SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 3, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10736-
10737 Index 655115/17

Cohen Brothers Realty Corp., et al.,
Plaintiffs-Appellants,

-against-

Ryan John Mapes, et al.,
Defendants,

Italco Data & Electric Inc. also known as, Italco Data & Electric Co.,
Defendant-Respondent.

- - - - -

Cohen Brothers Realty Corp., et al.,
Plaintiffs-Appellants,

-against-

Ryan John Mapes, et al.,
Defendants,

R&A Painting, Ltd.,
Defendant-Respondent.

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Harwood Reiff LLC, New York (Donald A. Harwood of counsel), for appellants.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Ronald M. Terenzi of counsel), for Italco Data & Electric Inc., respondent.

Cammarata & De Meyer P.C., Staten Island (Joseph M. Cammarata of counsel), for R&A Painting, Ltd., respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.),

entered July 20, 2018, which granted defendant R&A Painting,

Ltd.'s motion to dismiss the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied. Judgment, same court and Justice, entered September 26, 2018, in favor of defendant Italco Data & Electric Inc. against all plaintiffs except Cohen Brothers Realty Corporation, unanimously reversed, on the law, without costs, the judgment vacated, and so much of Italco's motion as sought to dismiss the causes of action for fraud and unjust enrichment and sought summary judgment on its counterclaim for account stated denied.

Plaintiffs are a group of 13 affiliated entities that own commercial office buildings in and around New York City and their managing agent, plaintiff Cohen Brothers. As an adjunct to their real estate business, plaintiffs also regularly engaged in demolition and renovation, HVAC, painting, electrical, and other construction work in their buildings.

Beginning in March 2015, defendant Ryan John Mapes was Cohen Brothers' vice president and director of construction. Defendant R&A provided painting services; defendant Italco provided data and electrical services; and defendants D&K General Contractor Corp., City Maintenance Corp., and Millennium Star Electric, Inc. (collectively D&K) were affiliates that provided maintenance, construction, general contracting, and electrical contracting services.

Plaintiffs typically outsourced construction work on their buildings to contractors, using a sealed bid process, with purchase orders and other construction contract documents signed only by each entity's authorized signer.

At some point in 2016, Cohen Brothers' chief operating officer, Steven M. Cherniak, noticed a pattern emerging in which Mapes bypassed plaintiffs' established bid practices, instead awarding contracts to R&A, D&K, and Italco. Plaintiffs allege that Mapes was able to prevail upon two new administrators to open sealed bids so that he could then counsel his favored contractors on what it would take to win.

Growing increasingly suspicious, given Mapes's boasting about conspicuous spending that appeared to be beyond his means, in July 2017, Cherniak decided to investigate. Searching Mapes's desk drawer, Cherniak found a copy of a purchase order issued to R&A in the amount of $5,000. The signature of Charles S. Cohen, Cohen Brothers' president and CEO, was taped over the purchase order's signature block. Behind this doctored purchase order, Cherniak found eight photocopies of a legitimate purchase order issued to R&A in the amount of $13,500, which Cherniak determined was the original for the copied signature block.

Searching Cohen Brothers' files, Cherniak then located numerous purchase orders issued to D&K, Millennium, R&A, and

Italco to which the bogus signature of Charles S. Cohen appeared to have been affixed.

Cherniak then proceeded to search Mapes's work emails, where he found an email dated May 22, 2017, from Mapes to Chase Bank, complaining about the bank's failure to quickly clear a large deposit. Mapes complained, "I have deposited $162,000 into this account in only 2 months since opening it and not only do I have a 12 day hold on a mere $31,500 check, I can't get anyone to override it."

Plaintiffs asserted eight numbered causes of action. The first four were asserted against Mapes, sounding in breach of his employment contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, and breach of the duty of loyalty. The fifth to eighth causes of action were asserted against all defendants.

In particular, in the fifth cause of action, plaintiffs alleged that defendants committed fraud by generating false, forged, or inflated purchase orders. In the process, defendants misrepresented the work that plaintiffs actually needed, the work that defendants actually performed, and how much such work would cost. It was alleged that the contractors shared with Mapes the monies that plaintiffs paid them. Plaintiffs alleged that they reasonably relied on the purchase orders so generated because of

the trust they vested in Mapes as their director of construction.

The sixth cause of action alleged a civil conspiracy to commit fraud, in which the contractors submitted inflated bills, or bills for nonexistent work, and Mapes ensured that the bills were paid through his function as plaintiffs' construction director. The contractors then kicked back some portion of receipts to Mapes.

Finally, the seventh and eighth causes of action sounded in unjust enrichment and conversion.

In its answer, Italco asserted four counterclaims, sounding in breach of contract, account stated, unjust enrichment, and quantum meruit, alleging, in sum, that Italco had performed valid work for plaintiffs, had issued invoices to which plaintiffs never objected, and had not been fully paid. R&A served an answer, generally denying plaintiffs' allegations and asserting numerous affirmative defenses, including accord and satisfaction and lack of particularity.

Italco moved pursuant to CPLR 3013 and 3016(f) to dismiss the complaint for lack of particularity. Italco also moved for summary judgment on its counterclaims, including account stated, pursuant to CPLR 3016(f). R&A moved pursuant to CPLR 3013, 3016, and 3211(a)(7) to dismiss the complaint for failure to state a claim and lack of specificity.

To state a cause of action for fraud, a plaintiff must allege "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Braddock v Braddock*, 60 AD3d 86 [1st Dept 2009], *appeal withdrawn* 12 NY3d 780 [2009]). Such a claim must be pleaded with particularity (CPLR 3016[b]; *Eurycleia*, 12 NY3d at 559). "[A]ctual knowledge[, however,] need only be pleaded generally, [given], particularly at the prediscovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind" (*Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]). As the *Oster* Court noted, "Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud"; rather, "intent to commit fraud is to be divined from surrounding circumstances" (*id.* at 55-56).

Here, we find that plaintiffs sufficiently pleaded fraud causes of action with the information available to them in a pre-discovery posture (*see e.g. Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98-100 [1st Dept 2003]). They alleged the creation and presentation for payment to plaintiffs of false, forged or inflated purchase orders; that defendants "knew that the work described on the bogus purchase orders or invoices and other

contract forms was either falsely stated, overcharged or not provided, and knew that Plaintiffs would rely on these falsified or doctored purchase orders to make unwarranted payments"; that plaintiffs "relied on these purchase orders, invoices and other contract forms in making unnecessary payments to . . . defendants" to their detriment; that such reliance was "justifiable" and "reasonable"; and that plaintiffs were damaged as a result of defendants' fraud. After discovery, plaintiffs can amplify their pleadings and defendants can renew their motions. But at this stage, plaintiffs should be allowed to probe defendants' knowledge of the alleged fraudulent scheme.

Plaintiffs also adequately pleaded civil conspiracy. Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted "to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]). To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury (*Abacus Fed. Savings Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). Plaintiffs

pleaded the underlying fraud against defendants Italco and R&A, as well as an agreement that "[d]efendants acted in concert and conspired to defraud [p]laintiffs' business." As a result, plaintiffs were damaged because they paid monies to the defendants "for non-existent, unnecessary, and/or overpriced construction and maintenance services."

On these facts, the motion court incorrectly dismissed the action and entered judgment in Italco's favor on its counterclaims, inasmuch as plaintiffs had not had a reasonable opportunity for disclosure prior to the making of the motion. Numerous fact issues were raised by plaintiffs' underlying papers that required further discovery, including previously noticed depositions of Italco and defendant Mapes, because the facts necessary to fully oppose Italco's summary judgment and dismissal motion were solely in Italco's possession.

As plaintiffs argue on appeal, further discovery was necessary to rebut defendant's motion to dismiss, including the production of construction documents, payments exchanged between the defendants and Mapes, and related email correspondence between defendants and in their sole possession, as well as the examination of each defendant, including Italco.

Plaintiffs also stated a cause of action for unjust enrichment by alleging that defendants "failed to perform a

substantial portion of the work that they billed to the Plaintiffs" and thereby "obtained a benefit without adequately compensating Plaintiffs" (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). The claim was pleaded with the requisite particularity (*see* CPLR 3013; *PF2 Sec. Evaluations, Inc. v Fillebeen*, 171 AD3d 551, 552-553 [1st Dept 2019]).

The conversion claim was correctly dismissed because the complaint fails to identify the monies plaintiffs seek to have returned as "a specific, identifiable fund" (*Amity Loans v Sterling Natl. Bank & Trust Co. of N.Y.*, 177 AD2d 277, 279 [1st Dept 1991] [internal quotation marks ommitted]).

With respect to Italco's motion for summary judgment on its counterclaim for account stated, plaintiffs' supported allegations that their employee charged with the issuance of construction purchase orders was corrupt and issued false or inflated purchase orders present issues of fact as to the reasonableness of plaintiffs' failure to contemporaneously object to defendants' invoices (*see Legum v Ruthen*, 211 AD2d 701, 703 [2d Dept 1995]; *Bowne of N.Y. v International 800 Telecom Corp.*, 178 AD2d 138, 139 [1st Dept 1991]). Moreover, if plaintiffs are able to prove that the purchase orders were invalid, the account stated claim will fall (*see Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995 [1979]; *DL Marble & Granite Inc. v Madison*

Park Owner, LLC, 105 AD3d 479 [1st Dept 2013]).

Contrary to Italco's contention based on CPLR 3016(f), plaintiffs were not required to provide specific denials to the account's items, because their defense to the counterclaim, that the purchase orders were invalid, "goes to the entirety of the parties' dealings rather than to the individual contents of the account" (*Green v Harris Beach & Wilcox*, 202 AD2d 993, 994 [4th Dept 1994] [internal quotation marks omitted]; *see Kessler v Surgent*, 139 AD3d 442 [1st Dept 2016], *lv denied* 27 NY3d 1189 [2016]).

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

ENTERED: MARCH 3, 2020

CLERK

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

11055 Eli Matos, Index 20635/15E
Plaintiff-Appellant,

-against-

Azure Holdings II, L.P., et al.,
Defendants-Respondents.

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Hasapidis Law Offices, Scarsdale (Annette G. Hasapidis of counsel), for appellant.

Lawrence, Worden, Rainis & Bard, P.D., Melville (Michael E. Shay of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 18, 2019, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that he slipped and fell while stepping out of a combined bathtub/shower in his apartment after taking a shower. He claims that the wet and slippery condition of the floor was the result of the failure of defendants, his landlord and the landlord's property manager, to repair the brackets that held the shower curtain rod.

To be entitled to summary judgment, a property owner is required to establish that it maintained its premises in a reasonably safe manner and that it did not create a dangerous condition that posed a foreseeable risk of injury to individuals

expected to be present on the property (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]).

Supreme Court erred in granting summary judgment to defendants on the basis that plaintiff failed to identify the condition of water on the floor before he slipped and fell. Supreme Court incorrectly found that any conclusion that plaintiff slipped and fell because of water accumulation would be based on speculation. Plaintiff argues correctly that, even if in his deposition testimony he did not explicitly state that he noticed water on the floor before he stepped out of the shower, a jury could reasonably infer that he slipped and fell on water on the floor due to the absence of a shower curtain (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743 [1986]). Defendants' proof failed to negate this reasonable inference (*see Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]; *Cesar Ivan A. v Lolita Child Day Care*, 98 AD3d 697 [2d Dept 2012]).

Supreme Court also erred in granting summary judgment to defendants on the basis that the water accumulation was an open and obvious condition that was not inherently dangerous. "[E]ven if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to

maintain the premises in a reasonably safe condition" (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014], quoting *Westbrook*, 5 AD3d at 70).

On this appeal, defendants themselves concede that whether a condition is open and obvious is generally relevant to the issue of plaintiff's comparative negligence, unless the condition is not inherently dangerous, in which case dismissal is appropriate. Whether a condition is not inherently dangerous usually depends on "the totality of the specific facts of each case" (*Powers*, 123 AD3d at 422 [internal quotation marks omitted]; *see also Westbrook*, 5 AD3d at 76). Defendants argue that the broken brackets were not an inherently dangerous condition but rather a benign condition. However, as plaintiff correctly observes, the purpose of the shower brackets was to hold up the shower curtain, and the purpose of a shower curtain is to prevent the accumulation of water when the shower is in use.

Thus, summary judgment should have been denied because issues of fact exist as to whether plaintiff's fall was caused by the condition of water accumulation and, if so, whether it was a

hazardous condition attributable to the absence of a shower curtain that was the result of defendants' negligence in failing to timely repair the brackets. The issue of comparative fault is for the trier of fact to consider.

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11180 The People of the State of New York, Respondent, Ind. 3977/15

-against-

Selwyn Lee, Defendant-Appellant.

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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 (Robin Jeanne Campbell-Urban of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered October 31, 2016, as amended January 25, 2017, 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 second violent felony offender, to an aggregate term of six years, unanimously affirmed.

The court providently exercised its discretion in permitting a testifying police officer to display his police-issued expandable baton to the jury and demonstrate how it expanded. The baton was a suitable model or demonstrative aid (*see People v Del Vermo*, 192 NY 470, 482-483 [1908]; *People v Hanzlik*, 95 AD3d 601, 602-03 [1st Dept 2012], *lv denied* 19 NY3d 997 [2012]). Despite a difference in length, the police baton closely corresponded to the unrecovered object wielded by defendant in the assault, as described in the victim's testimony, with

particular reference to its expansion feature, and the essence of the demonstration is sufficiently documented in the record. The court gave a careful limiting instruction that was sufficient to prevent any prejudice. Defendant's remaining arguments on this issue are unavailing.

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 evidence supports the conclusion that defendant used a dangerous instrument in the assault.

The court providently exercised its discretion when it charged the jury on the statutory definition of dangerous instrument, as set forth in the Criminal Jury Instructions, and declined to add language that a fist does not constitute a dangerous instrument. Although defendant is correct that a fist or other body part cannot so qualify (*see People v Owusu*, 93 NY2d 398, 399 [1999]), there was no reasonable possibility that the jury could have been misled in this regard. The People's theory, throughout the case and as specifically reflected in the parties' openings and summations, was that the only alleged dangerous instrument was the object described by the victim.

Defendant's argument regarding the prosecutor's impeachment of defendant's testimony was not preserved, and we decline to review it in the interest of justice. As an alternative holding,

we find no basis for reversal. We have considered and rejected defendant's ineffective assistance of counsel claim relating to the lack of preservation (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11181 In re Paul Yohay, Index 100469/18
Petitioner-Appellant,

-against-

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

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered December 27, 2018, which granted the cross motion of respondents City of New York and New York City Administration for Children's Services (ACS) to dismiss the petition brought pursuant to CPLR article 78 to annul ACS's determination, dated December 28, 2017, denying petitioner's request for advanced and extended sick leave, and to direct respondents to approve such request, unanimously affirmed, without costs.

Supreme Court providently determined that petitioner was barred from compelling ACS to grant his leave request in this proceeding. The regulations governing petitioner's application for additional and extended leave gave the ACS agency head discretion in the matter and "mandamus does not lie to enforce

the performance of a duty that is discretionary, as opposed to ministerial" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]). Accordingly, ACS's decision was not subject to article 78 review and the petition was properly dismissed.

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

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11182 Julia D., an Infant Under the Age of Eighteen Years, etc., et al., Plaintiffs-Appellants, Index 350060/14

-against-

New York City Housing Authority, Defendant-Respondent.

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Michelstein & Ashman, PLLC, New York (Stephen J. Riegel of counsel), for appellants.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about January 8, 2019, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Infant plaintiff was injured when, while descending a stairway in stairwell A in defendant's building, she slipped and fell on urine. Defendant established prima facie entitlement to judgment as a matter of law by showing that it neither created nor had notice of the wet condition. Defendant's caretaker stated that she followed the janitorial schedule on the day of the accident and performed the morning safety check at 8:10 a.m. by walking from the top floor to the lobby of the building, inspecting the stairwells. From 10:15 a.m. to 11 a.m., she swept

the stairs in stairwell A from the roof to the 2nd floor. When she completed the morning sweep down, stairwell A was clean, dry and free of debris. She also stated that if she saw a wet condition, she would have cleaned it immediately. Finally, she stated that no one complained to her about any conditions in the stairwell on the day of the accident (*see Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]).

Plaintiffs contend that the affidavit of infant plaintiff's grandmother, who lived in the building, raised a triable issue of fact in that she stated that there was a recurring problem with urine in the stairwell. According to her affidavit, she had complained to defendant about the condition numerous times, and saw urine in stairwell A between the 10th and 11th floors for two or three days prior to the accident. However, the grandmother's affidavit demonstrated only that defendant may have had a general awareness of the problem (*see Raposo v New York City Hous. Auth.* 94 AD3d 533, 534 [1st Dept 2012]). No evidence was presented that the puddle of urine that caused infant plaintiff's fall was the same condition that her grandmother observed two or three days earlier, given the caretaker's testimony and the evidence of a reasonable cleaning schedule. Furthermore, the record showed

that defendant did not routinely leave the condition unaddressed (*see Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 472 [1st Dept 2012]).

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11183 In re Global Liberty Insurance Company,
Petitioner-Appellant,

-against-

Nestor Ruben Perez,
Respondent,

Angela Flores, et al.,
Proposed Additional Respondents-Respondents.

Index 20041/16E

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

James G. Bilello & Associates, Hicksville (Susan J. Mitola of counsel), for respondents.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 30, 2019, which, after a framed issue hearing, denied Global Liberty Insurance Company's petition to stay arbitration, unanimously affirmed, without costs.

Petitioner commenced this proceeding pursuant to CPLR article 75, seeking an order to permanently stay the uninsured motorist arbitration. On January 1, 2015, on the Sheridan Expressway at Faile Street, in the Bronx, a 2011 Toyota driven by respondent Nestor R. Perez (Perez) was rear-ended by a vehicle. The driver of the vehicle fled the scene, and the year and make of the offensive vehicle is contested. There are two police reports that are identical, except for the description of the

year and brand of the offensive car. One report indicates that the vehicle was a 2003 Subaru, while the other report indicates that it was a 2005 Chevrolet. The license plate recorded in the police accident reports showed that it was registered to proposed additional respondent Angela Flores. On the date of the accident, the ex-spouse of Flores reported the vehicle registered to the license plate in the police accident reports as missing or stolen. That report does not ask for the year and make of the missing vehicle.

At the hearing, NYPD police officer Eric Smith testified that he responded to the accident. Officer Smith testified that the original police accident report identified a 2005 Chevrolet as the offensive vehicle. Smith was unable to explain why or how someone had changed the description of the vehicle to a 2003 Subaru, since only he could make changes to the report. Perez, on the other hand, testified that he believed the offensive vehicle that struck the rear end of his car was a blue Subaru. Contrary to petitioner's argument, the evidence did not demonstrate that the license plate registered under Flores matched a 2003 Subaru. We also note that the record does not show whether Flores owned a Subaru or a Chevrolet. In view of petitioner's inability to prove that the offending vehicle was owned by Flores and insured at the time of the accident, we find

no reason to disturb the court's decision (*see Matter of Allstate Ins. Co. v Albino*, 16 AD3d 682, 683 [2d Dept 2005]; *Matter of Empire Mut. Ins. Co. [Greaney-National Union Fire Ins. Co. of Pittsburgh*, 156 AD2d 154 [1st Dept 1989]).

We also find that additional respondent GEICO Insurance Company was not required to call witnesses relevant to petitioner, when petitioner was free to subpoena the ex-spouse of Flores itself if it wanted to (*see generally Matter of Guzman v Bratton*, 161 AD3d 591, 593 [1st Dept 2018]). Petitioner was well aware before the hearing began that the ex-spouse had filed a stolen vehicle report on the date of the accident for Flores's car, and chose not to subpoena him.

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

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11184 The People of the State of New York, Respondent, Ind. 7741/02

-against-

Michael Shaw, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about February 15, 2018, 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.

Although the hearing court did not adequately set forth its findings of fact and conclusions of law, the record is sufficient for this Court to make its own findings of fact and conclusions of law, and remittal is unnecessary (*see People v Palmer*, 20 NY3d 373, 380 [2013]). We find that the facts of the underlying rape as set forth in the case summary, including such aggravating factors as the use of a knife, were established by clear and convincing evidence. It is undisputed that defendant has a very extensive criminal history, both before the underlying 1993 rape

and until defendant was identified by means of DNA in 2002.

The record supports the court's discretionary upward departure to level three (*see People v Gillotti*, 23 NY3d 841, 861-62 [2014]). Clear and convincing evidence established aggravating factors "bearing on defendant's likelihood of reoffense and the potential harm in the event of his reoffense" (*People v Davis*, 178 AD3d 635, 636 [1st Dept 2019]) that were not sufficiently taken into account by the risk assessment instrument. The instrument did not adequately assess the extent and egregiousness of defendant's criminal history before and after the underlying rape. Although none of these crimes were recent, defendant has been incarcerated until only recently and his ability to avoid reoffense while at liberty has not yet been established. The mitigating factors cited by defendant were adequately taken into account by the amended risk assessment instrument or outweighed by the aggravating factors.

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11185 In re Solvin M., Index 450303/18
Petitioner,

-against-

New York State Office of Children
and Family Services, et al.,
Respondents.

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The Bronx Defenders, Bronx (Lauren Teichner of counsel), for petitioner.

Letitia James, Attorney General, New York (Amit R. Vora of counsel), for New York State Office of Children and Family Services, respondent.

James E. Johnson, Corporation Counsel, New York (Antonella Karlin of counsel), for New York City Administration for Children's Services, respondent.

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Determination of respondent New York State Office of Children and Family Services (OCFS), dated October 11, 2017, which, after a hearing, found that petitioner maltreated her children, unanimously confirmed, without costs, and the petition brought pursuant CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered on or about December 3, 2018), denied.

The administrative determination that respondent proved by a preponderance of the evidence that petitioner maltreated her children was supported by substantial evidence (*see generally Matter of Valentine v New York State Cent. Register of Child*

Abusers & Maltreatment, 37 AD3d 249, 250 [1st Dept 2007].

The finding of maltreatment was based on allegations made in a telephone call to the State Central Register (SRC) by a named individual, that in the presence of her children, petitioner stole a credit card and identification out of someone's purse, attempted to use it and was caught. The caller also alleged that petitioner used her two-year-old child to shield herself from the victim and gave another one of her children stolen items to hide. According to the caller, petitioner was arrested at the scene.

The Administration for Children's Services (ACS) corroborated the allegations by interviews with the children as well as the police and indicated a report against petitioner for inadequate guardianship.

Respondent OCFS properly found that ACS established by a fair preponderance of the evidence that petitioner committed the maltreatment as alleged in the indicated report. The investigative notes of ACS provided clear evidence that petitioner had engaged in stealing in front of her children, warranting a finding of inadequate guardianship. As noted by respondent, although the children denied seeing petitioner steal a credit card during the incident, their admissions as to other observations during the incident had more weight than their denials. Further, each child acknowledged witnessing petitioner

engaged in larcenies in the past. As respondent determined, there was "undisputed" evidence of petitioner's substantial criminal history of stealing in front of the children as well as evidence that the incident physically, mentally or emotionally impacted the children involved (*see* 18 NYCRR 432.1[b]).

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11186-
11187-
11187A

Index 655352/17

Timothy Spicer, et al.,
Plaintiffs-Appellants,

-against-

GardaWorld Consulting (UK) Limited,
Defendant-Respondent.

- - - - -

Timothy Simon Spicer, et al.,
Plaintiffs-Respondents,

-against-

GardaWorld Consulting (UK) Limited,
Defendant-Appellant.

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Chaffetz Lindsey, LLP, New York (Sanford M. Litvack of counsel), and Hogan Lovells US LLP, New York (David Wertheimer of counsel), for appellants/respondents.

Skadden, Arps Slate, Meagher & Flom, LLP, New York (Michael Richter and Scott D. Musoff of counsel), for GardaWorld Consulting (UK) Limited, respondent/appellant.

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Order, Supreme Court, New York County (Andrew Borrok, J.), entered August 13, 2019, which, insofar as appealed from, granted defendant's motion to compel production of communications between plaintiffs' counsel and nonparty KippsDeSanto & Company, unanimously reversed, on the law and the facts, with costs, and the motion denied. Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered August 23, 2018, which granted plaintiffs' motion for summary judgment on their declaratory

judgment claim, and denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs were the sole shareholders of Hestia B.V. (the Company) prior to selling all of their shares to defendant. Nonparty KippsDeSanto & Company (KDC) was plaintiffs' financial adviser in connection with the sale transaction.

The motion court should not have accepted defendant's blanket challenge to pre-closing communications between plaintiffs' counsel and KDC that were withheld as attorney-client privileged. Although, "'[g]enerally, communications made in the presence of third parties ... are not privileged from disclosure' because they are not deemed confidential," statements made to the agents of the attorney or client "retain their confidential (and therefore, privileged) character, where the presence of such third parties is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]). It is not dispositive for purposes of the agency exception that KDC did not have a fiduciary or formal agency relationship with plaintiffs (*see People v Osorio*, 75 NY2d 80, 84 [1989] ["The scope of the privilege is not defined by the third parties' employment or

function, [but] depends on whether the client had a reasonable expectation of confidentiality under the circumstances"]).

It is true that KDC was not retained to assist plaintiffs' counsel in providing legal advice. However, the unrebutted evidence reflects that KDC spent some portion of its time helping counsel to understand various aspects of the transaction for that purpose. As such, KDC's presence was necessary to enable attorney-client communication (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574 [1st Dept 2012]; *Lehman Bros. Intl. [Europe] v AG Fin. Prods., Inc.*, 2016 NY Slip Op 30187[U], *9-15 [Sup Ct, NY County 2016]; *United States v Kovel*, 296 F2d 918, 922 [2d Cir 1961]; *Urban Box Off. Network, Inc. v Interfase Mgrs., L.P.*, 2006 WL 1004472, *3, 2006 US Dist LEXIS 20648, *11 [SD NY Apr. 17, 2006]).

Plaintiffs also had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained. Plaintiffs' counsel attested that KDC promised to keep all such communications confidential. The governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant even after closing (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 138-139 [1996]; *Askari v McDermott, Will & Emery, LLP*, 179 AD3d 127, 149-150 [2d

Dept 2019]).

Contrary to defendant's contention, the Cooperation Clause in KDC's engagement letter did not undermine the reasonableness of this expectation of confidentiality, as it only required "reasonabl[e]" assistance to the Company (now owned by defendant), and should thus not be read to require KDC to turn over privileged documents (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 13 AD3d 278, 279-280 [1st Dept 2004]).

Thus, plaintiffs demonstrated that KDC's presence was deemed necessary to enable the attorney-client communication and that they had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained - at least as a general matter. Defendant is free to challenge specific documents on plaintiffs' privilege log.

Insofar as defendant's challenge to the withholding of post-closing communications between plaintiffs' counsel and KDC on attorney work product grounds is limited to challenging the reasonableness of the same expectation of confidentiality as discussed above, it is equally unavailing.

The sale of plaintiffs' shares to defendant was governed by a Purchase and Sale Agreement (PSA) that provided for a base purchase price plus two possible "earnout" payments to be calculated based on the Company's performance post-closing. The

parties dispute the method of calculating the first earnout payment.

Defendant contends that PSA § 1.5(c)(ii) constitutes an express condition precedent barring any earnout payment where, as here, the Company did not record profits of at least $87 million by January 31, 2016. This interpretation is in conflict with the plain meaning of the provision. In fact, § 1.5(c)(ii) provides that no earnout payment shall be due if the Company does not record profits of at least $87 million during the "First Earnout Period" - a defined term that is "automatically extended" beyond January 31st where (as here) profits did not equal or exceed $95 million by that date.

Defendant also contends that the provisions of the PSA detailing how to measure profits during any extended earnout period are ambiguous insofar as they specify the end dates but not the start dates thereof. In fact, it is clear in context that only one start date is indicated because that date is meant to continue to apply - resulting in an initial 12-month period and an "extended" (i.e., lengthened or prolonged) 13- to 16-month period.

To the extent the parties make arguments based on their

course of conduct, the arguments are not properly considered, because the PSA is unambiguous (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). We have considered defendant's remaining textual arguments and find them unavailing.

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11188 Andrea Mercer, as Guardian for Personal Needs and Property Management of Clarice Brown, an Incapacitated Person, Plaintiff-Appellant, Index 300932/14

-against-

The Hebrew Home for the Aged at Riverdale, Defendant-Respondent.

Mark E. Weinberger, P.C., Rockville Centre (Eric M. Parchment of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about February 19, 2019, which denied plaintiff's motion to substitute herself as administrator of the estate of Clarice Brown, deceased, and granted defendant's cross motion to dismiss the complaint for failure to seek substitution within a reasonable time, unanimously reversed, on the law and facts, without costs, plaintiff's motion granted and defendant's motion denied.

Plaintiff commenced this action as guardian on behalf of Clarice Brown, and then, after Brown died, sought leave to substitute herself as plaintiff in her capacity as administrator of Brown's estate. The motion court providently determined that

plaintiff demonstrated a reasonable excuse for the delay in seeking substitution. Defendant has not shown that it was unduly prejudiced by plaintiff's delay or that she had any intention to abandon the action (*Wynter v Our Lady of Mercy Med. Ctr.*, 3 AD3d 376, 378 [1st Dept 2004]; *Velez v New York-Presbyterian Hosp.*, 145 AD3d 632, 632 [1st Dept 2016]; *cf. Palmer v Selpan Elec. Co.*, 5 AD3d 248 [1st Dept 2004]; *Washington v Min Chung Hwan*, 20 AD3d 303, 305 [1st Dept 2005]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11189- Ind. 2747/14
11189A The People of the State of New York,
Respondent,

-against-

Bismark Duarte,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered January 23, 2017, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of three years, and order, same court (David L. Lewis, J.), entered on or about May 17, 2019, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After an evidentiary hearing, the court properly denied defendant's motion, in which he alleged that the attorney who represented him at the time of his plea rendered ineffective assistance by failing to investigate allegedly exculpatory information. There is no basis for disturbing the court's determination, in which it credited the attorney's testimony that

he never received an affidavit by a person claiming "ownership" of the pistol that defendant was charged with possessing. There was no evidence to the contrary, and defendant presented no testimony or other evidence supporting his claim that such an affidavit ever existed. Defendant, who had the burden of proof, did not testify at the hearing, and the version of the facts set forth in his own affidavit was never tested by cross-examination.

In any event, we note that defendant was charged with illegally *possessing* a pistol at a particular time, regardless of whether someone else claimed to be the "owner."

The record otherwise shows that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11190 Donald M. Callahan, et al., Index 650375/19
Plaintiffs-Respondents,

-against-

VBR Holdings, LLC, formerly known as Vanbridge Holdings LLC,
Defendant-Appellant.

_____

Carlton Fields, P.A., New York (Michael L. Yaeger of counsel), for appellant.

Beys Liston & Mobargha LLP, New York (Joshua D. Liston of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 9, 2019, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the cause of action for breach of contract pursuant to CPLR 3211 and for a declaratory judgment in its favor, unanimously affirmed, with costs.

In light of the ambiguity of the contractual provision at issue – section 7.6 of defendant's Amended and Restated Limited Liability Company Agreement – resolution of which must await discovery (*see LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 5-6 [1st Dept 2019]), the motion court correctly found that legal and factual issues exist as to whether defendant effectively exercised its right to purchase plaintiffs' ownership

interests in the company, given that the purchase was never consummated. These issues include the effect of the omission from the purchase notice of a time for the closing of the repurchase transaction and the effect of defendant's failure to pursue the selection of an investment firm to value the purchase price.

The court declined to consider, before the effectiveness of the purchase notice was determined, whether defendant's right to purchase was terminated by the company's change of control. Under the circumstances of this case, we will allow Supreme Court to consider the issue first.

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11192 The People of the State of New York, SCI 22/18
Respondent,

-against-

Jonathan Hidalgo,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Julia I. Rodriguez, J.), rendered April 30, 2018,

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

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

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

ENTERED: MARCH 3, 2020

CLERK

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

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11194 Lorna Greig, et al., Index 151650/19
Plaintiffs-Respondents,

-against-

Allstate Insurance Company,
Defendant,

John N. Riccio Agency, Inc.,
Defendant-Appellant.

_____

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

Law Office of Craig A. Blumberg, New York (Craig A. Blumberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Francis A. Kahn, III, J.), entered October 2, 2019, which denied the motion of defendant John N. Riccio Agency, Inc. (Riccio) to dismiss the complaint as against it, unanimously affirmed, without costs.

According plaintiffs the benefit of every favorable inference to be had from the allegations in the complaint and from plaintiff Lorna Greig's affidavit in opposition to the motion (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), Supreme Court correctly determined that plaintiffs adequately stated causes of action against Riccio in connection with its alleged failure to procure an insurance policy covering the back house on plaintiffs' premises to the extent they intended.

Plaintiffs sufficiently allege that such intention was communicated to Riccio prior to the fire that destroyed the back house (*see generally Voss v Netherlands Ins. Co.*, 22 NY3d 728, 735 [2014]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]).

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

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11195 C & J Brothers, Inc., Index 302074/12
Plaintiff-Respondent,

-against-

Hunts Point Terminal Produce
Cooperative Association, Inc.,
Defendant-Appellant.

_____

Fleming Ruvoldt PLLC, New York (Cathy Fleming of counsel), for appellant.

Freeman Mathis & Gary, LLP, Boston, MA (A. Neil Hartzell of the bar of the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about July 17, 2019, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

"[I]t is well settled that a corporation does not owe fiduciary duties to its members or shareholders" (*Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]; *see Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012]). Here, while the complaint alleges that defendant's board

of directors breached its fiduciary duty to plaintiff in refusing to approve the sale of certain units in the cooperative market to plaintiff, plaintiff brought this action solely against the cooperative corporation and thus, the complaint is dismissed.

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11196 Juan Mendez, Index 152189/12
Plaintiff, 590517/12

-against-

Bank of America, N.A., et al.,
Defendants-Respondents.

Atlantic Building & Construction Corp.,
Defendant.

- - - - -

Americon Construction, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Liberty Contracting Corp.,
Third-Party Defendant-Appellant.

_____

Black Marjieh & Sanford LLP, Elmsford (Lisa J. Black of counsel), for appellant.

Law Offices of Tromello & Fishman, Melville (Nikolaos E. Diamantis of counsel), for respondents.

_____

Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered April 22, 2019, which, to the extent appealed from as limited by the briefs, granted defendant/third-party plaintiff Americon Construction, Inc.'s motion for summary judgment on its contractual indemnification claim against third-party defendant (Liberty), and denied Liberty's cross motion for summary judgment dismissing the claim, unanimously modified, on the law, to deny Americon's motion, and otherwise affirmed, without costs.

Plaintiff was allegedly injured while performing demolition work in the course of his employment with Liberty, which had been retained by Americon for the work. Issues of fact exist as to whether terms and conditions containing an indemnification agreement were part of the purchase order between Americon and Liberty for the work. Further, even if those terms and conditions were part of the purchase order, issues of fact exist as to whether the purchase order, while not executed until after plaintiff's accident, memorialized an agreement to indemnify made before the accident (*see Elescano v Eighth-19th Co., LLC*, 13 AD3d 80, 81 [1st Dept 2004]; Workers' Compensation Law § 11).

The clause in the terms and conditions stating that partial or complete performance constitutes agreement does not express an intent that the terms will be applied retroactively (*see Perez Juarez v Rye Depot Plaza, LLC*, 140 AD3d 464, 465 [1st Dept 2016]). Nor does the fact that before beginning the work Liberty procured insurance, without more, evince an intent to indemnify (*Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d 777, 778 [2d Dept 2019]). However, issues of fact are presented by the fact that Liberty procured insurance consistent with the subsequently executed terms and conditions, the prior course of dealing

between the parties, and the fact that as of the time of the accident Liberty's work was nearly complete (*see Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 363 [1st Dept 2004]; *Quinn v Fisher Dev.*, 272 AD2d 106 [1st Dept 2000]; *see also LaFleur v MLB Indus., Inc.*, 52 AD3d 1087, 1088 [3d Dept 2008]).

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

ENTERED: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11197N Agim Dani, Index 155513/16
Plaintiff-Respondent,

-against-

551 West 21st Street Owner LLC, et al.,
Defendants-Appellants.

_____

Pillinger Miller Tarallo, LLP, Elmsford (Patrice M. Coleman of counsel), for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered August 28, 2018, which denied defendants' motion to compel production of plaintiff's cell phone records, unanimously affirmed, without costs.

The court providently exercised its discretion in denying defendants' motion (*see generally Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 373 [1st Dept 2008]). Defendants at this point have failed to satisfy the "threshold requirement" that the request was reasonably calculated to yield information that is "material and necessary" (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [internal quotation marks omitted]). The affidavits submitted in support of the motion simply stated that plaintiff was holding his cell phone in his hand prior to the

trip and fall accident, and that the cell phone was found near his body after the accident. As such, they were too speculative to warrant disclosure of plaintiff's cell phone records (*see Gough v Panorama Windows, Ltd.*, 133 AD3d 526 [1st Dept 2015]).

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: MARCH 3, 2020

CLERK

Acosta, P.J., Friedman, Mazzarelli, Webber, JJ.

11198N-
11198NA Burlington Insurance Company,
Plaintiff-Respondent,

-against-

Vartel NY Construction Corp.,
Defendant,

Constantinos Antonopoulos,
Defendant-Appellant.

Index 160980/17

_____

Nazrisho & Associates, P.C., Brooklyn (Russ M. Nazrisho of counsel), for appellant.

Soffer, Rech & Borg, LLP, New York (Michael A. Borg of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Frank P. Nervo, J.), entered March 12, 2019 and May 7, 2019, which, respectively, granted plaintiff's motion for a default judgment, and denied defendant Constantinos Antonopoulos's cross motion for an extension of time to answer, and denied defendant's motion to vacate his default or, in the alternative, for an extension of time to answer, unanimously affirmed, without costs.

Defendant failed to demonstrate a reasonable excuse for his default and a meritorious defense to the action (CPLR 5015[a][1]); *see Higgins v Bellet Constr. Co.*, 287 AD2d 377 [1st Dept 2001]). Neither his conclusory statement that he did not receive the summons and complaint nor his claimed medical

impairment constitutes a reasonable excuse for his default. The medical records, including a physician's unsworn letter dated March 27, 2019, do not establish defendant's inability to answer or otherwise respond to the complaint or to retain counsel after the action was commenced in late 2017. Defendant's hospital discharge records following his stroke in 2016 reflect that his cognition was "grossly intact" and that he was in "good spirits."

As for a meritorious defense, defendant failed to rebut plaintiff's showing that defendant Vartel NY Construction Corp. was established to continue the business of Vartel Construction Corp. (VCC) while avoiding the judgment that plaintiff had obtained against VCC.

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11160 The People of the State of New York, Respondent, Ind. 1775/80

-against-

Arthur Brown, 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 (John T. Hughes of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about April 2, 2018, 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 providently exercised its discretion in declining to grant a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant did not meet his burden of establishing by a preponderance of the evidence that his age makes him unlikely to reoffend (*see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016] *lv denied* 28 NY3d 916 [2017]). Even assuming that the other mitigating factors identified by defendant at the classification hearing were not adequately taken into account by the risk assessment instrument, the court

providently exercised its discretion in determining that these alleged mitigating factors were outweighed by the seriousness of the underlying offense and defendant's extensive criminal record.

Defendant's remaining arguments are unpreserved and, in any event, unavailing.

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11161 Natasha Reyes, Index 154601/14
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Rosenberg Minc Falkoff & Wolff, LLP, New York (Brooke Balterman of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Andrew Blancato of counsel), for respondent.

_____

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered August 19, 2019, which granted defendant's (City) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates as a matter of law that plaintiff, who was injured when she rode an inflated tube down a designated sledding hill in a city park and crashed into a park bench, assumed the risks of that recreational activity, even if she did not foresee the exact manner in which her injury occurred. Therefore, the City is not liable for her injury (*see Sajkowski v Young Men's Christian Assn. of Greater N.Y.*, 269 AD2d 105 [1st Dept 2000]). Plaintiff, an adult, testified that she had been sledding on that hill many times before, and that, having gone there regularly, she knew the locations of the park benches.

Further, there is no evidence in the record that the bale of hay in front of the bench, an open and obvious condition, increased the risks of sleigh riding on the hill. Moreover, plaintiff testified that she had seen the bales of hay before her accident and not noticed anything out of the ordinary.

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: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11162 In re Christine T., Dkt. G-24335-15/17B
Petitioner-Appellant,

-against-

Lashanna J.,
Respondent-Respondent.

_____

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

Diaz & Moskowitz, PLLC, New York (Hani Moskowitz of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Kimberly Schertz of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Valerie Pels, J.), entered on or about December 10, 2018, which, after a hearing, denied the petition to modify a prior order of guardianship placing the subject children with respondent, unanimously affirmed, without costs.

Petitioner failed to make the required evidentiary showing of changed circumstances to warrant modifying the order of guardianship (*see Matter of Brandy P. v Pauline W.*, 169 AD3d 577 [1st Dept 2019]). Petitioner's arguments regarding safety concerns for the children in respondent's care were

unsubstantiated and did not support a conclusion that respondent was unable to meet the children's needs. Nor has the mother demonstrated that she has addressed the issues that led to the children's placement in the first instance (*id.*).

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11163- Index 24168/16E
11163A Dorothy Ross,
Plaintiff-Respondent,

-against-

Hillaire Lewis,
Defendant-Appellant.

_____

Law Office of James F. Stewart, P.C., Bellmore (James Stewart of counsel), for appellant.

Mallilo & Grossman, Flushing (Lorenzo Tasso of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered August 5, 2019, which denied defendant's motion to renew an order, same court and Justice, entered April 3, 2019, denying his motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion to renew granted, and upon renewal, defendant's motion for summary judgment is granted. The Clerk is directed to enter judgment dismissing the complaint. Appeal from the April 3, 2019 order, unanimously dismissed, without costs, as academic.

Plaintiff slipped and fell on snow and ice on the steps in front of her residence, which was owned by defendant. She testified that she fell at 8 a.m. on January 24, 2016, after a record snowfall of approximately 27 inches in New York City.

Defendant contends that he was relieved of liability for plaintiff's injuries because of the storm-in-progress rule. The duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]).

It was undisputed that the snow continued to fall, albeit in trace amounts, until 2:30 a.m. at the earliest, five and a half hours before the accident. The weather records and defendant's expert's affidavit, once presented in admissible form, indicated that it was snowing in more than trace amounts until 11 p.m. on January 23, 2016, and in trace amounts thereafter. Thus, a reasonable period of time to correct the snow and ice condition on the steps had not yet elapsed at the time of the accident, given the blizzard conditions.

Plaintiff asserts that the weather data was not in admissible form on defendant's initial motion. However, the court in its discretion may grant renewal in the interest of justice, upon facts known to the movant at the time of the original motion so as not to "defeat substantive fairness" (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]). Here, the court improvidently exercised its discretion

upon renewal in failing to consider the weather data, in that the charts were identical to the data submitted in connection with the initial motion and plaintiff did not challenge the information or authenticity of the data contained in the charts.

Plaintiff contends that, regardless of whether defendant was required to remove the snow at an earlier time, his efforts, as depicted in a photograph, exacerbated the dangerous condition. However, the photograph is too unclear to raise a triable issue of fact as to this speculative claim.

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: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11165 & M-568 Curtis Gordon, Plaintiff-Appellant, Index 23110/17

-against-

Rafael Reyes Hernandez, et al., Defendants-Respondents.

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (David A. Craven of counsel), for appellant.

Robert D. Grace, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered February 5, 2019, which granted defendants' motion for summary judgment dismissing plaintiff's claims that he suffered a serious injury to his cervical spine, lumbar spine, left shoulder, left knee and left ankle within the meaning of Insurance Law § 5102(d), and denied that portion of defendants' motion seeking dismissal of plaintiff's 90/180-day claim, unanimously modified, on the law, defendants' motion denied as to plaintiff's claims of serious injury to his spine, shoulder and knee, and, upon a search of the record, the motion granted as to the 90/180-day claim, and otherwise affirmed, without costs.

Defendants satisfied their prima facie burden to show that plaintiff did not sustain a serious injury to any of the claimed body parts as a result of the accident by submitting the reports

of an emergency medicine physician and an orthopaedic surgeon, who opined that plaintiff's emergency room hospital records were inconsistent with his claimed injuries, and their radiologist, who reviewed MRI films of the spine and left shoulder and found they showed pre-existing degenerative conditions (*see De Los Santos v Basilio*, 176 AD3d 544, 545 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]). Defendants' orthopedist reviewed plaintiff's medical records and opined that they did not include any evidence of traumatic injury, but did not specify any particular degenerative conditions or prior injuries reflected in those records (*see Sanchez v Oxcin*, 157 AD3d at 563 [1st Dept 2018]).

In opposition, plaintiff raised an issue of fact as to whether he sustained significant or permanent injuries to his cervical spine, lumbar spine, left shoulder and left knee by submitting the report of his pain management specialist, who found that he had restricted range of motion in those body parts shortly after the accident and upon a more recent examination, and opined that his injuries were causally related to the accident at issue (*see Reyes v Se Park*, 127 AD3d 459, 460 [1st Dept 2015]). Given the absence of any evidence in plaintiff's own medical records that he had prior injuries or pre-existing degeneration, that was sufficient to raise an issue of fact as to

causation (*see Blake v Cadet*, 175 AD3d 1199, 1200 [1st Dept 2019]; *Sanchez v Oxcin*, 157 AD3d at 563*; Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). If a jury determines that plaintiff has met the threshold for serious injury as to any of these claims, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 550 [1st Dept 2010]).

Plaintiff failed, however, to raise an issue of fact as to whether he suffered a significant injury to his left ankle. His expert's finding that he had 8% restricted range of motion shortly after the accident is not of a sufficient magnitude to qualify as a significant limitation (*Arrowood v Lowinger*, 294 AD2d 315 [1st Dept 2002]).

Although defendants did not cross-appeal from the denial of that portion of their motion seeking dismissal of plaintiff's 90/180-day claim, we find that, upon a search of the record, pursuant to CPLR 3212(b), dismissal of that claim is warranted (*see Santiago v Bhuiyan*, 71 AD3d 485, 486 [1st Dept 2010]). Plaintiff's deposition testimony that he missed only "days" of work after the accident defeats his 90/180-day claim (*see Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

M-568 - *Curtis Gordon v Rafael Reyes Hernandez*

Motion for stay pending appeal and preference denied as academic.

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11166-
11167 Index 652857/16

Favourite Limited, et al.,
Plaintiffs-Respondents,

-against-

Benedetto Cico, et al.,
Defendants-Appellants,

151 East Houston Acquisition LLC, et al.,
Defendants.

_____

Toptani Law PLLC, New York (Edward Toptani of counsel), for Benedetto Cico, appellant.

Law Office of Sean M. Kemp, Rhinebeck (Sean M. Kemp of counsel), for Carlo Cico, appellant.

Fein & Jakab, New York (Peter Jakab of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 30, 2018, which, insofar as appealed from, denied defendants Benedetto Cico's and Carla Cico's motions to dismiss the amended complaint, and granted in part plaintiffs' cross motion for leave to file a second amended complaint, unanimously reversed, on the law, without costs, the motions granted, and the cross motion denied. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered June 17, 2019, which, insofar as appealed from, denied in part defendants' motion to dismiss the second amended complaint, unanimously dismissed, without costs, as academic.

Contrary to defendants' contention, New York courts have subject matter jurisdiction over the amended complaint, which was supposed to contain only derivative claims (*see Matter of Raharney Capital, LLC v Capital Stack LLC*, 138 AD3d 83, 87 [1st Dept 2016]). The fact that the operating agreement of Upper East Side Suites, LLC (the Company) chooses Delaware law is of no moment, since "choice of law and choice of forum are altogether separate matters" (*Bank of Tokyo-Mitsubishi, Ltd. v Kvaerner*, 243 AD2d 1, 5 [1st Dept 1998]). Furthermore, section 18-1001 of the Delaware Limited Liability Company Act (the Act), which provides that "a member or an assignee of a limited liability company interest may bring an action in the Court of Chancery," is permissive, not mandatory (*see generally Estate of Calderwood v ACE Group Intl. LLC*, 157 AD3d 190, 195 [1st Dept 2017], *lv dismissed* 31 NY3d 1111 [2018]).

However, the action should be dismissed on the ground that the Company lacks capacity or standing to sue because plaintiff Sirio SRL lacked authority to obtain a certificate of revival. Initially, the Company was not dissolved pursuant to section 18-801(a) of the Act. Rather, its certificate of formation was cancelled pursuant to section 18-104(d) due to its failure to designate a new registered agent within 30 days after its old one resigned. Therefore, the Company could, in theory, be revived

under section 18-1109(a). However, plaintiff Sirio SRL, which obtained the certificate of revival on April 19, 2018 as a member of the Company, lacked authority to act on behalf of the company. The Company's operating agreement states, "No Member as a Member shall have the right to bind the Company in dealings with third parties. No Member is an agent of the Company solely by virtue of being a member and no Member has authority to act for the Company solely." Even if the Company has become a member-managed LLC, which we are not deciding, the record contains no decision by more than 50% of the members to revive the Company before April 19, 2018. Plaintiffs rely on the vote to authorize the prosecution of the instant action but that vote was taken between May 31 and June 30, 2018.

"After [a] certificate of cancellation has been filed, suits generally may not be brought by ... an LLC" (*Matthew v Laudamiel*, 2012 WL 605589, *21, 2012 Del Ch LEXIS 38, *77-78 [Feb. 21, 2012, C.A. No. 5957-VCN]). Thus, the Company may not sue as a direct

plaintiff, and the members thereof may not bring derivative claims on its behalf. Since plaintiffs lack standing or capacity, this action should be dismissed (*see e.g. Otto v Otto*, 110 AD3d 620 [1st Dept 2013]).

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11168 The People of the State of New York, Ind. 1300/13
Respondent,

-against-

Nathan Mack,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J. at suppression hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered April 17, 2014, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The court correctly found that defendant's prompt arrest for an undercover drug sale was supported by probable cause (*see e.g. People v Rogers*, 71 AD3d 457 [1st Dept 2010], *lv denied* 14 NY3d 892 [2010]). Contrary to defendant's argument, we do not find any significant discrepancies relating

to defendant's location or the distinctive clothing item he was wearing. The hearing court providently exercised its discretion when it asked a few clarifying questions relating to probable cause (*see People v Arnold*, 98 NY2d 63, 67 [2002]; *People v Moulton*, 43 NY2d 944 [1978]). The record also supports the court's finding that the purchasing and "ghost" undercover officers made confirmatory identifications, as part of a planned procedure, promptly after a drug transaction (*see People v Wharton*, 74 NY2d 921, 922-923 [1989]). This appeal only presents the issue of whether suppression, after a hearing, was required. Viewed as a whole, the hearing evidence, including testimony as to the respective functions of the two officers, supports the inference that each officer made the type of detailed observation required for a confirmatory identification (*see People v Boyer*, 6 NY3d 427, 432-433 [2006]).

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 determinations concerning credibility and identification. The record does not cast doubt on testimony that the police recovered prerecorded buy money from defendant.

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11169 MIC General Insurance Corporation, Index 23851/16E
Plaintiff-Appellant,

-against-

Esmie Campbell,
Defendant-Respondent,

Guiseppina Scalisi,
Defendant.

_____

Law Office of James J. Croteau, New York (James J. Croteau of counsel), for appellant.

Warner & Scheuerman, New York (Jonathon D. Warner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 15, 2019, which denied plaintiff's motion for summary judgment declaring that it has no obligation to defend or indemnify defendant Esmie Campbell in the underlying personal injury action, granted defendant's cross motion for summary judgment declaring in her favor, and so declared, unanimously reversed, on the law, without costs, the declaration vacated, plaintiff's motion granted, defendant's motion denied, and it is declared that plaintiff is not obligated to defend or indemnify defendant in the underlying action.

Plaintiff demonstrated, via defendant's admission in a statement to its investigator and the investigator's inspection

of the insured premises, that defendant did not reside at the premises and was therefore not covered by the policy (*see Almonte v CastlePoint Ins. Co.*, 140 AD3d 658 [1st Dept 2016]).

Contrary to defendant's argument, the policy endorsement that amends the definition of "residence premises" – previously, "[t]he one-family dwelling ... where you reside" – to include three- and four-family dwellings without repeating the phrase "where you reside" is not ambiguous. The endorsement also states that "[a]ll other provisions of this policy apply," which gives effect to those portions of the policy that define "residence premises" as the place "where [the insured] reside[s]" (*MIC Gen. Ins. Co. v Allen*, 697 Fed Appx 717, 719 [2d Cir 2017]).

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

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11171 In re Global Liberty Insurance Company of New York,
Petitioner-Appellant,

-against-

Capital Chiropractic, P.C.,
Assignee of Oliver Rigor,
Respondent-Respondent.

Index 21999/19E

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

Fazio, Rynsky & Associates, LLP, Syosset (Svetlana Sobel of counsel), for respondent.

Order, Supreme Court, Bronx County (Donna Mills, J.), entered April 16, 2019, which denied the petition to vacate a master arbitrator's award, unanimously reversed, on the law, without costs, and the petition granted.

The master arbitrator's award was arbitrary in that it irrationally ignored well-established precedent that "the no-fault policy issued by petitioner was void ab initio due to respondent's assignor's failure to attend duly scheduled independent medical exams" (*Matter of Global Liberty Ins. Co. of*

N.Y. v Top Q. Inc., 175 AD3d 1131, 1131 [1st Dept 2019]; *see Matter of Global Liberty Ins. Co. v Professional Chiropractic Care, P.C.*, 139 AD3d 645, 646 [1st Dept 2016]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]).

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11173 The People of the State of New York, Respondent,

Ind. 825/15

-against-

Tashauna Rickertt,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Thomas A. Farber, J. at plea; Michael J. Obus, J. at sentencing), rendered September 22, 2015, convicting defendant of burglary in the third degree, and sentencing her to a term of 30 days, with five years' probation, unanimously affirmed.

Defendant made a valid waiver of her right to appeal (*see People v Thomas*, __ NY3d __, 2019 NY Slip Op 08545 [2019]; *People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of her excessive sentence claim and her challenge to her order of protection (*People v Gonzalez*, 178 AD3d 440 [1st Dept 2019]).

Regardless of whether defendant validly waived her right to appeal, we perceive no basis for reducing the sentence. Her claim that the order of protection imposed at sentencing was procedurally defective requires preservation (*see People v*

Nieves, 2 NY3d 310, 315-317 [2004]), and we decline to review this unpreserved claim in the interest of justice. The fact that the alleged errors involved procedures mandated by a statute does not exempt these claims from preservation requirements (*see e.g. People v Agramonte*, 87 NY2d 765, 770 [1996]). As an alternative holding, we find that the record sufficiently reflected the reasons for the imposition of the order of protection and that its term was also duly noted (*see People v Gonzalez*, 178 AD3d 440 [1st Dept 2019]).

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11174 Peter R. Ginsberg Law, LLC, Index 161430/17
Plaintiff-Respondent,

-against-

J&J Sports Agency, LLC, et al.,
Defendants-Appellants.

_____

Miller Law Office, PLLC, Lynbrook (Scott J. Farrell of counsel), for appellants.

Sullivan & Worcester LLP, New York (Peter R. Ginsberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered December 24, 2018, which granted plaintiff's motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, on liability, and denied defendants' cross motion to dismiss, unanimously modified, on the law, to deny plaintiff's motion and remand the matter for conversion to a plenary action, and otherwise affirmed, without costs.

Plaintiff's motion for summary judgment in lieu of complaint should have been denied. The invoices do not qualify for CPLR 3213 relief because it is necessary to consult extrinsic evidence aside from the invoices and proof of nonpayment in order for plaintiff to establish its entitlement to summary judgment on its account stated claim (*see PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017]). Plaintiff has failed to

establish, based on the invoices themselves, that defendants, as opposed to nonparty Impact Sports, are liable based on an account stated claim.

Defendants are not entitled to dismissal of the action based on the statute of frauds (GOL § 5-701[a][2]) as plaintiff has sufficiently alleged that there was new consideration flowing from plaintiff to defendants, which is an exception to the requirement that a promise to pay the debt for another be in writing (*Carey & Associates v Ernst*, 27 AD3d 261 [1st Dept 2006]).

Moreover, Levine and Sutton have not established that the action should be dismissed as against them as a matter of law.

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

Based on the foregoing, the matter should be converted to a plenary action and remanded to the court for further proceedings.

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

ENTERED: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11176 Noris Zaiter, Index 307890/11
Plaintiff-Appellant,

-against-

Southern Boulevard Partners, III,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Christopher J. Soverow of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Shannon Henderson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Paul L. Alpert, J.), entered on or about November 28, 2018, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Summary judgment on the issue of liability was properly denied in this action where plaintiff was injured when she slipped and fell on a wet condition in the lobby of the apartment building in which she lived. Plaintiff failed to show that defendant had notice of the hazardous condition, as she presented no evidence that defendant's employees were warned of the wet condition in the lobby or personally saw it before plaintiff's fall (*see Manderson v Phipps Houses Servs., Inc.*, 173 AD3d 459 [1st Dept 2019]; *Roman v Met-Paca II Assoc., L.P.*, 85 AD3d 509 [1st Dept 2011]). There is no dispute that defendant had actual

notice of a defective lobby door. However, there is no evidence that it had notice of the broken door repeatedly allowing snow to accumulate in the lobby (*compare Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294 [1st Dept 1994]). Although plaintiff previously made complaints about the malfunctioning door to the building superintendent, she stated that she had never before made complaints about any hazardous conditions in the lobby.

Plaintiff's argument that defendant is liable for her injuries because it violated Multiple Dwelling Law § 78 in failing to repair the broken door is unavailing. Even if defendant violated Multiple Dwelling Law § 78 by failing to fix the broken door, there is a question of fact as to whether the broken door was the proximate cause of plaintiff's injury (*see Sheehan v City of New York*, 40 NY2d 496, 503 [1976]). Defendant presented evidence showing that the door was still capable of being closed, and plaintiff acknowledged that she had manually closed the door in the past. Under the circumstances, there is a triable issue as to whether the accumulation of snow in the lobby

was a reasonably foreseeable consequence of the broken door (*see e.g. White v Diaz*, 49 AD3d 134, 139-140 [1st Dept 2008]).

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: MARCH 3, 2020

CLERK

Renwick, J.P., Gische, Kern, Singh, JJ.

11179N Yvette Bamberg-Taylor, Index 304386/08
Plaintiff-Appellant,

Donald Taylor,
Plaintiff,

-against-

Berish Strauch, M.D., et al.,
Defendants,

Montefiore Medical Center,
Defendant-Respondent.

_____

Peter H. Paretsky, New York, for appellant.

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

_____

Order, Supreme Court, Bronx County (George J. Silver, J.), entered on or about December 19, 2018, which, to the extent appealed from, denied plaintiff Yvette Bamberg-Taylor's motion to compel defendant to produce a witness for deposition to answer questions regarding general hospital credentialing procedures, unanimously affirmed, without costs.

The discovery sought in the motion to compel is protected by the statutory privileges of Education Law § 6527(3) and Public Health Law § 2805-m, and plaintiff offers no persuasive arguments to the contrary (*see Bush v Dolan*, 149 AD2d 799, 799-800 [3d Dept 1989]; *Lily v Turecki*, 112 AD2d 788, 789 [4th Dept 1985]).

These statutes "shield from disclosure the proceedings and the records relating to performance of a medical or a quality assurance review function or participation in a medical malpractice prevention program" (*Jousma v Kolli*, 149 AD3d 1520 [4th Dept 2017], citing *Logue v Velez*, 92 NY2d 13, 16-17 [1998] [internal quotation marks omitted]). Their purpose is to safeguard information collected as part of a medical review committee's periodic assessment of physicians' credentials and competence in order to encourage frank and objective discussion during the credentialing process (*id.* at 17).

Plaintiffs' argument, unsupported by statutory language, case law or other authority, that these statutory protections do not apply to "general" information about a hospital's credentialing procedures is not persuasive (*see Stalker v Abraham*, 69 AD3d 1172 [3d Dept 2010]).

Montefiore has met its burden to show that the statutory privilege applies; in order to do so, a hospital is required, at a minimum, to show it has a review procedure and that the information for which the exemption is claimed was obtained or maintained in accordance with that review procedure (*Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]). The motion court's prior order on defendant's motion for a protective order included a finding that the hospital had a review procedure that met the

standards of the Public Health Law. Dr. Weiss's affidavit, moreover, establishes that the information sought via the deposition at issue here is information obtained or maintained in accordance with Montefiore's review procedure. In particular, he attests that information compiled in order to "insure that a physician is capable of performing the procedures for which privileges are to be, or have been, granted," is information "compiled as a direct result of Montefiore's performance of its quality assurance function" (*cf. Orner v Mt. Sinai Hosp.*, 305 AD2d 307 [1st Dept 2003]; *Kivlehan*, 36 AD3d at 598).

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

ENTERED: MARCH 3, 2020

CLERK