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

8697 In re Lerone Washington, Index 101239/16
Petitioner-Appellant,

-against-

Shola Olatoye, etc.,
Respondent-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about November 3, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and a determination having been made by this court on June 11, 2019 to hold the petition in abeyance and remand the proceeding for respondent to make a determination in accordance with our decision, and upon the stipulation of the parties hereto dated March 4, 2020,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: JUNE 25, 2020

CLERK

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

11275 Arena Riparian LLC, Index 654429/18
Plaintiff,

Arena Riparian (Cayman), LLC, et al.,
Plaintiffs-Respondents,

-against-

CSDS Aircraft Sales and Leasing Company, et al.,
Defendants-Appellants,

Lance Toland Associates, LLC, et al.,
Defendants.

_____

William & Connolly LLP, Washington, D.C. (Brian T. Gilmore of the bar of the District of Columbia, admitted pro hac vice of counsel), and Tucker & Latifi, LLP, New York (S. Robert Schrager of counsel), for appellants.

Brown Rudnick LLP, Washington, D.C. (Benjamin G. Chew of the bar of the District of Columbia and State of Virginia admitted pro hac vice of counsel), for respondents.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 9, 2019, which, to the extent appealed from, denied defendants-appellants' (hereinafter defendants) motion to dismiss the causes of action asserted by plaintiff Arena SPC Manager, LLC and the causes of action for tortious interference with contract, breach of fiduciary duty, fraud, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and tortious interference with prospective business advantage, unanimously modified, on the law, to grant the motion as to the fourth and fifth causes of action for fraud and aiding and abetting fraud and the thirteenth cause of action for aiding and abetting breach of fiduciary duty by defendant

CSDS Aircraft Sales and Leasing, Inc. (CSDS), and otherwise affirmed, without costs.

The two remaining plaintiffs in this action, Arena Riparian (Cayman), LLC (Arena Cayman) and Arena SPV Manager, LLC (Manager), seek to hold defendants liable for damages flowing from plaintiffs' alleged failure to close on an aircraft transaction with Ethopian Airlines Group (EAG) in 2018.

Defendants' argument that Manager has no standing to maintain its claims fails on the face of the pleading, which alleges in detail that Manager was a member of the Arena Riparian joint venture, specifically, that it would "contribute capital, management experience, industry connections and finances for legal and diligence expenses" to the deal, and that it suffered damages as a result of defendants' actions. Defendants' related argument that plaintiffs rely on "impermissible group pleading" is also unavailing. Unlike the cases defendants rely on (*see e.g. ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397 [1st Dept 2008]), in this action, the two (remaining) plaintiffs allege that they were part of a single joint venture, and they are asserting joint claims against the three (remaining) closely related defendants, namely CSDS, and defendants Benedict Sirimanne and Christopher Keller, who control CSDS. Only one overall transaction is alleged. The complaint does not otherwise fail for lack of specificity or under any other pleading standard.

The complaint fails, however, to state a cause of action against defendant CSDS for aiding and abetting a breach of fiduciary duty because CSDS is not alleged to have taken a single distinct action independent of the underlying breaches of Sirimanne and Keller (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 11-12 [1st Dept 2008]).

The fraud-based claims should also be dismissed because plaintiffs have not adequately alleged "actual pecuniary loss sustained" as the direct result of defendants' alleged fraud (*Lama Holding Co v Smith Barney*, 88 NY2d 413, 421 [1996] [internal quotation marks omitted]; *see Sapienza v Becker & Poliakoff*, 173 AD3d 640 [1st Dept 2019]). Instead, in their complaint, plaintiffs seek to recover lost profits they would have realized if they successfully completed the purchase of the aircrafts. However, plaintiffs cannot be compensated under a fraud cause of action "for what they might have gained"

(*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks omitted]; *Sapienza* at 640).

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

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ.

11289 Mary Currid, et al., Index 156424/16
Plaintiffs-Appellants,

-against-

Patricia Valea,
Defendant-Respondent.

_____

Law Office of Alexander P. Kelly, P.C., New York (Alexander P. Kelly of counsel), for appellants.

The law Office of Craig A. DiPrima PLLC, Huntington (Craig A. DiPrima of counsel), for respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 25, 2019, which, upon the court's having previously resolved the parties' respective motions to compel production of each others' tax returns for the years 2010 through 2016 by directing them to submit the returns to the court for an in camera review, ordered plaintiffs to produce redacted tax information for the years 2010 to 2013, revealing only name and address, filing status and income sections, unanimously affirmed, without costs.

Plaintiffs claim that between 2010 and 2016 defendant employed them as a caretaker for her ailing aunt and that defendant violated, inter alia, several sections of the Department of Labor Regulations (12 NYCRR) requiring overtime pay, a minimum wage, and additional pay for split shifts. Defendant denies that she was plaintiffs' employer for purposes of the regulations and provisions of the Labor Law, but admits

that she paid plaintiffs by check from 2014 to 2016, albeit on her aunt's behalf. Plaintiffs claim they were paid in cash by defendant between 2010 and 2013. Defendant, who denies that she was the source of the cash payments, seeks plaintiffs' federal and state tax returns for 2010 to 2013, claiming she needs the returns to verify the cash amounts, as well as plaintiffs' assertion that they were employees, and not independent contractors.

While compelling disclosure of tax returns is generally disfavored (*see Williams v New York City Hous. Auth.*, 22 AD3d 315 [1st Dept 2005]), here defendant demonstrated both that the specific information ordered disclosed was necessary to defend the action, and unavailable from other sources *(see Gordon v Grossman*, 183 AD2d 669, 670 [1st Dept 1992]). Since plaintiffs were paid in cash between 2010 and 2013 and there is no other evidence in the record establishing who paid their wages and how much they were paid during those years, defendant showed a specific need for the production of the three years of tax returns, which might show the amounts claimed by plaintiffs as income from the caretaker work, as well as whether they claimed the income as wages or as money earned through self-employment. Defendant demonstrated that investigating plaintiffs' bank accounts would be inconclusive, since pay deposited in the accounts could have been commingled with other amounts, and because one of the plaintiffs claimed that she used several

banking institutions and did not make deposits on a predictable basis. We note that the court already inspected the tax returns in camera and deemed them relevant. Further, the redactions of those filings directed by the court's order ensures that discovery is narrowly tailored to the issues in controversy. Finally, the court's order does not constitute inappropriate judicial "pruning," since defendant did not serve a demand of which it can be said that "a substantial portion is overbroad, burdensome, or calls for irrelevant material or conclusions" (*Editel, N.Y. v Liberty Studios*, 162 AD2d 345, 346 [1st Dept 1990]). Nevertheless, to the extent plaintiffs are concerned about use of the tax returns for purposes unrelated to the action, they may seek an appropriate protective order.

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 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11687 The People of the State of New York, Ind. 3763/12
Respondent,

-against-

Omar Martinez,
Defendant-Appellant.

_____

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

Omar Martinez, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (James W. Hubert, J.), rendered January 25, 2016, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. There was no need for a hearing pursuant to *People v Rodriguez* (79 NY2d 445 [1992]), or any other hearing, because defendant never disputed the People's assertion that the witness at issue was defendant's stepdaughter, who had extensive contact with and knew defendant well during the three years that he and the witness's mother were married, thus establishing a relationship familiarity (*see People v Rodriguez*, 47 AD3d 417 [1st Dept 2008], *lv denied* 10 NY3d 816 [2008]).

Defendant did not preserve any of his remaining claims, and

we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Although the cell site data should have been introduced through a competent witness, that error, or any other error involving that evidence or the DNA evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's challenges to the People's summation, and the argument raised in defendant's pro se brief are unavailing.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11688 Antonio Mercedes, Index 300854/12
Plaintiff-Appellant,

-against-

248 JD Food Corp. doing business as
Bravo Supermarket, et al.,
Defendants,

Hobart Corp.,
Defendant-Respondent.

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Joseph R. Bongiorno & Associates, P.C., Mineola (Joseph R. Bongiorno of counsel), for appellant.

Darger, Errante, Yavitz & Blau LLP, New York (Jonathan B. Kromberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about September 24, 2018, which, inter alia, granted defendant ITW Food Equipment Group LLC's motion for summary judgment dismissing the design defect claims against it, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law in this action where plaintiff butcher alleged that he was injured when, while cleaning meat out of the hopper of the meat mixer-grinder in the supermarket where he worked, the machine turned on, causing the mixing paddles to rotate. Defendant submitted evidence showing that it was not liable because plaintiff's injury was a result of a post-sale modification of the product that disabled its safety system. Defendant's engineer opined that the mixer-grinder had been made

to industry standards with a magnetic interlock system meant to cut power to the motor when the hopper guard was opened and left defendant's control in safe condition, but that it had been rewired to bypass the interlock system. To the extent that plaintiff claimed that the cover of the foot pedal was defective, defendant was not the manufacturer of the pedal and irrespective of whether the pedal was defective, plaintiff would not have sustained injury had the interlock system been functioning properly, as it was when the mixer-grinder was sold. A manufacturer is not liable for harm that results from the modification, because "[s]ubstantial modifications of a product from its original condition by a third party which render a safe product defective are not the responsibility of the manufacturer" (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479 [1980]; *see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56-57 [2014]).

In opposition, plaintiff failed to raise a triable issue of fact. He presented no evidence to exclude the probability that the mixer-grinder's operation while the hopper guard was opened was the result of alterations made to the mixer-grinder after defendant sold it (*see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008]; *Williams v River Place II, LLC*, 145 AD3d 589, 590 [1st Dept 2016]). Furthermore, plaintiff's expert, a construction engineer with no background in industrial meat processing machines, provided a conclusory opinion, without reference to any

standards, and did not opine that alternative designs were available or financially feasible (*see Ford v Riina*, 160 AD3d 588 [1st Dept 2018], *lv denied* 32 NY3d 913 [2019]; *Williams* at 590).

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11689 In re Sheila N., Dkt. O-12530/17
Petitioner-Respondent,

-against-

Rudy N.,
Respondent-Appellant.

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

John R. Eyerman, New York, for respondent.

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Order, Family Court, New York County (Carol Goldstein, J.), entered on or about April 15, 2019, which, upon a factual finding that respondent committed the family offenses of menacing in the second degree and harassment in the second degree, granted a two-year order of protection in petitioner's favor, unanimously affirmed, without costs.

A fair preponderance of the evidence supports the court's determination that respondent committed the family offense of menacing in the second degree on May 23, 2017 (*see* Family Court Act § 832; Penal Law § 120.14; *Matter of Putnam v Jenney*, 168 AD3d 1155, 1157 [3d Dept 2019]). Petitioner testified that on that date, when she and another family member asked respondent about the fact that he had not deposited their rent checks, he went to the kitchen, grabbed a nine-inch meat knife, gestured with it aggressively, and told them that they were going to vacate the apartment where all three resided; petitioner testified further that respondent's actions made her very

nervous.

A fair preponderance of the evidence also supports the court's determination that respondent committed the family offense of harassment in the second degree on May 27, 2017 (*see* Penal Law § 240.26[1]; *Matter of Sheureka L. v Sidney S.*, 100 AD3d 547 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). Petitioner testified that respondent punched her in the chest, causing her to fall to the ground.

Petitioner's testimony demonstrates that the two-year order of protection directing respondent to refrain from committing family offenses against her was warranted and reasonable, because it will likely "end the family disruption," and also considered that respondent had already been excluded from the home while the petition was pending (*see* Family Court Act § 812[2][b]; § 842[a]; *Matter of Miriam M. v Warren M.*, 51 AD3d 581, 582 [1st Dept 2008]). Moreover, "the duration of any temporary order shall not by itself be a factor in determining the length or issuance of any final order" (Family Court Act § 842). The court found petitioner credible and respondent not credible, and there exists

no basis for disturbing these findings.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11691 The People of the State of New York, Ind. 1708/14
Respondent,

-against-

Efrain Nieves,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered on or about October 10, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factors for continuing course of sexual misconduct (Factor Four) and recency of a prior sex crime (Factor Ten). The record before the hearing court, including defendant's plea allocution, provided clear and convincing evidence that defendant's pattern of sexual conduct toward a child began in April, 2011 and continued until June, 2012 meeting the requirements under Factor Four. The

sexual conduct began less than three years from defendant's October 21, 2008 release from prison for his prior sex crime, and extended for a period that amply satisfied the timing requirements under Factor Ten (*see* Correction Law § 168-n[3]).

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

ENTERED: JUNE 25, 2020

CLERK

Friedman J.P., Richter, Gesmer, Oing, Singh, JJ.

11692 Karma Properties LLC, et al., Index 651385/17
Plaintiffs-Respondents,

-against-

Lilok, Inc., et al.,
Defendants-Appellants.

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Law Office of Robert G. Leino, New York (Robert G. Leino of counsel), for appellants.

Kazlow & Kazlow, New York (Stuart L. Sanders of counsel), for respondents.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered May 2, 2019, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

Although defendants allege that neither defendant principal Rogers nor anyone else on behalf of defendant tenant Lilok, Inc. signed the lease amendment, defendants made no assertions to the motion court based on the specific differences between Rogers's signature and the signature on the amendment, or the circumstances in which Lilok came to occupy suite 503 and agreed to pay the higher rent sufficient to raise a question of fact. "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). Accordingly, since the guaranty executed with the

original lease applied to all renewals and extensions, summary judgment in favor of plaintiffs was proper (*see 1424 Millstone Rd., LLC v James B. Fairchild, LLC*, 136 AD3d 556, 557 [1st Dept 2016]).

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11693 The People of the State of New York, Ind. 1380/14
Respondent,

-against-

Cesar Haines,
Defendant-Appellant.

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

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

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Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered on or about April 20, 2018, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant, who was convicted of sex crimes against children in both the underlying case and a prior case, fails to demonstrate how the mitigating factors he cites would

reduce his risk of reoffending or causing danger to the community. Although defendant will be subject to a lengthy period of postrelease supervision, we do not find that circumstance to warrant a departure (*see People v Lewis*, 143 AD3d 604 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017].

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11694-
11695-
11695A

Index 154460/15

Nick Voulkoudis,
Plaintiff-Respondent,

-against-

George Frantzeskakis, et al.,
Defendants-Appellants.

_____

Warshaw Burstein, LLP, New York (Pankaj Malik of counsel), for appellants.

Panteris & Panteris, LLP, Bayside (George Panteris of counsel), for respondent.

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Judgment, Supreme Court, New York County (Tanya R. Kennedy, J.), entered June 18, 2018, in plaintiff's favor against defendant George Frantzeskakis, unanimously affirmed, with costs. Appeal from so-ordered transcript, same court and Justice, entered on or about June 22, 2018, which denied Mr. Frantzeskakis's motion to vacate an order, same court (Ellen M. Coin, J.), dated June 28, 2016, granting plaintiff's motion for a default judgment against defendants on the issue of liability, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from statement of judgment, same court (Kennedy, J.), entered August 6, 2018, in plaintiff's favor against defendant Raw Organics, Inc., unanimously dismissed, without costs, as abandoned.

Plaintiff met his burden of demonstrating proper service of process on Mr. Frantzeskakis by a preponderance of the evidence

(*see e.g. Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476 [1st Dept 2016]). We find no basis for disturbing the traverse court's findings of fact, which in large part turned on witness credibility (*see e.g. Holtzer v Stepper*, 268 AD2d 372 [1st Dept 2000]).

In their papers on their motion to vacate their default, defendants did not make an issue of whether plaintiff's process server was licensed on May 16, 2015 (the date of service).

Defense counsel failed to object when the court asked Mrs. Frantzeskakis questions; hence, Mr. Frantzeskakis's appellate arguments are unpreserved (*see e.g. People v Bowen*, 50 NY2d 915 [1980]). Were we to consider them on the merits, we would find them unavailing.

The motion court providently exercised its discretion in finding that Mr. Frantzeskakis failed to establish a reasonable excuse for his delay in answering the complaint (*see e.g. U.S. Bank N.A. v Martinez*, 139 AD3d 548, 549-550 [1st Dept 2016]; *Citibank*, 144 AD3d at 476). Since he failed to set forth a reasonable excuse, the court did not have to consider whether he had a meritorious defense (*see e.g. Time Warner City Cable v Tri State Auto*, 5 AD3d 153 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004]; *Citibank*, 144 AD3d at 476-477).

On appeal, defendants make no arguments as why the statement

of judgment against Raw Organics (as opposed to the judgment against Mr. Frantzeskakis) should be reversed. Hence, we dismiss the appeal from the statement of judgment as abandoned.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11696 The People of the State of New York, Ind. 1156/15
Respondent,

-against-

Victor Badillo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered April 27, 2018, convicting defendant, after a jury trial, of robbery in the first degree, criminal possession of a weapon in the third degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

By modifying his initial offer of proof, defendant expressly withdrew his claim that he was entitled to ask his psychiatric expert about a self-exculpatory statement he made to the expert, bearing on the facts of the crime. The record fails to support defendant's assertion that his trial counsel merely acquiesced in the court's allegedly erroneous determination that the statement was inadmissible, nor does it establish that the court made a final adverse ruling on defendant's initial offer of proof. We decline to review this unpreserved claim in the interest of

justice. As an alternative holding, we find that, under the circumstances of the case, the exculpatory statement was not admissible to explain how the defense expert arrived at her opinion about defendant's ability to form the intent to forcibly steal property. Furthermore, defendant received ample scope in which to present a psychiatric defense and to explain the bases for his expert's opinion, including testimony about other statements defendant made to the expert. To the extent that defendant is claiming he was constitutionally entitled to introduce the evidence at issue, that claim is likewise unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

In this case involving the alleged use of force to retain stolen merchandise, the court providently exercised its discretion in permitting the People's expert to testify that defendant told him he had previously shoplifted, and that he thought he could get away with it. Unlike the hearsay evidence that defendant had initially sought to introduce through his own expert, this limited and nonprejudicial evidence of uncharged crimes was probative to explain the People's expert's opinion that defendant, despite his schizophrenia, had the ability to form an intent to forcibly steal. The court permitted only minimal testimony and twice gave limiting instructions, which the jury is presumed to have followed.

The court properly denied defendant's suppression motion.

The police had probable cause to arrest defendant when a citizen informant (later identified as a store employee) pointed to defendant and yelled that he had a knife (*see People v Taylor*, 61 AD3d 537 [1st Dept 2009], *lv denied* 13 NY3d 750 [2009]). The witness's excited demeanor plainly suggested criminal activity involving the knife, rather than innocuous possession of a possibly legal item. Probable cause was enhanced when defendant failed to comply with police directives to stop and to show his hands.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11697 The People of the State of New York, Ind. 5122/16
Respondent,

-against-

Ernest Gillard,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Elizabeth T. Schmidt of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 25, 2018, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 12 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury was justified in reaching its conclusion based on the weight of the credible evidence presented at trial. It is undisputed that someone hit the victim with a hard object and that defendant was present when the victim was hit. The victim testified that

he immediately turned around after being hit, saw a can on the ground, and saw that defendant was the only person standing behind him. The victim also testified that he saw the defendant run away with the can and witnesses saw the defendant with the can in an elevator. Although none of the witnesses saw who assaulted the victim, the evidence, viewed as a whole, supports the inference that the assailant was defendant.

Defendant did not preserve his objections to the sufficiency of the jury charge (*see e.g. People v Garcia*, 40 AD3d 541, 542 [1st Dept 2007], *lv denied* 9 NY3d 961 [2007]) and we decline to review them in the interest of justice. As an alternative holding, we find that the charge sufficiently conveyed to the jury the People's obligation to prove defendant's identity as the assailant. If there was any deficiency in this regard in the initial charge, the matter was adequately addressed in a supplemental charge, to which defendant had no objection.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11698 In re Jeff Smith, Index 100525/16
Petitioner,

-against-

City of New York, et al.,
Respondents.

_____

Jeff Smith, petitioner pro se.

James E. Johnson, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

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Determination of respondents, dated November 30, 2015, which, after a hearing, sustained a charge that petitioner owned and was operating an unlicensed vehicle for hire, found reasonable suspicion of illegal activity to support seizure of the vehicle, and imposed a $1,500 fine, unanimously confirmed in part, as to the finding of liability and resulting fine, without costs, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Kathryn E. Freed, J.], entered December 12, 2018), remanded for a new hearing to consider the reasonableness of the warrantless seizure of petitioner's vehicle.

The charge is supported by substantial evidence in the record (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Under applicable law, "[a]ny person who shall permit another to operate or . . . knowingly operate or offer to operate for hire any vehicle . . . in the city, without first having obtained . . . a license for such

vehicle," may be found liable for civil penalties in an administrative proceeding (Administrative Code of City of NY § 19-506[b][1], [f]). The complaining officer submitted a sworn statement in the summons and testified at the hearing that he heard petitioner's entire conversation with the undercover TLC officer for whose street hail petitioner admittedly stopped (Administrative Code of City of NY § 19-506.1[a]; 48 RCNY 5-02[a], 6-12[b]). Petitioner's right to confront witnesses against him was not violated merely because the undercover officer was not called as a witness (*see Matter of Friendly Convenience, Inc. v New York City Dept. of Consumer Affairs*, 71 AD3d 577, 577-578 [1st Dept 2010]).

We find no reason to overturn the ALJ's decision not to credit petitioner, which is "largely unreviewable" (*see Matter of Faison v New York City Taxi & Limousine Commn.*, 176 AD3d 416, 416 [1st Dept 2019], quoting *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Even were we to do so, the alternative finding that petitioner was offering his vehicle for hire, where he sought to exchange a ride to the airport for completion of a survey to be used for his freelance news business, is not irrational (*300 Gramatan Ave. Assocs.*, 45 NY2d at 180-181). Nor did enforcement of the general prohibition on unlicensed for-hire vehicles violate petitioner's First Amendment freedom of the press (*see Cohen v Cowles Media Co.*, 501 US 663, 669 [1991]).

That the summons was issued to petitioner as the owner,

instead of the driver, does not warrant vacatur. Respondents' interpretation of the law which "shall apply to the owner of such vehicle and, if different, to the operator of such vehicle" (Administrative Code of City of NY § 19-506[b][1]), is "not irrational or unreasonable" and "should be upheld" (*Matter of Nelson v Roberts*, 304 AD2d 20, 24 [1st Dept 2003]).

The record is insufficient to determine whether the warrantless seizure of petitioner's vehicle violated the Fourth Amendment (*see* Administrative Code of City of NY § 19-506[h][1]). Respondents' officers must have "probable cause to believe that the vehicle is, in fact, subject to forfeiture" (*United States v Gaskin*, 364 F3d 438, 458 [2d Cir 2004], *cert denied* 544 US 990 [2005], citing *Florida v White*, 526 US 559, 561 [1999]), based on facts and circumstances "within" their "knowledge" (*id.* at 456). Forfeiture would apply if petitioner were found liable for violating the same provision within 36 months of the violation on appeal here (Administrative Code of City of NY § 19-506[h][2]). However, respondents did not proffer evidence of petitioner's previous violation at the hearing, which pre-dated findings by federal district courts limiting the scope of the seizure provision to the well-established forfeiture exception (*see Harrell v City of New York*, 138 F Supp 3d 479, 490-495 [SD NY 2015], citing *Gaskin*, 364 F3d at 458; *see also DeCastro v City of*

New York, 278 F Supp 3d 753, 769-772 [SD NY 2017]).

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 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11699-
11699A In re Marsha V.,
Petitioner-Respondent,

-against-

Garfield V.,
Defendant-Appellant.

Dkt. F-24305/17

_____

H. Fitzmore Harris, P.C., Bronx (Fitzmore Harris of counsel), for appellant.

Marsha Vaughan, respondent pro se.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about March 7, 2019, which granted respondent father's motion for reargument and, upon reargument, denied his objection and confirmed the order of support and findings of the Support Magistrate, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about September 21, 2018, dismissing the father's objection as untimely, unanimously dismissed, without costs, as superceded by the appeal from the order granting reargument.

The court correctly determined that an award of child support to petitioner mother was proper. The record amply shows that the parties' children spent the majority of time in the

mother's care and physical custody (*see Bast v Rosoff*, 91 NY2d 723 [1998]; *Rubin v Della Salla*, 107 AD3d 60 [1st Dept 2013]).

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

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11700-
11700A Tracy Braithwaite, et al., Index 308252/09
308740/09
Plaintiffs,

Kashan Robinson, et al.,
Plaintiffs-Respondents,

-against-

Greenhouse, et al.,
Defendants,

John Bakhshi,
Defendant-Appellant.

- - - - -

Kiara Jones, et al.,
Plaintiffs,

-against-

Greenhouse, et al.,
Defendants,

John Bakhshi,
Defendant-Appellant.

_____

Nesenoff & Miltenberg, LLP, New York (Phillip A. Byler of counsel), for appellant.

Bader & Yakaitis, LLP, New York (Michael Caliguiri of counsel), for Kashan Robinson and Kalisha Ross, respondents.

_____

Orders, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered on or about August 13, 2019, and on or about September 3, 2019, which granted plaintiffs' motions to restore the actions to the trial calendar, unanimously reversed, on the law, without costs, and the motions denied.

Plaintiffs' motions to restore the actions to the trial calendar must be denied because defendant Bakhshi demonstrated

that the claims had been settled nearly a year earlier. The record shows that plaintiffs' attorney, Michael Caliguiri, Esq., entered into a global settlement of all outstanding claims against Bakhshi in these two actions and others pending in Bronx County, all arising out of an incident that occurred in August 2009.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11701 The People of the State of New York, Ind. 5166/15
Respondent,

-against-

Adrienne Walker,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered November 17, 2016, as amended January 23, 2017, 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 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11702 Eurotech Construction Corp., Index 653776/15
Plaintiff-Appellant,

-against-

QBE Insurance Corp.,
Defendant-Respondent.

_____

FG McCabe & Associates, PLLC, New York (Gerard McCabe of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Anne M. Murray of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered April 25, 2019, which denied plaintiff's motion for summary judgment and granted defendant insurer's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

"Well-established principles governing the interpretation of insurance contracts . . . provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court" (*Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 151 [1st Dept 2016], *affd* 31 NY3d 131 [2018][internal quotation marks and citation omitted]). The plain language of the Transfer Endorsement contained within defendant's policy states:

> a. If we conclude that, based on "occurrences" offenses, claims or "suits" which have been reported to us and to

> which this insurance may apply, the . . . [l]imit . . . is likely to be used up in the payment of judgments or settlements, we will notify the first Named Insured, in writing, to that effect.
>
> b. When a limit of insurance described in paragraph a. above has actually been used up in the payment of judgments or settlements;
>
> (1) We will notify the first Named Insured, in writing, as soon as practicable, that:
>
> (a) Such limit has actually been used up; and
> (b) Our duty to defend "suits" seeking damages subject to that limit has also ended (R354).

Defendant complied with subparagraph "a." of the Transfer Endorsement when it sent its February 1, 2012 letter advising plaintiff that "[i]t is probable that the value of this matter will exceed the primary limit." Notice "as soon as practicable" is only required under paragraph "b." of the Transfer Endorsement, which had not been triggered, because the policy limits had not been "actually . . . used up in the payment of judgments or settlements." It was plaintiff's duty to place its excess insurer on notice (*AAA Sprinkler Corp. v General Star Natl. Ins. Co.*, 271 AD2d 331 [1st Dept 2000], *lv denied* 95 NY2d 859 [2000]).

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11703 The People of the State of New York, Ind. 1975/15
Respondent,

-against-

Tarrek Arnold,
Defendant-Appellant.

_____

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

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

_____

Judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 29, 2016, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first and second degrees, criminal possession of a weapon in the second degree (two counts) and escape in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 22 years consecutive to a term of 2 to 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's guilt was established by compelling circumstantial evidence. This included videotapes that supported the conclusion that defendant was the assailant, particularly in light of his distinctive clothing, as well as text messages by defendant that could reasonably be interpreted as containing admissions of

guilt. The jury could also have reasonably discredited the victim's attempt to exonerate defendant.

The court properly denied defendant's motion to controvert a warrant for the search of defendant's phone, which was supported by probable cause (*see generally People v Castillo*, 80 NY2d 578, 585 [1992]). The affidavit in support of the warrant set forth the video evidence, from which a compelling inference of probable cause could be drawn, similar to the inference of guilt that supported the verdict.

Defendant abandoned any argument that a detective's testimony identifying defendant in a surveillance video based on prior familiarity should have been precluded for lack of notice pursuant to CPL 710.30(1)(b). When defense counsel raised the issue, the court did not make a final ruling. Instead, it deferred the issue pending further discussion, which never transpired. When the detective testified later in the trial, counsel did not call the court's attention to its failure to make a ruling, nor did he otherwise object to the testimony at issue, thereby abandoning the claim (*see People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Brimage*, 214 AD2d 454 [1995], *lv denied* 86 NY2d 732 [1995]). We decline to review this claim in the interest of justice. As an alternative holding, we find that on the particular record before us, the detective's testimony did not require CPL 710.30(1)(b) notice. In any event, any error in this regard was harmless.

Defendant's argument that the court should have accompanied an otherwise properly annotated verdict sheet with certain instructions is a claim requiring preservation (*see e.g. People v Azam*, 135 AD3d 654, 654 [1st Dept 2016], *lv denied* 27 NY3d 991 [2016]), and we decline to review it in the interest of justice. As an alternative holding, we find no prejudice to defendant (*see id.*). Defendant's ineffective assistance claim relating to the verdict sheet is unavailing.

The procedure set forth in *People v O'Rama* (78 NY2d 270 [1991]) was not implicated by a jury note that merely requested an exhibit, along with a request for ministerial assistance in locating it on a computer, but did not request any information about the exhibit (*see e.g. People v Dunham*, 172 AD3d 524, 525-526 [1st Dept 2019], *lv denied* 34 NY3d 930 [2019]). To the extent the court's response to another note went slightly beyond the jury's request, the court correctly stated the law and the response could not have caused any prejudice.

Because the court gave curative instructions and defense counsel failed to request any further relief, defendant did not preserve his challenges to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006]), 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]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11704 The People of the State of New York, Ind. 1684/12
Respondent,

-against-

Dominick Davis,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered January 12, 2016, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years to life and 10 years, unanimously affirmed.

The court properly denied defendant's motion to suppress his postarrest statements. The police had probable cause to arrest defendant based on a codefendant's statement that possessed ample indicia of reliability, in that it was generally against the codefendant's penal interest and was corroborated in numerous significant details by police investigation (*see People v Berzups*, 49 NY2d 417, 427 [1980]; *People v Daily*, 287 AD2d 293 [1st Dept 2001], *lv denied* 97 NY2d 680 [2001]). We need not decide whether the police needed a warrant for pinging (electronically locating) defendant's phone, which led to his apprehension, because the record supports each of the hearing court's alternative bases for denying suppression, that is, that the warrantless pinging was justified by exigent circumstances

(*see People v Lamb*, 164 AD3d 1470, 1471 [2d Dept 2018], *lv denied* 32 NY3d 1206 [2019]), and that defendant's statements were sufficiently attenuated from any preceding illegality (*see People v Bradford*, 15 NY3d 329, 333-335 [2010]).

Defendant's contention that his attorney was ineffective for failing to move to reopen the suppression hearing based on new information is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The court lawfully imposed consecutive sentences for murder and weapon possession, because the evidence established that defendant completed the weapon possession crime before forming the intent to use the weapon in the robbery that resulted in the

victim's death (*see People v Brown*, 21 NY3d 739, 752 [2012]). We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11705 In re Jayden J., Dkt. B-44347/15

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

Florence J.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

_____

George E. Reed, White Plains, for appellant.

Daniel Gartenstein, The New York Foundling Hospital, New York, for respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, New York County (Adetokunbo Fasanya, J.), entered on or about February 22, 2018, which denied respondent mother's motion to vacate an order of disposition, same court and Judge, entered on or about September 19, 2017, terminating her parental rights and freeing the subject child for adoption, unanimously affirmed, without costs.

The court's denial of respondent's request for an adjournment of the fact-finding and dispositional hearings was not an abuse of discretion (*see* Matter of Steven B, 24 AD3d 384, 385 [1st Dept 2005], *affd* 6 NY3d 888 [2006]).

The court properly denied vacatur of the dispositional order, since respondent failed to show a reasonable excuse for her default (*see* CPLR 5015; *Matter of Messiah G. [Giselle F.]*,

168 AD3d 420 [1st Dept 2019], *lv dismissed in part, denied in part* 32 NY3d 1212 [2019]). Respondent admits that, on each of the two successive days of the fact-finding and dispositional hearings, she arrived at Family Court, checked in, but then left before her case was called. Respondent argued that she had a reasonable excuse for not appearing in court because she was ill. She does not dispute that, on the first day, she left without telling her counsel that she was leaving. Respondent's explanation for not appearing on the first day of the scheduled fact-finding hearing was unsupported by any evidence, and she admits that she did not seek medical treatment for any illness that day (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]). On the second day, her medical records show that respondent did not go to the hospital until approximately four hours after she was required to appear in court, and even then, was diagnosed with only mild symptoms (*see Matter of Monica Irene C.*, 262 AD2d 69, 70 [1st Dept 1999]).

Because respondent failed to establish a reasonable excuse for her default, we need not reach the issue of whether she established a meritorious defense (*see U.S. Bank Nat. Ass'n v Brown*, 147 A.D.3d 428, 429-430 [1st Dept 2017]).

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

ENTERED: JUNE 25, 2020

CLERK

Friedman, J.P., Richter, Gesmer, Oing, Singh, JJ.

11706N Naazneen Rahman, Index 301573/2016
Plaintiff-Appellant,

-against-

Zamena Rahman,
Defendant-Respondent.

_____

Law Offices of Barry S. Gedan, Riverdale (Barry S. Gedan of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about April 12, 2019, which denied plaintiff's motion to extend certain notices of pendency, unanimously affirmed, without costs.

The court providently denied plaintiff's motion to extend the notices of pendency on the ground that she failed to show good cause for the extension, i.e., that the need for the extension did not result from her own delay in prosecuting the action (*see Petervary v Bubnis*, 30 AD3d 498, 499 [2d Dept 2006]; *Tomei v Pizzitola*, 142 AD2d 809 [3d Dept 1988]). Plaintiff asserted that the delay was caused by her lawyer's illness and death from cancer. However, she offered no details about the illness or its effect on the lawyer's work. Moreover, as the court noted, counsel died more than two years after the notices

were filed and the action commenced, and during that time plaintiff had done virtually nothing to advance the case. Among other things, she failed to comply with a discovery order that expressly granted defendant priority in discovery.

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

ENTERED: JUNE 25, 2020

CLERK

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

11707N In re Claudette Atkinson, Index 29358/18E
Petitioner-Respondent,

-against-

New York City Health & Hospitals Corp., et al.,
Respondents-Appellants.

_____

James E. Johnson, Corporation Counsel, New York (Mackenzie Fillow of counsel), for appellants.

Borrell & Riso, L.L.P., Staten Island (John Riso of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (George J. Silver, J.), entered December 13, 2018, which granted petitioner leave to serve a late notice of claim, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding dismissed.

Petitioner seeks leave to serve a late notice of claim alleging that respondents New York City Health & Hospitals Corp. and Alina Purcea, M.D. (together, HHC) failed to provide her with timely referrals for diagnostic testing at her appointment on December 22, 2017, resulting in delay of diagnosis of her breast cancer until March 2018. Petitioner retained counsel in July 2018, and counsel commenced this proceeding in August 2018.

Petitioner failed to show that HHC had actual notice of her claim within 90 days of accrual of the claim, or a reasonable time thereafter. HHC's "mere possession or creation of medical records does not ipso facto establish that it had 'actual

knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury on plaintiff'" (*Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672, 677 [2016]). Here, HHC records of petitioner's treatment do not on their face show any negligence, malpractice or injury to plaintiff, and plaintiff did not submit a physician's affirmation to make such a showing (*Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010]).

Likewise, petitioner failed to demonstrate the lack of any prejudice to HHC from the delay, as HHC's "possession of medical records that could not alert it to a claim of malpractice obviously cannot, ipso facto, establish a lack of prejudice" (*Kelley*, 76 AD3d at 828). Because petitioner offered no other basis for the lack of prejudice to HHC, the burden never shifted to HHC to show prejudice from the delay (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467-468 [2016]).

Petitioner also failed to show a reasonable excuse for her delay in serving the notice of claim. She did not provide any

specific information or medical evidence that would support her claim that her delay was reasonable (*see Mittermeier v State of New York*, 101 AD3d 426, 427 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]).

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11708 The People of the State of New York, Ind. 3662/16
Respondent,

-against-

Tyquan Hasquins,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight 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 (Charlotte E. Davidson, J. at motion to be relieved; Laura A. Ward at dismissal motion; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered September 14, 2017, convicting defendant of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

A defendant should be present at an ancillary proceeding where his lawyer is to be relieved from his case (*People v Moya*, 138 AD3d 620 [1st Dept 2016]). Criminal Court granted defendant's first attorney's motion to be relieved. However, defendant's absence did not constitute reversible error under the facts of this case (*id.*) Defendant was not present when the attorney represented to the court that he and defendant disagreed over defendant's desire to testify before the grand jury, that defendant wanted new counsel, and that the attorney joined the

motion. However, defendant had been present at an earlier proceeding when this attorney first alerted the court to the disagreement, and he did not dispute the attorney's statement that defendant "rejected" the idea that the attorney would ultimately decide whether defendant should testify before the grand jury. At a proceeding the day after this attorney's motion to be relieved, defendant's newly appointed second attorney also moved to be relieved. At that time, defendant confirmed that he had been dissatisfied with the first attorney's intention to withdraw grand jury notice, and insisted that he still wanted to testify, thus confirming that defendant and the first attorney had been in a state of irreconcilable disagreement (*see People v Sides*, 75 NY2d 822, 824 [1990]). The second attorney also confirmed that communication between defendant and the first attorney over the issue had broken down.

Under the circumstances, we find unpersuasive defendant's assertion that he was prejudiced by statements made, in his absence, by his first attorney. The violation of defendant's statutory right to attend the proceeding was de minimis because defendant's statements at other proceedings corroborate the first attorney's claims when he made the motion, and the outcome of the motion to be relieved, at this early stage of the proceeding, would not have been any different (*see Roman*, 88 NY2d at 26-29 [1996]; *People v Sprowal*, 84 NY2d 113, 118 [1994]).

Defendant received a reasonable opportunity to testify

before the grand jury, and the court properly denied defendant's dismissal motion raising this issue (*see People v Culbert*, 136 AD3d 609, 609 [1st Dept 2016], *lv denied* 27 NY3d 1067 [2016]). Defendant was produced before the grand jury, but instead of availing himself of the opportunity to testify, he refused to acknowledge that his new counsel represented him, and then refused to cooperate with counsel, who, as discussed above, was the second attorney to represent him at the grand jury stage (*see People v Davis*, 287 AD2d 376 [1st Dept 2001], *lv denied* 97 NY2d 680 [2001]).

The trial court properly admitted a 911 call as an excited utterance (*see generally People v Hernandez*, 28 NY3d 1056 [2016]). The record establishes that the victim was still under the influence of the stress of the incident, and we have considered and rejected defendant's arguments to the contrary.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11709 In re Michael Findlay, Index 654528/19
Petitioner-Appellant,

-against-

MTA Bus Company, et al.,
Respondents-Respondents.

_____

Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Jones Jones, LLC, New York (Jacqueline R. Mancino of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 21, 2019, which, inter alia, denied the petition brought pursuant to CPLR article 75 to vacate a master arbitration award, dated June 17, 2019, affirming the award of the lower arbitrator denying petitioner no-fault benefits, and granted respondent MTA Bus Company's application to confirm the master arbitration award, unanimously affirmed, without costs.

The master arbitrator reviewed the no-fault arbitrator's determination and the parties' submissions regarding petitioner's lost wage claim. The master arbitrator's award was based upon the evidence presented and was not irrational (*see Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90-91 [2010]). Petitioner submitted numerous no-fault forms and tax forms which contained contradictory evidence regarding his employer, job title and relationship to his employer. These documents were also contradictory as to the amount of his

contractual pay rate, how often he was paid, his last day of work, and how much income he actually received.

Petitioner's testimony, both at the arbitration hearing and at a prior deposition, also contained conflicting information regarding his lost wage claim. The no-fault arbitrator found that petitioner's testimony was "contradictory and unsupported," and as acknowledged by the master arbitrator such credibility determinations were within the arbitrator's discretion to make (*see Matter of Miller v Elrac, LLC*, 170 AD3d 436 [1st Dept 2019], *lv denied* 33 NY3d 907 [2019]).

Finally, the arbitrator acted within her authority to refuse to consider petitioner's employment contract which had been previously requested but not submitted prior to the close of evidence. Accordingly, the master arbitrator properly only considered the record before the no-fault arbitrator.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11710 In re Veronica C., Dkt. O-20816-17
Petitioner-Respondent,

-against-

Ariann D.,
Respondent-Appellant.

_____

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

D. Philip Schiff, New York, for respondent.

_____

Order of protection, Family Court, New York County (Patria Frias-Colon, J.), entered on or about May 10, 2019, in petitioner's favor, upon a finding that respondent committed certain family offenses, unanimously reversed, on the law and the facts, without costs, the order vacated, and the proceeding dismissed.

The court lacks subject matter jurisdiction over this family offense proceeding brought by the foster mother of respondent's biological children. Petitioner failed to establish that she and respondent, who are not members of the same family or household, are or have been in an intimate relationship (*see* Family Court Act § 812[1][e]; *Matter of Tyrone T. v Katherine M.*, 78 AD3d 545 [1st Dept 2010]; *compare Matter of Winston v Edwards-Clarke*, 127 AD3d 771, 773 [2d Dept 2015] [intimate relationship existed where the petitioner was living with the respondent's children and their father, who had custody of them, was acting as a stepmother to the children, had frequent contact with respondent, and helped

arrange respondent's visitation with the children]; *Matter of Kristina L. v Elizabeth M.*, 156 AD3d 1162, 1164 [3d Dept 2017] [intimate relationship existed based on parties' preexisting friendship and frequent interactions while living together, on both a personal level and with respect to the respondent's child], *lv denied* 31 NY3d 901 [2018]). Petitioner testified that she did not even know respondent's first name. It appears from the record that petitioner's contact with respondent has been limited to scheduling visitation with the children at the agency and, perhaps, interacting with respondent when she went to petitioner's home to pick up the children for visits.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11711 The People of the State of New York, Ind. 5578/13
Respondent,

-against-

Felix Morales,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Maxwell Wiley, J. at nonjury trial and sentencing), rendered July 7, 2016, of robbery in the second degree (two counts), strangulation in the second degree and grand larceny in the fourth degree (four counts), and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The hearing court properly determined that defendant's videotaped statement at the District Attorney's Office was attenuated from earlier statements that the court had suppressed after finding a *Miranda* violation. The taint of the *Miranda* violation was dissipated by the brevity of the statement defendant made without *Miranda* warnings, the passage of time (at least 45 minutes, even if measured only from the departure from the precinct to the beginning of the video statement), the change of location, the administration of a second set of *Miranda*

warnings by a new interrogator, the minimal involvement in the interrogation by the detective who had questioned defendant at the precinct, and the general absence of coercive circumstances (*see e.g. People v White*, 10 NY3d 286 [2008], *cert denied* 555 US 897 [2008]; *People v Davis*, 106 AD3d 144, 152-155 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *People v Samuels*, 11 AD3d 372 [1st Dept 2004], *lv denied* 4 NY3d 802 [2005]).

Any error in precluding counsel from impeaching a detective about allegations made in a lawsuit was harmless, in light of the overwhelming evidence of guilt, from multiple sources not dependent on this detective's testimony (*see People v Crimmins*, 36 NY2d 230 [1975]). Moreover, the court, sitting as trier of fact in this nonjury trial, was made aware of the allegations against the detective. As for the other lawsuit discussed by defendant on appeal, trial counsel affirmatively waived any use of that lawsuit for impeachment.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11712 The People of the State of New York, Respondent,
SCI 1430/18
SCI 1431/18
Ind. 4640N/17
Dkt. 14065C/18

-against-

Manuel Perez,
Defendant-Appellant.

_____

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

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

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Judgments, Supreme Court, New York County (Guy H. Mitchell, J. at pleas; Felicia A. Mennin, J. at hearing and sentencing), rendered October 3, 2018, as amended November 29, 2018, convicting defendant of assault in the second degree, criminal sale of a controlled substance in the third degree, possession of an imitation controlled substance and criminal possession of a controlled substance in the seventh degree, and sentencing him to an aggregate term of two years, unanimously affirmed.

The sentencing court providently exercised its discretion when it enhanced defendant's promised aggregate sentence based on defendant's violation of the no-arrest condition of his plea disposition of four pending cases. The arresting officer on the new arrest testified at an *Outley* hearing about her observations at the scene and her interviews with defendant, his fiancée, and the complainant, as well as her partner's interviews with neighbors. Defendant's fiancee also testified at the hearing.

After conducting the Outley hearing, the court correctly determined that there had been a legitimate basis for the postplea arrest (see *People v Outley*, 80 NY2d 702, 712-713 [1993]).

Even assuming there was no valid waiver of defendant's right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11713 Joseph Sancino, Index 159913/13
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Respondents,

The Related Companies, Inc.,
Defendant.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Allison A. Snyder of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Kathryn E. Freed, J.), entered on or about March 4, 2019, deemed appeal from judgment, entered March 28, 2019, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Metropolitan Transportation Authority, New York City Transit Authority, MTA Capital Construction Company, Hudson Yards Development Corporation, and the City of New York (collectively defendants) for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against them, unanimously modified, on the law, to reinstate plaintiff's Labor Law § 241(6) claim, and otherwise affirmed, without costs.

Plaintiff was an ironworker who was attempting to move a wheeled dumpster over an unfinished floor covered in portions by plywood slabs. As he reached a lip in the plywood, he heard a

crack, and felt what he believed to be one of the wheels breaking. The dumpster became off balance and began to topple over, and when another site worker attempted to help, the dumpster toppled over on to plaintiff, allegedly injuring his toe. Plaintiff commenced this action asserting causes of action under, inter alia, Labor Law § 241(6).

The motion court erred in dismissing so much of plaintiff's Labor Law § 241(6) claim premised upon violations of Industrial Code (12 NYCRR) §§ 23-1.28(b), 23-1.5(c), and 23-1.7(e)(2). Plaintiff's claim premised upon § 23-1.7(e)(2), which concerns debris in passageways, is viable because the area where the accident occurred was a passageway for the purposes of that provision (*see Rossi v 140 W. JV Mgr. LLC*, 171 AD3d 668 [1st Dept 2019]; *Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446 [1st Dept 2016]). The provision applies not just when loose debris causes a direct trip and fall, but also in circumstances similar to those involved here (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510 [1st Dept 2009]).

With regard to § 23-1.28(b), which pertains to hand-propelled vehicles, and § 23-1.5(c), which prohibits use of machinery or equipment that is not in good repair and safe working condition, defendants failed to make a prima facie showing that the wheeled dumpster was not defective (*see Ahern v NYU Langone Med. Ctr.*, 147 AD3d 537 [1st Dept 2017]; *Picchione*, 60 AD3d at 512; *compare Ruggiero v Cardella Trucking Co.*, 16 AD3d

342 [1st Dept 2005]). Plaintiff's argument concerning the applicability of § 23-2.1(a) however, is unpersuasive, as the accident did not occur due to the methods of material storage.

This Court declines to consider plaintiff's arguments concerning Labor Law 240(1), since he abandoned that claim by failing to oppose that aspect of defendants' motion (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]; *Josephson LLC v Column Fin., Inc.*, 94 AD3d 479 [1st Dept 2012]).

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11714 Royal Waste Services, Inc., et al., Index 112999/10
Plaintiffs-Appellants,

-against-

Interstate Fire & Casualty Company, et al.,
Defendants-Respondents,

A Fireman's Fund Insurance Company, et al.,
Defendants.

_____

Cole Schotz P.C., New York (Brian L. Gardner of counsel), for appellants.

Rivkin Radler LLC, Uniondale (Michael A. Kotula of counsel), for Interstate Fire & Casualty Company, respondent.

Law Office of Lorne M. Reiter, LLC, New York (Sharon Moreland of counsel), for First Mercury Insurance Company, respondent.

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Order, Supreme Court, New York County (Alan C. Marin, J.), entered January 23, 2019, which denied plaintiffs' motion for summary judgment declaring that defendants were obligated to provide excess liability coverage for claims arising out of a June 29, 2009 accident, and granted defendants' motions for summary judgment dismissing the complaint on the ground that Insurance Law § 2121 was inapplicable, unanimously modified, on the law, defendant Interstate's motion denied, defendant First Mercury's motion granted on the ground that coverage is excluded under First Mercury's excess liability policy, and otherwise affirmed, without costs.

Plaintiffs allege that they paid a broker the initial premium for the excess liability coverage issued by defendants,

and that the broker also procured a financing agreement for them for the balance of the premiums. The party financing the premiums paid the broker on plaintiffs' behalf and plaintiffs complied with the financing agreement. Plaintiffs' president testified that plaintiffs only dealt with that broker, who delivered the policies to them. However, the premiums never reached defendants, who canceled the policies. Thereafter, three persons were killed during the term of the policies in an accident on plaintiffs' premises when the decedents inhaled hydrogen sulfide fumes (the accident). Defendants disclaimed coverage.

Plaintiffs now seek a declaratory judgment that they are covered by the excess coverage policies issued by defendants based on the payments they made to the broker and the financing company. Defendants assert that the broker cited by plaintiffs was not a part of the chain of brokers that led to them and they had no knowledge of it. First Mercury also asserts that it is not obligated to provide excess liability coverage to plaintiffs based on certain exclusions in its policy.

Initially, First Mercury is entitled to summary judgment dismissing the complaint on the ground that coverage for claims arising out of the accident is excluded under its policy's pollution and hazardous materials exclusions. "In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*,

98 AD2d 208, 221 [2002]). "As with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Vigilant Ins. Co. v Bear Sterns Cos. Inc.*, 10 NY3d 170, 177 [2008][internal quotation marks omitted]). Pursuant to First Mercury's excess liability policy, coverage is excluded for "'[i]njury or damages,' which would not have occurred in whole or in part but for the actual, alleged . . . discharge . . . release or escape of 'pollutants' at any time" and for "'injury or damage' arising out of, caused or contributed by, 'hazardous materials' at any time." "Pollutants" are defined as "any solid, liquid, gaseous . . . irritant or contaminant, including smoke, vapor, . . . fumes, acids, alkalis, chemicals and waste" while "hazardous materials" are defined as "'pollutants,' toxic substances, . . . and materials containing them."

First Mercury has established that coverage is excluded under its policy's pollution and hazardous materials exclusions on the ground that the deaths of the decedents in the underlying action resulted from the inhalation of the toxic hydrogen sulfide fumes in the drywell where decedents were working and that injuries resulting from the release of such fumes unambiguously fall under the plain language of the broad policy exclusions at issue here. Initially, both of the complaints in the underlying actions allege that the decedents died due to the inhalation of

these toxic fumes. Indeed, the *Dahan* complaint alleges that the decedents' deaths were the result of "lethal toxic gases" at the work sites and wells, "deadly concentration of hydrogen sulfide gas and fumes upon the premises . . . and well" where the decedent was directed to work and "exposure to and inhalation of deadly concentration of toxic gases." The *Rivas* complaint alleges that the decedent died from exposure to fumes emanating from the sewers at the premises when he attempted to rescue the other two employees who had already been overcome with fumes. Additionally, after the accident, the OSHA Safety Notice made a finding that the decedents' deaths were the result of the decedents entering the drywell and being overcome with hydrogen sulfide fumes. In response, plaintiffs fail to raise an issue of fact to defeat First Mercury's motion as they have not put forth any evidence that decedents' deaths resulted from any cause other than the release or discharge of the toxic fumes in the drywell where decedents were working.

However, neither plaintiffs nor defendant Interstate are entitled to summary judgment. Where an insured makes timely payment to a broker in the chain of brokers and the insurer delivers the policy to the broker pursuant to the broker's request, Insurance Law § 2121 precludes the insurer from canceling the policy based on nonpayment of premiums where the broker did not remit the payment to the insurer (*see Greater N.Y. Mut. Ins. Co. v Axentiou*, 193 AD2d 474 [1st Dept 1993], *lv*

dismissed 82 NY2d 748 [1993]; *Bruckner Plaza Assoc. v Generali Ins. Co. of Trieste & Venice, U.S. Branch*, 172 AD2d 408, 409 [1st Dept 1991], *lv dismissed* 78 NY2d 1007 [1991]).

Here, the record is replete with triable issues of fact as to whether the broker with whom plaintiffs state they dealt was in the chain of brokers leading from plaintiffs to Interstate, such that the payment of the premiums to the broker was sufficient to bind Interstate. Plaintiffs referred to the testimony of their president that the broker was the only broker used by them, and that the broker's employee delivered the policies to them. Moreover, the premium checks were made payable to the broker, who prepared a loss summary, and no evidence was presented demonstrating that another broker delivered the policies to plaintiffs. However, the absence of significant paperwork naming the broker cited by plaintiffs as a broker in the transaction, the testimony of the wholesale brokers that they did not deal with the broker cited by plaintiffs and would not do so, and the Notice of Excess Line Placement naming a different entity as plaintiffs' broker, raise questions that preclude

summary judgment in favor of either plaintiffs or Interstate.

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

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11715 Bene LLC, Index 156876/14
Plaintiff-Appellant,

-against-

New York SMSA Limited Partnership,
Defendant-Respondent,

A-Z Corporations, et al.,
Defendants.

- - - - -

Leslie J. Snyder, Esq.,
Nonparty Respondent.

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Garth Molander, Bohemia, for appellant.

Montfort, Healy, McGuire & Salley LLP, Garden City (Christopher T. Cafaro of counsel), for New York SMSA Limited Partnership, respondent.

Snyder & Snyder, LLP, Tarrytown (Carlotta Cassidy of counsel), for Leslie J. Snyder, respondent.

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Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered on or about July 10, 2019, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss and for summary judgment to the extent of dismissing as time-barred any breach of contract claim that accrued before July 14, 2008, granted defendant's and nonparty Leslie Snyder, Esq.'s motions to quash subpoenas issued by plaintiff to Sedgwick Claims Management Services, Inc. and Snyder, respectively, and sub silentio denied plaintiff's cross motions to compel, unanimously affirmed, without costs.

The motion court correctly rejected plaintiff's argument that defendant is equitably estopped to assert a statute of

limitations defense. The record demonstrates as a matter of law that defendant's conduct in negotiating a settlement with plaintiff did not induce plaintiff to refrain from timely commencing this action (*see Dailey v Mazel Stores*, 309 AD2d 661, 663 [1st Dept 2003]). The court also correctly found that any information plaintiff seeks to uncover regarding the involvement of nonparties Sedgewick and Snyder in negotiating a settlement is irrelevant (*see Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]).

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11716 In re Deserie D. G., Dkt. V-31155-13/15D
Petitioner-Respondent, V-09236-15
V-22474-15

-against-

Jonathan C.,
Respondent-Appellant.

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Larry S. Bachner, New York, for appellant.

Jonathan Rosenberg, PLLC, Brooklyn (Jonathan Rosenberg of counsel), for respondent.

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Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about March 31, 2017, which, after a trial, awarded the mother sole legal and physical custody of subject child Ariana C., unanimously affirmed, without costs.

Matters of custody are within the sound discretion of the trial court and its findings should be accorded great deference, as that court was in the best position to evaluate the parties' testimony, character, and sincerity (*Matter of Deanna V. v Michael C.*, 179 AD3d 445, 446 [1st Dept 2020]; *Matter of Lisa W. v John M.*, 142 AD3d 879 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017]). Its determination should not be disturbed unless it lacks a sound and substantial basis in the record (*Deanna V.*, 179 AD3d at 446).

The record supports the award of sole custody to the mother and denial of joint custody. It supports the finding that the mother, with the grandmother's help, cared for the child's daily needs. The finding of the parties' acrimonious relationship,

evinced by domestic violence and extensive litigation history, and the finding that the parties do not communicate about the child further supports the Family Court's decision (*Deanna V.*, 179 AD3d at 445). The father, who ignores the domestic violence issue, offers no reason to revisit the finding that the mother testified credibly as to his aggressive behavior, which the court properly took into account (*Phillips v Phillips*, 146 AD3d 719 [1st Dept 2017]). The court properly balanced these issues at arriving at its decision. Further, the court acknowledged the mother's inflexibility as to parenting time and the benefits of the child spending time with her father, and accordingly awarded him significant parenting time and access to information.

The father's arguments regarding an attorney for the child (AFC) are unpreserved and, in any event, lack merit. "There is no requirement that the court invariably appoint a Law Guardian for the child in every case where parents . . . seek a judicial determination of child custody and there is no indication that the child's interests were prejudiced in any way" (*Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012], quoting *Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]; *Ambrose v Ambrose*, 176 AD3d 1148, 1151 [2d Dept 2019]; *Matter of Dorsey v De'Loache*, 150

AD3d 1420, 1423 [3d Dept 2017]). Under the circumstances, including the child's young age and the absence of demonstrable prejudice to her interests, the court providently exercised its discretion to not appoint an AFC.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11717 Phoenix Capital Finance Ltd., Index 654934/17
Plaintiff-Respondent,

-against-

Axia Realty, LLC,
Defendant-Respondent.
- - - - -
Spiros Milonas,
Intervenor-Respondent,

Antonia Milonas,
Proposed Intervenor-Appellant.

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Meyers Tersigni Feldman & Gray LLP, New York (Anthony L. Tersigni of counsel), for appellant.

Herrick, Feinstein LLP, New York (Michael Berengarten of counsel), for Phoenix Capital Finance Ltd., respondent.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for Axia Realty, respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 10, 2019, which denied the motion of proposed intervenor Antonia Milonas (Antonia) for leave to intervene in the subject action, unanimously affirmed, without costs.

Antonia did not meet the requirements for intervention as a matter of right under CPLR 1012(a)(2), (3) to assert her interests or Axia Realty's derivatively (*see Atlas MF Mezzanine Borrower, LLC v Macquarie Tex. Loan Holder LLC*, 173 AD3d 608 [1st Dept 2019]), and the court properly exercised its discretion in declining to grant an intervention that would have delayed the resolution of the Phoenix action pursuant to the negotiated settlement (*see State of New York v McLeod*, 45 AD3d 282, 284 [1st

Dept 2007], *lv dismissed* 10 NY3d 758 [2008]). The court correctly found that Antonia did not provide a basis to revisit the Referee's designation of her husband, Spiros, as the manager authorized to make litigation decisions, including settlement of the underlying debt collection action. Antonia can seek to vindicate her rights against Spiros in a pending matrimonial action or other action, rather than in this settled and discontinued action concerning Axia's obligation to Phoenix.

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

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11718-
11718A The People of the State of New York, Respondent,

Ind. 4705/15
SCI 30008/16

-against-

Santinderpal Ahluwalia also known as Satinderpal Ahluwalia,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered November 21, 2016, convicting defendant, after a jury trial, of operating a motor vehicle while under the influence of alcohol and aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him to an aggregate term of 2⅓ to 7 years, unanimously affirmed. Judgment of resentence (same court and Justice), rendered November 21, 2016, as amended February 10, 2017, revoking a prior sentence of probation and resentencing defendant to a consecutive term of 1⅓ to 4 years, unanimously modified, on the law, to the extent of remanding for resentencing for pronouncement of sentence on both of the convictions upon which probation was revoked, and otherwise affirmed.

Defendant's claim that the evidence was legally insufficient to prove he was intoxicated is unpreserved and we decline to

review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was ample evidence of defendant's intoxication, including police testimony that defendant drove the wrong way on a one-way street, had watery and bloodshot eyes, smelled of alcohol on his breath, was unsteady on his feet, had trouble standing, and slurred his speech. Furthermore, defendant's refusal to submit to a breath test was properly admissible (*see* Vehicle and Traffic Law § 1194[2][f]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). Also, because the prior convictions raised the present driving while intoxicated charge to a felony, and because defendant refused to admit to those convictions outside the jury's presence (*see* CPL 200.60[3][b]), those convictions were placed in evidence as part of the People's case. In addition, the People had a good faith basis for inquiring into whether defendant had previously asserted false medical excuses for refusing intoxication tests. That matter was probative of defendant's credibility, because he made similar medical claims in connection with the present arrest.

Defendant's claim that the court revoked a sentence of probation for a prior conviction without following the procedures set forth in CPL 410.70 requires preservation (*see People v*

Gianni, 94 AD3d 1477, 1477 [4th Dept 2012] *lv denied* 9 NY3d 973 [2012]; *see also People v Kyem*, 272 AD2d 136 [1st Dept 2000] *lv denied* 95 NY2d 836 [2000]), and we decline to review it in the interest of justice. As an alternative holding, we find that the record establishes that the court complied with CPL 410.70 by finding that defendant had violated a condition of his probation as the result of the present conviction after trial (*see People v Matos*, 28 AD3d 1120, 1121-22 [4th Dept 2006]).

The People agree that defendant should be resentenced on the violation of probation for the sole purpose of pronouncing sentence separately for each of the two counts upon which probation was revoked.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11719-
11719A The People of the State of New York,
Respondent,

-against-

Qinghua Ni,
Defendant-Appellant.

Ind. 4734/16

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Siegle & Sims L.L.P., New York (Eric W. Siegle of counsel), for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 23, 2019, convicting defendant, after a jury trial, of 74 counts of criminal possession of a forged instrument in the second degree, 2 counts of criminal possession of stolen property in the fourth degree, and 1 count of grand larceny in the third degree, and sentencing him to an aggregate term of 1 to 3 years, unanimously dismissed, as abandoned. Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about September 26, 2018, which summarily denied defendant's CPL 440.10 motion to vacate the judgment on the ground of ineffective assistance of counsel, unanimously reversed, on the law, and the matter remanded for a hearing.

A defense attorney's performance is deficient as a matter of law where he or she fails to accurately advise a client of the risk of deportation (*see Padilla v Kentucky*, 559 US 356, 367-74 [2010]). Here, defendant complains that his counsel overstated

the immigration consequences of accepting an offer of a guilty plea to petit larceny by advising him that it would "definitely" result in deportation, when in fact it would only have rendered him deportable with the possibility of discretionary relief. Thus, defendant asserts that he *rejected* a favorable plea offer based on erroneous advice that the conviction would result in mandatory deportation.

We find that a hearing is necessary to determine whether counsel inaccurately advised defendant of the risk of deportation and if so, whether defendant was prejudiced by the attorney's misadvice (*People v Martinez*, 180 AD3d 190 [1st Dept 2020]; *see also Lee v United States*, 582 US __, 137 S Ct 1958, 1966 [2017]).

Because we are remanding for a hearing, we find it unnecessary to reach the parties' arguments regarding the proper remedy for a finding of ineffective assistance of counsel.

Although defendant filed a timely notice of appeal from the underlying judgment of conviction, and that appeal was consolidated with the appeal from the order which denied the CPL

440.10 motion, defendant has not made any arguments relating to the direct appeal.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11720-
11720A In re Ayanna P. and Others,

Children Under Years of Age, etc.,

Darryl B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Dkt. NA-32184/17
NA-32185/17
NA-32186/17
NA-32187/17

_____

Larry S. Bachner, New York, for appellant.

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

Dawne A. Mitchell, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the children Ayanna P., Tyshay M., and Travis M.

Daniel R. Katz, New York, attorney for the child Prince B.

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Order of disposition, Family Court, Bronx County (Valerie A. Pels, J.), entered on or about August 5, 2019, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 5, 2019, which found that respondent sexually abused the child Ayanna P., and derivatively abused the children Tyshay M., Travis M., and Prince B., unanimously modified, on the law, to vacate the finding of derivative abuse as to Prince B., and otherwise affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The court's determination that respondent sexually abused Ayanna, his 15-year-old granddaughter, is supported by a

preponderance of the evidence (*see* Family Court Act § 1046[b][I]). The child's in-court testimony is sufficient to support the finding (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424 [1st Dept 2017]). The court determined that, despite some inconsistencies, the child's testimony was credible with respect to key aspects of her account, which remained consistent throughout, and we see no basis for disturbing that determination (*see Matter of N.D. [G.D.]*, 165 AD3d 416 [1st Dept 2018]). The court properly drew a negative inference from respondent's failure to testify at the fact-finding hearing, notwithstanding the ongoing criminal investigation (*Matter of Markeith G.*, 152 AD3d at 424-425).

The court's determination that respondent derivatively abused Prince B., his son, is not supported by a preponderance of the evidence. Prince is situated so differently from Ayanna that respondent's conduct toward Ayanna is insufficient to demonstrate that Prince is at risk of harm (*see Matter of Demetrius C. [David C.]*, 156 AD3d 521, 522 [1st Dept 2017], *lv dismissed* 31 NY3d 926 [2018]). There is no evidence that respondent's sexual abuse of his granddaughter was ever directed at his son or that his son was aware of the abuse and no evidence that Prince was ever at

risk of impairment (*see id.*).

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

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11721 Christopher Visone, Index 150978/16
Plaintiff-Appellant,

-against-

Third & Twenty Eight LLC, et al.,
Defendants-Respondents.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Farber Brocks & Zane L.L.P., Garden City (Lester Chanin of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered January 30, 2019, dismissing the complaint, and bringing up for review an order, same court and Justice, entered December 10, 2018, which granted defendants' motion for summary judgment to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff was not entitled to a *Noseworthy* inference (*see Noseworthy v City of New York*, 298 NY 76 [1948]) because he failed to offer expert medical evidence establishing, by clear and convincing evidence, that his lack of memory of his accident is causally related to his accident (*see Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 333-335 [1986]; *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 199 [1st Dept 2010]). Accordingly, plaintiff's inability to identify the cause of his fall is fatal to this action, as it is at least as likely, if not more so under the circumstances of this case, that his accident was caused by

his own voluntary intoxication following a day of participating in "SantaCon," as it was the result of defendants' negligence in maintaining its premises (*see Grande v Won Hee Lee*, 171 AD3d 877 [2d Dept 2019]; *McNally v Sabban*, 32 AD3d 340 [1st Dept 2006]).

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 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11722 Parker Madison Partners, Index 155490/18
Plaintiff-Appellant,

-against-

Airbnb, Inc.,
Defendant-Respondent.

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Newman Ferrara LLP, New York (Roger A. Sachar of counsel), for appellant.

Kaplan Hecker & Fink LLP, New York (Alexander J. Rodney of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 26, 2019, which granted the motion of defendant Airbnb, Inc. to dismiss the complaint, unanimously affirmed, with costs.

The complaint in this action is barred by the doctrine of collateral estoppel. In 2017, a substantially identical complaint was dismissed in federal court, with the court finding that plaintiff had failed to establish "any actual injury to plaintiff connected to Airbnb's activities" (*Parker Madison Partners v Airbnb, Inc.*, 283 F Supp 3d 174, 181 [SD NY 2017]). As such, the issue of plaintiff's injury was "necessarily . . . decided" in the prior federal action between the parties, and plaintiff was granted a "full and fair opportunity to contest" that finding (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]).

It is irrelevant that the federal court did not reach the

underlying merits of plaintiff's allegations, because the federal court did reach the merits of the issue in question, namely, whether plaintiff had an alleged injury; and, this question, "actually decided" in the first action, disposes of the present action as well (*see Cartesian Broadcasting Network, Inc. v Robeco USA*, 43 AD3d 311, 312 [1st Dept 2007]). The pleading deficiencies presented in the federal complaint have not been remedied in this case. For example, plaintiff has still not provided a single specific example of a client or prospective client it lost because of defendant's alleged actions.

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 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11723 The People of the State of New York, Respondent, Ind. 3867/16

-against-

Elijah Johnson, Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (David Crow of counsel) and Dechert LLP, New York (Ryan Strong of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered November 15, 2017, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 6½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. Viewed as a whole, the evidence, including expert testimony, supports the conclusion that defendant used a taser on the victim, which constituted a dangerous instrument because it was readily capable of causing serious physical injury under the circumstances of its use (*see* Penal Law § 10.00[13]; *People v Richard*, 30 AD3d 750, 753 [3d Dept 2006] *lv denied* 7 NY3d 869 [2006]; *People v MacCary*, 173 AD2d 646, 647 [2d Dept 1991], *lv denied* 78 NY2d 969 [1991]).

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11724 The People of the State of New York, Ind. 3299/17
Respondent,

-against-

Eva Korolishin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Kevin McGrath, J.), rendered January 4, 2018,

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

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

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

ENTERED: JUNE 25, 2020

CLERK

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

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11725 The People of the State of New York, Ind. 3892/15
Respondent,

-against-

Edward Ruiz,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about March 8, 2019, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). We do not find any overassessment of points for risk factors claimed by defendant to be related to his prior drug abuse, because the factors at issue are relevant to defendant's risk of sexual recidivism. The mitigating factors

cited by defendant were adequately taken into account by the risk assessment instrument, or otherwise did not warrant a departure.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11726N Maia Shulman, Index 300736/16
Plaintiff-Respondent,

-against-

ZFX, Inc. also known as ZFX Flying Effects,
Defendant-Appellant,

Wicked LLC, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Lori F. Graybow of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about February 22, 2019, which denied defendant ZFX, Inc.'s motion to compel plaintiff to submit to post-note of issue medical examinations, unanimously affirmed, without costs.

The court providently exercised its discretion in denying defendant's motion to compel plaintiff to submit to medical examinations (IMEs) (*see Parato v Yagudaeu*, 46 AD3d 332 [1st Dept 2007]; *Colon v Yen Ru Jin*, 45 AD3d 359 [1st Dept 2007]). Defendant brought this motion more than 14 months after the note of issue was filed and almost one year after obtaining additional time for the designation of IMEs post-note of issue, without offering any excuse for its inaction or alleging unusual or unanticipated circumstances that would warrant the relief requested. Moreover, defendant had violated three prior court

orders setting deadlines for the designation and completion of medical examinations.

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

ENTERED: JUNE 25, 2020

CLERK

Renwick, J.P., Mazzarelli, Webber, Kern, Moulton, JJ.

11727N Bayview Loan Servicing, LLC, Index 32090/16E
Plaintiff-Respondent,

-against-

Dany Dalal, et al.,
Defendants,

Link Point Realty, Inc.,
Defendant-Appellant.

_____

Warner & Scheuerman, New York (Jonathan D. Warner of counsel), for appellant.

Fein, Such & Crane, LLP, Westbury (Michael S. Hanusek of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered July 10, 2019, which denied defendant Link Point Realty's motion to renew the part of the prior order (Mary Ann Brigantti, J.), entered on or about February 14, 2017, which denied its cross motion for summary judgment dismissing plaintiff's complaint as time-barred, unanimously affirmed, with costs.

Defendant did not demonstrate the change in the law necessary to support a motion for renewal (*see Jackson v Westminster House Owners Inc.*, 52 AD3d 404, 405 [1st Dept 2008]). The decision relied on by defendant, *Milone v U.S. Bank N.A.* (164 AD3d 145 [2d Dept 2018], lv denied 34 NY3d 1009 [2019]), simply reiterated the law that a de-acceleration letter must be clear in its intent to de-accelerate the loan if it is to avoid being deemed pretextual. Consistent with *Milone*, Supreme Court held that the notice sent by the loan servicer to inform the mortgagor

that the loan, which had been previously accelerated by plaintiff's predecessor in interest, was de-accelerated and reinstated as an installment loan, created a genuine issue of material fact as to whether plaintiff brought its foreclosure action within the six-year limitations period. Thus, the notice was sufficient to defeat defendant's motion for summary judgment on limitations grounds.

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

ENTERED: JUNE 25, 2020

CLERK

CORRECTED ORDER - JUNE 30, 2020

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Barbara R. Kapnick
Peter H. Moulton
Lizbeth González, JJ.

11041
Index 350020/08

_____x

S.T., an Infant Under the Age
of Fourteen Years, etc., et al.,
Plaintiffs-Appellants,

-against-

1727-29 LLC, et al.,
Defendants-Respondents.
_____x

Plaintiffs appeal from an order of the Supreme Court, Bronx County (Paul L. **Alpert**, J.), entered on or about March 8, 2019, which denied plaintiffs' motion for partial summary judgment.

Law Office of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for appellants.

Landman Corsi Ballaine & Ford P.C., New York (Shayna A. Bryan and Rebecca W. Embry of counsel), for respondents.

MOULTON, J.

Plaintiff mother brings this appeal on behalf of her child (S.T.) and herself in this lead paint poisoning action under Local Law No. 1 (1982) of City of New York (Local Law 1). Supreme Court denied plaintiffs' motion for partial summary judgment on liability against the owners, landlord, and property manager of the building (collectively defendants) finding that defendants raised an issue of fact as to whether they took reasonable measures to address the hazardous lead-based paint condition in the apartment. However, Supreme Court granted plaintiffs' motion to the extent that it found that defendants were on notice of the alleged lead-based paint condition. Plaintiffs appealed.

We find that defendants failed to raise an issue of fact that the lead paint hazard existed despite their diligent and reasonable efforts to prevent it. Nevertheless, plaintiffs are not entitled to summary judgment on liability. The affirmation of defendants' medical expert raises an issue of fact as to whether defendants' negligence was the proximate cause of S.T.'s injuries.

Background

S.T. was born on March 15, 2002. The Administration for Children's Services placed S.T. in a foster placement with

plaintiff soon after he was born, and she adopted him in 2007. S.T. moved into plaintiff's Section 8 apartment less than two weeks after his birth and has continuously resided there. The apartment is located in a building that was built before 1960.

In November 2003, the New York City Housing Authority (NYCHA) conducted its annual inspection of the apartment. By letter dated November 8, 2003, NYCHA directed defendant landlord L.B. Associates LLC to correct one condition in the bathroom, described by the inspector as "TUB CHIPPED/FINISH DAMAGED." The landlord corrected the condition.

On September 13, 2004, when S.T. was 2 1/2 years old, he was diagnosed with lead poisoning after a blood test revealed that his blood lead level was 40 micrograms per deciliter of blood (ug/dL).[1] On September 17, 2004 his blood lead level was 30 ug/dL; on October 20, 2004 his blood lead level was 15 ug/dL; and

[1]New York State's Health Law provides that the term "[e]levated lead levels" means "a blood lead level greater than or equal to ten micrograms of lead per deciliter of whole blood or such blood lead level as may be established by the department pursuant to rule or regulation" (Public Health Law § 1370[6]). New York City Health Code (24 RCNY 11.03) defines lead poisoning as a blood level of 10 ug/dL or higher (*see also* 10 NYCRR 67-1.1[e]). As of May 2012, the CDC updated its guidelines to recommend public health intervention when a child's blood lead level is greater than or equal to 5 ug/dL, instead of the CDC's 1991 standard of greater than or equal to 10 ug/dL (*see* www.cdc.gov/nceh/lead/prevention/blood-lead-levels.htm [last accessed Apr. 14, 2020]).

on December 20, 2004 his blood lead level was 11 ug/dL.

As a result of S.T.'s high blood lead level, the New York City Department of Health and Mental Hygiene (DOH) intervened to assist the family through its "Lead Poisoning Prevention Program." DOH conducted lead testing at the apartment on September 21, 2004 and discovered 47 positive findings of lead paint throughout the apartment. DOH also determined that for 29 readings the condition of the paint in the apartment was "poor." On October 6, 2004, DOH ordered defendant L.B. Associates LLC. to abate the lead paint hazard.

In response to DOH's order to abate, defendants hired a contractor, JMJ Construction Corp. On October 16, **2004**, DOH re-visited the apartment and issued an Intervention Report (Report). The Report noted that the "family is being moved to a safehouse." The Report also indicated that no abatement work had started and "all violations are not complied with by evidence of lead stamps on violative areas." Thus, the inspector noted a "Failure to comply with Commissioner's Order."[2] JMJ Construction Corp. completed the abatement on October 29, 2004 and DOH certified the abatement as complete on November 23, 2004.

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[2]The Report reflected that the contractor informed DOH that they did not start the work because they were waiting for the City to relocate the family.

The Testimony

In her deposition testimony and her affidavit submitted to Supreme Court the mother described her unsuccessful efforts to have defendants address the deteriorated, cracked, and peeling paint in the apartment. The mother explained that she was fearful of letting S.T. out of his crib because the apartment walls were cracking, paint chips fell on the floor, and she saw S.T. place his fingers in his mouth after touching a deteriorated wall. Although the landlord's principal, Irvin Yasger, personally came to the apartment every month to collect rent, the mother averred that he did not want to make repairs.[3] She described enlisting the help of the building superintendent Antonio Abad and S.T.'s foster care caseworker Martiza Ramirez in an effort to get the landlord to address her complaints.

The superintendent, who submitted an affidavit in support of plaintiffs' motion, stated the apartment was "in bad shape." He asserted that Irvin Yasgur refused to allow him to paint the apartment because the landlord was worried about the cost. He averred that Irvin Yasgur was concerned that if the superintendent painted plaintiffs' apartment, then all the

[3]Irvin Yasgur was the principal of the owner and the property manager of the building. He passed away in August 2007 before plaintiffs commenced this action.

tenants would want to have their apartments painted. According to both the superintendent and the mother, Irvin Yasgur looked at the apartment on one occasion. However, they both explained that no repairs were made, despite the deteriorated conditions, because Irvin Yasgur said the apartment was "fine." The superintendent also averred that "[o]ver the years a number of apartments had lead in them and kids got sick but he wouldn't paint until after the City made him."

At her deposition, the foster care caseworker testified that she made home visits to the apartment between 2002 and 2007 and confirmed that the apartment paint was chipped and peeling. She also testified that she met the superintendent at the apartment on one occasion to show him the conditions and to relay the mother's concerns, including the mother's reluctance to allow S.T. out of his crib for fear that he would eat paint chips from the floor.

Irvin Yasgur's son testified that his father was the building manager who was responsible for all day-to-day operations. The son explained that his involvement with the building was occasionally signing or writing disbursement checks and driving his father to the building where the son would "[s]ometimes" but "[n]ot that often" get out of the car. While he testified "I don't know" or "I don't recall" at his deposition

approximately 189 times, he testified to his father's general practices. According to the son, his father had a general practice of painting apartments "upon vacancy or every three years, or to address specific problems that might arise in the interim." However, he admitted that "I don't know what my father did with this particular building." The son further testified that his father had a general practice of checking for peeling paint but conceded "I don't know specifically."

The Summary Judgment Motion

In support of their motion for summary judgment on liability, plaintiffs submitted the mother's affidavit and deposition testimony, the deposition testimony of S.T.'s foster caseworker, the affidavit of the building superintendent, and the deposition testimony of the landlord's son. Plaintiffs asserted that the evidence demonstrated that defendants knew about the broken, cracked, and peeling paint throughout the apartment when S.T. came to live there and that they failed to take reasonable steps to abate the hazardous condition. Plaintiffs submitted various documents with their motion, including a City of New York Housing Preservation & Development (HPD) Violation Summary Report reflecting "OVERDUE" or "LATE CERTIFIED" lead-based paint violations in over one dozen apartments in the building in 1999,

2004, and 2005.[4] In addition, plaintiffs submitted the affirmations of a medical expert, a toxicologist, and a psychologist all supporting plaintiffs' claim that as a result of S.T.'s exposure to lead paint, he sustained permanent brain damage as well as cognitive and behavioral deficits.

In opposition, defendants submitted the affirmation of their medical expert, who opined that S.T.'s injuries were not caused by lead exposure. Rather, the expert attributed S.T.'s injuries to his biological mother's use of cocaine and Xanax while pregnant and genetic inheritance of low intelligence and psychiatric disorders. Defendants also submitted a printout entitled "Housing Quality Standards" to support their argument that NYCHA's November 2003 inspection "necessarily" included a lead paint inspection.[5] The most likely inference of the inspector's failure to identify a lead paint hazard, defendants claimed, was that they properly maintained the apartment and

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[4]The HPD Report reflects violations for S.T.'s building and an attached building, which were both owned by defendants under the same block and lot number. Defendants owned the buildings from July 13, 1995 through March 29, 2006.

[5]The printout, which is dated five years after the inspection, states that "[d]uring inspection, NYCHA inspectors will check for the presence of lead-based paint." On appeal defendants no longer point to the printout but surmise that NYCHA must have conducted a lead paint inspection because 24 CFR 882.109(i)(2) provides that an inspector is required to look for defective paint surfaces.

timely responded to complaints prior to the abatement order.

After considering the relevant testimony, Supreme Court denied plaintiffs' motion for summary judgment on liability holding that a question of fact exists as to whether "defendants took reasonable measures to correct the condition." Supreme Court further reasoned that the NYCHA inspection "which showed no indication of lead paint is a fact that goes to the reasonableness of defendant's actions." However, Supreme Court found that "as a matter of law the defendants were on notice of the alleged lead paint in the subject apartment."

Discussion

Local Law 1, adopted by the New York City Council in 1982, amended Administrative Code of City of NY § 27-2013 by adding a new subdivision [h]. The law required that the landlord "remove or cover" hazardous lead paint in a manner approved by HPD (Administrative Code § 27-2013[h][1]). HPD's implementing regulations were codified in 28 RCNY Chapter 11.

The law included the following presumption of lead content:

> "In any multiple dwelling erected prior to January first, nineteen hundred sixty in which paint or other similar surface-coating material is found to be peeling on the interior walls, ceilings, doors, window sills or moldings in any dwelling unit in which a child or children six (6) years of age or under reside, it shall be presumed that the peeling substance contains more than 0.5 percent of metallic lead based on the non-volatile content of the paint or other similar surface-coating material or having a reading of 0.7

milligrams of lead per square centimeter or greater." (Administrative Code former § 27-2013[h][2]).[6]

A plaintiff can establish a prima facie case of liability under Local Law 1 by demonstrating that a) the subject premises was built before January 1, 1960; b) the plaintiff suffered injuries from lead poisoning as a consequence of the ingestion of lead-based paint in the premises; c) the plaintiff was six years old or younger when exposed to the lead-based paint; d) the landlord and/or owner had actual or constructive notice that the plaintiff was six years old or younger while residing in the premises (*see Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]).

Local Law 1 does not impose absolute liability (*id.* at 643). Rather, it imposes a standard of reasonableness. To avoid liability, a landlord must prove that even though it violated

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[6]Local Law No. 38 (1999) of the City of New York (Local Law 38) replaced Local Law 1. The Court of Appeals declared Local Law 38 null and void in 2003 based on a failure to comply with SEQRA (*see Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 349-350 [2003]). As a result, Local Law 1 was revived (*id.* at 350). As of August 2, 2004, Local Law No. 1 (2004) of the City of New York went into effect, repealing Local Law No. 1 (1982) and its predecessor Local Law No. 50 of 1972, and formally repealing the invalidated Local Law 38. Local Law No. 1 (2004) does not contain a directive that the landlord "remove or cover" the lead paint hazard but it obligates the landlord to "take action to prevent the reasonably foreseeable occurrence of such a condition and shall expeditiously remediate such condition and any underlying defect" (Administrative Code § 27-2056.3).

Local Law 1, it acted reasonably under the circumstances (*id.* at 644). That is, the landlord must demonstrate that the lead paint hazard existed "*despite* his diligent and reasonable efforts to prevent it" (*id.* [internal citation omitted]). Although the issue of reasonableness is often a jury question, we have decided the issue as a matter of law when warranted by the undisputed facts (*see e.g. Velez v Stopanjac*, 273 AD2d 22, 22 [1st Dept 2000] ["defendants failed to properly inspect the apartment and take reasonable measures to alleviate the lead contamination"]; *Miller v 135 Realty Assoc.*, 266 AD2d 112, 113 [1st Dept 1999] ["[d]efendants' cursory inspections of the apartment, which did not include any tests for the presence of lead, and their belated and inadequate attempts to abate the lead-based paint condition did not meet the standard of reasonableness"]).

Here, plaintiffs established a prima facie case of liability under Local Law 1. Contrary to Supreme Court's conclusion, defendants did not raise an issue of fact as to whether they acted reasonably. The evidence establishes that defendants failed to act reasonably as a matter of law. Nevertheless, plaintiffs are not entitled to summary judgment because the affirmation of defendants' medical expert raises an issue of fact as to whether defendants' negligence was the proximate cause of S.T.'s injuries.

On appeal defendants contend that they "never observed or were informed that any of the previously intact paint had begun to peel." They expend considerable effort in disputing the wealth of evidence establishing that they were aware of peeling paint and that they failed to respond to the mother's repair requests. On one hand, defendants cite the mother's testimony with approval as demonstrating that "each complaint was promptly addressed and fixed by the superintendent." They highlight the mother's testimony that the entry hallway was fixed one week after she complained. On the other hand, defendants attack the mother's "poor" recollection of when she made complaints, faulting her for not recalling "the year, month, day or date of any complaint made to the superintendent." Thus, despite the mother's statement in her purportedly "self-serving" affidavit that she started complaining before S.T. moved into the apartment, defendants assert that the mother's deposition testimony "confirms that her first complaint was not until the infant plaintiff was approximately one and a half years old." Defendants also point to inconsistencies in the mother's testimony and maintain that January and February 2003 repair records undermine her statements.[7] Further, defendants assert

[7]Defendants' Summary of Work/Repair History for the apartment reflects that the cost of the work done in January 2003

that the mother's credibility as well as the credibility of the allegedly disgruntled former superintendent should be evaluated by a jury. While defendants do not attack the foster care caseworker's credibility, they argue that her testimony fails to properly identify the specific locations of where she observed peeling paint in the apartment.

Defendants' arguments are without merit. Under Local Law 1 defendants' liability is not predicated on their observations of peeling paint or whether they are informed of it. Defendants' liability does not depend on the mother demonstrating that she credibly complained about each and every instance or location of peeling paint. Even assuming that the mother never complained about the paint condition, defendants are charged with notice of the hazardous lead-based paint condition under Local Law 1 from the time that defendants were aware that S.T. moved into apartment. Moreover, Local Law 1 imposes on landlords "a specific duty to ameliorate hazardous levels of lead-based paint" (*Juarez,* 88 NY2d at 643). Defendants cannot avoid liability by attempting to shift their statutory obligation to the mother by questioning her memory or her credibility, or for failing to inform them when the paint began to peel. Shifting the burden to

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was $175.00 and the cost of work done in February 2003 was $315.00.

the mother is inconsistent with the purpose of Local Law 1 which "is unquestionably intended to protect a definite class of persons [plaintiffs] from a particular hazard they are incapable of avoiding themselves" (*id.* at 643-644).

We also reject defendants' arguments that they acted reasonably by "respond[ing] to complaints or requests received prior to the abatement order" as opposed to being proactive in the face of their presumed knowledge of the hazardous condition since March 2002. In any event, defendants' alleged responsiveness is belied by the record.

Even assuming that NYCHA conducted an appropriate lead paint inspection and that no lead paint condition existed as of November 8, 2003, there is no evidence that defendants took any reasonable measures to address the lead paint condition during the nearly 11 month period between the NYCHA inspection and DOH's discovery of lead paint violations. During this 11-month window, defendants' Summary of Work/Repair History for the apartment reflects that the sole repair (which was made one month after the NYCHA inspection) involved a $75.00 replacement of a bathroom door, lock and hinge and a repair of the existing bathroom door frame. This minor $75.00 repair cannot be equated to reasonable measures to prevent and correct a hazardous lead paint condition

(*see e.g. Velez*, 273 AD2d at 22; *Miller*, 266 AD2d at 113).[8] Infrequent and cursory attempts to repair discrete and isolated areas of an apartment do not raise an issue of fact that the hazard existed despite the landlords' "diligent and reasonable efforts to prevent it" (*Juarez*, 88 NY2d at 644 [internal quotation marks omitted]). Notably, defendants' claim that they acted reasonably is seriously undermined by the HPD printout reflecting numerous lead paint violations in over one dozen apartments in the building.

Nor do we find persuasive defendants' argument that they acted reasonably because they "promptly hired a contractor" after being ordered to abate the hazard. This argument ignores that where a defendant has "knowledge that a child under seven resided in the apartment, it may be charged with notice of the lead hazard prior to receipt of the Order [to abate]" (*Juarez*, 88 NY2d at 648). Hiring a lead abatement contractor *after* a child is poisoned does not satisfy the standard of reasonableness because the standard requires that the landlord act reasonably in *preventing* the lead hazard. A landlord cannot wait for DOH to issue an abatement order and then claim that it acted reasonably because the landlord is charged with avoiding "the severity of

[8]By contrast, defendants' Summary of Work/Repair History reflects that the cost of the lead paint abatement was $7,500.

the medical damage created, and the personal, social, and economic costs [lead poisoning] imposes" (*id*. at 641 [internal quotation marks omitted]).

While no issue of fact exists as to whether defendants acted reasonably, defendants have raised an issue of fact as to causation. Plaintiffs highlight that defendants do not contend that S.T. was exposed to lead outside of the apartment. While that is true, defendants' medical expert opined that S.T.'s injuries were not caused by lead exposure. Contrary to plaintiffs' argument, the medical expert did not contest the extent of plaintiffs' injuries. Rather, the expert contested whether S.T. sustained any injury at all as a result of his lead poisoning.

Accordingly, the order of the Supreme Court, Bronx County (Paul L. **Alpert**, J.), entered on or about March 8, 2019, which denied plaintiffs' motion for partial summary judgment should be affirmed, without costs.

All concur.

Order, Supreme Court, Bronx County (Paul L. Albert, J.), entered on or about March 8, 2019, affirmed, without costs.

Opinion by Moulton, J. All concur.

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

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

ENTERED: JUNE 25, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Angela M. Mazzarelli
Ellen Gesmer
Cynthia S. Kern, JJ.

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Index 653849/16

_____x

Center for Specialty Care, Inc.,
et al.,
Plaintiffs-Respondents,

-against-

CSC Acquisition I, LLC, et al.,
Defendants-Appellants.
_____x

Defendants appeal from the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 16, 2018, to the extent appealed from, in plaintiffs' favor on liability as to breach of an asset purchase agreement, an administrative services agreement, a lease agreement, and a personal guarantee. Defendants also appeal from the order of the same court and Justice, entered January 8, 2018, which granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment.

Kasowitz Benson Torres LLP, New York (Marc E. Kasowitz, Daniel R. Benson, Sarmad M. Khojasteh and Henry B. Brownstein of counsel), for appellants.

Manatt, Phelps & Phillips, LLP, New York (Ronald G. Blum, Prana A. Topper and Andrew Case of counsel), for respondents.

MAZZARELLI, J.,

Plaintiff Center for Specialty Care, Inc. (CSC) operated an ambulatory surgical center located at 50 East 69th Street in Manhattan. CSC, a family business, was a leasehold tenant of plaintiff 50 East 69th Street Corporation (50 East), also controlled by the family, which owned the building that housed the surgical center. CSC held a Certificate of Need (CON)[1] from the Department of Health in accordance with Public Health Law article 28. In 2013, the family that owned CSC and 50 East decided to sell the business, and lease the building to a buyer that would operate the medical facility. They began to solicit bids in 2014.

A bid to purchase CSC was made by defendant Glen Klee Lau, M.D., and accepted by CSC. Lau is a surgeon who, since 1998, has acquired an ownership interest in around 20 surgical centers that he manages in California, Las Vegas, New York, and New Jersey. Lau's bid proposed a purchase price of $5 million and monthly lease payments of $100,000. The parties agreed to structure the

[1] "The Certificate of Need (CON) program is a review process, mandated under state law, which governs the establishment, ownership, construction, renovation and change in service of specific types of health care facilities," including ambulatory surgical centers (www.health.ny.gov/facilities/CONS/more_information [last accessed May 6, 2020]).

transaction around four separate agreements: (1) an asset purchase agreement (APA); (2) a lease of the building; (3) an administrative service agreement (ASA); and (4) a personal guarantee of the Lease running from the individual defendants, doctors who joined Lau's venture, to CSC.

The overarching agreement was the APA, dated August 4, 2015, which was between CSC on the one hand, and defendants CSC Acquisition I, LLC and Midtown Fifth Avenue Management, LLC, entities set up by Lau, and Lau individually, on the other hand. The contract price for the sale required payment of a $500,000 deposit into an escrow account upon execution of the APA, with closing of the APA to take place on or before June 1, 2016. The APA contained standard integration and no waiver clauses. The parties also agreed to "take . . . all such action as may reasonably be necessary or appropriate to achieve the purposes" of the APA.

Perhaps the most important action required of the parties would be to ensure that defendants could be issued their own CON, which would be necessary for them to operate the surgical center. To that end, CSC represented in the APA that it had "not been served with any notice by any governmental authority which . . . requires the performance of any work or alterations on the Facility" such that would possibly impede the issuance of a CON

to defendants, except as set forth in Exhibit M. Exhibit M, in turn, acknowledged that a DOH survey on July 9, 2014 had found that CSC "was not in compliance with certain structural requirements," but that "[r]emediation works undertaken to address the cited defaults were approved following a subsequent DOH survey on . . . June 29, 2015, except for a life safety issue pertaining to remote means of egress." The representation further stated that CSC had worked with "a healthcare architect, a contractor and the DOH to address this remaining issue," and that CSC "currently contemplated that the DOH will waive this requirement in exchange for enhancement of existing safety measures through the installment of additional sprinklers, heat and smoke detectors," which were in the process of being designed.

For its part with respect to legalizing the arrangement, CSC Acquisition was obliged to:

> "obtain all necessary approvals from the DOH . . . no later than June 1, 2016. Without limiting the foregoing, the Buyer shall file its [CON] application . . . no later than September 1, 2015. Seller shall fully cooperate with the Buyer in its CON application process including by providing any information needed to complete such application which is in the Seller's control. The Buyer shall provide a copy of its proposed CON application . . . as well as any and all other documents . . . to the Seller no later than ten (10) days prior to the date

> that the Buyer intends to submit same to the DOH . . . ."

Otherwise, Lau and his entities "jointly and severally" agreed that the APA "constitute[d] a legally valid and binding obligation of the Buyer, enforceable against the Buyer in accordance with its terms." Further, they represented that they had the financial wherewithal to perform under the APA and the Lease. They also represented that they "fully and completely investigated the Assets, the Contracts, the Permits, the Facility, the premises where the Facility is located, the books and records . . . and the operations of the Seller and the Facility," and that none of them had "relied on any representations, warranties or outside agreements, whether written or oral, of the Seller other than as expressly set forth within this Agreement." Finally, the APA recited, "Dr. Lau has the financial ability, knowledge and skill necessary to perform his obligations under the [ASA]."

The APA required CSC Acquisition to enter into the Lease, which the former provided would take effect on September 1, 2015 (this date was ultimately extended to October 1). The Lease required CSC Acquisition to provide a $6 million security deposit or a letter of credit in that amount. Lau elected, as permitted by the Lease, to make this payment through the combination of a

$3 million letter of credit, a $3 million insurance policy on the life of Lau naming 50 East as the beneficiary, and a signed guaranty from the four individual defendants.

The APA also required CSC and Lau to enter into the ASA, under which Lau would act as the administrator of CSC and "have substantial control over the operations and financial performance" thereof. Under the ASA, CSC retained Lau to be the "sole and exclusive Administrator" of the ambulatory surgery facility beginning September 1, 2015 and continuing through termination of, or closing under, the APA. The ASA noted that "consummation of the APA is subject to" DOH approval of the CON, which the parties anticipated would "take at least several months." Lau agreed in the ASA to make "advances" to CSC to cover its operations, in the form of, inter alia, the rent due under the Lease. The ASA provided that Lau would not be able to recover these advances if the APA did not close before June 1, 2016 or was terminated for cause. Lau also warranted that the ASA "constitutes a legally valid and binding obligation . . . enforceable against [him] in accordance with its terms."

The parties agreed in the APA that time was of the essence with respect to the performance of their respective obligations. The obligation of both sides to close was contingent upon receiving "[a]ll approvals required by applicable law to be

obtained from any governmental or regulatory entity" before the closing date, "including, but not limited to, Buyer's receipt of a non-contingent, unconditional final approval" of the CON to operate the facility. The APA recognized that plaintiffs had considered multiple bids and that holding another bidding process if defendants defaulted was impracticable. Thus, the agreement provided that, if the closing did not take place, "the Seller shall suffer substantial losses and damages which shall be difficult to quantify," and that if the sale were not closed by June 1, 2016, defendants "shall pay to the Seller, as liquidated damages and not as a penalty, a sum equal to" the $500,000 APA deposit plus the $6 million security deposit under the Lease.

Even though the relevant documents were dated August 4, 2015, they did not become effective until September 10, 2015, when plaintiffs delivered them and declared them to be effective. When they delivered the executed documents, plaintiffs reminded Lau that occupancy under the Lease and operation under the ASA were conditioned on receiving the fully-executed guarantee and the security deposit represented by a $3 million letter of credit and evidence of the insurance policy on Lau's life in the same amount. Plaintiffs requested the documents "as soon as possible so that there can be a smooth transition on October 1st."

Lau ran into difficulty securing a potential letter of

credit with a bank. According to defendant Chin's testimony at his deposition, bank representatives were concerned that Lau would have too little control over the surgical center and that there was no consideration for the Lease. Lau testified that the bank representative had said that the amount sought was "excessive for this kind of health care transaction." Because Lau could not procure the letter of credit, he was not able to satisfy the security deposit requirement of the APA. Further, he did not make the rental payment required on October 1, 2015, the effective date of the Lease, nor did he begin performance under the ASA. Lau also did not submit the CON application to DOH by September 1, 2015, as required by the APA.

On September 30, 2015, the day before the effective date of the Lease, Lau emailed plaintiffs' representatives to discuss the possibility of altering the Lease so it would go into effect after DOH approval of the CON. Defendants' counsel wrote separately to plaintiffs' counsel that they should have the new lease become operative after CON approval and upon closing on the APA. Lau testified that CSC Acquisition never paid rent to 50 East because they "never completed the transaction approved by the [DOH] [so] that I could lease the space." The parties conducted extensive negotiations seeking to amend the deal, but were unable to arrive at a satisfactory settlement.

By letter dated November 11, 2015, plaintiffs' counsel served defendants with a notice of default under the APA for violating the warranty concerning financial ability, failing to maintain financial solvency, and failing to take steps reasonably necessary to achieve the APA's purposes. By separate letter dated November 11, 2015, plaintiffs' counsel served a notice of default under the Lease, for failure to pay rent and the security deposit, failure to provide certificates of insurance, and failure to name 50 East as the beneficiary on Lau's life insurance policy. In a third letter dated November 11, 2015, plaintiffs' counsel served a notice of default under the ASA, for Lau's failure to make advances to cover operations and failure to commence his role as the facility administrator.

Defendants did not cure the defaults cited by plaintiffs. By letter dated December 29, 2015, defendants' counsel terminated the APA and ASA based on CSC's refusal under APA § 7(b) to cooperate fully with their CON application. Defendants proposed to reinstate the contracts with various changes to the ASA, increase the rent beginning March 2016 with Lau guaranteeing payments under the ASA, and provide an 18-month period to seek CON approval. Alternatively, defendants sought a return of their $500,000 deposit. Nevertheless, plaintiffs terminated the APA, the ASA, and the Lease, citing defendants' failure to remedy

their breaches.

Plaintiffs commenced this action for money damages based on defendants' alleged breach of each of the relevant contracts. In their answer, defendants alleged that Lau signed the contracts with plaintiffs "[b]elieving the signatures were simply part of the [CON] application process," and that plaintiffs breached the APA by not providing financial documents to support the CON application. Defendants moved for summary judgment dismissing the complaint, arguing that there was no meeting of the minds for any of the contracts. They also asserted frustration of purpose, because the premises could not be occupied under the Lease without issuance to them of a CON. Additionally, they claimed that plaintiffs failed to satisfy conditions precedent, since plaintiffs did not provide financial records for defendants' CON application, nor did they remedy the life safety violations. Finally, they argued that plaintiffs were not entitled to liquidated damages, because recovery under that provision would be disproportionate to actual loss.

Plaintiffs also moved for summary judgment. They argued that defendants breached the Lease by failing to pay the security deposit and rent, and that the Lease was entered into after arm's-length negotiations between sophisticated, counseled businesspeople. Plaintiffs further argued that the guarantees

were breached by the individual defendants' failure to ensure compliance with the Lease; that the APA was breached because defendants did not file the CON application by September 1, 2015; and that the ASA was breached because Lau never made advances to cover CSC's operating costs or managed the facility. The motion court denied defendants' motion and granted plaintiffs'.

Defendants argue on appeal that the contracts are not enforceable. First, they claim, the Lease was never intended to go into effect until the CON was transferred by DOH, and was only executed because DOH would not have processed the application without it. Indeed, they claim, it would have been impossible for defendants to operate as a surgical center without the CON. They further assert that, in any event, the entire arrangement was dependent on the issuance of the CON and that plaintiffs' own actions frustrated defendants' efforts to obtain the CON. Specifically, defendants argue, plaintiffs failed to disclose the nature of the various code violations imposed by DOH on the building, and abandoned attempts to obtain a waiver. Defendants further argue that plaintiffs prevented them from submitting the CON application before the September 1, 2015 deadline, because they did not even return executed documents to them until after that deadline had passed, and because, even after that date, they failed to share financial information that was necessary to

support the application.

Plaintiffs argue that the contracts should all be enforced strictly according to their terms because they are clear and unambiguous, and were negotiated by sophisticated parties who were represented by counsel. They dismiss defendants' claim that performance under the Lease was impossible, pointing to the facts that the documents together anticipated that the CON would not be issued before the Lease became effective, and that the ASA was designed to permit the arrangement to go forward while the DOH application process progressed. As for the frustration argument, plaintiffs note that defendants did not request the financial information they contend was necessary for the application until two months after the Lease took effect. Finally, plaintiffs state that defendants' argument that the former did not seek a waiver of the life safety violations imposed by DOH despite representations to the contrary, is grounded in fraud, but that defendants did not plead fraud as an affirmative defense. In any event, plaintiffs argue, the record does not support defendants' position that plaintiffs abandoned attempts to address the violations.

Contracts "are construed in accord with the parties' intent," the "best evidence" of which "is what they say in their writing. Thus, a written agreement that is complete, clear and

unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks and citations omitted]). "The rule has even greater force in the context of real property transactions, 'where commercial certainty is a paramount concern,' and where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995], quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Here, the language of the Lease unambiguously provided that the term was to commence, and CSC Acquisition was to begin paying rent, on October 1, 2015. Further, this was an arm's-length transaction negotiated over months between the parties and their attorneys. There is no evidence that the parties executed the Lease for the purpose of attaching it to the CON application. The last-minute, but futile, scramble by Lau and Chin to secure the letter of credit required by the Lease supports this conclusion.

Similarly without merit is the notion that plaintiffs prevented defendants from performing under the Lease or the guarantees. "`[U]nder the doctrine of prevention, when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that

failure'" (*Frank Brunckhorst Co., LLC v JPKJ Realty, LLC*, 129 AD3d 1019, 1020 [2d Dept 2015], quoting 13 Richard A. Lord, Williston on Contracts § 39:3 [4th ed May 2015]). In other words, "a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition" (*Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106 [1971]; *see Coby Elecs. Co., Ltd. v Toshiba Corp.*, 108 AD3d 419, 420 [1st Dept 2013]). Here, nothing in the record suggests that plaintiffs prevented defendants from paying rent or paying the security deposit due under the Lease. Plaintiffs' purported late delivery of the signed contracts on September 10, 2015 did not prevent performance beginning October 1. Also, plaintiffs' asserted failure to secure DOH violation waivers or cooperate with defendants' efforts to obtain the CON before June 1, 2016, under the APA, is not relevant to whether defendants were required to make the agreed-to payments under the Lease.

Nor do we accept defendants' argument that the purpose of the Lease was frustrated. "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009] [internal

quotation marks omitted], *lv denied* 14 NY3d 706 [2010]]; *see Jack Kelly Partners LLC v Zegelstein*, 140 AD3d 79, 85 [1st Dept 2016], *lv dismissed* 28 NY3d 1103 [2016]). Examples of a lease's purposes being declared frustrated have included situations where the tenant was unable to use the premises as a restaurant until a public sewer was completed, which took nearly three years after the lease was executed (*see Benderson Dev. Co. v Commenco Corp.*, 44 AD2d 889 [4th Dept 1974], *affd* 37 NY2d 728 [1975]), and where a tenant who entered into a lease of premises for office space could not occupy the premises because the certificate of occupancy allowed only residential use and the landlord refused to correct it (*Jack Kelly Partners*, 140 AD3d 79).

However, "frustration of purpose . . . is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence" (*Warner*, 71 AD3d at 6[internal quotation marks omitted]). Here, the parties accounted for the fact that the CON would not be available on October 1, 2015, the effective date of the Lease. The very purpose of the ASA, which was negotiated separately from the Lease but as part of the larger transaction, was to address the fact that defendants could not occupy the premises until they had the CON. Indeed, the working capital payments called for in the ASA included the payments required by the Lease, since the ASA

permitted Lau to start deriving the benefits of the surgical center before his own entity could legally occupy it. Because the parties acknowledged, and planned for, the fact that CSC Acquisition would not be able to occupy the building on the effective date of the Lease, this case cannot be compared to cases such as *Jack Kelly Partners*, where the tenant was completely deprived of the benefit of its bargain. Indeed, the Lease itself cannot be divorced from the other agreements entered into by the parties, which universally addressed the anticipated delay in securing the CON.

The motion court was also justified in finding that defendants breached the APA. Plaintiffs are correct that this breach came about when defendants missed the deadline for filing the CON application, especially because time was declared in the agreement to be of the essence and the agreement contained a no-waiver clause. "Time is generally of the essence where a definite time of performance is specified in a contract, unless the circumstances indicate a contrary intent" (*Burgess Steel Prods. Corp.*, 205 AD2d at 346 [1st Dept 1994]). Further, the deadline was a material term, since the entire transaction depended on issuance of the CON before the APA closing date. By first submitting their application three months after the September deadline, defendants were unquestionably in material breach of

the APA (see *Bisk v Cooper Sq. Realty, Inc.*, 115 AD3d 419, 419 [1st Dept 2014]).

There is no merit to defendants' position that plaintiffs prevented a timely filing through their own actions and inactions. It is true that plaintiffs did not provide the fully executed contracts until September 10, 2015. However, defendants utterly fail to explain their three-month delay in submitting the application after that date. Also, even though plaintiffs were obliged to provide their financial records under the APA, defendants' failure to file a timely CON application and to perform under the Lease were "prior material breach[es]" constituting "an uncured failure of performance that relieved [plaintiffs] from performing [their] remaining obligations under the contract" (*U.W. Marx, Inc. v Koko Contr., Inc.*, 124 AD3d 1121, 1122 [3d Dept 2015], *lv denied* 25 NY3d 904 [2015]).

With respect to the DOH violations, defendants cannot deny that those were disclosed in Exhibit M to the APA. They argue instead that plaintiffs represented in Exhibit M that they were negotiating a waiver of the violations but in reality had abandoned that effort. This argument is not supported by the record. The consultants who were shepherding the application through DOH testified that they understood the issues needed to be resolved before the CON was issued, but that at some point the

focus shifted to obtaining the CON. They never testified that they abandoned the process. To the contrary, one of the consultants testified that even in December 2015 it was "an ongoing dialogue between [DOH] and CSC." Furthermore, and critically, that consultant stated that the consultants would not have continued their work on the CON transfer application had they thought the life safety issues could not ultimately be resolved and that approval was not possible.

Finally, Lau breached the ASA because, for all the reasons outlined above, his failure to perform under it was not reasonably justified. Nor was the failure of the individuals to perform under the guarantees. Accordingly, summary judgment was also awarded to plaintiffs under those contracts. As to damages, the court correctly found that the liquidated damages clause of the APA is not a penalty, as it "`bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation'" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005], quoting *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]; *see also Addressing Sys. & Prods., Inc. v Friedman*, 59 AD3d 359, 360 [1st Dept 2009] [liquidated damages provision negotiated at arm's length is entitled to deference where parties to agreement are sophisticated businesspeople represented by experienced

counsel]).

For all of the foregoing reasons, the court correctly granted summary judgment to plaintiffs.

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered January 16, 2018, to the extent appealed from, in plaintiffs' favor on liability as to breach of an asset purchase agreement, an administrative services agreement, a lease agreement, and a personal guarantee, should be affirmed, with costs. The appeal from the order of the same court and Justice, entered January 8, 2018, which granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered January 16, 2018, affirmed, with costs. The appeal from the order, same court and Justice, entered January 8, 2018,

dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Mazzarelli, J. All concur.

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

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

ENTERED: JUNE 25, 2020

CLERK