CORRECTED ORDER - JUNE 26, 2020

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11665 The People of the State of New York, Respondent, Ind. 5068/13

-against-

Corey Dunton,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (David Crow of counsel) and Mayer Brown LLP, New York (Christopher J. Houpt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered February 17, 2017, as amended on February 28, 2017, convicting defendant, after a jury trial, of attempted murder in the **second** degree, assault in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), assault in the second degree and reckless endangerment in the first degree, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress a remark he made during arrest processing, in which he expressed remorse for the injuries he inflicted upon one of the victims. The brief interchange between defendant and a detective that preceded this remark was not the functional equivalent of

interrogation (*see People v Rivers*, 56 NY2d 476, 479-480 [1982]).

The court also properly declined to suppress a lineup identification. Our examination of the lineup photo reveals that, in all respects, defendant and the fillers were reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

Defendant failed to preserve his argument that police committed a constructive violation of *Payton v New York* (445 US 573 [1980]) by coercing him to leave his apartment, and the court did not expressly rule on that specific argument (*see* CPL 470.05(2); *see generally People v Bailey*, 32 NY3d 70, 78 [2018]; *see e.g. People v Wallace,* 27 NY3d 1037, 1038-1039 [2016]). As an alternative holding, we find that the evidence establishes that defendant was arrested after he voluntarily came out of his apartment (*see People v Garvin*, 30 NY3d 174, 180-183 [2017], *cert denied* 586 US __, 139 S Ct 57 [2018]).

In any event, any errors in the suppression rulings at issue were harmless, whether viewed individually or collectively, in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). Notably, defendant incriminated himself and expressed remorse in Facebook messages and posts.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of

justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11656 Rosalie Perez, Index 24311/16E
Plaintiff-Appellant,

-against-

Sharon J. Murray, et al.,
Defendants,

Jeffrey M. DeMartino,
Defendant-Respondent.

_____

Buzin & Berman, P.C., New York (Heath T. Buzin of counsel), for appellant.

Burke, Conway & Stiefeld, White Plains (Sami P. Nasser of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about November 8, 2019, which granted the motion of defendant Jeffrey M. DeMartino for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

Defendant established prima facie entitlement to judgment as a matter of law in this action for personal injuries arising from a motor vehicle accident involving four vehicles. It is undisputed that defendant's vehicle never made contact with plaintiff's vehicle. Defendant submitted evidence showing that he was confronted with an emergency not of his making. Defendant's evidence showed that he acted reasonably and prudently by activating his brakes and attempting to move his vehicle to the left upon observing codefendant Houston's vehicle suddenly entering his lane of travel, but losing control of his

vehicle after the impact (*see Dattilo v Best Transp. Inc.*, 79 AD3d 432, 433 [1st Dept 2010]; *Coleman v Maclas*, 61 AD3d 569, 569-570 [1st Dept 2009]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's claim that defendant failed to maintain a proper lookout or use due care while operating his vehicle before Houston suddenly attempted to enter his lane of travel is speculative. Plaintiff testified that she did not witness the accident and failed to submit an affidavit from anyone who did witness the accident (*see Mack v Seabrook*, 161 AD3d 704, 705 [1st Dept 2018], *lv denied* 32 NY3d 915 [2019]).

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11657-
11657A Dkt. NN-22799/18

In re Nylah E.,

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

Noemi C.,
Respondent-Appellant,

Theodore E.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Kevin Osowski of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (David J. Kaplan, J.), entered on or about June 12, 2019, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 5, 2019, which, after a hearing, found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner agency proved by a preponderance of the evidence that respondent neglected the child (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]). The record shows that respondent's lack of insight into caring for the newborn child, coupled with

her misuse of alcohol, placed the child in imminent danger of physical impairment (*see Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 44 [1st Dept 2010]; *see also Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516 [1st Dept 2012]).

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11659 The People of the State of New York, Ind. 903/17
Respondent,

-against-

Amado Vega, Jr.,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered June 19, 2017,

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

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

ENTERED: JUNE 18, 2020

CLERK

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

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11660 The People of the State of New York, Ind. 3809/16
Respondent,

-against-

Romie Knight,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas A. Farber, J.), rendered June 8, 2018,

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

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

ENTERED: JUNE 18, 2020

CLERK

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

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

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11662-
11662A-
11662B

Index 650002/14

Pensmore Investments, LLC,
Plaintiff-Respondent,

-against-

Gruppo, Levey & Co., et al.,
Defendants,

The Jane Michael 1999 Trust, et al.,
Defendants-Appellants.

_____

Harter Secrest & Emery LLP, Rochester (Peter H. Abdella of counsel), for appellants.

Frankfurt Kurnit Klein & Selz, P.C., New York (John B. Harris of counsel), for Claire Gruppo, appellant.

Kennedy Berg LLP, New York (Gabriel Berg of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about June 6, 2019, in favor of plaintiff Pensmore Investments, LLC (Pensmore) against defendants-appellants the total amount of $4,316,524.55, and bringing up for review orders, same court and Justice, entered on or about May 14, 2019 and on or about June 5, 2019, which, inter alia, after a nonjury trial, found that Pensmore was entitled to judgment against defendants-appellants for breach of the Settlement Agreement and veil piercing, granted Pensmore's motion to hold defendant Claire Gruppo in criminal contempt for selling a portion of the Frog Pond property in January 2018 in violation of an attachment order, and awarded Pensmore $394,349.89 in

attorneys' fees, unanimously modified, on the law, to dismiss the fraudulent conveyance claims as against defendants-appellants, and otherwise affirmed, without costs. Appeals from aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This Court defers to Supreme Court's credibility determinations, since they were supported by a fair interpretation of the documentary and testimonial evidence (*see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). Supreme Court properly determined that veil piercing was appropriate against Claire Gruppo, Hugh Levey, Frog Pond Partners, L.P. (Frog Pond), January Management, Inc. (Jan Mgmt), the Jane Michael 1999 Trust (JM Trust), and the Claire Gruppo Trust (CG Trust) on an alter-ego theory. The evidence showed that Gruppo and Levey exercised complete dominion and control over Frog Pond, Jan Mgmt, the JM Trust, and the CG Trust (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 90 [1st Dept 2015]). This domination was used to commit a fraud - transferring assets out of Gruppo, Levey & Co. (GLC), Gruppo, Levey Holdings, Inc. (GLH), and Gruppo Levey Partners, Inc. (GLPC) (collectively the GL Entities) to Jan Mgmt, the JM Trust, and the CG Trust to render the GL Entities judgment proof against Pensmore and using such assets to pay over $3.2 million in personal expenses. The evidence showed that the GL

Entities would have had sufficient funds to satisfy the underlying debt owed to Pensmore, but for appellants' fraud. Regardless of the application of the burden of proof under New York or Delaware law, Pensmore demonstrated that a finding of veil piercing against all of these defendants was appropriate. Pensmore also demonstrated that there were fraudulent transfers under Debtor and Creditor Law § 273 between the GL Entities and Jan Mgmt. From 2010 to 2013, Jan Mgmt received approximately $1.46 million from the GL Entities without any fair consideration (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). The lack of consideration creates a presumption of insolvency, which appellants did not rebut (*see Battlefield Freedom Wash, LLC v Song Yan Zhuo*, 148 AD3d 969, 971 [2d Dept 2017]).

However, Pensmore failed to prove that any other transfers between Jan Mgmt, Frog Pond LP, the JM Trust, the CG Trust, Gruppo and Levey were fraudulent transfers under Debtor and Creditor Law § 273. No other specific transfers were identified or shown to meet the requirements under section 273.

With respect to contempt, Pensmore proved beyond a reasonable doubt that Gruppo willfully violated two Supreme Court orders expressly attaching real estate owned by Frog Pond and an order of this Court (143 AD3d 588 [1st Dept 2016]). Gruppo admitted under oath that, while aware of these orders, she sold the Frog Pond properties in January 2018. She alleged that her

former counsel told her that there was no signed order from the Judge and a sale would be fine. At trial, former counsel strongly denied having any such conversation, and Supreme Court properly found former counsel credible (*see Town of Copake v 13 Lackawanna Props., LLC*, 73 AD3d 1308, 1310 [3d Dept 2010]).

While Gruppo argues that four days notice of Pensmore's criminal contempt motion is not reasonable, under the circumstances presented, Supreme Court acted properly (*see People ex rel. Cirillo v Warden of City Prison*, 11 NY2d 51, 56 [1962]). Defense counsel consented to having the contempt motion heard simultaneously with a prescheduled trial, had the ability to cross-examine witnesses, had an opportunity to call witnesses, and was provided three months to submit posttrial briefs. Defense counsel also was involved in the litigation since Pensmore filed the first attachment motion.

Furthermore, Gruppo's due process rights were not violated because of conflict-based ineffective assistance of counsel (*see People v Abar*, 99 NY2d 406, 409 [2003]). Although there were two potential conflicts of interest, namely counsel representing both Gruppo and Levey on the contempt motion, and counsel receiving payment from the Frog Pond property sale proceeds, neither affected the operation of Gruppo's defense. It would have been better practice for Supreme Court to inquire about the potential conflicts, but the failure to do so did not constitute reversible error (*see People v Harris*, 99 NY2d 202, 211 [2002]).

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: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11663 In re Skarlith G., Dkt. O-13953/18
Petitioner-Appellant,

-against-

Guelvis J.C.,
Respondent-Respondent.

_____

Beth E. Goldman, New York Legal Assistance Group, New York (Rachel Lieb of counsel), for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about October 26, 2018, which, after a trial, dismissed the family offense petition with prejudice, unanimously affirmed, without costs.

Petitioner's argument that the court demonstrated bias against her is unpreserved for appellate review (*see Matter of Bowe v Bowe*, 124 AD3d 645, 646 [2d Dept 2015]; *Matter of Kimberly Z. [Jason Z.]*, 88 AD3d 1181, 1184 [3d Dept 2011]). In any event, the argument is unavailing. The record shows that the court listened to the testimony, treated the parties fairly, and did not have a predetermined outcome in mind during the hearing (*see Matter of Bowe*, 124 AD3d at 646; *Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894 [2d Dept 2016]). Among other things, petitioner's arguments about the court's nonrenewal of the temporary order of protection are speculative.

The dismissal of the petition has a sound and substantial basis in the record. Petitioner failed to establish by a preponderance of the evidence that respondent committed acts that warranted an order of protection, in light of the court's finding that most of her testimony was not credible; petitioner offers no basis for disturbing this finding, which is entitled to great deference on appeal (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]; *Matter of Barnes v Barnes*, 54 AD3d 755 [1st Dept 2008]). The court correctly rejected the claim of disorderly conduct because the testimony did not establish the element of intent to cause a public inconvenience, annoyance or alarm (*see* Penal Law § 240.20).

The court's decision amply states the facts that the court deemed essential to the decision (*see* CPLR 4213[b]).

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

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11664 & M-1455 Index 26223/16E

Alexis Norris,
Plaintiff-Respondent,

-against-

Innovative Health Systems, Inc.,
Defendant-Appellant,

Zoe Rossner,
Defendant.

_____

Cozen O'Connor, New York (Amanda L. Nelson of counsel), for appellant.

Greenberg Law P.C., New York (Robert J. Menna of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 10, 2019, which, upon renewal, denied defendant Innovative Health System, Inc.'s (IHS) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against IHS.

Plaintiff alleges that, while an outpatient at defendant IHS's drug rehabilitation center in 2015, defendant Rossner, an IHS employee, offered to falsify plaintiff's toxicology reports so that plaintiff could smoke marijuana while undergoing treatment, in exchange for plaintiff babysitting Rossner's children. Plaintiff alleges that, after entering into this arrangement, they smoked marijuana together. According to

plaintiff, Rossner also began sexually assaulting her and on one occasion Rossner forced plaintiff to have sex with several men in exchange for drugs. Plaintiff eventually reported to IHS staff that Rossner was falsifying plaintiff's urine toxicology results and using drugs with her, leading to Rossner's termination.

The evidence submitted in support of and against IHS's motion for summary judgment shows that IHS first retained Rossner to work as an intern in 2014, and then hired her as a counselor in 2015. Before retaining her, IHS received the results of state and federal background checks, which revealed that Rossner had a criminal history in New York State consisting of a conviction for trespass and two separate convictions for drug related offenses. The New York State Office of Alcoholism and Substance Abuse Services then performed the review required by Mental Hygiene Law § 19.20(e) and determined that IHS was not required to deny Rossner's application. It did not express an opinion as to whether IHS should hire her.

During Rossner's employment with IHS, she was confronted once by a supervisor for "nodding out" during a staff meeting and for missing work, which Rossner attributed to her schoolwork and a stressful home environment. Around the same time, IHS staff members complained that several urine samples had gone missing from their laboratory, but IHS did not suspect that Rossner was the cause of these missing samples.

An essential element of a claim for negligent hiring,

supervision, and retention "is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004] [citations omitted]). Here, IHS's knowledge of Rossner's criminal history does not raise an issue of fact as to whether IHS knew or should have known of her propensity to commit sexual assault (*see Osvaldo D. v Rector Church Wardens & Vestrymen of Parish of Trinity Church of N.Y.*, 38 AD3d 480, 480-481 [1st Dept 2007]; *Steinborn v Himmel*, 9 AD3d 531, 533-534 [3d Dept 2004]). Similarly, the fact that an IHS supervisor confronted Rossner concerning her "nodding out" and missing work did not impute to IHS actual or constructive notice that Rossner had any propensity to commit sexual assault (*see Schiebel v Senior Care Emergency Med. Servs.*, 145 AD3d 456 [1st Dept 2016]; *Coronado v 3479 Assoc. LLC*, 128 AD3d 496 [1st Dept 2015]; *Taylor v United Parcel Serv., Inc.*, 72 AD3d 573, 574 [1st Dept 2010], *lv denied* 15 NY3d 705 [2010]). Accordingly, the cause of action for negligent hiring, supervision, and retention should have been dismissed as against IHS.

We find that the cause of action for negligent infliction of emotional distress also should have been dismissed as against IHS. Under the controlling precedent, IHS's alleged conduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"

(*Sheila C.*, 11 AD3d at 130-131 [citation and internal quotation marks omitted]; *see generally Wolkstein v Morgenstern*, 275 AD2d 635, 636-637 [1st Dept 2000]; *see also Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589 [1st Dept 2020]).

Finally, plaintiff's claims for assault and battery, intentional infliction of emotional distress, and punitive damages against IHS are dismissed as abandoned. Plaintiff did not oppose that part of IHS's motion seeking dismissal of those claims (*see Matter of Agoglia v Benepe*, 84 AD3d 1072, 1075 [2d Dept 2011]), and does not defend them on appeal (*see 430 W. 23rd St. Tenants Corp. v 23rd Assoc.*, 155 AD2d 237, 239 [1st Dept 1989]).

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

M-1455 - *Alexis Norris v Innovative Health Systems,* Inc., et al.

Motion for stay denied as moot.

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11665 The People of the State of New York, Ind. 5068/13
Respondent,

-against-

Corey Dunton,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (David Crow of counsel) and Mayer Brown LLP, New York (Christopher J. Houpt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered February 17, 2017, as amended on February 28, 2017, convicting defendant, after a jury trial, of attempted murder in the first degree, assault in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), assault in the second degree and reckless endangerment in the first degree, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress a remark he made during arrest processing, in which he expressed remorse for the injuries he inflicted upon one of the victims. The brief interchange between defendant and a detective that preceded this remark was not the functional equivalent of interrogation (*see People v Rivers*, 56 NY2d 476, 479-480 [1982]).

The court also properly declined to suppress a lineup

identification. Our examination of the lineup photo reveals that, in all respects, defendant and the fillers were reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

Defendant failed to preserve his argument that police committed a constructive violation of *Payton v New York* (445 US 573 [1980]) by coercing him to leave his apartment, and the court did not expressly rule on that specific argument (*see* CPL 470.05(2); *see generally People v Bailey*, 32 NY3d 70, 78 [2018]; *see e.g. People v Wallace,* 27 NY3d 1037, 1038-1039 [2016]). As an alternative holding, we find that the evidence establishes that defendant was arrested after he voluntarily came out of his apartment (*see People v Garvin*, 30 NY3d 174, 180-183 [2017], *cert denied* 586 US __, 139 S Ct 57 [2018]).

In any event, any errors in the suppression rulings at issue were harmless, whether viewed individually or collectively, in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). Notably, defendant incriminated himself and expressed remorse in Facebook messages and posts.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114,

118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11666 Dynatec Contracting, Inc., et al., Plaintiffs-Respondents, Index 655241/17

-against-

The Burlington Insurance Company, Defendant-Appellant,

Rock Scaffolding Corp., Defendant.

_____

Adrian & Associates, New York (James M. Adrian of counsel), for appellant.

Melito & Adolfsen P.C., New York (Ignatius John Melito of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 15, 2019, which denied the cross motion of defendant Burlington Insurance Company for summary judgment and granted plaintiffs' motion for summary judgment declaring that Burlington was obligated to defend plaintiffs in the underlying action, unanimously modified, on the law, to declare that Burlington is not obligated to defend or indemnify plaintiff 653 Tenth Avenue, LLC (653 Tenth) as an additional insured on its policy issued to nonparty Rock Scaffolding, and that Burlington is obligated to reimburse plaintiff Dynatec Contracting, Inc. (Dynatec) for defense costs incurred since its tender to Burlington, and otherwise affirmed, without costs.

653 Tenth was not an additional insured under the Burlington policy issued to Rock Scaffolding, given the absence of

contractual privity between Rock Scaffolding and 653 Tenth. The Burlington policy included as an additional insured, "any person(s) or organization(s) with whom you [Rock Scaffolding] agreed, because of a written contract, written agreement or permit, to provide insurance such as is afforded under this Coverage Part." However, no such contract exists between 653 Tenth and Rock Scaffolding (*see Turner Constr. Co. v Endurance Am. Specialty Ins. Co.*, 161 AD3d 439, 440 [1st Dept 2018]; *Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146 [1st Dept 2016]), *affd* 31 NY3d 131 [2018]).

Burlington's initial disclaimer stated that the underlying plaintiff's verified bill of particulars and C3 form had been reviewed. Since both of these documents identified the accident location as the 5th floor level, this ground for disclaiming coverage was "readily apparent based upon the documents delivered to the insurer" (*Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12, 13 [1st Dept 2007]), and Burlington's failure to raise this issue with its initial disclaimer precluded it from later asserting it as a defense (*see Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 146-147 [2013]; *see also Highrise Hoisting & Scaffolding, Inc. v Liberty Ins. Underwriters, Inc.*, 116 AD3d 647 [1st Dept 2014]). Burlington is therefore obligated to defend

Dynatec and reimburse Dynatec for its defense costs in the underlying action since the date of tender.

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11667 Jasmine Ray, Index 24518/14E
Plaintiff-Respondent,

-against-

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

_____

The Port Authority of New York and New Jersey Law Department, New York (Karla Denalli of counsel), for appellant.

David J. Hernandez & Associates, Brooklyn (David J. Hernandez of counsel), and Richard H. Gottesman, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 26, 2019, which denied defendant's (the Port Authority) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly rejected the Port Authority's arguments that, as a bistate entity created by a federally approved compact, it cannot be held liable under Labor Law §§ 215 and 740 (New York Whistleblower Laws). The Port Authority is "subject to New York's laws involving health and safety, insofar as its activities may externally affect the public" (*Matter of Agesen v Catherwood*, 26 NY2d 521, 525 [1970]; *see also Wortham v Port Auth. of N.Y. & N.J.*, 177 AD3d 481 [1st Dept 2019]). The express purpose of Labor Law § 740 is to protect public health and safety (*see id.* § 740[2]). As we recently ruled, "The Compact Clause of the United Stated Constitution is not implicated by the application of such New York workplace safety

statutes to [a] Port Authority work site located in New York" (*Rosario v Port Auth. of N.Y. & N.J.*, 179 AD3d 516, 517 [1st Dept 2020]).

We have considered the Port Authority's remaining contentions and find them unavailing.

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11668-
11668A-
11668B-
11668C-
11668D

Index 380881/11

Avail 1 LLC,
Plaintiff-Respondent,

-against-

Acquafredda Enterprises LLC, et al.,
Defendants-Appellants,

New York State Department of
Taxation and Finance,
Defendants.

_____

Joshpe Mooney Paltzik LLP, New York (Edward A. Paltzik of counsel), for appellants.

The Margolin & Weinreb Law Group, LLP, Syosset (Alan Smikun of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about May 29, 2018, bringing up for review (i) an order, same court and Justice, entered on or about April 21, 2017, which granted the motion of plaintiff's predecessor-in-interest for summary judgment, (ii) an order, same court and Justice, entered on or about April 21, 2017, which denied defendants' motion to amend the answer, (iii) so much of an order, same court and Justice, entered on or about September 22, 2017, which denied defendants' motion to renew the April 21, 2017 orders, and (iv) an order, same court and Justice, entered on or about February 21, 2018, which denied defendants' motion to vacate the order granting summary judgment, unanimously affirmed,

with costs.

Defendants did not raise a triable issue of fact that would warrant relief from their admitted default in repaying a construction loan (*see EBC Amro Asset Mgt. v Kaiser*, 256 AD2d 161, 161-162 [1st Dept 1998]). Defendants failed to proffer the agreement that was allegedly breached when the lender paid the retainage of loan advances to the contractor, months after work was finished but before certificates of occupancy were issued. They also failed to present any evidence showing that the payment was made in bad faith, caused the contractor to abandon the project, or caused the Department of Buildings not to issue permanent certificates of occupancy (*compare City of New York v 611 W. 152nd St.*, 273 AD2d 125, 126 [1st Dept 2000]).

Given the absence of "sufficient evidence to establish that the proposed amendment was not 'specious'" (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]; *accord MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]), leave to amend the answer was providently denied (*see* CPLR 3025[b]).

Defendants' renewal motion was also providently denied, as no new facts were presented that were "unknown to the party seeking renewal" when briefing the previous motions (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221[e][2]-[3]). Defendants were in possession of both an April

2013 email the day it was written, and the construction loan agreement that was allegedly breached the day of the loan closing in 2007. To the extent that defendants seek review of so much of their motion that sought reargument, "no appeal lies from the denial of a motion to reargue" (*Kaplan v U.S. Coal Corp.*, 115 AD3d 517, 518 [1st Dept 2014]).

Finally, defendants' motion to vacate the order granting summary judgment was providently denied for failure to demonstrate fraud, misrepresentation, or misconduct. The newly submitted documents did not show that plaintiff or its predecessor-in-interest made material misrepresentations of fact

(*see* CPLR 5015[a][3]; *Branch Banking & Trust Co. v Farber*, 181 AD3d 547, 548 [1st Dept 2020]).

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11669N Marie Brown, etc., Index 28169/17E
Plaintiff-Respondent,

-against-

United Odd Fellow and Rebekah Home, Inc.,
doing business as Rebekah Rehab & Extended Care,
Defendant-Appellant,

Bronx-Lebanon Hospital Center, et al.,
Defendants.

_____

Catalano Gallardo & Petropoulos, LLP, Jericho (Richard M. Fedrow of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (George J. Silver, J.), entered September 11, 2019, which denied the motion of defendant United Odd Fellow and Rebekah Home, Inc. to change of venue from Bronx County to Nassau County, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in determining that appellant's motion to change venue was untimely. Appellant was aware of the venue selection clause in its own admission agreement and the agreement, which was signed by plaintiff's decedent, was in its possession at all times. However, defendant waited almost two years after the action was commenced before seeking a change of venue, and provided no reasonable explanation for the delay (*see Sade San A Jong v Lesense*, 114 AD3d 624 [1st Dept 2014]; *Mena v Four Wheels Co.*,

272 AD2d 223 [1st Dept 2000]).

Accordingly we need not reach any other issues raised by the parties.

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

ENTERED: JUNE 18, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11670N Claudia Knafo, et al., Index 805127/13
Plaintiffs-Appellants,

-against-

The Mount Sinai Hospital, et al.,
Defendants,

Michael Diaz, M.D.,
Defendant-Respondent.

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

Dopf, P.C., New York (Martin B. Adams of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered June 18, 2019, which granted defendant Michael Diaz, M.D.'s motion to preclude plaintiffs' experts' testimony to the extent of precluding evidence that plaintiff Knafo's hyponatremia, which was subsequently corrected, caused permanent fasciculations, unanimously affirmed, without costs.

We reject defendant doctor's argument that the appeal should be dismissed pursuant to the rule that an evidentiary ruling made before trial is reviewable only in connection with the appeal from the judgment rendered after trial (*Piorkowski v Hospital for Special Surgery*, 116 AD3d 560 [1st Dept 2014]; *Rodriguez v Ford Motor Co.*, 17 AD3d 159, 159-160 [1st Dept 2005]). An exception to that rule exists where the evidence in question is so central to the proponent's case that its exclusion is "the functional equivalent of . . . summary judgment" (*Matter of City of New York*

v Mobil Oil Corp., 12 AD3d 77, 81 [2d Dept 2004]). Here, without the proposed evidence purporting to establish a causal link between defendant's alleged departure from accepted practice and plaintiff's permanent condition, her malpractice claim is certain to fail. Thus, the order is appealable because it limits the scope of issues to be tried (*see Rott v Negev, LLC*, 102 AD3d 522 [1st Dept 2013]).

Nevertheless, we agree on the merits that the proffered evidence was properly precluded. To satisfy the *Frye* standard, expert testimony must be based upon a scientific principle or procedure which has been "sufficiently established to have gained general acceptance" (*Marso v Novak*, 42 AD3d 377, 378 [1st Dept 2007], *lv denied* 12 NY3d 704 [2009] [internal quotation marks omitted]). A party fails to carry this burden if it does not present supporting material such as clinical data and peer reviewed medical literature (*see Matter of Bausch & Lomb Contact Lens Solution Prod. Liab. Litig.*, 87 AD3d 913, 913 [1st Dept 2011], *lv dismissed* 19 NY3d 845 [2012]). Here, the material presented by plaintiff's proposed experts discussed the presence of involuntary fasciculations in patients who experienced hyponatremia, but who also demonstrated indicia of brain damage.

Plaintiff, however, did not have brain damage. Accordingly, the material did not support plaintiff's theory of liability.

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

ENTERED: JUNE 18, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10811-
10811A Alberto Galue,
Plaintiff-Appellant,

-against-

Independence 270 Madison LLC, et al.,
Defendants-Respondents.

Index 303246/11

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

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Independence 270 Madison LLC, 270 Madison Avenue Associates LLC, and ABS Partners Real Estate LLC, respondents.

Koster, Brady & Nagler LLP, New York (William J. Volonte of counsel), for J. Spaccarelli Construction Co., Inc., respondent.

Judgments, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 21, 2016, upon a jury verdict in defendants' favor, dismissing the complaint, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a new trial on the issue of liability consistent with this decision.

Plaintiff commenced a personal injury action after his head was allegedly hit by a towel dispenser/trash receptacle unit (TD/TR unit) installed by defendant Spaccarelli Construction Co., Inc. The TD/TR unit fell out of a bathroom wall in a building owned by defendant Independent 270 Madison LLC and 270 Madison Ave Assocs LLC and operated by defendant ABS Partners Real Estate LLC.

Contrary to plaintiff's argument, the prior decisions of

this Court and supreme court on the parties' motions for summary judgment (*see Galue v Independence 270 Madison LLC*, 119 AD3d 403 [1st Dept 2014], *modfg* 2013 WL 6711534 [Sup Ct, Bronx County, Aug. 13, 2013, index No. 303246/11]) did not constitute law of the case so as to require the trial court to charge the jury on res ipsa loquitur; rather, charging the jury on that doctrine was dependent upon the proof adduced at trial (*see Elsawi v Saratoga Springs City Sch. Dist.*, 141 AD3d 921, 923 [3d Dept 2016]).

Based upon that proof, we find that the trial court improvidently exercised its discretion in declining to charge the jury on res ipsa loquitur. A res ipsa charge "merely permits the jury to infer negligence from the circumstances of the occurrence" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 495 [1997]). The doctrine does not require "sole physical access to the instrumentality causing the injury" (*Banca Di Roma v Mutual of Am. Life Ins. Co.*, Inc., 17 AD3d 119, 121 [1st Dept 2005]; *see Sangiovanni v Koloski*, 31 AD3d 422, 423 [2d Dept 2006]; *Johnson v Farr*, 268 AD2d 560 [2d Dept 2000], *lv denied* 95 NY2d 754 [2000]).

The trial court should also have charged that a violation of Administrative Code of the City of New York § 28-301.1, which requires property owners to maintain their buildings in a safe condition, constitutes "some evidence of negligence" (*see McGowan v Kennedy & Co.*, 158 AD2d 420, 421 [1st Dept 1990]). To the extent that the TD/TR unit allegedly fell out of the wall eight months after installation by defendant John Spaccarelli, the

court erred by failing to allow plaintiff to fully question the credentials of Mr. Spaccarelli and his qualifications as an expert (*McLamb v Metropolitan Suburban Bus Auth.*, 139 AD2d 572 [2d Dept 1988], citing *Felt v Olson*, 51 NY2d 977 [1980]).

In view of the foregoing, we need not reach defendants' argument concerning the denial of their motions for a directed verdict at the close of plaintiff's case (*see generally* CPLR 5501(a)(1); *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]). We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: JUNE 18, 2020

CLERK

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

11229 The People of the State of New York, Ind. 1141/16
Respondent,

-against-

Guilermo P. also known as Guilermo N.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 26, 2017, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a youthful offender, to a term of 60 days with 5 years probation, modified, on the law, to the extent of vacating the DNA databank fee imposed as a probation condition, and otherwise affirmed.

Defendant was charged with robbery in the third degree (Penal Law § 160.05) and burglary in the third degree (Penal Law § 140.20) in connection with a July 12, 2015 incident in which he stole food from a Dunkin' Donuts store. Specifically, it was alleged that when the store employee refused defendant's request that he be given a sandwich, defendant threw a banana at the employee, jumped over the counter, used a derogatory term to the employee, stated that he had a gun and then proceeded to leave the store with the sandwich. On March 24, 2017, defendant appeared with counsel before Justice Wittner, withdrew his plea

of not guilty, and entered a plea of guilty to robbery in the third degree in full satisfaction of the indictment. Defendant was promised youthful offender adjudication, 60 days incarceration and five years probation.

We find that defendant did not preserve his challenge to his plea allocution, and we decline to review it in the interest of justice. The narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988]) does not apply because defendant's factual recitation did not negate any element of the crime or cast significant doubt on his guilt. As an alternative holding, we find that the plea was knowing, intelligent and voluntary.

We perceive no basis for reducing the sentence imposed. The determination of an appropriate sentence requires consideration of, "among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*People v Farrar*, 52 NY2d 302, 305 [1981]). The sentencing court has broad discretion with regard to the imposition of a sentence (*People v Rosenthal*, 305 AD2d 327, 329 [1st Dept 2003]). This Court possesses "broad, plenary powers to modify a sentence that is unduly harsh or severe under the circumstances, in the interest of justice, even though the sentence falls within the permissible statutory range" (*id.*; *accord People v Delgado*, 80 NY2d 780, 783 [1992]; CPL

470.15[6][b]). Further, we may substitute our own discretion for that of the sentencing court, even if the sentencing court did not abuse its discretion (*see Delgado*, 80 NY2d at 783; *Rosenthal*, 305 AD2d at 329). Here, we find no basis to reduce the probationary sentence imposed as advocated by defendant and the dissent.

Both the dissent and defendant understate the seriousness of defendant's offense. What the dissent refers to as minor, was in fact a forcible taking of property. Defendant jumped over the store counter and threatened the use of a gun, after being told that he would not be given a sandwich. *Physical harm is not an element of the crime plead to by defendant*. These are not bare allegations but rather sworn to statements. Any hearsay in the felony complaint or failure of the People to immediately convert the felony complaint is of no consequence as defendant entered a plea of guilty under the indictment. An indictment which obviously was based upon sworn testimony by witnesses. Notably, defendant does not challenge the sufficiency of the evidence presented to the grand jury.

Contrary to the arguments set forth by the dissent, the court while considering defendant's actions, his criminal history, which includes convictions for minor drug crimes in Pennsylvania, an arrest for absconding while at liberty in this case, and several pending cases also obviously took into consideration defendant's age. Further, defendant benefitted

from a very favorable plea bargain, as a result of which he was adjudicated a youthful offender, sentenced to a term of probation and what amounted to time served.[1]

Finally, the dissent argues that the People's "sunny portrayal of probation ignores the onerous conditions of probation which create a risk that defendant, without committing a crime, could be incarcerated." According to the dissent, the risk is compounded by the current climate. The dissent ignores the fact that the supervision and guidance provided by probation can be beneficial to defendant. Further, while a violation could result in a term of incarceration, it is not mandatory and is ultimately up to the discretion of the sentencing court which would also be mindful of the current climate (*see People v Hobson*, 43 AD3d 1179 [2d Dept 2007]).

As the parties agree, and as the sentencing court itself observed, a DNA databank fee is not authorized where a defendant

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[1]The dissent's arguments that defendant's decision to plead guilty to a charged felony was based upon his having been incarcerated for 81 days (for absconding while at liberty in this case) prior to his family's ability to post bail which was prior to the Bail Reform Act (L 2019, ch 59, JJJ) is pure speculation and not supported anywhere in the record.

is adjudicated a youthful offender. Accordingly, no such fee was authorized as a condition of probation.

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

GESMER, J. (dissenting)

I respectfully dissent in part. Given the particular circumstances of this case, defendant's sentence of 60 days in jail and five years of probation is excessive. In the interests of justice, I would reduce the non-incarceratory portion of his sentence to three years of probation.[2]

At 6:15 am on July 12, 2015, his 18th birthday, defendant entered a Dunkin' Donuts and forcibly took a breakfast sandwich without paying for it. The police arrested defendant 20 minutes later, and they recovered a bag of marijuana from his pocket. At 9 a.m., when interviewed by Detective Mazza, defendant said, "All this over a sandwich." The record before us does not disclose that defendant had any prior contact with the criminal justice system.

At 2:25 p.m. the same day, Detective Mazza signed a misdemeanor complaint charging defendant with petit larceny, a class A misdemeanor; menacing in the third degree, a class B misdemeanor; and unlawful possession of marijuana, a violation. The maximum sentences for the three charges were, respectively, 364 days in jail and probation of up to three years; three months in jail and one year of probation; and a fine of no more than $50. Detective Mazza based the factual allegations in the complaint on a conversation with an employee of Dunkin' Donuts.

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[2]Having served the incarceratory portion, defendant acknowledges he cannot challenge it (*People v Papanye*, 159 AD3d 482, 483 [1st Dept 2018], *lv denied* 31 NY3d 1085 [2018]).

The record before us does not show that the complaint was ever converted to an information by submission of a nonhearsay sworn statement with regard to the facts of the incident as recited by Detective Mazza. Defendant was released on his own recognizance.

For the next eight months, defendant, a resident of Pennsylvania, showed up for all court appearances. On March 17, 2016, a grand jury issued an indictment charging defendant with robbery in the third degree and burglary in the third degree, both class D felonies. Under the indictment, defendant faced a possible indeterminate prison sentence of 2 1/3 to 7 years, a seven-fold increase in the period of incarceration that could be imposed on him.

After the indictment, there were four more scheduled court dates, on March 30, April 21 and June 8 and July 21. On July 21, for the first time, defendant did not appear for the scheduled court appearance, which was more than a year after the incident. The court issued a bench warrant. Two months later, defendant was returned on a warrant, and his bail was set at $2,500 cash or $5,000 secured bond. When his mother was finally able to post bail on December 10, defendant had spent 81 days in jail.

On March 24, 2017, defendant pled guilty to robbery in the third degree, acknowledging during the allocution that he "forcibly stole" the sandwich on July 12, 2015. The presentence report, issued on April 25, 2017, showed that defendant had one conviction in Pennsylvania in 2016, for drug possession, and two

pending cases in Pennsylvania, arising out of arrests in 2016 and 2017. On April 26, 2017, he was sentenced as promised as a youthful offender to 60 days in jail and 5 years of probation. Defendant is currently serving the probationary portion of his sentence, which is scheduled to expire on April 22, 2022.

Defendant asks that we reduce his sentence to a conditional or unconditional discharge, or a shorter period of probation. Given the circumstances of defendant's crime, his youth, and the interests of justice, the non-incarceratory portion of his sentence should be reduced to three years of probation (*see People v Rosenthal*, 305 AD2d 327, 329 [1st Dept 2003] [this Court "possesses broad, plenary powers to modify a sentence that is unduly harsh or severe under the circumstances, in the interest of justice, even though the sentence falls within the permissible statutory range"], citing *People v Delgado*, 80 NY2d 780, 783 [1992]).

In deciding whether a sentence is excessive and a reduced sentence is appropriate, we give "due consideration [] to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*People v Farrar*, 52 NY2d 302, 305 [1981]; *People v Martinez*, 124 AD2d 505, 506 [1st Dept 1986]).

Given the crimes with which defendant is charged, he is eligible for a sentence of an unconditional discharge, a

conditional discharge, or three years of probation. Under the circumstances of this case, it is in the interests of justice to reduce his sentence to three years of probation.

First, the facts of the crime charged are indisputably minor: defendant took a sandwich without paying for it. Defendant was arrested almost immediately, demonstrating that defendant was acting impulsively, and without any premeditation or planning.

The People argue that the "reality" of the crime was "more serious" because defendant "jumped over the counter, [and] shouted that he had a gun." However, that specific allegation appears only in the hearsay complaint, in which Detective Mazza states that a Dunkin' Donuts employee made that allegation to him.[3] Contrary to the statement in the majority opinion, there is no first hand sworn statement to that effect, and, in fact, in the next eight months, the complaint was never converted to an information by means of a sworn statement.

Certainly, in order for the grand jury to have indicted defendant for robbery in the third degree, the People would have had to present nonhearsay evidence to show that defendant stole the sandwich "forcibly" (Penal Law § 160.05). However, the record does not indicate what defendant's forcible actions

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[3]The People also cite to the presentence report. However, that too was based on hearsay, since the report was not based on any interviews with witnesses but only on the hearsay court documents.

consisted of. Moreover, there are no allegations that the store employee or anyone else suffered any harm.

Second, had the People not elevated this minor case to a felony, the sentence to which defendant agreed could not have been imposed. On the original misdemeanor charges, a probationary period of three years is the maximum that could have been imposed.

Third, defendant's young age at the time weighs heavily in favor of reducing his sentence (*see Johnson v Texas*, 509 US 350, 367 [1993][the "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . (which) often result in impetuous and ill-considered actions and decisions"]; *see also Graham v Florida*, 560 US 48, 68 [2010] ["developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"]). Defendant's actions at the restaurant epitomize an adolescent's lack of emotional development and maturity. Defendant had turned just 18 on the day of the incident; given that his conduct was "impetuous" and "ill-considered," defendant's lessened culpability as a youth warrants our leniency.

Fourth, the People paint defendant as a hardened criminal at the time of the theft in this case, because he had a conviction in Pennsylvania,[4] and because he absconded in this case.

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[4]The People also claim that defendant had other convictions but none of those appear in the record before us.

However, the conviction in Pennsylvania was for a minor drug offense which occurred almost a year after the Dunkin' Donuts incident; the record does not show that he had had any contact with the criminal justice system before that incident. Moreover, defendant faithfully appeared at all of the court appearances during the eight months that the People were prosecuting this matter as a misdemeanor, and then appeared for three more appearances after it had been converted to a felony. He failed to appear for the first time more than a year after the underlying incident, and long after this simple matter should have been concluded. Indeed, had defendant been offered at arraignment the plea which he eventually took, he would have completed his sentence by now.

Fifth, defendant's decision to plead guilty to a felony was undoubtedly influenced by his having already served 81 days after the court set bail when he was returned on a warrant. I would argue that an 81-day stay at Rikers Island is neither in the interest of justice nor a proper allocation of scarce jail resources given defendant's crime. In addition, defendant's period of incarceration resulted from his bail having been set at $2,500 cash or $5,000 secured bond. It is hardly surprising that it took defendant's family a few months to come up with the bail. Moreever, under the recently enacted Bail Reform Act (L 2019, ch 59, JJJ), the court would not have had authority to set cash bail at all, for two reasons. First, the two class D felonies with

which defendant was charged are not now eligible for cash bail (*see* CPL 510.10). Second, the court could not have set monetary bail unless, as is relevant here, it found by "clear and convincing evidence" that defendant "persistently and willfully failed to appear after notice of scheduled appearances in the case before the court" (CPL 530.60[2][b][i]). Here, the record shows that defendant missed only one court date, after appearing at every court date for 11 months, so there is no evidence at all that his absence was either "persistent[]" or "willful[]".

Finally, the People paint a sentence of probation as beneficial to defendant, suggesting it would guide him through a difficult stage of life and foster his rehabilitation. This sunny portrayal of probation ignores the onerous conditions of probation which create a risk that defendant, without committing a crime, could be incarcerated (*see* CPL 410.70[5]; Penal Law § 60.01[4]). This could lead to a very harsh result in the current climate, especially given the minor nature of his crime (Jan Ransom, *Jailed on a Minor Parole Violation, He Caught the Virus*

and Died, NY Times, April 9, 2020).

Based on all of these circumstances, the non-incarceratory portion of defendant's sentence should be reduced to a three-year period of probation.

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

ENTERED: JUNE 18, 2020

CLERK

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

11250 Stewart Family LLC, Index 156827/18
Plaintiff-Appellant-Respondent,

-against-

Barbara Stewart,
Defendant-Respondent-Appellant.

- - - - -

Barbara Stewart,
Third-Party Plaintiff-Respondent-Appellant,

-against-

William P. Stewart, Jr.,
Third-Party Defendant-Respondent.

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Thompson Hine LLP, New York (Richard A. De Palma of counsel), for appellants-respondents.

Marcus & Cinelli, LLP, Williamville (David Marcus of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered on or about August 16, 2019, which denied plaintiff's summary judgment motion and defendant's cross motion for summary judgment, ordered the paintings at issue to be delivered to defendant's residence, denied defendant's motion for fees and expenses pursuant to CPLR 7108, and granted third-party defendant's motion to dismiss the third-party complaint pursuant to CPLR 3211, unanimously modified, on the law, to grant plaintiff's application to keep the paintings at issue in storage at plaintiff's expense pending resolution of this action, and otherwise affirmed, without costs.

This lawsuit is a skirmish in a lengthy battle between

family members arising, inter alia, from four trusts set up in 1985 by third-party defendant William Stewart, Jr. (Bill). Bill was married for many years to defendant Barbara Stewart (Barbara). After acrimonious litigation, Bill and Barbara's divorce was finalized in either 2012 or 2014.[1]

Bill and Barbara's four children were each named as the beneficiary of one of the four trusts: William Stewart III (known as Tres), Jeffrey Stewart (Jeffrey), Lisa Stewart (Lisa),[2] and Gregory Stewart (Gregory). Initially Bill was the sole trustee of the four trusts. While the children were the nominal beneficiaries of the trusts, evidence received in prior proceedings in Surrogate's Court and made part of the record herein demonstrate that the parents have used trust assets to fund their opulent lifestyle. The children apparently enjoyed the partial use of some assets purchased by the trusts, including vacation homes in Bermuda and Maine, and a private jet, but it is unclear from the record on appeal what income, if any, they have derived from the trusts.

The property at issue in this appeal is comprised of four oil paintings purchased, one each, by the four trusts.

Plaintiff Stewart Family LLC (Stewart LLC or plaintiff) was formed as a Delaware Limited Liability Company in 2001. Its

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[1]Bill and Barbara provide contradictory dates in the record on appeal.

[2]Lisa died in 2010.

members are the four trusts. Initially, the named managers of Stewart LLC were Bill and Barbara.

In 2003 the trusts conveyed the four paintings to Stewart LLC. The paintings are part of Stewart LLC's holdings, which are comprised of a variety of assets, including the apartment where the paintings were displayed and where Barbara lives for part of the year.

In 2004 Barbara joined Bill as a co-trustee of the four trusts.

In 2005 Gregory petitioned to have Barbara removed as co-trustee of his trust. Tres made a similar application regarding his trust in 2006, and Jeffrey followed suit in 2009. That same year Bill petitioned to have Barbara removed as co-trustee of Lisa's trust. For her part, Barbara sought to remove Bill as co-trustee in 2008. Prior to bringing her removal petition, Barbara applied for the imposition of a constructive trust on the Gregory and Tres trusts. This application was submitted to retired Judge Howard A. Levine, formerly of the New York Court of Appeals, as referee (Referee). The Referee recommended that Barbara's application for a constructive trust be denied, and Surrogate's Court confirmed the Referee's report in a decision dated July 8, 2009. As discussed below, in the instant appeal Barbara relies to a great extent on statements contained in the Referee's report and the Surrogate's Court's decision denying the imposition of a constructive trust.

The removal petitions went forward and were referred to the Referee, who recommended that Barbara be removed as co-trustee. The Referee did not recommend that Bill be removed. Gregory, Jeffrey and Bill all moved to confirm the Referee's report.

On December 6, 2010, Surrogate's Court issued a temporary restraining order (TRO) directing that pending determination of the motions to confirm, "all powers of Barbara Stewart to act as co-trustee of the Trusts are hereby and the same be wholly and summarily suspended."[3] Surrogate's Court ultimately upheld the Referee's report removing Barbara as co-trustee in a decision dated December 1, 2011.

Between the issuance of the TRO and the decision confirming the Referee's recommendation to remove Barbara as co-trustee of the trusts, Bill took action to remove Barbara as co-manager of Stewart LLC. On October 11, 2011, the members of Stewart LLC (the four trusts) "met," each embodied in the person of their only active trustee (Bill), to remove a manager (Barbara) pursuant to the LLC's Operating Agreement. On the same day, subsequent to Barbara's removal, the members (again, as represented by Bill), entered into a First Amended and Restated

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[3]The TRO contains contradictory language concerning its duration. A handwritten emendation states that the TRO remains in effect pending the return date of the motion. However, typewritten language stating that the TRO would remain in place pending the "hearing and determination" of the motion was not crossed out. In all events, plaintiff's counsel represents that the court stated on the return date of the motion that the TRO would remain in effect pending the court's decision, and defendant does not contest that representation.

Operating Agreement (Amended Agreement). The Amended Agreement has four signature lines, one for each trust. Each signature line contains Bill's signature. The Amended Agreement contains a page entitled "Stewart Family LLC Member Signature and Power of Attorney Page" in which Bill as "member" (presumably exercising authority as trustee) appoints himself the manager of the Stewart LLC under the Amended Agreement.

As discussed at greater length below, the parties do not include in the record the Stewart LLC operating agreement in force prior to the adoption of the Amended Agreement. As Barbara was purportedly removed as manager prior to the adoption of the Amended Agreement, it would have been the predecessor operating agreement that governed Barbara's removal as manager.

On June 19, 2018, Bill wrote an email to Barbara seeking access to the apartment to allow the retrieval of one of the paintings so that it could be sold as "the trusts are very low on cash." Barbara replied, "Hahaha, you are really funny." After fruitless discussion between the parties' lawyers, Stewart LLC brought this lawsuit to recover the paintings. The complaint's first cause of action was for replevin. The second cause of action sought an order of seizure.

Plaintiff sought an ex parte order of seizure when it filed its complaint, asserting that Barbara had secreted other trust property in the past, and predicting that she might take action to hide, transfer, or "even destroy the [p]aintings." The court

granted the ex parte application. After the order was signed but before the Sheriff executed on it, Barbara moved the paintings out of the apartment. Plaintiff thereupon moved for disclosure concerning the paintings' whereabouts. Before the return date of this motion, plaintiff and Barbara stipulated that the paintings would be stored at Crozier Fine Arts (Crozier) pending further order of the court, at plaintiff's expense.

Barbara answered the complaint, and asserted affirmative defenses. She also asserted a third-party complaint against Bill for indemnity and for contribution.

In February 2019 plaintiff moved for summary judgment and Bill moved to dismiss the third-party complaint. Barbara cross-moved for summary judgment.

In a decision from the bench, Supreme Court denied plaintiff's motion for summary judgment on the ground that Stewart LLC had not demonstrated that it was necessary to sell the paintings for the benefit of the trusts. The court originally granted Barbara's cross motion for summary judgment, but then denied it with leave to renew. Supreme Court dismissed the third-party indemnity claim against Bill, and denied Barbara's application for fees associated with the aborted seizure. Finally, Supreme Court directed that the paintings be returned to Barbara's possession.

Plaintiff moved for a stay of Supreme Court's order pending appeal. This Court granted the stay, directing that the

paintings remain at Crozier at plaintiff's expense.

DISCUSSION

To prevail on a claim of replevin, a plaintiff must demonstrate that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff (*see Khoury v Khoury*, 78 AD3d 903, 904 [2d Dept 2010]; *see also Solomon R. Guggenheim Found. v Lubell*, 153 AD2d 143, 153 [1st Dept 1990], *affd* 77 NY2d 311 [1991]). Plaintiff has made out these elements. Stewart LLC's ownership of the paintings is established by the contract by which the paintings were conveyed to it by the trusts. Barbara's refusal to relinquish possession of the paintings is not disputed. Supreme Court erred when it imposed the additional requirement that plaintiff must demonstrate that the trusts' financial circumstances required the sale of the paintings.[4] However, on this appeal Barbara also asserts three affirmative defenses to plaintiff's claim for replevin which we must consider.

First, Barbara argues that Surrogate's Court, in denying her claim for a constructive trust in 2009, necessarily found that she had a life estate in trust property. She argues that this purported holding collaterally estops plaintiff from selling the

[4]Barbara does not argue that any document governing the trusts or Stewart LLC requires a showing of financial need before the paintings may be sold.

paintings, at least while she is alive. The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel comes into play when four conditions are fulfilled: "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Alamo v McDaniel*, 44 AD3d 149, 153 [1st Dept 2007]).

Barbara elides over the fact that Stewart LLC was not a party to the constructive trust litigation. Even if we assume, without deciding, that Stewart LLC is in privity with the trusts, this defense is without merit. The Referee and the Surrogate found that there was no promise to return trust assets to her that could underpin a claim for a constructive trust. In denying Barbara's claim for constructive trust, the Referee and the court acknowledged that the trust beneficiaries (i.e. the children of Bill and Barbara) had agreed that their parents could use the trust assets during the parents' lifetimes. However, the Surrogate's reference to this informal agreement does not amount to a holding that Barbara had a "life estate" in the paintings as

Barbara argues herein. The Surrogate's holding that there was no promise from the trusts to Barbara regarding the return of trust property to her does not contain a correlative finding that Barbara had an irrevocable right to use trust property until her death. Accordingly, the issue of whether Barbara has a life estate in the paintings was not decided in the constructive trust action. Indeed, in the subsequent proceedings where Barbara was removed as co-trustee Barbara asserted this "life estate" argument and it was rejected by the Referee in his report and in the Surrogate's confirmation of that report.[5]

Barbara's second argument is that, as manager of Stewart LLC, she had a power of attorney coupled with an interest that rendered her immune from removal as manager unless she consented to her removal. In support of this proposition she cites the Amended Agreement, which was allegedly adopted after her removal as manager. Stewart LLC's prior operating agreement, which is not in the record, would have governed Barbara's removal. Even assuming that the power of attorney language in the Amended Agreement appeared verbatim in the predecessor operating agreement, the power of attorney relied upon by Barbara is merely to take certain ministerial actions in order to carry out the terms of the operating agreement. This provision does not require her consent to remove her as manager of Stewart LLC.

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[5]Barbara cites to no trust document that confers on her a life estate in the paintings.

However, Barbara also argues that the October 11, 2011, "meeting," where Bill was apparently the sole attendee, or, at any rate, the sole attendee exercising any power, was improperly noticed. She again invokes the Amended Agreement, but, again, that document was allegedly adopted *after* her removal as manager. The operating agreement that was in force prior to the Amended Agreement is the governing document. For his part, Bill also relies on the Amended Agreement to argue that the October 11, 2011 meeting was properly called, and, in addition, that he had the power to act as he did on behalf of the members of Stewart LLC to remove Barbara. The Amended Agreement is not the agreement that governed when Barbara was purportedly removed as manager. Bill does not attach the prior operating agreement and he does not represent that the prior operating agreement was identical to the Amended Agreement with respect to the removal of managers. Therefore, among other questions, we do not know whether the prior operating agreement allowed for removal of a manager for cause without notice. Accordingly, there is an issue of fact as to whether Barbara was properly removed as co-manager of Stewart LLC. If she was not properly removed as manager, then there is a question as to whether Stewart LLC is authorized to bring this lawsuit.

Barbara's remaining arguments are without merit.

Barbara contends that the court should have awarded her attorney's fees she incurred with respect to plaintiff's effort

to seize the paintings pursuant to CPLR 7108(a). That statute states in relevant part:

> "If an order of seizure granted without notice is not confirmed as required pursuant to [CPLR 7102(d)(4)],[6] the plaintiff, unless the court orders otherwise upon good cause shown, shall be liable to the defendant for all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the granting of the order of seizure without notice."

Supreme Court properly denied Barbara fees and expenses under CPLR 7108. Although plaintiff obtained an order of seizure without notice and such order was not confirmed, the reason it was not confirmed is that the parties entered into a so-ordered stipulation as to the location of the paintings pendente lite.

Barbara also contends that the motion court erred by dismissing her third-party complaint, in which she seeks indemnity and contribution from Bill. Supreme Court correctly dismissed the third-party complaint.

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]; *see also City of New York v Lead Indus. Assn.*, 222 AD2d 119, 125 [1st Dept 1996] ["It is the independent duty which the wrongdoer owes to prevent

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[6] CPLR 7102(d)(4) says, "An order of seizure granted without notice shall provide that the plaintiff shall move for an order confirming the order of seizure on such notice to the defendant and sheriff and within such period, not to exceed five days after seizure, as the court shall direct."

the other from becoming vicariously liable, and cast in damages, to the injured party that is the predicate for the indemnity action"]). In the main action plaintiff does not seek any damages from Barbara; plaintiff merely seeks the paintings. Hence, Supreme Court properly dismissed the indemnity claim on the ground that no money damages are at stake.

Furthermore, "an indemnity cause of action can be sustained only if the third-party plaintiff and the third-party defendant have breached a duty to the plaintiff and also if some duty to indemnify exists between them" (*Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985] [internal quotation marks omitted]; *see also Chemical Bank v Stahl*, 272 AD2d 1, 19 [1st Dept 2000] ["The gravamen of an action for indemnity is that both parties . . . are subject to a duty to a third person under such circumstances that one of them, as between themselves, should perform it rather than the other" (internal quotation marks omitted)]). Only Barbara may owe a duty to return the paintings to plaintiff; Bill does not.

Barbara's contribution claim also fails. "The basic requirement for contribution . . . is that the culpable parties must be subject to liability for damages for the *same* personal injury, injury to property or wrongful death" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 602-603 [1988] [internal quotation marks omitted]). The main action does not seek damages for injury to property; instead, plaintiff seeks

the paintings themselves.

To the extent Barbara suggests that the injury is the depletion of trust assets, she fails to satisfy the "essential requirement" that "the parties must have contributed to the same injury" (*id.* at 603). Depleting trust assets and failing to transfer paintings are two different injuries (*see Miloscia v B.R. Guest Holdings, LLC*, 94 AD3d 563, 565 [1st Dept 2012]).

Finally, we find that the status quo is best preserved by the continued storage of the paintings with Crozier, at plaintiff's expense, pending the determination of plaintiff's claim for replevin.

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

ENTERED: JUNE 18, 2020

CLERK

Friedman, J.P., Kapnick, Oing, González, JJ.

11271 Global Montello Group Corp., Index 25940/16E
Plaintiff-Respondent,

-against-

Bronx Auto Tire, Inc., et al.,
Defendants-Appellants.

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Sharova Law Firm, Brooklyn (Charles Marino of counsel), for appellants.

Harriton & Furrer, LLP, Armonk (Kimberly A. Sanford of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered March 5, 2019, which denied defendants' motion to dismiss the complaint and granted plaintiff's cross motion for summary judgment, unanimously modified, on the law, to grant defendants' motion to the extent of dismissing plaintiff's claims as against defendants Noah Shalem and Mort Shalem, and otherwise affirmed, without costs.

Tax Law § 203-a(7) provides that once the outstanding tax arrears for a dissolved corporation are paid, the corporation is reinstated nunc pro tunc as if the dissolution never occurred (*see St. James Constr. Corp. v Long*, 253 AD2d 754, 755 [2d Dept 1998]). If the dissolution never occurred, then the individual defendants would not have been personally liable for the obligations of the corporation, absent a finding of, inter alia, fraud, piercing of the corporate veil, or alter ego. Therefore, since defendant Bronx Auto Tire, Inc. (BAT) paid off its

corporate taxes and was reinstated as an active corporation, Noah and Mort Shalem should no longer be held personally liable for the obligations under the License Agreement (*see Flushing Plaza Assoc. #2 v Albert*, 31 AD3d 494, 495-496 [2d Dept 2006]). "Whether or not a viable cause of action to recover damages for fraud exists cannot be determined on this record and is not an issue properly presented for consideration by this Court" (*id.* at 496).

Supreme Court properly granted summary judgment in plaintiff's favor as against BAT. Plaintiff's submission of the affidavit of its vice president was sufficient to authenticate the License Agreement and the Assignment Agreement. Defendants do not substantively challenge the authenticity of these agreements, or allege that the signatures were not genuine. Thus, these contracts are not hearsay and did not require a business record foundation to prove an exception to the hearsay rule (*see Service Alliance, Inc. v Betesh*, 52 Misc 3d 131[A], 2016 NY Slip Op 50966[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2016]).

Furthermore, while defendants object on hearsay grounds to the attached correspondence and other business documents, such documentation was unnecessary for a summary judgment finding. Plaintiff's vice president averred in his affidavit that the monthly license fee was increased to $10,050 per month, effective September 30, 2014, BAT defaulted under the License Agreement by

failing to timely pay fees, and BAT currently owed plaintiff $139,809.26. This evidence sufficiently established plaintiff's prima facie entitlement to judgment on the breach of contract claim against BAT, and defendants do not raise any triable issues with respect to BAT's liability or as to the damages amount.

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11672 The People of the State of New York, Ind. 886/18
Respondent,

-against-

Ruben Burgos,
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 (Victoria Muth of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Steven Statsinger, J.), rendered March 14, 2019,

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

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

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

ENTERED: JUNE 18, 2020

CLERK

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

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11673 In re Ahdawantazalam Aaron, etc., Index 500055/19
Plaintiff-Appellant,

-against-

Georgilia Aaron,
Defendant-Respondent.

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Ahdawantazalam Aaron, appellant pro se.

McCarthy Fingar LLP, White Plains (Michael S. Kutzin of counsel), for respondent.

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Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered August 8, 2019, which, after a hearing, denied the petition to appoint plaintiff Ahdawantazalam Aaron as guardian, and granted the cross-petition and appointed defendant Georgilia Aaron as guardian, unanimously affirmed, without costs.

In appointing a guardian, the primary concern is for the best interests of the incapacitated person, based on the facts. The determination is within the court's discretion and wide latitude is given (*see Matter of Von Bulow*, 63 NY2d 221, 224 [1984]). The parties, who divorced in 2014, agree that their daughter, an adult with multiple disabilities, needs a guardian. They each seek to serve in that capacity.

The court providently exercised its discretion in appointing defendant mother as Janisa's guardian, in view of the evidence that she had been diligently caring for Janisa for years and appropriately attended to her needs, and the absence of any evidence supporting plaintiff's claims of improper medical

treatment (*see Matter of Gustafson*, 308 AD2d 305, 308 [1st Dept 2003]). Moreover, similar claims by plaintiff had been rejected by the Family Court in an earlier custody proceeding in which defendant was awarded custody of Janisa. On the other hand, plaintiff had no experience caring for Janisa on his own.

Plaintiff asserts that the court should have permitted him to have Janisa, an adult, evaluated by an independent physician. However, he had no right to this relief, which was within the purview of the court evaluator (Mental Hygiene Law § 81.09[c][7]), who declined to seek additional medical advice.

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

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11674 In re Donna F.T., Dkt. V-1424/18
Petitioner-Respondent, V-2687/19

Paul C.T.,
Petitioner,

-against-

Renee G.-T.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

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

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

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Order, Family Court, New York County (Jonathan H. Shim, J.), entered on or about August 6, 2019, which, inter alia, awarded visitation with the subject child to the paternal grandparents, unanimously reversed, on the law and the facts, without costs, and the matter remanded for further proceedings.

This appeal is not precluded on the ground that the order was entered into upon consent of the parties insofar as the circumstances do not indicate that the particular visitation provisions ordered were the result of agreement between the parties. The mother's attorney's general acknowledgment that the grandparents had standing to seek visitation and that she did not oppose the child's contact with her grandparents, is not the same as agreement to the particular provisions regarding *the* nature and extent of the contact that the court ordered. The order

itself did not expressly state that it was entered on consent (*see Matter of Lacarrubba v Lacarrubba*, 198 AD2d 354 [2d Dept 1993]).

In the absence of consent, Family Court should not have awarded the paternal grandparents visitation without conducting a full trial. The decision was based only on the grandmother's partial testimony. The separately petitioning grandfather did not testify. The mother was not present due to a medical procedure she was undergoing in North Carolina. Even if the court was justified in drawing a negative inference from her failure to give testimony[1], the court failed to afford the attorney for the child (AFC) an opportunity to ascertain the seven-year-old child's position (KG v CH, 163 AD3d 67,83 [1st Dept 2018]). Although the Family Court appropriately appointed an AFC, he did not let her do her job. The child's position in this case was particularly important because of the mother's representations that the child did not want to see the grandparents so soon following her father's death and would be traumatized by such visitation. In addition, each of the grandparents brought separate petitions and each was separately represented in this matter. Although there is some indication that the grandparents are separated, because of the truncated record, there is insufficient information to support the court's

[1]In her brief the mother expressly states that she does not contest the negative inference from her failure to testify.

having jointly awarded jointly awarded them visitation with the child. Without a full hearing, the record is insufficient to determine whether visitation with the paternal grandparents is in the child's best interests (*see Matter of E.S. v. P.D.*, 8 NY3d 150, 160–161 [2007]; *Matter of Santiago v Halbal*, 88 AD3d 616, 617 [1st Dept 2011]). If after a full hearing *upon remand* the Family Court determines that grandparental visitation is in the child's best interest, it should also clarify the award of visitation rights vis-a-vis each grandparent, given that they filed separate petitions and were not jointly represented by counsel, and thus in fact may be separated.

The mother failed to establish that this case should be assigned to a different judge based on judicial bias. Rather,

the record reveals that the Judge was simply urging the parties to settle the issue of visitation without litigation.

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11675 Humble Monkey, LLC, Index 652534/14
Plaintiff-Appellant-Respondent,

-against-

Rice Securities, LLC, et al.,
Defendants-Respondents-Appellants.

_____

J. Greenberger, PLLC, New York (Jordan Greenberger of counsel), for appellant-respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about May 21, 2019, to the extent it denied plaintiff's motion for judgment against defendants for failure to produce a witness for deposition in accordance with a prior court order, unanimously modified, on the law and the facts, to strike defendants' answer, direct that a judgment as to liability be entered in plaintiff's favor, and remand the action for a hearing on damages and attorneys' fees, and defendant's cross-appeal therefrom otherwise dismissed, without costs, for failure to timely perfect (22 NYCRR 1250.9[a]).

When defendants failed to comply with the self-executing, conditional order striking their answer if they did not produce a witness for deposition by a date certain, the order became absolute (*Diaz v Maygina Realty LLC*, 181 AD3d 478 [1st Dept 2020]; CPLR 3126[3]). Defendants' proper recourse was to move to vacate the conditional order on the ground of excusable default (*Mehler v Jones*, 181 AD3d 535, 535 [1st Dept 2020]; CPLR 5015[a]). They did not seek that relief. In any event, the

excuses for failing to comply with the court's order that defendants asserted in opposition to plaintiff's motion were not reasonable, and defendants failed to seek an adjournment from the court or take any other action to avoid their knowing default.

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11676 The People of the State of New York, Ind. 841/15
Respondent,

-against-

Vincent Disieno,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ellen I. Biben, J.), rendered January 10, 2017, convicting defendant, after a jury trial, of attempted robbery in the first degree and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of nine years, unanimously modified, as a matter of discretion and in the interest of justice to the extent of reducing defendant's sentence on the attempted robbery in the first degree conviction from a term of 9 years and 5 years postrelease supervision to a term of 6 ½ years and 5 years postrelease supervision, and otherwise affirmed.

The court providently exercised its discretion when it denied defendant's motion to set aside the verdict on the ground of alleged juror misconduct (CPL 330.30[2]). There is no basis for disturbing the court's credibility findings, made after a hearing.

Defendant failed to demonstrate any misconduct by the juror,

who disclosed during jury selection that, among other law enforcement connections, he had previously worked as a trial preparation assistant at the New York County District Attorney's Office and that he still had close friends in the office. The fact that the juror did not go on to volunteer certain details of these friendships, the significance of which was unknown to him during voir dire, was not misleading and did not constitute misconduct. During voir dire, defense counsel had a full opportunity to elicit more details, such as the names and positions of the juror's friends in the prosecutor's office. However, counsel asked no questions on this subject, and did not see fit to challenge the juror for cause or peremptorily.

Furthermore, there was no prejudice that would warrant a new trial (*see generally People v Rodriguez*, 100 NY2d 30, 35-36 [2003]). The juror testified at the CPL 330.30 hearing that his personal relationships did not influence his deliberations, and there was no evidence of either actual or implied bias.

We find the sentence excessive to the extent indicated herein.

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11677 In re Ian Cyrus, Index 152564/17
Petitioner,

-against-

James P. O'Neill, etc., et al.,
Respondents.

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Brill Legal Group, P.C., Hempstead (Peter E. Brill of counsel), for petitioner.

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

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Determination of respondents, dated November 16, 2016, which, following a hearing, dismissed petitioner from his employment with the New York City Police Department, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Nancy M. Bannon, J.], entered November 1, 2017), unanimously dismissed, without costs.

Respondent's determination that petitioner was guilty of misconduct is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). In addition to video evidence of the incident, petitioner's own testimony established that he took money and pocketed it during the course of a police operation, and did not give the money to the arresting officer at the scene. The arresting officer testified that petitioner never subsequently gave the money in question to him. Respondents

rationally concluded that petitioner's actions as depicted on video, including turning away from the other officers while he pocketed the money, were inconsistent with an attempt merely to safeguard the money. Respondents also rationally concluded that petitioner's other explanations for his actions were not credible. We find petitioner's claim of agency bias unavailing in the absence of any proof that the outcome of the proceeding flowed from the alleged bias (*see Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197 [1981], *cert denied* 454 US 1125 [1981]).

The dismissal of petitioner from his employment with the Police Department does not shock the judicial conscience (*see generally Matter of Kelly v Safir*, 96 NY2d 32, 38, 39-40 [2001]). Respondent found that petitioner wrongfully took money during the course of a police operation, concealed his actions from his fellow officers, and then twice made false statements in the course of an investigation into the incident (*see Matter of Alfieri v Murphy*, 38 NY2d 976, 977 [1976]; *see also Matter of*

Martinez v Kelly, 24 AD3d 186, 186 [1st Dept 2005]).

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: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11678 In re Karen Jackson, Index 653255/17
Petitioner-Appellant,

-against-

The Department of Education of the City of New York,
Respondent-Respondent.

_____

Stewart Lee Karlin Law Group, P.C., New York (Stewart L. Karlin of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondent.

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Order, Supreme Court, New York County (John J. Kelley, J.), entered October 23, 2018, which denied the petition to vacate an arbitration award upholding 13 specifications against petitioner charging her with, inter alia, incompetence and neglect of duty, and imposing a penalty of termination of her employment as a public school teacher, and granted respondent's cross motion to dismiss the petition, unanimously affirmed, without costs.

The Hearing Officer's determination upholding 13 specifications against petitioner, all of which concerned teaching deficiencies during a four-year observational period, was supported by adequate evidence, including the testimony of school administrators and documentation. The determination was also rational, and not arbitrary and capricious (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]).

In determining an appropriate penalty, the Hearing Officer

properly considered respondent's significant remediation efforts, and his conclusion that those efforts were adequate is supported by the evidence showing that petitioner received feedback and suggestions for improvement through observation reports and one-on-one meetings, as well as assistance and support from her colleagues and outside professionals, and was provided with a teacher improvement plan (*see* Education Law § 3020-a[4]). In light of the Hearing officer's findings of a long-term pattern of inadequate performance, the penalty of termination is proportionate to the offenses (*see Matter of Benjamin v New York City Bd./Dept. of Educ.*, 105 AD3d 677 [1st Dept 2013]; *Lackow* at 569).

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: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11679 The People of the State of New York, Ind. 4584/15
Respondent,

-against-

Chris Thousand,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Jennifer Westphal 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 (Michael J. Obus, J.), rendered July 6, 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: JUNE 18, 2020

CLERK

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

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11680 Joe Sanchez, Index 308930/09
Plaintiff-Respondent, 84042/14

-against-

Triton Construction Company, LLC, et al.,
Defendants-Respondents-Appellants,
- - - - -
Canatal Industries, Inc.,
Third-Party Defendant-Appellant,

-against-

Low Bid Inc. doing business as Low Bid Erector,
Second Third-Party Defendant-Respondent.

_____

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

Cascone & Kluepfel, LLP, Garden City (Beth L. Rogoff-Gribbins of counsel), for Low Bid Inc., respondent.

_____

Order, Supreme Court, Bronx County (Donna Mills, J.), entered on or about June 3, 2019, which, to the extent appealed from as limited by the briefs, denied defendant Canatal Industries, Inc.'s motion for summary judgment dismissing defendant Triton Construction's common-law indemnification claim against it, and for summary judgment on its contractual indemnification claim against second third-party defendant Low Bid Inc., unanimously reversed, on the law, without costs and the motion granted as to defendant Triton Construction's common-law indemnification claim against it, and Canatal's contractual indemnification claim against Low Bid, without costs.

Plaintiff, an employee of Low Bid, allegedly slipped on oil

spilled on the floor at the work site. Trade contractor Canatal established prima facie that it was not negligent in connection with this accident and therefore that general contractor Triton's claim against it for common-law indemnification should be dismissed (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). In opposition, Triton failed to raise an issue of fact. It is uncontested that Canatal was not present on the work site, other than to deliver materials it had fabricated, and had subcontracted the installation portion of its contract with Triton to Low Bid. Thus, its employees could not have caused the dangerous condition alleged (id.). Further, Canatal had no duties relative to the work site's overall cleanliness; Triton had subcontracted laborers for that purpose.

Canatal established prima facie that Low Bid owes it contractual indemnification. In opposition, Low Bid failed to raise an issue of fact. The indemnification provision was triggered by the fact that the accident arose out of Low Bid's work (*see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401 [1st Dept 2005]). The indemnification provision in Low Bid's subcontract, which requires Low Bid to indemnify Canatal for claims or damages resulting from injuries arising out of Low Bid's work under the subcontract, "[t]o the fullest extent permitted by law," contemplates indemnification only to the extent Canatal is not negligent. Therefore, the provision is not void under General Obligations Law § 5-322.1 (*see Brooks v Judlau*

Contr., Inc., 11 NY3d 204, 210 [2008]). As indicated, there is no evidence of any negligence on the part of Canatal, which did not supervise or control plaintiff's work, bear any responsibility for the cleanliness of the work site, or contribute to the creation of the dangerous condition (*see Torres*, 14 Ad3d at 403; *Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306 [1st Dept 2002]).

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11681 In re Leilia O.W., and Another, Dkt. NA-10309/17
NA-10310/17

Dependent Children Under Eighteen
Years of Age, etc.,

Khalifah A.K.,
Respondent-Appellant,

Jeffrey A.W.,
Respondent,

Administration of Children's Services,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Deborah E. Wassel of counsel), for respondent.

Steven P. Forbes, Jamaica, attorney for the children.

_____

Order, Family Court, Bronx County (David J. Kaplan, J.), entered on or about April 3, 2019, which, after a hearing, found that respondent abused the subject children, unanimously affirmed, without costs.

Based on the existing record, respondent's claim of ineffective assistance of counsel is unavailing, as the record shows that respondent was afforded meaningful representation throughout the proceedings (*see People v Benevento*, 91 NY2d 708, 712-713 [1998]). Respondent failed to show that he was deprived of meaningful representation by counsel's failure to argue that he was not a person legally responsible for the children in a written summation, and that he suffered actual prejudice as a result (*see Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543 [1st

Dept 2014]).

In any event, the record amply supports the court's determination that, at the relevant times, respondent was a person legally responsible for the children. He resided in the home with the children, who were his nieces, for several months, cared for the children and assumed other household and parental duties (*see Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001 [2015]; *Matter of Yolanda D.*, 88 NY2d 790 [1996]).

The determination that respondent abused the children is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1046[b][i]; 1012[e][iii][A]). Contrary to respondent's argument, the court properly found that the children's out-of-court statements were sufficiently corroborated by the reports

and by the cross-corroboration of one of the children (*see Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]).

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11683 The People of the State of New York, Ind. 2059/16
Respondent,

-against-

Kevin May,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 4, 2016, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11685-
11685A Yevgeniya Khatskevich,
Plaintiff-Respondent,

-against-

Adam Victor,
Defendant-Appellant,

Transgas Energy Systems Corp., et al.,
Defendants.

Index 151658/14

_____

Schlam Stone & Dolan LLP, New York (John F. Whelan of counsel), for appellant.

Law Offices of John T. Brennan, Brooklyn (John T. Brennan of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 29, 2019, which, after in camera review, denied defendant Adam Victor's motion to compel plaintiff to produce her application for a T visa, unanimously reversed, on the law, without costs, and the case remanded for further proceedings consistent herewith. Appeal from order, same court and Justice, entered May 31, 2019, which directed plaintiff to produce the application for in camera review, unanimously dismissed, as superseded by the appeal from the order resolving the motion.

Victor served a written demand for plaintiff's T visa and application materials on October 22, 2018. Eight days later, plaintiff objected to production in writing, but did not specify any ground. Plaintiff did not raise the ground of privilege until March 2019, and never timely objected with particularity

(*see* CPLR 3122[a][1]). Accordingly, plaintiff waived objection based on any ground other than privilege or palpable impropriety (*see Recine v City of New York*, 156 AD3d 836 [2d Dept 2017]; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358-359 [1st Dept 2006]).

The only ground which plaintiff advances, 8 USC § 1367, is not a privilege for purposes of CPLR 3101 or waiver under CPLR 3122 (*see Joseph v Signal Intl. LLC*, 2014 WL 12597592, at *6 [ED Tex 2014]). Nor does plaintiff assert that the document demand was palpably improper (*cf. e.g. Duhe v Midence*, 1 AD3d 279, 280 [1st Dept 2003]; *Haller v North Riverside Partners*, 189 AD2d 615, 616 [1st Dept 1993]).

Accordingly, plaintiff has waived her objections to disclosure of the T visa-related documents sought by Victor. We thus reverse and remand for further proceedings, including

imposition of any confidentiality order or other protections which Supreme Court, in its discretion, may deem appropriate.

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

ENTERED: JUNE 18, 2020

CLERK

Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

11686N & M-1540 Index 154345/15

David Demurjian, et al.,
Plaintiffs-Appellants,

-against-

Michael Demurjian, et al.,
Defendants-Appellants,

187 Street Mazal Manager LLC,
Defendant-Respondent.

- - - - -

661 West 187 Street LLC,
Cross-Claim Defendant-Appellant.

_____

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Nicholas P. Chrysanthem of counsel)), for David Demurjian and Richard Demurjian, appellants.

Davidoff Hutcher & Citron LLP, New York (Joshua S. Krakowsky of counsel), for Michael Demurjian and 661 West 187 Street LLC, appellants.

Solomon & Siris, P.C., Garden City (Bill Tsevis of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered January 28, 2019, which granted the motion of defendant 187 Street Mazal Manager LLC (Mazal) to compel discovery, unanimously modified, on the law and on the facts, to deny Mazal's motion with respect to the production of tax returns, without prejudice to renewal, and otherwise affirmed, without costs.

The motion court providently deemed the appealing parties' objections waived under CPLR 3122 as a result of their failure to respond timely to Mazal's demands for production (*see Haller v*

North Riverside Partners, 189 AD2d 615, 616 [1st Dept 1993]). We modify, however, with respect to Mazal's demands for the appealing parties' tax returns, as objections to "palpably improper" demands are not waived (*id.* [internal quotation marks omitted]).

A demand for the production of tax returns is disfavored and requires "a strong showing of necessity," and the inability to obtain the information from other sources (*Weingarten v Braun*, 158 AD3d 519, 520 [1st Dept 2018] [internal quotation marks omitted]). Here, the failure "to identify the particular information the tax returns . . . will contain and its relevance to the claims made" (*id.*) should have been sufficient to deny Mazal's motion to compel. Indeed, the tax returns were not necessary to determine whether plaintiffs acquired an interest in the properties in 1994 or retained it thereafter – the reason the motion court gave for granting the motion. However, Mazal argues that the tax returns could be relevant to its affirmative defenses of laches, estoppel, waiver, ratification, and consent, and the motion court did not pass on this issue. As a result, although Mazal did not sufficiently show the inability to obtain the information sought from other sources or, indeed, what specific information the appealing parties' tax returns will show, we grant leave to renew upon a proper showing (*see Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]).

M-1540 - *Demurjian v Demurjian, et al.*

Motion to strike granted and to the extent that references to David Demurjian's deposition are deemed stricken from plaintiffs' reply brief at page 5 n 2, and otherwise denied.

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

ENTERED: JUNE 18, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11734 In re Akramul I. Khan, Dkt. G-01948-18
Petitioner-Appellant,

-against-

Shahida Z., et al.,
Respondents-Respondents.

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Law Office of Genet Getachew, Brooklyn (Genet Getachew of counsel), for appellant.

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Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about August 30, 2018, which denied petitioner and the subject child's motion for an order of special findings enabling the child to petition for Special Immigrant Juvenile Status, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The evidence shows that the subject child was unmarried and under the age of 21 at the time of the special findings hearing and order (*see generally* 8 USC § 1101[a][27][J]; 8 CFR 204.11[c]; *Matter of Marisol N.H.*, 115 AD3d 185, 188-189 [2d Dept 2014]). The Family Court's appointment of a guardian rendered the child dependent on a juvenile court (*see Matter of Antowa McD.*, 50 AD3d 507 [1st Dept 2008]).

The evidence also established that reunification with the child's parents was not viable due to neglect or abandonment. The child testified that, with no prior warning, his father left him in the United States with his uncle (petitioner), and that his parents later told him that they could not support him and

did not want him back. The child further stated, and petitioner corroborated, that he had only occasional contact with his parents, and received no gifts or support from them, since coming here. This was sufficient to "evince[] an intent to forego . . . parental rights and obligations" or a failure to exercise a minimum degree of care to supply the child with adequate food, clothing, shelter, education, or supervision (Social Services Law § 384-b[5][a]*; see* Family Ct Act § 1012[f][i], [ii]; *Antowa McD.*, 50 AD3d at 507).

In determining whether reunification was viable, the Family Court should not have refused to consider evidence of circumstances which occurred after the child's 18th, but before his 21st, birthday (*see* Family Court Act § 661[a]; 8 CFR 204.11[c][1]; *Matter of Goran S.*, 152 AD3d 698, 700 [2d Dept 2017]; *Matter of Sing W.C. [Sing Y.C.-Wai M.C.]*, 83 AD3d 84 [2d Dept 2011]).

The evidence also demonstrated that it is not in the best interests of the child to return to Thailand, where his parents reside, or to be sent to live in Bangladesh, where he has citizenship but has never resided. The child presented evidence that his parents would not accept him if he returned to Thailand, that his Thai visa was on the verge of expiring and he had no way to renew it, and that he had no other place to live or way to support himself in Thailand or Bangladesh (*see Matter of Alamgir A.*, 81 AD3d 937, 940 [2d Dept 2011]). He also presented evidence

that he was doing well in petitioner's care (*see Antowa McD.* at 507*; Matter of Marcelina M.-G. v Israel S.*, 112 AD3d 100, 114-115 [2d Dept 2013]).

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

ENTERED: JUNE 18, 2020

CLERK

CORRECTED ORDER - JULY 28, 2020

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11739 In re Michael R., Dkt. V-19315/18
Petitioner-Respondent, V-27521/18

-against-

Pamela G.,
Respondent-Appellant.

_____

Anne Reiniger, New York, for appellant.

Andrew J. Baer, New York, for respondent.

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Order, Family Court, Bronx County (Tamara Schwarzman, Referee), entered on or about June 5, 2019, which, after a hearing, awarded sole legal and physical custody of the subject child to petitioner father, with visitation to respondent mother, unanimously reversed, without costs, on the law and the facts, and remanded for further proceedings in accordance with the decision herein.

The referee failed to "determine[] whether the mother had established by a preponderance of the evidence that the father had committed acts of domestic violence against her and, if she met this burden, 'the effect of such domestic violence upon the best interests of the child'" (*Matter of Cassissa v Solares*, 176 AD3d 697, 698 [2d Dept 2019]; quoting *Matter of Khaykin v Kanayeva*, 47 AD3d 817, 817-818 [2d Dept 2008]; *see* Domestic Relations Law § 240[1][a]). The mother testified that the father

grabbed her by the hair and pulled her finger back, causing her nail to break. She further testified that she sought immediate medical attention. The father's attorney stated during summation that the mother's domestic violence allegations were not credible since she raised them for the first time during the hearing, did not include those claims in her petition, and failed to provide any medical records supporting the injuries alleged. However, the mother did state in her petition that the father took the child from her "forcibly" and stated at the very first court appearance that the father had "kicked [her] out of the house."

The referee failed to address the domestic violence issue in the decision and merely noted that she accepted the father's summation arguments. This bare bones statement was insufficient because we cannot determine whether the court found that the mother was not credible, or concluded that the domestic violence happened but that it was still in the child's best interest to award custody to the father.

Furthermore, the court did not make any findings on the different explanations for the mother's missed visits, nor address in any detail the mother's claims that the father was interfering with her access to the child. Thus, further proceedings are necessary.

Respondent's argument that the court erred in failing to appoint an attorney for the child is not preserved for appellate

review since no request for such an appointment was made to the court. In any event, it provides no basis for reversal given the very young age of the child and the lack of prejudice to the parties (*see Rena M. v Derrick A.*, 122 AD3d 457, 458 [1st Dept 2014], citing *Keen v Stephens*, 114 AD3d 1029, 1031-32 [3d Dept 2014]).

Finally, to preserve the status quo pending the rehearing, the father shall continue to have physical custody, with the mother having visitation with the child as ordered by the referee in the order entered on June 5, 2019. Prior to this hearing, neither parent had sole legal custody and, therefore, joint decision making shall continue pending the rehearing or further order of the referee upon remand. In light of the age of the child and the need for a prompt resolution of the custody situation, to the extent possible, the proceeding on remand should be expedited.

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

ENTERED: JUNE 18, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Jeffrey K. Oing
Anil C. Singh, JJ.

10435-
10435A
Index 306119/11

_____x

OneWest Bank, FSB,
Plaintiff-Respondent,

-against-

Deutsche Bank National Trust Company,
etc., et al.,
Defendants,

Signature Bank,
Defendant-Appellant.

- - - - -

Signature Bank,
Third-Party Plaintiff-Appellant,

-against-

JPMorgan Chase Bank, N.A.,
Third-Party Defendant-Respondent.

_____x

Defendant/third-party plaintiff appeals from the judgment of the Supreme Court, Bronx County (Donna M. Mills, J.), entered July 31, 2018, awarding plaintiff the principal sum of $292,000, plus interest of $280,320, against defendant/third-party plaintiff and dismissing the third-party complaint. Appeal from order, same court and Justice, entered May 1, 2018, which denied defendant

Signature's cross motion for summary judgment and granted third-party defendant JPMorgan Chase Bank's motion to dismiss the third-party complaint, and sua sponte granted plaintiff judgment against Signature Bank.

Meyner and Landis LLP, New York (David B. Grantz and Mark J. Krueger of counsel), for appellant.

Butler, Fitzgerald, Fiveson & McCarthy, New York (David K. Fiveson of counsel), for OneWest Bank, FSB, respondent.

Zeichner Ellman & Krause LLP, New York (Ronald M. Neumann and Mark Zeichner of counsel), for JPMorgan Chase Bank, N.A., respondent.

FRIEDMAN, J.P.

This appeal arises from a somewhat anomalous situation in which a bank (defendant/third-party plaintiff Signature Bank [Signature]) sold its customer an "official check" that was drawn on a second bank (third-party defendant JPMorgan Chase Bank, N.A. [Chase]).[1] The check was subsequently misappropriated, improperly endorsed, deposited into the wrongdoer's account at a third bank, and, upon presentment, improperly paid by Chase. We hold that, on these facts, Signature — which played no role in the depositing, collection or payment of the misappropriated check — is not liable for the loss to its customer.

In 2007, plaintiff's predecessor-in-interest, Dynamic Mortgage Bankers, Ltd. (Dynamic), extended a $509,400 mortgage loan to defendants Wayne Campbell and Lisa Mills-Campbell (the Campbells) for the purchase of a residential property in the Bronx from defendants Ruel Richards and Lorice Massias. Dynamic wired the funds representing the loan to its settlement agent, defendant Rubin & Licatesi, P.C. (R&L), at the mortgage settlement account R&L maintained with Signature. Dynamic instructed R&L to use $292,000 of the wired funds to satisfy the

[1]The term "official check" does not appear in the Uniform Commercial Code but is apparently used in the banking industry interchangeably with the term "cashier's check" to denote a check drawn by a bank on its own funds at the request of a customer (*see* 12 CFR part 229, app E, § II[I]).

sellers' mortgage, which was held by Argent Mortgage Company, LLC (Argent). The Argent mortgage was already in default at the time, and a foreclosure action was pending.

According to the affidavit of Patrick Manzi, Signature's senior vice president and director of bank operations, "[a]t the time in question, Signature did not issue its own official checks." Instead, as explained in Manzi's affidavit and in Signature's interrogatory responses, under an agreement between Signature and Integrated Payment Systems Inc. (IPS), Signature customers were provided by IPS with computer software and check forms that gave them the capability, upon Signature's approval, to print out a Signature "Official Check" at their own offices. Although such a check bore Signature's logo and the signatures of Signature officers, and designated Signature as the "Drawer," the check also indicated in the lower left corner that it was "Issued by Integrated Payment Systems Inc., Englewood, Colorado" through "JPMorgan Chase Bank, N.A., Denver, Colorado." In addition, the check bore Chase's ABA routing number.

In sum, when a Signature customer requested the issuance of an official check, Signature would debit the customer's account in the requested amount, wire the same amount to the IPS account at Chase, and notify the customer that it had permission to print out the check. In essence, official checks of this kind were drawn by Signature, not on its own account, but on the IPS

account at Chase.

Using the above-described procedure, R&L procured the issuance of a Signature "Official Check" in the amount of $292,000, payable to Argent's settlement agent, Steven J. Baum P.C., and dated November 8, 2007. The check identified R&L as the "Remitter."[2] According to a principal of R&L, R&L "forwarded the $292,000 bank check to Kim Saunders, the title closer, who undertook on behalf of the title company . . . to forward this check to Steven J. Baum, P.C. to pay off the seller's [sic] mortgage."

It is undisputed that Steven J. Baum P.C., the payee of the check, never received it. The check was, through some unknown chain of events, misappropriated, improperly endorsed, and deposited into the joint account that the sellers of the underlying real property (defendants Richards and Massias) maintained at defendant TD Bank, N.A. The check was subsequently presented for payment to Chase, the drawee bank, which paid it on January 8, 2008.[3]

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[2]"'Remitter' means the buyer from the obligated bank of a cashier's check or a teller's check" (Uniform Commercial Code § 4-104[1][k]).

[3]From a comparison of copies of the check in the record with documents in the record that bear Richards's signature, it appears that the check was endorsed by Richards, who seems simply to have signed his own name on the back of the check rather than forging the payee's endorsement. In any event, it is undisputed that the check was not properly endorsed and should not have been

As a result of the misappropriation of the Signature check, the Argent mortgage was not paid off. Accordingly, Argent continued its pending foreclosure action, which culminated in the transfer of the property by referee's deed, recorded October 9, 2009, to defendant Deutsche Bank National Trust Company (Deutsche Bank), in its capacity as trustee for a mortgage pool.

Meanwhile, in August 2009, Dynamic had assigned its mortgage to plaintiff. Plaintiff subsequently commenced this action in July 2011, seeking to quiet title to the underlying real property, and naming as defendants Deutsche Bank, the Campbells and R&L, among others. Plaintiff's counsel represents that, at the time this action was commenced, plaintiff "believed that Argent's foreclosure proceeded in error as the Check payable to Steven J. Baum was negotiated." When the truth about the disposition of the check emerged, plaintiff filed a supplemental summons and amended complaint naming as additional defendants Signature, TD Bank, Richards, Massias, and Kim Saunders, the title closer.[4]

Plaintiff asserted two causes of action against Signature, one "for breach of transfer warranties pursuant to [Uniform

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accepted for collection by TD Bank or paid by Chase.

[4]Plaintiff has withdrawn its claim against R&L and has settled its claim against Deutsche Bank. Richards and Saunders have never appeared or answered. Plaintiff has been granted a default judgment against Richards.

Commercial Code] § 4-207" and one for monies had and received. Signature answered the complaint and asserted a cross claim against TD Bank.

In February 2013, Supreme Court (Friedlander, J.) issued an order (the 2013 order) that, among other things, granted TD Bank's motion to dismiss all claims against it. Although plaintiff on this appeal adheres to the position that its claim against TD Bank should not have been dismissed, it did not appeal the 2013 order, which is not brought up for review on the present appeal by Signature from the judgment against it.

Once plaintiff had settled with Deutsche Bank and the claims against TD Bank had been dismissed, the only actively litigated claim remaining in the case was plaintiff's claim against Signature. In July 2013, Signature served responses to plaintiff's interrogatories, and in March 2014, it produced an employee from its operations department for deposition. Thereafter, in July 2014, Signature was granted leave, without opposition, to file an amended answer and to commence a third-party action against Chase. In its third-party complaint, Signature asserted only a common-law claim, based on theories of negligence and indemnification, against Chase. Signature did not assert any claim against Chase under the Uniform Commercial Code.

In December 2014, Chase moved to dismiss Signature's third-party claim on the ground that any claim that Signature might

have had against Chase was governed by the Uniform Commercial Code, not the common law, and as such was barred by the three-year statute of limitations asserted to be applicable to a claim under section 4-401 of the Code, since Chase had paid the check in January 2008. Chase further argued that Signature's common-law theories of liability were displaced by the Uniform Commercial Code and therefore failed to state a cause of action. Plaintiff and Signature both opposed the motion. In addition, Signature cross-moved for summary judgment dismissing the amended complaint as against Signature. Plaintiff opposed the cross motion.

The motion and cross motion were argued and decided on May 1, 2018. The court granted Chase's motion and, on Signature's cross motion for summary judgment, upon a search of the record, granted plaintiff summary judgment against Signature. The court did not specify which of the two causes of action against Signature (the claim under the Uniform Commercial Code or the claim for monies had and received) was the basis for the grant of summary judgment to plaintiff. Signature has appealed from the ensuing judgment, dated July 24, 2018.[5]

We turn first to plaintiff's cause of action against

[5]Although the latest written submissions in the motion sequence is dated February 25, 2015, the court did not hear argument until May 2018. The reason for the three-year delay is not explained in the record or the briefs.

Signature under the Uniform Commercial Code, which is predicated on the contention — denied by Signature, as more fully discussed below — that Signature made payment on the misappropriated and improperly endorsed check. Although the amended complaint characterizes this cause of action as one "for breach of transfer warranties pursuant to UCC § 4-207," it is plain that, even if Signature could be deemed liable for breach of a warranty arising under that statute, Dynamic (plaintiff's assignor) was not a beneficiary of any such warranty under the statute's express terms.[6] In fact, plaintiff appears to recognize that it does not have any claim under section 4-207, since it has not referred to that statute as the basis of its claim against Signature either in its opposition to Signature's cross motion in Supreme Court or in its brief on this appeal.

From plaintiff's appellate brief and its counsel's affirmation in the record addressing this issue, it is apparent that plaintiff now seeks to hold Signature liable under the Uniform Commercial Code for having paid, upon an improper

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[6]The warranties established by section 4-207 run, by the express terms of the statute, from a "customer or collecting bank" only "to the payor bank or other payor who in good faith pays or accepts the item" (§ 4-207[1]) or "to [such customer's or collecting bank's] transferee and any subsequent collecting bank who takes the item in good faith" (§ 4-207[2]). Dynamic, as the remitter (through its agent, R&L) of the "Official Check" in question, does not fall within any class designated as a beneficiary of the warranties arising under section 4-207.

endorsement, a check that had been purchased with the funds of plaintiff's assignor. It is well established, of course, that a drawee bank paying a check that is not properly payable — such as a check that is not properly endorsed — incurs liability to the drawer of the check (*see* Uniform Commercial Code § 4-401 [permitting a bank to charge against its customer's account any item that is "properly payable from that account"]; *Clemente Bros. Contr. Corp. v Hafner-Milazzo*, 23 NY3d 277, 283 [2014] ["New York's version of the Uniform Commercial Code . . . imposes strict liability upon a bank that charges against its customer's account any 'item' that is not 'properly payable'"]; *Tonelli v Chase Manhattan Bank, N.A.*, 41 NY2d 667, 670 [1977] ["the drawee bank (paying) a check over a forged indorsement . . . does so at its peril and may not charge its customer's account for a check so paid," and "(t)he same rule should prevail where a bank honors a check payable to order which lacks the indorsement of the payee"]; *Atlantic Bank of N.Y. v Israel Discount Bank*, 108 Misc 2d 342, 345 [App Term, 1st Dept 1981] ["A check bearing a forged indorsement is not properly payable and the drawer has a cause of action against the drawee-payor bank"]). Under the same principle, a bank's improper payment of a cashier's check (or, as denominated in this case, an "official check") gives rise to a cause of action on the part of the remitter of the check (*see Old*

Republic Natl. Title Ins. Co. v Bank of E. Asia Ltd., 291 F Supp 2d 60, 68 [D Conn 2003] [applying New York law]; *see also Kerr S.S. Co. v Chartered Bank of India, Australia & China*, 292 NY 253, 262 [1944] [in holding that the purchase of a cashier's check could not be rescinded, the Court of Appeals noted that "(u)ntil title to (a cashier's check) is transferred to the payee the 'remitter' or 'purchaser' remains its owner and in some circumstances may sue upon the instrument as if named as payee"]).

While it appears from the foregoing that plaintiff, as Dynamic's assignee, might well have had a cause of action (now time-barred) against the bank that made payment on the misappropriated check in January 2008, the record establishes that Signature was *not* the payor of that check. As previously discussed, although the check bore Signature's logo and identified Signature as the drawer, the check was actually drawn on funds on deposit at IPS's account at Chase. This is indicated on the check itself, which states that it was "[i]ssued" by IPS and bears Chase's name and ABA routing number. In addition, the record contains affidavits by two competent witnesses (Manzi of Signature and Debra Anders, an executive of the parent company of IPS), each of whom identifies Chase as the drawee of the check. The record establishes that Signature's involvement with the

check was limited to: (1) wiring, at the request of its client R&L, $292,000 to the IPS account at Chase to cover the anticipated check; (2) charging a corresponding debit to the mortgage settlement account that R&L maintained at Signature; and (3) notifying R&L that it had approval to print the check at its own office, using the software and forms previously provided by IPS. There is no claim that Signature acted improperly, or in any way harmed plaintiff's assignor, in taking any of these steps. Thereafter, Signature played no role in the depositing, collection or payment of the check — the processes that damaged plaintiff's assignor. It neither paid the check itself nor presented it for payment to any other bank.

Notwithstanding the foregoing uncontroverted evidence, plaintiff argues that Signature should be deemed to have paid the check on two grounds, neither of which is availing. First, plaintiff seizes on the fact that Signature's original answer in this action alleged in the cross claim against TD Bank that "Signature paid the Check in good faith so transferred or presented to it by TD in reliance of the warranties of TD." However, Signature's original answer has been superseded by an amended answer that omits any such allegation. Signature was granted leave by the court to file the amended answer, without opposition by plaintiff; accordingly, the original answer on

which plaintiff relies is no longer operative.[7]

Plaintiff also argues that Signature is liable for "the wrongful acts of IPS/Chase" (namely, the improper payment of the check) because Signature "delegat[ed] its contractual responsibility [to its customer, R&L] to [Signature's] undisclosed agent," namely, IPS. This argument fails. To begin, on this record, Signature had no "contractual responsibility" to R&L in the payment of the check because Signature was not the drawee of the check and, therefore, had no role in paying it. More fundamentally, there is no basis in the record for plaintiff's assertion that "IPS was [Signature's] agent," much less for plaintiff's implicit contention that IPS's purported agency somehow extended to Chase, the actual payor of the check.[8] While the "Master Service Agreement" (MSA) between IPS and Signature did create a principal-agent relationship, that relationship was between IPS as principal and Signature as agent.[9] Nor does plaintiff advance its cause by asserting that

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[7]Signature's counsel in Supreme Court admitted to that court that, at the time the original answer was drafted, counsel had labored under a misapprehension of the facts concerning which bank had been the payor of the check.

[8]In this regard, it should be noted that IPS, a vendor of payment system services, does not appear to be a bank at all and is not alleged to have acted as a bank in this matter.

[9]Specifically, the MSA provides in pertinent part: "IPS appoints Client [Signature] as its agent to use or sell Payment Instruments." The MSA defines the term "Payment Instruments" to

the relationship between Signature and IPS was "undisclosed" to Signature's client, R&L. In fact, as previously noted, the form on which R&L printed out the subject check indicated that the funds were being drawn on IPS's account at Chase, the bank whose ABA routing number appeared at the bottom of the instrument. Moreover, the record contains the affidavit of Richard Harris Rubin, Esq., a principal of R&L, in which Rubin makes no claim that his firm had been unaware of Signature's relationship with IPS or was misled by Signature in any way.

Signature also argues that plaintiff lacks standing to pursue claims under the UCC based on the wrongful payment of the check because plaintiff's assignor, Dynamic, was not the remitter of the check and because plaintiff has not established that Dynamic assigned such a claim to it when Dynamic assigned the mortgage. We need not address these arguments in view of our foregoing discussion demonstrating that Signature has no liability for the wrongful payment of the check on the ground that it was not the drawee of the check and never presented the check or paid it.

Having established that Signature was entitled to summary judgment dismissing the Uniform Commercial Code claim against it, we now turn to plaintiff's cause of action against Signature for

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include an "IPS Official Check."

money had and received.[10] We conclude that, on this record, the claim for money had and received also should have been dismissed. A claim for money had and received lies where "one party possesses money that in equity and good conscious he ought not to retain and that belongs to another" (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]). "The remedy is available if one [person] has obtained money from another, through the medium of oppression, imposition, extortion or deceit, or by the commission of a trespass" (*id.* [internal quotation marks omitted]). In this case, the money in question was a deposit in R&L's bank account at Signature, and the record establishes that Signature treated those funds exactly as R&L, its customer, directed. Specifically, pursuant to R&L's request to purchase an official check in the amount of $292,000, Signature wired $292,000 to IPS and debited R&L's account in the same amount. Signature neither retained the money nor used the money for its own benefit. There is not a shred of evidence that Signature engaged in conduct that could be described as "oppression, imposition, extortion or deceit, or . . . the commission of a trespass" (*id.*). Signature has no obligation "in equity and good conscience" (*id.*) to absorb

[10]As previously noted, Supreme Court, in granting plaintiff summary judgment against Signature, did not specify whether it was granting plaintiff relief on its Uniform Commercial Code claim, its claim for money had and received, or both.

the loss that was caused by the theft of the check, the check's improper acceptance by TD Bank, and the check's improper payment by Chase — events in which Signature had no involvement at all. Accordingly, on this record, Signature is entitled to summary judgment dismissing the claim for money had and received.

Finally, our dismissal of the complaint as against Signature renders moot Signature's third-party claim for common-law indemnification against Chase. We therefore affirm the order appealed from insofar as it dismissed Signature's third-complaint, without reaching the question of whether the third-party claim is time-barred or otherwise not legally viable.

Accordingly, the judgment of Supreme Court, Bronx County (Donna M. Mills, J.), entered July 31, 2018, awarding plaintiff the principal sum of $292,000, plus interest of $280,320, against defendant/third-party plaintiff and dismissing the third-party complaint, should be modified, on the law, to dismiss the complaint, and otherwise affirmed, with costs to defendant/third-party plaintiff against plaintiff. The appeal from the order, same court and Justice, entered on or about May 1, 2018, should

be dismissed, without costs, as subsumed in the appeal from the judgment. The Clerk is directed to enter an amended judgment accordingly.

All concur.

Judgment, Supreme Court, Bronx County (Donna M. Mills, J.), entered July 31, 2018, modified, on the law, to dismiss the complaint, and otherwise affirmed, with costs, to defendant/third-party plaintiff against plaintiff. Appeal from order, same court and Justice, entered on or about May 1, 2018, dismissed, without costs. The Clerk is directed to enter an amended judgment accordingly.

Opinion by Friedman, J.P. All concur.

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

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

ENTERED: JUNE 18, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische
Barbara R. Kapnick, JJ.

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_____x

Madeline Hosking, as the Administratrix of the Estate of Jeanette Martinez, Deceased,
Plaintiff-Respondent-Appellant,

-against-

Memorial Sloan-Kettering Cancer Center,
Defendant-Appellant-Respondent.
_____x

Cross appeal from an order of the Supreme Court, Bronx County (Lizbeth González, J.), entered September 21, 2016, which granted defendant's motion for summary judgment dismissing the complaint to the extent of dismissing plaintiff's claims for age discrimination under the New York State and City Human Rights Laws (State and City HRLs) and denied the motion to the extent it sought dismissal of plaintiff's claims for disability discrimination under the State and City HRLs.

Jones Day, New York (Terri L. Chase and Karen Rosenfield of counsel), for appellant-respondent.

Michael G. O'Neil, New York, for respondent-appellant.

ACOSTA, P.J.

At issue in this appeal is whether defendant, Memorial Sloan-Kettering Cancer Center (MSK), engaged plaintiff, a disabled employee, in a good faith dialogue to ascertain the possibility of a reasonable accommodation. We find that there are issues of fact as to whether defendant engaged in the required process, and accordingly, it is not entitled to summary judgment dismissing plaintiff's disability claims.

Plaintiff decedent, Jeanette Martinez, was hired by defendant MSK's Sidney Kimmel Center in Manhattan in April 2002 to work as a Guest Services Representative (informally referred to as the concierge position). Plaintiff performed functions commonly associated with that job title, including answering the phone and greeting and directing patients. By 2012, plaintiff was diagnosed with multiple disabling conditions that, together, restricted her from pushing, pulling, or lifting on the job, or working outdoors. Plaintiff was thus medically restricted from performing many of the doorman functions (another position based in the lobby), including pushing patients in wheelchairs or escorting them outside.

In 2012, defendant decided to move to a "pooled model" for five Kimmel Center job functions at the time filled by five separate employees and consolidate those positions into a unified

"Kimmel Representative" position. Because of her medical restrictions, plaintiff informed defendant that she would be unable to perform most of the tasks associated with the consolidated position, except for the concierge function that she was already doing.

Plaintiff accordingly asked defendant to accommodate her by permitting her to remain exclusively in the concierge function. Defendant concluded, however, that it would be unable to accommodate her. According to defendant, keeping plaintiff permanently at the concierge position would directly impact the pooled model by requiring managers to station two employees in the lobby at all times. Defendant similarly reasoned that stationing plaintiff permanently at the concierge position would also interfere with managers' ability to prioritize in assigning employees. Managers' ability to shift the Kimmel Representatives would also be impacted on days when one or more of the employees was on vacation or otherwise absent.

Deposition testimony, however, raised issues regarding the extent to which defendant actually considered accommodating plaintiff. For instance, the Administrator for the Kimmel Center, Rosanna Fahy, initially testified that she did not recall whether plaintiff "asked for an accommodation or if she just articulated that she couldn't perform the duties." She then

testified that she gave no consideration to accommodating plaintiff in the Kimmel Representative position. After having her recollection refreshed, she acknowledged that plaintiff requested an accommodation. She testified that she considered how much of the new position plaintiff could do. However, when asked whether she considered letting plaintiff "stay in the Kimmel rep position, doing the front door duties, the combination of Functions 3 and 4? Did anyone consider allowing her to do that?," she replied "I would not consider it." Fahy was then asked whether she considered having plaintiff do the rotation for those functions that she could do to which she replied "It doesn't work." She stated that "we discussed it," but that she did not try to create a schedule that would allow plaintiff to rotate to functions that she could perform.

Fahy's testimony was also inconsistent with that of Tina Sollazo, plaintiff's immediate supervisor's testimony. According to Sollazo, the only reason plaintiff was not permitted to stay in the concierge role was because she could not perform "any functions in the concierge position." However, plaintiff had satisfactorily performed the concierge job for 10 years.

Defendant's human resources department informed plaintiff that, although she would not be able to do the Kimmel Representative job, MSK would allow her to keep working as a

concierge while applying for other available positions internally. Plaintiff applied for approximately 15 positions in a four-month period and went on seven job interviews. She was not hired for any of the open positions. On December 8, 2012, plaintiff was terminated effective December 31, 2012.

In her complaint, plaintiff asserted claims for disability and age discrimination under the State and City Human Rights Laws (State and City HRLs). Defendant served an answer denying liability and asserting affirmative defenses, including that it terminated plaintiff for legitimate, nondiscriminatory reasons, and that it met its obligations to accommodate plaintiff's conditions. Defendant then moved for summary judgment dismissing the complaint. The motion court granted defendant's motion to the extent of dismissing plaintiff's age discrimination claims.

On appeal, defendant argues that it is entitled to summary judgment dismissing plaintiff's disability discrimination claim because she could not perform the essential functions of the Kimmel Representative position with or without accommodation. On her cross appeal, plaintiff contends that issues of fact exist warranting reinstatement of her claim for age discrimination.

An employee "states a prima facie case of discrimination under both the State HRL and City HRL if the employee suffers from a statutorily defined disability and the disability caused

the behavior for which the employee" suffered an adverse employment action (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]; *Harrington v City of New York*, 157 AD3d 582, 585 [1st Dept 2018] ["Under the City HRL, the test is similar, though rather than an adverse action, the plaintiff must show only that the defendant 'took an action that disadvantaged' him or her"], quoting *Fletcher v Dakota, Inc*, 99 AD3d 43, 51-52 [1st Dept 2012]; *Santiago-Mendez v City of New York*, 136 AD3d 428, 429 [1st Dept 2016] [Under City HRL, the plaintiff must have been adversely or differently treated]; *Cadet-Legros v New York Univ. Hosp. Ctr*, 135 AD3d 196, 204 n 5 [1st Dept 2015] [Under City HRL, "the conduct in question is illegal so long as it was (at least in part) because of protected class status and operated to the disadvantage of the plaintiff"]).

Notably, the State and City HRL define "disability" in the employment context differently. The State HRL limits the term to "disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation . . . held" (Executive Law § 292[21]). "Reasonable accommodation," in turn, means actions which permit an employee or prospective employee with a disability "to perform in a

reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, . . . [or] job restructuring and modified work schedules," with the additional proviso that the accommodation does "not impose an undue hardship on the business, program or enterprise of the entity from which action is requested" (Executive Law § 292[21-e]; *see also Jacobsen*, 22 NY3d at 834).

In contrast to the State HRL, "the City HRL's definition of 'disability' does not include 'reasonable accommodation' or the ability to perform a job in a reasonable manner. Rather, the City HRL defines 'disability' solely in terms of impairments" (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013]). The City HRL shifts the burden to the employer to show as an "affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job . . . provided that the disability is known or should have been known by the [employer]" (Administrative Code of City of NY § 8-107[15][b]). Moreover, such "reasonable accommodation" should not "cause undue hardship in the conduct of the [employer's] business" (Administrative Code § 8-102).

Under both the State and City HRLs, "the first step in

providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached" (*Phillips v City of New York*, 66 AD3d 170, 176 [1st Dept 2009]). As we noted in *Phillips*,

> "Rather than operating on generalizations about people with disabilities, employers (and courts) must make a clear, fact-specific inquiry about each individual's circumstance.
>
> [W]hen confronted with a disabled employee's request for reasonable accommodation, the employer is required to engage in a good faith interactive process whereby employer and employee clarify the individual needs of the employee and the business, and identify the appropriate reasonable accommodation. This good faith process is the key mechanism for facilitating the integration of disabled employees into the workplace. . . . [S]ummary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith" (66 AD3d at 175 [internal quotation marks omitted]).

Unlike the State HRL where the employer must "engage[] in interactions with the employee revealing at least some deliberation upon the viability of" an accommodation (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d at 837), the City HRL clearly requires a more rigorous process (*Phillips*, 66 AD3d at 176 ["The State HRL provides protections broader than the ADA;

and the City HRL is broader still"]).[1] Indeed, to emphasize the seriousness by which employers must engage in the interactive process, the City Council amended the City HRL in 2018 to codify *Phillips* (*see* Local Law No. 59 [2018] of the City of NY). The Committee Report in support of Local Law 59 states:

> "This bill would clarify the reasonable accommodation requirement by expressly requiring, as a part of the reasonable accommodation process, that covered entities engage in a cooperative dialog with individuals who they know or should know may require accommodation.
>
> "A cooperative dialog is the process by which a covered entity and a person who may be entitled to an accommodation engage, in good faith, in a written or oral dialogue concerning the person's accommodation needs, potential accommodations that may address those needs, and the difficulties that such accommodations may pose for the covered entity. The requirement for a cooperative dialog would apply to covered entities in the context of employment, public accommodations, and housing. Upon reaching a final determination at the conclusion of a

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[1]The State HRL was recently amended, to include section 300, which states, in relevant part, "The provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300 [effective date: August 12, 2019]). This amendment is remarkably similar to the City HRL's Restoration Act (Local Law 85), which states, in relevant part, "The provisions of this [chapter] title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" (Local Law 85 § 7; *see also Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

> cooperative dialog, covered entities in the context of employment and housing accommodations would be obligated to provide any person requesting an accommodation, who participated in the cooperative dialogue, with a written final determination identifying any accommodation granted or denied" (Report of the Governmental Affairs Division, Committee on Civil Rights, December 18, 2017, p. 3).

Significantly, this "bill . . . legislatively modif[ied] the holding of *Jacobsen v New York City Health & Hosp. Corp.*, 22 NY3d 824, 838 (2014), which held that refusal to engage in a good faith interactive process is not independently actionable under the HRL" (*id.* at 4; *see* Administrative Code § 8-107[28][a] ["It shall be an unlawful discriminatory practice for an employer, labor organization or employment agency or an employee or agent thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation: (2) Related to a disability"]; Local Law 59 § 2).

Section one of Local Law 59 also amended section 8-102 [definitions] of the City HRL by adding a subdivision entitled "cooperative dialogue."

> "The term 'cooperative dialogue' means the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations

> that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity."

Here, defendant cannot prevail in its summary judgment motion seeking to dismiss plaintiff's State HRL disability claim because there are issues of fact as to whether defendant engaged plaintiff in a good faith interactive process to ascertain the viability of an appropriate accommodation. Instead, it essentially told plaintiff that she did not fit within the new model and that she should apply for another position within the hospital. Although defendant claims that it engaged in the process in good faith, the testimony of two of its employees suggest otherwise.

For instance, as noted above, Fahy stated that she gave no consideration to accommodating plaintiff in the Kimmel Representative position. Later on, when asked whether she considered letting plaintiff "stay in the Kimmel rep position, doing the front door duties, the combination of Functions 3 and 4? Did anyone consider allowing her to do that?," she replied "I would not consider it." Fahy was then asked whether she considered having plaintiff do the rotation for those functions that she could do to which she replied "It doesn't work." She stated that "we discussed it," but that she did not try to create

a schedule that would allow plaintiff to rotate to functions that she could perform.

Significantly, Fahy's testimony was inconsistent with plaintiff's immediate supervisor, Sollazo, who stated that the only reason plaintiff was not permitted to stay in the concierge role was because she could not perform "any functions in the concierge position," notwithstanding that plaintiff had satisfactorily performed the concierge job for 10 years.

Instead, defendant relies on its unilateral determinations and self-serving statements that the ability to perform all the tasks within the new model is essential to the position, rather than the fact-specific individualized inquiry required by the State HRL (*see Phillips*, 66 AD3d at 175 and cases cited therein). However, it is not clear from the record that all the functions of the new model are essential. Indeed, each separate function is performed by a Kimmel Representative only 20 percent of the time and four other employees are available to perform functions that plaintiff could not perform. Moreover, there are questions regarding MSK's hardship if plaintiff is not required to rotate into other positions since the new model mandated that a Kimmel Representative work in the concierge function at all times. Last, it is undisputed that plaintiff satisfactorily performed the concierge function for 10 years.

Defendant argues that its efforts were more than sufficient, quoting language in *Jacobsen* that "an employer faces an obstacle to summary judgment if the employer did not engage in interactions revealing *at least some* deliberation upon the viability of the employee's request" (*Jacobsen*, 22 NY3d at 837 [emphasis added]). However, language in *Jacobsen* stating that the record has to reveal "at least some deliberation" does not mean that an employer can take a haphazard approach to the interactive process or engage in it without taking the process seriously. As we stated in *Phillips*, "the employer is required to engage in a good faith interactive process whereby employer and employee clarify the individual needs of the employee and the business, and identify the appropriate reasonable accommodation" (*Phillips*, 66 AD3d at 175). There is no rule that an employer has to engage in the process for a certain number of days or that it ultimately has to give the employee what the employee is demanding. However, the process has to be held in good faith and the essential functions of the position need to be part of the interactive process the law requires, not a unilateral employer decision cloaked by business judgement. Indeed, what happened here "is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the [Americans with Disabilities Act [ADA]

intended" (*Phillips*, 66 AD3d at 175).

Given that the City HRL is even broader than the State HRL (*Phillips*, 66 AD3d at 176), defendant has likewise failed to show that it engaged in an interactive process with plaintiff.

Defendant argues that plaintiff's claim fails because plaintiff could not perform the Kimmel Representative position, with or without a reasonable accommodation. Accordingly, the argument goes, it did not even have to show undue hardship. Defendant, however, is conflating several concepts. First, although a jury may ultimately find that defendant cannot perform the position even with an accommodation, or that to do so would impose an undue hardship, defendant cannot jump to that ultimate conclusion without first engaging in a good faith interactive process with plaintiff (*Jacobsen*, 22 NY3d at 837-838).

Last, we disagree with defendant's position that it need not restructure the position or modify the work schedule to accommodate plaintiff because it would be inconsistent with the new model. What defendant fails to recognize is that, here, the whole purpose of engaging in an interactive process is to see whether the position or schedule could be modified to accommodate plaintiff. To sanction defendant's position, this Court would in essence be giving carte blanche to employers to create business models that can be used as a subterfuge to discriminate against

disabled employees and circumvent the HRLs (*Phillips*, 66 AD3d at 177 [employer simply cannot abrogate the requirements of the HRLs by carving out a category of employees who are not subject to an interactive process]). Regardless of the model or position, the HRLs require an interactive process, conducted in good faith, to ascertain whether an employee can be accommodated (*id.*).

The motion court properly granted defendant's motion to dismiss plaintiff's claims for age discrimination (*see Rollins v Fencers Club, Inc.*, 128 AD3d 401, 401 [1st Dept 2015]). The fact that plaintiff was replaced by a person nearly 30 years younger than her suffices to support an inference that her termination was motivated by age-based animus (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 114-115 & n 2 [1st Dept 2012]). However, plaintiff offers no other record evidence of age-related animus. The simple fact that plaintiff was replaced by someone younger than her, standing alone, does not suffice to establish a prima facie case and to rebut defendant's proffered legitimate reason for her termination, as pretextual (*see Suri v Grey Global Group, Inc.*, 164 AD3d 108, 111 & n 1 [1st Dept 2018], *appeal dismissed* 32 NY3d 1138 [2019]; *Hudson v Merril Lynch & Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]).

Accordingly, the order of the Supreme Court, Bronx County (Lizbeth González, J.), entered September 21, 2016, which granted

defendant's motion for summary judgment dismissing the complaint to the extent of dismissing plaintiff's claims for age discrimination under the New York State and City Human Rights Laws (State and City HRLs) and denied the motion to the extent it sought dismissal of plaintiff's claims for disability discrimination under the State and City HRLs, should be affirmed, without costs.

All concur.

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered September 21, 2016, affirmed, without costs.

Opinion by Acosta, P.J. All concur.

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

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

ENTERED: JUNE 18, 2020

CLERK