Dept 2014]); and why they waited so long to request the social media information.

Defendants also assert that they were also improperly denied the opportunity to depose a corporate witness from third-party defendant BGC Partners, Inc. (BGC), who had knowledge of their claims for contractual indemnification and failure to procure

insurance, and that the first witness produced by BGC did not have the requisite knowledge. However, they fail to indicate why they waited until after the note of issue was filed to seek this discovery inasmuch as the sale of assets to BGC occurred in April 2012, and defendants deposed the corporate witness in August 2018. The court further noted that defendants moved for summary judgment on their indemnification claims against BGC, demonstrating that the additional discovery was superfluous.

We have considered defendants' remaining arguments and find then unavailing.

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

ENTERED: APRIL 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11359N SAI Contracting Corporation, Index 154430/16
Plaintiff-Respondent,

-against-

18 W. 16th Street Corp.,
Defendant-Appellant,

Emigrant Funding Corporation, et al.,
Defendants.

_____

Baker Greenspan & Bernstein, Bellmore (Cheryl Kravatz of counsel), for appellant.

Law Offices of Matthew T. Worner, White Plains (Matthew T. Worner of counsel), for respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered June 13, 2019, which granted plaintiff's motion to extend the notice of pendency, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in granting plaintiff's motion to extend the notice of pendency (*see* CPLR 6513). A large part of the delay in this case was attributable to circumstances outside the control of either party (*see Tomei v Pizzitola*, 142 AD2d 809, 810 [3d Dept 1988]).

Although plaintiff is responsible for some of the delay, we find that good cause has been shown to extend the notice of pendency for an additional three years (*Matter of Sakow*, 97 NY2d 436, 442 [2002]; CPLR 6513).

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

ENTERED: APRIL 2, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Sallie Manzanet-Daniels, J.P.
Barbara R. Kapnick
Ellen Gesmer
Jeffrey K. Oing, JJ.

11146
Ind. 1474/08
2796/08

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The People of the State of New York,
Respondent,

-against-

Reginald Trammell,
Defendant-Appellant.
_____x

Defendant appeals from a judgment, Supreme Court, New York County (Ruth Pickholz and Richard D. Carruthers, JJ. at self-representation requests, Carruthers, J. at motions, jury trial and sentencing), rendered February 17, 2011, as amended February 24 and March 3, 2011, convicting defendant of three counts of robbery in the first degree and two counts of robbery in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 50 years to life.

Janet E. Sabel, The Legal Aid Society, New York (Andrew C. Fine and Frances A. Gallagher of counsel), for appellant.

Reginald Trammell, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman and Susan Gliner of counsel), for respondent.

MANZANET-DANIELS, J.P.,

The denial of defendant's repeated requests to proceed pro se deprived defendant of his right to represent himself and requires reversal of his conviction.

The right of self-representation is a fundamental right guaranteed both by the Sixth Amendment and article 1, § 6 of the New York State Constitution, and "forcing a lawyer" on a defendant is contrary to this basic right (*People v Lewis*, 114 AD3d 402, 403 [1st Dept 2014] [internal quotation marks omitted]). When a defendant desires to exercise the right to represent himself, "the court's only function is to ensure that the defendant is acting knowingly and voluntarily, that is, that the defendant is aware of the disadvantages and risks of waiving his right to counsel" (*People v Schoolfield*, 196 AD2d 111, 115 [1st Dept 1994], *lv denied* 83 NY2d 915 [1994]). If the waiver is knowing and voluntary, the request must be granted (*id.*). That a defendant may be better represented by counsel is immaterial (*see Schoolfield*, 196 AD2d at 115-116). "[R]espect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open" (*id.* [internal quotation marks omitted]). "[R]epeated judicial entreaties" that a defendant continue with assigned counsel or observations that the defendant's interests would be

better served through a lawyer's representation do not meet the standard (*see People v Smith*, 92 NY2d 516, 521 [1998]).

If a court believes that the motion to proceed pro se is an attempt to "subvert the overall purpose of the trial," the proper procedure is to conduct a "dispassionate inquiry" to determine whether the request is in good faith or the intention is to undermine, upset, or unreasonably delay the trial (*People v McIntyre*, 36 NY2d 10, 18, 19 [1974] [erroneous to rely on post-ruling "outburst" to justify an erroneous denial of the right to represent oneself]; *People v Smith*, 68 NY2d 737 [1986] [reversing conviction where the court summarily rejected the defendant's request to proceed pro se and forced assigned counsel to participate under threat of contempt, despite defendant's objections], *cert. denied* 479 US 953 [1986]).

On August 6, 2008, after the second indictment had been returned, defendant asserted that his appointed lawyer was not communicating with him and not "representing [his] interest."

On August 20, 2008, defendant announced that he would "like to assert [his] right to proceed pro se," explaining that his subsequently-appointed attorney, Mr. Wolfe, was not representing his interests. Justice Pickholz acknowledged that defendant had that right, but warned that it was "very difficult . . . to represent yourself," especially without a legal background.

Defendant proceeded to complain that his lawyer was not visiting him. The court stated that it "c[ouldn]'t stop" defendant from representing himself, but stated that it was "a very dangerous thing, very dangerous to represent yourself," and urged defendant to try to work with his lawyer. The court stated that if defendant found himself unable to work with his lawyer, "then you can represent yourself obviously." Defendant noted that he had written out his own book on criminal procedure while in prison. The court told defendant that it would keep Mr. Wolfe on the case, but that if defendant continued to want to represent himself, he would have that right.

Although the court stated that it would not prevent defendant from representing himself, it did just that – stating, over defendant's protests, that it was keeping the lawyer on the case and ignoring defendant's unequivocal assertion of his right to self-representation.

This denial was error, as the court's only function at this juncture was to ensure that defendant understood the implications of his decision and that his waiver was knowingly and intelligently made. The court failed to undertake the relevant inquiry and instead foisted Mr. Wolfe upon defendant.

This denial was not without consequence, as counsel appears never to have filed the relevant motion pertaining to the second

indictment, and neither he nor subsequent counsel asked for a *Dunaway* hearing with respect to the second indictment.

On October 29, 2008, following an off-the-record conversation initiated by defense counsel, Justice Carruthers ordered a CPL article 730 examination. Defendant asked to be heard, and stated that he wanted to assert his right to appear pro se. He stated that he was "tired of coming back and forth to court with a lawyer unprepared to defend" him. The court acknowledged the validity of the point and stated they would take it up after the report of the exam had been issued. The case was adjourned several times pending issuance of the report.

On January 7, 2009, defendant noted that he had asserted his right to proceed pro se "four appearances ago," well before the 730 exam had been ordered. He noted that assigned counsel had been "forced" on him. The court deferred discussion until after the 730 report had been rendered.

On January 14, 2009, a report was issued finding defendant fit to proceed.

On February 3, 2009, the parties agreed to confirm the findings of the report. Justice Carruthers confirmed the report, stating that based on the report and his interaction with defendant, it was clear to him that defendant was "well aware of the procedures that we follow here. He is well aware of his

rights." He noted that defendant had indicated on previous occasions that he wished to represent himself, but stated that he did not "think [defendant was] still of that mind." Defendant replied, "Yes, I said three months ago before the Court decided to reject my request to represent myself and forced me to continue to be represented by this attorney... If it meant me proceeding pro se, yes."

When defendant complained about Mr. Wolfe's representation, cursing and stating that he "[did]n't want to be represented by this piece of shit, period," the Judge stated, "I'll have an attorney for you when [you're] calmer," and the case was adjourned.

This, too, was error: If defendant was competent to stand trial, he was competent to waive counsel. His threats against counsel cannot be construed as an attempt to delay or disrupt the trial, as he had been making similar requests to represent himself for months, long before the episode occurred.

On the following day, February 4, 2009, a new attorney, Mr. Konoski, entered an appearance on behalf of defendant. Mr. Konoski acknowledged during a subsequent appearance that defendant "seem[ed] to understand everything that's going on," and had been "easy enough" to work with. The parties agreed to confirm the 730 report.

On April 8, 2009, defendant stated for the record that he was "angered about the way this proceeding is going on," noting that he had made requests to represent himself for the "last 6 months,"[1] but that when he did so, his lawyer requested a 730 exam. Defendant complained that Mr. Konoski was taking too long to file the motion in opposition to consolidation and opined that he could "do better by representing" himself. He asked for the relevant paperwork so he could begin drafting the motion and stated, "From this stage on I would like to represent myself. I ask that you relieve this attorney." The court stated that it would "think" about it, notwithstanding that by this time defendant had already been found competent to stand trial, and instead foisted a lawyer upon him.

On May 6, 2009, defendant asked for Mr. Konoski to be removed and reiterated that he wanted to represent himself. When defendant became insistent, stating, "I want to represent myself pro se. He is not going to represent me. Now I'm going to hawk and spit in his motherfucking face," the court did not pass upon the request but instead ordered another 730 examination.

On July 8, 2009, a new attorney, Mr. Katz, appeared for defendant. On August 26, 2009, the parties appeared before

[1]At this point, defendant had actually been making such requests for eight months.

Justice Marcy Kahn, who received the report and found defendant fit to proceed.

On November 4, 2009, defendant reported that his new lawyer, Mr. Katz, had filed papers without defendant's input, even though the court had previously assured him that he would be able to review the papers before they were filed. Defendant said he wanted to "state in the record for more than a year I have been attempting to assert my right to proceed [pro] se. Every time I do that I am put in for a 730 evaluation and reassigned another attorney. The Court record will bear out this happened three times. I attempted to assert my rights for more than a year. Every time the Court has put me in for a 730 and reassigned me counsel as though the basis of my argument was really a request for reassignment of counsel." Justice Carruthers explained that he hadn't ordered 730 exams because defendant wanted to represent himself, but because defendant appeared to have a "mental issue" that would make it difficult for him to represent himself. (This, despite the fact that defendant had already been found fit to stand trial).

Defendant ventured that "[i]f you would allow me to proceed [pro] se as I have been attempting to do I am sure I would have been able to do more extensive-," whereupon the Judge interjected, allowing that defendant could represent himself, and

that Mr. Katz would remain as adviser. Defendant replied that he wanted Mr. Katz removed and did not want him as an advisor, but the court ignored him.

On December 16, 2009, defendant complained that the omnibus motion Mr. Katz had filed "consisted of facts and law from another individual['s] case." Mr. Katz acknowledged that defendant was correct and asked that the motion be "amended to indicate the proper charges." Defendant stated, "You will allow me, you say, to represent myself."

The court acknowledged that defendant was found "fit to proceed." The court asked defendant if he wished to go forward; defendant replied that he did, but requested the case file in order to prepare motions. Defendant stated that he was "disappointed" with counsel, and the court granted defendant's request for a new lawyer to substitute for Mr. Katz. The court appointed Mr. Weinstein and gave him an extension to file defendant's "new motions."

On April 7, 2010, defendant again raised the fact that Mr. Katz had filed a "defective" omnibus motion raising arguments concerning someone else's case, and he complained that Mr. Weinstein, although he said he was ready to proceed to trial, had not "resubmitted the motion." He handed the court an omnibus motion that he had drafted himself. Defendant asked, "[D]o I

have a right to counsel who is going to effectively represent me or somebody just trying to eat up 18-B fees?" The court urged defendant to have more "confidence" in his attorney, and the case was adjourned.

On September 16, 2010, the parties appeared for a suppression hearing. Defendant disagreed with counsel's strategy and asserted that he no longer had "confidence" in Mr. Weinstein. On September 20, 2016, at the continued hearing, defendant reiterated that he lacked confidence in Mr. Weinstein and threatened violence against him. Mr. Weinstein asked to be removed. Counsel stated that he was "at a bit of a loss in terms of how to proceed" since defendant was "unresponsive" to what he was saying, and requested a CPL 730 examination.

Both examiners found defendant fit to proceed, and on December 6, 2010, the report was confirmed. Defendant asserted that he wanted to proceed pro se and requested that he be provided with the relevant documentation. When Justice Carruthers stated that they would "have to talk about that some more," defendant replied, "I have asserted my right to proceed pro se, the last 18 to 24 months. Every time I bring this up to the Court you say we'll have to talk about it." The court noted the need for "further minutes on the hearing," and adjourned the case to conclude the hearing and schedule a trial date.

Defendant interjected, "I have a right to represent myself."

On December 16, 2010, as soon as appearances had been entered, defendant began complaining that his attorney had failed to consult with him. The court acknowledged that defendant had been found fit to proceed; nonetheless, the court concluded that defendant's behavior was "purposeful" and intended to "disrupt the court and the proceedings." Defendant protested that it was not "fair for [the court] to force a lawyer on [him] and then say [he] shouldn't rebel." Defendant insisted that he did not want Mr. Weinstein to represent him and that he wanted to "go pro se." The judge told defendant that Mr. Weinstein would not be relieved, and directed that the suppression hearing continue. The court stated that it was evident that defendant's intention was to "disrupt" the proceeding and that he had "forfeited" his right to be present.

Mr. Weinstein and another lawyer, Mr. Heinzmann, represented defendant at trial, with the latter conducting cross-examinations and delivering the summation.

Defendant's repeated and insistent requests to proceed pro se were erroneously denied. His initial requests were denied summarily, without the requisite inquiry to ensure that the waiver was knowingly and intelligently made.

While giving lip service to defendant's right to represent

himself, the court nonetheless foisted counsel on defendant over defendant's vigorous protests. *As Schoolfield* counsels, a court may not foist an attorney on defendant simply because it feels a defendant is better served by assigned counsel (196 AD2d at 115). Defendant was entitled to proceed "under his own banner" (*id.*); that he might be better served by counsel is immaterial.

If the court believed that defendant was trying to subvert the trial, it was obliged to conduct the "dispassionate inquiry" required by *McIntyre* to ascertain whether defendant's requests were calculated to delay and disrupt or were a good faith attempt to exercise his constitutional right to represent himself.

Instead of conducting the requisite inquiry, the court ordered 730 examinations and assigned successive defense counsel, notwithstanding defendant's legitimate complaints about counsel's deficiencies. It was acknowledged that counsel filed an incorrect motion on defendant's behalf and that a corrected motion was never filed, belying the notion that defendant's request was calculated to disrupt.

The court's belated finding, on December 16, 2010, that defendant intended to "disrupt" the proceedings cannot be used as post-hoc justification of its earlier denials of repeated requests to proceed pro se. Defendant's requests to proceed pro se were denied throughout 2008, 2009, and much of 2010, without

mention of "disruption" as a basis.

It was hardly surprising that defendant expressed increasing frustration with the process, given that he had repeatedly been found fit to proceed, and yet the court continued to deny his requests to proceed pro se and to ignore his complaints regarding counsel. As the Court of Appeals has observed, in finding a defendant's "outburst" insufficient to trump his right to self-representation,

> "Just as the court may not rely on a postruling outburst to validate an erroneous denial, the court may not goad the defendant to disruptive behavior by conducting its inquiry in an abusive manner calculated to belittle a legitimate application. An outburst thus provoked will not justify the forfeiture of the right to self-representation" (*McIntyre*, 36 NY2d at 19).

That defendant on occasion agreed to the appointment of new lawyers does not render his requests to proceed pro se equivocal (*see Lewis*, 114 AD3d at 404 [request to proceed pro se not equivocal merely because it is made in the alternative]). A defendant who elects to proceed pro se "is frequently motivated by dissatisfaction with trial strategy or a lack of confidence in counsel" (*id.*).

An erroneous denial of the right to defend onself is not subject to a harmless error analysis. We are therefore obliged to reverse the conviction and remand for a new trial.

The verdict challenged on appeal was based on legally sufficient evidence and was not against the weight of the evidence. Defendant's arguments concerning suppression or preclusion of identification testimony are unpreserved and unavailing. Because we are ordering a new trial, we declined to reach any other issues.

Accordingly, the judgment of the Supreme Court, New York County (Ruth Pickholz and Richard D. Carruthers, JJ. at self-representation requests, Carruthers, J. at motions, jury trial and sentencing), rendered February 17, 2011, as amended February 24 and March 3, 2011, convicting defendant of three counts of robbery in the first degree and two counts of robbery in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 50 years to life, should be reversed, and the matter remanded for a new trial.

All concur.

Judgment, Supreme Court, New York County (Ruth Pickholz and Richard D. Carruthers, JJ. at self-representation requests, Carruthers, J. at motions, jury trial and sentencing), rendered

February 17, 2011, as amended February 24 and March 3, 2011, reversed, and the matter remanded for a new trial.

Opinion by Manzanet-Daniels, J. All concur.

Manzanet-Daniels, J.P., Kapnick, Gesmer, Oing, JJ.

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

ENTERED: APRIL 2, 2020

CLERK