SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 13, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10888- Index 311416/11
10888A Calvin E. Thomas,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

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

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Howard H. Sherman, J., and a jury), entered on or about July, 31, 2018, apportioning fault as 67% against defendant and awarding plaintiff $70,000 for past pain and suffering, $0 for future pain and suffering, and $0 for future medical expenses, unanimously modified, on the facts, to vacate the award for past and future pain and suffering and remand the matter for a new trial on damages for past and future pain and suffering, unless defendant stipulates, within 30 days after entry of this order, to increase the award for past pain and suffering to $275,000 and the award for future pain and

suffering to $100,000, and to the entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 17, 2018, which denied plaintiff's motion to set aside the damages portion of the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's award of damages for past pain and suffering deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]). Plaintiff sustained a bimalleolar ankle fracture and underwent two surgeries, the first involving implantation of hardware in the ankle and the second involving arthroscopy and removal of the hardware and some scar tissue. Comparing this matter to similar cases (*see Donlon v City of New York*, 284 AD2d 13, 18 [1st Dept 2001]; *Garcia v Queens Surface Corp.*, 271 AD2d 277 [1st Dept 2000]), we find that $275,000 is reasonable compensation (*see e.g. Martinez v Metropolitan Transp. Auth.*, 159 AD3d 584 [1st Dept 2018]; *Harrison v New York City Tr. Auth.*, 113 AD3d 472 [1st Dept 2014]; *Hopkins v New York City Tr. Auth.*, 82 AD3d 446 [1st Dept 2011]).

The award for future damages also deviates materially from what would be reasonable compensation (CPLR 5501[c]). Defendant's expert agreed that plaintiff's injury is permanent and that he has developed arthritis in his left ankle, which may

require treatment in the future, including the possibility of an ankle replacement. In light of the foregoing, we find that $100,000 for future pain and suffering is reasonable compensation (*see e.g. Grinberg v C&L Contr. Corp.*, 107 AD3d 491 [1st Dept 2013]; *Alicea v City of New York*, 85 AD3d 585 [1st Dept 2011]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

10999 The People of the State of New York, Respondent, Ind. 3347N/12

-against-

Edwin Diaz, Defendant-Appellant.

_____

Office of The Appellate Defender, New York (Lisa Packard of counsel), and Wachtell, Lipton, Rosen & Katz, New York (Nicholas Walter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Michael R. Sonberg, J. at plea and sentencing), rendered June 11, 2013, convicting defendant of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's findings on issues of fact. The record supports the court's determination that at each stage of the encounter the police actions were justified either by the information they possessed or by defendant's voluntary consent.

The evidence elicited that defendant matched the description of a person who, according to a confidential informant, was selling drugs at a particular apartment. The police officers' observations indicated that defendant entered and left the subject apartment. Defendant was also observed engaging in actions known to be taken by drug dealers to avoid surveillance. This combination of factors provided, at the very least, an objective credible reason to approach defendant and ask where he was coming from (*see People v Corbett*, 278 AD2d 118 [1st Dept 2000], *lv denied* 96 NY2d 799 [2001]).

The police officers did not exceed the permissible bounds of a request for information. The record does not establish coercive circumstances as argued by defendant. The officer's statement, "Let's walk," to defendant, after defendant agreed to show the officers the building where he claimed to have been visiting a friend, was not a command when viewed in the context of the conversation (*see People v Flynn*, 15 AD3d 177, 178 [1st Dept 2005], *lv denied* 4 NY3d 853 [2005]).

The record supports the court's determinations that by handing over his keys and agreeing to show the police where the person defendant claimed to be visiting lived, defendant consented to the officers using the key to enter the building, and that defendant freely accompanied the officers to the fourth

floor. The totality of relevant circumstances established a voluntary consent (*see People v Gonzalez*, 39 NY2d 122, 128-130 [1976]; *People v Hartley*, 295 AD2d 159 [1st Dept 2002], *lv denied* 99 NY2d 536 [2002]).

Once the officers smelled a strong odor of acetone, which is used in processing cocaine, outside of the apartment, the potential destruction of narcotics evidence constituted exigent circumstances justifying the officers' warrantless entry into the apartment (*see Kentucky v King*, 563 US 452, 460 [2011]; *People v White*, 291 AD2d 250 [1st Dept 2002], *lv denied* 98 NY2d 682 [2002]). The officers also properly conducted a protective sweep of the apartment given their observations of the apartment as well as their awareness that drug dealers are often in possession of weapons (*see People v Johnson*, 160 AD3d 573, 574 [1st Dept 2018]). Accordingly, the officers "possesse[d] a reasonable belief based on specific and articulable facts" that the area to be swept harbored a person posing a danger (*Maryland v Buie*, 494 US 325, 327 [1990]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11000 Marlene Wilson, Index 655275/17
Plaintiff-Respondent,

-against-

Kore Method on Gansevoort LLC,
Defendant-Appellant.

Rosenberg, Giger & Perala, New York (Matthew H. Giger of counsel), for appellant.

Feerick Nugent MacCartney, PLLC, South Nyack (Patrick A. Knowles of counsel), for respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 15, 2019, which denied defendant's motion pursuant to CPLR 5015 to vacate an order, same court and Justice, entered December 6, 2018, denying its motion pursuant to CPLR 317 to vacate a default judgment against it, unanimously reversed, on the facts and in the exercise of discretion, without costs, the CPLR 5015 motion granted on condition that defense counsel pay the sum of $1,500 to plaintiff's counsel within 30 days of service of a copy of this order, and the matter remanded to Supreme Court for consideration of the CPLR 317 motion on the merits.

In the exercise of our own discretion (*see e.g. Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9 [1st Dept 2002]), we find that defense counsel offered a reasonable excuse for failing to appear at the

December 5, 2018 oral argument (*see e.g. Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [1st Dept 2011]; *Chelli v Kelly Group, P.C.*, 63 AD3d 632 [1st Dept 2009]; *Dokmecian v ABN AMRO N. Am.*, 304 AD2d 445 [1st Dept 2003]). However, we recognize that plaintiff incurred attorneys' fees to oppose defendant's second motion; therefore, we condition the vacatur of the 2018 order on defense counsel's paying plaintiff's counsel $1,500.

Because the motion court sub silentio found that defendant failed to offer a reasonable excuse for its default, it did not reach the issue of whether defendant had a meritorious defense to plaintiff's claim. Plaintiff seeks repayment of a loan pursuant to the "Summary of Proposed Terms for Com[m]itment of a $100,000.00 Investment in the Company [defendant] in Exchange for 10% Equity in the Company" (the Summary), which plaintiff claims is a promissory note. We find that defendant has viable defenses, including those based upon the enforceability and interpretation of the Summary and later Operating Agreement.

We note that on its motion to vacate a default judgment pursuant to CPLR 317 defendant was not required to demonstrate a

reasonable excuse for its default (*see Simon & Schuster v Howe Plastics & Chems. Co.*, 105 AD2d 604, 605 [1st Dept 1984]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11001 In re Terazay S., Dkt NN-04621/16

A Child Under Eighteen Years of Age, etc.,

Yazaret T.,
Respondent-Appellant,

Administration For Children's Services,
Petitioner-Respondent.

_____

The Law Office of Steven P. Forbes, Jamaica (Steven P. Forbes of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julia Bedell of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about April 6, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 1, 2018, which found that respondent mother neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that the mother neglected the child by inflicting excessive corporal punishment by scratching, hitting and biting the child with enough force to cause bruising and scratch marks that were

visible days after the incident (*see* Family Ct Act § 1046[b][I]; *Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011]). The child's out-of-court statements to the ACS caseworker that the mother physically abused her were sufficiently corroborated by the caseworker's testimony as to her own observations of the child's injuries, along with photographs of the injuries (*see Matter of Jazmyn R. [Luceita F.]*, 67 AD3d 495 [1st Dept 2009]; *Matter of Fred Darryl B.*, 41 AD3d 276 [1st Dept 2007]).

The mother's argument that the aid of the Family Court was no longer needed pursuant to Family Ct Act § 1012(f)(i)(B) is unpreserved, and, in any event, unavailing. On this record, it was in the child's best interest to remain in foster care and under the supervision of the Family Court (*see Matter of Sharnaza Q. [Clarence W.]*, 68 AD3d 436 [1st Dept 2009]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11003 Jennifer Swanson, Index 154077/17
Plaintiff-Respondent,

-against-

Zink Global Media, LLC, et al.,
Defendants-Appellants.

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Brown Rudnick LLP, New York (Danielle A. D'Aquila of counsel), for appellants.

Frankfurt Kurnit Klein & Selz PC, New York (Wendy Stryker of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert R. Reed, J.), entered February 1, 2019, in favor of plaintiff, and bringing up for review an order, same court and Justice, entered January 14, 2019, which granted plaintiff's motion pursuant to CPLR 2004 to extend the time to file a confession of judgment (CPLR 3218[b]), unanimously affirmed, with costs.

CPLR 2004 provides that a court "may extend the time fixed by any statute . . . for doing any act, . . . upon good cause shown," "[e]xcept where otherwise expressly prescribed by law." CPLR 3218 does not expressly prescribe that the time to file a defendant's affidavit confessing judgment may not be extended (*compare* CPLR 201; 5514[d]). Accordingly, upon finding that good cause was shown, the motion court properly granted plaintiff's motion for an extension of time to file defendants' confession of

judgment (*see e.g. Coastal Oil N.Y. v Diversified Fuel Carriers Corp.*, 303 AD2d 251 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]). Good cause was shown by plaintiff's diligence in attempting to file the confession of judgment in a timely manner and in seeking an order that would permit her to file under seal the confidential settlement agreement upon which the confession of judgment is based and which defendants have consistently refused to place before the court.

We decline to impose sanctions against defendants.

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11004- Ind. 763/15
11004A The People of the State of New York, 251/16
Respondent,

-against-

Timothy Shepard,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Angie Louie of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Teri Chung of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered November 1, 2016, (indictment No. 763/15) and January 9, 2017 (indictment No. 251/16),

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

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11005 In re Lamont Banton, Index 100187/18
Petitioner-Appellant,

-against-

Cynthia Brann, etc., et al.,
Respondents-Respondents.

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Lamont Banton, appellant pro se.

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Judgment (denominated an order), Supreme Court, New York County (Carol R. Edmead, J.), entered August 24, 2018, denying the petition to annul respondents' determination, dated October 17, 2017, which discontinued petitioner's probationary promotion, and to reinstate him to the title of correction captain with back pay and benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner remained a probationary employee at the time respondent Department of Correction demoted him to his permanent title of correction officer. Petitioner had agreed and consented to extend his probationary period for six months based on an evaluation of his work performance during his original one-year probationary period and agreed to further automatic day-for-day extensions based on the number of days that he was absent or on

limited duty (*see Matter of Skidmore v Abate*, 213 AD2d 259 [1st Dept 1995]). In view of his probationary status, petitioner was not entitled to a hearing (*see id.* at 259-260; Civil Service Law § 75).

Furthermore, a probationary employee may be demoted without a hearing for any reason or no reason at all, as long as the demotion was not unlawful or in bad faith (*see generally Matter of Finkelstein v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 150 AD3d 464, 465 [1st Dept 2017]). Evidence supporting the conclusion that petitioner's performance was unsatisfactory establishes that the demotion was not made in bad faith (*see Matter of Johnson v Katz,* 68 NY2d 649, 650 [1986]). Here, petitioner alleged no facts to show that his demotion from the probationary position as a correction captain to a correction officer was for an improper reason. Rather, the record shows that petitioner's demotion was based on his numerous use-of-force incidents following his promotion, failure to supervise and use alternative conflict resolution methods, and an inaccurate

written account of an incident (*see Matter of Cohen v Koehler*, 82 NY2d 882, 884 [1993]; *Matter of Johnson*, 68 NY2d at 650).

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11006-
11007 In re Mark Hodge,
Petitioner-Appellant,

-against-

New York City Transit Authority,
Respondent-Respondent.

Index 159612/18
655191/18

- - - - -

In re Mark Hodge, et al.,
Petitioners-Appellants,

-against-

New York City Transit Authority,
Respondent-Respondent.

_____

Advocates for Justice, New York (Arthur Z. Schwartz of counsel), for appellant.

Office of the General Counsel, Brooklyn (Byron Z. Zinonos of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about March 7, 2019, denying the petition to annul an arbitration award, dated November 8, 2018, (index No. 655191/18), which upheld respondent's termination of petitioner Hodge's employment, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs. Order and judgment (one paper), same court and Justice, entered on or about March 7, 2019 (index No. 159612/18), denying the petition to annul respondent's

determination, dated October 8, 2018, which denied petitioner's request for reinstatement to his employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The termination of petitioner Hodge's employment based on conduct that, if proven in court, would have constituted a felony was not against public policy (*see Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 7 [2002]). Correction Law article 23-A provides that "no employment . . . held by an individual . . . shall be . . . acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses" (Correction Law § 752) where the conviction "preceded such employment" (Correction Law § 751). The conviction at issue occurred during Hodge's employment and was, therefore, not covered by the referenced Correction Law (*Martino v Consolidated Edison Co. of N.Y., Inc.*, 105 AD3d 575 [1st Dept 2013]).

Similarly, the New York City Human Rights Law (NYCHRL) makes it an unlawful discriminatory practice to "take adverse action against any employee by reason of such . . . employee having been convicted of one or more criminal offenses . . . when such . . . adverse action is in violation of the provisions of article 23-a of the correction law" (Administrative Code of City of NY § 8-

107[10][a]).

Nor does Administrative Code § 8-107(11)(a) apply to this matter. Section 8-107(11)(a) prevents adverse employment actions based on arrests or criminal accusations when "in violation of subdivision 16 of section 296 . . . of the executive law." Executive Law § 296(16) "'simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law'" (*Matter of Joseph M. [New York City Bd. of Educ.]*, 82 NY2d 128, 130 [1993]). Hodge pleaded guilty based upon the offending acts. Thus they were more than accusations.

Respondent's denial of petitioner's request for reinstatement was not arbitrary and capricious (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Under governing regulations, an agency "may consider such application" but is not required to do so, and any approval thereof is discretionary (Personnel Rules & Regs of City of NY [55 RCNY Appendix A] § 6.2.6[a]-[b]; *see Silberzweig v Doherty*, 76 AD3d 915 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]). It was not irrational for respondent to conclude that in seeking reinstatement, petitioner merely sought to relitigate issues presented approximately six weeks before his reinstatement request, and decided three weeks beforehand by a neutral arbitrator in the grievance proceeding

pursuant to a collective bargaining agreement, which resulted in his termination.

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

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11008-
11008A M.G., etc., et al.,
Plaintiffs-Respondents,

-against-

Haanh N. Pham,
Defendant-Appellant,

Board of Managers of the Parkchester North Condominium, et al.,
Defendants-Respondents.

Index 350189/13

Frank P. Allegretti, Harrison, for appellant.

Burns & Harris, New York (Jason Steinberg of counsel), for M.G., S.G. and Yacine C., respondents.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for Board of Managers of the Parkchester North Condominium, Parkchester North Condominium, Inc., and Parkchester Preservation Managements, LLC, respondents.

Appeal from order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about September 7, 2018, which, to the extent appealed from, denied defendant Haanh N. Pham's motion for summary judgment dismissing the complaint as against him, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered on or about June 28, 2019, which denied Pham's motion to renew and reargue, unanimously reversed, on the law, without costs, defendant's motion to renew granted, and defendant's motion for summary judgment denied.

The motion court improvidently exercised its discretion in denying defendant Pham's motion to renew. Although the original motion for summary judgment was denied as untimely, on renewal defendant provided evidence that his motion for summary judgment was, in fact, timely received and accepted by court personnel who signed for the package with the motion papers. Although the underlying motion papers were received on December 6, 2017, within the motion court's deadline for summary judgment motions, the motion was not processed by the court until December 11th, making it appear as if Pham had missed the deadline. Under these circumstances, the motion to renew should have been granted to correct the court's records and the motion for summary judgment considered on the merits. Since Pham's motion for summary judgment is restored and fully briefed, we consider it and deny it on the merits.

Pham did not demonstrate that, as the owner of an individual condominium unit, he cannot be held responsible for violation of the lead paint laws. Local Law 1 of 2004 (Administrative Code of City of NY §§ 27-2056.1, *et seq.*), without defining the term "owner," imposes obligations on "the owner of a dwelling or dwelling unit" (*see* Administrative Code §§ 27-2056.3, 27-2056.5). As the unit owner he bears responsibility for compliance with the obligations of New York City Local Law 1 of 2004 (*see*

Administrative Code § 27-2056.15[b]). In addition, the leases in the record indicate that Pham, as unit owner, not the condominium board, accepted responsibility for compliance with the obligations of New York City Local Law 1 of 2004 (*see* Administrative Code § 27-2056.15[b]). In any event, defendant Parkchester has asserted cross claims against him that continue. Pham's reliance on *Essilfie-Obeng v Ahyia* (93 AD3d 433 [1st Dept 2012]), is misplaced since it interpreted Local Law 1 of 1982, not Local law 1 of 2004, and concerned the obligations of the owner of proprietary shares in a cooperative corporation.

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11009 In re Elijah S., and Others, Dkt B91/15
B92/15
Dependent Children Under the Age of Eighteen Years, etc., B93/15

Mercedes S.,
Respondent-Appellant.

New Alternatives for Children,
Petitioner-Respondent.

_____

Simpson Thacher & Bartlett LLP, New York (Nihara K. Choudhri of counsel), for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

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

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Order, Family Court, Bronx County (Monica D. Shulman, J.), entered on or about October 9, 2018, which, upon a December 19, 2016 oral fact-finding determination, same court (Carol Sherman, J.), that respondent mother permanently neglected the subject children, terminated respondent's parental rights, and transferred custody of the children to petitioner agency for purposes of adoption, unanimously affirmed, without costs.

The determination that the children were permanently neglected by respondent is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The agency engaged in diligent efforts to encourage and strengthen

respondent's relationship with the children by developing a service plan, offering to make referrals and monitoring her mental health services, offering and providing assistance with her public housing application, keeping her apprised of all the children's medical, educational, and therapeutic appointments, and scheduling and facilitating visits with the children (*see Matter of Jaheim B. [April M.]*, 176 AD3d 558, 558 [1st Dept 2019]). However, despite these efforts, respondent failed both to maintain contact with the children and to plan for their future (*see* Social Services Law § 384-b[7][a]; *see Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588 [1st Dept 2018]). She failed to visit with the children consistently, and did not see or contact them from September 2014 to February 2015. Respondent also failed to address the problems that led to the children's removal, including her failure to timely obtain necessary medical treatment for the children, failed to attend numerous medical, educational, and therapeutic appointments for the children and either refused to sign numerous medical consent forms or delayed signing them for so long that the agency was forced to obtain medical overrides. She also stopped attending mental health therapy (*see Matter of Megan Victoria C-S. [Maria Ester S.]*, 84 AD3d 472 [1st Dept 2011]).

The determination that termination of respondent's parental

rights is in the best interests of the children is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the children have been in a stable and loving foster home for more than five years and that the foster parents meet all of their daily needs as well as their significant medical needs (*see Matter of Elijah G. [Stephanie S.]*, 173 AD3d 525, 526 [1st Dept 2019], *lv denied* 34 NY3d 903 [2019]). While one of the children currently resides in a residential treatment facility, the record shows that the intention is that he will return to the foster home once he is psychiatrically stable.

The record also shows that the mother had not seen the children in more than two years and had not taken any steps to remedy that situation. Under the circumstances, a suspended judgment is not warranted (*id.*).

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11010 The People of the State of New York, Respondent, Ind. 4848/13

-against-

Arnold McKelvey, Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 18 2014, as amended November 21, 2015, convicting defendant, after a jury trial, of burglary in the first degree and robbery in the second and third degrees, and sentencing him, as a persistent violent felony offender to an aggregate term of 20 years to life, unanimously affirmed.

The verdict was supported by legally sufficient evidence. The victim's testimony about the pain and injuries she sustained when defendant put her in a chokehold, impeded her breathing, and violently ripped necklaces off her neck established the physical injury element (*see People v Chiddick*, 8 NY3d 445 [2007]), and the jury was entitled to credit that testimony notwithstanding the absence of any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]). Defendant's entry into the victim's

building was rendered unlawful, not by his unlawful intent, but by the fact that he only obtained the victim's permission to enter by affirmatively misrepresenting that his sole purpose in entering was to help the victim, who was using a walker; thus, "there exist[ed] both a hidden intent to commit a crime as well as the additional deceit in obtaining the license to enter the premises" (*People v Graves*, 76 NY2d 16, 21 [1990]; *see also People v Brevard*, 149 AD3d 546, 547 [1st Dept 2017], *lv denied* 30 NY3d 947 [2017]). The element of entry with intent to commit a crime was supported by the reasonable inference that when defendant followed the victim home from a bus stop and "helped" her through the door, he did so with the intent to rob her, rather than forming that intent after he had already entered.

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11011 The People of the State of New York, Ind. 1739/15
Respondent,

-against-

Mickel Simone,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Victoria Muth 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 (Michael Obus, J.), rendered September 22, 2016,

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

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11013 Nicholas Letterese, Plaintiff-Appellant, Index 156434/14 595052/16

-against-

A&F Commercial Builders, L.L.C., et al., Defendants-Respondents.

- - - - -

[And a Third-Party Action]

Kazmierczuk & McGrath, Forest Hills (Joseph Kazmierczuk of counsel), for appellant.

Gallo Vitucci Klar LLP, New York (Christopher L. Parisi of counsel), for A&F Commercial Builders, L.L.C., respondent.

Cullen & Dykman, Garden City (Nicholas M. Cardascia of counsel), for Sol Goldman Investments, LLC, respondent.

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered August 16, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendant A&F Commercial Builders, L.L.C. (A&F) for summary judgment dismissing the Labor Law §§ 241(6)200 and common-law negligence claims as against it, and granted the motion of defendant Sol Goldman Investments, LLC (Sol Goldman) for summary judgment dismissing the Labor Law § 241(6) claim as against it, unanimously affirmed, without costs.

Plaintiff's Labor Law § 241(6) was properly dismissed, since Industrial Code (12 NYCRR) § 23-1.7(e)(2) does not apply to the

facts of this case. The affixed rebar dowel over which plaintiff fell was an integral part of the work being performed (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421, 422 [1st Dept 2013]; *Tucker v Tishman Constr. Corp. of N.Y.*, 36 AD3d 417 [1st Dept 2007]).

Plaintiff's Labor Law § 200 and common-law negligence claims as against A&F were also properly dismissed, since the condition that led to plaintiff's accident, a protruding rebar dowel that allegedly blended into the surrounding area, was created by the means and methods of the work of plaintiff's employer and its subcontractor (*see O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581 [4th Dept 2010]). A&F did not exercise supervisory control over the work of plaintiff, plaintiff's employer, or its subcontractor, nor is there any evidence that it directed the contractors to cease using the orange rebar caps, upon the discovery that the caps were pulling off waterproofing when removed. That A&F was allegedly aware

that plaintiff's employer would cease using orange caps is insufficient to impart liability.

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: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11014 The People of the State of New York, Respondent, Ind. 3029/15

-against-

Justin Bruno, Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 6, 2017, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a prison term of six years, unanimously affirmed.

Defendant's expressions of dissatisfaction with his third assigned attorney, near the end of the trial, and his declaration that he was hiring private counsel, did not constitute a "seemingly serious request" for new counsel, and thus the court was not required to make a "minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]). While the court did not make a direct inquiry, and expressed its inclination to deny any substitution of counsel, defendant nevertheless received a significant opportunity to explain his position and was not prevented from making any explanations (*see e.g. People v Rodriguez*, 46 AD3d 396

[1st Dept 2007], *lv denied* 10 NY3d 844 [2008]). Defendant's comments were neither indicative of good cause for a substitution of counsel (*see Porto*, 16 NY3d at 100), nor sufficiently compelling to require substitution at such a late stage (*see People v Arroyave*, 49 NY2d 264, 271 [1980]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11017N In re James Sproule, et al., Index 156972/18
Petitioners-Appellants,

-against-

New York Convention Center
Operating Corporation, et al.,
Respondents-Respondents.

_____

Hach & Rose, LLP, New York (Michael A. Rose of counsel), for appellants.

Kennedys CMK LLP, New York (Michael R. Schneider of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered September 13, 2018, which denied petitioners' application for leave to serve a late notice of claim, unanimously reversed, on the law, without costs, and the motion granted.

The court improvidently exercised its discretion in denying petitioners leave to file a late notice of claim in this action where petitioner James Sproule alleges that he was injured when he was struck by a scissor lift that was being operated by an employee of respondent New York Convention Center Operating Corp. Approximately six months after petitioner's accident, petitioners commenced this proceeding for leave to file a late notice of claim pursuant to General Municipal Law § 50-e. In determining

whether to grant an extension, the key factors to consider are: (1) "whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame"; (2) "whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter"; and (3) "whether the delay would substantially prejudice the municipality in its defense" (*Velazquez v City of N.Y. Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010] [internal quotation marks omitted]; *see also* General Municipal Law § 50-e[5]). "The presence or absence of any one factor, however, is not determinative" (*Matter of Thomas v City of New York*, 118 AD3d 537, 538 [1st Dept 2014]).

Here, although petitioners failed to offer any reasonable excuse for their failure to timely serve a notice of claim, this failure is not, standing alone, fatal (*id.*). Indeed, petitioners sufficiently demonstrated that respondents acquired actual notice of the event within a reasonable time thereafter, and that respondents would not be substantially prejudiced in their defense by the delay. Specifically, there is a surveillance video of the accident, which York Risk Services Group, the claims administrator for the Javits Center acknowledged having in its possession approximately six months after the accident.

Moreover, the operator of the lift that injured petitioner was employed by respondents.

In addition, the correspondence between York and Continental Insurance Company, the underwriter for CNA US Marine Claim, which was the insurance carrier for nonparty National Marine Manufacturers Association, who leased the space at the Javits Center for the New York Boat Show where plaintiff was injured, suggests that as of February 2018, only one month after plaintiff's accident, respondents' insurers were aware that the claims administrator anticipated that petitioner would be asserting a claim based on the January 22, 2018 incident. In opposition to petitioners' motion, respondents failed to come forward with any evidence showing that it would suffer any specific prejudice if petitioners were permitted to file a late notice of claim. Our conclusion is further supported by the relatively short delay in petitioners' moving for leave to file a late notice of claim.

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

ENTERED: FEBRUARY 13, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11018N & M-8970 Franco Belli Plumbing & Heating & Sons, Inc., Plaintiff-Respondent, Index 107725/11

-against-

Citnalta Construction Corp., et al., Defendants-Appellants,

New York City School Construction Authority, Defendant.

- - - - -

The Surety & Fidelity Association of America, Amicus Curiae.

_____

The Law Office of Thomas D. Czik, Glen Cove (Thomas D. Czik of counsel), for appellants.

Terrence O'Connor, P.C., Bronx (Terrence O'Connor of counsel), for respondent.

Chiesa Shahinian & Giantomasi PC, New York (Armen Shahinian of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 30, 2018, after a nonjury trial, which, to the extent appealed from as limited by the briefs, found in plaintiff's favor on its claims for onsite overtime premium, extra foremen, rerouting waste lines, withheld retainage, and costs of a bond, and declared that plaintiff is entitled to attorneys' fees pursuant to State Finance Law § 137(4)(c), unanimously modified, on the facts, to delete the declaration that plaintiff is entitled to attorneys' fees, and otherwise

affirmed, without costs.

There is no basis for disturbing the trial court's extensive and detailed findings of fact as to plaintiff's claims for onsite overtime premium, extra foremen, rerouting waste lines, withheld retainage, and costs of a bond (*see Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006]], *affd* 8 NY3d 874 [2007]). However, the court improvidently exercised its discretion in awarding plaintiff attorneys' fees pursuant to State Finance Law § 137(4)(c). We find, "upon reviewing the entire record," that it does not appear that the defense was "without substantial basis in fact or law" (*id.*).

M-8970 - *Franco Belli Plumbing & Heating & Sons, Inc. v Citnalta Constr. Corp.*

Motion to strike a portion of reply brief denied.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11019 The People of the State of New York, Respondent, Ind. 1734/17

-against-

Anthony Capella, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Sasha Yishu Zheng of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 27, 2018, convicting defendant, after a jury trial, of criminal contempt in the first degree and aggravated family offense, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the summation remarks were not so egregious as to require reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's challenge to the court's supplemental jury

charge is waived because defense counsel expressly stated that, notwithstanding the concerns she had expressed in a prior colloquy, she was satisfied with the instruction as given. We decline to review defendant's present claim in the interest of justice. As an alternative holding, we find that the court provided a meaningful response to the jury's note.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11020 In re Pedro Endara-Caicedo, Index 250444/17
Petitioner-Appellant,

-against-

New York State Department of
Motor Vehicles, et al.,
Respondents-Respondents.

_____

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

Letitia James, Attorney General, New York (Philip J. Levitz of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about January 22, 2019, denying the petition to annul the determination of respondent New York State Department of Motor Vehicles, dated February 28, 2017, which, after a hearing, revoked petitioner's license to drive for at least one year and imposed a $500 civil penalty, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

We hold that Vehicle and Traffic Law § 1194(2) permits the refusal of a motorist arrested for operating a motor vehicle while under the influence of alcohol or drugs to submit to a chemical test to be used against the motorist in administrative license revocation hearings even if the chemical test is offered,

and the refusal occurs, more than two hours after the motorist's arrest. This interpretation of the statute is supported by its legislative history, which indicates that the two-hour time limitation in Vehicle and Traffic Law § 1194(2)(a)(1) was confined to the admissibility of the chemical test results (or the chemical test refusal) in a criminal action against the motorist and kept separate from the deemed consent and license revocation provisions (*see* Vehicle and Traffic Law § 1194[2][a], [c]) until 1970, when the Legislature merely "redrafted the piecemeal revisions of" the Vehicle and Traffic Law from the preceding decades (Josephine Y. King & Mark Tipperman, *The Offense of Driving while Intoxicated: The Development of Statutory and Case Law in New York*, 3 Hofstra L Rev 541, 577 [1975], available at https://perma.cc/4PXK-7TYT [cached Jan. 8, 2020]; *see* L 1970, ch 275); the recent opinions of four Judges of the Court of Appeals (*see People v Odum*, 31 NY3d 344, 354 [2018, Wilson, J., concurring]; *id.* at 356, 359 [DiFiore, Ch. J., dissenting]); the longstanding public policy of this State, and this Nation, to discourage drunk driving in the strongest possible terms (*see e.g. Birchfield v North Dakota*, __ US __, 136 S Ct 2160 [2016]; *People v Washington*, 23 NY3d 228, 231 [2014]; *People v Ward*, 307 NY 73, 76-77 [1954]); and the same conclusions reached by courts of sister states that have similar statutory

regimes (*see Motor Veh. Admin. v Jones*, 380 Md 164, 179, 844 A2d 388, 397 [2004]; *Cline v Ohio Bur. of Motor Vehs.*, 61 Ohio St 3d 93, 99, 573 NE2d 77, 82 [1991]; *see also Stumpf v Colorado Dept. of Revenue, Motor Veh. Div.*, 231 P3d 1 [Colo App 2009], *cert denied* 2010 WL 1948672, 2010 Colo LEXIS 378 [Colo 2010]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11021 In re Keenan S., and Another, Dkt NN2117/18
NN2118/18

Children Under the Age of
Eighteen Years, etc.,

Keith S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

James E. Johnson, Corporation Counsel, New York (Kate Fletcher of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about October 12, 2018, which, inter alia, after a hearing, found that respondent father neglected the subject child Keenan S., unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (see Family Ct Act §§ 1012 [f][i][B]; 1046[b][i]). The record shows that the child was subject to actual or imminent danger of impairment to his emotional and mental condition due to his exposure to incidents of domestic violence by the father against the mother (*see Matter of Andru G. [Jasmine C.]*, 156 AD3d

456 [1st Dept 2017]; *Matter of Serenity H. [Tasha S.]*, 132 AD3d 508 [1st Dept 2015]). There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11022 Bienvenido Quiros, Index 152245/16
Plaintiff-Appellant,

-against-

William A. Hawkins, et al.,
Defendants-Respondents.

_____

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for appellant.

Zaklukiewicz, Puzo & Morrissey LLP, Islip Terrace (Jenny L. Lazar of counsel), for respondents.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered April 12, 2018, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

It is well established that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the rear vehicle's driver, and imposes a duty upon the driver of the rear vehicle to come forward with an adequate nonnegligent explanation for the accident (*see e.g. Williams v Kadri* 112 AD3d 422 [1st Dept 2013]).

Here, defendants' contention that their vehicle's brake failure was the cause of the accident was insufficient to raise a triable issue of fact as to liability. Defendants failed to satisfy the two-pronged showing that the accident was caused by

an unanticipated problem with the vehicle's brakes, and that they exercised reasonable care to keep the brakes in good working order (*see Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 200 [1st Dept 2010]; *Normoyle v New York City Tr. Auth.*, 181 AD2d 498 [1st Dept 1992]]).

Summary judgment in plaintiff's favor is not premature. Both plaintiff and defendant driver had firsthand knowledge of the accident, and submitted affidavits. However, defendants did not submit any evidence concerning maintenance of their vehicle. Defendants only speculate that there may be facts supporting their opposition to plaintiff's motion which exist but cannot yet be stated (*see Reyes v Se Park*, 127 AD3d 459, 462 [1st Dept 2015]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11023 Robert Galpern, Index 650347/15
Plaintiff-Respondent,

-against-

Air Chefs, L.L.C., et al.,
Defendants-Appellants.

_____

The Law Offices of Edward J. Troy, Greenlawn (Edward J. Troy of counsel), for appellants.

Ilganayev Law Firm, New York (Migir Ilganayev of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Andrew S. Borrok, J.), entered on or about February 26, 2019, which granted plaintiff's motion for summary judgment, deemed appeal from judgment (CPLR 5520[c]), same court and Justice, entered April 23, 2019, awarding plaintiff the sum of $400,316.92 representing unpaid rent, and, as so considered, the judgment unanimously modified, on the law, to vacate the judgment against defendant Sheeli Aggarwal and deny summary judgment on both liability and damages on the second cause of action upon the guaranty, and otherwise affirmed, without costs.

The motion court providently exercised its discretion under CPLR 2001 to disregard plaintiff's failure to submit the pleadings because the record was "sufficiently complete" and otherwise available to the court and parties on the NYSCEF docket

(*see e.g. Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012]).

As for defendants' arguments under the dead man's statute (CPLR 4519), plaintiff does not deny that he is a person "interested in the event," and that the communications described in his affidavit were with the decedent. Because the lease was entered into by defendant Air Chef, Inc., and defendants failed to present any evidence that the corporate defendant was entitled to raise the dead man's statute as a defense to the action (*Herrmann v Sklover Group*, 2 AD3d 307, 307 [1st Dept 2003]), the motion court properly awarded summary judgment on the first cause of action under the lease against defendant Air Chef, Inc.

We modify, however, with respect to the cause of action under the personal guaranty purportedly signed by the decedent, because although documentary evidence is admissible notwithstanding the dead man's statute, it must be "authenticated by a source other than an interested witness's testimony" (*Matter of Press*, 30 AD3d 154, 157 [1st Dept 2006]). Having failed to authenticate the guaranty through "a source other than an interested witness's testimony," plaintiff was not entitled to summary judgment on the guaranty.

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

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11024 The People of the State of New York, Ind. 4246/17
Respondent,

-against-

Exander Rodriguez Santos,
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 (Michael J. Yetter of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil Ross, J.), rendered March 12, 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.

ENTERED: FEBRUARY 13, 2020

CLERK

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

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

11025 The People of the State of New York, Ind. 7870/98
Respondent,

-against-

Keith Taylor,
Defendant-Appellant.

_____

Feldman & Feldman, Uniondale (Arza Feldman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Vincent Rivellese 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 (Daniel P. FitzGerald, J.), rendered May 19, 2017,

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

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

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

11026 Vishal Vohra, et al., Index 301572/13
Plaintiffs-Respondents,

-against-

The Mount Sinai Hospital, et al.,
Defendants-Respondents,

Rhino Construction NYC, Inc.,
Defendant,

Rock Scaffolding Corp.,
Defendant-Appellant.

_____

Carol R. Finocchio, New York, for appellant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for The Mount Sinai Hospital and The Mount Sinai Medical Center, Inc., respondents.

Law Offices of Neil Kalra, PC, Forest Hills (Neil Kalra of counsel), for Vishal Vohra and Neetu S. Vohra, respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about May 14, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim as against defendant Rock Scaffolding Corp. (Rock), granted the motion of defendants The Mount Sinai Hospital and The Mount Sinai Medical Center, Inc. (collectively Mount Sinai) for summary judgment on their common-law indemnification claim against Rock, and denied Rock's motion for summary judgment

dismissing the claims and cross claims as against it, unanimously affirmed, without costs.

The court properly granted partial summary judgment in favor of plaintiffs and against Rock on the Labor Law § 240(1) claim where plaintiff Vishal Vohra was injured while dismantling a scaffold. The record shows that Rock was a statutory agent of the general contractor, which had hired it for the installation and dismantling of scaffolding at the project (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). There was also ample evidence that Rock exercised supervision and control over the injury-producing work, thereby entitling Mount Sinai to common-law indemnification from Rock (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

The court properly denied Rock's motion seeking dismissal of the Labor Law § 200 and common-law negligence claims as against it. Triable issues remain as to whether Rock had notice of a dangerous or defective condition on the work site and also whether the injury was caused by the manner in which the work was

being performed (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11027 Bear Stern Asset-Backed Securities I Trust 2006-IMI, etc., et al.,
Plaintiffs-Appellants,

-against-

Eliman Ceesay,
Defendant-Respondent,

Saul Romero, et al.,
Defendants.

Index 32709/16E

_____

Ras Boriskin, LLC, Westbury (Leah Lenz of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about April 3, 2018, which granted defendant Ceesay's motion to vacate an order of reference, reinstate his answer, and dismiss the complaint as against him, unanimously affirmed, without costs.

Defendant demonstrated a reasonable excuse for its default in opposing plaintiff's motion for summary judgment on its foreclosure complaint (CPLR 5015[a][1]). Defendant's assertion of difficulties with the court's e-filing system is a reasonable excuse (*see e.g. Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463 [1st Dept 2016]; *Spira v New York City Tr. Auth.*, 49 AD3d 478 [1st Dept 2008]).

Defendant also demonstrated a meritorious defense to the

action (*see Rivera*, 142 AD3d at 463). Plaintiff never sent him a statutorily compliant prior notice of risk of foreclosure (*see* RPAPL 1304), a condition precedent to the commencement of a residential foreclosure action (*see HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 825 [2d Dept 2017]). The affidavit by an officer of plaintiff's servicing company on which plaintiff relies refers to, and attaches, only a notice of default that is not in compliance with RPAPL 1304. Moreover, the affidavit merely confirms the officer's review of her employer's business records, which is insufficient to establish proof that the notice was mailed. Plaintiff argued in opposition to the motion to vacate that it sent an RPAPL 1304 notice in good faith. However, there is no proof of actual mailing (*see CitiMortgage, Inc. v Moran*, 167 AD3d 461 [1st Dept 2018]).

Plaintiff contends that the requirements of RPAPL 1304 are inapplicable because the mortgage loan was not a "home loan" as defined under that statute (*see id.* § [6][a][1]). We do not reach this contention, because it involves issues of fact raised for the first time on appeal (*cf. Ozcan*, 154 AD3d at 824-825 [deciding "home loan" issue where defendant did not refute that

the subject property was a commercial property and that he lived elsewhere]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11028 Earl Lind Jr., et al., Index 154781/16
Plaintiffs-Appellants,

-against-

Tishman Construction Corporation
of New York, et al.,
Defendants-Respondents.

_____

Bernadette Panzella, P.C., New York (Bernadette Panzella of counsel), for appellants.

Segal McCambridge Singer & Mahoney, Ltd., New York (Brian E. Bergin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 13, 2019, which denied plaintiffs' motion for partial summary judgment on the Labor Law §§ 240(1) and 241(6) claims or, in the alternative, to strike defendants' answer for failure to comply with discovery demands, unanimously modified, on the law, to the extent of granting partial summary judgment in favor of plaintiffs as to liability on the Labor Law 240(1) claim, and otherwise affirmed, without costs.

Plaintiff Earl Lind Jr. testified that he was injured when the articulating lift on which he was working during construction of the World Trade Center's Vehicle Security Center and Tour Bus Facility suddenly picked up speed as he backed it down the ramp that led to the underground parking garage. He released the

lift's joystick to engage the brakes, but due to "slippery sludge" on the ramp, the lift skidded and crashed into a curb, causing him to be "ricocheted" around the lift basket. Defendant Tishman Construction Corporation (Tishman) entered into a Construction Management Agreement with The Port Authority of New York and New Jersey (Port Authority), the project owner, to provide construction management services on the project. The agreement and other documents also refer to Tishman Construction Corporation of New York (Tishman-NY) as the construction manager.

Plaintiffs demonstrated that defendants can be held liable as a statutory "agent" of the Port Authority based on the contract documents that they submitted on the motion. Those documents impose not only the responsibility to coordinate the work but also a broad responsibility for "overall job site safety," including the implementation of the Port Authority's Safety Health and Environmental Program, as well as measures to ensure worker safety, thereby granting the construction manager "the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]).

Moreover, plaintiffs are entitled to summary judgment on the Labor Law § 240(1) claim. As the motion court found, plaintiff's testimony established prima facie that the articulating lift was a safety device and that it's failure to protect him from the

elevation-related risk that he faced was the proximate cause of his injury. Accordingly, the existence of a question of fact as to his second theory, that his accident was also caused by sludge on the ramp, is irrelevant.

In view of our grant of plaintiffs' motion for partial summary judgment, we need not address their remaining contentions.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11029 In re Zaire S., Dkt NN-47980/16

A Child Under Eighteen
Years of Age, etc.,

Mary W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

_____

Order of fact-finding, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 3, 2018, which found that respondent grandmother neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect against the grandmother vacated, and the petition dismissed as against grandmother.

The finding of neglect against the grandmother is not supported by a preponderance of the evidence (see Family Ct Act § 1046[b][i]). "The statutory test for neglect is 'minimum degree of care' - not maximum, not best, not ideal — and the failure to exercise that degree of care must be actual, not threatened'"

(*Matter of Andy Z. [Hong Lai Z.]*, 105 AD3d 511, 512 [1st Dept 2013], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]).

Petitioner presented insufficient evidence that the grandmother knew or should have known that the boyfriend had a serious substance abuse problem. While the grandmother was aware that he used alcohol frequently, and he overdosed on drugs one time, the record does not establish the frequency or duration of his drug use prior to the incident that was the subject of this proceeding.

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: FEBRUARY 13, 2020

CLERK

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

11030 The People of the State of New York, Respondent, Ind. 2944/11

-against-

Jamal Cox,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 8, 2012, as amended February 10, 2008, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his guilty plea, and the court was not obligated to appoint new counsel sua sponte. In a standard form motion, defendant only made conclusory complaints about his attorney. Despite being provided with the opportunity to do so, defendant never elaborated on those conclusory allegations, which in any event were belied by the thorough plea allocution (*see e.g. People Quintana*, 15 AD3d 299 [1st Dept 2005], *lv denied* 4

NY3d 856 [2005]). Counsel's brief remarks about his preparation for trial, even if volunteered, were innocuous and fell far short of taking "a position on the motion that is adverse to the defendant" (*People v Mitchell*, 21 NY3d 964, 967 [2013]). Therefore, defendant was not deprived of his right to conflict-free representation.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11031 Dawda Touray, Index 28002/16
Plaintiff-Respondent,

-against-

HFZ 11 Beach Street LLC,
Defendant-Appellant.

_____

Fullerton Beck LLP, White Plains (Edward J. Guardaro, Jr., of counsel), for appellant.

Law Offices of Andrew J. Carboy LLC, New York (Andrew J. Carboy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 20, 2018, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff established prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim. The evidence shows that plaintiff and his coworkers were moving an A-frame cart, loaded with approximately 16 cement boards measuring 4' x 8' in dimension and weighing approximately 100 pounds each, when its wheel became stuck and the cart would not move. Plaintiff and his coworkers then pushed and pulled the cart to free it, and, in the process, the cart and the boards suddenly tipped, with the boards landing on plaintiff's left leg. Given the weight and height of the cement boards on the A-frame cart, the

elevation differential was within the purview of the statute (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *see also Runner v New York Stock Exch., Inc.*, 13 NY3d 599).

In opposition, defendant failed to raise a triable issue of fact. The opinion of its expert that the A-frame cart was an adequate safety device for the undertaking and that plaintiff's injuries were proximately caused by the workers' actions in trying to free the stuck cart, rather than any inadequacy in safety devices, was contradicted by the facts. Defendant HFZ'S supervisor, Giraudi, testified plaintiff was hit by the cement boards and not by the tipping A-frame cart. Contrary to defendant's expert opinion, the cart itself did not have a mechanism to self-secure the stacked materials it transported.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11032 In re Norma Knopf, et al., Index 153821/19
Petitioners-Respondents,

-against-

Feldman & Associates, PLLC, etc., et al.,
Respondents,

Esposito PLLC, doing business as
Esposito Partners, PLLC, et al.,
Respondents-Appellants.

_____

Esposito, PLLC, New York (Frank Esposito of counsel), for appellants.

Berry Law, PLLC, New York (Eric W. Berry of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about July 11, 2019, which, to the extent appealed from, granted the petition to compel respondents Esposito PLLC d/b/a Esposito Partners, PLLC and Frank Esposito to turn over certain funds, unanimously reversed, on the law, without costs, and the petition dismissed.

Petitioners failed to show that their right to the funds in question was superior to that of respondents (*see* CPLR 5225[b]). Contrary to petitioners' contention, respondents did not take the funds in violation of any order of this Court.

Petitioners do not have an equitable lien on the funds, because the debtor spent the money on services that were

contracted for (*see Montanile v Board of Trustees of Natl. El. Indus. Health Benefit Plan*, __, US __, 136 SCt 651, 658 [2016]).

We decline to consider petitioners' fraudulent conveyance theories, raised for the first time on appeal, because the issues are intensely fact-bound and cannot be resolved on the existing record (*see Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]).

Contrary to respondents' contention, petitioners' claims are not barred by the doctrine of collateral estoppel (*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11033-
11033A & In re Rebecca L. Cenni, Index 652201/18
M-7641 Petitioner-Respondent,

-against-

Adrian Cenni,
Respondent-Appellant.

_____

Nadel & Ciarlo, P.C., New York (Lorraine Nadel of counsel), for appellant.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (W. Franc Perry, J.), entered November 15, 2018, in favor of petitioner in the total amount of $216,864.56, unanimously affirmed. Appeal from order, same court and Justice, entered October 25, 2018, which granted petitioner's petition to confirm an arbitration award and denied respondent's cross petition to vacate the award, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

While certain portions of the Operating Agreements governing the companies of which the parties are members or shareholders support respondent's position, others support petitioner's. Because the Operating Agreement "is reasonably susceptible of the construction given it by the arbitrator[]" (*Matter of National*

Cash Register Co. [Wilson], 8 NY2d 377, 383 [1960]), it is not irrational (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York,* 94 NY2d 321, 326 [1999]; *Maross Constr. v Central N.Y. Regional Transp. Auth.,* 66 NY2d 341 [1985]; *Madison Realty Capital, L.P. v Scarbrough-St. James Corp.,* 135 AD3d 652, 653 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]).

Respondent contends that the award is contrary to the Limited Liability Company Act. Even if, arguendo, this were true, "courts are obligated to give deference to the decision of the arbitrator ... even if the arbitrator misapplied the substantive law in the area of the contract" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO,* 6 NY3d 332, 336 [2005]).

Furthermore, respondent argues that the arbitrator exceeded the authority set forth in the parties' agreement. However, he fails to point to a specifically enumerated limitation on the arbitrator's power (*see id.; see also Matter of Silverman [Benmor Coats],* 61 NY2d 299, 307 [1984]).

While respondent and/or his counsel were sloppy in answering the verified petition, their conduct was not so egregious as to warrant sanctions.

M-7641 - *In re Cenni v Cenni*

Motion for sanctions denied.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11034 Joseph Dunn, Index 151462/13
Plaintiff-Respondent,

-against-

New Lounge 4324, LLC doing business
as Bounce Sporting Club,
Defendant-Appellant,

John Does 1-7, etc., et al.,
Defendants.

_____

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Law Office of Natascia Ayers, New York (Natascia Ayers of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 22, 2019, which denied the motion of defendant New Lounge 4324, LLC for summary judgment dismissing the complaint and granted plaintiff's cross motion for sanctions for spoliation to the extent of granting an adverse inference charge at trial, unanimously affirmed, without costs.

Defendant's summary judgment motion was properly denied. Defendant's witness testified that plaintiff was attacked by a third party away from defendant's business, after being removed from defendant's club. Plaintiff, however, testified that while inside defendant's club, defendant's bouncers punched him in the face, tackled him, and stomped on his foot, and then proceeded to

punch him in the face again outside of the club. Such conflicting versions of what occurred raise credibility issues precluding summary judgment (*see Rawls v Simon*, 157 AD3d 418, 419 [1st Dept 2018]).

The motion court properly refused to consider the mobile phone video submitted by defendant in support of the motion because it was not sufficiently authenticated (*see National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 921 [2d Dept 2012]; *see generally Zegarelli v Hughes*, 3 NY3d 64, 69 [2004]). In any event, the video, which does not show the entire incident, does not establish that plaintiff was not punched by defendant's bouncers at some time after the video was taken.

The motion court also properly granted plaintiff's cross motion for sanctions for spoliation and found that an adverse inference charge at trial is appropriate (*see Strong v City of New York*, 112 AD3d 15, 22 [1st Dept 2013]). Plaintiff established that defendant was on notice that its surveillance footage, which captured what happened inside of its club and a portion of the area immediately outside of its club, might be needed for future

litigation. After receiving such notice, defendant did not take steps to ensure that the video footage was preserved.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11035 Renata Sklarova, Index 805212/14
Plaintiff-Appellant,

-against-

Allen Coopersmith, M.D., et al.,
Defendants-Respondents,

Andrew Feldman, M.D., et al.,
Defendants.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of Counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 31, 2018, which, to the extent appealed from as limited by the briefs, dismissed the complaint as against defendants Allen Coopersmith, M.D., Lisa Mouzi, M.D. and NYU Langone Medical Center, unanimously modified, on the law, to vacate the dismissal of the complaint as against Dr. Coopersmith and NYU Langone and to reinstate plaintiff's causes of action for medical malpractice and lack of informed consent as against Dr. Coopersmith and her vicarious liability claim against NYU Langone, based on the doctrine of ostensible agency, and otherwise affirmed, without costs.

In this medical malpractice action, plaintiff alleges that

she sustained damage to her right brachial plexus after undergoing an interscalene nerve block performed by Dr. Coopersmith, an anesthesiologist, and Dr. Mouzi, an anesthesiology fellow, at defendant NYU Langone. The nerve block was performed prior to arthroscopic surgery that was performed on plaintiff's right shoulder by defendant Andrew Feldman, M.D., a physician who was not employed by NYU Langone. After the surgery, plaintiff experienced pain, numbness, weakness, burning, and hypersensitivity in her right arm. An electromyography and nerve conduction study of plaintiff's right brachial plexus was abnormal and compatible with right brachial plexopathy.

Based on their expert report, defendants made a prima facie showing that they did not depart from the standard of care. However, plaintiff's expert affidavits raise issues of fact both as to the departures and causation. Accordingly, the medical malpractice claim should be reinstated (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012].

Further, we agree with plaintiff that she sufficiently established that the doctrine of res ipsa loquitur applies to her cause of action for medical malpractice. The parties' experts disagreed as to whether plaintiff's injury ordinarily occurs in the absence of negligence, raising an issue of fact on that point (*see States v Lourdes Hosp.*, 100 NY2d 208, 211 [2003]; *Frank v*

Smith, 127 AD3d 1301 [3d Dept 2015]; *Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]). Plaintiff also established that defendants were in control of all instruments used in the nerve block, and plaintiff's actions did not contribute to her injuries (*see Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1284, 1286 [3d Dept 2014]). To the extent that defendants' expert opined that post-operative symptoms and image studies were not consistent with needle trauma to a nerve, that opinion did not refute plaintiff's assertion of res ipsa loquitur because it failed to identify any other possible cause of plaintiff's plexopathy, let alone a more probable cause (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-497 [1997]). Moreover, defendants' expert did not dispute that plaintiff sustained nerve damage and did not opine that the nerve damage pre-existed the surgery.

Plaintiff's lack of informed consent cause of action should be reinstated because defendants' expert's opinion that there was informed consent was conclusory in that it did not set forth what reasonable foreseeable risks should have been disclosed to plaintiff regarding the nerve block (*Halloran v Kiri*, 173 AD3d 509, 511 [1st Dept 2019]).

The Supreme Court correctly dismissed plaintiff's complaint as against Dr. Mouzi, a fellow, because the evidence established

that she acted under the supervision of Dr. Coopersmith and, although she actively participated in the nerve block, she did not exercise any independent judgment (*e.g. Buccheim v Sanghavi*, 299 AD2d 229, 230 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003] *Crawford v Sorkin*, 41 AD3d 278, 280 [1st Dept 2007]).

We agree with defendants that they were entitled to a determination that no actual agency existed between NYU Langone and Dr. Coopersmith because NYU Langone did not employ or otherwise control Dr. Coopersmith. However, we find that an issue of fact exists as to whether NYU Langone could be held liable for Dr. Coopersmith's actions in his treatment of plaintiff through ostensible agency. It is undisputed that plaintiff was treated by Dr. Feldman because she sought out his care. However, Dr. Feldman testified that he did not choose which anesthesiologist at NYU Langone would perform the nerve block on plaintiff, instead an anesthesiologist was assigned by the Department of Anesthesia. A jury could reasonably infer from this testimony that Dr. Coopersmith was provided by NYU Langone and that plaintiff reasonably believed that Dr. Coopersmith was

acting on NYU Langone's behalf (*see Warden v Orlandi*, 4 AD3d 239, 241 [1st Dept 2004]).

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11037 GEM Investments America, LLC, Index 657141/17
Plaintiff-Respondent,

-against-

Julio A. Marquez
Defendant-Appellant.

_____

Ceccarelli Law Firm PLLC, New York (Joseph J. Ceccarelli of counsel), for appellant.

Venturini & Associates, New York (August C. Venturini of counsel), for respondent.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered April 26, 2019, which, inter alia, denied defendant's motion to vacate the court's prior order (September 21, 2018) granting plaintiff summary judgment pursuant to CPLR 3213, unanimously affirmed, with costs.

The IAS court providently exercised its discretion in finding that defendant failed to present a reasonable excuse for its default (*see Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010]). Though lack of proper service may support excusable default (*see Sachellaridou v Tap Elec.*, 188 AD2d 427 [1st Dept 1992]), the facts here suggest that the default was willful, as defense counsel noted his appearance in March of 2018, but failed to submit any opposition papers until after the court had already entered judgment against

defendant in September of 2018 (*see e.g. Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]). Furthermore, his alleged unsuccessful attempts to reach an agreement with opposing counsel did not constitute a reasonable excuse (*see e.g. Wells Fargo Bank, N.A. v Cean Owens, LLC*, 110 AD3d 872 [2d Dept 2013].

Defendant also failed to present a meritorious defense, though his arguments need not be addressed, given the lack of a reasonable excuse for the default (*see Hertz Vehs. LLC v Westchester Radiology & Imaging, PC*, 161 AD3d 550 [1st Dept 2018]). Contrary to his contentions, the promissory note here was a monetary instrument that is eligible for CPLR 3213 adjudication. Though the note was made pursuant to a separation agreement between defendant and Global, the terms of the separation agreement did not alter the monetary nature of the note and render it ineligible for CPLR 3213 treatment (*see Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d 342 [1st Dept 2002]; *see Lyons v Cates Consulting Analysts*, 88 AD2d 526 [1st Dept 1982] [note was "self-standing" and established plaintiff's right to payment, though it referenced the terms of a shareholders agreement], *affd* 64 NY2d 1025 [1985]). In any event, defendant failed to present sufficient evidence showing that he was entitled to a set-off of the balance of the note, pursuant to the separation agreement.

Furthermore, defendant's argument that GEM's action should be dismissed due to an arbitration clause found in the separation agreement is unavailing because he never moved to compel arbitration prior to entry of the September 2018 order. In any event, even if defendant had a valid claim to arbitrate, his unreasonable delay in asserting his right to arbitration amounted to a waiver of that right (*see Plateis v Flax*, 54 AD2d 813 [3d Dept 1976]).

Defendant's other arguments pursuant to CPLR 5015(a)(3) are similarly unpersuasive. The assignment of the note to GEM was proper, as nothing in the separation agreement precluded it. Defendant's argument that GEM engaged in misconduct by "conspicuously" failing to include the separation agreement in its initial motion for summary judgment is also unavailing. Under CPLR 3213, GEM was only required to show the existence of the note and proof of defendant's default under the note (*see Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11038 The People of the State of New York, Ind. 576/17
Respondent,

-against-

Jason Rivera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Guy H. Mitchell, J.), rendered February 15, 2018, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal facilitation in the fourth degree, and sentencing him to an aggregate term of six months, with three years' probation on the drug sale count, unanimously reversed, on the law, and the matter remanded for a new trial.

Following a *Hinton* hearing at which there was no testimony that defendant or any member of his family threatened or otherwise posed a threat to either of two testifying undercover officers, defense counsel requested that family members be permitted to attend the officers' trial testimony. Although the prosecutor made no argument in opposition to this application, the court denied it, without making any supporting findings.

This was error. "[A]n order of closure that does not make an exception for family members will be considered overbroad, unless the prosecution can show specific reasons why the family members must be excluded" (*People v Nazario*, 4 NY3d 70, 72-73 [2005] [citations omitted]). We reject the People's argument that the defense was obligated to identify specific family members who might attend the proceedings, in the absence of any request by the prosecutor or the court that it do so, as incompatible with the "presumption of openness" that applies in this context (*People v Echevarria*, 21 NY3d 1, 11 [2013]; *see also People Moise*, 110 AD3d 49, 52 [1st Dept 2013]). Moreover the court did not ask any questions to clarify which family members wanted to attend before issuing the closure order.

In light of this determination, we need not reach defendant's remaining contentions except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: FEBRUARY 13, 2020

CLERK

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

11039N Rosalinda Ortiz, Index 27583/16E
Plaintiff-Appellant,

-against-

Mar-Can Transportation Co., Inc., et al.,
Defendants-Respondents.

_____

Law Office of Charles E. Finelli & Associates, PLLC, Bronx (David Gordon of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (James M. Strauss of counsel), for respondents.

_____

Order, Bronx County (John R. Higgitt, J.), entered February 7, 2019, which, inter alia, granted the motion of defendants, Mar-Can Transportation Co., Inc. (Mar-Can) and Ramonita Matos, to renew their motion for summary judgment dismissing the complaint, and upon renewal, granted the motion, unanimously affirmed, without costs.

The court providently exercised its discretion in granting defendants' motion to renew their summary judgment motion, in order to correct a procedural error by the court, which had overlooked a prior order by another justice precluding plaintiff from submitting opposition papers (*see Kase v H.E.E. Co.*, 95 AD3d 568, 569 [1st Dept 2012]). Contrary to plaintiff's contention, defendants had a right to enforce the preclusion order, which had been served upon her with notice of entry (*see James Talcott*

Factors v Larfred, Inc., 115 AD2d 397, 400 [1st Dept 1985], *lv dismissed* 67 NY2d 736 [1986]).

The court correctly found, both in its original decision and upon renewal, that defendants made a prima facie showing that the action was barred by the exclusivity provisions of the Workers' Compensation Law by submitting evidence establishing that plaintiff was Mar-Can's special employee at the time of the bus accident giving rise to her claims. Although plaintiff was a general employee of nonparty B-Alert, the individual who was president and manager of both Mar-Can and B-Alert averred that Mar-Can supervised and controlled all of B-Alert's employees, including plaintiff, and had authority to hire and fire, conduct work evaluations, determine sick and vacation leave policies, and set work schedules (*see Urena v Pace Univ.*,1 AD3d 208, 209 [1st Dept 2003]; *Karczewicz v 473 Owners Corp.*, 272 AD2d 137 [1st Dept 2000]). That B-Alert paid plaintiff's salary and workers' compensation benefits is of no moment, given that defendants demonstrated her duties were directed and controlled by Mar-Can (*see Evans v Citicorp*, 276 AD2d 370 [1st Dept 2000]).

Since plaintiff was precluded from submitting opposition, the action was properly dismissed upon defendants meeting their

initial burden to show that she was Mar-Can's special employee when the accident happened.

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

ENTERED: FEBRUARY 13, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Troy R. Webber, JJ.

8076
Ind. 4844/14

_____x

The People of the State of New York,
Respondent,

-against-

Jawawn Fraser,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 13, 2016, convicting him, after a jury trial, of robbery in the third degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Jacqueline A. Meese-Martinez of counsel), for appellant.

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

WEBBER, J.

We find that the motion court properly denied defendant's suppression motion. The testimony elicited at the hearing was that prior to a buy-and-bust operation, P.O. Matthew Regina and his field team met to discuss how they would proceed with the operation. During the meeting, they agreed on a nonverbal distress signal that the undercover officer could use if he were in trouble.

According to Regina, shortly before 9:00 p.m., the undercover officer was in front of 118 Avenue D. Regina was on the east side of Avenue D with the field team's ghost undercover officer, observing the target location from 60 to 70 feet away. Regina testified that although it was dark out, he could see the undercover officer in artificial light from nearby buildings. Shortly thereafter, defendant walked to within one to two feet of the undercover officer and began speaking with him. Soon, a group of five or six other people arrived and stood about three feet away from the undercover officer. Given the number of people around the undercover officer, Regina radioed the rest of the field team and told them they should move in closer to the undercover officer.

Shortly thereafter, the undercover officer made the previously agreed upon nonverbal distress signal. According to

Regina, he and P.O. Deltoro walked toward defendant and the undercover officer. When they arrived, defendant and the undercover officer were "almost struggling." Deltoro arrived first, said "police," and grabbed defendant with both hands. Defendant broke free and ran. Defendant was ultimately apprehended and placed under arrest by other members of the field team. Regina testified that he searched defendant and recovered, among other things, cash and the undercover officer's driver's license.

Later, in speaking to the undercover officer, Regina learned that defendant demanded to see his identification threatening that if not produced, defendant would "f*** him up," and that the group standing nearby told defendant to "f*** him up." According to Regina, the undercover officer showed defendant his identification, and that defendant grabbed it from him and refused to return it.

Regina's testimony established that there was probable cause for defendant's arrest, and that defendant was searched incident to a lawful arrest. It is the information known to the police at the time of the arrest which is relevant in determining whether the arrest was justified. This Court has held that a distress signal can provide police officers with reasonable suspicion to detain a suspect in order to investigate (*People v Rodriguez*, 265

AD2d 181 [1st Dept 1999], *lv denied* 94 NY2d 906 [2000]; *People v Davis*, 130 AD2d 268, 270-271 [1st Dept 1987], *appeal dismissed* 72 NY2d 950 [1988]). Reasonable suspicion is defined as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113 [1975]).

Here, the distress signal, coupled with Regina's observation of defendant and the nearby group standing close to the undercover officer and yelling, provided the officers with reasonable suspicion (*see People v Palmer*, 290 AD2d 224, 224-225 [1st Dept 2002], *lv denied* 97 NY2d 759 [2002] [during nighttime buy-and-bust operation, radio transmission of undercover officer's screaming and defendant's close proximity to her, provided reasonable suspicion to detain defendant, where the "urgency" of the scream "clearly indicated that [the] defendant had committed or attempted to commit some criminal act against her and that her safety was in danger"]; *see also People v Lopez*, 258 AD2d 388, 388 [1st Dept 1999], *lv denied* 93 NY2d 1022 [1999] [police officers' observation of the complainant, who had "a panicked look on his face" while waving to a marked police car to draw the officers' attention while chasing defendant, provided reasonable suspicion to pursue]).

When Regina and Deltoro approached, they observed the undercover officer struggling with defendant. This, coupled with the fact that when Deltoro tried to restrain defendant, defendant broke free and fled, established that the police officers had probable cause to arrest defendant for obstruction of governmental administration in the second degree, based on defendant's action of intentionally attempting to prevent Deltoro from performing an official function by means of force.

While Regina's testimony established the requisite probable cause to arrest defendant, the court providently exercised its discretion in granting the People's motion to reopen the suppression hearing before rendering a decision in order to permit the People to call an officer with additional information tending to establish reasonable suspicion (*see eg. People v Cook,* 161 AD3d 708, 708, [1st Dept 2018]; *affd* ___ NY3d ___, 2019 NY Slip Op 09059 [2019]; *People v Gnesin*, 127 AD3d 652 [1st Dept 2015], *lv denied* 25 NY3d 1164 [2015], *lv denied* 29 NY3d 948 [2017]; *People v McCorkle*, 111 AD3d 557 [1st Dept 2013], *lv denied* 24 NY3d 963 [2014]; *see also People v Lee*, 143 AD3d 643 [1st Dept 2016]). The court had not made any ruling, and the circumstances did not pose a risk of tailored testimony.

Upon granting the People's motion to present additional evidence, the court expressly stated that it had not yet rendered

a decision (*see People v Valentin*, 132 AD3d 499, 500 [1st Dept 2015], *affd* 29 NY3d 150 [2017]). Despite defendant's arguments to the contrary, there is nothing in the hearing transcript to suggest that the court previously forecasted its decision or provided guidance to the People. The court's very brief remark at the end of the initial hearing about an aspect of the facts cannot be viewed as "direction from the court" (*People v Kevin W.*, 22 NY3d 287, 295 [2013]), and was highly unlikely to result in tailored testimony (*see People v Lee*, 143 AD3d at 644).

The evidence adduced at the reopened hearing established another lawful basis for defendant's arrest. The undercover officer testified that, as he was attempting to buy drugs from another person, defendant interfered and forcibly took property from the officer. This gave the undercover officer probable cause to arrest defendant for robbery, which may be imputed to the arresting officer by way of the fellow officer rule (*see People v Ketcham*, 93 NY2d 416, 419 [1999]). The combination of the undercover officer's distress signal, the field team officers' observation of defendant in a struggle with the undercover officer, and the undercover officer's act of chasing defendant satisfied the requirement that the arresting officer act on "direction of" or "communication with" a fellow officer (*id.*). The court's general finding of probable cause can be

reasonably interpreted as encompassing this theory (*see People v Nicholson*, 26 NY3d 813, 825 [2016]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014]).

The jury's verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

Accordingly, the judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 13, 2016, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him to a term of two to six years, should be affirmed.

All concur.

Judgment Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 13, 2016, affirmed.

Opinion by Webber, J. All concur.

Acosta, P.J., Renwick, Manzanet Daniels, Webber, JJ.

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

ENTERED: FEBRUARY 13, 2020

CLERK