SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 12, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Richter, Kapnick, Mazzarelli, Moulton, JJ.

10964-
10964A Wells Fargo Bank, N.A., etc.,
Plaintiff-Respondent,

-against-

Manuel A. Martinez, et al.,
Defendants-Appellants,

Alliance Mortgage Banking
Corp., et al.,
Defendants.

Index 381643/09

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Gail M. Blasie, PC , Garden City (Gail M. Blasie of counsel), for appellants.

Knuckles Komosinski & Manfro, LLP, Elmsford (Gregg L. Verrilli of counsel), for respondent.

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Appeal from judgment of foreclosure and sale, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 6, 2016, to the extent appealed from, against defendant Manuel Martinez, unanimously dismissed, without costs. Order, same court and Justice, entered on or about May 23, 2018, which denied defendant's motion to vacate the default judgment and dismiss the action, unanimously reversed, on the law and the facts and in the

exercise of discretion, without costs, the motion granted, the judgment vacated, and the complaint dismissed.

The motion court should have granted the motion to vacate the judgment and upon vacatur, should have dismissed the action as abandoned. CPLR 3215(c) states that "if [a] plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . upon its own initiative or on motion." The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned (*see HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]). Notwithstanding, a claim will not be deemed abandoned if the party seeking a default judgment provides sufficient cause as to why the complaint should not be dismissed (CPLR 3215[c]). Here, plaintiff waited almost three years to seek a default judgment, and it failed to provide sufficient cause as to why the complaint should not be dismissed. As such, plaintiff's complaint is dismissed as abandoned.

Plaintiff's argument that defendant waived his right to seek dismissal pursuant to CPLR 3215(c) because he participated in the settlement conferences is equally unavailing. Although a party

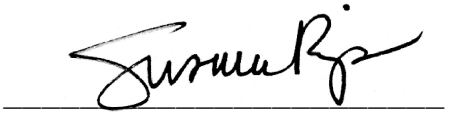
may waive it rights under CPLR 3215(c) "by serving an answer or taking any other steps which may be viewed as a formal or informal appearance" (*Private Capital Group, LLC v Hosseinipour*, 170 AD3d 909, 910 [2d Dept 2019][internal quotation marks omitted]), defendant's participation in settlement conferences did not constitute either a formal or an informal appearance "since [he] did not actively litigate the action before the Supreme Court or participate in the action on the merits" (*Slone*, 174 AD3d at 867).

The appeal from the judgment is dismissed, as no appeal lies from a judgment entered on default (CPLR 5511; *Bace v Tai May Realty, Inc.*, 144 AD3d 443, 444 [1st Dept 2016]).

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 12, 2020



CLERK

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

10853 In re Gregorios Christakis, Index 159538/18
Petitioner-Appellant,

-against-

New York City Transit Authority,
Respondent-Respondent.

_____

Advocates for Justice Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for appellant.

New York City Transit Authority Law Department, Brooklyn (Daniel Chiu of counsel), for respondent.

_____

Judgment (denominated an order), Supreme Court, New York County (Debra A. James, J.), entered on or about April 9, 2019, denying the petition to annul respondent's determination, dated June 14, 2018, which denied petitioner's application for short-term disability benefits, and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law and the facts, without costs, the petition granted, and the matter remanded to the agency for calculation of petitioner's benefits.

Petitioner was employed by respondent New York City Transit Authority as a General Superintendent. From on or about November 24, 2014 to June 12, 2015, petitioner was absent from work due to post-traumatic stress disorder and related conditions that he

believed were caused by a series of events at his workplace. On or about December 24, 2014, he applied for Workers' Compensation benefits. The Workers' Compensation Board Judge denied his claim by decision dated May 28, 2015, which found that petitioner suffered from a psychiatric injury, including post-traumatic stress disorder, but determined that there was insufficient evidence that petitioner had experienced "stress at work greater than the usual irritations to which all workers in similar employment are normally subjected." The Workers' Compensation Board affirmed the decision of the Administrative Law Judge by Panel Decision dated January 19, 2016.

On or about June 15, 2015, petitioner made an application for retroactive short-term disability benefits under respondent's short term disability policy. The policy provides, inter alia, that "[p]rior to short-term disability benefits taking effect, all of the employee's accumulated sick leave, and all but two weeks (10 working days) of the aggregate of all accrued . . . vacation, personal leave, floating holidays and compensatory time . . . must first be exhausted." It is undisputed that petitioner had a balance of 133 hours of sick leave as of November 28, 2014 (four days after he began his leave), and a balance of 203 hours of sick leave as of June 26, 2015 (11 days after he applied for

short-term disability).

By letter dated July 14, 2015, respondent advised petitioner that his application for short-term disability benefits was "[a]pproved" by Occupational Health Services. Enclosed with the letter was a memorandum from the Medical Director stating that "the documentation submitted represents a health condition that meets the criteria for short term disability. This approval *does not* determine if the employee is eligible for short term disability" (emphasis in original). Nevertheless, although respondent determined that petitioner suffered from a qualifying medical condition, petitioner did not receive short-term disability benefits and received no further information about his claim for more than two years.

In or about November 2017, petitioner's counsel inquired about the status of petitioner's claim. After a long string of emails, in March 2018, the Senior Director of respondent's Office of Labor Relations, Ms. Abdelrahman, advised petitioner's counsel by email that petitioner's claim was still in process.

On June 14, 2018, Ms. Abdelrahman advised petitioner's counsel orally that a final determination had been made that petitioner was not eligible for short-term disability benefits. In a letter to counsel dated July 16, 2018, she confirmed this

and explained that petitioner "was not eligible since managers/non-represented employees are not permitted to use sick leave benefits for absence due to claimed injury on duty and exhaustion of sick leave is a prerequisite for short term disability benefits."

On or about August 27, 2018, petitioner notified his employer of his intention to retire as of August 31, 2018. In the "Separation Payout Form," he checked the box marked "I want a different deferral amount from current paycheck deductions (fill in below)," and he checked the box on the next line marked "401K," with "100%" handwritten on the line next to this box.

By letter dated September 17, 2018, respondent advised petitioner that it was issuing him a "Lump-Sum Cash Payment for Terminal Leave," and that such payment represented 30:15 hours of current vacation, 58:20 hours of accrued vacation, 42 hours of unused sick leave, and 15 minutes of compensatory time. Petitioner's October 18, 2018 paycheck lists a total of $7,033.78 as "Lump Sum N/P." It lists a deposit of $6,194.72, after state and federal deductions, into petitioner's 401K account, and a payment of $0 directly to petitioner.

On or about October 15, 2018, petitioner commenced this proceeding pursuant to article 78 of the CPLR to challenge

respondent's denial of his petition for short-term disability benefits. Respondent filed an answer in which it alleged that petitioner's short term disability claim was denied "because he filed a claim for Workers' Compensation benefits asserting he was injured on duty and had not exhausted his sick leave, which was a prerequisite for short term disability." Respondent's answer further stated that "[e]mployees are prohibited from filing for Workers' Compensation Benefits and short term disability benefits to minimize the potential for fraud and 'double dipping.'" Respondent's July 16, 2018 letter had not notified petitioner of this alleged prohibition, and nothing in respondent's Employee Benefit Summary or short-term disability policy states that employees who have applied for Workers' Compensation benefits are not eligible for short-term disability.

By order dated April 1, 2019, Supreme Court found that petitioner commenced this proceeding within the applicable statute of limitations,[1] but denied the petition on the basis of respondent's claim that its short-term disability policy "rendered workers who applied for Workers' Compensation benefits ineligible for short term disability benefits."

[1] That determination is not challenged on this appeal.

Petitioner now appeals, arguing that the denial of his short-term disability application on this basis was arbitrary and capricious, citing CPLR 7803(3). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). We find that the denial of petitioner's short-term disability benefits claim was arbitrary and capricious and irrational for the following reasons.

First, respondent never notified petitioner that it was denying his claim because he had previously applied for Workers' Compensation benefits. The first time respondent made this claim was in its answer filed in response to petitioner's article 78 petition. Nothing in respondent's Employee Benefit Summary, short-term disability policy, or its letter confirming that petitioner's short-term disability claim had been denied states that employees are barred from seeking short-term disability benefits if they have previously applied for Workers' Compensation. Under these circumstances, the rationality of the agency's determination is called into question (*see Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1044 [2013]; *Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Comm.*, 18 NY3d 329, 333-334 [2011]).

Second, in this case, there was no risk of "double dipping," which is the sole rationale respondent has given for interpreting its short-term disability policy to bar an employee who has applied for Workers' Compensation from applying for short-term disability. When petitioner applied for short-term disability benefits, his Workers' Compensation claim had been denied.

Third, respondent's position regarding the Workers' Compensation claim is inconsistent with its position regarding what the disability policy covers. After all, if, as respondent maintains, the policy only covers non-work-related illnesses such as cancer or a heart attack, then it would have had no reason to be concerned about "double dipping," since Workers' Compensation benefits only relate to work-related conditions.

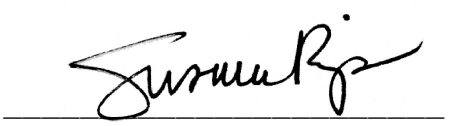
It is similarly disingenuous for respondent to argue that petitioner was not eligible under the disability policy because he did not exhaust his sick leave. Ms. Abdelrahman stated in her July 16, 2018 letter confirming the denial of petitioner's short-term disability application that petitioner was "not permitted to use sick leave benefits for absence due to claimed injury on duty and exhaustion of sick leave is a prerequisite for short term disability benefits." If petitioner had been approved for Worker's Compensation, this rationale might hold. Once

petitioner was denied those benefits, however, no rational basis for denying petitioner his sick time could be advanced. With respect to how many sick days should be credited to petitioner, respondent cites to documents in the record indicating that petitioner had a balance of 133 hours (or 19 seven-hour days) of sick leave as of November 28, 2014 (4 days after he began his leave) and a balance of 203 hours (or 29 seven-hour days) of sick leave as of June 26, 2015 (11 days after he applied for retroactive short-term disability). In addition, respondent's September 17, 2018 letter to petitioner regarding his lump sum cash payment for terminal leave states that he had 42 hours (or six seven-hour days) of unused sick leave as of that date, for which he received a payment of funds deposited into his 401K account. However, since the period for which petitioner sought short-term disability benefits exceeded six months, his sick leave balance, calculated at any of those times, would have been insufficient to cover the entire period. Accordingly, this matter must be remanded to respondent for calculation of

petitioner's short-term disability benefits after deduction of petitioner's sick leave.

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

Entered: MARCH 12, 2020



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Richter, J.P., Oing, Moulton, González, JJ.

11217N & M-1290 Linda Macklowe, Plaintiff-Appellant, Index 350044/16

-against-

Harry Macklowe, Defendant-Respondent.

_____

Holwell Shuster & Goldberg LLP, New York (James M. McGuire of counsel), for appellant.

Boies Schiller Flexner LLP, New York (Joshua I. Schiller of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered August 12, 2019, which granted defendant's motion to appoint a receiver to coordinate the sale of Schedules II and III of the parties' art collection at public auction, to the extent of stating that the court "shall" do so in accordance with a forthcoming order appointing the receiver, unanimously affirmed, without costs.

During their marriage, the parties amassed a large collection of artwork, which is their most valuable marital asset. At the divorce trial, plaintiff wife asked the court to award the artwork to her and award the parties' real estate interests to defendant husband, with a cash distributive award to the husband to equalize any discrepancy. The husband argued that

the artwork should be sold and the proceeds distributed equally. After trial, the court issued a decision wherein it divided the artwork into three "Schedules." The court awarded the wife all of the artwork on Schedule I, and awarded the husband an equalizing credit for his 50% marital share. The court ordered that the artwork on Schedules II and III (the art collection) be "sold" with "the net proceeds distributed 50% to each party." A judgment was subsequently entered containing similar provisions.

The wife appealed and argued, inter alia, that the court erred in directing a sale of the art collection. She proposed instead that the collection be valued and distributed to her, with an equalizing payment to the husband. In unanimously affirming the judgment, this Court rejected the wife's approach, concluding that the trial court had "providently exercised its discretion in directing that [the art collection] be sold and the net proceeds distributed equally between the parties" (*Macklowe v Macklowe*, 176 AD3d 470, 470 [1st Dept 2019]).

In its trial decision, the court concluded that it was in the parties' best interest to appoint a receiver to sell the art collection. The parties thereafter became embroiled in various disputes over who the receiver would be and the terms of retention, and whether the art collection should be disposed of

by way of a public auction, private sales, or an internal auction between the parties. The husband moved to appoint a receiver to sell the art collection at public auction. The court granted the husband's motion "to the extent that the court shall appoint a receiver to coordinate the sale of [the art collection] at public auction in accordance with the forthcoming order appointing the receiver."

On appeal, the wife argues that the motion court erred in ordering a public auction instead of an internal auction. In an internal auction, each of the parties would submit sealed bids for each piece of art in the collection, and the highest bidder would be awarded the item. At the end of the process, each party's total asset value would be determined by the sum of his or her winning bids. The party with the highest total asset value would then pay the other party one-half of the difference between the two asset values in order to purportedly effect an equal distribution.

We find no basis for reversal. In the divorce judgment, which was affirmed on appeal, the trial court equitably distributed the art collection by ordering that it be "sold" with each party receiving "50% of the net proceeds from the sale." The internal auction proposed by the wife is inconsistent with

the judgment in two respects. First, it is not a "sale," as that term is commonly understood, and second, it will not generate "net proceeds" that will be evenly distributed between the parties. The wife has failed to adequately explain how an internal auction effectuates these core provisions of the judgment. Indeed, in her appellate brief on the earlier appeal, the wife stated that an internal auction between the parties "would obviate the need for a sale," thus recognizing that her suggested method of distributing the artwork is not a sale.

Essentially, the wife is proposing an in-kind distribution of the art collection, where the art is split between the parties, and the party that ends up with the greater value of art pays the other a distributive award. However, this approach was rejected by this Court on the earlier appeal when it affirmed the trial court's decision that the art collection be sold. The wife should not be permitted to relitigate this issue under the guise of an internal auction. Moreover, the internal auction approach could lead to other inequities. After the divorce, neither party was left with the cash necessary to buy the art collection from the other. Under the internal auction approach, the losing party, who would be owed a distributive award, would likely have to wait until the winning party sells the art, or otherwise

raises the money required to pay the award.

We find unpersuasive the wife's contention that the motion court rejected the internal auction proposal without proper consideration. Since an internal auction is not a sale, the motion court appropriately characterized it as a "settlement solution," and, because the husband did not agree to it, the court properly declined to require the receiver to consider it as an available method of disposition. Even if we were to accept the wife's argument that the motion court had the power to order an internal auction, no basis exists to reverse. Under the specific circumstances here, the court did not abuse its discretion in choosing a public auction as the method to sell the art collection.

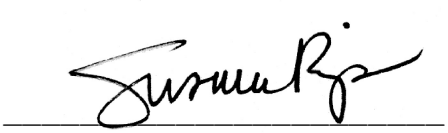
We have considered the wife's remaining arguments and find them unavailing.

M-1290 - *Linda Macklowe v Harry Macklowe*

Motion for stay pending appeal denied as academic.

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

ENTERED: MARCH 12, 2020



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

11238-
11239 The People of the State of New York, Respondent,

-against-

Clarence Houston,
Defendant-Appellant.

Ind. 4358/16

- - - - -

The People of the State of New York,
Respondent,

-against-

Darius Wade,
Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (Margaret E. Knight of counsel), for Clarence Houston, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), and Arnold & Porter Kaye Scholer LLP, New York (Molly McGrath of counsel), for Darius Wade, appellant.

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

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Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered December 15, 2017, convicting defendants, after a jury trial, of criminal possession of a weapon in the second degree (four counts), and sentencing defendant Clarence Houston, as a second violent felony offender, to concurrent terms of 10 years, and sentencing defendant Darius Wade to concurrent terms of 8 years, unanimously affirmed.

Defendants, whose postverdict arguments had no preservation effect, did not preserve their legal insufficiency claims, and we decline to review them in the interest of justice. As an alternative holding, we reject these claims on the merits, and we also find that the verdicts were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence established that defendants possessed two loaded and operable pistols. Although these weapons were not recovered, there was overwhelming circumstantial evidence that defendants shot the victim, who did not cooperate with the authorities. Defendants were both seen holding pistols on surveillance videotapes, shortly before the nearby shooting of the victim, in which 18 shots were fired. The recovery of cartridge cases showed that two different types of pistols were used. An eyewitness saw defendants running from the scene, and the evidence also included video evidence that they not only fled, but sought to hide their pistols in car wheels. There was also video evidence from before the shooting supporting an inference that defendants were about to engage in coordinated violent behavior. Under the circumstances of this case, defendants' speculation that another person or persons might have fired the shots is unavailing.

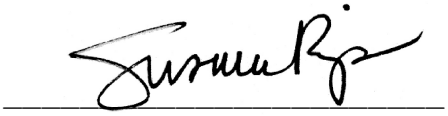
Both defendants challenge the admission of surveillance video recordings, but defendant Houston failed to preserve those challenges, and we decline to review his claims in the interest of justice. Alternatively, we reject both defendants' arguments that the videos were not properly authenticated. "The totality of the evidence, including the relationship of the videotapes at issue to other videotapes that were undisputedly authenticated, supported the inference that the videotapes at issue depicted the relevant events, and any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Mercedes*, 172 AD3d 599, 600-01 [1st Dept 2019], *lv denied* 33 NY3d 1071 [2019]). By a variety of methods, testifying officers were able to verify the accuracy of the videos at issue and the times at which they were recorded. Accordingly, the foundation was established by "reasonable inferential linkages"

that were far from being "tenuous and amorphous" (*People v Patterson*, 93 NY2d 80, 85 [1999]).

We perceive no basis for reducing the sentences.

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

ENTERED: MARCH 12, 2020



CLERK

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

11241 Myrna Diaz, Index 151534/16
Plaintiff-Appellant,

-against-

Maygina Realty LLC, et al.,
Defendants-Respondents.

_____

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

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Michael J. Kesselman of counsel), for Maygina Realty LLC, respondent.

Milber Makris Plousadis & Seiden, LLP, White Plains (Danielle L. Rizzo of counsel), for Srinidhhi Inc., respondent.

Office of Nadine Rivellese, New York (Stephen T. Brewi of counsel), for Consolidated Edison Inc. and Consolidated Edison Company of New York, Inc., respondents.

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Order, Supreme Court, New York County (Robert R. Reed), entered December 21, 2018, which granted defendants Maygina Realty LLC's and Srinidhhi Inc.'s motions for summary judgment dismissing the complaint as against them and, upon a search of the record, granted the Con Edision defendants summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff failed to comply with a conditional order of preclusion requiring her to produce authorizations relating to

treatment for her preexisting conditions, and the order became absolute (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 83 [2010]). As the order precluded her from offering evidence as to damages at trial, plaintiff would be unable to prove her prima facie case.

Contrary to plaintiff's unpreserved contention, defendants were not required to show prejudice as a result of her noncompliance (*see generally id.* at 81).

Plaintiff failed to demonstrate a reasonable excuse for her failure to produce the authorizations and the existence of a meritorious claim, as required to obtain relief from the conditional order (*id.* at 80).

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

ENTERED: MARCH 12, 2020

CLERK

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

11242 Virginia Rivera, Index 302970/13
Plaintiff-Appellant,

-against-

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

1170 Webster Avenue Co., LLC,
Defendant-Respondent.

_____

Ferro Kuba Mangano P.C., New York (Kenneth E. Mangano of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about February 7, 2019, which granted the motion of defendant 1170 Webster Avenue Co., LLC (Webster) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant Webster established its prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she tripped on a water cap in the sidewalk in front of premises owned by defendant. Defendant showed that plaintiff did not trip on the sidewalk in front of its building by submitting plaintiff's deposition testimony that

the store in front of which she tripped said "99 cents" on it in big red letters and the affidavit of defendant's owner asserting that no such sign was displayed on its building, but rather on a building across the street (*see e.g. Foley v Chateau Rive Equities, LLC*, 172 AD3d 599 [1st Dept 2019]).

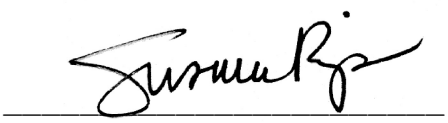
In opposition, plaintiff failed to raise a triable issue of fact. Her reliance on Google maps photos, purporting to show the location she described walking to in her testimony, is misplaced since they were not authenticated, nor do they definitively show that her fall was in front of defendant's building.

In any event, the alleged defect on which plaintiff tripped was trivial and nonactionable as a matter of law based on the characteristics and surrounding circumstances (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77-80 [2015]). The water cap was a quarter to half of an inch below the surface of the sidewalk, and the photographic evidence shows no defects in the water cap and surrounding sidewalk. Furthermore, plaintiff never attributed the cause of the accident to any broken or cracked

cement or inadequate lighting (*see Saab v CVS Caremark Corp.*, 144 AD3d 540, 541 [1st Dept 2016]).

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

ENTERED: MARCH 12, 2020



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

11243-
11243A Paul Fiondella,
Plaintiff-Appellant,

Index 100594/14

-against-

345 West 70th Tenants Corp.,
Defendant-Respondent.

Charla R. Bikman, East Hampton, for appellant.

Marin Goodman, LLP, Harrison (Alexander J. Drago of counsel), for respondent.

Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered November 15, 2018, dismissing the complaint pursuant to an order, same court and Justice, entered on or about October 15, 2018, which granted defendant's motion to dismiss the action, unanimously affirmed, with costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

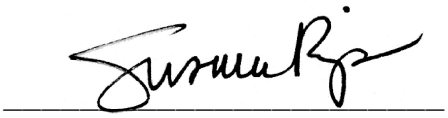
The motion court properly ordered the action to be marked "disposed" since all four causes of action in the complaint had been resolved at the time defendant made its motion to dismiss. Plaintiff's argument that the second cause of action had not been withdrawn at the time defendant moved to dismiss the action, is unavailing since the motion court's earlier order of July 17,

2018 explicitly dismissed without prejudice the second cause of action. Although the July 2018 order was decided by a different Justice, "the CPLR permits . . . reassignment of such motions" (*Matter of Pettus v Board of Directors*, 155 AD3d 485, 486 [1st Dept 2017]). Furthermore, plaintiff's contention that dismissing the case deprived him of an opportunity to move for attorneys' fees under Real Property Law § 234 is unavailing in light of the absence of a request for such relief in the complaint, and the failure by plaintiff to cross move for attorneys' fees.

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 12, 2020



CLERK

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

11244- Joseph Gaudio, et al., Index 153998/16
11245 Plaintiffs-Appellants, 150982/16
11246
11247 -against-

The Grabler Building
Condominium, et al.,
Defendants,

Jordan Cooper, LLP,
Defendant-Respondent.
- - - - -
Joseph Gaudio, et al.,
Plaintiffs-Appellants,

-against-

The Grabler Building
Condominium, et al.,
Defendants,

Paul Brensilber,
Defendants-Respondent.
- - - - -
Joseph Gaudio, et al.,
Plaintiffs-Appellants,

-against-

The Grabler Building
Condominium, et al.,
Defendants-Respondents,

Jordan Cooper, LLP, et al.,
Defendants.
- - - - -
Joseph Gaudio, et al.,
Plaintiffs-Appellants,

-against-

Lesle Harris, et al.,
Defendants-Respondents,

John and Jane Does, et al.,
Defendants.

- - - - -

The Grabler Building Condominium, et al.,
Intervenors-Respondents.

_____

The Basil Law Group P.C., New York (Robert J. Basil and David A. Cohen of counsel), for appellants.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Kevin G. Faley of counsel), for Jordan Cooper, LLP, respondent.

Law Offices of Michael E. Pressman, New York (Eric S. Fenyes of counsel), for Paul Brensilber, respondent.

Fixler & LaGattuta, LLP, New York (Luigi Tollis of counsel), for The Grabler Building Condominium and The Board of Managers of the Grabler Building Condominium, respondents.

Michael Stepper, New York, for Leslie Harris and Pamela Harris, respondents.

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Orders, Supreme Court, New York County (Carol R. Edmead, J.), entered October 1, 2018, which granted the motions of defendants Grabler Building Condominium/Board of Managers of the Grabler Building Condominium, Paul Brensilber, and Jordan Cooper, LLP, respectively, to dismiss the complaint (Index No. 153998/16) on res judicata grounds, unanimously reversed, on the law, without costs, and the motions denied. Orders, same court and Justice, entered December 10, 2018 and January 9, 2019, which

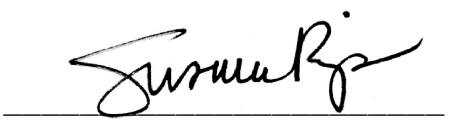
denied plaintiffs' motion to amend a November 14, 2016 judgment, and granted the cross motion of defendants Leslie Harris and Pamela Harris to the extent of awarding them attorneys' fees and costs in the amount of $500 from plaintiffs and their counsel, and granted the motion of intervenor Jordan Cooper & Associates, Inc. to the extent of awarding them attorneys' fees and costs from plaintiffs in the amount of $500 (Index No. 150982/16), unanimously modified, on the law, to deny the motions for attorneys' fees and costs, and otherwise affirmed, without costs.

Res judicata did not bar plaintiffs' current action seeking compensation for injuries and damages resulting from a mold condition in their apartment in the building owned and managed by the Grabler Building Condominium (the condominium) defendants (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). The record shows that a stipulation discontinuing a prior lawsuit against one of the condominium's board members for his alleged tortious acts was not intended to encompass plaintiffs' current mold-related claims (*see e.g. Frenk v Solomon*, 173 AD3d 490 [1st Dept 2019]).

There was no basis for an award of costs and attorneys' fees against plaintiffs.

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

ENTERED: MARCH 12, 2020



CLERK

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

11249- Index 650817/18
11249A 652396/18
11249B 652399/18
11249C 652400/18
11249D 652395/18
11249E
11249F Natixis Funding Corp., et al.,
Plaintiffs-Appellants,

-against-

GenOn Mid-Atlantic, LLC,
Defendant,

Morgantown OL1 LLC, et al.,
Defendants-Respondents.

- - - - -

Dickerson OL1 LLC,
Plaintiff-Respondent,

-against-

Natixis, New York Branch,
Defendant-Appellant.

- - - - -

Dickerson OL2 LLC,
Plaintiff-Respondent,

-against-

Natixis, New York Branch,
Defendant-Appellant.

- - - - -

Dickerson OL3 LLC,
Plaintiff-Respondent,

-against-

Natixis, New York Branch,
Defendant-Appellant.

- - - - -

Dickerson OL4 LLC,
Plaintiff-Respondent,

-against-

Natixis, New York Branch,
Defendant-Appellant.

_____

Binder & Schwartz LLP, New York (Neil S. Binder of counsel), for appellants.

Moses & Singer LLP, New York (Mark N. Parry of counsel), for Morgantown OL1 LLC, Morgantown OL2 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, Morgantown OL7 LLC, Dickerson OL1 LLC, Dickerson OL2 LLC, Dickerson OL3 LLC and Dickerson OL4 LLC respondents.

Shipman & Goodwin LLP, Hartford, CT (Kathleen LaManna of the bar of the State of Connecticut admitted pro hac vice of counsel), for U.S. Bank National Association, respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered May 31, 2019, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint as against them in the *Natixis* Action (Index No. 650817/18), unanimously affirmed, with costs. Four judgments, same court and Justice, entered July 10, 2019, in the *Dickerson* Actions in favor of plaintiffs and against defendant, unanimously affirmed, with costs. Appeal from orders, same court and Justice, entered May 30, 2019, which granted plaintiffs' motions for summary judgment in lieu of complaint, and denied defendant's

cross motion to dismiss the Dickerson Actions (Index Nos. 652395-96/18, 652399-400/18), unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

The instant appeals concern disputes related to 11 letters of credit (the Natixis LCs) issued by Natixis, New York Branch (Natixis). Seven letters of credit were issued for the benefit of Morgantown OL1 LLC, Morgantown OL2 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, and Morgantown OL7 LLC (the Morgantown Parties), and four were issued for the benefit of Dickerson OL1 LLC, Dickerson OL2 LLC, Dickerson OL3 LLC, and Dickerson OL4 LLC (the Dickerson Parties and, collectively with the Morgantown Parties, the Owner Lessors). The letters of credit issued for the benefit of the Morgantown Parties were not issued to these entities directly, but to U.S. Bank National Association (US Bank) as lease indenture trustee. Natixis Funding Corp. (NFC) contracted with Natixis to provide the Natixis LCs pursuant to a Payment Agreement between NFC and GenOn Mid-Atlantic, LLC (GenMa).

We find as a matter of law that Natixis was required to honor the Owner Lessors' November and December 2017 draw requests (the Outstanding Draw Requests). It is undisputed that these requests complied with the stated terms, including draw limits,

of the Natixis LCs.

There is no basis for rescission or reformation of the Natixis LCs to correct an alleged mistake in drafting, i.e., the failure to include an aggregate $130 million draw cap. Natixis does not allege that the mistake was mutual; the mutual mistake doctrine would not apply in any event, because Natixis could easily have ascertained that there was no draw cap in the Natixis LC schedules (*see Jerome M. Eisenberg, Inc. v Hall*, 147 AD3d 602, 604-05 [1st Dept 2017]). Nor is unilateral mistake a basis for reformation or rescission because Natixis does not allege fraud by the Owner Lessors at the time of contract formation, and the Owner Lessors could not have been unjustly enriched by enforcement of terms that Natixis and NFC, sophisticated parties represented by counsel, were actively involved in negotiating and drafting (*see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-370 [1st Dept 2007]; *Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 520 [1st Dept 2010]).

Natixis is also not permitted to dishonor the Outstanding Draw Requests on the basis of the fraud exception to the obligation to pay, codified at New York Uniform Commercial Code § 5-109(a) (*see generally BasicNet S.P.A. v CFP Servs. Ltd.*, 127 AD3d 157, 171 [1st Dept 2015]). Natixis alleges that the Owner

Lessors' requests to draw funds exceeding the contemplated $130 million cap were fraudulent insofar as they represented attempts to take advantage of a clearly mistaken contract (*see Food Serv. Mktg. v National Foods*, 225 AD2d 477 [1st Dept 1996]). However, it was not clear on the face of the Natixis LCs that a mistake had been made, and any reference to the terms of the underlying agreement between NFC and GenMa is improper in view of the independence principle and strict rules of interpretation in the letter of credit context (*see BasicNet*, 127 AD3d at 167-169; NY UCC § 5-103[d]; *Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 121-122 [2002]). Natixis's separate claim that the Outstanding Draw Requests falsely certified that the Natixis LCs constituted "Qualifying Credit Support" is belied by the text of the requests.

Because we find that the Natixis LCs are clear and enforceable and govern the instant dispute, NFC's quasi-contractual claims must be dismissed (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). They are at any rate insufficiently pleaded.

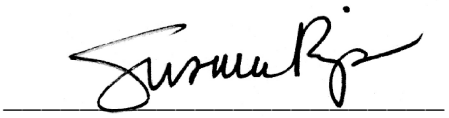
The motion court properly denied leave to amend the pleading, as any amendment would be futile in light of the clear terms of the Natixis LCs.

Because we dismiss all claims asserted in the Natixis Action, we need not reach the issue of whether US Bank should separately be dismissed because it is not a proper party.

For the reasons stated above, judgment was also properly granted in the Dickerson Parties' favor in the *Dickerson* Actions. Dismissal of those actions would not have been proper under CPLR 3211(a)(4) insofar as the purposes of the *Dickerson* and *Natixis* Actions differed and the relief sought therein was "'antagonistic and inconsistent'" (*see White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997], quoting *Arred Enters. Corp. v Indemnity Ins. Co.*, 108 AD2d 624, 627 [1st Dept 1985]).

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

ENTERED: MARCH 12, 2020



CLERK

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

11251 Leslie Edwards, Index 22326/17E
Plaintiff-Respondent,

-against-

Amanda Aponte, et al.,
Defendants-Appellants,

Tanya L. Hernandez, et al.,
Defendants.

Namita A. Ghandi,
Defendant-Respondent.

_____

Henderson & Brennan, White Plains (Brian C. Henderson of counsel), for appellants.

Hausman & Pendzick, Harrison (Elizabeth M. Pendzick of counsel), for Leslie Edwards, respondent.

James G. Bilello & Associates, Hicksville (Melissa A. Marano of counsel), for Namita A. Ghandi, respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered October 18, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability against defendants Amanda Aponte and Nelson Aponte, and, upon a search of the record, granted summary judgment in favor of codefendants Hernandez, Torres, Arnold, and Ghandi on their cross claims for common-law contribution and apportionment of liability,

unanimously affirmed, without costs.

Plaintiff established a prima facie case of negligence by showing that the vehicle driven by defendant Amanda Aponte and owned by defendant Nelson Aponte struck her vehicle in the rear while she was stopped in heavy traffic (*see Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dept 2017]). Amanda Aponte's contention that plaintiff unexpectedly stopped short was insufficient to rebut plaintiff's showing, especially in light of the fact that Aponte conceded that traffic conditions were heavy (*see Elihu v Nicoleau*, 173 AD3d 578 [1st Dept 2019]). Contrary to the Apontes' argument, there were no conflicting accounts regarding the collision between their vehicle and plaintiff's vehicle, and plaintiff's motion was not premature (*see Rodriguez v Garcia*, 154 AD3d 581 [1st Dept 2017).

In view of the foregoing, the motion court properly searched the record and granted summary judgment in favor of the codefendants on the cross claims for contribution against the Apontes. Contrary to the Apontes' contention, the codefendants were not required to demonstrate their own freedom from liability

in order to obtain contribution (*see generally Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988]).

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

ENTERED: MARCH 12, 2020

CLERK

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

11252 In re Annette R., Dck V 274-17/18A
Petitioner-Respondent,

-against-

Dakiem E.D.,
Respondent-Appellant.

_____

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

Davis Polk & Wardwell LLP, New York (Sushila Rao Pentapati of counsel), for respondent.

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

_____

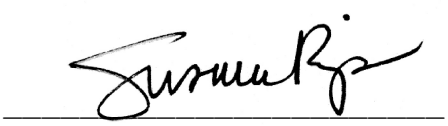
Order, Family Court, Bronx County (Stephanie Schwartz, Referee), entered on or about April 22, 2019, which denied respondent father's motion to disqualify petitioner mother's counsel, unanimously affirmed, without costs.

The Referee providently exercised her discretion in denying respondent's motion to disqualify petitioner's counsel. There was no evidence that petitioner's counsel spoke with or interacted with the child regarding matters related to the pending litigation (*see Matter of Madris v Oliviera*, 97 AD3d 823,

825 [2d Dept 2012]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 4.2).

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

ENTERED: MARCH 12, 2020



CLERK

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

11253 The People of the State of New York, Respondent,
Ind. 3248/10
SCI 3950/11
Dkt 54845/10C
39027/10C

-against-

Ramon Hall,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered January 4, 2012, unanimously affirmed.

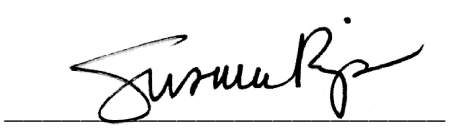
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: MARCH 12, 2020



CLERK

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

11254 Tanya Stovall, Index 309048/12
Plaintiff-Appellant,

-against-

The New York City Transit Authority, et al.,
Defendants,

Davidson C. Lewis, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Burke, Conway & Stiefeld, White Plains (Michelle J. Piantadosi of counsel), for Davidson C. Lewis, respondent.

James G. Bilello & Associates, Hicksville (Katie A. Walsh of counsel), for Samantha A. Lisowy and Edward Lisowy, respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about January 11, 2019, which granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's inability to establish that she suffered a serious injury to her cervical spine or lumbar spine within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their prima facie burden by submitting the reports of their orthopedic surgeons, who found only slight limitations in one plane of each body part, and opined that

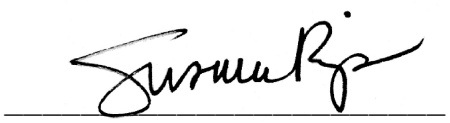
plaintiff's injuries had resolved (*see Alverio v Martinez*, 160 AD3d 454, 454 [1st Dept 2018]; *Green v Domino's Pizza, LLC*, 140 AD3d 546, 546 [1st Dept 2016]). Their experts set forth the findings in plaintiff's own MRI and x-ray reports of degenerative conditions in the cervical and lumbar spine. In addition, defendants noted that plaintiff had ceased all treatment within months of the accident.

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's neurologist, who did not examine her until over two years after the accident, found that she had no range of motion limitations in her cervical spine and only minor limitations in her lumbar spine (*see Mendoza v L. Two Go, Inc.*, 171 AD3d 462, 462 [1st Dept 2019]; *Nakamura v Montalvo*, 137 AD3d 695, 696 [1st Dept 2016]). Further, plaintiff's expert failed to address the evidence of degeneration noted on her own MRI and x-ray reports, or explain why the degenerative conditions could not have caused her limitations (*see Williams v Laura Livery Corp.*, 176 AD3d 557, 558 [1st Dept 2019]; *Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]). Finally, plaintiff's affidavit stating that she stopped treatment because her insurance coverage stopped conflicts with her earlier sworn testimony that she stopped because she felt better, and thus created only a feigned issue of

fact insufficient to defeat defendants' properly supported motions for summary judgment (*Alston v Elliott*, 159 AD3d 575, 575-576 [1st Dept 2018]).

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

ENTERED: MARCH 12, 2020



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

11255 The American Youth Dance Theater, Inc., Index 650052/17
Plaintiff-Appellant,

-against-

4000 East 102nd Street Corp.,
Defendant-Respondent.

_____

Barclay Damon LLP, New York (Lauren J. Wachtler of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel) for respondent.

_____

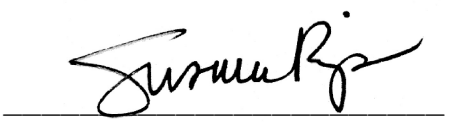
Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered June 29, 2018, which dismissed plaintiff's claim for certain damages for breach of contract, unanimously affirmed, without costs.

The court correctly concluded that Article 4 of the parties' lease precludes plaintiff from claiming the damages it seeks in this action, namely, an "allowance to [plaintiff] for the diminution of rental value" or for liability on defendant's part "for any inconvenience, annoyance or injury to business arising from defendant's failure to make repairs" (*see After Midnight Co. LLC v MIP 145 E. 57th St, LLC.*, 146 AD3d 446, 447 [1st Dept 2017]; *Bowlmor Times Sq LLC v AI 229 W. 43rd St. Prop. Owner, LLC*, 106 AD3d 646, 647 [1st Dept 2013]).

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 12, 2020



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

11256 Thomas A. Inganamort, Index 101981/15
Plaintiff-Respondent,

-against-

Windsor Park Condominium,
Defendant-Appellant.

_____

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

Thomas A. Inganamort, respondent pro se.

_____

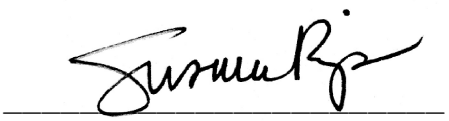
Order, Supreme Court, New York County (Paul A. Goetz, J.), entered June 18, 2019, which denied defendant's motion for summary judgment, unanimously affirmed, with costs.

The IAS court properly found that the parties' agreement did not fall within the statute of frauds, GOL § 5-701(a)(10), which voids any oral agreement to "pay compensation for services rendered in negotiating . . . the purchase, sale [or] exchange . . . of a business opportunity." As the IAS court found, the mere fact that plaintiff was allegedly to be paid on a commission basis is not enough to bring this case within the statute of frauds. Plaintiff did not operate as a broker or intermediary for defendant. Rather, plaintiff contends that he performed extra work in the context of an already-existing business

relationship with respect to recouping money from known third parties. There is no indication that he was assisting defendant with the acquisition of a business or a business opportunity within the meaning of the statute, and as such, this is not the type of business transaction that was contemplated by the statute of frauds (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 266-267 [1977]).

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

ENTERED: MARCH 12, 2020



CLERK

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

11257N In re Libre by Nexus, Inc., et al., Index 151982/18
Petitioners-Appellants,

-against-

Barbara D. Underwood, etc.,
Respondent-Respondent.

- - - - -

Juan Valoy, et al.,
Intervenors-Appellants.

_____

McFadden & Shoreman, New York (John M. Shoreman of counsel), and Mario Williams, New York, for appellants.

Letitia James, Attorney General, New York (Joshua M. Parker of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Andrew Borrok, J.), entered September 11, 2018, inter alia, denying petitioners' revised petition to quash, fix conditions on, or modify an investigative subpoena duces tecum issued by respondent Attorney General of the State of New York, granting the Attorney General's cross motion to dismiss the petition and compel compliance with the subpoena, and dismissing the proceeding brought pursuant to CPLR 2304, unanimously affirmed, without costs.

The Attorney General demonstrated the authority to issue the subpoena to investigate allegations of fraudulent and deceptive

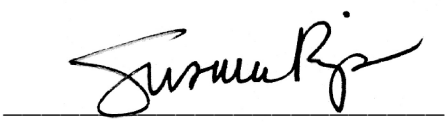
business practices, "the relevance of the items sought, and some factual basis for [the] investigation" (*Matter of American Dental Coop. v Attorney-General of State of N.Y.*, 127 AD2d 274, 280 [1st Dept 1987]; *see* Executive Law § 63[12]; General Business Law § 349[f]).

Although raising confidentiality concerns of their immigrant clients and family members, petitioners and intervenors failed to demonstrate that "the futility of the process to uncover anything legitimate is inevitable or obvious" or that any "information sought is utterly irrelevant to any proper inquiry" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal quotation marks omitted]). Furthermore, contrary to the contentions of petitioners and intervenors, the subpoena did not seek information "strictly pertaining to immigration status" (*United States v California*, 921 F3d 865, 891 [9th Cir 2019] [internal quotation marks omitted]; *see* 8 USC § 1373[a], [b]), and the record does not support their contention that any information arising from the Attorney General's civil investigation would be

available on the Attorney General's criminal law enforcement information-sharing system.

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

ENTERED: MARCH 12, 2020



CLERK

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

11258N Atlas MF Mezzanine Borrower, LLC, Index 651657/17
Plaintiff-Appellant,

against-

Macquarie Texas Loan
Holder LLC, et al.,
Defendants-Respondents,

_____

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

Dechert LLP, New York (Gary J. Mennitt of counsel), for Macquarie Texas Loan Holder LLC, respondent.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Andrew J. Rossman of counsel), for KKR Repa AIV-2, L.P, and KRE LRP Osprey Venture LLC, respondents.

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Order, Supreme Court, New York County (Joel M. Cohen, J.), entered October 9, 2019, based on the so-ordered transcript dated October 8, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motions for leave to amend the complaint against all defendants and for a preliminary injunction against defendants KKR REPA AIV-2, L.P. and KRE LRP Osprey Venture LLC, unanimously affirmed, with costs.

The Supreme Court did not abuse its discretion in denying leave to amend the first amended complaint, particularly where plaintiff acknowledged that it could have sought, but

strategically chose not to seek, leave sooner (CPLR 3025[b]; *see e.g. MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). The additional allegations against defendant Macquarie Texas Loan Holder LLC (Macquarie) supplement claims this Court already deemed sufficiently pleaded (*Atlas MF Mezzanine Borrower, LLC v Macquarie Tex. Loan Holder LLC*, 174 AD3d 150 [1st Dept 2019]), and those further allegations would prejudice Macquarie at this late stage, when discovery has closed, trial was scheduled to commence, and Macquarie's summary judgment motion to dismiss the claims was pending (*see e.g. Lattanzio v Lattanzio*, 55 AD3d 431, 431-432 [1st Dept 2008]).

All claims against defendants KKR REPA AIV-2, L.P. and KRE LRP Osprey Venture LLC. (collectively KKR) were previously dismissed. KKR would be prejudiced by the post-discovery addition of new claims against them, which plaintiff could have pleaded sooner. Moreover, the proposed tortious interference claims against KKR were palpably insufficient, as plaintiff no longer seeks to plead breach of contract claims against Macquarie (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]). This Court dismissed the underlying breach of contract claim against Macquarie on the prior appeal,

and dismissed the tortious interference claim because there was no viable breach of contract claim (*Atlas MF Mezzanine Borrower, LLC* at 166). Plaintiff does not appeal from the motion court's denial of leave to replead or newly allege any breach of contract claim.

The Supreme Court providently exercised its discretion in denying plaintiff's motion for a preliminary injunction. Plaintiff failed to show that it would suffer irreparable harm from the sale of any of the underlying properties (*UAH-Mayfair Mgt. Group LLC v Clark*, 177 AD3d 572, 573 [1st Dept 2019]). KKR submitted documentation assuring that it would be able to pay any judgment that may arise from the instant action, notwithstanding the sale of any properties during the pendency of the suit or appeal. Plaintiff does not need an amendment to contest the reasonableness of attorneys' fees.

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

ENTERED: MARCH 12, 2020

CLERK

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

11260 The People of the State of New York, Ind. 2205/13
Respondent,

-against-

David Smith,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered December 12, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of nine years, unanimously affirmed.

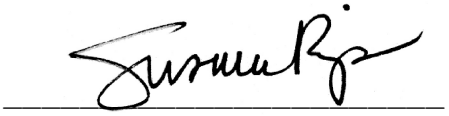
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). On the contrary, the evidence of defendant's guilt was overwhelming. There is no basis for disturbing the jury's determinations regarding identification and credibility. The victim's testimony was corroborated by that of a police sergeant who observed the robbery, as well as by the recovery of incriminating evidence from defendant and his codefendant immediately after the crime.

Defendant did not preserve his challenge to trial testimony that the People had agreed not to introduce, and which therefore had never been the subject of an otherwise-required suppression hearing, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. It was defense counsel who first introduced this evidence on cross-examination, thereby opening the door to the People's appropriate clarification of the issue on redirect, as well as through another witness. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). We have considered and rejected defendant's ineffective assistance of counsel claim relating to this issue (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 12, 2020



CLERK

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

11261 Detectives Endowment Association, et al., Plaintiffs-Respondents, Index 654958/17

-against-

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

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Georgia M. Pestana, Acting Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for appellants.

Pitta LLP, New York (Barry N. Saltzman and Michael A. Palladino of counsel), respondents.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered February 1, 2019, which denied defendants' motion pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint in its entirety, unanimously reversed, on the law, without costs and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs allege that the City breached an oral promise made during collective bargaining negotiations that if it reached agreements with them before reaching an agreement with another union, it would not then use the other union's contract as leverage to extract additional concessions from them. The complaint alleges that the City came to an agreement with the

Patrolmen's Benevolent Association (PBA) that included a wage increase for incumbent officers 2.25% higher than plaintiffs had received, and that this increase was funded by reducing entry level pay and/or benefits for new officers, a practice known as "selling the unborn." However, plaintiffs do not represent entry-level members, so if they wish to obtain the same salary increases as the PBA, they have to make different concessions, such as giving back incumbent members' existing benefits in what is known as "attrition bargaining." The complaint alleges that, contrary to its promise, after reaching the agreement with the PBA, the City maintained that plaintiffs were locked into their lower contractual terms or, in the alternative, were required to pay for a wage increase by making additional concessions. Plaintiffs seek a declaration that the City owes them the 2.25% wage increase it promised and is estopped from demanding that the increase be achieved through concessions.

Plaintiffs' effort to have the court interpret the parties' collective bargaining agreements, on grounds of fairness and equity, to impliedly include these advantageous terms, places this dispute squarely within the definition of a grievance under the agreements, i.e., "a dispute concerning the . . . interpretation of the terms of this collective bargaining

agreement." As such, it must be resolved pursuant to the grievance procedures set forth in the agreements.

The grievance procedures provide that if the matter is not resolved at an earlier stage, it will be arbitrated before the Board of Collective Bargaining (BCB) (*see* NYC Charter § 1171). Thus, this dispute is within BCB's primary jurisdiction. Moreover, plaintiffs allege that defendant Linn initially took steps to "implement" the agreement to refrain from brokering a deal with the PBA that would trigger attrition bargaining by them, but, in an about-face, not only failed to "implement" the agreement, but altogether subverted it, by negotiating the PBA agreement that entailed "selling the unborn" (*see* Administrative Code of City of NY § 12-306[c][5]). Thus, plaintiffs allege that defendants eventually engaged in conduct antithetical to good faith bargaining as defined in Administrative Code § 12-306(c).

This is a claim of "improper practices" that is properly addressed by BCB (*see* Administrative Code § 12-309[a][4]).

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

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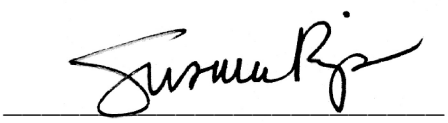

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Friedman, J.P., Kapnick, Oing, González, JJ.

11262 In re Kaleem U., Dkt V-4248/18
Petitioner-Respondent, V-31416/17

-against-

Halima S.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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Order, Family Court, Bronx County (Tamara Schwarzman, Referee), entered on or about January 23, 2019, which, to the extent appealed from as limited by the brief, after a hearing, granted the father's petition for joint legal custody of the subject child and visitation, including overnight visits, denied respondent mother's cross petition for sole physical and legal custody of the child, and ordered that petitioner have the final decision-making authority with respect to religious issues and that neither party shall travel outside the country with the child without the written consent of the other, unanimously affirmed, without costs.

The court's determination, based largely on credibility findings, that it is in the child's best interest to have overnight visitation with petitioner is supported by the record (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). The

determination that petitioner should have final decision-making authority with regard to major religious issues is also supported by the record, which shows that the parties share the same religious views and that respondent expressed no concerns in this regard during the hearing. In view of respondent's strong familial ties to her home country and her lack of significant family, employment or property in this country, the court also providently exercised its discretion in ordering that neither parent may travel outside the country with the child without the prior written consent of the other parent.

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

ENTERED: MARCH 12, 2020

CLERK

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

11264 The Estate of Kyle A., etc., et al., Plaintiffs-Appellants, Index 21280/11

-against-

The New York City Housing Authority, sued herein as New York City Housing Department, et al., Defendants-Respondents,

Lincoln Medical and Medical Health Center, et al., Defendants.

_____

Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, New York (Jill B. Savedoff of counsel), for appellant.

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

Georgia M. Pestana, Acting Corporation Counsel, New York (Deborah A. Brenner of counsel), for The City of New York, The New York City Police Department, Fire Department and the New York City Fire Department Emergency Medical Services, respondents.

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered June 6, 2018, which, to the extent appealed from as limited by the briefs, granted the motions of defendant New York City Housing Authority (NYCHA) and defendants City of New York and New York City Fire Department Emergency Medical Services (collectively the City defendants) for summary judgment

dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiffs' decedent (the infant) died after suffering a severe asthma attack. Plaintiffs allege that inoperable elevators in the NYCHA building where the infant lived with his mother, plaintiff B. A., delayed emergency medical workers in reaching him, and that the City defendants were negligent in their treatment of him. The motion court correctly found that the City defendants were entitled to summary judgment as they demonstrated they owed no special duty to plaintiffs (*see Lauer v City of New York*, 95 NY2d 95, 100 [2000]; *Kinsey v City of New York*, 141 AD3d 420 [1st Dept 2016], *lv denied* 28 NY3d 907 [2016]). The City's employees, who responded to the 911 call regarding the infant's asthma attack, made no promises to the infant or to the mother, nor did they give any assurances or advice that would create a special relationship (*compare Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]).

The court also properly granted summary judgment to NYCHA for plaintiffs' claims arising out of allegedly defective elevators at their premises. The mother's testimony that she and her son rode the elevator down with the first responding unit contradicts claims that both elevators were inoperable that day.

Their claims that the elevators were inoperable minutes earlier, when emergency workers first arrived, are similarly belied by the testimonial evidence, and other hearsay statements to the contrary are insufficient alone to create a question of fact (*see Andron v Libby*, 120 AD3d 1056, 1057-1058 [1st Dept 2014]). Furthermore, plaintiffs failed to adduce evidence that any delay caused by the emergency medical workers allegedly needing to take the stairs upon arrival was a proximate cause of the infant's death (*see Lebron v New York City Hous. Auth.*, 158 AD3d 503 [1st Dept 2018]).

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

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

ENTERED: MARCH 12, 2020

CLERK

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

11265 Kathleen Rooney, Index 300295/14
Plaintiff-Appellant,

-against-

George Hardy St. Francis Apartments, LLC, et al.,
Defendants-Respondents,

Giant Taping & Plastering, Inc., et al.,
Defendants.

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Adrienne Yaron of counsel), for George Hardy St. Francis Apartments, LLC and Wavecrest Management Team, Ltd, respondents.

Kennedys CMK, LLP, New York (Hilary Simon of counsel), for Notias Construction, Inc., respondent.

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for MAC Construction of Jackson Heights, Inc., respondent.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about August 23, 2018, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motions for summary judgment dismissing the complaint and all cross claims against them, unanimously

affirmed, without costs.

Plaintiff alleges that she sustained injuries after stepping on a nail embedded in a piece of wood on the floor of her apartment, during the time that her apartment was being renovated by the building's owner, defendant George Hardy St. Francis Apartments LLC (George Hardy). Defendant Notias Construction Inc. (Notias) was retained as the general contractor for the renovation, and Notias hired defendants MAC Construction of Jackson Heights Inc. (MAC) and Neptune Mechanical Inc. (Neptune) as subcontractors.

The court properly granted the defendants' respective motions for summary judgment dismissing the complaint. Defendants George Hardy and Wavecrest Management Team (Wavecrest), the property manager, do not dispute that they owed plaintiff a duty to maintain the premises in a reasonably safe condition (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]), but they demonstrated, prima facie, that they did not create or have actual or constructive notice of the specific presence of any debris with embedded nails on the floor (*see Piacquadio v Recine Rlty. Corp.*, 84 NY2d 967, 969 [1994]*; Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 [1st Dept 2004], *lv denied* 4 NY3d 705 [2005]). Plaintiff's contention that the owner and manager

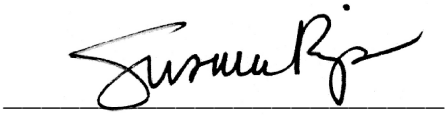
had notice of a recurring condition of debris left on the floor of her apartment is unavailing, because "a 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's [injury]" (*Piacquadio*, 84 NY2d at 969 [internal citation omitted]; *see also Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 736 [1st Dept 2005], *affd* 6 NY3d 734 [2005]). To the extent that the subcontractor defendants owed a duty of care to plaintiff (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139 [2002]), defendant Notias demonstrated it did not engage in any renovation work that could have left behind a nail embedded in a piece of wood, and Neptune and MAC each demonstrated, with the admission of work logs and the testimony of Notias's project manager, that their assignments were completed and inspected at least six days before plaintiff's accident (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [1st Dept 2007]; *Asare v Ramirez*, 5 AD3d 193, 194 [1st Dept 2004]).

It would require speculation for a jury to conclude that any of the defendants created a hazardous condition in plaintiff's apartment, i.e. - leaving behind a piece of wood with a nail embedded in it, or had notice of its existence (*see Beckford v New York City Hous. Auth.*, 84 AD3d 441, 441 [1st Dept 2011]).

Moreover, plaintiff testified that she did not take any photographs of the piece of wood, but instead threw it out after the accident.

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

ENTERED: MARCH 12, 2020



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

11266 The People of the State of New York, Ind. 1054/16
Respondent,

-against-

Joshua McDaniels-Payne,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 4, 2017, unanimously affirmed.

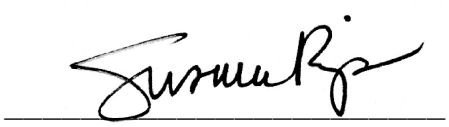
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: MARCH 12, 2020



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

11267 In re Police Officer Michael Golden, Index 100093/18
Petitioner-Respondent,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow of counsel), for appellants.

London & Worth, LLP, New York (Howard B. Sterinbach of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered September 14, 2018, granting the petition brought pursuant to CPLR article 78 to vacate petitioner's penalty of termination from the New York City Police Department (NYPD), dated September 28, 2017, and remanding the matter for the imposition of a less severe penalty, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The NYPD charged petitioner, an undercover NYPD detective for Vice, with anonymously making a false allegation of misconduct against one of his supervisors, a sergeant, to the Internal Affairs Bureau (IAB) Command Center. Petitioner

admitted to the charges and pleaded guilty to two instances of conduct prejudicial to the good order of the department.

After pleading guilty, petitioner testified under oath before the Assistant Deputy Commissioner (ADC) in an attempt to mitigate the penalty he would receive. After the hearing, the ADC found that petitioner's "misconduct here constitutes extremely serious misconduct" and recommended to the Police Commissioner that petitioner be dismissed from the NYPD. On September 28, 2017, the Commissioner approved the ADC's recommended penalty and dismissed petitioner from the NYPD.

Supreme Court erred in granting the petition to the extent of remanding the matter for the imposition of a lesser penalty. In matters of police discipline, "great leeway must be accorded to the Commissioner's determinations concerning the appropriate punishment, for it is the Commissioner, not the courts, who is accountable to the public for the integrity of the Department" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001] [internal quotation marks omitted]). As the Court of Appeals has explained, the Commissioner's decision in disciplinary matters "must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law" (*id.* [internal

quotation marks omitted], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]).

In this case, petitioner lied to IAB twice, acted with premeditation, and sought to have the sergeant that he reported to IAB face negative consequences as a result. As the ADC noted in its decision, petitioner's lies not only had an adverse impact on the sergeant, who had to defend himself against the false claim, but also on the NYPD and IAB, which were required to spend significant time investigating petitioner's false complaint. In light of the foregoing, the Commissioner's termination of petitioner is not so disproportionate to the offenses committed as to shock one's sense of fairness (*see Matter of Kelly* at 38). Accordingly, the order of Supreme Court is reversed, and the petition dismissed in its entirety.

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

ENTERED: MARCH 12, 2020

CLERK

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

11268 In re James C. Russell, Index 155344/16
Petitioner-Appellant,

-against-

New York State Insurance
Fund, et al.,
Respondents-Respondents.

_____

James C. Russell, appellant pro se.

Letitia James, Attorney General, New York (Eric R. Haren of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about December 27, 2017, denying the petition to annul respondent New York State Insurance Fund's determinations, dated September 23, 2015 and February 12, 2016, which, respectively, required petitioner to serve a second probationary period as a hearing representative, and "reverted" him to his previous position of claims service representative due to unsatisfactory performance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding, commenced on June 24, 2016, is untimely as to respondents' September 23, 2015 determination (CPLR 217[1]; 3211[a][5]). Respondents' pre-answer motion to dismiss for

failure to state a cause of action, i.e., CPLR 3211(a)(7), did not effect a waiver of the statute of limitations ground for dismissal under CPLR 3211(a)(5) (*see Hertz Corp. v Luken*, 126 AD2d 446, 448 [1st Dept 1987]; CPLR 3211[e]). In any event, the petition was correctly denied on the merits.

The record demonstrates that respondent Fund did not violate lawful procedure. The initial probationary period commenced when petitioner began to serve, due to the imposition of a leave of absence (Department of Civil Service Rules [4 NYCRR] § 4.5[a], [b][1], [g]; State Personnel Management Manual § 2010.2.234[A]; *see Matter of Reis v New York State Hous. Fin. Agency*, 74 NY2d 724 [1989]). During both probationary periods, the Fund complied with the requirement of 4 NYCRR 4.5(b)(5)(iii) to provide feedback to petitioner "from time to time" (*see Tuller v Central School Dist. No. 1 of Towns of Conklin, Binghamton, Kirkwood & Vestal*, 40 NY2d 487, 495 [1976]; *see also Matter of Green v Commissioner of Envtl. Conservation of State of N.Y.*, 105 AD2d 1037 [3d Dept 1984] [additional probationary period, not reinstatement, is remedy for noncompliance with 4 NYCRR 4.5(b)(5)(iii)]). This compliance included a period of five months of counseling petitioner against submitting late hearing reports. Petitioner had no right "clearly conferred by statute

or by rules" to two weeks' notice of his performance review or of the determination requiring him to serve a second probationary period (*see Matter of King v Sapier*, 47 AD2d 114, 116 [4th Dept 1975], *affd* 38 NY2d 960 [1976]; *see* 4 NYCRR 4.5[b][5][ii]-[iii]). Further, the Fund appropriately gave petitioner more than one week's notice of termination and reversion to his previous position (4 NYCRR 4.5[b][5][iii]; *Matter of Harper v Director of Bronx Dev. Ctr.*, 134 AD2d 197 [1st Dept 1987]).

Petitioner failed to allege sufficiently that his reversion to his former position was due to bad faith or discrimination on the Fund's part (*see Matter of Finkelstein v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 150 AD3d 464, 465 [1st Dept 2017], quoting *Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]). Rather than asserting "uncontradicted allegations present[ing] a substantial issue of bad faith" (*Matter of Castro v Schriro*, 140 AD3d 644, 648 [1st Dept 2016], *affd* 29 NY3d 1005 [2017]), petitioner annexed extensive documentary evidence supporting a finding of unsatisfactory performance for repeatedly submitting or amending hearing reports in an untimely fashion (*see Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]). Similarly, his allegations of discrimination relied upon one stray remark concerning a different employee (*see Melman v*

Montefiore Med. Ctr., 98 AD3d 107, 125 [1st Dept 2012]) and conclusory allegations concerning another employee's poor performance (*cf. Shah v Wilco Sys., Inc.*, 27 AD3d 169, 177 [1st Dept 2005] [dismissing claim of disparate pay where plaintiff failed to establish that individuals being compared were similarly situated in all material respects], *lv dismissed in part, denied in part* 7 NY3d 859 [2006]).

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: MARCH 12, 2020

CLERK

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

11269 State of New York ex rel Doreen L. Light, Plaintiff-Appellant, -against- Myron R. Melamed, et al., Defendants, Joseph Melamed, et al., Defendants-Respondents. Index 101451/14

Willens & Scarvalone LLP, New York (Jonathan A. Willens of counsel), for appellant.

Cole Schotz P.C., New York (Wendy F. Klein of counsel), for respondents.

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered July 12, 2019, which granted defendants Joseph Melamed and Daniel Melamed's motion to dismiss the complaint as against them and, upon a search of the record, dismissed the complaint as against the remaining defendants, unanimously affirmed, without costs.

Plaintiff relator commenced this action in 2014 on behalf of the State of New York, alleging a scheme by the decedent and his family to avoid New York State income taxes and estate taxes for the benefit of the beneficiaries of the estate, defendants Joseph Melamed and Daniel Melamed, by, among other things, failing to

report income earned by the decedent in New York between 2008 and 2013, and filing false documents with the State representing that the decedent was a resident of Florida, when in fact he was working and living full-time in Westchester County until shortly before his death in 2013. The complaint asserts causes of action for violations of the New York False Claims Act (NYFCA) (State Finance Law § 187 *et seq.*).

Assuming, without deciding, that NYFCA applies to causes of action alleging that misrepresentations were made to avoid estate tax obligations (*see* State Finance Law § 189[1][g]), the estate tax fraud causes of action were correctly dismissed. The complaint does not allege that the decedent (or any defendant) had income (or sales) of at least $1 million in 2013, the year in which estate taxes came due and the claim for estate tax fraud arose.

With respect to the income tax fraud causes of action, the complaint fails to adequately allege sales/income within the statute.

There is no basis for granting leave to replead, as relator's opposition papers do not show that she would be able to state any viable causes of action upon repleading (*see Genger v Genger*, 135 AD3d 454, 455 [1st Dept 2016], *lv denied* 27 NY3d 912

[2016]), and she failed to submit any proposed amendments that would cure the present deficiencies (*see FCRC Modular, LLC v Skanska Modular LLC*, 159 AD3d 413, 416 [1st Dept 2018]).

We note that at oral argument it became clear that defendant University Pathology, P.C. no longer exists.

THIS CONSTITUTES THE DECISION AND ORDER
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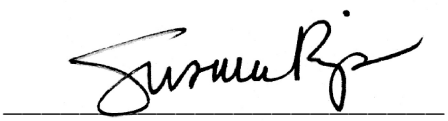
ENTERED: MARCH 12, 2020



CLERK

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

11270-
11270A In re Jennifer V., and Another, Dkt. NA-30669/16
NA-30670/16

Children Under Eighteen Years
of Age, etc.,

John S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Appellant-Respondent.

_____

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for appellant-respondent.

The Bronx Defenders, Bronx (Mara Fleder of counsel), for respondent-appellant.

Dawne A. Mitchell, The Legal Aid Society (Marcia Egger of counsel), attorney for the children.

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Orders of fact-finding and disposition, Family Court, Bronx County (Michael R. Milsap, J.), entered on or about December 24, 2018 and July 26, 2019, respectively, which, after a hearing, dismissed claims of sexual abuse against respondent John S., and found that he neglected the subject child for whom he was legally responsible (Jennifer V.) and derivatively neglected his child (Jenessa S.), unanimously affirmed, without costs.

A preponderance of the evidence supports the findings of neglect of Jennifer V. and Jenessa S. based on respondent's

admission to smoking marijuana daily, Jennifer V.'s credible testimony that she regularly observed respondent going into the bathroom to smoke, and her observation of marijuana in the home (*see Matter of Shaun H. [Monique B.]*, 161 AD3d 559, 559 [1st Dept 2018]). In response, respondent failed to rebut the agency's prima facie case by showing that he was voluntarily and regularly participating in a drug rehabilitation program (*id.*).

The Family Court also properly found that respondent neglected Jennifer V. by giving her unprescribed medication that made her feel drowsy and unable to walk. Contrary to respondent's contention, the child's credible and detailed testimony about the appearance, taste, and effects of the medication was not refuted by his denial of this conduct. Nor did the child's testimony require any scientific or expert corroboration to establish injury from the medication, because establishing ingestion was sufficient (*see Matter of Diana C. [Felipe J.]*, 129 AD3d 487, 488 [1st Dept 2015]).

The Family Court correctly concluded, and the parties do not dispute, that there was no direct evidence of sexual abuse or sexual conduct in this case, and the agency did not establish, by "relevant, competent and material evidence" that respondent sexually abused Jennifer V. (Family Ct Act § 1046[b][iii]; *Matter*

of Tammie Z., 66 NY2d 1 [1985]). Given the child's lack of certainty about whether respondent engaged in sexual contact with her, neither the medical evidence nor the testimony by her therapist, which was inconclusive on the issue of whether her physical symptoms and PTSD were caused by sexual abuse, were sufficient to satisfy the agency's burden on this charge.

We have considered the parties' remaining contentions and find them without merit.

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

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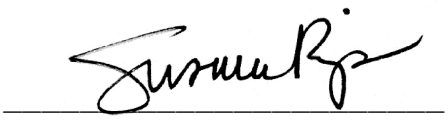

CLERK

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

11272 Latoya James, Index 451494/15
Plaintiff-Appellant,

-against-

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

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

James E. Johnson, Corporation Counsel, New York (Claibourne Henry of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered on or about February 13, 2019, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record shows that four police officers were on foot patrol when an individual suddenly attacked them with a hatchet, injuring two of the officers, and prompting the other two to open fire. During the sequence of events, an errant bullet struck plaintiff as she was running and ducking for cover.

Defendants established prima facie entitlement to judgment as a matter of law by showing that the officers did not violate New York City Police Department Patrol Guide § 203-12 in discharging their weapons. The officers were exercising their

discretion and judgment in response to an emergency situation caused by the sudden attack on their fellow officers with a hatchet, which endangered the lives of the officers as well as the public, and the individual's subsequent conduct of rushing toward one of the officers with the hatchet in hand (*see Johnson v City of New York*, 15 NY3d 676 [2010]). That the officers did not observe bystanders under these circumstances is insufficient to raise an issue of fact as to whether they unnecessarily endangered innocent persons (*id.* at 681-682).

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

ENTERED: MARCH 12, 2020

CLERK

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

11274 The People of the State of New York, Ind. 1343/16
Respondent,

-against-

Jamal Mateen,
Defendant-Appellant.

_____

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

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

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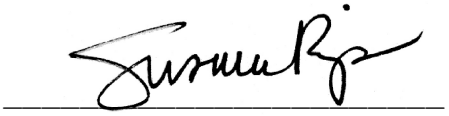
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered October 4, 2016,

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

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

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

ENTERED: MARCH 12, 2020



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

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

11276 Jose Benitez-Rivera, Index 21562/16E
Plaintiff-Respondent, 24288/15E

-against-

The New York Botanical Garden, Inc., et al.,
Defendants,

LCR-Webster Ave, LLC,
Defendant-Appellant.

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Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski of counsel), for appellant.

Law Office of Stephen B. Kaufman, P.C., Bronx (John V. Decolator of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about October 1, 2018, which denied defendant LCR-Webster Ave., LLC's motion to dismiss the complaint as against it, and dismissed as moot plaintiff's cross motion for leave to file an amended pleading nunc pro tunc, unanimously reversed, on the law, without costs, the motion granted, and the cross motion denied. The Clerk is directed to enter judgment accordingly.

Defendant LCR-Webster established prima facie that no action was commenced against it before the applicable three-year statute of limitations had expired on March 6, 2016 (CPLR 214[5]; *see*

MTGLQ Invs., LP v Wozencraft, 172 AD3d 644 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019]). In or about October 2015, plaintiff named LCR-Webster as a defendant in an amended summons and complaint, but he did not file the amended summons and complaint until July 2016. Plaintiff's failure to file the amended summons and complaint by March 6, 2016 meant that the action was a nullity as to LCR-Webster (see Baptiste v "John Doe," 89 AD3d 436, 436-37 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]; *Shivers v International Serv. Sys.*, 220 AD2d 357 [1st Dept 1995]). On March 8, 2016, plaintiff commenced a second action against LCR-Webster, but, as he eventually learned, the accident from which the suit arose actually occurred on March 6, 2013, and the second action was commenced two days after the statute of limitations had expired.

In opposition, plaintiff failed to raise an issue of fact as to the timeliness of the action, the tolling of the limitations period, or the applicability of a relevant exception (*see MTGLQ Invs.*, 172 AD3d at 645; *Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499, 500 [1st Dept 2013]). Plaintiff's argument that his claims against LCR-Webster are preserved pursuant to the relation back doctrine is unavailing, as LCR-Webster is not "united in interest" with any other defendant named in the

original complaint (*see Buran v Coupal*, 87 NY2d 173, 177 [1995]; *see also Lord Day & Lord, Barrett, Smith v Broadwall Mgt. Corp.*, 301 AD2d 362, 363 [1st Dept 2003). Plaintiff's argument that "John Doe" in the caption was a placeholder meant to describe LCR-Webster, whose identity was unknown to him when the 2015 action was commenced, is belied by his own moving papers, which show that he was aware of LCR-Webster's alleged involvement no later than October 2015, nearly six months before the statute of limitations expired (*see Temple v New York Community Hosp. of Brooklyn*, 89 AD3d 926, 927 [2d Dept 2011]). Plaintiff failed to offer an explanation for the pre-commencement delay other than the incorrect statement that the filing of the amended summons and complaint was a "mere ministerial act" (*see* CPLR 304).

Plaintiff's request that his first amended complaint, dated October 30, 2015, be deemed filed nunc pro tunc pursuant to CPLR 3025(a) and 305(c) because LCR-Webster was "on notice" of the action in November 2015 is also unavailing. Even assuming arguendo that LCR-Webster was properly served, in these

circumstances, there is no basis for permitting plaintiff to avoid the statute of limitations bar.

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

ENTERED: MARCH 12, 2020

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

11277N Audthan LLC, Index 652050/15
Plaintiff-Respondent,

-against-

Nick & Duke, LLC,
Defendant-Appellant.

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Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Seyfarth Shaw LLP, New York (Owen R. Wolfe of counsel), for respondent.

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Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about August 29, 2018, which, inter alia, granted plaintiff's motion for a *Yellowstone* injunction, unanimously affirmed, with costs.

The motion court properly awarded plaintiff a *Yellowstone* injunction, based on its showing that "(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]

[internal quotation marks omitted]).

While defendant is correct that *Yellowstone* relief may be denied where a tenant has failed to seek relief during the cure period (*see Three Amigos SJL Rest., Inc. v 250 W. 43 Owner LLC*, 144 AD3d 490, 491 [1st Dept 2016]), defendant did not establish that the violations in the notice of default could have been cured within one year, particularly in light of the affidavit of plaintiff's property manager attesting to his inability to obtain the violations from the New York City Fire Department to address them after the notice was served (*see Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 222 [1st Dept 2012]). Furthermore, this Court has permitted tenants such as plaintiff to rely on a longer cure period under the lease where, as here, there is evidence that the cure could not be effected in the shorter period, and the tenant has made a diligent effort to cure (*id.*). Since there are questions as to whether the violations in the notice of default are plaintiff's responsibility to cure under the lease, a *Yellowstone* injunction

was properly granted to maintain the status quo until there is a hearing on the merits.

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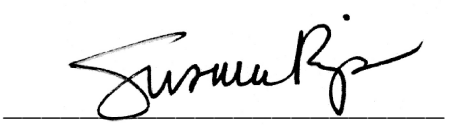

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Friedman, J.P., Kapnick, Oing, González, JJ.

11278N In re Center on Privacy & Technology, Index 154060/17
Petitioner-Appellant,

-against-

New York City Police Department,
Respondent-Respondent.

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Vladeck, Raskin & Clark, P.C., New York (Rachel L. Fried of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (MacKenzie Fillow of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered April 11, 2019, which, inter alia, precluded petitioner from referring to certain unredacted documents inadvertently disclosed by respondent New York City Police Department in response to petitioner's request for documents pursuant to the Freedom of Information Law (FOIL), unanimously affirmed, without costs.

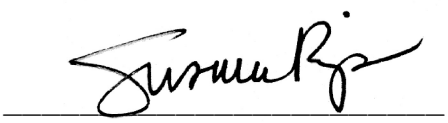
The court did not impose an unconstitutional prior restraint by precluding petitioner from referring to the source of unredacted documents inadvertently disclosed by respondent in the course of this FOIL proceeding, which were a small portion of the thousands of pages of records respondent has disclosed in response to petitioner's FOIL request (*see e.g. Laura Inger M. v*

Hillside Children's Ctr., 17 AD3d 293, 295-296 [1st Dept 2005]). "[A]n order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny" (*Seattle Times Co. v Rhinehart*, 467 US 20, 33 [1980]). Instead, a court may restrict a litigant's use of information obtained through litigation as long as the restriction "furthers an important or substantial governmental interest unrelated to the suppression of expression," and "the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved" (*id.* at 32 [internal quotation marks and brackets omitted]). Respondent had a substantial government interest in preventing the inadvertent disclosure of records. Furthermore, the protective order was narrowly tailored in expressly allowing petitioner to disseminate any information it had gleaned from the materials at issue, and requiring respondent to provide petitioner with replacement

records bearing redactions that are not challenged on the merits on the instant appeal.

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

ENTERED: MARCH 12, 2020



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Friedman, Kapnick, Webber, Gonzalez, JJ.

11380 In re Nella Manko, Index 526781/19
(M-1244) Petitioner, Dkt 14291/19

-against-

Hon. William F. Mastro, etc., et al
Respondents.

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Nella Manko, petitioner pro se.

Letitia James, Attorney General, New York (Charles F. Sanders of counsel), for State respondents.

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for Kaufman Borgeest & Ryan LLP, respondent.

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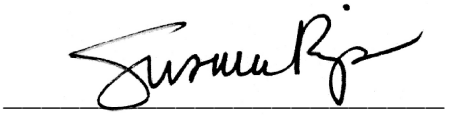
The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

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

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

ENTERED: MARCH 12, 2020



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