SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 18, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Kern, Oing, González, JJ.

10847 Raymond Clemente, Index 301074/13
Plaintiff-Appellant,

-against-

205 West 103 Owners Corp., et al.,
Defendants-Respondents,

R&L Realty Associates, et al.,
Defendants.
- - - - -
[And A Third-Party Action]

_____

Hecht, Kleeger & Damashek, P.C., New York (Ephrem J. Wertenteil of counsel), for appellant.

Brooks, Berne & Herndon PLLC, Elmsford (Michael Andreou of counsel), for 205 West 103 Owners Corp., respondent.

Law Office of Kevin P. Westerman, Elmsford (Jonathan R. Walsh of counsel), for 103 W. Coop, LLC and CIDH-VCMB, LLC, respondents.

_____

Order, Supreme, Bronx County (Lucindo Suarez, J.), entered November 30, 2017, which denied plaintiff's motion for partial summary judgment on liability on his Labor Law §§ 240(1) and 241(6) claims, and granted the motion of defendant 205 West 103 Owners Corp. (Owners Corp.) and the cross motion of defendants

103 W. Coop, LLC (103 Coop) and CIDH-VMBC LLC's (CIDH) for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendants' motion and cross motion insofar as they sought dismissal of the Labor Law § 240(1) claim, the Labor Law § 241(6) claim predicated upon Industrial Code § 23-3.3(b)(3) and (c), and the claims for common law negligence and Labor Law § 200, and the matter remanded for consideration of the portion of Owners Corp.'s motion seeking summary judgment on its contractual indemnification claim against 103 Coop, and otherwise affirmed, without costs.

Plaintiff alleges he was injured during the course of work renovating a cooperative apartment unit owned by defendant 103 Coop in a building owned by defendant Owners Corp., when the bathroom ceiling collapsed on him. Defendant CIDH acted as general contractor. The renovation included, inter alia, the demolition of two of the existing bathroom walls and moving the location of one. Plaintiff had just finished stripping plaster from two of the bathroom walls when the accident occurred.

Initially, we find that the motion court improperly dismissed the Labor Law § 240(1) claim. To prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure (in this case,

the collapse of a ceiling), a plaintiff must show that the failure of the structure in question was a foreseeable risk of the task he was performing, creating a need for protective devices of the kind enumerated in the statute (*Jones v 414 Equities LLC*, 57 AD3d 65, 80 [1st Dept 2008]; *see also Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1 [1st Dept 2011]; *Espinosa v Azure Holdings II*, LP (58 AD3d 287 [1st Dept 2008]).

Here, there are issues of fact as to whether the ceiling was in such an advanced state of disrepair due to water damage that plaintiff's work on the bathroom walls exposed him to a foreseeable risk of injury from an elevation-related hazard, the fall of the ceiling, and whether the absence of a type of protective device enumerated under Labor Law § 240(1) was a proximate cause of his injuries. Because the evidence of water stains on the bathroom ceiling could provide constructive notice of a dangerous condition, summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims was also improperly granted.

We reject defendants' contention that plaintiff's affidavit, indicating he had observed water stains prior to the ceiling collapse, was a feigned attempt to avoid his prior deposition testimony. In his deposition testimony, plaintiff

testified that, before the accident, he had not observed any portion of the ceiling damaged or missing. Plaintiff's deposition testimony is not irreconciliable or wholly inconsistent with plaintiff's affidavit submitted in opposition to defendant's motion for summary judgment and in support of plaintiff's motion for summary judgment. There is a difference between damage and stains. Thus, that plaintiff did not notice any breaks or missing pieces in the ceiling does not mean that he did not notice any stains. Nor can we place blame on plaintiff for not answering a question that he was never asked. "Where an affidavit can be reconciled with prior testimony, it cannot be regarded as merely a self-serving allegation calculated to contradict an admission made in the course of previous testimony" (*Kalt v Ritman*, 21 AD3d 321, 323 [1st Dept 2005] [internal quotation marks and citation omitted]).

Finally, we find that the motion court improperly dismissed the Labor Law § 241(6) claim. Defendants failed to show that plaintiff was not engaged in demolition work to trigger Labor Law § 241(6). His task was part of a larger project that included the demolition of interior walls, "which altered 'the structural integrity of the building'" (*Luebke v MBI Group*, 122 AD3d 514, 515 [1st Dept 2014]; *see Perillo v Lehigh Constr. Group, Inc.*, 17

AD3d 1136 [4th Dept 2005]; Industrial Code § 23-1.4[b][16]). Issues of fact exist as to whether Industrial Code § 23-3.3(b)(3) and (c), pertaining to demolition, were violated or whether any such violation was a proximate cause of plaintiff's injuries.

In light of the modification reinstating plaintiff's Labor Law claims and common-law negligence claims against defendant Owners Corp., we remand for consideration of Owners Corp.'s motion on its claim for contractual indemnification against 103 Coop.

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11040 The People of the State of New York, Ind. 3339/16
Respondent,

-against-

Celia Dosamantes,
Defendant-Appellant.

_____

Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Kevin B. McGrath, J. at motion; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered April 20, 2018, convicting defendant, after a jury trial, of offering a false instrument for filing in the first degree (31 counts) and attempted grand larceny in the third degree, and sentencing her to an aggregate term of four months of intermittent imprisonment to be served on weekends, 400 hours of community service and five years' probation, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the

jury's credibility determinations. The evidence supports the conclusion that defendant, a candidate for City Council, was personally responsible for the submission of false contribution documents to the Campaign Finance Board, with knowledge of their falsity and with the intent to obtain matching funds to which she was not entitled. Defendant's particular challenge to the sufficiency of the evidence supporting seven counts of offering a false instrument for filing in the first degree is unavailing. While the donors involved in the other counts testified to the falsity of the documents with regard to their purported contributions to defendant's campaign, the seven donors at issue did not testify. Nevertheless, the People established the falsity of these documents through extensive circumstantial evidence, including proof that submission of these documents was part of the same pattern of conduct that was involved in the 22 instances where falsity was proven by direct testimony (*see e.g. People v McCants*, 194 AD2d 301, 302 [1st Dept 1993], *lv denied* 82 NY2d 722 [1993]).

The motion court properly denied, as untimely (*see* CPL 255.20[1], 710.40[1]), defendant's third motion to suppress, in which she sought to challenge an additional seizure not addressed in her earlier motions. Defendant did not demonstrate that she

lacked a reasonable opportunity to make the motion earlier, or any other good cause for the delay (*see People v Mason*, 157 AD3d 439, 440 [1st Dept 2018], *lv denied* 31 NY3d 985 [2018]). Because defendant was undisputedly present at a compliance interview when an auditor acquired a folder, defendant would know whether it was taken without a warrant or consent, regardless of whether the grand jury minutes, allegedly received later, revealed that they were taken in that manner. Thus, "[f]rom the inception of the case, defendant could have provided [her] attorney with sufficient information to raise this issue in a timely fashion" (*People v Glover*, 66 AD3d 532, 533 [1st Dept 2009], *lv denied* 14 NY3d 800 [2010]).

Defendant did not preserve any of her arguments regarding evidentiary matters and the People's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that to the extent there were any improprieties,

they did not deprive defendant of a fair trial, and any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11042 In re Reginald McM., Dkt. O-13338/18
Petitioner-Appellant,

-against-

Marilyn M.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Douglas H. Reiniger, New York, for respondent.

_____

Order, Family Court, Bronx County (Tamara Schwarzman, Referee), entered on or about March 5, 2019, which, after a hearing, dismissed petitioner father's family offense petition with prejudice, unanimously affirmed, without costs.

The father failed to establish by a preponderance of the evidence that the mother committed the family offenses of harassment in the second degree and menacing in the third degree (Penal Law § 240.26; § 120.15; Family Ct Act § 832). The father failed to present any corroborating evidence to support his allegations against the mother. There exists no basis to disturb

the credibility determinations of the Referee, who was fully familiar with the parties (*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 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11043 Mario Ayars, Index 158178/17
Plaintiff-Respondent,

-against-

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

George Washington Bridge Bus Station
Development Venture LLC, et al.,
Defendants.

- - - - -

New York State Trial Lawyers' Association,
New York State AFL-CIO, and New York
State Committee for Occupational Safety
and Health,
Amici Curiae.

_____

The Port Authority of New York and New Jersey Law Department, New York (Allen F. Acosta of counsel), for appellant.

The Perecman Firm, P.L.L.C., New York (Peter D. Rigelhaupt of counsel), for respondent.

Pollack, Pollack Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for New York State Trial Lawyers' Association, amicus curiae.

Colleran, O'Hara & Mills LLP, Woodbury (Michael D. Bosso of counsel), for New York State AFL-CIO, amicus curiae.

Charlene Obernauer, New York (Suzanne Y. Mattei of counsel), for New York State Committee for Occupational Safety and Health, amicus curiae.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered June 26, 2018, which denied the motion of defendant

Port Authority of New York and New Jersey to dismiss plaintiff's Labor Law §§ 240(1) and 241(6) claims as against it, unanimously affirmed, without costs.

The court properly rejected the Port Authority's arguments that as a bistate entity created by a federally approved compact (*see Matter of Agesen v Catherwood*, 26 NY2d 521, 524 [1970]), it cannot be held liable under Labor Law §§ 240(1) or 241(6) for the injuries plaintiff sustained while working in a building owned by the Port Authority (*see Rosario v Port Auth. of N.Y. & N.J.*, AD3d , 2020 NY Slip Op 00365 [1st Dept 2020]; *Wortham v Port Auth. of N.Y. & N.J.*, 177 AD3d 481 [1st Dept 2019]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11044- Index 152276/18
11045 Punch Fashion, LLC, et al., Index 651454/18
Plaintiffs-Appellants,

-against-

Merchant Factors Corp.,
Defendant-Respondent.

- - - - -

Merchant Factors Corp.,
Plaintiff-Respondent,

-against-

David Cleary et al.,
Defendants-Appellants.

_____

Cole Schotz P.C., New York (Arnold P. Picinich and Joseph Barbiere of counsel), for appellants.

Hahn & Hessen LLP, New York (Stephen J. Grable of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered October 16, 2018, in index no. 152276/18, dismissing the action, unanimously reversed, on the law, without costs, the judgment vacated, the part of defendant's motion seeking to dismiss the claim for breach of the covenant of good faith and fair dealing (part of the third cause of action) denied, the part of the motion seeking to dismiss the breach of contract claim (the rest of the third cause of action) and the tortious

interference claim (fourth cause of action) granted without prejudice, and it is declared in defendant's favor on the fifth cause of action that the guarantees given by plaintiffs David K. Cleary, John M. Higgins, and Banyan Mezzanine Fund II, L.P. are enforceable. Judgment, same court and Justice, entered December 4, 2018, in index no. 651454/18, against defendants and in plaintiff's favor, unanimously modified, on the law, to vacate so much of the judgment as is against Cleary, to deny plaintiff's motion for summary judgment in lieu of complaint as against him, and to remand the case against him to be converted to a plenary action, and otherwise affirmed, without costs.

The court providently exercised its discretion in sub silentio denying the cross motion to dismiss the action brought by Merchant Factors Corp. pursuant to CPLR 3211(a)(4). Since both cases were before the same Justice, "a major concern" underlying the statute – viz., "to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction" (*White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 93 [1st Dept 1997]) – is not present.

In Merchant's action, defendant Banyan's guarantee, which is an absolute and unconditional guarantee of payment, qualifies as an instrument for the payment of money only under CPLR 3213

(*Cooperatieve Centrale Raffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). However, Cleary's guarantee, which is a guarantee of both payment and performance, does not (*see PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494 [1st Dept 2017]; *Dresdner Bank AG. [N.Y. Branch] v Morse/Diesel, Inc.*, 115 AD2d 64, 67-68 [1st Dept 1986]). Therefore, we vacate the judgment as against Cleary, deny Merchant's CPLR 3213 motion as against him, and remand the case against him to be converted to a plenary action (*see PDL*, 147 AD3d at 494).

Defendants' other arguments in opposition to Merchant's CPLR 3213 motion are unavailing. The fact that one must look at the factoring agreement between Merchant and Punch Fashion, LLC to determine the amount of the guarantees does not preclude the use of CPLR 3213 (*see Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737, 737 [1st Dept 1983], *appeal dismissed* 61 NY2d 760 [1984]; *Boland v Indah Kiat Fin. [IV] Mauritius*, 291 AD2d 342, 342-343 [1st Dept 2002]). Similarly, the fact that one must look at Merchant's books and records to determine the amount of Obligations under the factoring agreement does not bar the use of CPLR 3213 (*see European Am. Bank v Cohen*, 183 AD2d 453 [1st Dept 1992]). Both guarantees say that Merchant's books and records

"shall be admissible as prima facie evidence of the Obligations." Finally, the affidavit submitted by Merchant does not take this case outside CPLR 3213 (*see Manufacturers Hanover*, 95 AD2d at 738).

Defendants in Merchant's case and three of the plaintiffs in the case against Merchant (Cleary, Banyan, and Higgins) contend that their guarantees are void because they were given under duress. However, since all of the guarantees are absolute and unconditional, the guarantors may not raise the defense of duress (*see Cooperatieve*, 25 NY3d at 493-494). In any event, Merchant's alleged threat to stop funding Punch was not a *wrongful* threat, as required for duress (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]).

Defendants in Merchant's case contend that there are triable issues of fact as to whether the amount sought by Merchant included improper chargebacks (see *Garden State Yarn Corp. v Rosenthal & Rosenthal*, 99 AD2d 721 [1st Dept 1984]) and should be offset by defendants' damages and inventory under Merchant's control. Defendants' absolute and unconditional guarantees preclude such defenses (*see Cooperatieve*, 25 NY3d at 493-494).

In the case against Merchant, the court correctly dismissed the first cause of action (for fraud in inducing Punch's purchase

of nonparty JJamz, Inc.). The allegation that Merchant misrepresented that it would provide a credit facility to Punch upon the same terms and conditions as previously extended to JJamz fails to state a fraud claim because the documentary evidence (the factoring agreements) shows that Merchant actually gave Punch *better* terms than it gave JJamz. The allegation that Merchant misrepresented that it would not require a guarantee from Cleary sufficiently states "a promise ... made with a preconceived and undisclosed intention of not performing it" (*Sabo v Delman*, 3 NY2d 155, 160 [1957]; *see also e.g. Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). However, rather than seek to rescind the contract and tender back what they received, plaintiffs are trying impermissibly to "affirm the transaction by continuing to perform, keep the property and also recover the costs of acquiring and maintaining it" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 56-57 [1st Dept 2013]). There is no indication that Punch ever repudiated the contract by which it acquired JJamz. Yet Punch seeks the consideration it gave to acquire JJamz, and Cleary seeks the funds he infused into JJamz to sustain its operations.

For similar reasons, the dismissal of the second cause of

action (fraud in inducing Punch's purchase of nonparty New Life Accessories, Inc. [NLA]) was also correct (*see id.*). In addition, the second cause of action fails for lack of reasonable reliance (*see e.g. Unique Goals Intl., Ltd. v Finskiy*, 178 AD3d 626 [1st Dept 2019]). Contrary to plaintiffs' contention on appeal, the amended complaint does not allege that Merchant had particular knowledge of NLA's inventory. Finally, unlike the plaintiffs in *DDJ Mgt., LLC v Rhone Group L.L.C.* (15 NY3d 147, 156 [2010]), Punch did not obtain a representation and warranty about the allegedly misrepresented matter in its contract.

The court correctly dismissed so much of the third cause of action as alleges that Merchant breached the factoring agreement by misclassifying receivables as disputed and then charging them back to Punch's account. Punch failed to object to the monthly account statements within 30 days, as required by the agreement (*see Silvermark Corp. v Rosenthal & Rosenthal Inc.*, 18 Misc 3d 1124[A], 2008 NY Slip Op 50196[U], *3 [Sup Ct, NY County 2008]). Although Punch contends on appeal that Merchant made it impossible for Punch to object within 30 days, the amended complaint does not allege this.

So much of the third cause of action as alleges that Merchant breached the covenant of good faith and fair dealing

implied in the factoring agreement states a cause of action (*see Silvermark*, 2008 NY Slip Op 50196[U] at *3-4). Since we have dismissed the part of the third cause of action that alleges breach of contract, the portion of the third cause of action that alleges breach of the implied covenant cannot be dismissed as duplicative (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 [1st Dept 2003]).

The court correctly dismissed the fourth cause of action (for tortious interference with Punch's contract with nonparty Luanne Trovato) for failure to adequately allege but-for causation (*see Meer Enters., LLC v Kocak*, 173 AD3d 629, 630-631 [1st Dept 2019]).

The fifth cause of action seeks a declaration that Cleary's, Higgins's, and Banyan's guarantees are void due to economic duress. As discussed, the guarantors cannot succeed on this argument; hence, this cause of action was correctly dismissed.

We modify only to declare in Merchant's favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11046 Carmen Vizcaino, Index 24866/17E
Plaintiff-Respondent,

-against-

Park Lane Mosholu, LLC, et al.,
Defendants-Appellants,

The City of New York,
Defendant-Respondent.

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Laurie A. Tascione of counsel), for appellants.

Peña & Kahn, PLLC, Bronx (Eric J. Gottfried of counsel), for Carmen Vizcaino, respondent.

Georgia M. Pestana, Acting Corporation Counsel, New York (Janet L. Zaleon of counsel), for The City of New York, respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about December 12, 2018, which denied the motion of defendants Park Lane Mosholu, LLC and Rettner Building Management Corp. for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants failed to make a prima facie showing that the defect that caused plaintiff's fall was located entirely within the curb (*e.g. Rojas v Empire City Subway Co. Ltd.*, 173 AD3d 626 [1st Dept 2019]; *Rios Cruz v Mall Props., Inc.*, 145 AD3d 463 [1st Dept 2016]; *Yousef v Kyong Jae Lee*, 103 AD3d 542 [1st Dept

2013]). Plaintiff's nonspecific testimony and the circles she placed on the photograph of the premises establish that the defect may have extended onto the sidewalk. The remainder of the motion for summary judgment was premature because defendants had not been deposed and they are exclusively in possession of essential facts concerning notice and creation of the hole (*see Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624 [1st Dept 2013]; CPLR 3212[f]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11047 The People of the State of New York, Ind. 4048/13
Respondent,

-against-

Elsie Montanez,
Defendant-Appellant.

_____

Janet Sabel, New York (Lorca Morello of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered August 4, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fifth degree and criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing her to a conditional discharge for a period of one year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations, including its rejection of defendant's explanation for her possession of prerecorded buy money and a package of drugs that matched the package that another person sold to an undercover officer, immediately after the other person interacted with defendant.

The evidence supports the conclusion that defendant was a participant in the drug transaction, whose role was to hold the drugs to be sold and the money received (*see generally People v Bello*, 92 NY2d 523 [1998]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11048 47 East 34th Street (NY), L.P., Index 653320/15
Plaintiff-Respondent,

-against-

Bridgestreet Corporate Housing, LLC,
Defendant-Appellant.

_____

Fox Rothschild LLP, New York (Mitchell Berns of counsel), for appellant.

Ressler & Ressler, New York (Ellen Werther of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered July 12, 2019, which, to the extent appealed from as limited by the briefs, denied defendant's motion for partial summary judgment and granted plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

The unambiguous language of the lease between the parties required defendant to operate the building in compliance with the Real Property Tax Law § 421-a abatement program, and defendant admittedly failed to do so. Indeed, defendant concedes that it violated section 8.2 of the lease by failing to offer subleases for the apartments with at least six month terms, but instead argues that because it could have offered "cancelable" six-month leases, plaintiff has no damages because such use would have

violated the 421-a program requirements in any event. As the motion court determined, however, 28 RCNY § 6-01(c) dictates the term of the lease, not the duration of occupancy. The motion court properly determined that the term was unambiguous and precluded extrinsic evidence based on the merger clause in the lease (*see Gladstein v Martorella*, 71 AD3d 427, 429 [1st Dept 2010]).

The motion court also properly determined that section 30.1 of the lease required defendant to indemnify plaintiff for "any and all losses" suffered as a result of defendant's default, and the damages arising from the Attorney General's investigation fell under that provision. Contrary to defendant's contention, section 30.1 did not contain a notice provision, and plaintiff was not required to permit defendant to participate in the Attorney General's investigation under section 30.2, particularly given that there was no question as to liability or the measure of the damages (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group, Inc.*, 309 AD2d 657 [1st Dept 2003]).

The motion court providently declined to consider the facts relating to the reduction of damages submitted by defendant for the first time on reply (*Residential Bd. of Mgrs. of Platinum v 46th St. Dev., LLC*, 154 AD3d 422, 423 [1st Dept 2017]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11049 The People of the State of New York, Ind. 3006/14
Respondent,

-against-

Rondell Baker,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Emma L. Shreefter of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William I. Mogulescu, J.), rendered August 7, 2017,

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

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

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

ENTERED: FEBRUARY 18, 2020

CLERK

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

Acosta, P.J., Kapnick, Moulton, González, JJ.

11050 Tania Ventura Perez, Administrator of the Estate of Ramona Antonia Perez, Plaintiff-Appellant, Index 450552/16

-against-

139 Medical Facility, P.C., et al., Defendants-Respondents,

Jee Sook Lee, M.D., et al., Defendants.

_____

Mitchell D. Kessler, New York, for appellant.

Gerspach & Sikoscow, LLP, New York (Alexander Sikoscow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 5, 2019, which, to the extent appealed from as limited by the briefs, granted the motion of defendants 139 Medical Facility, P.C., Muhammad Haque Jr., M.D. and Muhammad Mishbah-Ul Haque, M.D. (defendants) for summary judgment dismissing certain claims as against them, unanimously modified, on the law, to deny the motion as to the claims related to defendants' failure to perform a chest X ray prior to October 2012, and otherwise affirmed, without costs.

Defendants made a prima facie showing that they did not depart from accepted medical practice by failing to perform

diagnostic scans based on decedent's presenting symptoms. In opposition, plaintiff's expert raised an issue of fact (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Plaintiff's expert asserted that defendants' failure to order a diagnostic work-up prior to October 2012, including at minimum a chest X ray, constituted a deviation from the standard of care, in view of decedent's clinical picture, including her apparent non-responsiveness to asthma medication, her status as a smoker, her age, the development of a bad cough that may have subsequently been masked by medication, and the change in the character of her headaches. Plaintiff's expert further opined that, had decedent been given a chest X ray prior to October 2012, the lung cancer would have been discovered before it entered Stage IV, and, thus, she would have had a greater chance of survival. Contrary to defendants' contention, plaintiff's expert affirmation contained adequately detailed assertions that were sufficient to defeat summary judgment, "since they were predicated on specific factual evidence, and were not merely

speculation" (*McManus v Lipton*, 107 AD3d 463, 464 [1st Dept 2013]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, Gonzàlez, JJ.

11051 Michael Broderick, et al., Index 302512/12
Plaintiffs-Respondents,

-against-

Edgewater Park Owners Cooperative, Inc.,
Defendant-Appellant,

Edgewater Park Athletic Assoc.,
Inc., et al.,
Defendants.

_____

London Fischer LLP, New York (Brian A. Kalman of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 11, 2019, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Edgewater Park Owners Cooperative, Inc. (EPOC) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff was injured when he fell from the second-story roof deck of EPOC's building, which had a low parapet wall in front. Although plaintiff could not recall exactly how he fell, the record contains circumstantial evidence from which the negligence of EPOC and proximate causation of the accident may be

reasonably inferred (*see e.g. Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 149 [1st Dept 2017]). The court properly concluded that there are triable issues of fact concerning whether EPOC was negligent because the parapet wall did not comply with applicable building codes, and EPOC failed to increase the height of the parapet wall, even after a prior accident. Plaintiff's testimony as to where he was standing immediately prior to the accident, the location of his body after the fall, and the affidavits of his experts were sufficient to provide a jury with reasonable grounds to infer that he may have tripped or fallen over the insufficiently high parapet wall.

Furthermore, the court correctly concluded that the issue of whether plaintiff's conduct was a superseding cause of the accident was best left to a trier of fact (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314-315 [1980]).

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

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11053 The People of the State of New York, Respondent, Ind. 2344N/11 3493N/11

-against-

Salvador Fernandez, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about October 18, 2018, which denied defendant's CPL 440.10 motion to vacate a judgment rendered February 16, 2014, unanimously affirmed.

The court properly denied defendant's motion to vacate judgment, made on the ground of ineffective assistance of trial counsel, without granting a hearing. Defendant's motion contained no additional factual allegations beyond the existing record on direct appeal, including the undisputed fact that trial counsel did not raise several possible suppression issues. On that appeal, this Court found that "the existing record [was] insufficient to establish that any of counsel's alleged deficiencies in handling potential suppression issues was a

product of his misunderstanding of the law" (158 AD3d 462, 463 [1st Dept 2018], *lv denied* 31 NY3d 1081 [2018]).

The CPL 440 motion was supported by an affirmation from appellate counsel citing trial counsel's alleged deficiencies regarding suppression issues. However, appellate counsel offered neither personal knowledge nor information and belief that would shed any new light on the critical issue of whether trial counsel's omissions resulted from his misunderstanding of the law, or whether they instead resulted from a reasonable belief that raising the additional suppression issues would be futile or undesirable. While we understand that appellate counsel made diligent efforts to obtain this information, defendant remains in the same position he was in on the direct appeal, that is, he is unable to "demonstrate the *absence* of strategic or other legitimate explanations," and "[a]bsent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment" (*People v Rivera*, 71 NY2d 705, 709 [1988][emphasis added]). In particular, trial counsel may

have reasonably concluded that he had no nonfrivolous basis to contest the voluntariness of defendant's statements or his consent to a search of his apartment (*see People v Carver*, 27 NY3d 418, 420-421 [2016]; *People v Gray*, 27 NY3d 78, 82 [2016]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11054-
11054A Sabby Healthcare Master Fund Ltd., et al., Plaintiffs-Respondents,

-against-

Microbot Medical Inc., Defendant-Appellant.

Index 654581/17

_____

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., New York (John F. Sylvia of counsel), for appellant.

Olshan Frome Wolosky LLP, New York (Peter M. Sartorius of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered March 11, 2019, which, upon a nonjury trial, granted judgment to plaintiffs on the complaint's first cause of action seeking rescission of a securities purchase agreement (the SPA) between the parties, dated June 5, 2017, and directed defendant to remit to plaintiffs $3,375,000 upon delivery by plaintiffs of 83,333 shares of defendant's common stock, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 28, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial record indicates that plaintiffs, two affiliated private investment funds, rapidly negotiated the SPA essentially

over the course of a single day, Sunday, June 4, 2017. The material terms called for plaintiffs to purchase 1,250,000 shares of defendant's common stock (now equivalent to 83,333 shares, subsequent to a 15-to-1 reverse stock split), at $2.70 per share, for a total of $3,375,000. Defendant's disclosures indicated that one of its stockholders, Alpha Capital Anstalt, held a dominant position in the company, holding preferred shares which were convertible to about 30% of total common stock. Alpha also had a very low basis in its shares of defendant's stock of no more than 64 cents per share (which had closed at $3.81 on June 2, 2017, the last trading day before the transaction at issue). Alpha's low basis gave it a strong incentive to monetize its shares, particularly since volume and price had spiked that week in response to a favorable press release. Defendant's disclosures also indicated that Alpha was an affiliate.

Plaintiffs' CEO thus testified that Alpha's status as an affiliate was not merely "material," it was "everything." As an affiliate, Alpha's ability to sell its shares would be severely restricted under SEC rules. If Alpha were not an affiliate, then it could rapidly sell shares, adversely impacting the stock price. The trial court credited the CEO's testimony, which was consistent with the documentary evidence, in the form of the

disclosures and emails exchanged between plaintiffs and defendant's agent (*see PSKW, LLC v McKesson Specialty Ariz., Inc.*, 159 AD3d 599 [1st Dept 2018]; *Hardwick v State of New York*, 90 AD3d 540 [1st Dept 2011]). The trial court, therefore, properly found defendant's misrepresentation that Alpha was an affiliate to be "material" to the transaction (*see Helprin v Harcourt, Inc.*, 277 F Supp 2d 327, 339 [SD NY 2003), for purposes of establishing plaintiffs' claim for rescission (*see Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984]; *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]).

It is true that the trial record also indicates that Alpha was subject to a "blocker," preventing it from holding more than 9.9% of defendant's outstanding common stock. This does not render Alpha's affiliate status immaterial, however; if Alpha were not an affiliate, the sale of shares amounting to 9.9% of the company's shares would obviously have a substantial downward impact on the stock price.

Defendant's misrepresentation was also substantial in that it "strongly tend[ed] to defeat the object of the parties in making the contract" (*Callanan*, 199 NY at 284). Plaintiffs' CEO testified that their goal in entering into the transaction was to

arbitrage the difference between their discounted $2.70 purchase price and the last closing price of $3.81 per share. If defendant's largest shareholder, which had also acquired its shares for less than a fifth of the latest price, had the ability (and the incentive) to rapidly monetize its position, this would pose a significant potential for impacting plaintiffs' plans. We accordingly find that the trial court properly granted rescission of the contract.

Nor do plaintiffs have any adequate remedy at law. Indeed, a "defrauded party to a contract may elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud" (*Big Apple Car, Inc. v City of New York*, 204 AD2d 109, 110-111 [1st Dept 1994]; *accord J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 507-508 [1st Dept 2015]). Plaintiffs here acted diligently, and elected to demand rescission immediately upon discovering the misrepresentation, which happened less than a week after closing (*see Clearview Concrete Prods. Corp. v S. Charles Gherardi Inc.*, 88 AD2d 461, 466-467 [2d Dept 1982]). Defendant, acting in what can fairly be characterized on the trial record as bad faith, refused.

Plaintiffs are further entitled to affirmance on the

separate and independent ground of fraudulent inducement (*see GoSmile, Inc. v Levine*, 81 AD3d 77 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). Defendant falsely represented to plaintiffs that Alpha was an affiliate. Plaintiffs reasonably relied on this representation (which they specifically questioned both by emails and in phone conversations with defendant's agent). While no showing of pecuniary loss is needed to support a claim for fraudulent inducement based on rescission, plaintiffs in fact suffered a loss, as the stock price dropped on the day of the transaction and has never recovered (*see Board of Mgrs. of the Soundings Condominium v Foerster*, 138 AD3d 160, 164 [1st Dept 2016]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11056 Arminda Reynoso, Index 27279/16E
Plaintiff-Appellant,

-against-

Idrissa Tradore,
Defendant-Respondent.

_____

Goldstein & Handwerker, LLP, New York (Jason Levine of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered May 16, 2019, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint due to plaintiff's inability to establish that her claimed cervical spine injury was a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant satisfied her prima facie burden to show that plaintiff did not sustain a serious injury to her cervical spine by submitting the reports of her experts, including a radiologist and orthopedist, who found that plaintiff's own MRI report showed preexisting degenerative changes not causally related to the accident (*see Williams v Laura Livery Corp.*, 176 AD3d 557, 558

[1st Dept 2019]; *Rodriguez v Konate*, 161 AD3d 565, 566 [1st Dept 2018]).

In opposition, plaintiff failed to raise an issue of fact. Her orthopedic surgeon offered only a conclusory opinion of causation, and a physician, who examined her recently, acknowledged generally that plaintiff may or may not have degenerative conditions, but did not address the particular conditions identified in plaintiff's own records, and offered no objective basis for concluding that those conditions were not the cause of the claimed injuries (*see Diakite v PSAJA Corp.*, 173 AD3d 535, 536 [1st Dept 2019]; *Francis v Nelson*, 140 AD3d 467, 468 [1st Dept 2016]; *Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]). Nor did that physician reconcile his findings of limitations in range of motion, with the surgeon's earlier finding of "full" normal range of motion within a month after the

accident (*see Booth v Milstein*, 146 AD3d 652, 653 [1st Dept 2017]; *Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567, 568 [1st Dept 2014]).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11057 The People of the State of New York, Ind. 4491N/15
Respondent,

-against-

Faith Locrotondo,
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 (Katherine KulKarni of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil Ross, J.), rendered May 1, 2017,

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

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

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

ENTERED: FEBRUARY 18, 2020

CLERK

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

Acosta, P.J., Kapnick, Moulton, González, JJ.

11058N Dennis Caserta, Index 157983/15
Plaintiff-Respondent,

-against-

Triborough Bridge and Tunnel Authority,
Defendants-Appellant.

_____

The Law Office of Kenneth Arthur Rigby, PLLC, New York (Kenneth Arthur Rigby of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered February 26, 2019, which granted defendant's motion for a so-ordered subpoena compelling access to plaintiff's social media accounts only to the extent of directing plaintiff to provide "those items which show or discuss plaintiff attending and/or performing in concerts or playing musical instruments since March 6, 2015," unanimously modified, on the law and the facts, the motion granted without subject matter limitation, and the matter remanded for execution of such subpoenas, and otherwise affirmed, without costs.

The discovery sought by defendants, including photographs, videos, and other social media postings regarding plaintiff's social and recreational activities that might contradict his

claims of disability, is relevant, useful, and reasonable (*see Forman v Henkin*, 30 NY3d 656, 665 [2018]; *Vasquez-Santos v Mathew*, 168 AD3d 587 [1st Dept 2019]). Plaintiff has not specified any items that may be irrelevant or private (*see Forman* at 666-667), has not sought in limine review and has actually agreed to execute an authorization releasing such information. Accordingly, the order directing disclosure only of posts regarding musical events and performances, was unduly restrictive.

We decline to consider plaintiff's argument that defendant's motion was defective pursuant to 22 NYCRR 202.7(c), since plaintiff failed to raise it below (*see Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 829 [2008]; *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 146 AD3d 603 [1st Dept 2017]). In any event, the motion sufficiently satisfied the requirements of 22 NYCRR 202.7(c) (*see Loeb v Assara N.Y. I L.P.*, 118 AD3d 457 [1st Dept 2014]).

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

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

ENTERED: FEBRUARY 18, 2020

CLERK

Acosta, P.J., Kapnick, Moulton, González, JJ.

11059N K.V., an Infant by His Guardian Ad Litem Debra C., et al., Plaintiffs-Respondents, Index 350023/13

-against-

New York City Housing Authority, Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

Gregory J. Cannata & Associates, LLP, New York (Jennifer K. Mathew of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about September 7, 2018, which granted plaintiffs' motion to renew or reargue a prior motion to compel discovery, and, upon reargument, directed defendant to produce its lead paint records for the entire housing development for a period of five years, unanimously modified, on the law and the facts, to limit defendant's disclosure obligation to the three years preceding the infant plaintiff's lead paint diagnosis and to the subject building, and otherwise affirmed, without costs.

The court providently exercised its discretion in granting plaintiffs' motion to reargue (*see* CPLR 2221[d]). Under First Department precedent, as clarified by *Z.D. v MD Mgt.* (150 AD3d

550 [1st Dept 2017]), records pertaining to lead paint in the apartment building as a whole are relevant to the issue of defendant's notice of a lead condition in other parts of the building that may have triggered an independent "obligation to examine" plaintiffs' apartment (*id.* at 551-552 [internal quotation marks omitted]).

However, the scope of the discovery that the court ordered is too broad. In their original demands, plaintiffs did not seek documents pertaining to the entire development, and, in any event, such documents are not material and necessary to establish defendant's notice of lead paint hazards in plaintiffs' apartment. Thus, we limit defendant's obligation to documents in its possession for the three years preceding the infant plaintiff's diagnosis and to plaintiffs' building (*see Z.D.*, 150 AD3d 550).

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

ENTERED: FEBRUARY 18, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10763N In re LEK Securities Corporation, et al., Petitioners-Respondents, Index 653120/19

-against-

Istvan Elek, Respondent-Appellant.

_____

Malecki Law, New York (Jenice L. Malecki of counsel), for appellant.

Tannenbaum Helperin Syracuse & Hirsctritt LLP, New York (Adam M. Felsenstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered on or about June 19, 2019, which granted the petition for a permanent stay of respondent's FINRA arbitration, and denied respondent's cross motion to compel arbitration, reversed, on the law, with costs, the petition denied, and the cross motion granted.

The record establishes that respondent was a customer of nonparty Lek Securities UK, Ltd. (LekUK), where he had his account, and was also a client of petitioner Lek Securities Corp. (LekUS), with which he had a series of direct agreements. Under those agreements, LekUS conditioned its provision of depository and execution services for certain trades on respondent's

providing certain representations and an indemnity (*see Sinclair & Co. LLC v Pursuit Inv. Mgt. LLC*, 74 AD3d 650 [1st Dept 2010]).

Specifically, respondent purchased shares of Cannabis Science, Inc. (CBIS) in a series of transactions in 2015 and 2016 that required that the shares be held and sold in the United States. For each transaction, respondent executed an agreement (Deposit Agreement) directly with LekUS pursuant to which LekUS deposited the shares in its account at the Depository Trust & Clearing Corporation (DTCC). In each Deposit Agreement, (1) respondent represented that his answers to certain questions were true and acknowledged that LekUS would rely on those representations; (2) LekUS agreed to act as the "Processing Broker" to provide the services of depositing and reselling the shares; and (3) LekUS accepted respondent's "Deposit Securities Request" on certain conditions, including that any claims by respondent or disputes arising from respondent's representations in the Deposit Agreement "shall be governed by New York law and subject to the exclusive venue and jurisdiction of the courts and arbitration forums in the City and State of New York," and that respondent would indemnify LekUS in connection with claims arising from respondent's representations in the Deposit Agreement or from "the deposit process or the subsequent sale of

the securities."[1]

When respondent sought to trade the CBIS shares deposited with LekUS, he communicated with Michael Mainwald, who was located at the office of LekUS, had a LekUS phone number and email address, and was registered with FINRA as the "principal operating officer" of LekUS.[2]

By letter dated December 6, 2018, LekUS notified respondent that it had been sued by FINRA in connection with CBIS transactions and that LekUS sought indemnification by defendant pursuant to the Deposit Agreements. LekUS repeated that claim in an email dated January 16, 2019, again citing to the Deposit Agreements.[3]

Under these circumstances, respondent was a "customer" of LekUS within the meaning of FINRA Rule 12200, and was therefore entitled to demand arbitration.

---

[1]Although these documents were headed "Deposit for Securities Request Questionnaires," they include a list of "Terms and Conditions" which imposed obligations on each party and were thus certainly agreements, and were referred to as such by LekUS.

[2]Accordingly, petitioners' claim that Mainwald was exclusively an employee of LekUK is not supported by the record.

[3]Thus, we disagree with our colleague's statement that LekUS did not assert a claim against respondent based on the language in the Deposit Agreements.

Petitioners and our dissenting colleague cite to *Citigroup Global Mkts. Inc. v Abbar* (761 F3d 268 [2d Cir 2014]) in asserting that respondent was not a customer of LekUS and may not, therefore engage in FINRA arbitration with LekUS. However, the facts of this case are distinguishable from the facts in *Abbar*. There, defendants entered into a complex investment vehicle with CitiUK. CitiUK then transferred its voting rights to an affiliate, Citi New York, whose personnel helped structure the transaction, gave investment advice, and performed other tasks related to the investment vehicle pursuant to an agreement between Citi New York and CitiUK. When the fund crashed, defendants sought FINRA arbitration against FINRA member Citi New York. Noting that defendants had investment agreements only with CitiUK, and had no agreements with Citi New York, the Second Circuit found that defendants had neither purchased goods or services from, nor had an account with, Citi New York and thus could not seek FINRA arbitration with Citi New York.

In contrast, here, LekUS performed deposit and resale services for respondent pursuant to the Deposit Agreements between LekUS and respondent. To accomplish this, respondent dealt directly with the principal operating officer of LekUS.

Furthermore, while respondent did not pay fees directly to

LekUS, he was charged a minimum of $25,000 in fees each month by LekUK, and LekUK paid LekUS fees to provide services to respondent. Respondent's LekUK statements list securities processing fees for the CBIS transactions processed by LekUS. Moreover, contrary to petitioners' counsel's unsupported claim that fees paid by LekUK to LekUS were not commissions or volume-based, dependent on specific transactions performed by LekUS, respondent's LekUK statements list different fees charged for each CBIS transaction that appear to be volume-based.[4] Similarly, the dissent's apparent assumption that fees paid by respondent were merely "pass-through" fees charged by the DTCC to LekUS rather than revenue to LekUS is not supported by the record. Accordingly, respondent did pay fees indirectly to LekUS for the services it rendered to him.

Triad Advisors, Inc. v Siev (60 F Supp 3d 395 [ED NY 2014]) is closely on point. In that case, plaintiff FINRA member's employee referred defendants to a real estate venture investment for which the employee received a referral fee from the venture. When the investment went badly, defendants commenced FINRA

[4]Indeed, petitioners' counsel admitted at oral argument before Supreme Court with regard to fees paid by LekUK to LekUS, "I don't know if it's a flat fee, honestly. . . ."

arbitration against plaintiff, and plaintiff sought to stay the arbitration. The court denied plaintiff's request, finding that defendants were customers of plaintiff, despite the fact that plaintiff's employee was paid indirectly through a third party rather than directly by defendants. In so holding, the court noted that the source of the compensation is immaterial. "It either comes directly from the customer or indirectly through the third party. . . but in either situation, it is the customer that pays it. . . ." (*id.* at 398; *see also Abbar*, 761 F3d 268, n 5 [noting that FINRA Regulatory Notice 12-55 defines "customer" as one who purchases a security for which the broker-dealer receives compensation "directly or indirectly"]). Applying that reasoning here, we find that respondent purchased services from LekUS, even though LekUS received direct payment for its services from LekUK.

All concur except Kern, J. who dissents in a memorandum as follows:

KERN, J. (dissenting)

The motion court properly stayed the FINRA arbitration. The parties did not have an agreement to arbitrate and respondent was not a customer of LekUS, a FINRA member. Therefore, I respectfully dissent.

Respondent is the former Consul General of Hungary to Monaco and is a resident of Monaco. Petitioner Lek Securities Corporation (LekUS) is a New York-based broker/dealer and member of FINRA. LekUS's parent is nonparty Lek Holdings Limited, which is owned by petitioner Samuel Lek.

In July 2014, respondent opened a securities account with nonparty Lek Securities UK, Ltd. (LekUK), a London-based broker/dealer, registered with and governed by the Financial Services Authority of the United Kingdom. LekUK is also owned by Lek Holdings Limited. Respondent opened this account pursuant to a written customer agreement with LekUK, which provides for jurisdiction of disputes in England and Wales. The agreement also provides that respondent will indemnify LekUK in the event the representations made in the agreement are false and lead to the assertion of claims against LekUK.

In 2015 and 2016, began to trade, through his LekUK securities account, in the shares of a microcap company, Cannabis

Sciences, Inc. (CBIS). Respondent's trading involved restricted shares of CBIS. He entered into special liquidating transactions with the original shareholders in order to attempt to comply with the restrictions on the shares. In each instance, he obtained an opinion of counsel that the transaction complied with SEC Rule 144A, regarding the permissible trading in restricted shares.

The CBIS shares transactions in which respondent engaged provided that the shares would be held and liquidated in the United States. Thus, while respondent traded through his LekUK account, LekUK had to deposit the shares in the United States. LekUK deposited the shares with its affiliate, LekUS. LekUS then held and liquidated the shares at respondent's direction. Respondent traded 139,000,000 shares of CBIS in a series of transactions throughout 2015 and 2016. For each transaction, respondent provided LekUS opinion of counsel that the transaction complied with Rule 144A and also entered into a questionnaire/shareholder agreement with LekUS. In each questionnaire/shareholder agreement, respondent made numerous representations about himself and his trading. The questionnaire/shareholder agreements also contained an indemnification provision which stated that, should the statements made by respondent turn out to be false, or if any

claim or investigation is brought against LekUS relating to the "deposit process or subsequent sale of the securities," respondent must indemnify LekUS.

LekUS deals with LekUK via a Business Services Agreement (BSA) pursuant to which LekUS maintains a bulk account for all securities held for LekUK, including LekUK customers' securities that are in the United States. The BSA provides that LekUK will indemnify LekUS should any conduct of a LekUK customer cause LekUS to be in violation of the securities laws or regulations. LekUS uses the Depository Trust & Clearing Company (DTCC) to hold the shares. Pursuant to the BSA between LekUK and LekUS, LekUS charged LekUK a fixed fee for its services, which was not based on total volume of services performed and no additional fees were charged by LekUS to LekUK for the specific services provided to respondent. LekUS did not charge respondent fees for the deposit and liquidation services it performed. Respondent was only charged fees by LekUK pursuant to their customer agreement.

In November 2018, FINRA brought suit against LekUS for failure to supervise in relation to a number of transactions related to the stock of CBIS, which included the transactions made by respondent during 2015 and 2016. The allegations in the FINRA action included that LekUS had failed to consider the money

laundering aspects of certain types of transactions, had failed to verify compliance with Rule 144A and had failed to check on the relevant holding period on the restricted shares.

Pursuant to the indemnification provision of the BSA, LekUS asserted a claim against LekUK for indemnification for any fees or losses arising from the FINRA action. In response, pursuant to its customer agreement with respondent, LekUK froze respondent's account, preventing him from withdrawing his funds or securities.

Instead of proceeding under his customer agreement with LekUK and commencing an action against LekUK in England or Wales to challenge its freezing of his account, respondent commenced an arbitration with FINRA against LekUS, Samuel Lek and his son, Charles Lek, as control persons of LekUS. Respondent's statement of claim sought, inter alia, compensatory damages in an amount not less than $500,000 plus punitive damages and attorney's fees on the theory that LekUS improperly froze and deducted fees from respondent's account.

Thereafter, petitioners commenced this proceeding, pursuant to CPLR 7503(b) and the Federal Arbitration Act (9 USC § 1 *et seq.*), seeking to stay the FINRA arbitration, and respondent cross-petitioned to compel arbitration. The motion court granted

petitioners' motion to stay the arbitration and denied respondent's cross motion to compel arbitration on the ground that LekUS could not be compelled to arbitrate because the parties had no agreement to arbitrate and because respondent was not a customer of LekUS. I agree and would affirm the motion court's order.

Pursuant to the FINRA Code, FINRA members must submit to arbitration of a dispute if arbitration under the Code is either required by a written agreement or requested by the customer, the dispute is between a customer and a member or associated person of a member and the dispute arises in connection with the business activities of the member or the associated person (*see* FINRA Rule 12200). Since LekUS is a FINRA member and there is undisputedly no written agreement to arbitrate, LekUS can only be compelled to arbitrate if respondent was a "customer" of LekUS.

The FINRA Code does not define "customer" except to say that a "customer shall not include a broker or dealer" (FINRA Rule 12100[k]). Both LekUS and respondent cite to and apply to the facts of this case the definition of "customer" as set forth by the Second Circuit in *Citigroup Global Mkts. Inc. v Abbar*, 761 F3d 268 (2d Cir 2014). In *Abbar*, the Second Circuit held that "a 'customer' under FINRA Rule 12200 is one who, while not a broker

or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member" (*Abbar*, 761 F3d at 275).

Abbar is instructive as it is directly on point with the facts of this case. In *Abbar*, the defendants entered into a complex investment vehicle with CitiUK. The defendants invested approximately $200 million into the vehicle as a "reference fund" and CitiUK invested approximately $300 million. While CitiUK owned the reference funds, they were managed by defendants with oversight from New York by CitiUK's affiliate, CitiNY. CitiUK also transferred its voting rights to CitiNY. Personnel at CitiNY helped structure the investment transaction, gave investment advice and performed other tasks related to the reference fund and defendants were regularly in contact with the CitiNY personnel who were located in New York. When the fund crashed, the defendants sought FINRA arbitration against CitiNY, a FINRA member. Faced with the question, as we are here, of whether the defendants were "customers" of CitiNY, the district court permanently enjoined the arbitration on the ground that defendants were not customers of CitiNY but rather only customers of CitiUK, where they had their account. The Second Circuit affirmed on the grounds that defendants "never held an account

with the FINRA member and (notwithstanding [their] argument to the contrary) never purchased any goods or services from it" (*Abbar*, 761 F3d at 276). Although the court found that "CitiNY employees certainly provided services to [defendants]..., [they] did not purchase those services from CitiNY. [The] investment agreements were with CitiUK and the fee for all services rendered by Citigroup personnel and offices was paid to CitiUK" (*Abbar*, 761 F3d at 275).

Applying to the facts of this case the definition of "customer" as set forth in *Abbar*, I find that respondent was not a customer of LekUS and therefore, LekUS cannot be compelled to arbitrate. Initially, as in *Abbar*, there is no dispute that respondent did not have an account with LekUS. Respondent opened and maintained an account only with LekUK. Further, as in *Abbar*, there is no evidence that respondent purchased goods or services from LekUS, either directly or indirectly. Rather, the record indicates that the deposit and liquidation services performed by LekUS were performed on behalf, and at the behest, of LekUK and that LekUS was compensated for its services only by LekUK pursuant to the BSA. There is no evidence that respondent paid any fees directly to LekUS for the services it provided. There is also no evidence that any of the fees paid by LekUK to LekUS

in exchange for providing its services were paid by respondent. Indeed, the record establishes that the fees paid to LekUS by LekUK were paid irrespective of whether the services were used, who used such services or LekUS's trading volume. Further, as the Court held in *Abbar*, the fact that LekUS and its personnel provided services for respondent at the request of LekUK is not evidence that respondent *purchased* such services from LekUS.

Respondent is seeking to compel LekUS to arbitrate merely to avoid the jurisdictional requirements of his customer agreement with LekUK that he litigate his disputes in England and Wales. Respondent commenced the arbitration at issue solely to challenge the freezing of his securities account. However, it was LekUK, and not LekUS, which froze respondent's account.

Respondent's assertion that the questionnaire/shareholder agreements he entered into with LekUS are evidence that he purchased services from LekUS, thereby making him a "customer" under the FINRA Code, is unavailing. Before selling unregistered shares for LekUK, LekUS had to conduct a searching inquiry to determine if the shares could be sold pursuant to a valid exemption from registration. To accomplish that goal, LekUS asked respondent to fill out and sign the questionnaire/shareholder agreements, which respondent filled out

and signed and returned to LekUK, which, in turn, forwarded the signed questionnaire/shareholder agreements to LekUS. However, the questionnaire/shareholder agreements do not include any terms of purchase of any goods or services and they do not state that respondent is purchasing any goods or services. The agreements provide that "in consideration of [LekUS] accepting this Deposit Securities Request," respondent would, inter alia, indemnify LekUS from any loss or claim arising out of respondent's representations in the questionnaire, the deposit process or the subsequent sale of securities. Notably, LekUS has not asserted any indemnification claim against respondent based on the language in the questionnaire/shareholder agreements. Rather, LekUS only asserted indemnification claims against LekUK arising from the BSA between LekUS and LekUK, to which respondent is not a party.

Respondent's assertion that the "pass-through" fees he was charged by LekUK for trading in CBIS securities are evidence that he purchased services from LekUS, thereby making him a "customer" under the FINRA Code, is also unavailing. The pass-through fees relied upon by respondent were charged to LekUS by the DTCC for holding the securities. LekUS then passed such fees on to LekUK, which in turn, passed them on to respondent. However, such fees

do not constitute revenue for LekUS, which did not charge respondent any fees at all. Moreover, these fees are charged to respondent by LekUK in accordance with their customer agreement and they appear on respondent's LekUK account statement.

Respondent's assertion that petitioners are estopped from arguing that he was not a customer is unavailing as he fails to allege, nor could he, that he was fraudulently induced into opening an account with LekUK (*see Oppenheimer v Neidhardt*, 56 F3d 352, 357 [2d Cir 1995]).

Respondent's contention that the FINRA arbitration should not be stayed on the ground that a stay violates the important public policy favoring arbitration is also without merit. Although the policy favoring arbitration requires that ambiguities as to the scope of arbitrability be resolved in favor of arbitration, the same policy does not apply to determinations of whether there is an agreement to arbitrate in the first instance (*see Abbar*, 761 F3d at 274).

Based on the foregoing, I respectfully dissent and would affirm the decision of the motion court.

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

ENTERED: FEBRUARY 18, 2020

CLERK

Friedman, J.P., Renwick, Kern, Oing, JJ.

10996 In re Gronich & Company, Inc., Index 653263/16
Petitioner-Appellant,

-against-

Simon Property Group, Inc., et al.,
Respondents-Respondents.

_____

Lionel A. Barasch, New York, for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Allan J. Arffa of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered April 16, 2019, dismissing the petition brought pursuant to CPLR 5225(b), unanimously affirmed, without costs.

Petitioner judgment creditor seeks to enforce its judgment against the alleged successor corporation (and affiliates) of the judgment debtor, respondent Longstreet Associates L.P. The motion court dismissed the petition on the ground that it lacked personal jurisdiction over respondents because petitioner failed to show that there was a substantial relationship between the merger involving Longstreet and petitioner's claims under CPLR 5225(b) (*see* CPLR 302[a][1]; *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). We affirm the dismissal on other grounds.

Petitioner established jurisdiction over respondent C1

Delaware as it demonstrated a substantial relationship between the merger and its claims by virtue of C1 Delaware's status as successor by merger of the company that received a transfer of assets from Longstreet (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 2015 WL 6471938, *6 [Sup Ct, NY County 2015], *mod on other grounds* 150 AD3d 490 [1st Dept 2017]). Contrary to respondents' contention, the mere fact that the parent company that received the subsidiaries' assets had agreed, pursuant to the merger agreement, to pass them through to shareholders as a dividend does not demonstrate that the parent lacked control or dominion over the assets (*cf. Bonded Fin. Servs., Inc. v European Am. Bank*, 838 F2d 890, 892 [7th Cir 1988] [distinguishing between transferee or "mere conduit" of funds]). Rather, it freely chose to structure the merger in that way. Moreover, given that a successor by merger inherits the liabilities of its constituent companies, there is no reason that a judgment creditor should not be permitted to commence a special proceeding pursuant to CPLR 5225(b) to enforce a judgment against such a successor by merger (*see Mitchell v Lyons Professional Servs., Inc.*, 727 F Supp 2d 120, 123 [ED NY 2010]). Respondents' argument that jurisdictional contacts are not imputed to a successor by merger is misplaced. It is where the "successor" has merely acquired

the assets of the predecessor company that the contacts are not imputed (*see U.S. Bank N.A. v Bank of Am. N.A.*, 916 F3d 143, 156–58 [2d Cir 2019]).

Nevertheless, the petition must be dismissed, because petitioner failed to establish that its rights to the assets are "superior to those of the transferee" (CPLR 5225[b]). Petitioner sought to establish a fraudulent conveyance under Debtor and Creditor Law § 277. Given that there was no consideration for the transfer, there arose a rebuttable presumption of insolvency (*see McCarthy v Estate of McCarthy*, 145 F Supp 3d 278, 286 [SD NY 2015]). However, respondents rebutted the presumption by showing that all debts of the debtor existing at the time of the merger were satisfied. The one exception was the contingent liability to petitioner under its commission agreement with Longstreet. As liability turned on whether a tenant would renew its lease 13 years later, it was too contingent to establish insolvency (*see Staten Is. Sav. Bank v Reddington*, 260 AD2d 365, 366 [2d Dept 1999]).

The court correctly dismissed the petition as against Longstreet. Joinder of the debtor in a CPLR 5225(b) proceeding

is permissive (*see Matter of Centerpointe Corporate Park Partnership 350 v MONY*, 96 AD3d 1401 [4th Dept 2012], *lv dismissed* 19 NY3d 1097 [2012]). There is simply no reason for it to be in this proceeding.

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

ENTERED: FEBRUARY 18, 2020

CLERK