Friedman, J.P., Renwick, Manzanet-Daniels, Singh, González, JJ.

10939-
10940-
10940A

Index 652375/11
652369/12

Al Rushaid Parker Drilling Ltd.,
Plaintiff-Appellant,

-against-

Byrne Modular Buildings L.L.C.,
Defendant-Respondent.

\- - - - -

Rasheed Al Rushaid, et al.,
Plaintiffs-Appellants,

-against-

Pictet & Cie, et al.,
Defendants-Respondents.

____

Kramer Levin Naftalis & Frankel LLP, New York (Gary P. Naftalis of counsel), for appellants.

Holland & Knight LLP, New York (James H. Hohenstein of counsel), for Byrne Modular Buildings L.L.C., respondent.

Mayer Brown LLP, New York (Mark G. Hanchet of counsel), for Pictet & Cie, Philippe Bertherat, Remy Best, Renaud de Planta, Jacques de Saussure, Bertrand Demole, Jean-Francois Demole, Marc Pictet, Nicholas Pictet and Pierre-Alain Chambaz, respondents.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 19, 2019, in Index No. 652375/11, dismissing the action on the ground of forum non conveniens, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on January 7, 2019, which granted defendants' motion to dismiss pursuant to CPLR 327(a), unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered on or about January 7, 2019, in Index No. 652369/12, which granted the part of defendant's motion to

dismiss the action based on forum non conveniens, unanimously affirmed, with costs.

Plaintiff Rasheed Al Rushaid, a resident and national of Saudi Arabia, controls plaintiffs Al Rushaid Petroleum Investment Corp. (ARPIC) and Al Rushaid Parker Drilling, Ltd. (ARPD), both of which are Saudi entities. ARPD entered into a contract with the Saudi national oil company to carry out a construction project in Saudi Arabia. One of ARPD's vendors for this project was the predecessor in interest of defendant Byrne Modular Buildings L.L.C. (Byrne), a United Arab Emirates (UAE) company. Plaintiffs allege that Byrne bribed certain of ARPD's employees to act against ARPD's interests in connection with the project. Plaintiffs further allege that Byrne's bribery of the faithless employees was facilitated by defendant Pictet & Cie (Pictet), a Swiss private bank. Pictet allegedly opened an account for a British Virgin Islands (BVI) entity created by the faithless employees, and Byrne wired funds from its UAE bank account to the BVI entity's account with Pictet in Switzerland. These funds were transmitted through a correspondent bank in New York.

This appeal concerns plaintiffs' separate actions against Byrne (Index No. 652369/12) (the *Byrne* action) and against Pictet and nine individuals affiliated with it (Index No. 652375/11) (the *Pictet* action). On an earlier appeal in the *Pictet* action, the Court of Appeals determined that the transfer of the funds constituting the bribes through the New York correspondent bank

subjected Pictet and its affiliated individual codefendants to personal jurisdiction in New York for purposes of that action (*see Rushaid v Pictet & Cie*, 28 NY3d 316 [2016]). In so doing, the Court of Appeals declined to address Pictet's alternative argument that the action should be dismissed pursuant to the doctrine of forum non conveniens even if personal jurisdiction existed. Rather, the Court observed that, upon remittitur, "Supreme Court should address the matter [of forum non conveniens] in the first instance" (28 NY3d at 332).

In each of the subject actions, Supreme Court, after considering all the relevant factors (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479, 482 [1984], *cert denied* 469 US 1108 [1985]), properly exercised its discretion in granting the motion to dismiss on the ground of forum non conveniens (CPLR 327[a]) on the condition that the defendant or defendants stipulate to accept service of process and waive any statute of limitations defense if sued in the alternative forum (Switzerland in the *Pictet* action, the UAE in the *Byrne* action).[1] In this regard, the court properly considered the following matters, among others: (1) none of the parties to either action is a New York citizen or resident or (if an entity) is formed under New York law or has its principal place of business in New York;[2] (2)

---

[1]On the motion in the *Byrne* action, the court implicitly assumed that it had personal jurisdiction over the defendant.

[2]As previously noted, Al Rushaid resides in Saudi Arabia, ARPIC and ARPD are both Saudi entities, and Byrne is a UAE

the alleged conduct at issue primarily occurred in the UAE, Saudi Arabia and Switzerland, with the sole New York connection being the fleeting presence of the bribery funds at a nonparty New York correspondent bank while en route from the UAE to Switzerland; (3) the bulk of the relevant documentary evidence is located in the UAE, Saudi Arabia, Switzerland and BVI, and most witnesses are located outside New York and beyond New York's subpoena power; (4) there is a likelihood that foreign substantive law will govern; (5) there are alternative fora available (Switzerland and the UAE) with greater connection to the subject matter; and (6) in the *Pictet* action, Switzerland has an interest in regulating the conduct of a bank operating within its borders.[3] In view of these considerations, it cannot be said that Supreme Court improvidently exercised its broad discretion in granting the motions for forum non conveniens dismissal, still less that its discretion was abused.

The Court of Appeals' decision in *Pictet* establishes that the passage of the alleged bribery funds through a New York correspondent bank sufficed to confer on the state's courts personal jurisdiction over the parties that arranged that

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entity. Pictet is a private Swiss bank with its principal place of business in that country. Of the nine Pictet-affiliated individuals sued in the *Pictet* action, eight reside in Switzerland and one resides in the United Kingdom.

[3]In contrast, the conduct of the New York correspondent bank, through which the alleged bribery funds were moved, is not at issue in either action.

transfer. As Supreme Court correctly recognized, however, the *Pictet* holding did not abrogate the Court of Appeals' statement less than three years earlier, in reinstating the dismissal of an action on forum non conveniens grounds, that

> "[o]ur state's interest in the integrity of its banks . . . is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York. . . . New York's interest in its banking system is not a trump to be played whenever a party to such a transaction seeks to use our courts for a lawsuit with little or no apparent contact with New York" (*Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137 [2014] [internal quotation marks omitted]).

In accordance with *Mashreqbank*, this Court has declined to disturb the motion court's discretionary determination that New York is not a convenient forum in cases where the sole connection to New York was the passage of wired funds through a correspondent bank in the state (*see Confederacion Sudamericana de Futbol v International Soccer Mktg., Inc.*, 161 AD3d 581 [1st Dept 2018]; *Norex Petroleum Ltd. v Blavatnik*, 151 AD3d 647 [1st Dept 2017]).

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

ENTERED: FEBRUARY 25, 2020

CLERK

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

11071-
11071A-
11071B Index 21177/12

Matthew I. Handelsman, et al.,
Plaintiffs-Appellants,

-against-

Andrew L. Llewellyn,
Defendant-Respondent,

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

____

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellants.

Russo & Toner, LLP, New York (Alexandra L. Alvarez of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about August 10, 2018, which denied plaintiffs' renewed motion for summary judgment as to liability on the negligence and General Municipal Law § 205-e claims against defendant Andrew L. Llewellyn, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 10, 2018, which, after an in camera inspection, directed Llewellyn to disclose certain redacted documents, unanimously affirmed, without costs. Appeal from order, entered on or about December 12, 2017, to the extent it denied plaintiffs' motion for summary judgment against Llewellyn with leave to renew, unanimously dismissed, without costs, as taken from a superseded order.

The record demonstrates two different versions of how the

accident occurred. Plaintiffs' version is that their vehicle was stopped and that defendant Llewellyn crossed the double yellow line and struck them. Llewellyn, however, testified at his EBT that plaintiffs' vehicle sped towards his vehicle and struck it. These circumstances give rise to credibility issues, which cannot be resolved summarily (*see Jeffrey v DeJesus*, 116 AD3d 574, 575 [1st Dept 2014]).

Plaintiffs' reliance on Llewellyn's plea of guilty to reckless driving, a misdemeanor (Vehicle and Traffic Law § 1212), to support their argument that he is collaterally estopped from contesting liability is misplaced. Llewellyn's plea, without more, merely constitutes "some evidence of negligence" (*McGraw v Ranieri*, 202 AD2d 725, 726 [3d Dept 1994]). Further, contrary to plaintiffs' argument, the plea itself, is not dispositive of Llewellyn's liability because the allocution minutes indicate that he pleaded guilty to reckless driving with no further factual elaboration of the circumstances (*see Gilberg v Barbieri*, 53 NY2d 285, 292-294 [1981]).

To the extent the record permits review, we see no reason to disturb the motion court's order directing the production of certain medical records after the in camera review (*see generally 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]; *Flores v City of New York*, 207 AD2d 302, 304 [1st Dept 1994]; *see also Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 359 [1st Dept 2006]).

We are without jurisdiction to entertain plaintiffs' arguments concerning the parts of the order entered on or about December 12, 2017 that relate to discovery, since their notice of appeal limited the appeal to the part of the order that denied their motion for summary judgment (*see* CPLR 5515[1]; *Martin v Silver*, 170 AD3d 505, 506 [1st Dept 2019], *lv denied* 34 NY3d 908 [2020]; *McCabe v Consulate Gen. of Can.*, 170 AD3d 449, 450 [1st Dept 2019]).

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Gesmer, Kern, JJ.

11080 The People of the State of New York, Ind. 5073/14
Respondent,

-against-

Gabriel Urena,
Defendant-Appellant.

Stanley Neustadter, Cardozo Criminal Appeals Clinic, New York (Lauren Miller of counsel), for appellant.

Gabriel Urena, appellant pro se.

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

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 13, 2016, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, unanimously affirmed.

The verdict was based on legally sufficient evidence. The jury could have reasonably inferred, from the totality of evidence, including, among other things, defendant's statements to the police, that defendant fired a loaded and operable firearm (*see People v Samba*, 97 AD3d 411, 414-415 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]).

Defendant did not preserve his argument that the testimony of two detectives identifying a brief emission of light from the weapon, seen on surveillance video, as a muzzle flash was

improper lay opinion, and we decline to review this claim in the interest of justice. Nor was there any further objection after the court instructed the jurors that they were the finders of fact and it was for them "to determine whether there was a muzzle flash or not" (*see People v Ross*, 99 AD3d 483, 483 [1st Dept 2012], *lv denied* 20 NY3d 1014 [2013]).

Defendant's pro se ineffective assistance claim is unreviewable on the present record, and his challenge to a 911 call is waived.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11100 The People of the State of New York, Ind. 3584/16
Respondent,

-against-

Levar Henry,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered March 27, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 3½ years, unanimously affirmed.

Defendant's unpreserved challenge to the voluntariness of his plea does not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently, and voluntarily made. The isolated phrases in the plea allocution cited by defendant on appeal do not suggest any coercion, in the context of the remainder of the allocution, which unequivocally established that defendant was pleading guilty of his free will.

Defendant made a valid waiver his right to appeal (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *see also People v Thomas*, __ NY3d __, 2019 NY Slip Op 08545 [2019]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the two-year period of postrelease supervision.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11101 Anetha Myers, etc., Index 21137/12E
Plaintiff-Respondent,

-against-

Americare Certified Special Services, Inc., et al.,
Defendants,

St. Barnabas Hospital,
Defendant-Appellant.

Garbarini & Scher, P.C., New York (Thomas M. Cooper of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 24, 2018, which denied the motion of defendant St. Barnabas Hospital for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

St. Barnabas made a prima facie showing of entitlement to judgment as a matter of law. St. Barnabas submitted an affirmation from a medical expert establishing that the treatment provided to plaintiff's decedent, who had a sacral ulcer, comported with good and accepted practice, and that the failure of the ulcer to heal was the result of decedent's many comorbidities, rather than any failure of care on the part of St. Barnabas (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986];

Coronel v New York City Health & Hosps. Corp., 47 AD3d 456 [1st Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of fact. The affirmation from her expert set forth only general conclusions, misstatements of evidence and unsupported assertions, which were insufficient to demonstrate that St. Barnabas failed to comport with accepted medical practice, or that any such failure was a proximate cause of decedent's injuries (*see Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238, 239 [1st Dept 2005]). Furthermore, plaintiff's expert failed to address decedent's preexisting conditions or the assertion of defendant's expert that those conditions complicated decedent's treatment. Nor did plaintiff's expert address the fact that the ulcer continued to fail to heal, despite admission into an in-patient nursing care facility (*see Homan v David Seinfeld, M.D., PLLC*, 164 AD3d 1147, 1148 [1st Dept 2018]; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]).

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11102 In re William E., Dkt. D-24465/18

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Jesse A. Townsend of counsel), for presentment agency.

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 11, 2019, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion when it adjudicated appellant a juvenile delinquent and placed him on probation, which was recommended by the Probation Department, and which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). An adjournment in contemplation of dismissal would not have provided sufficient supervision, in view of appellant's deliberately violent underlying offense, lack of remorse, history of violent behavior, admitted membership in a gang as well as other negative

associations, history of substance abuse, pattern of truancy, poor academic performance and school suspensions, and history of behavioral problems at home.

Appellant's remaining arguments are unavailing.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11103-
11103A-
11103B   S. P., Infant Under the Age of fourteen years, etc., et al.,
Plaintiffs-Appellants,

Index 350072/11

-against-

St. Barnabas Hospital, et al.,
Defendants-Respondents.

____

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

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Bartlett LLP, Garden City (Robert G. Vizza of counsel), for Quarry Road Emergency Service, P.C., and Eric C. Appelbaum, D.O., respondents.

____

Order, Supreme Court, Bronx County (Joseph R. Capella, J.), entered on or about July 5, 2018, which granted defendants Quarry Road Emergency Service, P.C. and "John" Applebaum's motion for summary judgment dismissing the complaint as against them, and order (same court, Robert T. Johnson, J.), entered on or about November 26, 2018, as amended by order entered on or about January 18, 2019, which granted defendant St. Barnabas Hospital's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs. Appeal from order entered on or about November 26, 2018, unanimously dismissed, without costs, as superseded by the January 18, 2019 order.

Plaintiff alleges that defendants' failure to detect and remove a watch battery that was lodged in the infant plaintiff's

right nostril on January 9, 2010, resulted in its remaining in place until January 12, 2010, causing further injuries to his nose. Defendants established prima facie entitlement to summary judgment by presenting evidence, including the testimony of Dr. Applebaum and Dr. Maria Rosero, who both examined the infant plaintiff on January 9, 2010, that the battery was not present when they treated the infant on that date and examined him with an otoscope and nasal speculum.

In opposition, plaintiff failed to raise a triable issue. Her experts' opinions that edema hindered visualization on January 9 were contradicted by the record, namely the testimony by Dr. Rosero, and otherwise speculative (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Fleming v Pedinol Pharmacal, Inc.*, 70 AD3d 422, 422 [1st Dept 2010]). One expert's opinion that the extent of the nasal perforation made by the battery indicated that it had been in the nose for several days did not contradict defendants' showing, because the battery could have been placed soon after treatment on January 9. The infant's symptoms after his treatment on January 9, did not raise a triable issue of fact because they were not interpreted by plaintiff's experts or any other doctor as demonstrating that the battery was present when the infant was treated by defendants. Moreover, the symptoms do not indicate that the battery was placed in the nose before the treatment on January 9. 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 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11104- Index 154391/15
11104A PEG Bandwidth, LLC,
Plaintiff-Respondent,

-against-

Optical Communications Group, Inc.,
Defendant-Appellant.
____

Cuomo LLC, Mineola (Oscar Michelen of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 9, 2018, in favor of plaintiff and against defendant, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 5, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

As the trial court found, the parties entered into the governing Master Services Agreement (MSA) in October 2013, and, by October 2014, defendant was hopelessly in breach, having failed to render any meaningful performance. As provided for in the agreement, plaintiff terminated the agreement on the ground of material default. When the parties met in December 2014, defendant admitted that, even at that late date, it still needed at least 90 to 150 days to finish the work.

A fair interpretation of the evidence supports Supreme Court’s finding that the MSA was properly terminated for

convenience.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11105 Burton S. Sultan, Index 101402/17
Plaintiff-Appellant,

-against-

Michael H. Zhu, Esq., et al.,
Defendants-Respondents.

____

Burton S. Sultan, appellant pro se.

Kaufman, Dolowich & Voluck, LLP, New York (Anthony J. Proscia of counsel), for respondents.

____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 28, 2018, which granted defendants' motion to dismiss the complaint alleging claims for legal malpractice and breach of fiduciary duty, unanimously affirmed, without costs.

Defendants were retained by plaintiff in July of 2013 to represent him in an underlying action involving a dispute over allocation of repairs of condominium common areas in a townhouse. On appeal, plaintiff argues primarily that defendants negligently represented him because they failed to succeed in relieving him of a judgment in the amount of over $538,000 that had been entered against him in December 2012, notwithstanding an earlier judgment, entered in February 2003, following arbitration, which capped his liability at $127,660. Plaintiff alleges that defendants failed to even bring the fact of the inconsistent judgments to the court's attention.

Plaintiff's allegations in this vein do not amount to actionable malpractice (*see Nomura Asset Capital Corp. v*

Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 50 [2015]). The record makes clear that the judge who directed entry of both judgments was fully aware of the terms of the earlier judgment, but the circumstances had changed in the intervening ten years due to Dr. Sultan's own delays and the added costs that his obstruction had caused. As such, the second judgment superseded the first, and the two were not inconsistent.

The IAS court also correctly determined that the remainder of the allegations underlying plaintiff's malpractice claims were barred by the doctrines of res judicata and collateral estoppel pursuant to CPLR 3211(a)(5) (*see e.g. Karakash v Trakas*, 163 AD3d 788 [2d Dept 2018]; *Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 [1st Dept 2016]). Many of the issues raised in the complaint have already been fully vetted and decided against Dr. Sultan despite his being precluded from relitigating those issues on appeal (*id.*).

Further, while plaintiff asserts for the first time on appeal that his claim for breach of fiduciary duty is not duplicative of his legal malpractice claims because it seeks separate damages, namely for wrongful and excessive billing, there are no such allegations in the complaint. This Court has not considered this new theory advanced by plaintiff, which was not alleged by plaintiff in any event (*Bautista v Hach & Rose, LLP*, 176 AD3d 546 [1st Dept 2019]).

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 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11106 The People of the State of New York, Ind. 985/17
Respondent,

-against-

Christopher Dwight,
Defendant-Appellant.

Marianne Karas, Thornwood, for appellant.

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

Judgment, Supreme Court, New York County (Diane Kiesel, J. at motion; Curtis J. Farber, J. at plea and sentencing), rendered November 5, 2018, convicting defendant of attempted burglary in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

After an evidentiary hearing, the motion court properly denied defendant's motion to dismiss the indictment on the ground of prearrest delay (*see generally People v Singer*, 44 NY2d 241 [1978]; *People v Taranovich*, 37 NY2d 442, 445 [1975]). The People established that the nearly five-year delay was "not due to bad faith" (*People v Nazario*, 85 AD3d 577, 577 [1st Dept 2011], *lv denied* 17 NY3d 904 [2011]), but was caused by an initial failure to match a palmprint recovered from the scene to defendant's print in a database, and the absence of other means of identifying any suspect in this burglary (*see e.g. People v Velez*, 22 NY3d 970 [2013]; *People v Ortiz*, 49 AD3d 279 [1st Dept 2008], *lv denied* 10 NY3d 868 [2008]). Defendant was promptly

arrested after a later analysis resulted in a match. In addition, the underlying charge was serious, and defendant was not unduly prejudiced by the delay.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11107-
11108-
11109 Tisoped Corp.,
Plaintiff-Appellant,

Index 655731/16

-against-

Thor 138 N 6th St LLC,
Defendant-Respondent.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for appellant.

M A T A L O N PLLC, New York (Joseph Lee Matalon of counsel), for respondent.

Order and judgment (one paper) and "Final Judgment," Supreme Court, New York County (Melissa Crane, J.), entered April 4, 2018, which denied plaintiff's motion for summary judgment, granted defendant's motion for summary judgment, and adjudged, decreed and declared that plaintiff was not entitled to the remaining deposit balance, that defendant was entitled to the remaining deposit balance, and dismissed plaintiff's action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 19, 2018, which is identical to the initial judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment(s).

The motion court properly determined that under the parties' assignment of the contract of sale, plaintiff was entitled to the release of the balance of the consideration upon the closing of the underlying contract, or upon defendant's breach of the

underlying contract, and here, neither occurred. Contrary to plaintiff's contention, there was no manifest intention to make the underlying contract "time of the essence" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 489 [2006]). Nor did the underlying contract (as opposed to the assignment) require defendant to seek plaintiff's permission to adjourn the closing while the seller attempted to resolve the litigation with his commercial tenant. Thus, plaintiff was not entitled to summary judgment.

Plaintiff's contentions under the so-called prevention doctrine and its mirror image, the covenant of good faith and fair dealing, are likewise unavailing. "[T]he prevention doctrine, a variant of the implied covenant of good faith and fair dealing, is only applicable when it is consistent with the intent of the parties to the agreement" (*Thor Props., LLC v Chetrit Group LLC*, 91 AD3d 476, 477 [1st Dept 2012]). Here, there was no evidence in the record that defendant's failure to close was attributable to anything other than the seller's inability to obtain the required estoppel certificate from its tenant while in litigation. The motion court properly determined that the parties specifically contemplated an inability to close "for any other reason" than defendant's default by providing an exclusive remedy under section 8.2 of the assignment agreement. Therefore, defendant acted within the terms of the agreements and was entitled to summary judgment in its favor and release of the

remaining deposit balance to it.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11111 The People of the State of New York, Ind. 8204/93
Respondent,

-against-

Rhamed Armstrong,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about July 28, 2017, which, after a hearing, adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in granting an upward departure from defendant's presumptive level two classification, and denying any downward departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]). The upward departure was based on clear and convincing evidence of aggravating factors, "bearing on defendant's likelihood of reoffense and the potential harm in the event of his reoffense" (*People v Davis*, 178 AD3d 635, 636 [1st Dept 2019]), that were not sufficiently taken into account by the risk assessment instrument. The instrument did not adequately assess the extent and egregiousness of defendant's criminal history, which included a murder and an attempted murder

(of a child), committed in separate incidents, as well as numerous other violent crimes. Although all of these crimes were committed in 1993, defendant has been incarcerated until only recently and his ability to avoid reoffense while at liberty has not yet been established. The mitigating factors cited by defendant, including documented rehabilitation while incarcerated, are significant but not so impressive as to outweigh defendant’s criminal history.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11112-
11112A Anastasia Xenias, Index 800014/15
Plaintiff-Appellant,

-against-

The Roosevelt Hospital doing business as Mount Sinai West, et al.,
Defendants-Respondents.

Anastasia Xenias, appellant pro se.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered August 10, 2018, dismissing the complaint, and bringing up for review an order (same court and Justice), entered June 6, 2018, which granted defendants' motion to dismiss the complaint, and order (same court and Justice), entered December 13, 2018, which, upon granting reargument, adhered to its prior determination, unanimously affirmed, without costs. Appeal from June 6, 2018 order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that, after her father's death at Mount Sinai West Hospital, defendants engaged in conduct that constituted negligent infliction of emotional distress (*see generally Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004]). The claim was properly dismissed since the allegations do not set forth the breach of a duty of care owed to plaintiff (*see DeCintio v Lawrence Hosp.*, 299 AD2d 165, 166 [1st Dept 2002], *lv*

denied 100 NY2d 549 [2003]; *Yates v Genesee County Hospice Found.*, 278 AD2d 928, 929 [4th Dept 2000]), or that defendants' actions caused plaintiff to fear for her safety (*see Nainan v 715-723 Sixth Ave. Owners Corp.*, 177 AD3d 489, 491 [1st Dept 2019]; *Sheila C.,* 11 AD3d at 130]). Extreme and outrageous conduct continues to be an essential element of a cause of action alleging negligent infliction of emotional distress (*see Holmes v City of New York*, 178 AD3d 496 [1st Dept 2019]; *Melendez v City of New York*, 171 AD3d 566, 567 [1st Dept 2019], *lv denied* 33 NY3d 914 [2019]; *but see Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]). Whether the requisite outrageousness has been alleged is, in the first instance, an issue of law for the courts (*Cavallaro v Pozzi*, 28 AD3d 1075, 1078 [4th Dept 2006]; *Sheila C.* 11 AD3d at 131). Although the alleged removal of plaintiff from the decedent's room following his passing was distressing to her, it was not sufficiently extreme or outrageous so as to support plaintiff's claim (*see generally Sheila C., supra*).

The court properly rejected plaintiff's argument that defendants wrongfully withheld the decedent's medical records. Plaintiff was appointed administrator of decedent's estate prior to the alleged withholding, and this argument should be raised in her capacity as administrator (*see* Public Health Law § 18[1][g], [3]; *see also Smalls v St. John's Episcopal Hosp.*, 152 AD3d 629, 630 [2d Dept 2017]).

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 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11113 Felipe Reyes, Index 36410/17E
Plaintiff-Respondent-Appellant,

-against-

The Roman Catholic Church of St. Raymond doing business as St. Raymond Academy for Girls,
Defendant-Appellant-Respondent.

- - - - -

The Roman Catholic Church of St. Raymond doing business as St. Raymond Academy for Girls,
Third-Party Plaintiff-Appellant-Respondent,

-against-

ABM Janitorial Services-Northeast, Inc.,
Third-Party Defendant-Respondent.

____

Rivkin Radler LLP, Uniondale (J'Naia L. Boyd of counsel), for appellant-respondent.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent-appellant.

Jeffrey Samel & Partners, New York (Robert G. Spevack of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 8, 2019, which, to the extent appealed from as limited by the briefs, granted the part of defendant The Roman Catholic Church of St. Raymond (St. Raymond)'s motion seeking summary judgment dismissing the Labor Law § 240(1) claim and denied the part seeking summary judgment on the third-party contractual indemnification claim, unanimously affirmed, without costs.

The evidence demonstrates that plaintiff was St. Raymond's

special employee. Although plaintiff was employed by third-party defendant ABM Janitorial Services-Northeast, Inc. (ABM), St. Raymond’s facilities manager supervised, directed and controlled plaintiff's work, and his work was completed solely for the benefit of St. Raymond (*see Vincente v Silverstein Props., Inc.*, 83 AD3d 586, 587 [1st Dept 2011], *lv denied* 17 NY3d 710 [2011]). Accordingly, plaintiff’s claim against St. Raymond is barred by Workers’ Compensation Law § 29(6) (*see Villanueva v Southeast Grand St. Guild Hous. Dev. Fund Co.*, Inc., 37 AD3d 155, 157 [1st Dept 2007]).

The court properly denied St. Raymond’s motion for summary judgment on the third-party indemnification claim. An issue of fact remains as to whether plaintiff’s injury was caused by the negligence, misconduct or other fault of ABM, its agents or employees, as required by the indemnification provision of the contract.

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 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11114 The People of the State of New York, Ind. 1310/17
Respondent,

-against-

Yancarlos Rodriguez,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Rafael A. Curbelo 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 (Judith Lieb, J.), rendered March 14, 2018,

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

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

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

ENTERED: FEBRUARY 25, 2020

CLERK

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

Friedman, J.P., Richter, Webber, Singh, JJ.

11115 Ocwen Loan Servicing, LLC, Index 382334/09
Plaintiff-Respondent,

-against-

Ruhina B. Ali,
Defendant-Appellant,

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

Fadullon Dizon Krul, LLP, Jericho (Alexander Krul of counsel), for appellant.

Stern & Eisenberg, P.C., Depew (Margaret J. Cascino of counsel), for respondent.

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about July 31, 2019, which denied the motion of defendant Ruhina B. Ali to dismiss the complaint for lack of personal service and to set aside the foreclosure sale held on August 6, 2018, to vacate the foreclosure deed recorded on September 14, 2018, and to vacate the judgment of foreclosure and sale entered on March 21, 2017, unanimously affirmed, without costs.

Supreme Court providently found that jurisdiction was obtained over defendant by proper service of the summons and complaint. An affidavit of service constitutes prima facie evidence of proper service and the "mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service"

(*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008] [internal quotation marks omitted]). In her affidavit, defendant denied that she was personally served because she had temporarily moved to a family member's home. Defendant's claim that she was never in her "dwelling place or usual place of abode" (CPLR 308[2]) at the time service was allegedly effected upon her was not supported with documentary evidence (*see U.S. Bank N.A. v Martinez*, 139 AD3d 548, 549 [1st Dept 2016]).

Defendant's argument that she is shorter than the person described in the affidavit of service is insufficient to rebut the presumption of proper service (*see e.g. JP Morgan Chase Bank v Dennis*, 166 AD3d 530 [1st Dept 2018]), and defendant does not dispute that the other descriptions set forth in the affidavit of service, such as her age, weight, hair color, and skin color, match her description. Furthermore, defendant concedes that both her husband and a female tenant resided at the address where service was effectuated, and she does not dispute that they were

of suitable age and discretion to have accepted service (*see* CPLR 308[2]; *Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007], *lv dismissed* 10 NY3d 851 [2008]).

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11116 Ericka Rivas, et al., Index 157011/17
Plaintiffs-Appellants,

-against-

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

____

Law Office of Ryan S. Goldstein, PLLC, Bronx (Ryan Seth Goldstein of counsel), for appellants.

James E. Johnson, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondents.

____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered February 13, 2019, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiffs allege that they suffered personal injuries when they were attacked by a group of unknown assailants as they were visiting an outdoor pool owned and operated by the City defendants.

The complaint was properly dismissed. Although plaintiffs' allegations that defendants failed to provide adequate security personnel gave rise to a general duty of care, plaintiffs failed to plead sufficiently that defendants owed them a special duty of

care (*see Valdez v City of New York*, 18 NY3d 69, 75 [2011]; *Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 451 [2011]; *but see Caldwell v Village of Is. Park*, 304 NY 268, 273-274 [1952]). Plaintiffs also failed to allege or provide the factual predicate for a special relationship under the special duty doctrine (*see Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *Blackstock v Board of Educ. of the City of N.Y.*, 84 AD3d 524 [1st Dept 2011]).

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

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11117N Anna Condo, Index 300341/14
Plaintiff-Respondent,

-against-

George Condo,
Defendant-Appellant.

____

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler and Julie G. Matos of counsel), for appellant.

Dentons US LLP, New York (Anthony B. Ullman of counsel), for respondent.

____

Appeal from interim order, Supreme Court, New York County (Matthew F. Cooper, J.), entered May 21, 2019, which, to the extent appealed from, held in abeyance defendant's motion seeking plaintiff's forfeiture of further distribution of artwork under the parties' settlement agreement, the appointment of a permanent receiver, and to enjoin plaintiff from litigation on the parties' settlement agreement without leave of court, unanimously dismissed, without costs, as taken from a nonappealable order.

The court's deferral of a decision on defendant's motion is not appealable as of right (CPLR 5701[a][2][v]; *see Henneberry v*

Borstein, 172 AD3d 523, 524 [1st Dept 2019]), and we decline to grant leave to appeal. We note however, that there has been substantial delay and therefore the matter should be brought to a close expeditiously.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Friedman, J.P., Richter, Webber, Singh, JJ.

11118-
11119N-
11119NA In re Qwil PBC, et al., Index 653605/19
Petitioners-Respondents,

-against-

Jonathan Landow, et al.,
Respondents-Appellants.

____

GordonLaw LLP, Katonah (Michael R. Gordon of counsel), for appellants.

Goodwin Proctor LLP, New York (Meghan K. Spillane of counsel), for Qwil PBC, respondent.

____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered July 15, 2019, which granted the petition for an order of pre-arbitration attachment and ordered the parties to proceed to arbitration, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 22, 2019, which modified the order of attachment beyond the five accounts listed in its original order, unanimously dismissed, without costs. Order, same court and Justice, entered August 2, 2019, which granted pre-arbitration discovery, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion when it issued the July 15 attachment. An order of attachment is left to the discretion of the motion court (*see J.V.W. Inv. Ltd. v Kelleher*, 41 AD3d 233, 234 [1st Dept 2007]). Petitioners met their burden of showing that "the award to which the applicant

may be entitled may be rendered ineffectual without such provisional relief" (CPLR 7502(c); *Matter of Mermaid Mar., Ltd. v Maritime Capital Mgt. Partners, Ltd.*, 147 AD3d 498, 499 [1st Dept 2017]). Petitioners' website contained a button to create an account, and directly under that button was a disclaimer which stated that, "by registering your practice account, you agree to our terms of service, . . . and the Qwil products and services agreement," sufficiently informed respondents of the binding arbitration provisions contained within petitioner's agreements (*see Fteja v Facebook*, 841 F Supp 2d 829, 840 [SD NY 2012]). Petitioners demonstrated that "absent the attachment being requested, the ultimate arbitration award would be severely compromised" (*County Natwest Sec. Corp., USA v Jesup, Josephthal & Co.*, 180 AD2d 468, 469 [1st Dept 1992]), based on evidence of a significant balance due, the fact that respondents had cut off petitioners' ability to access their accounts, discontinued the distribution of arbitration proceeds to Enter, and moved funds out of the Landow Entities' accounts at Chase Bank into other accounts.

With respect to the August 2 discovery order, while no formal notice was made, the need for further discovery was raised at the parties July 29, 2019 hearing, and was indisputably discussed at the August 1, 2019 telephonic conference, which did not deprive the Landow Entities of their due process rights (*see Matter of Keisha Gabriel S. v Alphonso S.*, 100 AD3d 449 [1st Dept

2012]). The August 2 discovery order was correctly issued in contemplation of two pending motions - petitioners' contempt motion and respondents' July 29 order to show cause, as the court may order "disclosure by any person of information regarding any property in which the defendant has an interest, or any debts owing" (CPLR 6220; *Heller Fin. v Wall St. Imports*, 140 Misc 2d 205, 206 [Sup Ct, NY County 1988]). Because the July 29 order to show cause, by which respondents challenged the July 22 supplemental order, remains pending, consideration of this order is premature, and the appeal therefrom is dismissed without prejudice.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11121 The People of the State of New York, SCI 171/19
Respondent,

-against-

William Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine 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 (Laurie Peterson, J.), rendered February 15, 2019,

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 25, 2020

CLERK

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

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11122 U.S. Bank National Association, etc., Index 32166/16E
Plaintiff-Respondent,

-against-

Lorna James, et al.,
Defendants-Appellants,

Criminal Court of the City of
New York, et al.,
Defendants.

____

Petroff Amshen LLP, Brooklyn (Serge F. Petroff of counsel), for appellants.

Greenberg Traurig, LLP, New York (Leah N. Jacob of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered January 8, 2019, which granted plaintiff's motion for, inter alia, summary judgment and an order of reference against defendants, and denied defendants' cross motion for summary judgment dismissing the action, unanimously affirmed, without costs.

Plaintiff demonstrated its prima facie entitlement to summary judgment by submitting the mortgage, unpaid note and evidence of defendants' default (*see e.g. JPMCC 2007-CIBC Bronx Apts., LLC v Fordham Fulton LLC*, 84 AD3d 613 [1st Dept 2011]). Plaintiff also submitted the affidavit of a contract management coordinator from its loan servicer, who attested that, based on her review of the business records relied upon in the ordinary course of business, the notices were sent to defendants at the

mortgage address in compliance with the requirements of RPAPL 1304 and the subject mortgage. Plaintiff's coordinator stated that the RPAPL 1304 notice was "mailed by first-class and certified mail having been placed in an official depository under the exclusive care and custody of the United States Post Office in postage-paid properly addressed envelopes," "separate from" the notice of default, and was not returned as undeliverable. Tracking numbers for both mailings were also provided. Plaintiff thereby submitted sufficient evidence to demonstrate the absence of material issues as to its strict compliance with RPAPL 1304 and the notice provisions of the subject mortgage, and this evidence created a rebuttable presumption that defendants received these notices (*see e.g. Deutsche Bank Natl. Trust Co. v Al Rasheed*, 169 AD3d 532 [1st Dept 2019]).

Defendants did not submit any evidence contesting that plaintiff mailed the notice of default and 90-day notice, nor did defendants deny receipt of either notice.

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

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11123 In re Lorraine D. S., Dkt. P-34373/17
Petitioner-Respondent,

-against-

Steven W., Jr.,
Respondent-Appellant.

____

Geoffrey P. Berman, Larchmont, for appellant.

Aleza Ross, Patchogue, for respondent.

The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 15, 2019, which, after a hearing, found that respondent was equitably estopped from denying paternity of the subject child, and entered an order of filiation declaring him to be the child's father, unanimously affirmed, without costs.

Although no appeal lies as of right from an order of filiation entered in a proceeding where an order of support has been requested, we deem the notice of appeal an application for leave to appeal and grant respondent such leave (*see* Family Ct Act § 1112[a]; *Matter of Caroline D. v Travis S.*, 168 AD3d 410 [1st Dept 2019]).

Clear and convincing evidence demonstrates that respondent held himself out as the father of the child and that the child,

who was 15 years old at the time of the hearing, considered respondent to be his father (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 330 [2006]). The child lived with respondent and his mother for approximately five years and believed that respondent was his father, and respondent never attempted to dissuade the child from believing otherwise. Even after respondent and the mother stopped living together, respondent regularly sent text messages and visited with the child, and indicated to the mother that the child would have his own space for weekend visits in respondent's new home. Respondent attended the child's basketball games and graduations and had the child as his best man at his wedding to his current wife. He introduced the child as his son to the guests at the wedding and referred to him as his child on social media. Under these circumstances, where respondent assumed the role of a parent and led the child to believe he was his father, the court properly concluded that the best interests of the child required that respondent be estopped

from denying paternity (*see Matter of Kerry Ann P. v Dane S.*, 121 AD3d 470, 471 [1st Dept 2014]; *Matter of Commissioner of Social Servs. v Victor C.*, 91 AD3d 417 [1st Dept 2012]).

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11124 John Pizarro, Index No. 102474/11
Plaintiff, 590006/12

-against-

Dennis James Boyle, Inc., et al.,
Defendants.
- - - - -
Dennis James Boyle, Inc.
Third-Party Plaintiff-Appellant,

-against-

Complete Copper Works, Inc.
Third-Party Defendant-Respondent.
____

Gorton & Gorton, LLP, Garden City (John T. Gorton of counsel), for appellant.

Mintzer Sarowitz Zeris Ledva & Meyers, LLP, New York (Kevin L. Kelly of counsel), for respondent.
____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered March 20, 2019, which, to the extent appealed from as limited by the briefs, granted third-party defendant's (Complete Copper) motion to dismiss the third-party complaint, and denied third-party plaintiff's (Boyle) cross motion to strike the affirmative defense based on the Workers' Compensation Law, unanimously affirmed, without costs.

The motion court providently exercised its discretion in considering the special employment and alter ego arguments raised by Complete Copper for the first time in its reply papers, having given Boyle the opportunity to respond to Complete Copper's arguments by way of a sur-reply and a motion for summary judgment

(*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006]; *see also Sally v Keyspan Energy Corp.*, 106 AD3d 894, 896 [2d Dept 2013], *lv denied* 22 NY3d 860 [2014]).

Complete Copper established prima facie that it is entitled to the protections of Workers' Compensation Law § 29(6) by showing that it is the alter ego of nonparty Norske, Inc., which was named as plaintiff's employer in his Workers' Compensation claim and paid his benefits (*see Paulino v Lifecare Transp.*, 57 AD3d 319, 319 [1st Dept 2008]; *Hernandez v Sanchez*, 40 AD3d 446 [1st Dept 2007]; *see also Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529, 529 [1st Dept 2011]). Complete Copper submitted evidence that it and Norske shared a president and sole owner, office staff, office space, and insurance policies, that Norske owned the equipment used by Complete Copper, and that Norske's president and owner generated the work invoices and obtained insurance coverage on behalf of Complete Copper.

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

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

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11125 The People of the State of New York, Ind. 983/16
Respondent,

-against-

Terrell Hicks,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nathan Brandon Shi 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 (Charles H. Solomon, J.), rendered February 28, 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 25, 2020

____
CLERK

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

Gische, J.P., Mazzarelli, Moulton, González, JJ.

11126 Abdiana Suero, Index 306656/14
Plaintiff-Appellant,

-against-

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

NYPD Officers sued herein as
John/Jane Doe I-V,
Defendants.

____

Sim & DePaola, LLP, Bayside (Sang J. Sim of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about July 13, 2018, which granted The City defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie entitlement to judgment as a matter of law by submitting evidence that defendant police officers had probable cause to arrest plaintiff on a theory of constructive possession. Such is a complete defense to plaintiff's claims of false arrest, false imprisonment and malicious prosecution (*see Hunter v City of New York*, 169 AD3d 603 [1st Dept 2019]).

In opposition, plaintiff failed to raise an issue of fact. The evidence shows that she was discovered asleep, in a state of undress, in an apartment identified in a valid search warrant as

a drug distribution point (*see Walker v City of New York*, 148 AD3d 469, 470 [1st Dept 2017]*; Mendoza v City of New York*, 90 AD3d 453 [1st Dept 2011]). Contraband was in open view in the apartment and readily accessible to her (*see Brown v City of New York*, 170 AD3d 596 [1st Dept 2019]). The excessive force claim was also properly dismissed since plaintiff claims no physical injury (*see Davidson v City of New York*, 155 AD3d 544 [1st Dept 2017]).

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 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11127- Moreton Binn, etc., et al., Index 158105/17
11127A Plaintiffs-Appellants,

-against-

Muchnick, Golieb & Golieb, P.C.,
etc., et al.,
Defendants-Respondents.

____

Felicello Law P.C., New York (Rosanne E. Felicello of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for Muchnick, Golieb & Golieb, P.C., and John Golieb, respondents.

Morea Schwartz Bradham Friedman & Brown LLP, New York (Thomas A. Brown II of counsel), for DLA Piper LLP (US), and Sydney Burke, respondents.

____

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about March 7, 2019, which granted defendants' motions to dismiss the complaint as against them pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

Plaintiffs allege that their long-time attorneys, defendants John Golieb, Esq. and Muchnick, Golieb & Golieb, P.C. (together, the Golieb defendants), gave poor advice in connection with a series of transactions in 2014, 2015 and 2016, resulting in the loss of plaintiffs' majority interest and dilution of their interest in their airport spa business, XpresSpa Holdings, LLC (XpresSpa), as well as other damages. The motion court correctly concluded that documentary evidence, including emails and transaction documents, rendered it "essentially undeniable" that plaintiffs were advised of and/or otherwise understood the terms

of the transactions they entered into in 2014 and 2015, as well as their alternative options, if any (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal quotation marks omitted]). Those documents "conclusively establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see* CPLR 3211[a][1]).

The court correctly concluded that plaintiffs failed to establish that the Golieb defendants were the proximate cause of any damages in connection with the 2016 vote on the merger of XpresSpa and its acquisition by Form Holdings Corp. Documents show that plaintiff Moreton Binn voted in favor of the merger "under protest," that he felt "frozen . . . out" of the merger negotiations, and that he received inadequate information from Form Holdings – factors outside of the Golieb defendants' control. Moreover, in connection with their execution of the Joinder Agreement relating to the merger, plaintiffs retained separate counsel to represent them and the minority shareholders in evaluating the voluminous merger and acquisition documents by reviewing the documents and summarizing their terms for the minority shareholders. Thus, separate counsel was an intervening and superseding cause of any damages (*see Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 10 [1st Dept 2017]).

The court correctly dismissed the legal malpractice claim against defendants DLA Piper LLP (US) (DLA) and Sidney Burke

(collectively, the DLA defendants), counsel for Mistral Equity Partners (Mistral), an investor in plaintiffs' business, and its related entities, including Mistral XH, which facilitated the 2016 merger. Plaintiffs do not dispute that there was no attorney-client relationship, and, contrary to their contentions, there is no near privity to support a claim of legal malpractice (*see e.g. Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 60-61 [1st Dept 2007]). Nor is any other ground for a legal malpractice claim alleged (*see Good Old Days Tavern v Zwirn*, 259 AD2d 300 [1st Dept 1999]). Plaintiffs signed the 2016 Joinder Agreement, dated October 28, 2016, which acknowledges that "DLA Piper LLP (US) is not representing and will not represent any Member ... other than the Mistral Vehicles" in connection with the Joinder Agreement or other transaction documents.

The court correctly dismissed the claim that the DLA defendants aided and abetted Mistral XH's breach of fiduciary duty, in which plaintiffs allege that the DLA defendants drafted amendments in the merger documents to increase the number of plaintiffs' shares to be held in escrow, thereby advancing Mistral XH's interests to plaintiffs' detriment. This is merely an allegation that the DLA defendants performed routine legal services on behalf of their client, Mistral XH, which does not amount to "substantial assistance" in the commission of the alleged breach (*see Learning Annex, L.P. v Blank Rome LLP*, 106

AD3d 663, 663 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]; *Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480, 483 [1st Dept 2015]).

Plaintiffs abandoned their appeal from the dismissal of the breach of fiduciary duty claims by failing to make any arguments about it in their appellate briefs (*see Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480, 483 [2015]).

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

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11128-
11128A Andrew Mulé, etc., Index 654984/16
Plaintiff-Appellant,

-against-

Robert F.X. Sillerman,
Defendant,

Peter C. Horan, et al.,
Defendants-Respondents.

____

Abbey Spanier, LLP, New York (Karin E. Fisch of counsel), for appellant.

Greenberg Traurig, LLP, New York (Robert A. Horowitz of counsel), for respondents.

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Judgment, Supreme Court, New York County (Andrea Masley, J.), entered January 18, 2019, to the extent appealed from as limited by the briefs, dismissing the cause of action for breach of fiduciary duty in entering into the Exchange Agreement, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 2, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that defendants-respondents (defendants), directors of defendant Function(x), Inc., breached their fiduciary duties to him and all other similarly situated minority public shareholders by failing to protect their interests in connection with the Exchange Agreement transactions, which were approved by defendant Sillerman, the company chairman, CEO, senior creditor and majority shareholder, and improperly

benefitted Sillerman while diluting the value of the public shareholders' investment in the company. Defendants moved to dismiss on the ground, inter alia, that the company's certificate of incorporation contains a clause that exculpates them from personal liability for all claims by the company or its stockholders except for breaches of the duty of loyalty or good faith (i.e., "non-exculpated" claims), and that plaintiff failed to plead any non-exculpated claims.

Contrary to plaintiff's apparent contention, even if, as the motion court found, the allegation that Sillerman "stood on both sides of the Exchange Agreement transactions" subjects the transactions to entire fairness review, rather than the less exacting business judgment rule, plaintiff is nevertheless required to plead non-exculpated claims against defendants (*In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A3d 1173, 1180-1181 [Del 2015]), and this, as the motion court found, he failed to do.

With respect to the duty of loyalty, plaintiff does not allege facts that, if true, would establish that defendants were self-interested (*see Cede & Co. v Technicolor, Inc.*, 634 A2d 345, 362 [Del 1993]). There are no factual allegations that would establish that defendants were partial or non-independent. Moreover, plaintiff does not allege facts that would establish disloyalty, for example, that defendants were motivated to entrench Sillerman or that they engaged in fraud, abdicated any

specific duty, or sold their votes (*id.* at 363). Plaintiff's allegations on that point are speculative or conclusory.

With respect to the duty of good faith, plaintiff does not allege facts that would establish that defendants intentionally acted with any purpose other than advancing the best interests of the corporation (*see Stone v Ritter*, 911 A2d 362, 369 [Del 2006]). Plaintiff does not allege facts that would establish that defendants intentionally acted to violate any law (*see id.*). Notably, plaintiff does not allege that defendants undertook any improper action related to the Exchange Agreement. Plaintiff contends that the motion court erred in stating that there are no facts alleged that would establish that defendants acted with an intention to harm the company, rather than its minority shareholders. Plaintiff failed to allege facts that would establish that defendants intentionally harmed either Function(x) or its public minority shareholders. His allegations as to intent are speculative and conclusory.

Plaintiff alleges some facts that would establish that defendants failed to act (*see Stone*, 911 A2d at 369). However, these allegations fall short of establishing that defendants utterly failed to implement any safeguard against self-dealing by Sillerman. Plaintiff's general allegation that there were no safeguards is conclusory. His specific allegations are insufficient, because, taken together, they would not establish a sustained or systematic failure by defendants to exercise

oversight (*see Marchand v Barnhill*, 212 A3d 805, 821 n 104 [Del 2019]). The specific allegations would establish merely that the directors could have, and perhaps should have, done more with regard to the Exchange Agreement transactions.

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 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11129 The People of the State of New York, SCI 30082/17
Respondent,

-against-

Russell Ochocki,
Defendant-Appellant.

____

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

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

____

Order, Supreme Court, New York County (Kevin B. McGrath, Jr., J.), entered on or about February 28, 2018, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the egregiousness

of the underlying child pornography offense (*see e.g. People v Labarbera*, 140 AD3d 463 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]).

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11131 & M-213 Index 23279/18E

Darlene W., as Parent and Natural Guardian of A.D.W an Infant,
Plaintiff-Appellant,

-against-

Montefiore Medical Center,
Defendant-Respondent.

____

The Fitzgerald Law Firm PC, Yonkers (Mitchell Gittin of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County, entered December 27, 2018 (Lewis J. Lubell, J.), dismissing the complaint, unanimously affirmed, without costs.

This is the second medical malpractice action plaintiff brings in state court alleging that defendant's employees rendered negligent medical care and services to herself and the infant during labor and delivery, causing them to sustain severe and serious personal injuries. Plaintiff does not dispute that the prior action was properly removed to federal court (*see* 28 USC § 1446[d]). After the removal to federal court, the parties entered into a stipulation, which was so-ordered by the U.S. District Court for the Southern District of New York, that the prior action would be discontinued without prejudice and that any subsequent medical malpractice claims against defendants, including Montefiore, would be brought in federal court

(*see Williams v Belova*, 121 AD3d 572 [1st Dept 2014]). Although this action encompasses claims against other entities and for a later time period, there is an overlapping period of time. Thus, it is for the federal court to determine whether plaintiff's claims allege violations of the Federal Tort Claims Act or whether the matter should be remanded to state court (*see Clayton v American Fedn. of Musicians*, 243 AD2d 347 [1st Dept 1997]).

M-213 - *White v Montefiore Medical Center*

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 25, 2020

CLERK

Gische, J.P., Mazzarelli, Moulton, González, JJ.

11132 Miguel Cintron, Index 302552/13
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

Detective Matthew Collins, etc., et al.,
Defendant.

____

James E. Johnson, Corporation Counsel, New York (Ashley R. Garman of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered October 1, 2018, which denied the City's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Viewed in the light most favorable to plaintiff (*see Thomas v City of New York*, 173 AD3d 633, 635 [1st Dept 2019]), the record evidence shows that, shortly after an incident on June 3, 2007, in which George Cruz was stabbed to death, police obtained surveillance video which, while of insufficient resolution to enable identification of any of the participants, clearly depicted the fatal struggle between Cruz and an assailant who approached him from behind and began stabbing him, as well as the presence of several other individuals. During the days after the incident, the police received several reports tying a man named

“Mike” or “Crazy Mike” to the stabbing, including one report stating that “Mike” resided in the basement of a private house a half-block south of where the incident occurred. Police thereafter interviewed Hysen Berisha, who resided in that house and whom they believed had witnessed the incident. Crediting Berisha’s deposition testimony in this action, he initially denied knowing anything about the stabbing. The police then told Berisha that they had video showing that he had been at the scene, and, if he did not tell them who the assailant was, they would charge him as an “accessory to murder,” and he would be “facing 25 years.”

The detectives left the room and returned with a photograph of plaintiff (whose daughter lived in Berisha’s basement, and who in his deposition in this action admitted that he is known as “Mike” and “Crazy Mike”), and asked, “Is this the guy who did the murder?” Berisha was aware that, by the time of the interview, plaintiff had already removed to Florida. This fact made Berisha “a little more comfortable” with identifying plaintiff as the assailant. Berisha then gave the police a statement providing details about the incident, including the assailant’s approach from behind, and the assailant’s and victim’s struggle across the street to a funeral home, which were closely corroborated by the surveillance video. Berisha also stated that plaintiff lived in his basement, so that he knew him well.

The foregoing establishes that the police had probable cause

to arrest plaintiff for stabbing Cruz to death (*see Medina v City of New York*, 102 AD3d 101, 104 [1st Dept 2012]). Berisha gave similar testimony before the grand jury, leading to plaintiff's indictment on murder and other counts, and establishing a further presumption of probable cause (*see Lawson v City of New York*, 83 AD3d 609, 610 [1st Dept 2011], *lv dismissed* 19 NY3d 952 [2012]). Plaintiff's ultimate acquittal on all counts at the jury trial, despite Berisha's consistent testimony, does not vitiate the finding of probable cause (*see Jenkins v City of New York*, 2 AD3d 291, 292 [1st Dept 2003]).

As noted, at his deposition in this action, Berisha asserted, for the first time, that the police threatened him with murder charges in order to get him to talk, and then showed him a photograph of plaintiff, and asked him to confirm that plaintiff was the assailant. Notably, while his overall narrative of the stabbing incident remained substantially the same, Berisha asserted at his deposition that he was no longer certain that plaintiff was the assailant. Critically, however, Berisha never stated that he fabricated his initial account and grand jury and trial testimonies. To the contrary, when asked at his deposition if he identified plaintiff as the assailant "because [he] didn't want to get locked up," Berisha cautioned counsel, "Don't put words in my mouth." Instead, Berisha insisted that, "at that [earlier] point" in time, he believed that plaintiff was the assailant.

Nor is there any evidence that the police did not believe plaintiff to be the assailant. To the contrary, multiple persons had already identified plaintiff — "Crazy Mike" — as being involved in the stabbing. Additionally, plaintiff had already removed to Florida (where he was ultimately arrested some 10 months after the incident) (*see People v Jamison*, 173 AD2d 341, 342 [1st Dept], *lv denied* 78 NY2d 955 [1991]).

Even crediting Berisha's account that the police applied pressure to persuade him to talk, there is no evidence that they did so in bad faith or as part of an attempt to frame plaintiff, or that they were not genuinely looking for confirmation of something they already reasonably suspected (*see People v Tarsia*, 50 NY2d 1, 11 [1980]; *Jenkins*, 2 AD3d at 292).

The existence of probable cause constitutes a "complete defense" to the claims of false arrest and malicious prosecution (*Lawson*, 83 AD3d at 609-610; *see Nadal v City of New York*, 105 AD3d 598, 598 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]).

Accordingly, we reverse and grant the City's motion for summary judgment dismissing the complaint.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11133 Travelers Property Casualty Company of America, et al., Plaintiffs-Appellants, Index 156200/15

-against-

The Burlington Insurance Company,
Defendant-Respondent.

____

Kenney Shelton Liptak Nowak LLP, Buffalo (Matthew C. Ronan of counsel), for appellants.

Adrian & Associates, LLC, New York (Charles Benedict Bergin of counsel), for respondent.

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Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered on or about April 25, 2018, which, to the extent appealed from, denied plaintiffs' motion for summary judgment declaring that defendant must defend plaintiffs Plaza-Schiavone Joint Venture (PSJV) and Plaza Construction LLC as additional insureds in the underlying personal injury action, unanimously affirmed, with costs.

The relevant blanket additional insured endorsement to the policy issued by defendant to nonparty subcontractor Sal Vio Construction Corp. provided additional insured coverage to "any person or organization for whom you [Sal Vio] are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The written subcontract between Del Savio Masonry Corp. and PSVJ contained such an agreement, i.e., that Del Savio would add PSJV

and Plaza as additional insureds under its policy (*see Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 151 [1st Dept 2016], *affd* 31 NY3d 131 [2018]). However, Del Savio assigned its rights and obligations under the subcontract to nonparty Sal Vio Construction Corp., and defendant argues that it is not bound by the assignment. We disagree.

Under the assignment, Sal Vio, the assignee, "acknowledges that its obligation [sic] and liabilities under the Agreement [the PSJV-Del Savio subcontract] are effective as of the date Assignor signed The [sic] Agreement (as if Assignee was the original signatory thereof)." Thus, "by virtue of the assignments and assumptions obligating them to be bound by the same [subcontract]," defendant may be obligated to insure PSJV and Plaza (*see Holbrook Realty, LLC v Peerless Ins. Co.*, 2019 WL 4862073, *8, 2019 US Dist LEXIS 131843, *21-22 [ED NY, August 5, 2019, No. 18-CV-1005 (JMA) (SIL)]). However, as defendant points out, issues of fact exist whether the assignment was made prior to the date of the underlying plaintiff's accident. The assignment expressly states that it is "effective as of the date

of this Assignment." However, the assignment is not dated, and plaintiffs' evidence failed to establish prima facie the effective date.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11134 The People of the State of New York, Ind. 5351/15
Respondent,

-against-

Jonathan Manning,
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 (Jennifer Westphal of counsel), for respondent.

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentencing), rendered November 22, 2016, convicting defendant of robbery in the third degree and attempted assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously reversed, on the law, and the matter remanded for a new trial to be preceded by further suppression proceedings in accordance with this decision.

The record did not justify the court's discharge for cause of a selected but unsworn juror. Both defendant and the People initially declined to challenge the juror peremptorily or for cause. However, the prosecutor challenged the juror for cause, over defense objection, after the court, concerned about an important out-of-town meeting that the prospective juror was scheduled to attend on a day before the anticipated conclusion of

the trial, announced that it would grant such a challenge. Although subsequent questioning demonstrated that rescheduling the meeting would be inconvenient for the juror, it did not establish that the juror, who never directly asked to be excused for hardship or otherwise, had "a state of mind that [was] likely to preclude him from rendering an impartial verdict based on the evidence adduced at the trial" (CPL 270.20[b]). By way of contrast, in *People v Williams* (44 AD3d 326, 326 [1st Dept 2007], *lv denied* 9 NY3d 1010]), we found that the selected but unsworn juror at issue was unfit for service because her scheduling conflict involving a funeral "would make it difficult for her to focus on the trial." Here, the juror's responses did not establish a sufficient basis to sustain a challenge for cause, which was the only issue presented to and ruled upon by the court.

On remand, there should also be a factual determination of the significant issue of whether the plainclothes police officers identified themselves to defendant as the police before defendant fled and the officers chased him. The hearing court made no finding in this regard; nor did it give any detailed explanation of its conclusion that the police actions leading to defendant's arrest were lawful. While this Court possesses the authority to make its own findings where it "has an adequate record" (*People v Rodriguez*, 258 AD2d 299, 299 [1st Dept 1999], *lv denied* 93 NY2d 902 [1999]), we find that the record is insufficient for that

purpose. Although there was significant evidence indicating that the officers did identify themselves before pursuing defendant, there was also ostensibly contradictory testimony, warranting determination of the issue by a primary factfinder.

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11135 Efrain Rodriguez, Index 23789/16E
Plaintiff-Appellant,

-against-

Dairyland HP, LLC,
Defendant-Respondent.

____

Law Office of Ryan S. Goldstein, PLLC, Bronx (Ryan Seth Goldstein of counsel), for appellant.

Weber Gallagher Simpson Stapleton Fires & Newby LLP, New York (Shawn D. Wagner of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered March 4, 2019, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly determined that plaintiff's claims against defendant are barred by Workers' Compensation Law § 11 (*see Morato-Rodriguez v Riva Constr. Group, Inc.*, 88 AD3d 549 [1st Dept 2011]; *Hernandez v Sanchez*, 40 AD3d 446, 447 [1st Dept 2007]). Whether plaintiff was employed by nonparties Chef's Warehouse (CW) or Dairyland USA Corp. (USA) at the time of the accident, defendant demonstrated that it was the alter ego of both of those entities. Among other things, defendant and USA were wholly-owned subsidiaries of CW; defendant had no employees, was exclusively managed by USA, and had a common CEO with both CW and USA; and all three entities utilized common administrative,

financial and insurance resources. Furthermore, CW procured and paid the premiums for all insurance policies, including workers' compensation benefits covering its subsidiaries, including USA and defendant (*see Morato-Rodriguez* 88 AD3d at 549).

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

ENTERED: FEBRUARY 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11138N Ness Technologies SARL, et al., Index 657241/17
Plaintiffs-Respondents,

-against-

Pactera Technology International Limited,
Defendant-Appellant,

John Does 1-10, inclusive,
Defendants.

____

O'Melveny & Myers LLP, New York (Allen W. Burton of counsel), for appellant.

Sheppard, Mullin, Richter & Hampton LLP, New York (Daniel L. Brown of counsel), for respondents.

____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered October 3, 2019, which denied defendant Pactera Technology International Limited's motion for leave to amend its answer to add an affirmative defense and counterclaims, unanimously affirmed, without costs.

The motion court did not abuse its discretion in denying leave to amend. Defendant failed to explain why it waited until the brink of the discovery deadline to file its motion, and why it did not move by order to show cause or otherwise convey in a timely fashion the "emergency" that arose when it realized that plaintiffs' belated document production contained previously unknown admissions that formed the basis for the counterclaims. While defendant claims that it acted as soon as possible after its receipt of the 100,000-plus documents, the motion court reasonably concluded that the last-minute nature of the

production could have been avoided by defendant, which did not move to compel more prompt production of the documents, which it admits it had sought since February 2018. Moreover, defendant's June 14, 2019 letter to the court primarily addressed plaintiff's failure to produce discovery substantiating its own damages claims, rather than the documents that it now claims support the proposed counterclaims.

Further, defendant's proposed new allegations – against plaintiff and two new defendants as well as other potentially relevant individuals implicated by the allegations – would inevitably entail substantial discovery and resulting delays. While CPLR 3025(b) motions may be granted at any time during the pendency of an acion (*see Prote Contr. Co. v Board of Educ. of City of N.Y. [Livingston High School]*, 249 AD2d 178 [1st Dept 1998]; *Pensee Assoc. v Quon Shih-Shong*, 199 AD2d 73 [1st Dept 1993]), defendant's explanation for the timing of its motion, combined with the scope of the proposed amendments, fails to show that the court, which anticipated not being able to try the case

until 2021, was not reasonably concerned about the delay the new issues would generate.

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 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11139N Tyler B. Miller, Index 159118/18
Plaintiff-Appellant,

-against-

21st Century Fox America, Inc.,
Defendants-Respondents.

____

Tyler B. Miller, appellant pro se.

Mintz & Gold LLP, New York (Kevin M. Brown of counsel), for respondents.

____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 22, 2019, which denied plaintiff's motion for a default judgment, and sua sponte dismissed the complaint for lack of personal jurisdiction due to improper service, unanimously affirmed, without costs.

The court properly denied plaintiff's motion and sua sponte dismissed the complaint for lack of personal jurisdiction, as plaintiff failed to demonstrate proper service of the summons and complaint (*see De Zego v Donald F. Bruhn, M.D., P.C.*, 67 NY2d 875 [1986]; *Klein v Educational Loan Servicing, LLC*, 71 AD3d 957, 958 [2d Dept 2010]). Service by certified mail to the corporate defendant's address, alone, is not a proper means of service (*see*

e.g. CPLR 311[a][1]; CPLR 312-a[a]; Business Corporation Law § 306).

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 25, 2020

CLERK