SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 7, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10721 Fiumen Aquino Martinez, Index 28648/17E
Plaintiff,

-against-

250 West 43 Owner, LLC, et al.,
Defendants.
- - - - -
250 West 43 Owner, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Park Developers & Builders,
Inc., et al.,
Third-Party Defendants,

I & G Group, Inc.,
Third-Party Defendant-Respondent.

____

Cerussi & Spring, P.C., White Plains (Richard D. Bentzen of counsel), for appellants.

Torino & Bernstein, P.C., Mineola (Vincent J. Battista of counsel), for respondent.

____

Order, Supreme Court, New York County (Lucindo Suarez, J.), entered April 15, 2019, which, to the extent appealed from as limited by the briefs, granted third-party defendant I & G Group, Inc.’s motion for summary judgment dismissing the third-party claims against it for common law contribution and

indemnification, based on a prior decision by the worker's compensation board finding that it is plaintiff's employer, unanimously reversed, on the law, without costs, and the motion denied.

The Court of Appeals has stated that "[w]here liability is imposed upon an employer to provide work[er]'s compensation and compensation is provided, that liability is exclusive and in the stead of any other employer liability whatsoever" (*O'Rourke v Long*, 41 NY2d 219, 221 [1976]; *see* Worker's Compensation Law § 11). Thus, "[i]f the right to sue the employer has been stripped away by work[er]'s compensation coverage, it is an arrogation of jurisdiction to consider a tort complaint on its merits" (*id.* at 221). Applying the holding in *O'Rourke*, courts have granted summary judgment dismissing tort claims against employers when the exclusive remedy of worker's compensation benefits has already been awarded (*Decavallas v Pappantoniou*, 300 AD2d 617 [2d Dept 2002]; *Raphael v Sun Oil Co.*, 214 AD2d 720 [2d Dept 1995]; *Calhoun v Big Apple Wrecking Corp.*, 162 AD2d 574 [2d Dept 1990]). Notably, however, in each of these cases the employer was a party to, and participated in, the worker's compensation proceeding.

The Court of Appeals has also recognized that a decision by the worker's compensation board may not be binding on parties who do not participate in its hearings. In *Liss v Trans Auto Sys.*

(68 NY2d 15, 22 [1986]), the Court held that "where a defendant was not afforded an opportunity to cross-examine witnesses or present evidence at the prior [worker's compensation] hearing, the outcome of the hearing cannot have preclusive effect on that party" (internal citations omitted). By contrast, "any party to the hearing who had the required notice and opportunity to be heard will be precluded from relitigating issues necessarily decided by the administrative Judge" (*id.* at 21 [internal citation omitted]). The Court explained that "the Worker's Compensation Board has primary jurisdiction, but not necessarily exclusive jurisdiction, in factual contexts concerning compensability" (*id.* at 20). Noting that the defendants were not parties in interest in the worker's compensation proceedings, since they had no possible enforceable interest in a worker's compensation award, the Court determined that it was not an abuse of discretion for the worker's compensation judge to have precluded their participation at the hearing. However, the Court warned that "[u]nless the Legislature expands the definition of parties in interest, the unfortunate result will be that a duplicative proceeding must be held and the issue of compensability adjudicated anew because defendants never had a 'full and fair opportunity' to litigate the question" (*id.* at 22; *see also Reynoso v Kensington Mgt. Servs.*, 181 AD2d 415 [1st Dept

1992] ["the Board's decision is determinative of the issue, thus precluding any party to the hearing, who had the required notice and opportunity to be heard, from relitigating such issue"]).

Here, because it is undisputed that appellants were not given notice of the worker's compensation hearing, and were not afforded the opportunity to present evidence or cross-examine witnesses, their third-party claims, in which they challenge the identity of plaintiff's employer, should not have been dismissed as precluded by the board's prior determination of that issue (*Liss*, 68 NY2d at 22).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10720- Ind. 1684/13
10720A- 2384/13
10720B- 2855/14
10720C 2762/14

The People of the State of New York,
Respondent,

-against-

Joseph Anderson,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Levi P. Stoep of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered December 22, 2015,

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

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

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

ENTERED: JANUARY 7, 2020

CLERK

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

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

10722 In re Dantee R.W.,
Petitioner-Respondent,

-against-

Valerie T.,
Respondent-Appellant.

____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Elina Druker of counsel), for respondent.

____

Appeal from order, Family Court, New York County (Robert F.X. Ross, Support Magistrate), entered on or about July 26, 2016, which denied respondent mother's motion to vacate an order of support that had been entered upon her default, unanimously dismissed, without costs, and assigned counsel's motion to withdraw granted.

We have reviewed the record and agree with assigned counsel that there are no viable arguments to be raised on appeal (*Matter of Victor M.N. v Norma G.C.*, 154 AD3d 554 [1st Dept 2017]). The appeal is from a nonappealable order of the Support Magistrate,

and there appears to be no meritorious defense to the support petition. The mother also previously moved to vacate the January 2016 support order and defaulted, and did not object to or attempt to appeal from the order denying the motion.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10723 Pedro Gutierrez, Index 305823/13
Plaintiff, 83959/14

-against-

451 Lexington Realty LLC, et al.,
Defendants.
- - - - -
451 Lexington Realty LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Vortex Electric Co. Inc., et al.,
Third-Party Defendants-Appellants.

____

Russo & Toner, LLP, New York (Dan Schiavetta, Jr. of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith, New York (Nicholas P. Hurzeler of counsel), for respondents.

____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about February 21, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of third-party plaintiffs 451 Lexington Realty LLC and Flintlock Construction Services, LLC (Flintlock) for summary judgment for contractual indemnification against third-party defendants Vortex Electric Co. Inc. (Vortex) and Sigma Electric Inc. (Sigma), and denied third-party defendants' cross motion for summary judgment dismissing the third-party complaint as against Sigma, unanimously affirmed, without costs.

The court properly granted third-party plaintiffs' motion. Vortex signed an agreement in connection with the construction work to be done at the site, which clearly and unambiguously obligated it to defend and indemnify third-party plaintiffs for any personal injury claims resulting from the work under the subcontract. Flintlock was not at the scene at the time of plaintiff's accident, and both third-party plaintiffs' liability to plaintiff was strictly vicarious (*see Gutierrez v 451 Lexington Realty LLC*, 156 AD3d 418 [1st Dept 2019]). The evidence further demonstrated that third-party defendants were negligent in their supervisory control over the means and methods of the work which resulted in plaintiff's injuries (*id.*; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Maddox v Tishman Constr. Corp.*, 138 AD3d 646 [1st Dept 2016]; *Balbuena v New York Stock Exch., Inc.*, 49 AD3d 374, 376 [1st Dept 2008], *lv denied* 14 NY3d 709 [2010]).

The court also properly declined to dismiss the third-party complaint as against Sigma. The evidence shows that Vortex and Sigma were interchangeable, as there existed overlap in ownership, as well as common use of office space, equipment, and

employees, including plaintiff and his supervisor, who were employed on this job (*see Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341 [1st Dept 1996]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10724 Said Hakim, etc., Index 603000/05
Plaintiff-Respondent,

-against-

Kamran Hakim,
Defendant-Appellant,

Ranell Freeze Company, et al.,
Defendants.

____

Leo Fox, New York, for appellant.

Helene W. Hartig, New York, for respondent.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 21, 2017, which, upon reargument, adhered to its prior decision, denying defendant Kamran Hakim's (defendant) motion for summary judgment on his counterclaim to enforce a matured promissory note executed by plaintiff, unanimously affirmed, with costs.

On reargument, defendant failed to establish prima facie entitlement to summary judgment, as he failed to submit a supporting affidavit, founded upon personal knowledge, that set forth the note's underlying terms, including the nature of the alleged value exchanged as consideration for plaintiff's obligation under the note (*see generally Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381 [2004]; *Mann v Green*, 159 AD3d 545

[1st Dept 2018]; *Gliklad v Cherney*, 132 AD3d 601 [1st Dept 2015], *lv dismissed* 28 NY3d 952 [2016]). Assuming arguendo that defendant did establish prima facie entitlement to summary judgment on his counterclaim to enforce the note, plaintiff's affidavit in opposition, along with his expert accountant's affidavit, raised factual issues as to the viability of plaintiff's defenses to the note, including whether plaintiff had ever received loan proceeds which defendant claimed was the consideration that supported plaintiff's obligation on the note.

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: JANUARY 7, 2020

CLERK

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

10725 The People of the State of New York, Ind. 3299/14
Respondent,

-against-

Freddy Trujillo,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Felicia A. Yancey 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 (Raymond L. Bruce, J.), rendered July 25, 2016,

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

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

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

ENTERED: JANUARY 7, 2020

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CLERK

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

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

10726 The People of the State of New York, Ind. 9474/99
Respondent,

-against-

Ricardo Lopez,
Defendant-Appellant.

____

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

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

____

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about May 28, 2015, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court providently exercised its discretion in denying resentencing, in light of defendant's extensive criminal history and repeated parole violations, including a violent crime committed while on parole, and his unsatisfactory prison disciplinary record (*see e.g. People v Correa*, 83 AD3d 555 [1st Dept], *lv denied* 17 NY3d 805 [2011]).

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

ENTERED: JANUARY 7, 2020

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CLERK

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

10728-
10728A Mirta Esponda,
Plaintiff-Respondent,

-against-

Ana Ramos-Ciprian,
Defendant,

The City of New York,
Defendant-Appellant.

____

James E. Johnson, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellant.

The Law Offices of Michael S. Lamonsoff, PLLC, New York (Stacey Haskel of counsel), for respondent.

____

Index 305186/12

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 20, 2018, which granted plaintiff's motion for clarification and thereupon vacated a prior order, entered July 16, 2014, to the extent it had granted the City's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion denied, and the complaint dismissed as to the City. Appeal from order, same court and Justice, entered on or about April 25, 2018, which denied the City's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper and as academic. The Clerk is directed to enter judgment dismissing the complaint as against the City.

In 2014, plaintiff moved for partial summary judgment against defendant Ana Ramos-Ciprian, the owner of the property abutting the allegedly defective sidewalk where she fell, and the City cross-moved for summary judgment dismissing the complaint as against it. The City agreed with plaintiff that Ramos-Ciprian was responsible for maintaining the sidewalk, and also argued that it could not be liable based on evidence establishing that it did not have prior written notice of the defect, a condition precedent to municipal liability, and did not create the defect. Plaintiff did not oppose the City's motion.

In the order entered July 16, 2014, the motion court granted plaintiff's motion for partial summary judgment against Ramos-Ciprian, and also granted the City's cross motion for summary judgment, finding that its responsibility for sidewalk maintenance was shifted to Ramos-Ciprian. Ramos-Ciprian appealed, and this Court issued an order modifying the July 2014 order to the extent of denying plaintiff's motion for partial summary judgment against Ramos-Ciprian, finding issues of fact as to whether she could rely on the exemption applicable for residential owners (133 AD3d 547 [1st Dept 2015]).

Thereafter, plaintiff moved for "clarification" before the motion court, contending that her claims against the City must be reinstated based on this Court's order. The motion court granted

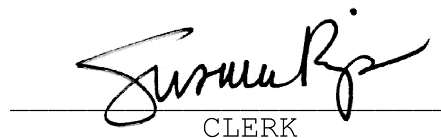
plaintiff's motion, concluding that since the legal reasoning for releasing the City in this case was deemed erroneous, it logically flowed that the grant of the City's cross motion was likewise erroneous. This appeal ensued.

Initially, we note that plaintiff's motion for clarification was in essence a motion to vacate the court's order granting the City's summary judgment motion pursuant to CPLR 5015(a). First, there was no logical inconsistency between the order denying plaintiff's motion against the landowner and the order granting the City's motion for summary judgment. Even if the landowner was not responsible for sidewalk maintenance, the City cannot be held liable unless it had prior written notice of the alleged sidewalk defect (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Kales v City of New York*, 169 AD3d 585, 585 [1st Dept 2019]). By failing to oppose the City's factual showing of lack of prior written notice, plaintiff is "deemed [to have admitted the facts]" in the moving papers, and, in effect, made "a concession that no question of fact exists" as to the City's lack of liability (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *see Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 609 [1st Dept 2012]). Moreover, she did not appeal the order which then became final. There was no basis to vacate the final,

unappealed order granting the City summary judgment based on a subsequent decision in favor of a different party (*see Nash v Port Auth. of N.Y. & N.J.*, 131 AD3d 164, 166-167 [1st Dept 2015], *lv dismissed* 26 NY3d 1116 [2016]).

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

ENTERED: JANUARY 7, 2020



CLERK

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

10729 In re John Mooney, Index 100413/18
Petitioner,

Brian Burke,
Petitioner-Appellant,

-against-

New York City Transit Authority, et al.,
Respondents-Respondents.

____

Brian Burke, appellant pro se.

David I. Farber, Brooklyn (Daniel Chiu of counsel), for New York City Transit Authority, respondent.

David P. Quinn, Albany (Ellen M. Mitchell of counsel), for New York State Public Employment Relations Board, respondent.

Colleran, O'Hara & Mills, L.L.P., Woodbury (Steven C. Farkas of counsel), for Transport Workers Union Local 100, respondent.

____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered July 13, 2018, to the extent appealed from, denying the petition to vacate a determination by respondent Public Employment Relations Board (PERB), dated February 21, 2018, which dismissed petitioner Burke's improper practice charge against respondents New York City Transit Authority (NYCTA) and Transport Workers Union Local 100 (TWU), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

PERB's determination that petitioner failed to state a claim

of improper practices against NYCTA and TWU is not arbitrary and capricious or legally impermissible (*see District Council 37, Am. Fedn. of State, County, and Mun. Empls., AFL-CIO v City of New York*, 22 AD3d 279 [1st Dept 2005]). PERB rationally found that petitioner failed to allege facts that would show that TWU engaged in arbitrary, discriminatory or bad faith conduct, as required to state a claim for breach of the duty of fair representation (*see Matter of Civil Serv. Bar Assn., Local 237, Intl. Bhd. of Teamsters v City of New York*, 64 NY2d 188, 195-196 [1984]). Indeed, petitioner acknowledged that a TWU representative sent an email to NYCTA, seeking to schedule three of petitioner's grievances for a Step II hearing. Petitioner's primary complaint, that NYCTA did not process his grievances quickly enough, does not present a basis for finding that TWU breached its duty of fair representation (*Matter of Sapadin v Board of Educ. of City of N.Y.*, 246 AD2d 359 [1st Dept 1998]).

Because petitioner failed to show that TWU breached its duty of fair representation, he is precluded from litigating directly against NYCTA for a breach of Civil Service Law (Public Employees' Fair Employment Act) § 209-a(1) (*Matter of Gil v Department of Educ. of the City of N.Y.*, 146 AD3d 688, 688 [1st Dept 2017]). In any event, PERB rationally concluded that petitioner's charge failed to allege facts that would show that

NYCTA refused to process his grievances on the basis of improper motivation or discrimination (*see Sapadin*, 146 AD2d at 360). Construed liberally in petitioner's favor, the allegations in the charge are conclusory and fail to establish that PERB acted arbitrarily and capriciously in dismissing the charge (*see Aristy-Farer v State of New York*, 29 NY3d 501, 515-516 [2017]).

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

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

ENTERED: JANUARY 7, 2020

CLERK

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

10730-
10730A In re Katherine U.,

A Child under Eighteen Years of Age, etc.,

Jose U.,
Respondent-Appellant,

Administration for Children's Services
Petitioner-Respondent.

____

Law Offices of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Jesse A. Townsend of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

____

Order of disposition, Family Court, Bronx County (Alma M. Gómez, J.), entered on or about February 27, 2019, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about February 11, 2019, which found that respondent father sexually abused the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court properly balanced respondent's due process rights with the child's emotional well-being in permitting the child to

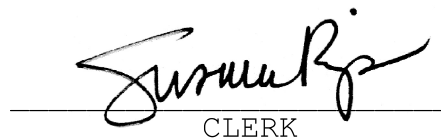
testify via closed-circuit television. Although the child was out of respondent’s presence, she was visible and subject to contemporaneous cross-examination by respondent’s counsel in consultation with respondent (*see Matter of Moona C. [Charlotte K.]*, 107 AD3d 466 [1st Dept 2013]). The affidavit of the child’s social worker was sufficient to establish that the child would suffer emotional harm if she were required to testify in open court (*see Matter of Giannis F. [Vilma C.-Manny M.]*, 95 AD3d 618 [1st Dept 2012]).

Furthermore, prior to the conclusion of the fact-finding hearing, respondent was convicted after a jury trial of predatory sexual assault against a child, rape in the first degree, incest in the first degree, and two counts of sexual abuse in the second degree as against the child. Respondent had a full and fair opportunity to litigate the charges in the criminal action, at which the child testified in open court. The acts that respondent was convicted of fell squarely within the allegations

in the sexual abuse petition, which collaterally estops respondent from rebutting the allegations of sexual abuse that were set forth in the petition (*see Matter of Vivien V. [Carlos F.]*, 119 AD3d 596 [2d Dept 2014]).

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

ENTERED: JANUARY 7, 2020



CLERK

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

10731-
10731A The People of the State of New York, Ind. 2043/14
Respondent,

-against-

Shaun Martin,
Defendant-Appellant.

Aidala, Bertuna & Kamins, P.C., New York (Barry Kamins of counsel), for appellant.

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

Order, Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about May 4, 2018, which denied defendant's CPL 440.10 motion, unanimously reversed, on the law, and the matter remanded for a hearing. Appeal from judgment (same court and Justice) rendered November 4, 2016, as amended November 22, 2016, convicting defendant, after a nonjury trial, of murder in the second degree, aggravated vehicular homicide (two counts), assault in the first degree (two counts), aggravated vehicular assault (four counts), reckless endangerment in the first degree, operating a motor vehicle while under the influence of alcohol or drugs (three counts), assault in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term

of 20 years to life, held in abeyance pending the outcome of the hearing on defendant's CPL 440.10 motion.

Defendant's CPL 440.10 motion presented a factual dispute requiring a hearing. On the one hand, defendant's counsel on the motion submitted an affirmation representing that defendant's trial counsel had told him that he was unaware that he could call an expert witness regarding whether defendant was incapable, based on his ingestion of drugs, of possessing the required mental state of depraved indifference. The motion was also supported by the affidavit of an expert who represented that he would have testified at trial that defendant did not possess that statutorily required mental state. On the other hand, the prosecutor represented in an affirmation that trial counsel had told him that he was aware that he could have called an expert but chose not to do so for certain strategic reasons, the validity of which the parties dispute.

While the motion court had a sound basis for its conclusion that there was "no reasonable possibility" that defendant's trial counsel "was unaware that he could call an expert to testify about the defendant's state of mind," we find that this was not an adequate basis for denying the motion without a hearing in these circumstances. First, to the extent the court may have been relying on CPL 440.30(d), that section permits summary

denial when “there is no reasonable possibility that such an allegation is true,” but it applies only when the allegation “is made solely by the defendant.” That is not the case here, where the allegation at issue regarding trial counsel’s statements was made by defendant’s motion counsel based on his own knowledge.

Nor do we believe that this is a case such as *People v Samandarov* (13 NY3d 433 [2009]), where the lack of merit of a CPL 440.10 motion could be determined on the parties’ submissions, despite it being “theoretically possible that a hearing could show otherwise” (*id.* at 440). Here, while the court’s perception may well be borne out, there are issues of fact sufficient to warrant a hearing (*see People v Coleman*, 10 AD3d 487 [1st Dept 2004]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10732 John Woodward, et al., Index 655709/16
Plaintiffs-Appellants,

-against-

Nira Levine, et al.,
Defendants-Respondents.

____

Roberts & Roberts, New York (Arthur W. Greig of counsel), for appellants.

Carter Reich, PC, New York (Carter A. Reich of counsel), for respondents.

____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered June 5, 2019, which denied plaintiffs' motion for a protective order and to strike counterclaims asserted by defendants, unanimously affirmed, without costs.

The parties' so-ordered stipulation of January 30, 2018, where plaintiffs agreed that defendants' motion to amend the answer to assert counterclaims was granted, bars their challenge to defendants' assertion of the counterclaims now. The stipulation was not simply an agreement to accept service or to set a deadline for reply, but one that plainly allowed defendants to amend the answer to include counterclaims.

By signing the stipulation, plaintiffs waived the challenges to the counterclaims they assert here, including their collateral estoppel argument grounded in Business Corporation Law (BCL) §

1312, asserted only on reply and one we could decline to consider on that basis alone (*see e.g. Stang LLC v Hudson Sq. Hotel, LLC*, 158 AD3d 446 [1st Dept 2018]; *Matter of Erdey v City of New York*, 129 AD3d 546 [1st Dept 2015]). Even were we to consider the argument now, we would reject it, in light of the stipulation. In their initial cross motion to amend the answer, defendants posited that even if BCL § 1312 barred claims affirmatively asserted in their petition in a separate proceeding seeking pre-action discovery, it did not, given the maintain/defend distinction in the statute's subparts (a) and (b), bar its assertion of counterclaims in this action. Even if, as plaintiffs now assert, this argument begs the question of whether defendants' ostensibly unrelated counterclaims constitute "maintenance" or "defense" of an action, it is a question the parties already resolved in defendants' favor, by agreement.

Contrary to plaintiffs' arguments, defendants' revised discovery requests do not rehash requests previously stricken on grounds of overbreadth, and the court's determination on this point was a sound exercise of its discretion (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740 [2000]).

The court properly deemed the requests adequately tailored. Plaintiffs claim they are no different from the prior requests because they similarly seek, *e.g.*, documents or correspondence

concerning “the works described above.” However, by significantly narrowing what is “described above,” defendants narrowed the overall requests. Defendants’ requests are all the more appropriate because they are based on transactions previously disclosed by plaintiffs themselves in plaintiff Kristine Woodward’s affidavit, and thus the likelihood of their having responsive information available is greater.

Plaintiffs’ effort to frame the requests as a fishing expedition for irrelevant information is not persuasive. The counterclaims allege grounds for defendants’ concern about their business dealings with plaintiffs, and the requests, seeking specific information about such dealings, are made in furtherance of information supporting such claims.

Moreover, plaintiffs do not explain why their objections to the discovery requests should be entertained at this point, given their agreement to respond to such requests in a so-ordered stipulation entered into at the preliminary conference on January 23, 2019.

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: JANUARY 7, 2020

CLERK

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

10733 Pui Kum Ng Lee, etc., Index 155485/12
Plaintiff-Respondent,

-against-

Chatham Green, Inc., et al.,
Defendants-Appellants,

Transel Elevator & Electric Inc.,
Defendant.

____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Koster, Brady & Nagler, LLP, New York (Louis E. Valvo of counsel), for respondent.

____

Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered March 29, 2019, which, insofar as appealed from as limited by the briefs, denied the motion of defendants Chatham Green, Inc., Chatham Green Management Corp. and Gerard J. Picaso, Inc. for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

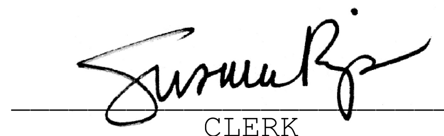
Defendants established prima facie entitlement to judgment as a matter of law in this action where plaintiff's decedent was injured when the door to the wheelchair lift on the exterior of the building in which they lived malfunctioned causing him to

fall out of the lift. Defendants submitted evidence demonstrating that they did not have notice of any malfunction in the subject door through service records showing no issues related to the door opening prematurely (*see Meza v 509 Owners LLC*, 82 AD3d 426 [1st Dept 2011]; *Lee v City of New York*, 40 AD3d 1048 [2d Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff did not submit any evidence that complaints about the lift were similar in nature or caused by similar contributing factors (*see Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [1st Dept 2007]). Nor is the doctrine of res ipsa loquitur applicable under the circumstances presented (*see Torres-Martinez v Macy's, Inc.*, 146 AD3d 638, 639 [1st Dept 2017]; *Parris v Port of N.Y. Auth.*, 47 AD3d 460 [1st Dept 2008]).

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

ENTERED: JANUARY 7, 2020



CLERK

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

10734 The People of the State of New York, Ind. 3962/13
Respondent,

-against-

Anthony Randall,
Defendant-Appellant.

____

Janet E. Sabel, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered May 13, 2015, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

Defendant's challenge to his second felony offender adjudication, alleging a lack of equivalency between his federal conviction and a New York felony, is unpreserved (*see People v Samms*, 95 NY2d 52, 57 [2000]; *People v Smith*, 73 NY2d 961 [1989])

and we decline to review it in the interest of justice. As an alternative holding, we find that defendant's federal bank robbery conviction is the equivalent of third-degree robbery (*see People v Smith*, 129 AD2d 517 [1st Dept 1987]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10738 The People of the State of New York, SCI 99026/18
Respondent,

-against-

Okami Landa,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson of counsel), for respondent.

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about August 31, 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.

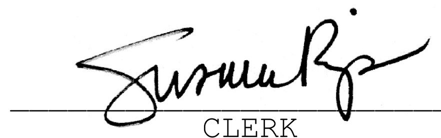
The People demonstrated by clear and convincing evidence aggravating factors that correlate with a risk of reoffense to justify the court's upward departure (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). The evidence establishes, among other things, that defendant was in possession of numerous videos and images of child pornography, and that he had spliced preferred content onto a compilation DVD for masturbatory purposes. In addition, the evaluating psychiatrist found that defendant will continue to possess cognitive distortions that present a moderate

risk for seeking child pornography in the future.

The mitigating factors cited by defendant have already been accounted for in the risk assessment instrument, or are outweighed by the seriousness of defendant’s conduct (*see People v Ryan*, 157 AD3d 463 [1st Dept 2018], *lv denied* 31 NY3d 904 [2018]; *People v Velasquez,* 143 AD3d 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]).

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

ENTERED: JANUARY 7, 2020



CLERK

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

10739 In re Milford Management, Index 161132/17
Petitioner-Appellant,

-against-

New York City Water Board, et al.,
Respondents-Respondents.

Christopher Hazen, Staten Island, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kevin Osowski of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered December 17, 2018, which denied the petition to annul a determination of respondent New York City Water Board (Water Board), dated August 17, 2017, finding that petitioner was not entitled to retroactive credits on its sewer bills for having cooling towers, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Water and Wastewater Rate Schedule promulgated by the Water Board, and administered by respondent New York City Department of Environmental Protection (DEP), neither violates a duty enjoined on respondents by law nor was promulgated in excess of jurisdiction, and instead complies with applicable law (CPLR 7803[1], [2]). The Rate Schedule generally charges for use of

the sewer system based on consumption of water (General Municipal Law § 451[1]; *see* Public Authorities Law § 1045-j[1] [charges appropriate for "services ... made available by() the sewer system"]; Administrative Code of City of NY § 24-514[a] [same, where sewer system is "used or useful"]), and allows for credits where DEP can estimate, "as far as practicable," the sewage to be discharged (Administrative Code of City of NY § 24-514[b][5]).

Nothing in the state or city legislative provisions identified precludes respondents from requiring customers to apply for the credits or from providing credits only prospectively. The regulations are both reasonable and practical given the statutory requirement to ensure that the system is financially self-sufficient (*see* Public Authorities Law §§ 1045-g[4], 1045-j[1]). "[A] utility has 'unfettered discretion to fix [rates] as it will so long as invidious illicit discriminations are not practiced and differentials are *not utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them*'" (*Matter of Prometheus Realty Corp. v New York City Water Bd.*, 30 NY3d 639, 646 [2017], quoting *Carey Transp. v Triboro Bridge & Tunnel Auth.*, 38 NY2d 545, 553 [1976]).

As such, the determination that petitioner was not entitled to retroactive credits beginning April 15, 2010, before it filed an application in 2015, was supported by a rational basis in the

record, as petitioner acknowledged that it did not apply before 2015 (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 [1974]).

The argument that respondents should have granted the credits as of May 22, 2015, when petitioner submitted its application, instead of June 1, 2015, when DEP installed remote reading devices on petitioner's cooling tower meters, based upon the text of the Rate Schedule, was not raised before the administrative agencies and, thus, "may not be raised for the first time before the courts in an article 78 proceeding" (*Matter of Peckham*, 12 NY3d at 430).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10740N Joseph Birro, Jr., Index 156590/16E
Plaintiff-Respondent,

-Against-

The Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants.

____

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

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

____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered February 7, 2019, which denied defendants' motion for leave to depose plaintiff's treating physicians, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in denying defendants' motion for leave to depose two physicians, one who treated plaintiff for prior injuries, and another who treated plaintiff following the accident at issue. Defendants failed to show that plaintiff's statements as recorded by the physicians conflicted with his deposition testimony (*compare Schroder v Consolidated Edison Co. of N.Y.*, 249 AD2d 69, 70-71 [1st Dept 1998]). Absent proof of a discrepancy between the medical records and plaintiff's testimony, defendants failed to

show that the deposition of the physicians was material and necessary to their defense (*see* CPLR 3101[a]). Furthermore, defendants failed to demonstrate that the physicians' testimony regarding plaintiff's spine and knee conditions would be unrelated to their diagnosis and treatment, and is the only avenue of discovering the information sought (*see Tuzzolino v Consolidated Edison Co. of N.Y.*, 135 AD3d 447 [1st Dept 2016]; *Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349 [1st Dept 2005]).

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

ENTERED: JANUARY 7, 2020

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10632 & M-8220 In re The People of the State of New York, ex rel. Martin J. LaFalce, on behalf of Anonymous, Petitioner, Ind. 869/19

-against-

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

- - - - -

Bridget G. Brennan, etc., Nonparty Respondent.

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

Office of Special Narcotics Prosecutor, New York (Brian Rodriguez of counsel), for Bridget G. Brennan, respondent.

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

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

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

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

M-8220 ***In re The People of the State of New York, ex rel. Martin J. LaFalce, on behalf of Anonymous***

Motion granted, all documents and orders in Case Nos. 2019-4290 and 2019-1433 are to be sealed and the captions are to be designated anonymous, as indicated. The protective order

granted by this Court by order entered November 14, 2019 is hereby extended for 72 hours from the date of entry hereof.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10698 The People of the State of New York, Ind. 4873/15
Respondent,

-against-

Peter Kapasakis,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 22, 2016, convicting defendant, upon his plea of guilty, of criminal contempt in the first degree, and sentencing him to a term of 90 days and three years' probation, unanimously affirmed.

Defendant has not preserved his challenge to the validity of his guilty plea, as he did not move to vacate his plea before sentencing (*People v Williams*, 27 NY3d 212, 214 [2016]). This case does not fall within the "narrow exception" where, because of the sequence of events, the defendant has "no practical ability" to move to withdraw his plea (*id.* at 220-221), Defendant, who was represented by counsel, had the opportunity to seek relief from the sentencing court (*see People v Conceicao*, 26 NY3d 375, 381 [2015]). As an alternative holding, we find that

defendant's plea was knowing, intelligent and voluntary (*see People v Toxey*, 86 NY2d 725 [1995]). The requisite elements, and defendant's understanding of the crime to which he was pleading guilty, can be readily inferred from the allocution (*see People v McGowen*, 42 NY2d 905 [1977]; *see also People v Seeber*, 4 NY3d 780, 781 [2005]).

The sentencing minutes establish that the court imposed an eight-year order of protection under the correct statute. The use of a printed form referring to a different statute was irrelevant to the order's validity and did not affect any substantial right of defendant (*see* CPL 470.05[1]). Because the order ran from the date of sentencing, rather than from the expiration of the sentence, there was no need for a sentence calculation, and thus defendant was not entitled to credit against the order for the eight days he spent in custody (*see* CPL 530.13[4]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10699 Wendy White, Index 157064/13
Plaintiff-Respondent,

-against-

Metropolitan Opera Association, Inc.,
Defendant-Appellant.

Katz & Rychik, P.C., New York (Abe M. Rychik of counsel), for appellant.

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for respondent.

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered May 15, 2019, which granted plaintiff's motion to dismiss defendant's second affirmative defense and for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

The motion court properly determined that plaintiff is specifically excluded as an "employee" of defendant for purposes of the Workers' Compensation Law, and that the special employee

doctrine cannot be used to deem her an "employee" of defendant for purposes of the Workers' Compensation Law (*see* 2017 McKinney's Session Law News of NY ch 23, § 1).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10700-
10700A In re Daniel P.,

A Child Under the Age
of Eighteen Years, etc.,

Noheme P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.
- - - - -
David P.,
Nonparty Respondent.
____

Andrew J. Baer, New York, for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Jonathan A. Popolow of counsel), for Administration for Children's Services, respondent.

Carol L. Kahn, New York, for David P., respondent.

The Law Office of Steven P. Forbes, Jamaica (Steven P. Forbes of counsel), attorney for the child.
____

Appeal from order of disposition, Family Court, Bronx County (Michael Milsap, J.), entered on or about May 3, 2018, which, based upon a fact-finding determination that respondent mother neglected the subject child, Daniel P., released the child for 12 months into Administration of Children's Services' (ACS) supervised custody of his nonrespondent father, David P., unanimously dismissed, without costs, as moot. Appeal from order of fact-finding, same court and Judge, entered, on the mother's

default, on or about December 20, 2017, unanimously dismissed, without costs, as taken from a nonappealable paper.

The mother argues, for the first time on appeal, that Family Court (and this Court, in its August 30, 2018 order granting poor person relief) was incorrect to state the order of fact-finding was issued on her default. Even were we to consider this unpreserved argument (*see Matter of Twania B. v James A.B.*, 172 AD3d 643 [1st Dept 2019]; *Matter of Toshea C.J.*, 62 AD3d 587 [1st Dept 2009]), we would reject it, as the record belies her characterizations. She eventually appeared at the April 28, 2017 proceedings, but by the time she did so, records from her treatment and evaluation at Lincoln Hospital, on which the fact-finding order was heavily based, had already been admitted into evidence. Counsel was not authorized to participate in her absence and stated he would not participate until she arrived (*cf. Matter of Jahira N.D. [Shaniqua S.S.]*, 111 AD3d 826 [2d Dept 2013]; *Matter of Bradley M.M. [Michael M.- Cindy M.]*, 98 AD3d 1257 [4th Dept 2012]; *Matter of Shemeco D.,* 265 AD2d 860 [4th Dept 1999]).

The mother was present at certain times, but not when most of the evidence of her neglect was submitted to Family Court. Moreover, when she was present, she did not seek to introduce any evidence to rebut the evidence of neglect. Accordingly, the

fact-finding order was properly deemed to have issued on the mother's default and, as such, is not an appealable paper (*Matter of George L. v Karen L.*, 172 AD3d 474 [1st Dept 2019]; *Matter of Daleena T.*, 145 AD3d 628 [1st Dept 2016]).

Even were we to consider the mother's second, third and fourth appellate points, addressed to the fact-finding order, we would find she has not shown grounds to disturb the findings of neglect.

While the mother faults Family Court for granting a motion she made: specifically, to relieve Bronx Defenders as her counsel, it was she who, in the middle of fact-finding, stated she no longer wanted Bronx Defenders as counsel. The court suggested her decision was ill-timed and that, as she herself notes, their representation of her was "vigorous." Her arguments about the departure of her second court-appointed counsel are also unavailing. Again, she asked that he be relieved yet faults Family Court for acting on her request. In any case, Family Court immediately appointed her new counsel each time and, when her third court-appointed attorney sought to be relieved because she insisted that he commence frivolous proceedings, Family Court resolved the impasse by dismissing the proceedings at issue (which the mother had commenced pro se), then persuaded counsel to stay on as her attorney.

The record also belies the mother's claim to have been wrongly deprived of the opportunity to cross-examine the ACS caseworker. Notwithstanding disruptions caused by her own tardy arrival and sudden request for new counsel, Family Court was open to the possibility of reopening the caseworker's testimony, and reasonably advised counsel to first determine if cross-examination was necessary, and, if so, to make an application explaining why the testimony should be reopened. The court also presented the option that counsel might call the caseworker as the mother's witness. However, at some point counsel decided not to call the caseworker to testify. This was his strategic decision, not the result of prohibitions by Family Court that would constitute denial of due process (*cf. Matter of Middlemiss v Pratt*, 86 AD3d 658 [3d Dept 2011]).

Even were we to consider the mother's unpreserved argument that nonrespondent father should not have been permitted to participate in fact-finding, we would reject it. A nonrespondent parent may participate in hearings to the extent they affect temporary custody of the subject child (*see* Family Ct Act § 1035[d]; *Matter of Kimberly RR. [Gloria RR.- Pedro RR.]*, 165 AD3d 1428 [3d Dept 2018]).

That the neglect findings were largely premised on the mother's alcohol abuse did not deprive her of due process. The

petition alleges incidents of domestic violence, aggressive and/or bizarre behavior that constituted neglect on October 24, December 24, and December 29, 2016 – which, moreover, is alleged to have been behavior that led to her being hospitalized for treatment or evaluation. The fact-finding order was based primarily upon these incidents, and its findings of alcohol abuse were based on hospital records of the moether's hospital treatment and evaluation on these dates, *i.e.*, events squarely alleged in the petition. The petition thus gave adequate notice of the specific dates at issue, while, at the same time, alleged conduct on those dates in a manner broadly enough to encompass the court's eventual findings (*cf. Matter of Vallery P.[Jondalla P.]*, 106 AD3d 575 [1st Dept 2013]; *Matter of Blaize F.*, 50 AD3d 1182 [3d Dept 2008]; *Matter of Joseph O.*, 28 AD3d 562 [2d Dept 2006]). Notably, the mother does not argue the events of those dates were inadequate to support a finding of neglect (*cf. Matter of Amier H. [Shellyann C.H.]*, 106 AD3d 1086 [2d Dept 2013]).

Her appeal from the order of disposition is moot, since it has expired by its own terms (*see Matter of Baby Boy W. [Jessica W.]*, 170 AD3d 538 [1st Dept 2019]; *Matter of Gabriel N.*, 144 AD3d

443 [1st Dept 2016]; *Klam v Klam*, 239 AD2d 390 [2d Dept 1997]).

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

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

ENTERED: JANUARY 7, 2020

CLERK

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

10701 Life Sourcing Co., Ltd., Index 655714/16
Plaintiff-Respondent,

-against-

Shoez, Inc.,
Defendant-Appellant,

Brands Unlimited, LLC, et al.,
Defendants.

____

Sam P. Israel, P.C., New York (Timothy L. Foster of counsel), for appellant.

Lazarus & Lazarus, P.C., New York (Harlan M. Lazarus of counsel), for respondent.

____

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered on or about December 24, 2018, which granted plaintiff's motion for partial summary judgment as to liability on its unjust enrichment claim and directed an assessment of damages against defendant Shoez, Inc., unanimously affirmed, with costs.

Plaintiff met its initial burden to show that defendant was unjustly enriched at plaintiff’s expense. There is no dispute that the matter is not controlled by a governing contract, and defendant acknowledges that it received the goods at issue.

Contrary to defendant's contention, the record shows that there is a connection or relationship between defendant and

plaintiff that could have caused reliance or inducement on plaintiff's part. Plaintiff paid for the goods one day after codefendant GIF Services, Inc., which was acting as defendant's customs agent for the goods in question, reassured plaintiff that defendant would pay for them. This was after defendant verified the original bill of lading and plaintiff's proof that it paid the factory and [was] given a discount (*see Philips Intl. Invs., LLC v Pektor*, 117 AD3d 1, 3 [1st Dept 2014]). Although defendant submitted an affidavit from its officer averring "upon information and belief" that the party defendant contracted with for the goods "already received payment, in whole or in part," it failed to submit evidence in support of that claim. As such, defendant failed to raise a triable issue of fact.

Finally, defendant waived its claims that the affirmation plaintiff submitted in support of its motion for partial summary judgment is inadmissable or that plaintiff lacks standing.

Defendant failed to raise those issues before the motion court, and we decline to review them (*see Sam v Town of Rotterdam*, 248 AD2d 850, 851-852 [3d Dept 1998], *lv denied* 92 NY2d 804 [1998]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10702 Jacquelin Motta, Index 101040/17
Plaintiff-Appellant,

-against-

Acting Judge Diane Kiesel,
etc., et al.,
Defendants-Respondents,

Joseph Motta, et al.,
Defendants.

____

Jacquelin Motta, appellant pro se.

Letitia James, Attorney General, New York (David Lawrence III of counsel), for respondents.

____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 27, 2018, which denied plaintiff's motion to vacate orders, same court and Justice, entered January 17, 2018 and April 27, 2018, upon her default, granting the motions by defendants Acting Judge Diane Kiesel, Support Magistrate Kemp Reaves, Caroline Oppenheimer, Esq., Roger Feihi, Esq. (together, the State defendants), Larry Sheehan, Esq., Shari R. Gordon, Esq., and Stephanie N. Burke, Esq. to dismiss the complaint as against them, unanimously affirmed, without costs.

Plaintiff failed to demonstrate a meritorious cause of action against the State defendants, who are entitled to judicial or quasi-judicial immunity from liability for the actions that

form the basis of plaintiff's claims against them (*see generally Tarter v State of New York*, 68 NY2d 511, 518 [1986]; *Mosher-Simons v County of Allegany*, 99 NY2d 214, 219-220 [2002]; CPLR 5015[a][1]).

Further, vacatur was properly denied as to defendant Sheehan, who was appointed by Supreme Court as receiver to sell the marital home, given that a "legal action filed against a receiver without leave of court cannot be maintained" (*Guberman v Rudder*, 85 AD3d 683, 684 [1st Dept 2011]).

On appeal, plaintiff does not address her claims against Gordon and Burke.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10703 The People of the State of New York, Ind. 3447/16
Respondent,

-against-

Sandy Munroe,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson 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 S. Lieb, J.), rendered January 3, 2018,

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

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

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

ENTERED: JANUARY 7, 2020

____
CLERK

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

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

10704 Robert Grate, Index 26162/16E
Plaintiff-Appellant,

-against-

Ralph Rodrigues, et al.,
Defendants-Respondents.

____

Law Office of Amy Posner, New York (Amy Posner of counsel), for appellant.

Picciano & Scahill, PC, Bethpage (Gerard Ferrara of counsel), for respondents.

____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered September 13, 2018, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to establish that he suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Contrary to plaintiff's contention, defendants are not limited to the ground relied on by the motion court in granting summary judgment, but may advance other grounds for affirmance that were presented to the motion court (*Matter of Nieves v Martinez*, 285 AD2d 410 [1st Dept 2001], citing *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]).

Defendants established prima facie that plaintiff, who was 53 years old at the time of the subject motor vehicle accident,

did not sustain a serious injury to his cervical spine, lumbar spine or right knee as a result of the accident. They submitted the report of an orthopedic surgeon, who found that plaintiff had full range of motion and negative test results in his cervical spine, lumbar spine, and right knee (*see Vishevnik v Bouna*, 147 AD3d 657 [1st Dept 2017]). The orthopedist also opined that plaintiff's MRI reports documented preexisting degenerative conditions, and defendant's radiologist reviewed the underlying MRI films and opined that they revealed chronic degenerative conditions, including spondylosis in the spine and osteoarthritis in the knee, unrelated to trauma (*see Batista v Porro*, 110 AD3d 609, 609 [1st Dept 2013]). Defendants also presented evidence, notably plaintiff's deposition testimony, that plaintiff sought no further medical treatment for the claimed conditions after undergoing an arthroscopic procedure in July 2016 and had no future medical treatment scheduled, which supports the conclusion that he did not sustain a serious injury to his spine or knee.

In opposition, plaintiff failed to address the issue of causation presented by the evidence of preexisting conditions documented in his own medical records (*see Hessing v Carroll*, 161 AD3d 462, 463 [1st Dept 2018]); *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Plaintiff submitted his unaffirmed MRI reports, which he was

entitled to rely upon because defendants’ orthopedist expressly relied upon them in reaching his conclusion that plaintiff’s conditions were preexisting and degenerative in nature (*Francis v Nelson*, 140 AD3d 467, 468 [1st Dept 2016]). However, the MRI reports do not avail plaintiff. While they show herniated and bulging discs in the spine and meniscal tears in the knee, they also reflect degenerative conditions, as noted by defendant’s orthopedist. Plaintiff’s doctors acknowledged that degeneration was likely in a person of plaintiff’s age, but they provided only conclusory opinions that the accident caused or aggravated the preexisting conditions, without addressing the particular conditions identified in plaintiff’s own records, and they offered no objective basis, only the history provided by plaintiff, for concluding that those conditions were not the cause of the claimed injuries (*see Sosa-Sanchez v Reyes*, 162 AD3d 414, 415 [1st Dept 2018]; *Marino v Amoah*, 143 AD3d 541, 541 [1st Dept 2016]; *Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10705 Jose M. Saavedra, Index 161750/15
Plaintiff-Respondent,

-against-

111 John Realty Corp., et al.,
Defendants-Appellants.
- - - - -
111 John Realty Corp., et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

The Daniel Mathews Group, Ltd.,
Third-Party Defendant,

The Daniel Mathews Group USA, Inc.,
Third-Party Defendant-Appellant-Respondent.

____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Lauren V. Lieberman of counsel), for appellants/respondents-appellants.

Lewis Johs Avallone Aviles, LLP, Islandia (Amy E. Bedell of counsel), for appellant-respondent.

The Oshman Mirisola Law Group, PLLC, New York (David L. Kremen of counsel), for respondent.

____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered December 3, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, denied defendants/third-party plaintiffs 111 John Realty Corp. (111 John) and Braun Management, Inc.'s (Braun) motion for summary judgment on their third-party claim for contractual

indemnification, and denied third-party defendant The Daniel Mathews Group USA, Inc.’s (DMGU) motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Plaintiff established a prima facie case of a Labor Law § 240(1) violation with undisputed evidence that his accident occurred when the scaffold on which he was working collapsed (*Noah v 270 Lafayette Assoc.*, 233 AD2d 108, 108 [1st Dept 1996]). In opposition, defendants failed to raise an issue of fact as to whether plaintiff was the sole proximate cause of his accident, because, even if, as they contend, plaintiff was instructed not to use scaffolds belonging to other trades working at the site of his accident, “an instruction to avoid an unsafe practice is not a sufficient substitute for providing a worker with a safety device to allow him to complete his work safely” (*Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 598 [1st Dept 2013]; *see Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]).

Summary resolution of 111 John and Braun’s indemnification claim against DMGU is precluded by the ambiguity in the 2015 agreement between Braun and DMGU (*see Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 362 [1st Dept 2004]; *Hudson-Port Ewen Assoc. v Chien Kuo*, 165 AD2d 301, 303 [3d Dept 1991], *affd* 78 NY2d 944 [1991]; *see also Eldoh v Astoria Generating Co., LP*, 57 AD3d 603,

604 [2d Dept 2008]) and the existence of other issues of fact. The ambiguity in the 2015 agreement arises from the fact that both parties are referred to as the "Contractor" at different places in the agreement. At issue is also the legal existence of third-party defendant The Daniel Mathews Group, Ltd. (DMGL), with whom Braun purportedly entered into an indemnification agreement in 2011, whether DMGU ever assumed DMGL's rights and responsibilities under the 2011 agreement, and the circumstances surrounding Braun and DMGU's entry into the 2015 agreement.

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

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

ENTERED: JANUARY 7, 2020

CLERK

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

10706 Empery Asset Master, Ltd, et al., Index 651306/18
Plaintiffs-Respondents,

-against-

AIT Therapeutics, Inc.,
Defendant-Appellant.

____

Kasowitz Benson Torres LLP, New York (Kim Conroy of counsel), for appellant.

Olshan Frome Wolosky LLP, New York (Thomas J. Fleming of counsel), for respondents.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about October 15, 2018, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiffs are holders of warrants to purchase shares of defendant's stock that contain antidilution provisions, which mandate that defendant adjust the warrant exercise price and share amount in the event it issues shares of stock to other parties for consideration below the then exercise price of plaintiffs' warrants. Plaintiffs allege that defendant issued securities to new investors pursuant to the February 16, 2018 Security Purchase Agreement (February 16 SPA). Plaintiffs contend that the February transaction diluted their investment, and that the certificate of adjustment it issued was incorrect as

to the exercise price and failed to reflect a change in the number of warrant shares arising from the transaction.

The complaint states a cause of action for breach of section 3(d) of the warrants by alleging that defendant’s issuance of Tranche A and Tranche B warrants in accordance with the February 16 SPA triggered defendant’s obligation to provide plaintiffs with an adjustment to the exercise price (*see Brad H. v City of New York*, 17 NY3d 180, 185 [2011]).

The complaint also states a cause of action for reformation of section 3(b) of the warrants. The complaint alleges that the relevant clause, which provides for the increase of the number of shares subject to plaintiffs’ option after a dilutive transaction, misstates the parties’ agreement by limiting the increase of the number of shares to an issuance of stock described in the “immediately preceding sentence” - which deals with the issuance of stock for no consideration - rather than the “immediately preceding *sentences*,” which would include the issuance of stock for a price lower than the exercise price. In this regard, plaintiffs’ complaint sufficiently alleges that the parties intended for the warrants to permit the increase of plaintiffs’ shares under both circumstances. Accordingly, the cause of action for reformation was properly sustained (*see Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*,

112 AD3d 78, 86 [1st Dept 2013] ["The purpose of reformation is . . . to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties"] [internal quotation marks omitted]). For the same reason, the court also properly denied defendant's motion to dismiss plaintiffs' breach of contract claim based on section 3(b) of the warrants.

In light of the foregoing, the court, on this pleading motion, properly sustained plaintiffs' claim for a declaratory judgment regarding the exercise price and the number of shares allotted to them under the warrants based on the certificate of adjustment.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10707 The People of the State of New York, Ind. 3357/09
Respondent,

-against-

William Thomas,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about August 29, 2017, which 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 correctly assessed 20 points under the risk factor for unsatisfactory conduct while confined, including sexual misconduct. There was reliable evidence that defendant engaged in lewd conduct directed at a female officer, and the record fails to support defendant's characterization of his conduct as other than sexual.

However, the court incorrectly assessed 15 points under the risk factor for acceptance of responsibility, because defendant was removed from sex offender treatment for reasons that were

“not tantamount to a refusal to participate in treatment” (*People v Ford*, 25 NY3d 939, 941 [2015]). Instead, the court should have assessed 10 points under the same risk factor based on defendant’s general failure to accept responsibility for his sexual misconduct. Nevertheless, even without any assessment for the risk factor for acceptance of responsibility, defendant remains a level three offender, and even with such a reduced score we find no basis for a downward departure (*see generally 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 seriousness of the underlying offenses.

The court providently exercised its discretion in declining to defer defendant’s sex offender classification hearing indefinitely, pending civil commitment proceedings (*see People v Powell*, 170 AD3d 413 [1st Dept 2019], *lv denied* 33 NY3d 908

[2019]; *People v Blum*, 166 AD3d 571 [1st Dept 2018], *lv denied* 32 NY3d 918 [2019]). We have considered defendant's remaining arguments relating to this issue.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10708 In re Deanna V.,
Petitioner-Respondent,

-against-

Michael C.,
Respondent-Appellant.

Bruce A. Young, New York, for appellant.

Carol L. Kahn, New York, for respondent.

Law Office of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child.

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about April 7, 2019, which, to the extent appealed from as limited by the briefs, granted the mother's petition to modify the custody order, awarded her sole legal and physical custody of the parties' child and ordered that the child commute from the Bronx to Long Beach for high school, unanimously affirmed, without costs.

The record demonstrates that, upon the parties' agreement in 2012, the child went to live with the father and paternal grandmother in Long Beach, Long Island and would visit the mother every weekend. However, by 2016, the father was spending 2 of 5 weeknights at his girlfriend's home in Brooklyn, and the child was being supervised by the grandmother. The grandmother

enrolled the child in school and took him to all medical, dental, and therapy appointments. She was also disciplining the child. The record showed that the child complained to his mother that his grandmother was abusing him, took away his things, and prevented him from contacting her. The child, through his attorney, expressed his desire to not live with the grandmother, and to either live with the father outside of the grandmother's home or with his mother.

A court has the discretion to order a change in custody when the totality of the circumstances warrants its doing so and it is in the best interest of the child (*Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). Factors to consider in determining the best interests of the child include the quality of each parent's home environment; the length of time the child has resided with each parent; the parents' past performance and relative fitness as a parent; their respective abilities to provide for the child's emotional and intellectual growth/development; the quality of the home environment and the parental guidance provided; and the willingness of each to foster a positive relationship with the other parent (*see id.*; *Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). Matters of custody are within the sound discretion of the trial court (*Sequeira v Sequeira*, 105 AD3d 504 [1st Dept 2013], *lv dismissed*

21 NY3d 1052 2015]), and its findings should be accorded great deference since that court was in the best position to evaluate the testimony, character, and sincerity of the parties (*Matter of Lisa W. v John M.*, 142 AD3d 879, 879 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017]). Further, the court's determination should not be disturbed unless it lacks a sound and substantial basis in the record (*Matter of David H. v Khalima H.*, 111 AD3d 544, 545 [1st Dept 2013], *lv dismissed* 22 NY3d 1149 [2014]).

The Family Court's determination that it was in the subject child's best interests to modify the prior joint custody order and award the mother sole legal and physical custody of the child, with visitation to the father, has a sound and substantial basis in the record (*see Matter of Phillip M. v Precious B.*, 173 AD3d 434, 435 [1st Dept 2019], *lv denied* 33 NY3d 911 [2019]). It is clear from the child's actions that the father's current home, which he shares with the paternal grandmother, is harming the child's emotional and mental health. In addition, while the father does play a role in the child's life, he has delegated decision-making authority to the grandmother, rather than sharing it with the mother. As such, the Court properly determined that it was in the child's best interests to transfer physical custody to the mother. The circumstances also support the Court's order that the child continue to attend Long Beach High School so that

he may remain with his friends and continue his extracurricular activities.

Moreover, it was clear from the extensive litigation history and the parties' acrimonious relationship that the parents are unable to reach a consensus or communicate on issues relating to the child. Accordingly, joint legal custody is inappropriate (*see id.; Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012]).

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: JANUARY 7, 2020

CLERK

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

10709 The People of the State of New York, Ind. 2166/13
Respondent,

-against-

Jonathan Austin,
Defendant-Appellant.

____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered June 10, 2014,

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: JANUARY 7, 2020

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CLERK

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

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

10710 U.S. Education Loan Trust IV, LLC, et al., Plaintiffs-Appellants-Respondents, — Index 654415/17

-against-

Bank of New York Mellon, Defendant-Respondent-Appellant.

Arnold & Porter Kaye Scholer LLP, New York (Eric N. Whitney of counsel), for appellants-respondents.

Dechert LLP, New York (Hector Gonzalez of counsel), for respondent-appellant.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about August 8, 2018, which, to the extent appealed from, granted defendant's motion pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the claims for conversion, breach of the duty to not operate under a conflict of interest, and a declaratory judgment, the part of the claim for breach of the indentures related to the Maximum Rate, Carry-Over Amounts, and broker-dealer fees, and all claims asserted by plaintiff Henry B. Howard, and denied the motion as to the claim for breach of the duty of due care, the remaining part of the claim for breach of the indentures, and the claims for common-law indemnification and attorneys' fees, unanimously modified, on the law, to grant the motion as to the part of the claim for breach

of the indentures based on section 4.06 of the indenture (the waterfall provision) and the part of the claim for breach of the duty of due care relating to the Maximum Rate, Carry-Over Amounts, and broker-dealer fees, and to deny the motion as to the part of the declaratory judgment claim related to defendant's entitlement to legal fees in the instant action, and otherwise affirmed, without costs.

The court correctly found that plaintiff Howard was not an intended third-party beneficiary of either the indenture or the Auction Agent Agreement. The indenture states that it is "intended to be ... for the sole and exclusive benefit of the parties hereto" and nine categories of people (Authenticating Agent, Paying Agent, Remarketing Agent, etc.). Howard was not a named beneficiary. Nor does he fall within the other nine categories (*see generally Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018]; *see also id.* at 708). The Auction Agent Agreement says, "Nothing in this Agreement ... shall give to any Person, other than the Trustee, ... the Issuer and the Auction Agent and their respective successors and assigns, any benefit of any legal or equitable right, remedy or claim under this Agreement." Howard is not the Trustee, the Issuer, the Auction Agent, or the successor or assign of any of the above.

Since plaintiffs are not New York residents, their causes of action accrued either in Delaware, the state of incorporation of plaintiff U.S. Education Loan Trust IV (hereinafter plaintiff), or in Florida, plaintiff's principal place of business (CPLR 202; *see Deutsche Bank Natl. Trust Co. v Barclays Bank PLC*, __NY3d__, 2019 NY Slip Op 08519 [2019]; *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 530 [1999]).

The court correctly dismissed the contract claims related to the Maximum Rate, Carry-Over Amounts, and broker-dealer fees as time-barred. Under Delaware law the statute of limitations for breach of contract is three years and begins to run when the contract is breached (*see e.g. Armstrong v Council of the Devon*, 2018 WL 1448093, *2, 2018 Del Super LEXIS 133, *4-5 [Mar. 23, 2018, C.A. NO.:N16C-09-026 AML], *affd* 198 A3d 724 [Del 2018]). The documentary evidence shows that plaintiff's' claim for overpayment of broker-dealer fees accrued, at the latest, on June 4, 2009. Plaintiffs' claim for Carry-Over Amounts accrued by the end of 2009. The allegation that defendant miscalculated the Maximum Rate accrued on or before November 2, 2010. This action was not commenced until June 2017 and is time-barred.

Plaintiff contends that the statute of limitations of Florida controls. However, these claims are also time-barred under Florida law. In Florida, the statute of limitations for

breach of a written contract is five years (*see e.g. Delco Oil, Inc. v Pannu*, 856 So 2d 1070, 1071 n 2 [Fla Dist Ct App 2003]). Since the dismissed contract claims accrued by November 2010, they were time-barred by November 2015 and should be dismissed under Florida law as well.

Plaintiff relies on equitable tolling, continuous representation, and equitable estoppel under Florida law. To the extent Florida permits equitable tolling in ordinary civil litigation, as opposed to the administrative context (*compare Matter of Engle Cases*, 45 F Supp 3d 1351, 1363-1364 [MD Fla 2014], *with Lopez v Geico Cas. Co.*, 968 F Supp 2d 1202, 1206 [SD Fla 2013]), this action is not an extraordinary case warranting the otherwise sparing use of the remedy (*see Engle*, 45 F Supp 3d at 1364). Nor would equitable tolling be applicable, because plaintiff was not ignorant of the limitations period (*see Machules v Department of Admin.*, 523 So 2d 1132, 1134 [Fla 1988]). It sought a tolling agreement in August 2014, before the statute of limitations expired.

Similarly, equitable estoppel would not avail plaintiff under Florida law (*see Delco*, 856 So 2d at 1073), because defendant did not lull plaintiff into complacency until after the statute of limitations had run.

Plaintiff's reliance on continuous representation is

unavailing because Florida has not adopted the continuous representation/treatment doctrine (*see Larson & Larson, P.A. v TSE Indus., Inc.*, 22 So 3d 36, 45-46 [Fl 2009]).

Under Delaware law, plaintiff relies on equitable tolling and equitable estoppel. The fiduciary type of equitable tolling is unavailable to plaintiff with respect to its breach of the indentures claim (*Sunrise Ventures, LLC v Rehoboth Canal Ventures, LLC,* 2010 WL 363845, *6, 2010 Del Ch LEXIS 22, *26-27 [Jan. 27, 2010, C.A. No. 4119-VCS]), because defendant was not a fiduciary in its capacity as indenture trustee (*see Cece & Co. Ltd. v U.S. Bank N.A.*, 153 AD3d 275, 279 [1st Dept 2017]). While defendant was a fiduciary in its capacity as Auction Agent, plaintiff may not invoke the fiduciary type of equitable tolling with respect to its breach of the Auction Agent Agreements claim, because it had not only *inquiry* notice but also *actual* notice of defendant's miscalculation of the Maximum Rate by November 2, 2010 and of overpayments to broker-dealers by October 2011 – before the expiration of the statute of limitations in November 2013 (*see Sunrise*, 2010 WL 363485 at *6, 2010 Del Ch LEXIS 22 at *27).

Nor may plaintiff invoke the type of equitable tolling under Delaware law that is based on a defendant's affirmative act to mislead and induce a plaintiff not to bring suit, because the

complaint alleges "mere attempts to repair or a promise to repair a breach of contract" which do not preclude the running of the statute (*Central Mtge. Co. v Morgan Stanley Mtge. Capital Holdings LLC*, 2012 WL 3201139, *23, 2012 Del Ch LEXIS 171, *90 [Aug. 7, 2012, Civil Action No. 5140-CS]).

As for equitable estoppel, plaintiff cites New York law. However, it does not allege that defendant induced it to refrain from suit by fraud, misrepresentations or deception (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). Moreover, plaintiff was aware of the facts before the statute of limitations expired (*see Pahlad v Brustman*, 8 NY3d 901, 902 [2007]; *Bacon v Nygard*, 140 AD3d 577, 578 [1st Dept 2016]).

The conversion claim is duplicative of the contract claims (*see Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 [1st Dept 2008]).

Plaintiff does not need a declaratory judgment with respect to the Noteholder Lawsuits, because by its own admission it has an adequate remedy at law (*see Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016]). We note that Section 6.11 of the indenture authorizes an award of attorneys' fees (see *e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 584 [2018]). However, a declaration is necessary as to whether defendant is entitled to attorneys' fees in this action. While in the seventh cause of action plaintiff seeks its

own fees in this action, in the eighth cause of action it seeks a declaration that defendant is not entitled to attorneys' fees.

With respect to the claims that the court declined to dismiss, the negligence claim is time-barred to the extent it is based on the same facts as underlie the dismissed contract claims (i.e., Carry-Over Amounts, Maximum Rate, and broker-dealer fees). Under Delaware law, which is the focus of the parties' dispute about accrual (*see* CPLR 202), the cause of action accrues at the time of injury caused by a tortious act (*Lima Delta Co. v Global Aerospace, Inc.,* 2017 WL 4461423, *5, 2017 Del Super LEXIS 495, *10 [Oct. 5, 2017, C.A. No. 16C-11-241WCC CCLD], *affd* 189 A3d 185 [Del 2018]). In its opposition to defendant's motion, plaintiff admitted that it did suffer some injury at the time of defendant's wrongful acts (*see Kaufman v C.L. McCabe & Sons, Inc.*, 603 A2d 831, 834 [Del 1992]). Moreover, plaintiff had reason to know in 2010-2012 that wrongs had been committed (*see Abdi v NVR, Inc.*, 2007 WL 2363675, *3, 2007 Del Super LEXIS 237, *17 [Aug. 17, 2007, C.A. No. 04C-08-028-PLA], *affd* 945 A2d 1167 [Del 2008]).

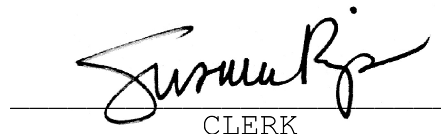
Contrary to defendant's contention, the breach of the indentures claim includes allegations in addition to those concerning Carry-Over Amounts, the Maximum Rate, broker-dealer fees, and defendant's use of funds to reimburse itself for its

legal expenses in the Noteholder Lawsuits. However, to the extent the claim is based on allegations that defendant did not properly allocate funds according to the waterfall, it is time-barred because the waterfall is connected to Carry-Over Amounts and because plaintiff knew about this issue as long ago as 2010.

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

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

ENTERED: JANUARY 7, 2020



CLERK

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

10711 Fitzgerald Edibles, Inc., doing business as P.J. Carneys, Plaintiff-Appellant, Index 150625/12

-against-

Osborne Tenants Corp., et al., Defendants-Respondents,

Yunga Construction Inc., Defendant.

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Law Office of James C. Mantia, P.C., New York (James C. Mantia of counsel), for appellant.

Robert I. Cantor, PLLC, New York (Patrick Train-Gutiérrez of counsel), for respondents.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered May 11, 2018, which, to the extent appealed from, granted defendants Osborne Tenants Corp. and Joseph Ferrara's motion to set aside the award of punitive damages, and denied plaintiff's application for a judgment declaring that it is restored to possession of contested areas of the building and that it has a prescriptive easement, unanimously affirmed, without costs.

The trial court's conclusion that restoration to the premises following the wrongful eviction would be futile is supported by the jury's finding that there was no trespass to land (*see Matter of 110-45 Queens Blvd. Garage v Park Briar Owners*, 265 AD2d 415, 416 [2d Dept 1999]). The trial court also

correctly concluded, given the trial testimony that plaintiff had permission from the net lessee to use the vestibule or, alternatively, that the vestibule was a common area, that plaintiff’s use lacked the requisite hostility to establish its entitlement to a prescriptive easement (*see Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364 [1st Dept 2006]; *10 E. 70th St. v Gimbel*, 309 AD2d 644, 645 [1st Dept 2003]).

On this record, the court properly set aside the award of punitive damages.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10712 Hetri Totaram, Index 380033/15
Plaintiff-Respondent,

-against-

Debbie Gibson,
Defendant-Appellant,

CACH LLC, et al.,
Defendants.

____

Law Offices of Steven A. Grant, New York (Steven A. Grant of counsel), for appellant.

Robinowitz Cohlan Dubow & Doherty LLP, White Plains (Bruce Minkoff of counsel), for respondent.

____

Order and judgment of foreclosure and sale (one paper), Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about February 13, 2019, unanimously affirmed, without costs.

Defendant lacks standing to contest the judgment of foreclosure, because she conveyed her interest in the property while the foreclosure action was pending (*see Terrapin Indus., LLC v Bank of N.Y.,* 137 AD3d 569 [1st Dept 2016]; *Wells Fargo Bank, N.A. v Munoz*, 169 AD3d 609 [1st Dept 2019]; *NYCTL 1996-1 Trust v King*, 13 AD3d 429, 430 [2d Dept 2004]; *Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222, 223 [2d Dept 1994]). Her attempt to reconvey the property to herself and her son as joint tenants after the notice of pendency was filed does not avail her.

Defendant's argument that her cross motion to reargue and reconsider should not have been transferred to a new Justice is unavailing, because the transfer was administrative (*see e.g. C & N Camera & Elecs. v Public Serv. Mut. Ins. Co.*, 210 AD2d 132, 133 [1st Dept 1994]; *Dalrymple v Martin Luther King Community Health Ctr.*, 127 AD2d 69, 72-73 [2d Dept 1987]), *Billings v Berkshire Mut. Ins. Co.*, 133 AD2d 919, 919-920 [3d Dept 1987], *lv dismissed* 70 NY2d 1002 [1988]).

We decline to reach defendant's remaining arguments, which are unpreserved.

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

ENTERED: JANUARY 7, 2020

CLERK

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

10713-
10713A The People of the State of New York, Respondent,

Ind. 2353/15
1504/16

against-

Jarel Moore, also known as Malik Moore,
Defendant-Appellant.

____

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 30, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of three years, and judgment, same court (Neil E. Ross, J.) rendered February 6, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a concurrent term of six years, unanimously affirmed.

Defendant’s argument that his pleas should be vacated in the event this Court reverses a separate conviction has been rendered academic by our affirmance of that conviction (171 AD3d 406 [1st Dept 2019], *lv denied* 33 NY3d 1071 [2019]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10714 In re J.H., an Infant, by His Mother and Natural Guardian, Raniqua B., Petitioner-Appellant, Index 805168/16

-against-

New York City Health and Hospitals Corporation, Respondent-Respondent.

____

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

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

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 8, 2018, which denied petitioner's motion for leave to serve a late notice of claim, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying petitioner's motion for leave to serve a late notice of claim. The infant plaintiff and his mother received pre- and post-natal care at Harlem Hospital Center (HHC), an institution operated by respondent. The record establishes that the subject medical malpractice claim accrued by April 11, 2013, when the infant was discharged from the hospital after birth (*see Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d

672, 674 [2016]). However, the instant motion for leave to serve a late notice of claim was not brought until May 2016, and we decline to consider petitioner's claim of continuing treatment (*see Plummer v New York City Health & Hosps. Corp.*, 98 NY2d 263, 267-268 [2002]), as it was raised for the first time on appeal.

The medical records were insufficient to impute actual knowledge to respondent, as they did not "*evince* that the medical staff, by its acts or omissions, inflicted any injury on [petitioner]" (*see Wally G.*, 27 NY3d at 677). Even if petitioner's untimely and unauthorized June 2014 notice of claim was sufficient to provide such actual knowledge to respondent, the 11-month delay between the expiration of the 90-day notice of claim period in July 2013 and the service of this notice in June 2014 was not reasonable (*see Matter of Shun Mao Ma v New York City Health & Hosps. Corp.*, 153 AD3d 529, 530-531 [2d Dept 2017]).

Petitioner failed to establish that the delay in serving a notice of claim or seeking leave to serve a late notice of claim was the product of the infant's health issues (*see Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 [1st Dept 2006]).

Petitioner further failed to meet the initial burden of demonstrating the absence of substantial prejudice (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016]). Accordingly, respondent was not required to make a particularized evidentiary showing thereof (*see id.* at 467).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10716-
10716A The People of the State of New York, Appellant, Ind. 702/18

-against-

Travis Butler,
Defendant-Respondent.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for appellant.

The Bronx Defenders, Bronx (Courtney S. Dixon of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered on or about November 20, 2018, which, to the extent appealed from, dismissed 10 counts of the indictment upon inspection of the grand jury minutes, unanimously reversed, on the law, the motion to dismiss denied, and the dismissed counts reinstated. Appeal from order, same court and Justice, entered on or about March 7, 2019, which effectively granted reargument, and upon reargument, adhered to its original order, unanimously dismissed, as academic.

The grand jury testimony established, among other things, that after defendant and another man approached the victim, defendant cut the victim's forehead with a razor blade, the other man hit the victim in the back of the head with a hard object,

and both men punched the victim. Immediately after the attack, the victim noticed that the cell phone he had used shortly before the attack was missing. Either directly or by way of reasonable circumstantial inferences, this evidence was sufficient to support an indictment for each of the robbery, larceny, weapon and assault-related charges that the court dismissed (*see generally People v Swamp*, 84 NY2d 725, 730 [1995]; *People v Deegan*, 69 NY2d 976, 979 [1987]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10717 Daniel Minaya Delgado, Index 22895/16
Plaintiff-Appellant,

-against-

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

The New York City Housing Authority,
Defendant-Respondent.

____

Harris Law, New York (Joseph Kelley of counsel), for appellant.

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

____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about October 12, 2018, which granted defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

NYCHA established prima facie that it neither created nor had actual or constructive notice of the black ice that allegedly caused plaintiff's fall in the employee parking lot. A NYCHA maintenance worker testified that he had cleared snow from the lot the day before plaintiff's alleged accident and salted the area on the morning of the accident, 1½ to 2 hours before plaintiff's fall. Plaintiff admitted that he had not observed any black ice before falling (*see Pena v City of New York*, 161

AD3d 522, 523 [1st Dept 2018]).

In opposition, plaintiff submitted an affirmation by his counsel asserting that black ice was created by the melting and re-freezing of snow. The affirmation failed to raise an issue of fact because it was not made on the basis of personal knowledge of the facts and was not supported by any evidence (*see Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006]). There is also no evidentiary support for plaintiff's insinuation that the area was salted only after his fall (*see Cyril v Mueller*, 104 AD3d 465 [1st Dept 2013]).

Finally, we decline to consider plaintiff's claim that NYCHA had notice of a recurring condition as plaintiff failed to allege this theory in his notice of claim (*Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651 [1st Dept 2013]).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10718N Christion Rivera, Index 21536/14E
Plaintiff-Appellant,

-against-

Skanska USA Civil Northeast,
Inc., et al.,
Defendants-Respondents.

____

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

Armienti, DeBellis & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for respondents.

____

Appeal from order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 11, 2016, which denied plaintiff’s motion to vacate an order, entered April 23, 2015, upon plaintiff’s default, granting defendants' motion for an order of preclusion pursuant to CPLR 3126 and dismissing the complaint, unanimously dismissed, without costs.

Plaintiff’s notice of appeal, dated September 25, 2018, states that he is appealing “from a Decision and Order of the Supreme Court, Bronx dated July 5, 2016.” He claims that his notice of appeal contains an "inaccurate description" of the paper appealed, as evinced by his attachment of the judgment entered September 20, 2018, and requests this Court to exercise its discretion to deem the appeal as a timely one from the

judgment (*see* CPLR 5520[c]). Even if the defect were a mere "typographical error" as claimed by plaintiff, we find no interest of justice basis to treat the notice as valid, where plaintiff is clearly seeking to circumvent an untimely appeal from the order (*see Pollak v Moore*, 85 AD3d 578 [1st Dept 2011]). In any event, even if we were to grant plaintiff's request, the appeal from the judgment would not bring up for review the order, which was final and disposed of all of the causes of action between the parties and left nothing for further judicial action apart from the ministerial entry of the judgment (CPLR 5501[a]; *Burke v Crosson*, 85 NY2d 10, 15-16 [1995]; *315 W. 103 Enters. LLC v Robbins*, 171 AD3d 466, 467 [1st Dept 2019]; *Pollak v Moore*, 85 AD3d at 578).

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

ENTERED: JANUARY 7, 2020

CLERK

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

10719N In re Donna T. Anthony, M.D., etc., Index 531108/06
Petitioner-Respondent,

-against-

Jerry V.,
Respondent-Appellant.

____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Margo Flug of counsel), for appellant.

Garfunkel Wild, P.C., Great Neck (Eve Green Koopersmith of counsel), for respondent.

____

Appeal from order, Supreme Court, New York County (Frank P. Nervo, J.), entered October 24, 2018, which, inter alia, granted petitioner's motion to renew its motion for involuntary medication of respondent and, upon renewal, authorized petitioner to administer such emergency medications as it deemed necessary, unanimously dismissed, without costs, as moot.

As petitioner has been released from involuntary hospitalization under Mental Hygiene Law § 9.27, we find, on the record before us, that the instant appeal is now moot.

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

ENTERED: JANUARY 7, 2020

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CLERK

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

10743-
10743A Julia E. Knight, etc.,
Plaintiff,

Index 26284/15

-against-

City of New York,
Defendant-Respondent,

New York City Fire Department, et al.,
Defendants,

Call Operator/Dispatcher Tracy
Evans-Whitehead,
Defendant-Appellant.

____

Law Office of Erika L. Hartley, Brooklyn (Erika L. Hartley of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about April 3, 2018, which granted the application of the Office of Corporation Counsel to withdraw as defendant Tracy Evans-Whitehead's attorney, and denied her cross motion to compel the City of New York to provide her with defense counsel, without prejudice to her seeking article 78 relief unanimously modified, on the law and the facts, to remand for reconsideration of the cross motion in accordance herewith, and otherwise affirmed, without costs. Appeal from order (same court and Justice) entered on or about March 4, 2019, which denied

defendant’s motion to renew, unanimously dismissed, without costs, as academic in light of the foregoing.

As a City employee, defendant is entitled to a defense under General Municipal Law § 50-k unless Corporation Counsel determines that defendant has violated certain agency rules and regulations (*see Matter of Bolusi v City of New York*, 249 AD2d 134 [1st Dept 1998]). Here, the record does not show that the City made a formal determination denying defendant a defense. Instead, on August 31, 2017, Corporation Counsel sent a letter to defendant, stating that it was bringing a motion to be relieved as defendant’s attorney in this action. The letter did not specify any agency rule or regulation that the City claimed she had violated (*see Matter of Krug v City of Buffalo*, –NY3d–, 2019 NY Slip Op 08546, 2019 WL 6312524 [2019] [City’s determination notified employee that he had violated City’s rules against the use of force]). The letter only stated that there was a conflict prohibiting Corporation Counsel from representing her. The City then proceeded to ask Supreme Court to relieve it from continuing to represent the defendant. Defendant cross-moved to have the court direct the City to provide her with legal representation, even if that be by separately retained private counsel.

Under the circumstances, Supreme Court erred in not considering the merits of the cross motion. Instead, the court

limited her to bringing an article 78 proceeding. Although Supreme Court denied the motion without prejudice to commencing an article 78 proceeding in order to challenge Corporation Counsel's "determination" that she is not entitled to its defense in this matter, there was no administrative determination issued by the City or Corporation Counsel that can be reviewed. Defendant is entitled to a determination on the merits of whether her actions exceeded the scope of her employment for purposes of determining whether she is entitled to representation by Corporation Counsel (*see Matter of Williams v City of New York*, 64 NY2d 800, 802 [1985]; *Blood v Board of Educ. of City of N.Y.*, 121 AD2d 128, 130 [1st Dept 1986]). Since there is no formal agency determination to review, this determination should have been made by Supreme Court. We recognize that in denying the cross motion, without prejudice, Supreme Court did not address the parties' requests to amplify the record. Accordingly, we remand this matter to Supreme Court to determine the cross motion and what, if any, further materials should be submitted by the parties (General Municipal Law § 50-k; *see Timmerman v Board of Educ. of City School Dist. of City of N.Y.*, 50 AD3d 592, 593 [1st Dept 2008]).

Since we are remanding the cross motion for consideration by the Supreme Court, we need not reach defendant’s remaining arguments.

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

ENTERED: JANUARY 7, 2020

CLERK